§ 35.738 Maximum federal share.

The Regional Administrator may provide up to 100 percent of the approved work plan costs with the exception of the cost shares required by CERCLA 104(k)(9)(B)(iii) for capitalization of revolving loan funds under CERCLA 104(k)(3).

Subparts C–D [Reserved]

Subpart E—Grants for Construction of Treatment Works—Clean Water Act

AUTHORITY: Secs. 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 217, 304(d)(3), 313, 501, 502, 511, and 516(b) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq*.

SOURCE: 43 FR 44049, Sept. 27, 1978, unless otherwise noted.

§ 35.900 Purpose.

(a) This subpart supplements the EPA general grant regulations and procedures (part 30 of this chapter) and establishes policies and procedures for grants to assist in the construction of waste treatment works in compliance with the Clean Water Act.

(b) A number of provisions of this subpart which contained transition dates preceding October 1, 1978, have been modified to delete those dates. However, the earlier requirements remain applicable to grants awarded when those provisions were in effect. The transition provisions in former §§ 35.905–4, 35.917, and 35.925–18 remain applicable to certain grants awarded through March 31, 1981.

(c) Technical and guidance publications (MCD series) concerning this program which are issued by EPA may be ordered from: General Services Administration (8FFS), Centralized Mailing List Services, Building 41, Denver Federal Center, Denver, Colo. 80225. In order to expedite processing of requests, persons desiring to obtain these publications should request a copy of EPA form 7500–21 (the order form listing all available publications), from EPA Headquarters, Municipal Construction Division (WH–547) or from any regional office of EPA.

§ 35.901 Program policy.

The primary purpose of Federal grant assistance available under this subpart is to assist municipalities in meeting enforceable requirements of the Act, particularly, applicable national pollution discharge elimination system (NPDES) permit requirements. The Regional Administrator and States are authorized and encouraged to administer this grant program in a manner which will most effectively achieve the enforceable requirements of the Act.

§ 35.903 Summary of construction grant program.

(a) The construction of federally financed waste treatment works is generally accomplished in three steps: Step 1, facilities plans and related elements; step 2, preparation of construction drawings and specifications; and step 3, building of a treatment works.

(b) The Regional Administrator may award grant assistance for a step 1, step 2, or step 3 project, or, as authorized by § 35.909, for a project involving a combination of step 2 and step 3 (step 2=3 grant). For a step 1, step 2, or step 3 grant award, a ''project'' may consist of an entire step or any ''treatment works segment'' (see § 35.905) of construction within a step. In the case of step 2=3 grant awards, a project must consist of all associated step 2 and step 3 work; segmenting is not permitted.

(c) Grants are awarded from State allocations (see § 35.910 *et seq*.) under the Act. No grant assistance may be awarded unless priority for a project has been determined in accordance with an approved State priority system under § 35.915. The State is responsible for determining the amount and timing of Federal assistance to each municipality for which treatment works funding is needed.

(d) An applicant will initially define the scope of a project. The State may revise this initial project scope when priority for the project is established. The Regional Administrator will make the final determination of project scope when grant assistance is awarded (see § 35.930–4).

(e) For each proposed grant, an applicant must first submit his application to the State agency. The basic grant

application must meet the requirements for the project in §35.920–3. If grant assistance for subsequent related projects is necessary, the grantee shall make submissions in the form of amendments to the basic application. The State agency will forward to the appropriate EPA Regional Administrator complete project applications or amendments to them for which the State agency has determined priority. The grant will consist of the grant agreement resulting from the basic application and grant amendments awarded for subsequent related projects.

(f) Generally, grant assistance for projects involving step 2 or 3 will not be awarded unless the Regional Administrator first determines that the facilities planning requirements of §§35.917 to 35.917–9 of this subpart have been met. Facilities planning may not be initiated prior to approval of a step 1 grant or written approval of a ''plan of study'' accompanied by a reservation of funds (see §35.925–18 and definition of ''construction'' in §35.905).

(g) If initiation of step 1, 2, or 3 construction (see definition of ''construction'' in §35.905) occurs before grant award, costs incurred before the approved date of initiation of construction will not be paid and award will not be made except under the circumstances in §35.925–18.

(h) The Regional Administrator may not award grant assistance unless the application meets the requirements of §35.920–3 and he has made the determinations required by §35.925 *et seq*.

(i) A grant or grant amendment awarded for a project under this subpart shall constitute a contractual obligation of the United States to pay the Federal share of allowable project costs up to the amount approved in the grant agreement (including amendments) in accordance with §35.930–6. However, this obligation is subject to the grantee's compliance with the conditions of the grant (see §35.935 *et seq*.) and other applicable requirements of this subpart.

(j) Sections 35.937–10, 35.938–6 and 35.945 authorize prompt payment for project costs which have been incurred. The initial request for payment may cover the Federal share of allowable costs incurred before the award except as otherwise provided in §35.925–18. Before the award of such assistance, the applicant must claim in the application for grant assistance for that project all allowable costs incurred before initiation of project construction. An applicant may make no subsequent claim for payment for such costs. The estimated amount of any grant or grant amendment, including any prior costs, must be established in conjunction with determination of priority for the project. The Regional Administrator must determine that the project costs are allowable under §35.940 *et seq*.

(k) Under section 204(b) of the Act, the grantee must comply with applicable user charge and industrial cost recovery requirements; see §§35.925–11, 35.928 *et seq*., 35.929 *et seq*., 35.935–13, 35.935–15, and appendix B to this subpart.

(l) The costs of sewage collection systems for new communities, new subdivisions, or newly developed urban areas should be included as part of the development costs of the new construction in these areas. Under section 211 of the Act, such costs will not be allowed under the construction grant program; see §35.925–13.

(m) The approval of a plan of study for step 1, a facilities plan, or award of grant assistance for step 1, step 2, or step 3, or any segment thereof, will not constitute a Federal commitment for grant assistance for any subequent project.

(n) Where justified, a deviation from any substatutory requirement of this subpart may be granted under §30.1000 of this chapter.

(o) The Act requires EPA and the States to provide for, encourage and assist public participation in the Construction Grants Program. This requirement for public participation applies to the development of the State water pollution control strategy, the State project priority system, and the State project priority list, under §35.915; to the development of user charge and industrial cost recovery systems, under §§35.925.11, 35.928, and 35.929; and to the delegation of administrative responsibilities for the Construction Grants Program under subpart F of this chapter.

(p) Requirements regarding the award and administration of subagreements are set forth in §§ 35.935 through 35.939.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.905 Definitions.

As used in this subpart, the following words and terms mean:

Act. The Clean Water Act (33 U.S.C. 1251 *et seq*., as amended).

Ad valorem tax. A tax based upon the value of real property.

Combined sewer. A sewer intended to serve as a sanitary sewer and a storm sewer, or as an industrial sewer and a storm sewer.

Complete waste treatment system. A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involved in: (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities.

Construction. Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items. The phrase *initiation of construction*, as used in this subpart means with reference to a project for:

(a) *Step 1:* The approval of a plan of study (see §§ 35.920–3(a)(1) and 35.925–18(a));

(b) *Step 2:* The award of a step 2 grant;

(c) *Step 3:* Issuance of a notice to proceed under a construction contract for any segment of step 3 project work or, if notice to proceed is not required, execution of the construction contract.

Enforceable requirements of the Act. Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary to meet applicable criteria for best practicable waste treatment technology (BPWTT).

Excessive infiltration/inflow. The quantities of infiltration/inflow which can be economically eliminated from a sewerage system by rehabilitation, as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow, subject to the provisions in § 35.927.

Industrial cost recovery. (a) The grantee's recovery from the industrial users of a treatment works of the grant amount allocable to the treatment of waste from such users under section 204(b) of the Act and this subpart.

(b) The grantee's recovery from the commercial users of an individual system of the grant amount allocable to the treatment of waste from such users under section 201(h) of the Act and this subpart.

Industrial cost recovery period. That period during which the grant amount allocable to the treatment of wastes from industrial users is recovered from the industrial users of such works.

Industrial user. (a) Any nongovernmental, nonresidential user of a publicly owned treatment works which discharges more than the equivalent of 25,000 gallons per day (gpd) of sanitary wastes and which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing.
Division B. Mining.
Division D. Manufacturing.
Division E. Transportation, Communications, Electric, Gas, and Sanitary Services.
Division I. Services.

(1) In determining the amount of a user's discharge for purposes of industrial cost recovery, the grantee may exclude domestic wastes or discharges from sanitary conveniences.

(2) After applying the sanitary waste exclusion in paragraph (b)(1) of this section (if the grantee chooses to do so), dischargers in the above divisions that have a volume exceeding 25,000 gpd or the weight of biochemical oxygen demand (BOD) or suspended solids (SS) equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users. Sanitary wastes, for purposes of this calculation of equivalency, are the wastes discharged from residential users. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, BOD and SS per volume of flow.

(b) Any nongovernmental user of a publicly owned treatment works which discharges waste water to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(c) All commercial users of an individual system constructed with grant assistance under section 201(h) of the Act and this subpart. (See § 35.918(a)(3).)

Infiltration. Water other than waste water that enters a sewerage system (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

Infiltration/inflow. The total quantity of water from both infiltration and inflow without distinguishing the source.

Inflow. Water other than waste water that enters a sewerage system (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

Interceptor sewer. A sewer whose primary purpose is to transport waste waters from collector sewers to a treatment facility.

Interstate agency. An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

Municipality. A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

(a) This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district, or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of liquid wastes of the general public in a particular geographic area.

(b) This definition excludes the following:

(1) Any revenue producing entity which has as its principal responsibility an activity other than providing waste water treatment services to the general public, such as an airport, turnpike, port facility, or other municipal utility.

(2) Any special district (such as school district or a park district) which has the responsibility to provide waste water treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under State law to provide waste water treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

Operable treatment works. An operable treatment works is a treatment works that:

(a) Upon completion of construction will treat waste water, transport waste water to or from treatment, or transport and dispose of waste water in a manner which will significantly improve an objectionable water quality situation or health hazard, and

(b) Is a component part of a complete waste treatment system which, upon completion of construction for the complete waste treatment system (or completion of construction of other treatment works in the system in accordance with a schedule approved by the Regional Administrator) will comply with all applicable statutory and regulatory requirements.

Project. The scope of work for which a grant or grant amendment is awarded under this subpart. The scope of work is defined as step 1, step 2, or step 3 of treatment works construction or segments (see definition of *treatment works segment* and § 35.930–4).

Replacement. Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed. The term *operation and maintenance* includes replacement.

Sanitary sewer. A sewer intended to carry only sanitary or sanitary and industrial waste waters from residences, commercial buildings, industrial plants, and institutions.

Sewage collection system. For the purpose of § 35.925–13, each, and all, of the common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive waste waters directly from facilities which convey waste water from individual structures or from private property, and which include service connection ''Y'' fittings designed for connection with those facilities. The facilities which convey waste water from individual structures, from private property to the public lateral sewer, or its equivalent, are specifically excluded from the definition, with the exception of pumping units, and pressurized lines, for individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

State. A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas.

State agency. The State water pollution control agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

Storm sewer. A sewer intended to carry only storm waters, surface runoff, street wash waters, and drainage.

Treatment works. Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the useful life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost, and land used for the storage of treated waste water in land treatment systems before land application); or any other method or system

for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in combined storm water and sanitary sewer systems.

Treatment works segment. A treatment works segment may be any portion of an operable treatment works described in an approved facilities plan, under § 35.917, which can be identified as a contract or discrete subitem or subcontract for step 1, 2, or 3 work. Completion of construction of a treatment works segment may, but need not, result in an operable treatment works.

Useful life. Estimated period during which a treatment works will be operated.

User charge. A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

Value engineering (VE). A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

§ 35.907 Municipal pretreatment program.

(a) The Regional Administrator is authorized to provide grant assistance for the development of an approvable municipal pretreatment program as required by part 403 of this chapter in conjunction with a step 1, step 2, or step 3 project.

(b) The grantee is required to develop a pretreatment program if the Regional Administrator determines that:

(1) The municipal treatment works:

(i) Serves industries subject to proposed or promulgated pretreatment standards under section 307(b) of the Act, or

(ii) Expects to serve industries connecting into the works in accordance with section 301(i)(2), where these industries are subject to the section 307 (b) or (c) standards: and

(2) A work plan under a section 208 planning grant has not provided for the development of a program approvable under part 403 of this chapter.

(c) A pretreatment program may be required for municipal treatment works which receive other nondomestic wastes covered by guidance issued under section 304(g) of the Act.

(d) Development of an approvable municipal pretreatment program under part 403 of this chapter shall include:

(1) An industrial survey as required by § 403.8 of this chapter including identification of system users, the character and volume of pollutants discharged, type of industry, location (see paragraph (f) of this section);

(2) An evaluation of legal authority, including adequacy of enabling legislation, and selection of mechanisms to be used for control and enforcement (e.g., ordinance, joint powers agreement, contract);

(3) An evaluation of financial programs and revenue sources to insure adequate funding to carry out the pretreatment program;

(4) A determination of technical information necessary to support development of an industrial waste ordinance or other means of enforcing pretreatment standards;

(5) Design of a monitoring enforcement program;

(6) A determination of pollutant removals in existing treatment works;

(7) A determination of the treatment works tolerance to pollutants which interfere with its operation, sludge use, or disposal;

(8) A determination of required monitoring equipment for the municipal treatment works;

(9) A determination of municipal facilities to be constructed for monitoring or analysis of industrial waste.

(e) Items (d) (6) and (7) of this section are grant eligible if necessary for the proper design or operation of the municipal treatment works but are not grant eligible when performed solely for the purpose of seeking an allowance for removal of pollutants under § 403.7 of this chapter.

(f) Information concerning the character and volume of pollutants discharged by industry to a municipal treatment works is to be provided to the municipality by the industrial discharger under paragraph (d)(1) of this

section. However, the costs of a limited amount of end-of-pipe sampling and associated analysis of industrial discharges to a municipal treatment works properly allocable to the municipality are allowable if the grantee obtains the prior written approval of the Regional Administrator; see § 35.940–3(f).

(g) The pretreatment program developed under paragraph (b) of this section is subject to the Regional Administrator's approval under § 35.935–19 and must be implemented in accordance with part 403 of this chapter.

§ 35.908 Innovative and alternative technologies.

(a) *Policy.* EPA's policy is to encourage and, where possible, to assist in the development of innovative and alternative technologies for the construction of waste water treatment works. Such technologies may be used in the construction of waste water treatment works under this subpart as § 35.915–1, § 35.930–5, appendix E, and this section provide. New technology or processes may also be developed or demonstrated with the assistance of EPA research or demonstration grants awarded under Title I of the Act (see part 40 of this subchapter).

(b) *Funding for innovative and alterative technologies.* (1) Projects or portions of projects which the Regional Administrator determines meet criteria for innovative or alternative technologies in appendix E may receive 85-percent grants (see § 35.930–5).

(i) Only funds from the reserve in § 35.915–1(b) shall be used to increase these grants from 75 to 85 percent.

(ii) Funds for the grant increase shall be distributed according to the chronological approval of grants, unless the State and the Regional Administrator agree otherwise.

(iii) The project must be on the fundable portion of the State project priority list.

(iv) If the project is an alternative to conventional treatment works for a small community (a municipality with a population of 3,500 or less or a highly dispersed section of a larger municipality, as defined by the Regional Administrator), funds from the reserve in § 35.915(e) may be used for the 75 percent portion of the Federal grant.

(v) Only if sewer related costs qualify as alternatives to conventional treatment works for small communities are they entitled to the grant increase from 75 to 85 percent, either as part of the entire treatment works or as components.

(2) A project or portions of a project may be designated innovative or alternative on the basis of a facilities plan or on the basis of plans and specifications. A project that has been designated innovative on the basis of the facilities plan may lose that designation if plans and specifications indicate that it does not meet the appropriate criteria stated in section 6 of appendix E.

(3) Projects or portions of projects that receive step 2, step 3, or step 2=3 grant awards after December 27, 1977, from funds allotted or reallotted in fiscal year 1978 may also receive the grant increase from funds allotted for fiscal year 1979 for eligible portions that meet the criteria for alternative technologies in appendix E, if funds are available for such purposes under § 35.915–1(b).

(c) *Modification or replacement of innovative and alternative projects.* The Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with 85-percent grant assistance if:

(1) He determines that:

(i) The facilities have not met design performance specifications (unless such failure is due to any person's negligence);

(ii) Correction of the failure requires significantly increased capital or operating and maintenance expenditures; and

(iii) Such failure has occurred within the 2-year period following final inspection; and

(2) The replacement or modification project is on the fundable portion of the State's priority list.

(d) *Sole source procurement.* A determination by the Regional Administrator under this section that innovative criteria have been met will serve

as the basis for sole source procurement (see § 35.936–13(b)) for step 3, if appropriate, to achieve the objective of demonstrating innovative technology.

§ 35.909 Step 2+3 grants.

(a) *Authority.* The Regional Administrator may award grant assistance for a step 2=3 project for the combination of design (step 2) and construction (step 3) of a waste water treatment works.

(b) *Limitations.* The Regional Administrator may award step 2=3 grant assistance only if he determines that:

(1) The population is 25,000 or less for the applicant municipality (according to most recent U.S. Census information or disaggregations thereof);

(2) The treatment works has an estimated total step 3 construction cost of $2 million or less, as determined by the Regional Administrator. For any State that the Assistant Administrator for Water and Waste Management finds to have unusually high costs of construction, the Regional Administrator may make step 2=3 awards where the estimated total step 3 construction costs of such treatment works does not exceed $3 million. The project must consist of all associated step 2 and step 3 work; segmenting is not permitted; and

(3) The fundable range of the approved project priority list includes the step 2 and step 3 work.

(c) *Application requirements.* Step 2+3 projects are subject to all requirements of this subpart that apply to separate step 2 and step 3 projects except compliance with § 35.920–3(c) is not required before grant award. An applicant should only submit a single application.

(d) *Cross references.* See §§ 35.920–3(d) (contents of application), 35.930–1(a)(4) (types of projects) and 35.935–4 (grant conditions).

§ 35.910 Allocation of funds.

§ 35.910–1 Allotments.

Allotments are made on a formula or other basis which Congress specifies for each fiscal year. Except where Congress indicates the exact amount of funds which each State should receive, computation of a State's ratio will be carried out to the nearest ten-thousandth percent (0.0001 percent). Unless regulations for allotments for a specific fiscal year otherwise specify, alloted amounts will be rounded to the nearest thousand dollars.

§ 35.910–2 Period of availability; reallotment.

(a) All sums allotted under § 35.910–5 shall remain available for obligation within that State until September 30, 1978. Such funds which remain unobligated on October 1, 1978, will be immediately reallotted in the same manner as sums under paragraph (b) of this section.

(b) All other sums allotted to a State under section 207 of the Act shall remain available for obligation until the end of 1 year after the close of the fiscal year for which the sums were authorized. Sums not obligated at the end of that period shall be immediately reallotted on the basis of the same ratio as applicable to sums allotted for the then-current fiscal year, but none of the funds reallotted shall be made available to any State which failed to obligate any of the funds being reallotted. Any sum made available to a State by reallotment under this section shall be in addition to any funds otherwise allotted to such State for grants under this subpart during any fiscal year.

(c) Sums which are deobligated after the reallotment date for those funds shall be treated in the same manner as the most recent allotment before the deobligation.

§§ 35.910–3—35.910–4 [Reserved]

§ 35.910–5 Additional allotments of previously withheld sums.

(a) A total sum of $9 billion is allotted from sums authorized, but initially unallotted, for fiscal years 1973, 1974, and 1975. This additional allotment shall be available for obligation through September 30, 1977, before reallotment of unobligated sums under § 35.910–2.

(b) Two-thirds of the sum hereby allotted ($6 billion) represents the initially unallotted portion of the amounts authorized for fiscal years 1973 and 1974. Therefore, the portion of the additional allotments derived from this sum were computed by applying

the percentages formerly set forth in § 35.910–3(b) to the total sums authorized for fiscal years 1973 and 1974 ($11 billion) and subtracting the previously allotted sums, formerly set forth in § 35.910–3(c).

(c) One-third of the sum hereby allotted ($3 billion) represents the initially unallotted portion of the amounts authorized for fiscal year 1975. Therefore, the portion of the additional allotments derived from this sum were computed in a three-step process: First, by applying the percentages set forth in § 35.910–4(b) to the total sums authorized for fiscal year 1975 ($7 billion); then, by making adjustments necessary to assure that no State's allotment of such sums fell below its fiscal year 1972 allotment, under Pub. L. 93–243; and, finally, by subtracting the previously allotted sums set forth in § 35.910–4(c).

(d) Based upon the computations set forth in paragraphs (b) and (c) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$43,975,950
Alaska	25,250,500
Arizona	18,833,450
Arkansas	39,822,700
California	945,776,800
Colorado	43,113,300
Connecticut	155,091,800
Delaware	56,394,900
District of Columbia	72,492,000
Florida	345,870,100
Georgia	117,772,800
Hawaii	51,903,300
Idaho	19,219,100
Illinois	571,698,400
Indiana	251,631,800
Iowa	100,044,900
Kansas	53,794,200
Kentucky	90,430,800
Louisiana	71,712,250
Maine	78,495,200
Maryland	297,705,300
Massachusetts	295,809,100
Michigan	625,991,900
Minnesota	172,024,500
Mississippi	38,735,200
Missouri	157,471,200
Montana	12,378,200
Nebraska	38,539,500
Nevada	31,839,800
New Hampshire	77,199,350
New Jersey	660,830,500
New Mexico	15,054,900
New York	1,046,103,500
North Carolina	110,345,000
North Dakota	2,802,000
Ohio	497,227,400
Oklahoma	64,298,700
Oregon	77,582,900
Pennsylvania	498,984,900
Rhode Island	45,599,600
South Carolina	82,341,900
South Dakota	5,688,000
Tennessee	107,351,400
Texas	174,969,850
Utah	21,376,500
Vermont	22,506,600
Virginia	251,809,000
Washington	103,915,600
West Virginia	59,419,900
Wisconsin	145,327,400
Wyoming	2,930,650
Guam	6,399,200
Puerto Rico	84,910,500
Virgin Islands	7,794,800
American Samoa	738,200
Trust Territory of Pacific	2,672,800
Total	9,000,000,000

§ 35.910–6 Fiscal Year 1977 public works allotments.

(a) The $480 million appropriated by Public Law 94–447, 90 Stat. 1498, is available for obligation under the authority of title III of the Public Works Employment Act of 1976 (Pub. L. 94–369, 90 Stat. 999), as provided by section 301 of Public Law 94–369, to carry out title II of the Clean Water Act (other than sections 206, 208, and 209). Allotments of these funds shall remain available until expended. Amounts allotted are in addition to the State's last allotment under the Clean Water Act and are to be used for the same purpose.

(b) The sum of $480 million has been allotted to States identified in column 1 of the Table IV of the House Public Works and Transportation Committee print numbered 94–25 based on percentages shown in column 5 of that table.

(c) The percentages referred to in paragraph (b) of this section and used in computing the State allotments set forth in paragraph (d) of this section are as follows:

State	Percent
Alabama	4.90
Alaska	.91
Arizona	4.69
Arkansas	3.74
California	0
Colorado	3.04
Connecticut	0
Delaware	0
District of Columbia	0
Florida	2.97
Georgia	5.70
Hawaii	.60
Idaho	1.06
Illinois	0
Indiana	0
Iowa	.37

State	Percent
Kansas	2.90
Kentucky	2.70
Louisiana	3.51
Maine	0
Maryland	1.51
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	2.65
Missouri	1.47
Montana	.63
Nebraska	.77
Nevada	.13
New Hampshire	0
New Jersey	0
New Mexico	1.13
New York	0
North Carolina	6.65
North Dakota	1.06
Ohio	0
Oklahoma	3.64
Oregon	.28
Pennsylvania	0
Rhode Island	0
South Carolina	2.92
South Dakota	.89
Tennessee	3.01
Texas	18.46
Utah	1.86
Vermont	0
Virginia	0
Washington	2.49
West Virginia	7.14
Wisconsin	2.65
Wyoming	.91
Guam	.30
Puerto Rico	1.22
Virgin Islands	0
American Samoa	.16
Trust Territory of Pacific	.98
Total	100.00

(d) Based on these percentages, the total additional sums hereby allotted to the States are as follows:

State	Allotments from funds appropriated under Public Law 94–447
Alabama	$23,520.000
Alaska	4,368,000
Arizona	22,512,000
Arkansas	17,952,000
California	0
Colorado	14,592,000
Connecticut	0
Delaware	0
District of Columbia	0
Florida	14,256,000
Georgia	27,360,000
Hawaii	2,880,000
Idaho	5,088,000
Illinois	0
Indiana	0
Iowa	1,776,000
Kansas	13,920,000
Kentucky	12,960,000
Louisiana	16,848,000
Maine	0
Maryland	7,248,000
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	12,720,000
Missouri	7,056,000
Montana	3,024,000
Nebraska	3,696,000
Nevada	624,000
New Hampshire	0
New Jersey	0
New Mexico	5,424,000
New York	0
North Carolina	31,920,000
North Dakota	5,088,000
Ohio	0
Oklahoma	17,472,000
Oregon	1,344,000
Pennsylvania	0
Rhode Island	0
South Carolina	14,016,000
South Dakota	4,272,000
Tennessee	14,448,000
Texas	88,608,000
Utah	8,928,000
Vermont	0
Virginia	0
Washington	11,952,000
West Virginia	34,272,000
Wisconsin	12,720,000
Wyoming	4,368,000
Guam	1,440,000
Puerto Rico	5,856,000
Virgin Islands	0
American Samoa	768,000
Trust Territory of Pacific	4,704,000
Total	480,000,000

§ 35.910–7 Fiscal Year 1977 Supplemental Appropriations Act allotments.

(a) Under title I, chapter V of Public Law 95–26, $1 billion is available for obligation. The allotments are to be used to carry out title II of the Act, excluding sections 206, 208, and 209. These allotments are available until expended but must be obligated by May 3, 1980. After that date, unobligated balances will be subject to reallotment under section 205 (b) of the Act (see § 35.910–2 (b)).

(b) The allotments, computed by proportionally adjusting the table on page 16 of Senate Report No. 95–38, are based on the following four factors:

(1) 25 percent on the States estimated 1975 census population;

(2) 50 percent on each State's partial needs, i.e., on the cost of needed facilities in categories I, II, and IVB (secondary treatment, more stringent

treatment required to meet water quality standards, and interceptor sewers and pumping stations), as shown in table IV of the May 6, 1975, EPA report, ''cost Estimates for Construction of Publicly Owned Waste Water Treatment Facilities—1974 Needs Survey'';

(3) 25 percent on each State's full needs, i.e., on the cost of needed facilities in categories I, II, IIIA, IIIB, IVA, IVB, and V (secondary treatment, more stringent treatment required to meet water quality standards, infiltration and inflow correction, major sewer system rehabilitation, collector sewers, interceptor sewers, and pumping stations, and treatment of combined sewer overflows), as shown in table V of the EPA report noted in paragraph (b) (2) of this section; and

(4) An allotment adjustment to insure that no State receives less than the one-third of 1 percent of the total amount allocated.

(c) Based on paragraph (b) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$10,906,000
Alaska	4,759,000
Arizona	6,345,000
Arkansas	10,807,000
California	82,391,000
Colorado	8,031,000
Connecticut	12,195,000
Delaware	3,966,000
District of Columbia	3,966,000
Florida	35,792,000
Georgia	19,929,000
Hawaii	6,940,000
Idaho	4,065,000
Illinois	52,151,000
Indiana	21,713,000
Iowa	11,005,000
Kansas	12,195,000
Kentucky	14,971,000
Louisiana	12,493,000
Maine	5,453,000
Maryland	37,874,000
Massachusetts	27,662,000
Michigan	46,897,000
Minnesota	15,070,000
Mississippi	7,535,000
Missouri	19,830,000
Montana	3,272,000
Nebraska	6,147,000
Nevada	3,272,000
New Hampshire	6,742,000
New Jersey	47,591,000
New Mexico	3,272,000
New York	105,294,000
North Carolina	20,722,000
North Dakota	3,272,000
Ohio	55,522,000
Oklahoma	13,484,000
Oregon	8,328,000
Pennsylvania	46,698,000
Rhode Island	3,966,000
South Carolina	13,088,000
South Dakota	3,272,000
Tennessee	14,872,000
Texas	43,030,000
Utah	5,057,000
Vermont	3,272,000
Virginia	22,011,000
Washington	15,368,000
West Virginia	21,614,000
Wisconsin	19,929,000
Wyoming	3,272,000
Guam	992,000
Puerto Rico	8,923,000
Virgin Islands	496,000
American Samoa	298,000
Trust Territory of Pacific	1,983,000
Total	1,000,000,000

§ 35.910–8 Allotments for fiscal years 1978–1981.

(a) Unless later legislation requires otherwise, for each of the fiscal years 1978–1981, all funds appropriated under authorizations in section 207 of the Act will be distributed among the States based on the following percentages drawn from table 3 of Committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alabama	1.2842
Alaska	.4235
Arizona	.7757
Arkansas	.7513
California	7.9512
Colorado	.9187
Connecticut	1.1072
Delaware	.3996
District of Columbia	.3193
Florida	3.8366
Georgia	1.9418
Hawaii	.7928
Idaho	.4952
Illinois	5.1943
Indiana	2.7678
Iowa	1.2953
Kansas	.8803
Kentucky	1.4618
Louisiana	1.2625
Maine	.7495
Maryland	2.7777
Massachusetts	2.9542
Michigan	4.1306
Minnesota	1.8691
Mississippi	.9660
Missouri	2.4957
Montana	.3472
Nebraska	.5505
Nevada	.4138
New Hampshire	.8810
New Jersey	3.5715
New Mexico	.3819
New York	10.6209
North Carolina	1.9808

State	Percentage
North Dakota	.3107
Ohio	6.4655
Oklahoma	.9279
Oregon	1.2974
Pennsylvania	4.3616
Rhode Island	.5252
South Carolina	1.1766
South Dakota	.3733
Tennessee	1.5486
Texas	4.3634
Utah	.4457
Vermont	.3845
Virginia	1.9602
Washington	1.7688
West Virginia	1.7903
Wisconsin	1.9503
Wyoming	.3003
Guam	.0744
Puerto Rico	1.1734
Virgin Islands	.0378
American Samoa	.0616
Trust Territory of Pacific	.1530
Total	100.00

(b) Based on paragraph (a) of this section, and table 4 of the committee print, the following authorizations are allotted among the States subject to the limitations of paragraph (c) of this section:

State	For fiscal year 1978	For each of the fiscal years 1979, 1980, 1981
Alabama	$57,789,000	$64,210,000
Alaska	19,057,500	21,175,000
Arizona	34,906,500	38,785,000
Arkansas	33,808,500	37,565,000
California	357,804,000	397,560,000
Colorado	41,341,500	45,935,000
Connecticut	49,824,000	55,360,000
Delaware	17,982,000	19,980,000
District of Columbia	14,368,500	15,965,000
Florida	172,647,000	191,830,000
Georgia	87,381,000	97,090,000
Hawaii	35,676,000	39,640,000
Idaho	22,284,000	24,760,000
Illinois	233,743,500	259,715,000
Indiana	124,551,000	138,390,000
Iowa	58,288,500	64,765,000
Kansas	39,613,500	44,015,000
Kentucky	65,781,000	73,090,000
Louisiana	56,812,500	63,125,000
Maine	33,727,500	37,475,000
Maryland	124,996,500	138,885,000
Massachusetts	132,939,000	147,710,000
Michigan	185,877,000	206,530,000
Minnesota	84,109,500	93,455,000
Mississippi	43,470,000	48,300,000
Missouri	112,306,500	124,785,000
Montana	15,624,000	17,360,000
Nebraska	24,772,500	27,525,000
Nevada	18,621,000	20,690,000
New Hampshire	39,645,000	44,050,000
New Jersey	160,717,500	178,575,000
New Mexico	17,185,500	19,095,000
New York	477,940,500	531,045,000
North Carolina	89,136,000	99,040,000
North Dakota	13,981,500	15,535,000
Ohio	290,947,500	323,275,000
Oklahoma	41,755,500	46,395,000
Oregon	58,383,000	64,870,000
Pennsylvania	196,272,000	218,080,000
Rhode Island	23,634,000	26,260,000
South Carolina	52,947,000	58,830,000
South Dakota	16,798,500	18,665,000
Tennessee	69,687,000	77,430,000
Texas	196,353,000	218,170,000
Utah	20,056,500	22,285,000
Vermont	17,302,500	19,225,000
Virginia	88,209,000	98,010,000
Washington	79,596,000	88,440,000
West Virginia	80,563,500	89,515,000
Wisconsin	87,763,500	97,515,000
Wyoming	13,513,500	15,015,000
Guam	3,348,000	3,720,000
Puerto Rico	52,803,000	58,670,000
Virgin Islands	1,701,000	1,890,000
American Samoa	2,772,000	3,080,000
Trust Territory of the Pacific Islands	6,885,000	7,650,000
Total	4,500,000,000	5,000,000,000

(c) The authorizations in paragraph (b) of this section depend on appropriation. Therefore, the Regional Administrator may not obligate any portion of any authorization for a fiscal year until a law is enacted appropriating part or all of the sums authorized for that fiscal year. If sums appropriated are less than the sums authorized for a fiscal year, EPA will apply the percentages in paragraph (a) of this section to distribute all appropriated sums among the States, and promptly will notify each State of its share. The Regional Administrator may not obligate more than the State's share of appropriated sums.

(d) If supplementary funds are appropriated in any fiscal year under section 205(e) of the Act to carry out the purposes of this paragraph, no State shall receive less than one-half of 1 percent of the total allotment among all States for that fiscal year, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territories not more than thirty-three one-hundredths of 1 percent of the total allotment shall be allotted to all four of those jurisdictions. If for any fiscal year the amount appropriated to carry out this paragraph is less than the full amount needed, the following States will share in any funds appropriated for the purposes of this paragraph in the following percentages, drawn from the

note to table 3 of committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alaska	5.4449
Delaware	7.1459
District of Columbia	12.8612
Idaho	.3416
Montana	10.8755
Nevada	6.1352
New Mexico	8.4057
North Dakota	13.4733
South Dakota	9.0178
Utah	3.8648
Vermont	8.2206
Wyoming	14.2135
Total	100.0000

§ 35.910–9 Allotment of Fiscal Year 1978 appropriation.

(a) Public Law 95–240 appropriated $4.5 billion. These allotments are available until expended but must be obligated by September 30, 1979. After that date unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) These sums were allotted to the States as shown in § 35.910–8(b).

[43 FR 56200, Nov. 30, 1978]

§ 35.910–10 Allotment of Fiscal Year 1979 appropriation.

(a) Title II of Public Law 95–392 appropriated $4.2 billion. These allotments are available until expended but must be obligated by September 30, 1980. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8(a) and (b) to the funds appropriated for FY 1979 and rounding to the nearest hundred dollars.

(c) The $4.2 billion are allotted as follows:

State	Allotments from funds appropriated under Pub. L. 95–392
Alabama	$53,189,100
Alaska	20,709,000
Arizona	32,128,000
Arkansas	31,117,400
California	329,323,400
Colorado	38,050,800
Connecticut	45,858,100
Delaware	20,709,000
District of Columbia	20,709,000
Florida	158,904,600
Georgia	80,425,600
Hawaii	32,836,300
Idaho	20,709,000
Illinois	215,137,900
Indiana	114,637,000
Iowa	53,648,800
Kansas	36,460,300
Kentucky	60,545,000
Louisiana	52,290,300
Maine	31,042,900
Maryland	115,047,000
Massachusetts	122,357,300
Michigan	171,081,500
Minnesota	77,414,600
Mississippi	40,009,900
Missouri	103,367,100
Montana	20,709,000
Nebraska	22,800,700
Nevada	20,709,000
New Hampshire	36,489,300
New Jersey	147,924,700
New Mexico	20,709,000
New York	439,897,200
North Carolina	82,040,900
North Dakota	20,709,000
Ohio	267,788,600
Oklahoma	38,431,900
Oregon	53,735,800
Pennsylvania	180,649,100
Rhode Island	21,752,800
South Carolina	48,732,500
South Dakota	20,709,000
Tennessee	64,140,000
Texas	180,723,600
Utah	20,709,000
Vermont	20,709,000
Virginia	81,187,700
Washington	73,260,300
West Virginia	74,150,800
Wisconsin	80,777,700
Wyoming	20,709,000
American Samoa	2,551,400
Guam	3,081,500
Northern Mariana Islands	570,300
Puerto Rico	48,600,000
Trust Territory of Pacific	5,766,700
Virgin Islands	1,565,600
Total	4,200,000,000

[43 FR 56201, Nov. 30, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.910–11 Allotment of Fiscal Year 1980 appropriation.

(a) Title II of Public Law 96–103 appropriated $3.4 billion. These allotments are available until expended but must be obligated by September 30, 1981. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8 (a) and (d) to the funds appropriated for FY 1980 and rounding to the nearest hundred dollars.

(c) The $3.4 billion are alloted as follows:

State	Allotments from funds appropriated under Pub. L. 95–372
Alabama	$43,057,800
Alaska	16,764,500
Arizona	26,008,400
Arkansas	25,190,300
California	266,595,100
Colorado	30,803,000
Connecticut	37,123,200
Delaware	16,764,500
District of Columbia	16,764,500
Florida	128,637,000
Georgia	65,106,400
Hawaii	26,581,700
Idaho	16,764,500
Illinois	174,159,300
Indiana	92,801,300
Iowa	43,430,000
Kansas	29,515,500
Kentucky	49,012,600
Louisiana	42,330,300
Maine	25,129,900
Maryland	93,133,300
Massachusetts	99,051,100
Michigan	138,494,500
Minnesota	62,668,900
Mississippi	32,388,900
Missouri	83,678,100
Montana	16,764,500
Nebraska	18,457,700
Nevada	16,764,500
New Hampshire	29,539,000
New Jersey	119,748,500
New Mexico	16,764,500
New York	356,107,300
North Carolina	66,414,100
North Dakota	16,764,500
Ohio	216,781,200
Oklahoma	31,111,500
Oregon	43,500,400
Pennsylvania	146,239,700
Rhode Island	17,609,400
South Carolina	39,450,100
South Dakota	16,764,500
Tennessee	51,922,900
Texas	146,300,100
Utah	16,764,500
Vermont	16,764,500
Virginia	65,723,400
Washington	59,305,900
West Virginia	60,026,800
Wisconsin	65,391,400
Wyoming	16,764,500
American Samoa	2,065,400
Guam	2,494,500
Puerto Rico	39,342,800
Trust Terr	4,667,200
Virgin Islands	1,267,400
Northern Marianas	462,700
Total	3,400,000,000

[45 FR 16486, Mar. 14, 1980]

§ 35.910–12 Reallotment of deobligated funds of Fiscal Year 1978.

(a) Of the 4.5 billion appropriated by Public Law 95–240 for Fiscal Year 1978, $23,902,130 remained unobligated as of September 30, 1979 and thereby became subject to reallotment.

(b) The reallotment was computed by applying the percentages in § 35.910–8(a), adjusted to account for the absence of Ohio and readjusted to comply with the requirements of § 35.910(d) establishing a minimum allotment of .5 percent.

(c) These funds are added to the Fiscal Year 1980 allotments and will remain available through September 30, 1981 (see §§ 35.910–2(b) and 35.910–8).

(d) The $23,902,130 is allotted as follows:

State	Amount
Alabama	$324,543
Alaska	118,190
Arizona	196,050
Arkansas	189,880
California	2,009,389
Colorado	232,191
Connecticut	279,813
Delaware	118,190
District of Columbia	118,190
Florida	969,582
Georgia	490,736
Hawaii	200,367
Idaho	125,148
Illinois	1,312,681
Indiana	699,465
Iowa	327,345
Kansas	222,494
Kentucky	369,430
Louisiana	319,073
Maine	189,428
Maryland	701,974
Massachusetts	746,591
Michigan	1,043,875
Minnesota	472,360
Mississippi	244,147
Missouri	630,710
Montana	118,190
Nebraska	139,138
Nevada	118,190
New Hampshire	222,653
New Jersey	902,590
New Mexico	118,190
New York	2,684,060
North Carolina	500,590
North Dakota	118,190
Oklahoma	234,496
Oregon	327,888
Pennsylvania	1,102,234
Rhode Island	132,719
South Carolina	297,352
South Dakota	118,190
Tennessee	391,354
Texas	1,102,708
Utah	118,190
Vermont	118,190
Virginia	495,392
Washington	447,046

State	Amount
West Virginia	452,493
Wisconsin	492,883
Wyoming	118,190
Guam	18,805
Puerto Rico	296,561
Virgin Islands	9,561
American Samoa	15,573
Tr. Terr. of Pac. Islds	35,192
N. Mariana Islds	3,480
Total	23,902,130

[45 FR 83497, Dec. 19, 1980. Correctly designated at 46 FR 9947, Jan. 30, 1981]

§ 35.912 Delegation to State agencies.

EPA's policy is to maximize the use of staff capabilities of State agencies. Therefore, in the implementation of the construction grant program, optimum use will be made of available State and Federal resources. This will eliminate unnecessary duplicative reviews of documents required in the processing of construction grant awards. Accordingly, the Regional Administrator may enter into a written agreement, where appropriate, with a State agency to authorize the State agency's certification of the technical or administrative adequacy of specifically required documents. The agreement may provide for the review and certification of elements of:

(a) Facilities plans (step 1),

(b) plans and specifications (step 2),

(c) operation and maintenance manuals, and

(d) such other elements as the Regional Administrator determines may be appropriately delegated as the program permits and State competence allows. The agreement will define requirements which the State will be expected to fulfill as part of its general responsibilities for the conduct of an effective preaward applicant assistance program; compensation for this program is the responsibility of the State. The agreement will also define specific duties regarding the review of identified documents prerequisite to the receipt of grant awards. A certification agreement must provide that an applicant or grantee may request review by the Regional Administrator of an adverse recommendation by a State agency. Delegation activities are compensable by EPA only under section 106 of the Act or subpart F of this part.

§ 35.915 State priority system and project priorty list.

Construction grants will be awarded from allotments according to the State priority list, based on the approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act.

(a) *State priority system.* The State priority system describes the methodology used to rate and rank projects that are considered eligible for assistance. It also sets forth the administrative, management, and public participation procedures required to develop and revise the State project priority list. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide water quality management (WQM) plans. The State shall hold a public hearing before submission of the priority system (or revision thereto). Before the hearing, a fact sheet describing the proposed system (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission. The Regional Administrator shall review and approve the State priority system for procedural completeness, insuring that it is designed to obtain compliance with the enforceable requirements of the Act as defined in § 35.905. The Regional Administrator may exempt grants for training facilities under section 109(b)(1) of the Act and § 35.930–1(b) from these requirements.

(1) *Project rating criteria.* (i) The State priority system shall be based on the following criteria:

(A) The severity of the pollution problem;

(B) The existing population affected;

(C) The need for preservation of high quality waters; and

(D) At the State's option, the specific category of need that is addressed.

(ii) The State will have sole authority to determine the priority for each category of need. These categories

comprise mutually exclusive classes of facilities and include:

(A) Category I—Secondary treatment;

(B) Category II—More stringent treatment;

(C) Category IIIA—Infiltration/inflow correction;

(D) Category IIIB—Sewer system replacement or major rehabilitation;

(E) Category IVA—New collectors and appurtenances;

(F) Category IVB—New interceptors and appurtenances; and

(G) Category V—Correction of combined sewer overflows.

(iii) Step 2, step 3 and step 2=3 projects utilizing processes and techniques meeting the innovative and alternative guidelines in appendix E of this part may receive higher priority. Also 100 percent grants for projects that modify or replace malfunctioning treatment works constructed with an 85 percent grant may receive a higher priority.

(iv) Other criteria, consistent with these, may be considered (including the special needs of small and rural communities). The State shall not consider: The project area's development needs not related to pollution abatement; the geographical region within the State; or future population growth projections.

(2) *Criteria assessment.* The State shall have authority to determine the relative influence of the rating criteria used for assigning project priority. The criteria must be clearly delineated in the approved State priority system and applied consistently to all projects. A project on the priority list shall generally retain its priority rating until an award is made.

(b) *State needs inventory.* The State shall maintain a listing, including costs by category, of all needed treatment works. The most recent needs inventory, prepared in accordance with section 516(b)(1)(B) of the Act, should be used for this purpose. This State listing should be the same as the needs inventory and fulfills similar requirements in the State WQM planning process. The State project priority list shall be consistent with the needs inventory.

(c) *State project priority list.* The State shall prepare and submit annually a ranked priority listing of projects for which Federal assistance is expected during the 5-year planning period starting at the beginning of the next fiscal year. The list's fundable portion shall include those projects planned for award during the first year of the 5-year period (hereinafter called the funding year). The fundable portion shall not exceed the total funds expected to be available during the year less all applicable reserves provided in §35.915–1 (a) through (d). The list's planning portion shall include all projects outside the fundable portion that may, under anticipated allotment levels, receive funding during the 5-year period. The Administrator shall provide annual guidance to the States outlining the funding assumptions and other criteria useful in developing the 5-year priority list.

(1) *Project priority list development.* The development of the project priority list shall be consistent with the rating criteria established in the approved priority system, in accordance with the criteria in paragraph (a)(1) of this section. In ranking projects, States must also consider the treatment works and step sequence; the allotment deadline; total funds available; and other management criteria in the approved State priority system. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide WQM plans. The Regional Administrator may request that a State provide justification for the rating or ranking established for specific project(s).

(2) *Project priority list information.* The project priority list shall include the information for each project that is set out below for projects on the fundable portion of the list. The Administrator shall issue specific guidance on these information requirements for the planning portion of the list, including phase-in procedures for the fiscal year 1979 priority planning process.

(i) State assigned EPA project number;

(ii) Legal name and address of applicant;

(iii) Short project name or description;

(iv) Priority rating and rank of each project, based on the approved priority system;

(v) Project step number (step 1, 2, 3, or 2=3);

(vi) Relevant needs authority/facility number(s);

(vii) NPDES number (as appropriate);

(viii) Parent project number (i.e., EPA project number for predecessor project);

(ix) For step 2, 3, or 2=3 projects, indication of alternative system for small community;

(x) For step 2, 3, or 2=3 projects, that portion (if any) of eligible cost to apply to alternative techniques;

(xi) For step 2, 3, or 2=3 projects, that portion (if any) of eligible cost to apply to innovative processes;

(xii) For step 3 or 2=3 projects, the eligible costs in categories IIIB, IV, and V (see § 35.915(a)(1)(ii));

(xiii) Total eligible cost;

(xiv) Date project is expected to be certified by State to EPA for funding;

(xv) Estimated EPA assistance (not including potential grant increase from the reserve in § 35.915–1(b)); and

(xvi) Indication that the project does or does not satisfy the enforceable requirements provision, including (as appropriate) funding estimates for those portions which do not meet the enforceable requirements of the Act.

(d) *Public participation.* Before the State submits its annual project priority list to the Regional Administrator, the State shall insure that adequate public participation (including a public hearing) has taken place as required by subpart G of this part. Before the public hearing, the State shall circulate information about the priority list including a description of each proposed project and a statement concerning whether or not it is necessary to meet the enforceable requirements of the Act. The information on the proposed priority list under paragraph (c)(2) of this section may be used to fulfill these requirements. This public hearing may be conducted jointly with any regular public meeting of the State agency. The public must receive adequate and timely statewide notice of the meeting (including publication of the proposed priority list) and attendees at the meeting must receive adequate opportunity to express their views concerning the list. Any revision of the State priority list (including project bypass and the deletion or addition of projects) requires circulation for public comment and a public hearing unless the State agency and the Regional Administrator determine that the revision is not significant. The approved State priority system shall describe the public participation policy and procedures applicable to any proposed revision to the priority list.

(e) *Submission and review of project priority list.* The State shall submit the priority list as part of the annual State program plan under subpart G of this part. A summary of State agency response to public comment and hearing testimony shall be prepared and submitted with the priority list. The Regional Administrator will not consider a priority list to be final until the public participation requirements are met and all information required for each project has been received. The Regional Administrator will review the final priority list within 30 days to insure compliance with the approved State priority system. No project may be funded until this review is complete.

(f) *Revision of the project priority list.* The State may modify the project priority list at any time during the program planning cycle in accordance with the public participation requirements and the procedures established in the approved State priority system. Any modification (other than clerical) to the priority list must be clearly documented and promptly reported to the Regional Administrator. As a minimum, each State's priority list management procedure must provide for the following conditions:

(1) *Project bypass.* A State may bypass a project on the fundable portion of the list after it gives written notice to the municipality and the NPDES authority that the State has determined that the project to be bypassed will not be ready to proceed during the funding year. Bypassed projects shall retain their relative priority rating for consideration in the future year allotments. The

highest ranked projects on the planning portion of the list will replace bypassed projects. Projects considered for funding in accordance with this provision must comply with paragraph (g) of this section.

(2) *Additional allotments.* If a State receives any additional allotment(s), it may fund projects on the planning portion of the priority list without further public participation if:

(i) The projects on the planning portion have met all administrative and public participation requirements outlined in the approved State priority system; and

(ii) The projects included within the fundable range are the highest priority projects on the planning portion.

If sufficient projects that meet these conditions are not available on the planning portion of the list, the State shall follow the procedures outlined in paragraph (e) of this section to add projects to the fundable portion of the priority list.

(3) *Project removal.* A State may remove a project from the priority list only if:

(i) The project has been fully funded;

(ii) The project is no longer entitled to funding under the approved priority system;

(iii) The Regional Administrator has determined that the project is not needed to comply with the enforceable requirements of the Act; or

(iv) The project is otherwise ineligible.

(g) *Regional Administrator review for compliance with the enforceable requirements of the Act.* (1) Unless otherwise provided in paragraph (g)(2) of this section, the Regional Administrator may propose the removal of a specific project or portion thereof from the State project priority list during or after the initial review where there is reason to believe that it will not result in compliance with the enforceable requirements of the Act. Before making a final determination, the Regional Administrator will initiate a public hearing on this issue. Questioned projects shall not be funded during this administrative process. Consideration of grant award will continue for those projects not at issue in accordance with all other requirements of this section.

(i) The Regional Administrator shall establish the procedures for the public notice and conduct of any such hearing, or, as appropriate, the procedures may be adapted from existing agency procedures such as §6.400 or §§123.32 and 123.34 of this chapter. The procedures used must conform to minimum Agency guidelines for public hearings under part 25 of this chapter.

(ii) Within 30 days after the date of the hearing, the Regional Administrator shall transmit to the appropriate State agency a written determination about the questioned projects. If the Regional Administrator determines that the project will not result in compliance with the enforceable requirements of the Act, the State shall remove the project from the priority list and modify the priority list to reflect this action. The Regional Administrator's determination will constitute the final agency action, unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

(2) The State may use 25 percent of its funds during each fiscal year for projects or portions of projects in categories IIIB, IVA, IVB, and V (see §35.915(a)(1)(ii)). These projects must be eligible for Federal funding to be included on the priority list. EPA will generally not review these projects under paragraph (g)(1) of this section to determine if they will result in compliance with the enforceable requirements of the Act. The Regional Administrator will, however, review all projects or portions thereof which would use funds beyond the 25-percent level according to the criteria in paragraph (g)(1) of this section.

(h) *Regional Administrator review for eligibility.* If the Regional Administrator determines that a project on the priority list is not eligible for assistance under this subpart, the State and municipality will be promptly advised and the State will be required to modify its priority list accordingly. Elimination of any project from the priority list shall be final and conclusive unless the State or municipality files a notice

of appeal under part 30, subpart J of this subchapter.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.915–1 Reserves related to the project priority list.

In developing the fundable portion of the priority list, the State shall provide for the establishment of the several reserves required or allowed under this section. The State shall submit a statement specifying the amount to be set aside for each reserve with the final project priority list.

(a) *Reserve for State management assistance grants.* The State may (but need not) propose that the Regional Administrator set aside from each allotment a reserve not to exceed 2 percent or $400,000, whichever is greater, for State management assistance grants under subpart F of this part. Grants may be made from these funds to cover the reasonable costs of administering activities delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for innovative and alternative technology project grant increase.* Each State shall set aside from its annual allotment a specific percentage to increase the Federal share of grant awards from 75 percent to 85 percent of the eligible cost of construction (under § 35.908(b)(1)) for construction projects which use innovative or alternative waste water treatment processes and techniques. The set-aside amount shall be 2 percent of the State's allotment for each of fiscal years 1979 and 1980, and 3 percent for fiscal year 1981. Of this amount not less than one-half of 1 percent of the State's allotment shall be set aside to increase the Federal grant share for projects utilizing innovative processes and techniques. Funds reserved under this section may be expended on projects for which facilities plans were initiated before fiscal year 1979. These funds shall be reallotted if not used for this purpose during the allotment period.

(c) *Reserve for grant increases.* The State shall set aside not less than 5 percent of the total funds available during the priority list year for grant increases (including any funds necessary for development of municipal pretreatment programs) for projects awarded assistance under § 35.935–11. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, if they are not needed for grant increases they should be released for funding additional projects before the reallotment deadline.

(d) *Reserve for step 1 and step 2 projects.* The State may (but need not) set aside up to 10 percent of the total funds available in order to provide grant assistance to step 1 and step 2 projects that may be selected for funding after the final submission of the project priority list. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, they should be released for funding additional projects before the reallotment deadline.

(e) *Reserve for alternative systems for small communities.* Each State with a rural population of 25 percent or more (as determined by population estimates of the Bureau of Census) shall set aside an amount equal to 4 percent of the State's annual allotment, beginning with the fiscal year 1979 allotment. The set-aside amount shall be used for funding alternatives to conventional treatment works for small communities. The Regional Administrator may authorize, at the request of the Governor of any non-rural State, a reserve of up to 4 percent of that State's allotment for alternatives to conventional treatment works for small communities. For the purposes of this paragraph, the definition of a small community is any municipality with a population of 3,500 or less, or highly dispersed sections of larger municipalities, as determined by the Regional Administrator. In States where the reserve is mandatory, these funds shall be reallotted if not obligated during the allotment period. In States where the reserve is optional, these funds should be released for funding projects before the reallotment deadline.

§ 35.917 Facilities planning (step 1).

(a) Sections 35.917 through 35.917–9 establish the requirements for facilities plans.

(b) Facilities planning consists of those necessary plans and studies which directly relate to the construction of treatment works necessary to comply with sections 301 and 302 of the Act. Facilities planning will demonstrate the need for the proposed facilities. Through a systematic evaluation of feasible alternatives, it will also demonstrate that the selected alternative is cost-effective, i.e., is the most economical means of meeting established effluent and water quality goals while recognizing environmental and social considerations. (See appendix A to this subpart.)

(c) EPA requires full compliance with the facilities planning provisions of this subpart before award of step 2 or step 3 grant assistance. (Facilities planning initiated before May 1, 1974, may be accepted under regulations published on February 11, 1974, if the step 2 or step 3 grant assistance is awarded before April 1, 1980.)

(d) Grant assistance for step 2 or step 3 may be awarded before approval of a facilities plan for the entire geographic area to be served by the complete waste treatment system of which the proposed treatment works will be an integral part if:

(1) The Regional Administrator determines that applicable statutory requirements have been met (see §§ 35.925–7 and 35.925–8); that the facilities planning related to the proposed step 2 or step 3 project has been substantially completed; and that the step 2 or step 3 project for which grant assistance is made will not be significantly affected by the completion of the facilities plan and will be a component part of the complete system; and

(2) The applicant agrees to complete the facilities plan on a schedule the State accepts (subject to the Regional Administrator's approval); the schedule shall be inserted as a special condition in the grant agreement.

(e) Facilities planning may not be initiated before award of a step 1 grant or written approval of a plan of study (see § 35.920–3(a)(1)) accompanied by reservation of funds for a step 1 grant (see §§ 35.925–18 and 35.905). Facility planning must be based on load allocations, delineation of facility planning areas and population projection totals and disaggregations in approved water quality management (WQM) plans. (See paragraph 8a(3) of appendix A.) After October 1, 1979, the Regional Administrator shall not approve grant assistance for any project under this subpart if such facility-related information is not available in an approved WQM plan, unless the Regional Administrator determines, in writing, based on information submitted by the State or the grantee, that the facility-related information was not within the scope of the WQM work program, or that award of the grant is necessary to achieve water quality goals of the Act.

(f) If the information required as part of a facilities plan has been developed separately, the facilities plan should incorporate it by reference. Planning which has been previously or collaterally accomplished under local, State, or Federal programs will be utilized (not duplicated).

§ 35.917–1 Content of facilities plan.

Facilities planning must address each of the following to the extent considered appropriate by the Regional Administrator:

(a) A description of the treatment works for which construction drawings and specifications are to be prepared. This description shall include preliminary engineering data, cost estimates for design and construction of the treatment works, and a schedule for completion of design and construction. The preliminary engineering data may include, to the extent appropriate, information such as a schematic flow diagram, unit processes, design data regarding detention times, flow rates, sizing of units, etc.

(b) A description of the selected complete waste treatment system(s) of which the proposed treatment works is a part. The description shall cover all elements of the system, from the service area and collection sewers, through treatment, to the ultimate discharge of treated waste waters and management and disposal of sludge. Planning area maps must include major components of existing and proposed treatment

works. For individual systems, planning area maps must include those individual systems which are proposed for funding under § 35.918.

(c) Infiltration/inflow documentation in accordance with § 35.927 *et seq*.

(d) A cost-effectiveness analysis of alternatives for the treatment works and for the complete waste treatment system(s) of which the treatment works is a part. The selection of the system(s) and the choice of the treatment works for which construction drawings and specifications are to be prepared shall be based on the results of the cost-effectiveness analysis. (See appendix A to this subpart.) This analysis shall include:

(1) The relationship of the size and capacity of alternative works to the needs to be served, including reserve capacity;

(2) An evaluation of alternative flow and waste reduction measures, including nonstructural methods;

(3) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to construction of new facilities;

(4) An evaluation of the capability of each alternative to meet applicable effluent limitations. (All step 2, step 3, or step 2=3 projects shall be based on application of best practicable waste treatment technology (BPWTT), as a minimum. Where application of BPWTT would not meet water quality standards, the facilities plan shall provide for attaining such standards. Such provision shall consider the alternative of treating combined sewer overflows.);

(5) An identification of, and provision for, applying BPWTT as defined by the Administrator, based on an evaluation of technologies included under each of the following waste treatment management techniques:

(i) Biological or physical-chemical treatment and discharge to receiving waters;

(ii) Systems employing the reuse of waste water and recycling of pollutants;

(iii) Land application techniques;

(iv) Systems including revenue generating applications; and

(v) Onsite and nonconventional systems;

(6) An evaluation of the alternative methods for the ultimate disposal of treated waste water and sludge materials resulting from the treatment process, and a justification for the method(s) chosen;

(7) An adequate assessment of the expected environmental impact of alternatives (including sites) under part 6 of this chapter. This assessment shall be revised as necessary to include information developed during subsequent project steps;

(8) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of innovative and alternative treatment processes and techniques that reclaim and reuse water, productively recycle waste water constituents, eliminate the discharge of pollutants, recover energy or otherwise achieve the benefits described in appendix E. The provisions of this paragraph are encouraged in all cases. They are required in facilities planning for new treatment works and for treatment works which are being acquired, altered, modified, improved, or extended either to handle a significant increase in the volume of treated waste or to reduce significantly the pollutant discharges from the system. Where certain categories of alternative technologies may not be generally applicable because of prevailing climatic or geological conditions, a detailed analysis of these categories of alternative technologies is not required. However, the reason for such a rejection must be fully substantiated in the facilities plan;

(9) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of the primary energy requirements (operational energy inputs) for each system considered. The alternative selected shall propose adoption of measures to reduce energy consumption or to increase recovery as long as such measures are cost-effective. Where processes or techniques are claimed to be innovative technology on the basis of energy reduction criterion contained in paragraph 6e(2) of appendix E to this subpart, a detailed energy analysis

shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

(e) An identification of effluent discharge limitations or, where a permit has been issued, the NPDES permit number, and a brief description of how the proposed project(s) will result in compliance with the enforceable requirements of the Act.

(f) Required comments or approvals of relevant State, interstate, regional, and local agencies (see § 30.305–8).

(g) A final responsiveness summary, consistent with 40 CFR 25.8 and § 35.917–5.

(h) A brief statement demonstrating that the authorities who will be implementing the plan have the necessary legal, financial, institutional, and managerial resources available to insure the construction, operation, and maintenance of the proposed treatment works.

(i) A statement specifying that the requirements of the Civil Rights Act of 1964 and of part 7 of this chapter have been met.

(j) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, a description of potential opportunities for recreation, open space, and access to bodies of water analyzed in planning the proposed treatment works and the recommended actions. The facilities plan shall also describe measures taken to coordinate with Federal, State, and local recreational programs and with recreational elements of applicable approved areawide WQM plans.

(k) A municipal pretreatment program in accordance with § 35.907,

(l) An estimate of total project costs and charges to customers, in accordance with guidance issued by the Administrator.

(m) A statement concerning the availability and estimated cost of proposed sites.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.917–2 State responsibilities.

(a) *Facilities planning areas.* Facilities planning should focus upon the geographic area to be served by the waste treatment system(s) of which the proposed treatment works will be an integral part. The facilities plan should include the area necessary to prepare an environmental assessment and to assure that the most cost-effective means of achieving the established water quality goals can be implemented. To assure that facilities planning will include the appropriate geographic areas, the State shall:

(1) Delineate, as a preliminary basis for planning, the boundaries of the planning areas. In the determination of each area, appropriate attention should be given to including the entire area where cost savings, other management advantages, or environmental gains may result from interconnection of individual waste treatment systems or collective management of such systems;

(2) Include maps, which shall be updated annually, showing the identified areas and boundary determinations, as part of the State submission under section 106 of the act;

(3) Consult with local officials in making the area and boundary determinations; and

(4) Where individual systems are likely to be cost-effective, delineate a planning area large enough to take advantage of economies of scale and efficiencies in planning and management.

(b) *Facilities planning priorities.* The State shall establish funding priorities for facilities planning in accordance with §§ 35.915 and 35.915–1.

§ 35.917–3 Federal assistance.

(a) *Eligibility.* Only an applicant which is eligible to receive grant assistance for subsequent phases of construction (steps 2 and 3) and which has the legal authority to subsequently construct and manage the facility may apply for grant assistance for step 1. If the area to be covered by the facilities plan includes more than one political jurisdiction, a grant may be awarded for a step 1 project, as appropriate, to:

(1) The joint authority representing such jurisdictions, if eligible;

(2) one qualified (lead agency) applicant; or

(3) two or more eligible jurisdictions. After a waste treatment management agency for an area has been designated in accordance with section 208(c) of the

Act (see subpart G of this part) the Regional Administrator shall not make any grant for construction of treatment works within the area except to the designated agency.

(b) *Reports.* Where a grant has been awarded for facilities planning which is expected to require more than 1 year to complete, the grantee must submit a brief progress report to the Regional Administrator at 3-month intervals. The progress report shall contain a minimum of narrative description, and shall describe progress in completing the approved schedule of specific tasks for the project.

§ 35.917–4 Planning scope and detail.

(a) Initially, the geographic scope of step 1 grant assistance shall be based on the area delineated by the State under § 35.917–2, subject to the Regional Administrator's review. The Regional Administrator may make the preliminary delineation of the boundaries of the planning area, if the State has not done so, or may revise boundaries selected by the locality or State agency, after appropriate consultation with State and local officials.

(b) Facilities planning shall be conducted only to the extent that the Regional Administrator finds necessary in order to insure that facilities for which grants are awarded will be cost-effective and environmentally sound and to permit reasonable evaluation of grant applications and subsequent preparation of designs, construction drawings, and specifications.

§ 35.917–5 Public participation.

(a) *General.* Consistent with section 101(e) of the Clean Water Act and 40 CFR part 25, EPA, the States, and grantees shall provide for, encourage, and assist public participation in the facilities planning process and shall provide citizens with information about and opportunities to become involved in the following:

(1) The assessment of local water quality problems and needs;

(2) The identification and evaluation of locations for waste water treatment facilities and of alternative treatment technologies and systems including those which recycle and reuse waste water (including sludge), use land treatment, reduce waste water volume, and encourage multiple use of facilities;

(3) The evaluation of social, economic, fiscal, and environmental impacts; and

(4) The resolution of other significant facilities planning issues and decisions.

(b) *Basic Public Participation Program.* Since waste water treatment facilities vary in complexity and impact upon the community, these public participation requirements institute a two-tier public participation program for facilities planning consisting of a Basic Public Participation Program, suitable for less complex projects with only moderate community impacts, and a Full-Scale Public Participation Program, for more complex projects with potentially significant community impacts. All facilities planning projects, except those that qualify for the Full-Scale Public Participation Program under paragraph (c) of this section and those exempt under paragraph (d) of this section, require the Basic Public Participation Program. In conducting the Basic Public Participation Program, the grantee shall at a minimum:

(1) Institute, and maintain throughout the facilities planning process, a public information program (including the development and use of a mailing list of interested and affected members of the public), in accordance with 40 CFR 25.4 and § 35.917–5(a).

(2) Notify and consult with the public, during the preparation of the plan of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer.

(3) Include in the plan of study, submitted with the Step 1 grant application, a brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, the types of consultation and informational mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement.

(4) Submit to EPA, within 45 days after the date of acceptance of the Step

1 grant award, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method of coordination between the appropriate Water Quality Management public participation program under subpart G of this part and the grantee's public participation program as required by 40 CFR 35.917–5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting charges to each affected household.

(5) Consult with the public, in accordance with 40 CFR 25.4, early in the facilities planning process when assessing the existing and future situations and identifying and screening alternatives, but before selecting alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). After consultating with the public, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(6) Hold a meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected and then prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(7) Hold a public hearing before final adoption of the facilities plan, in accordance with 40 CFR 25.5.

(8) Include in the final facilities plan a final responsiveness summary, in accordance with 40 CFR 25.8.

(c) *Full-Scale Public Participation Program.* (1) The Regional Administrator shall require a Full-Scale Public Participation Program for all Step 1 facilities planning projects that fulfill one or more of the following three conditions:

(i) Where EPA prepares or requires the preparation of an Environmental Impact Statement during facilities planning under 40 CFR part 6; or

(ii) Where advanced wastewater treatment (AWT) levels, as defined in EPA guidance, may be required; or

(iii) Where the Regional Administrator determines that more active public participation in decision-making is needed because of the possibility of particularly significant effects on matters of citizen concern, as indicated by one or more of the following:

(A) Significant change in land use or impact on environmentally sensitive areas;

(B) Significant increase in the capacity of treatment facilities or interceptors, significant increase in sewered area, or construction of wholly new treatment and conveyance systems;

(C) Substantial total cost to the community or substantial increased cost to users (i.e., cost not reimbursed under the grant);

(D) Significant public controversy;

(E) Significant impact on local population growth or economic growth;

(F) Substantial opportunity for implementation of innovative or alternative wastewater treatment technologies or systems.

(2) The grantee shall initiate a Full-Scale Public Participation Program as soon as the determination in paragraph (c)(1) of this section is made. Generally, the determination should be made before or at the time of award of the Step 1 grant. However, if the Regional Administrator's determination under paragraph (c)(1) of this section to require a Full-Scale Public Participation Program occurs after initiation of facilities planning because of newly discovered circumstances, the grantee shall initiate and expanded public participation program at that point. The Regional Administrator shall assure that the expanded program is at least as inclusive as a normal Full-Scale Public Participation Program, except for constraints imposed by facilities planning activities that have already been completed. If the project is segmented, the Regional Administrator shall look at the project as a whole when considering whether to require a Full-Scale Public Participation Program.

(3) In conducting the Full-Scale Public Participation Program, the grantee shall at a minimum:

(i) Institute and maintain, throughout the facilities planning process, a public information program, in accordance with 40 CFR 25.4 and § 35.917–5(a);

(ii) Notify and consult with the public, during the development of the plan of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer;

(iii) Include, in the plan of study submitted with the Step 1 grant application, brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, types of information and consultation mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement;

(iv) Designate or hire a public participation coordinator and establish an advisory group, in accordance with 40 CFR 25.7, immediately upon acceptance of the Step 1 grant award.

(v) Submit to EPA, within 45 days after the date of acceptance of the step 1 grant award and after consultation with the advisory group, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method for coordination between the appropriate Water Quality Management agency public participation program under subpart G of this part, and the grantee's public participation program as required by 40 CFR 35.917–5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting costs to each affected household;

(vi) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, early in the facilities planning process when assessing the existing and future situations, and identifying and screening alternatives, but before selection of alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). Following the public meeting, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8;

(vii) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected, and then prepare and circulate a responsiveness summary, in accordance with 40 CFR 25.8;

(viii) Hold a public hearing prior to final adoption of the facilities plan, in accordance with 40 CFR 25.5. This public hearing may be held in conjunction with the public hearing on the draft Environmental Impact Statement under 40 CFR part 6.

(ix) Include, in the final facilities plan, a final responsiveness summary, in accordance with 40 CFR 25.8.

(d) *Exemptions from public participation requirements.* (1) Upon written request of the grantee, the Regional Administrator may exempt projects in which only minor upgrading of treatment works or minor sewer rehabilitation is anticipated according to the State Project Priority List from the requirements of the Basic and Full-Scale Public Participation Programs under paragraphs (b) and (c) of this section, except for the public hearing and public disclosure of costs. Before granting any exemption, the Regional Administrator shall issue a public notice of intent to waive the above requirements containing the facts of the situation and shall allow 30 days for response. If responses indicate that serious local issues exist, then the Regional Administrator shall deny the exemption request.

(2) During the facilities planning process, if the Regional Administrator determines that the project no longer meets the exemption criteria stated above, the grantee, in consultation with the Regional Administrator, shall

undertake public participation activities commensurate with the appropriate public participation program but adjusted for constraints imposed by facilities planning activities that have already been completed.

(3) If a project is segmented, the Regional Administrator shall look at the project as a whole when considering any petition for exemption.

(e) *Relationship between facilities planning and other environmental protection programs.* Where possible, the grantee shall further the integration of facilities planning and related environmental protection programs by coordinating the facilities planning public participation program with public participation activities carried out under other programs. At a minimum, the grantee shall provide for a formal liaison between the facilities planning advisory group (or the grantee, where there is no advisory group) and any areawide advisory group established under subpart G of this part. The Regional Administrator may request review of the facilities plan by any appropriate State or areawide advisory group in association with the facilities plan review required by 40 CFR 35.1522.

(f) *Mid-project evaluation.* In accordance with 40 CFR 25.12(a)(2), EPA shall, in conjunction with other regular oversight responsibilities, conduct a mid-project review of compliance with public participation requirements.

[44 FR 10302, Feb. 16, 1979]

§ 35.917–6 Acceptance by implementing governmental units.

A facilities plan submitted for approval shall include adopted resolutions or, where applicable, executed agreements of the implementing governmental units, including Federal facilities, or management agencies which provide for acceptance of the plan, or assurances that it will be carried out, and statements of legal authority necessary for plan implementation. The Regional Administrator may approve any departures from these requirements before the plan is submitted.

§ 35.917–7 State review and certification of facilities plan.

Each facilities plan must be submitted to the State agency for review. The State must certify that:

(a) The plan conforms with requirements set forth in this subpart;

(b) The plan conforms with any existing final basin plans approved under section 303(e) of the Act;

(c) Any concerned 208 planning agency has been given the opportunity to comment on the plan; and

(d) The plan conforms with any waste treatment management plan approved under section 208(b) of the Act.

§ 35.917–8 Submission and approval of facilities plan.

The State agency must submit the completed facilities plan for the Regional Administrator's approval. Where deficiencies in a facilities plan are discovered, the Regional Administrator shall promptly notify the State and the grantee or applicant in writing of the nature of such deficiencies and of the recommended course of action to correct such deficiencies. Approval of a plan of study or a facilities plan will not constitute an obligation of the United States for any step 2, step 3, or step 2=3 project.

§ 35.917–9 Revision or amendment of facilities plan.

A facilities plan may provide the basis for several subsequent step 2, step 3, or step 2=3 projects. A facilities plan which has served as the basis for the award of a grant for a step 2, step 3, or step 2=3 project shall be reviewed before the award of any grant for a subsequent project involving step 2 or step 3 to determine if substantial changes have occurred. If the Regional Administrator decides substantial changes have occurred which warrant revision or amendment, the plan shall be revised or amended and submitted for review in the same manner specified in this subpart.

§ 35.918 Individual systems.

(a) For references to individual systems, the following definitions apply:

(1) *Individual systems.* Privately owned alternative wastewater treatment works (including dual waterless/

gray water systems) serving one or more principal residences or small commercial establishments which are neither connected into nor a part of any conventional treatment works. Normally, these are on-site systems with localized treatment and disposal of wastewater with minimal or no conveyance of untreated waste water. Limited conveyance of treated or partially treated effluents to further treatment or disposal sites can be a function of individual systems where cost-effective.

(2) *Principal residence.* Normally the voting residence, the habitation of the family or household which occupies the space for at least 51 percent of the time annually. Second homes, vacation, or recreation residences are not included in this definition. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flows) is included.

(3) *Small commercial establishments.* Private establishments normally found in small communities such as restaurants, hotels, stores, filling stations, or recreational facilities with dry weather wastewater flows less than 25,000 gallons per day. Private, nonprofit entities such as churches, schools, hospitals, or charitable organizations are considered small commercial establishments. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flow) shall be treated as a residence.

(4) *Conventional system.* A collection and treatment system consisting of minimum size (6 or 8 inch) gravity collector sewers normally with manholes, force mains, pumping and lift stations, and interceptors leading to a central treatment plant.

(5) *Alternative waste water treatment works.* A waste water conveyance and/or treatment system other than a conventional system. This includes small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated waste water.

(b) A public body otherwise eligible for a grant under § 35.920–1 is eligible for a grant to construct privately owned treatment works serving one or more principal residences or small commercial establishments if the requirements of §§ 35.918–1, 35.918–2, and 35.918–3 are met.

(c) All individual systems qualify as alternative systems under § 35.908 and are eligible for the 4-percent set-aside (§ 35.915–1(e)) where cost-effective.

§ 35.918–1 Additional limitations on awards for individual systems.

In addition to those limitations set forth in § 35.925, the grant applicant shall:

(a) Certify that the principal residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date;

(b) Demonstrate in the facility plan that the solution chosen is cost-effective and selected in accordance with the cost-effectiveness guidelines for the construction grants program (see appendix A to this subpart);

(c) Apply on behalf of a number of individual units located in the facility planning area;

(d) Certify that public ownership of such works is not feasible and list the reasons in support of such certification;

(e) Certify that such treatment works will be properly installed, operated, and maintained and that the public body will be responsible for such actions;

(f) Certify before the step 2 grant award that the project will be constructed and an operation and maintenance program established to meet local, State, and Federal requirements including those protecting present or potential underground potable water sources;

(g) Establish a system of user charges and industrial cost recovery in accordance with §§ 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15;

(h) Obtain assurance (such as an easement or covenant running with the land), before the step 2 grant award, of unlimited access to each individual system at all reasonable times for such purposes as inspection, monitoring, construction, maintenance, operation, rehabilitation, and replacement. An option will satisfy this requirement if it

can be exercised no later than the initiation of construction;

(i) Establish a comprehensive program for regulation and inspection of individual systems before EPA approval of the plans and specifications. Planning for this comprehensive program shall be completed as part of the facility plan. The program shall include as a minimum, periodic testing of water from existing potable water wells in the area. Where a substantial number of onsite systems exist, appropriate additional monitoring of the aquifer(s) shall be provided;

(j) Comply with all other applicable limitations and conditions which treatment works projects funded under this subpart must meet.

§ 35.918–2 Eligible and ineligible costs.

(a) Only the treatment and treatment residue disposal portions of toilets with composting tanks, oil-flush mechanisms or similar in-house systems are grant eligible.

(b) Acquisition of land in which the individual system treatment works are located is not grant eligible.

(c) Commodes, sinks, tubs, drains, and other wastewater generating fixtures and associated plumbing are not grant eligible. Modifications to homes or commercial establishments are also excluded from grant eligibility.

(d) Only reasonable costs of construction site restoration to preconstruction conditions are eligible. Costs of improvement or decoration associated with the installation of individual systems are not eligible.

(e) Conveyance pipes from wastewater generating fixtures to the treatment unit connection flange or joint are not eligible where the conveyance pipes are located on private property.

§ 35.918–3 Requirements for discharge of effluents.

Best practicable waste treatment criteria published by EPA under section 304(d)(2) of the Act shall be met for disposal of effluent on or into the soil from individual systems. Discharges to surface waters shall meet effluent discharge limitations for publicly owned treatment works.

§ 35.920 Grant application.

Grant applications will be submitted and evaluated in accordance with part 30, subpart B of this chapter.

§ 35.920–1 Eligibility.

Municipalities (see § 35.905), intermunicipal agencies, States, or interstate agencies are eligible for grant assistance.

§ 35.920–2 Procedure.

(a) Preapplication assistance, including, where appropriate, a preapplication conference, should be requested from the State agency or the appropriate EPA Regional Office for each project for which State priority has been determined. The State agency must receive an application for each proposed treatment works. The basic application shall meet the project requirements in § 35.920–3. Submissions required for subsequent related projects shall be in the form of amendments to the basic application. The grantee shall submit each application through the State agency. It must be complete (see § 35.920–3), and must relate to a project for which priority has been determined under § 35.915. If any information required by § 35.920–3 has been furnished with an earlier application, the applicant need only incorporate it by reference and, if necessary, revise such information using the previously approved application.

(b) Grant applications (and, for subsequent related projects, amendments to them) are considered received by EPA only when complete and upon official receipt of the State priority certification document (EPA form 5700–28) in the appropriate EPA Regional Office. In a State which has been delegated Federal application processing functions under § 35.912 or under subpart F of this part, applications are considered received by EPA on the date of State certification. Preliminary or partial submittals may be made; EPA may conduct preliminary processing of these submittals.

§ 35.920–3 Contents of application.

(a) *Step 1: Facilities plan and related step 1 elements.* An application for a grant for step 1 shall include:

(1) A plan of study presenting—

(i) The proposed planning area;

(ii) An identification of the entity or entities that will be conducting the planning;

(iii) The nature and scope of the proposed step 1 project and public participation program, including a schedule for the completion of specific tasks;

(iv) An itemized description of the estimated costs for the project; and

(v) Any significant public comments received.

(2) Proposed subagreements, or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work;

(3) Required comments or approvals of relevant State, local and Federal agencies, including clearinghouse requirements of Office of Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter).

(b) *Step 2: Preparation of construction drawings and specifications.* Before the award of a grant or grant amendment for a step 2 project, the applicant must furnish the following:

(1) A facilities plan (including the environmental assessment portion in accordance with part 6 of this chapter) in accordance with §§ 35.917 through 35.917–9;

(2) Adequate information regarding availability of proposed site(s), if relevant;

(3) Proposed subagreements or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work;

(4) Required comments or approvals of relevant State, local, and Federal agencies, including clearinghouse requirements of Office and Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter);

(5) A value engineering (VE) commitment in compliance with § 35.926(a) for all step 2 grant applications for projects with a projected total step 3 grant eligible construction cost of $10 million or more excluding the cost for interceptor and collector sewers. For those projects requiring VE, the grantee may propose, subject to the Regional Administrator's approval, to exclude interceptor and collector sewers from the scope of the VE analysis;

(6) Proposed or executed (as determined appropriate by the Regional Administrator) intermunicipal agreements necessary for the construction and operation of the proposed treatment works, for any treatment works serving two or more municipalities;

(7) A schedule for initiation and completion of the project work (see § 35.935–9), including milestones; and

(8) Satisfactory evidence of compliance with:

(i) Sections 35.925–11, 35.929 *et seq.* and 35.935–13 regarding user charges;

(ii) Sections 35.925–11, 35.928 *et seq.* and 35.935–15, regarding industrial cost recovery, if applicable;

(iii) Section 35.925–16, regarding costs allocable to Federal facilities, if applicable;

(iv) Section 35.927–4 regarding a sewer use ordinance;

(v) Section 30.405–2 and part 4 of this chapter, regarding compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, if applicable; and,

(vi) Other applicable Federal statutory and regulatory requirements (see subpart C of part 30 of this chapter).

(9) After June 30, 1980, for grantees subject to pretreatment requirements under § 35.907(b), the items required by § 35.907(d)(1), (2), and (4).

(10) A public participation work plan, in accordance with § 35.917–5(g), if the grantee, after consultation with the public and its advisory group (if one exists), determines that additional public participation activities are necessary.

(c) *Step 3. Building and erection of a treatment works.* Prior to the award of a grant or grant amendment for a step 3 project, the applicant must furnish the following:

(1) Each of the items specified in paragraph (b) of this section (in compliance with paragraph (b)(6) of this section, the final intermunicipal agreements must be furnished);

(2) Construction drawings and specifications suitable for bidding purposes (in the case of an application for step 3 assistance solely for acquisition of eligible land, the grantee must submit a plat which shows the legal description

of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property);

(3) A schedule for or evidence of compliance with §§35.925–10 and 35.935–12 concerning an operation and maintenance program, including a preliminary plan of operation; and

(4) After December 31, 1980, the items required by §35.907(d)(1) through (d)(9), as applicable, for grantees subject to pretreatment requirements under §35.907(b).

(5) A public participation work plan, in accordance with §35.917–5(g), if the grantee determines, after consultation with the public, that additional public participation activities are necessary.

(d) *Step 2+3.* Combination design and construction of a treatment works. Before the award of a grant or grant amendment for a step 2=3 project, the grantee must furnish:

(1) Each of the items specified in paragraph (b) of this section, and (2) a schedule for timely submission of plans and specifications, operation and maintenance manual, user charge and industrial cost recovery systems, sewer use ordinance, and a preliminary plan of operation.

(e) *Training facility project.* An application for grant assistance for construction and support of a training facility, facilities or training programs under section 109(b) of the Act shall include:

(1) A statement concerning the suitability of the treatment works facility, facilities or training programs for training operations and maintenance personnel for treatment works throughout one or more States;

(2) A written commitment from the State agency or agencies to carry out at such facility a program of training approved by the Regional Administrator;

(3) An engineering report (required only if a facility is to be constructed) including facility design data and cost estimates for design and construction;

(4) A detailed outline of the training programs, including (for 1-, 3-, and 5-year projections):

(i) An assessment of need for training,

(ii) How the need was determined,

(iii) Who would be trained,

(iv) What curriculum and materials would be used,

(v) What type of delivery system will be used to conduct training, (i.e., State vocational education system, State environmental agency, universities or private organizations),

(vi) What resources are available for the program,

(vii) A budget breakdown on the cost of the program, and

(viii) The relationship of the facility or programs to other training programs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920–3 have been met. He shall also determine the following:

§ 35.925–1 Facilities planning.

That, if the award is for step 2, step 3, or step 2=3 grant assistance, the facilities planning requirements in §35.917 *et seq.* have been met.

§ 35.925–2 Water quality management plans and agencies.

That the project is consistent with any applicable water quality management (WQM) plan approved under section 208 or section 303(e) of the Act; and that the applicant is the wastewater management agency designated in any WQM plan certified by the Governor and approved by the Regional Administrator.

§ 35.925–3 Priority determination.

That such works are entitled to priority in accordance with §35.915, and that the award of grant assistance for the proposed project will not jeopardize the funding of any treatment works of higher priority.

§ 35.925–4 State allocation.

That the award of grant assistance for a particular project will not cause

the total of all grant assistance which applicants within a State received, including grant increases, to exceed the total of all allotments and reallotments available to the State under § 35.910.

§ 35.925–5 Funding and other capabilities.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) The legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction. (Also see § 30.340–3 of this subchapter.)

§ 35.925–6 Permits.

That the applicant has, or has applied for, the permit or permits as required by the national pollutant discharge elimination system (NPDES) with respect to existing discharges affected by the proposed project.

§ 35.925–7 Design.

That the treatment works design will be (in the case of projects involving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in § 35.930–4, achievement of applicable effluent limitations established under the Act, or BPWTT (see § 35.917–1(d)(5)), including consideration, as appropriate, for the application of technology which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants;

(c) The sewer system evaluation and rehabilitation requirements of § 35.927; and

(d) The value engineering requirements of § 35.926 (b) and (c).

§ 35.925–8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2=3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of part 6 of this chapter, as part of facilities planning, in accordance with § 35.917–1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with part 6 of this chapter (particularly §§ 6.108, 6.200, 6.212, and 6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 or step 3 grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator.

§ 35.925–9 Civil rights.

That if the award of grant assistance is for a project involving step 2 or step 3, the applicable requirements of the Civil Rights Act of 1964 and part 7 of this chapter have been met.

§ 35.925–10 Operation and maintenance program.

If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure proper and efficient operation and maintenance of the treatment works (including the sewer system), in accordance with § 35.935–12, and that the State will have an effective operation and maintenance monitoring program to assure that treatment works assisted under this subpart comply with applicable permit and grant conditions.

§ 35.925–11 User charges and industrial cost recovery.

That, in the case of grant assistance for a project involving step 2 or step 3, the grantee has complied or will comply with the requirements for user

charge and industrial cost recovery systems. (See §§ 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15.)

(a) *Grants awarded before July 1, 1979.* Grantees must submit a schedule of implementation to show that their user charge and industrial cost recovery systems will be approved in accordance with the requirements of §§ 35.935–13 and 35.935–15.

(b) *Grants awarded after June 30, 1979.* The grantee's user charge and industrial cost recovery systems must be approved before the award of step 3 grant assistance.

(c) *Letters of intent.* In the case of any grant assistance for a project involving step 2 or step 3, the applicant must have received signed letters of intent from each significant industrial user stating that it will pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

§ 35.925–12 Property.

That the applicant has demonstrated to the satisfaction of the Regional Administrator that it has met or will met the property requirements of § 35.935–3.

§ 35.925–13 Sewage collection system.

That, if the project involves sewage collection system work, such work (a) is for the replacement or major rehabilitation of an existing sewer system under § 35.927–3(a) and is necessary to the total integrity and performance of the waste treatment works serving the community, or (b) is for a new sewer system in a community in existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected sewage. Replacement or major rehabilitation of an existing sewer system may be approved only if cost-effective; the result must be a sewer system design capacity equivalent to that of the existing system plus a reasonable amount for future growth. For purposes of this section, a community would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the Regional Administrator further determines that:

(a) The bulk (generally two-thirds) of the expected flow (flow from existing plus projected future habitations) from the collection system will be for waste waters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost-effective;

(c) The population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project:

(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with § 35.925–14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and

(e) The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.

§ 35.925–14 Compliance with environmental laws.

That the treatment works will comply with all pertinent requirements of applicable Federal, State and local environmental laws and regulations. (See § 30.101 and subpart C of part 30 of this chapter and the Clean Air Act.)

§ 35.925–15 Treatment of industrial wastes.

That the allowable project costs do not include (a) costs of interceptor or collector lines constructed exclusively,

or almost exclusively, to serve industrial sources or (b) costs allocable to the treatment for control or removal of pollutants in wastewater introduced into the treatment works by industrial sources, unless the applicant is required to remove such pollutants introduced from nonindustrial sources. The project must be included in a complete waste treatment system, a principal purpose of which project (as defined by the Regional Administrator; see §§ 35.903 (d) and 35.905) and system is the treatment of domestic wastes of the entire community, area, region or the district concerned. See the pretreatment regulations in part 403 of this chapter and § 35.907.

[44 FR 39340, July 5, 1979]

§ 35.925–16 Federal activities.

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A ''major activity'' includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

§ 35.925–17 Retained amounts for reconstruction and expansion.

That the allowable project costs have been reduced by an amount equal to the unexpended balance of the amounts the applicant retains for future reconstruction and expansion under § 35.928–2(a)(2)(ii), together with interest earned.

§ 35.925–18 Limitation upon project costs incurred prior to award.

That project construction has not been initiated before the approved date of initiation of construction (as defined in § 35.905), unless otherwise provided in this section.

(a) *Step 1 or Step 2:* No grant assistance is authorized for step 1 or step 2 project work performed before award of a step 1 or step 2 grant. However, payment is authorized, in conjunction with the first award of grant assistance, for all preaward allowable project costs in the following cases:

(1) Step 1 work begun after the date of approval by the Regional Administrator of a plan of study, if the State requests and the Regional Administrator has reserved funds for the step 1 grant. However, the step 1 grant must be applied for and awarded within the allotment period of the reserved funds.

(2) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981.

(3) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980.

(b) *Step 3:* Except as otherwise provided in this paragraph, no grant assistance for a step 3 project may be awarded unless the award precedes initiation of the step 3 construction. Preliminary step 3 work, such as advance acquisition of major equipment items requiring long lead times, acquisition of eligible land or of an option for the purchase of eligible land, or advance construction of minor portions of treatment works, including associated engineering costs, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator after completion of environmental review, but only if (1) the applicant submits a written and adequately substantiated request for approval and (2) written approval by the Regional Administrator is obtained before initiation of the advance acquisition or advance construction. (In the case of authorization for acquisition of eligible land, the applicant must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property.)

(c) The approval of a plan of study, a facilities plan, or advance acquisition of equipment or advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested before grant award (see § 35.945(a)). In instances where such approval is obtained, the

applicant proceeds at its own risk, since payment for such costs cannot be made unless grant assistance for the project is awarded.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.925–19 [Reserved]

§ 35.925–20 Procurement.

That the applicant has complied or will comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement actions taken before the award of step 1, 2, or 3 grant assistance, such as submission of the information required under § 35.937–6.

§ 35.925–21 Storm sewers.

That, under section 211(c) of the Act, the allowable project costs do not include costs of treatment works for control of pollutant discharges from a separate storm sewer system (as defined in § 35.905).

§ 35.926 Value engineering (VE).

(a) *Value engineering proposal.* All step 2 grant applications for projects having a projected total step 3 grant eligible cost of $10 million or more, excluding the cost for interceptor and collector sewers, will contain a VE commitment. The VE proposal submitted during step 2 must contain enough information to determine the adequacy of the VE effort and the justification of the proposed VE fee. Essential information shall include:

(1) Scope of VE analysis;

(2) VE team and VE coordinator (names and background);

(3) Level of VE effort;

(4) VE cost estimate;

(5) VE schedule in relation to project schedule (including completion of VE analysis and submittal of VE summary reports).

(b) *Value engineering analysis.* For projects subject to the VE requirements of paragraph (a) of this section, a VE analysis of the project design shall be performed. When the VE analysis is completed, a preliminary report summarizing the VE findings and a final report describing implementation of the VE recommendations must be submitted to the project officer on a schedule approved by him.

(c) *Implementation.* For those projects for which a VE analysis has been performed in accordance with paragraph (b) of this section, VE recommendations shall be implemented to the maximum extent feasible, as determined by the grantee, subject to the approval of the EPA project officer. Rejection of any recommendation shall be on the basis of cost-effectiveness, reliability, extent of project delays, and other factors that may be critical to the treatment processes and the environmental impact of the project.

§ 35.927 Sewer system evaluation and rehabilitation.

(a) All applicants for step 2 or step 3 grant assistance must demonstrate to the Regional Administrator's satisfaction that each sewer system discharging into the treatment works project for which grant application is made is not or will not be subject to excessive infiltration/inflow. A determination of whether excessive infiltration/inflow exists may take into account, in addition to flow and related data, other significant factors such as cost-effectiveness (including the cost of substantial treatment works construction delay, see appendix A to this subpart), public health emergencies, the effects of plant bypassing or overloading, or relevant economic or environmental factors.

(b) A sewer system evaluation will generally be used to determine whether or not excessive infiltration/inflow exists. It will consist of:

(1) Certification by the State agency, as appropriate; and, when necessary,

(2) An infiltration/inflow analysis; and, if appropriate,

(3) A sewer system evaluation survey and, if appropriate, a program, including an estimate of costs, for rehabilitation of the sewer system to eliminate excessive infiltration/inflow identified in the sewer system evaluation. Information submitted to the Regional Administrator for such determination should be the minimum necessary to enable him to make a judgment.

(c) Guidelines on sewer system evaluation published by the Administrator provide further advisory information (see § 35.900(c)). Also see §§ 35.925–7(c) and 35.935–16.

§ 35.927–1 Infiltration/inflow analysis.

(a) The infiltration/inflow analysis shall demonstrate the nonexistence or possible existence of excessive infiltration/inflow in the sewer system. The analysis should identify the presence, flow rate, and type of infiltration/inflow conditions which exist in the sewer system.

(b) For determination of the possible existence of excessive infiltration/inflow, the analysis shall include an estimate of the cost of eliminating the infiltration/inflow conditions. These costs shall be compared with estimated total costs for transportation and treatment of the infiltration/inflow. Cost-effectiveness analysis guidelines (Appendix A to this subpart) should be consulted with respect to this determination.

(c) If the infiltration/inflow analysis demonstrates the existence or possible existence of excessive infiltration/inflow a detailed plan for a sewer system evaluation survey shall be included in the analysis. The plan shall outline the tasks to be performed in the survey and their estimated costs.

§ 35.927–2 Sewer system evaluation survey.

(a) The sewer system evaluation survey shall identify the location, estimated flow rate, method of rehabilitation and cost of rehabilitation versus cost of transportation and treatment for each defined source of infiltration/inflow.

(b) A report shall summarize the results of the sewer system evaluation survey. In addition, the report shall include:

(1) A justification for each sewer section cleaned and internally inspected.

(2) A proposed rehabilitation program for the sewer system to eliminate all defined excessive infiltration/inflow.

§ 35.927–3 Rehabilitation.

(a) Subject to State concurrence, the Regional Administrator may authorize the grantee to perform minor rehabilitation concurrently with the sewer system evaluation survey in any step under a grant if sufficient funding can be made available and there is no adverse environmental impact. However, minor rehabilitation work in excess of $10,000 which is not accomplished with force account labor (see § 35.936–14(a)(2)), must be procured through formal advertising in compliance with the applicable requirements of §§ 35.938 *et seq.* and 35.939, the statutory requirements referenced in §§ 30.415 through 30.415–4 of this subchapter, and other applicable provisions of part 30.

(b) Grant assistance for a step 3 project segment consisting of major rehabilitation work may be awarded concurrently with step 2 work for the design of the new treatment works.

(c) The scope of each treatment works project defined within the facilities plan as being required for implementation of the plan, and for which Federal assistance will be requested, shall define (1) any necessary new treatment works construction and (2) any rehabilitation work (including replacement) determined by the sewer system evaluation to be necessary for the elimination of excessive infiltration/inflow. However, rehabilitation which should be a part of the applicant's normal operation and maintenance responsibilities shall not be included within the scope of a step 3 treatment works project.

(d) Only rehabilitation of the grantee's sewage collection system is eligible for grant assistance. However, the grantee's costs of rehabilitation beyond ''Y'' fittings (see definition of ''sewage collection system'' in § 35.905) may be treated on an incremental cost basis.

§ 35.927–4 Sewer use ordinance.

Each applicant for grant assistance for a step 2 or step 3 project shall demonstrate to the satisfaction of the Regional Administrator that a sewer use ordinance or other legally binding requirement will be enacted and enforced in each jurisdiction served by the treatment works project before the completion of construction. The ordinance shall prohibit any new connections from inflow sources into the sanitary sewer portions of the sewer system and shall insure that new sewers and connections to the sewer system are properly designed and constructed.

§ 35.927–5 Project procedures.

(a) *State certification.* The State agency may (but need not) certify that excessive infiltration/inflow does or does not exist. The Regional Administrator will determine that excessive infiltration/inflow does not exist on the basis of State certification, if he finds that the State had adequately established the basis for its certification through submission of only the minimum information necessary to enable a judgment to be made. Such information could include a preliminary review by the applicant or State, for example, of such parameters as per capita design flow, ratio of flow to design flow, flow records or flow estimates, bypasses or overflows, or summary analysis of hydrological, geographical, and geological conditions, but this review would not usually be equivalent to a complete infiltration/inflow analysis. State certification must be on a project-by-project basis. If, on the basis of State certification, the Regional Administrator determines that the treatment works is or may be subject to excessive infiltration/inflow, no step 2 or step 3 grant assistance may be awarded except as paragraph (c) of this section provides.

(b) *Pre-award sewer system evaluation.* Generally, except as otherwise provided in paragraph (c) of this section, an adequate sewer system evaluation, consisting of a sewer system analysis and, if required, an evaluation survey, is an essential element of step 1 facilities planning. It is a prerequisite to the award of step 2 or 3 grant assistance. If the Regional Administrator determines through State Certification or an infiltration/inflow analysis that excessive infiltration/inflow does not exist, step 2 or 3 grant assistance may be awarded. If on the basis of State certification or the infiltration/inflow analysis, the Regional Administrator determines that possible excessive infiltration/inflow exists, an adequate sewer system evaluation survey and, if required, a rehabilitation program must be furnished, except as set forth in paragraph (c) of this section before grant assistance for step 2 or 3 can be awarded. A step 1 grant may be awarded for the completion of this segment of step 1 work, and, upon completion of step 1, grant assistance for a step 2 or 3 project (for which priority has been determined under § 35.915) may be awarded.

(c) *Exception.* If the Regional Administrator determines that the treatment works would be regarded (in the absence of an acceptable program of correction) as being subject to excessive infiltration/inflow, grant assistance may be awarded if the applicant establishes to the Regional Administrator's satisfaction that the treatment works project for which grant application is made will not be significantly changed by any subsequent rehabilitation program or will be a component part of any rehabilitated system. The applicant must agree to complete the sewer system evaluation and any resulting rehabilitation on an implementation schedule the State accepts (subject to approval by the Regional Administrator), which shall be inserted as a special condition in the grant agreement.

(d) *Regional Administrator review.* Municipalities may submit through the State agency the infiltration/inflow analysis and, when appropriate, the sewer system evaluation survey to the Regional Administrator for his review at any time before application for a treatment works grant. Based on such a review, the Regional Administrator shall provide the municipality with a written response indicating either his concurrence or nonconcurrence. In order for the survey to be an allowable cost, the Regional Administrator must concur with the sewer system evaluation survey plan before the work is performed.

§ 35.928 Requirements for an industrial cost recovery system.

(a) The Regional Administrator shall approve the grantee's industrial cost recovery system and the grantee shall implement and maintain it in accordance with § 35.935–15 and the requirements in §§ 35.928–1 through 35.928–4. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

(b) Grantees awarded step 3 grants under regulations promulgated on February 11, 1974, or grantees who obtained approval of their industrial cost recovery systems before April 25, 1978, may

amend their systems to correspond to the definition of industrial users in § 35.905 or to provide for systemwide industrial cost recovery under § 35.928–1(g).

§ 35.928–1 Approval of the industrial cost recovery system.

The Regional Administrator may approve an industrial cost recovery system if it meets the following requirements:

(a) *General.* Each industrial user of the treatment works shall pay an annual amount equal to its share of the total amount of the step 1, 2, and 3 grants and any grant amendments awarded under this subpart, divided by the number of years in the recovery period. An industrial user's share shall be based on factors which significantly influence the cost of the treatment works. Volume of flow shall be a factor in determining an industrial user's share in all industrial cost recovery systems; other factors shall include strength, volume, and delivery flow rate characteristics, if necessary, to insure that all industrial users of the treatment works pay a proportionate distribution of the grant assistance allocable to industrial use.

(b) *Industrial cost recovery period.* The industrial cost recovery period shall be equal to 30 years or to the useful life of the treatment works, whichever is less.

(c) *Frequency of payment.* Except as provided in § 35.928–3, each industrial user shall pay not less often than annually. The first payment by an industrial user shall be made not later than 1 year after the user begins use of the treatment works.

(d) *Reserve capacity.* If an industrial user enters into an agreement with the grantee to reserve a certain capacity in the treatment works, the user's industrial cost recovery payments shall be based on the total reserved capacity in relation to the design capacity of the treatment works. If the discharge of an industrial user exceeds the reserved capacity in volume, strength or delivery flow rate characteristics, the user's industrial cost recovery payment shall be increased to reflect the actual use. If there is no reserve capacity agreement between the industrial user and the grantee, and a substantial change in the strength, volume, or delivery flow rate characteristics of an industrial user's discharge share occurs, the user's share shall be adjusted proportionately.

(e) *Upgrading and expansion.* (1) If the treatment works are upgraded, each existing industrial user's share shall be adjusted proportionately.

(2) If the treatment works are expanded, each industrial user's share shall be adjusted proportionately, except that a user with reserved capacity under paragraph (d) of this section shall incur no additional industrial cost recovery charges unless the user's actual use exceeded its reserved capacity.

(f) [Reserved]

(g) *Collection of industrial cost recovery payments.* Industrial cost recovery payments may be collected on a systemwide or on a project-by-project basis. The total amount collected from all industrial users on a systemwide basis shall equal the sum of the amounts which would be collected on a project-by-project basis.

(h) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the industrial cost recovery system. If the project is a regional treatment works accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt industrial cost recovery systems in accordance with section 204(b)(1)(B) of the Act with §§ 35.928 through 35.928–4. These industrial cost recovery systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be consulted prior to adoption of the industrial cost recovery system, in accordance with 40 CFR part 25.

(i) *Inconsistent agreements.* The grantee may have pre-existing agreements which address (1) the reservation of capacity in the grantee's treatment works or (2) the charges to be collected by the grantee in providing waste water treatment services or reserving capacity. The industrial cost recovery system shall take precedence over any terms or conditions of agreements or

contracts between the grantee and industrial users which are inconsistent with the requirements of section 204(b)(1)(B) of the Act and these industrial cost recovery regulations.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 39340, July 5, 1979]

§ 35.928–2 Use of industrial cost recovery payments.

(a) The grantee shall use industrial cost recovery payments received from industrial users as follows:

(1) The grantee shall return 50 percent of the amounts received from industrial users, together with any interest earned, to the U.S. Treasury annually.

(2) The grantee shall retain 50 percent of the amount recovered from industrial users.

(i) A portion of the amounts which the grantee retains may be used to pay the incremental costs of administration of the industrial cost recovery system. The incremental costs of administration are those costs remaining after deducting all costs reasonably attributable to the administration of the user charge system. The incremental costs shall be segregated from all other administrative costs of the grantee.

(ii) A minimum of 80 percent of the amounts the grantee retains after paying the incremental costs of administration, together with any interest earned, shall be used for the allowable costs (see § 35.940) of any expansion, upgrading or reconstruction of treatment works necessary to meet the requirements of the Act. The grantee shall obtain the written approval of the Regional Administrator before the commitment of the amounts retained for expansion, upgrading, or reconstruction.

(iii) The remainder of the amounts retained by the grantee may be used as the grantee sees fit, except that they may not be used for construction of industrial pretreatment facilities or rebates to industrial users for costs incurred in complying with user charge or industrial cost recovery requirements.

(b) Pending the use of industrial cost recovery payments, as described in paragraph (a) of this section, the grantee shall:

(1) Invest the amounts received in obligations of the U.S. Government or in obligations guaranteed as to principal and interest by the U.S. Government or any agency thereof; or

(2) Deposit the amounts received in accounts fully collateralized by obligations of the U.S. Government or any agency thereof.

§ 35.928–3 Implementation of the industrial cost recovery system.

(a) When a grantee's industrial cost recovery system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain all records that are necessary to document compliance with these regulations.

§ 35.928–4 Moratorium on industrial cost recovery payments.

(a) EPA does not require that industrial users defined in paragraphs (a) and (b) of the definition in § 35.905 pay industrial cost recovery for charges incurred during the period after December 31, 1977, and before July 1, 1979. Any industrial cost recovery charges incurred for accounting periods or portions of periods ending before January 1, 1978, shall be paid by industrial users. These funds are to be used as described in § 35.928–2.

(b) Grantees may either defer industrial cost recovery payments, or require industrial users as defined in paragraphs (a) and (b) of the definition in § 35.905 to pay industrial cost recovery payments for the period after December 31, 1977, and before July 1, 1979. If grantees require payment, the amount held by the municipality for eventual return to the U.S. Treasury under § 35.928–2(a)(1) shall be invested as required under § 35.928–2(b) until EPA advises how such sums shall be distributed. Grantees shall implement or continue operating approved industrial cost recovery systems and maintain their activities of monitoring flows, calculating payments due, and submitting bills to industrial users informing them of their current or deferred obligation.

(c) Industrial users as defined in paragraphs (a) and (b) of the definition

in § 35.905 who are served by grantees who defer payment during the 18-month period ending June 30, 1979, shall make industrial cost recovery payments for that period in a lump sum by June 30, 1980, or in equal annual installments prorated from July 1, 1979, over the remaining industrial cost recovery period.

§ 35.929 Requirements for user charge system.

The Regional Administrator shall approve the grantee's user charge system and the grantee shall implement and maintain it in accordance with § 35.935–13 and the requirements in §§ 35.929–1 through 35.929–3. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

§ 35.929–1 Approval of the user charge system.

The Regional Administrator may approve a user charge system based on either actual use under paragraph (a) of this section or ad valorem taxes under paragraph (b) of this section. The general requirements in §§ 35.929–2 and 35.929–3 must also be satisfied.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.

(b) *User charges based on ad valorem taxes.* A grantee's user charge system (or the user charge system of a subscriber, i.e., a constituent community receiving waste treatment services from the grantee) which is based on ad valorem taxes may be approved if it meets the requirements of paragraphs (b)(1) through (b)(7) of this section. If the Regional Administrator determines that the grantee did not have a dedicated ad valorem tax system on December 27, 1977, meeting the requirements of paragraphs (b)(1) through (b)(3) of this section, the grantee shall develop a user charge system based on actual use under § 35.929–1(a).

(1) The grantee (or subscriber) had in existence on December 27, 1977, a system of ad valorem taxes which collected revenues to pay the cost of operation and maintenance of waste water treatment works within the grantee's service area and has continued to use that system.

(2) The grantee (or subscriber) has not previously obtained approval of a user charge system on actual use.

(3) The system of ad valorem taxes in existence on December 27, 1977, was dedicated ad valorem tax system.

(i) A grantee's system will be considered to be dedicated if the Regional Administrator determines that the system meets all of the following criteria:

(A) The ad valorem tax system provided for a separate tax rate or for the allocation of a portion of the taxes collected for payment of the grantee's costs of waste water treatment services;

(B) The grantee's budgeting and accounting procedures assured that a specified portion of the tax funds would be used for the payment of the costs of operation and maintenance;

(C) The ad valorem tax system collected tax funds for the costs of waste water treatment services which could not be or historically were not used for other purposes; and

(D) The authority responsible for the operation and maintenance of the treatment works established the budget for the costs of operation and maintenance and used those specified amounts solely to pay the costs of operation and maintenance.

(ii) A subscriber's system based on ad valorem taxes will be considered to be dedicated if a contractual agreement or a charter established under State law existed on December 27, 1977, which required the subscriber to pay its share of the cost of waste water treatment services.

(4) A user charge system funded by dedicated ad valorem taxes shall establish, as a minimum, the classes of users listed below:

(i) Residential users, including single-family and multifamily dwellings, and small nonresidential users, including nonresidential commercial and industrial users which introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works:

(ii) Industrial and commercial users;

(A) Any nongovernmental user of publicly owned treatment works which discharges more than 25,000 gallons per day (gpd) of sanitary waste; or a volume of process waste, or combined process and sanitary waste, equivalent to 25,000 gpd of sanitary waste. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, biochemical oxygen demand (BOD) and suspended solids (SS) per volume of flow. Dischargers with a volume exceeding 25,000 gpd or the weight of BOD or SS equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users.

(B) Any nongovernmental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(iii) Users which pay no ad valorem taxes or receive substantial credits in paying such taxes, such as tax exempt institutions or governmental users, but excluding publicly owned facilities performing local governmental functions (e.g., city office building, police station, school) which discharge solely domestic wastes.

(5) The grantee must be prepared to demonstrate for the Regional Administrator's approval that its system of evaluating the volume, strength, and characteristics of the discharges from users or categories of users classified within the subclass of small nonresidential users is sufficient to assure that such users or the average users in such categories do not discharge either toxic pollutants or more than the equivalent of 25,000 gallons per day of domestic wastewater.

(6) The ad valorem user charge system shall distribute the operation and maintenance costs for all treatment works in the grantee's jurisdiction to the residential and small nonresidential user class, in proportion to the use of the treatment works by this class. The proportional allocation of costs for this user class shall take into account the total waste water loading of the treatment works, the constituent elements of the wastes from this user class and other appropriate factors. The grantee may assess one ad valorem tax rate to this entire class of users or, if permitted under State law, the grantee may assess different ad valorem tax rates for the subclass of residential users and the subclass of small nonresidential users provided the operation and maintenance costs are distributed proportionately between these subclasses.

(7) Each member of the industrial and commercial user class described under paragraph (b)(4)(ii) of this section and of the user class which pays no ad valorem taxes or receives substantial credits in paying such taxes described under paragraph (b)(4)(iii) of this section shall pay its share of the costs of operation and maintenance of the treatment works based upon charges for actual use (in accordance with § 35.929–1(a)). The grantee may use its ad valorem tax system to collect, in whole or in part, those charges from members of the industrial and large commercial class where the following conditions are met:

(i) A portion or all of the ad valorem tax rate assessed to members of this class has been specifically designated to pay the costs of operation and maintenance of the treatment works, and that designated rate is uniformly applied to all members of this class:

(ii) A system of surcharges and rebates is employed to adjust the revenues from the ad valorem taxes collected from each user of this class in accordance with the rate designated

under paragraph (b)(7)(i) of this section, such that each member of the class pays a total charge for its share of the costs of operation and maintenance based upon actual use.

§ 35.929–2 General requirements for all user charge systems.

User charge systems based on actual use under § 35.929–1(a) or ad valorem taxes under § 35.929–1(b) shall also meet the following requirements:

(a) *Initial basis for operation and maintenance charges.* For the first year of operation, operation and maintenance charges shall be based upon past experience for existing treatment works or some other method that can be demonstrated to be appropriate to the level and type of services provided.

(b) *Biennial review of operation and maintenance charges.* The grantee shall review not less often than every 2 years the waste water contribution of users and user classes, the total costs of operation and maintenance of the treatment works, and its approved user charge system. The grantee shall revise the charges for users or user classes to accomplish the following:

(1) Maintain the proportionate distribution of operation and maintenance costs among users and user classes as required herein;

(2) Generate sufficient revenue to pay the total operation and maintenance costs necessary to the proper operation and maintenance (including replacement) of the treatment works; and

(3) Apply excess revenues collected from a class of users to the costs of operation and maintenance attributable to that class for the next year and adjust the rate accordingly.

(c) *Toxic pollutants.* The user charge system shall provide that each user which discharges any toxic pollutants which cause an increase in the cost of managing the effluent or the sludge of the grantee's treatment works shall pay for such increased costs.

(d) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users of the grantee's treatment works system based upon either of the following:

(1) In the same manner that it distributes the costs of operation and maintenance among users (or user classes) for their actual use, or

(2) Under a system which uses one of any combination of the following factors on a reasonable basis:

(i) Flow volume of the users;

(ii) Land area of the users;

(iii) Number of hookups or discharges to the users;

(iv) Property valuation of the users, if the grantee has a user charge system based on ad valorem taxes approved under § 35.929–1(b).

(e) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act and §§ 35.929 through 35.929–3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be informed of the financial impact of the user charge system on them and shall be consulted prior to adoption of the system, in accordance with 40 CFR part 25.

(f) *Notification.* Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill, of the rate and that portion of the user charges or ad valorem taxes which are attributable to waste water treatment services.

(g) *Inconsistent agreements.* The grantee may have preexisting agreements which address: (1) The reservation of capacity in the grantee's treatment works, or (2) the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or

Federal agencies or installations) which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and these regulations.

(h) *Costs of pretreatment program.* A user charge system submitted by a municipality with an approved pretreatment program shall provide that the costs necessary to carry out the program and to comply with any applicable requirements of section 405 of the Act and related regulations are included within the costs of operation and maintenance of the system and paid through user charges, or are paid in whole or in part by other identified sources of funds.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§ 35.929–3 Implementation of the user charge system.

(a) When a grantee's user charge system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain such records as are necessary to document compliance with these regulations.

(c) Appendix B to this subpart contains guidelines with illustrative examples of acceptable user charge systems.

(d) The Regional Administrator may review, no more often than annually, a grantee's user charge system to assure that it continues to meet the requirements of §§ 35.929–1 through 35.929–3.

§ 35.930 Award of grant assistance.

The Regional Administrator's approval of an application or amendments to it through execution of a grant agreement (including a grant amendment), in accordance with § 30.345 of this subchapter, shall constitute a contractual obligation of the United States for the payment of the Federal share of the allowable project costs, as determined by the Regional Administrator. Information about the approved project furnished in accordance with § 35.920–3 shall be considered incorporated in the grant agreement.

§ 35.930–1 Types of projects.

(a) The Regional Administrator is authorized to award grant assistance for the following types of projects:

(1) *Step 1.* A facilities plan and related step 1 elements (see § 35.920–3(b)), if he determines that the applicant has submitted the items required under § 35.920–3(a); (In the case of grant assistance awarded solely for the acquisition of eligible land, the following provisions are deferred until the award of the ensuing step 3 assistance for the construction of facilities: §§ 35.925–10, 35.925–11(b), 35.935–12 (c) and (d), 35.935–13(c), 35.935–15(c), 35.935–16 (b) and (c));

(2) *Step 2.* Construction drawings and specifications, if he determines that the applicant has submitted the items required under § 35.920–3(b);

(3) *Step 3.* Building and erection of a treatment works, if he determines that the applicant has submitted the items required under § 35.920–3(c); or

(4) *Steps 2 and 3.* A combination of design (step 2) and construction (step 3) for a treatment works (see § 35.909) if he determines that the applicant has submitted the items required under § 35.920–3(d).

(b) The Regional Administrator may award Federal assistance by a grant or grant amendment from any allotment or reallotment available to a State under § 35.910 *et seq.* for payment of 100 percent of the cost of construction of treatment works required to train and upgrade waste treatment works operations and maintenance personnel and for the costs of other operator training programs. Costs of other operator training programs are limited to mobile training units, classroom rental, specialized instructors, and instructional material, under section 109(b) of the Act.

(1) Where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each State. The Federal funds awarded under section 109(b) to any State for all training facilities or programs shall not exceed $500,000.

(2) Any grantee who received a grant under section 109(b) before December 27, 1977, is eligible to have the grant increased by funds made available under the Act, not to exceed 100 percent of eligible costs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.930–2 Grant amount.

The grant agreement shall set forth the amount of grant assistance. The grant amount may not exceed the amount of funds available from the State allotments and reallotments under § 35.910 *et seq.* Grant payments will be limited to the Federal share of allowable project costs incurred within the grant amount or any increases effected through grant amendments (see § 35.955).

§ 35.930–3 Grant term.

The grant agreement shall establish the period within which the project must be completed, in accordance with § 30.345–1 of this chapter. This time period is subject to extension for excusable delay, at the discretion of the Regional Administrator.

§ 35.930–4 Project scope.

The grant agreement must define the scope of the project for which Federal assistance is awarded under the grant. The project scope must include a step or an identified segment. Grant assistance may be awarded for a segment of step 3 treatment works construction, when that segment in and of itself does not provide for achievement of applicable effluent discharge limitations, if:

(a) The segment is to be a component of an operable treatment works which will achieve the applicable effluent discharge limitations; and

(b) A commitment for completion of the entire treatment works is submitted to the Regional Administrator and that commitment is reflected in a special condition in the grant agreement.

§ 35.930–5 Federal share.

(a) *General.* The grant shall be 75 percent of the estimated total cost of construction that the Regional Administrator approves in the grant agreement, except as otherwise provided in paragraphs (b) and (c) of this section and in §§ 35.925–15, 35.925–16, 35.925–17, 35.930–1(b), and paragraph 10 of appendix A.

(b) *Innovative and alternative technology.* In accordance with § 35.908(b), the amount of any step 2, step 3, or step 2=3 grant assistance awarded from funds allotted for fiscal years 1979, 1980, and 1981 shall be 85 percent of the estimated cost of construction for those eligible treatment works or significant portions of them that the Regional Administrator determines meet the criteria for innovative or alternative technology in appendix E. These grants depend on the availability of funds from the reserve under § 35.915–1(b). The proportional State contribution to the non-Federal share of construction costs for 85-percent grants must be the same as or greater than the proportional State contribution (if any) to the non-Federal share of eligible construction costs for all treatment works which receive 75-percent grants in the State.

(c) *Modification and replacement of innovative and alternative projects.* In accordance with § 35.908(c) and procedures published by EPA, the Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with grant assistance based upon a Federal share of 85 percent under paragraph (b) of this section.

§ 35.930–6 Limitation on Federal share.

The grantee must exert its best efforts to perform the project work as specified in the grant agreement within the approved cost ceiling. If at any time the grantee believes that the costs which it expects to incur in the performance of the project will exceed or be substantially less than the previously approved estimated total project costs, the grantee must notify the Regional Administrator and the State agency promptly in writing. As soon as practicable, the grantee must give the revised estimate of total cost for the performance of the project (see § 30.900 of this subchapter). Delay in submission of the notice and excess cost information may prejudice approval of an increase in the grant amount. The United States shall not be obligated to pay for costs incurred in excess of the approved grant amount or any amendment to it until the State has approved an increase in the grant amount from available allotments under § 35.915 and the Regional Administrator has issued a written grant amendment under § 35.955.

§ 35.935 Grant conditions.

In addition to the EPA general grant conditions (subpart C and appendix A to part 30 of this subchapter), each treatment works grant shall be subject to the following conditions:

§ 35.935–1 Grantee responsibilities.

(a) Review or approval of project plans and specifications by or for EPA is for administrative purposes only and does not relieve the grantee of its responsibility to design, construct, operate, and maintain the treatment works described in the grant application and agreement.

(b) By its acceptance of the grant, the grantee agrees to complete the treatment works in accordance with the facilities plan, plans and specifications, and related grant documents approved by the Regional Administrator, and to maintain and operate the treatment works to meet the enforceable requirements of the Act for the design life of the treatment works. The Regional Administrator is authorized to seek specific enforcement or recovery of funds from the grantee, or to take other appropriate action (see § 35.965), if he determines that the grantee has failed to make good faith efforts to meet its obligations under the grant.

(c) The grantee agrees to pay, pursuant to section 204(a)(4) of the Act, the non-Federal costs of treatment works construction associated with the project and commits itself to complete the construction of the operable treatment works and complete waste treatment system (see definitions in § 35.905) of which the project is a part.

(d) The Regional Administrator may include special conditions in the grant or administer this subpart in the manner which he determines most appropriate to coordinate with, restate, or enforce NPDES permit terms and schedules.

§ 35.935–2 Procurement.

The grantee and party to any subagreement must comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement for step 1, 2, or 3 work. The Regional Administrator will cause appropriate review of grantee procurement to be made.

§ 35.935–3 Property.

(a) The grantee must comply with the property provisions of § 30.810 *et seq.* of this subchapter with respect to all property (real and personal) acquired with project funds.

(b) With respect to real property (including easements) acquired in connection with the project, whether such property is acquired with or in anticipation of EPA grant assistance or solely with funds furnished by the grantee or others:

(1) The acquisition must be conducted in accordance with part 4 of this chapter;

(2) Any displacement of a person by or as a result of any acquisition of the real property shall be conducted under the applicable provisions of part 4 of this chapter; and

(3) The grantee must obtain (before initiation of step 3 construction), and must thereafter retain, a fee simple or such estate or interest in the site of a step 3 project, and rights of access, as the Regional Administrator finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project. If a step 3 project serves more than one municipality, the grantee must insure that the participating municipalities have, or will have before the initiation of step 3 construction, such interests or rights in land as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project site for the estimated life of the project.

(c) With respect to real property acquired with EPA grant assistance, the grantee must defer acquisition of such property until approval of the Regional Administrator is obtained under § 35.940–3.

§ 35.935–4 Step 2+3 projects.

A grantee which has received step 2=3 grant assistance must make submittals required by § 35.920–3(c), together with approvable user charge and industrial cost recovery systems and a preliminary plan of operation. The Regional Administrator shall give written approval of these submittals before advertising for bids on the step 3 construction portion of the step 2=3

project. The cost of step 3 work initiated before such approval is not allowable. Failure to make the above submittals as required is cause for invoking sanctions under § 35.965.

§ 35.935–5 Davis-Bacon and related statutes.

Before soliciting bids or proposals for step 3-type work, the grantee must consult with the Regional Administrator concerning compliance with Davis-Bacon and other statutes referenced in § 30.415 *et seq.* of this subchapter.

§ 35.935–6 Equal employment opportunity.

Contracts involving step 3-type work of $10,000 or more are subject to equal employment opportunity requirements under Executive Order 11246 (see part 8 of this chapter). The grantee must consult with the Regional Administrator about equal employment opportunity requirements before issuance of an invitation for bids where the cost of construction work is estimated to be more than $1 million or where required by the grant agreement.

§ 35.935–7 Access.

The grantee must insure that EPA and State representatives will have access to the project work whenever it is in preparation or progress. The grantee must provide proper facilities for access and inspection. The grantee must allow the Regional Administrator, the Comptroller General of the United States, the State agency, or any authorized representative, to have access to any books, documents, plans, reports, papers, and other records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, copies and transcriptions. The grantee must insure that a party to a subagreement will provide access to the project work, sites, documents, and records. See §§ 30.605 and 30.805 of this subchapter, clause 9 of appendix C–1 to this subpart, and clause 10 of appendix C–2 to this subpart.

§ 35.935–8 Supervision.

In the case of any project involving Step 3, the grantee will provide and maintain competent and adequate engineering supervision and inspection of the project to ensure that the construction conforms with the approved plans and specifications.

§ 35.935–9 Project initiation and completion.

(a) The grantee agrees to expeditiously initiate and complete the step 1, 2, or 3 project, or cause it to be constructed and completed, in accordance with the grant agreement and application, including the project progress schedule, approved by the Regional Administrator. Failure of the grantee to promptly initiate and complete step 1, 2, or 3 project construction may result in annulment or termination of the grant.

(b) No date reflected in the grant agreement, or in the project completion schedule, or extension of any such date, shall modify any compliance date established in an NPDES permit. It is the grantee's obligation to request any required modification of applicable permit terms or other enforceable requirements.

(c) The invitation for bids for step 3 project work is expected to be issued promptly after grant award. Generally this action should occur within 90 to 120 days after award unless compliance with State or local laws requires a longer period of time. The Regional Administrator shall annul or terminate the grant if initiation of all significant elements of step 3 construction has not occurred within 12 months of the award for the step 3 project (or approval of plans and specifications, in the case of a step 2=3 project). (See definition of ''initiation of construction'' under ''construction'' in § 35.905.) However, the Regional Administrator may defer (in writing) the annulment or termination for not more than 6 additional months if:

(1) The grantee has applied for and justified the extension in writing to the Regional Administrator;

(2) The grantee has given written notice of the request for extension to the NPDES permit authority;

(3) The Regional Administrator determines that there is good cause for the delay in initiation of project construction; and

(4) The State agency concurs in the extension.

§ 35.935–10 Copies of contract documents.

In addition to the notification of project changes under § 30.900 of this chapter, a grantee must promptly submit to the Regional Administrator a copy of any prime contract or modification of it and of revisions to plans and specifications.

§ 35.935–11 Project changes.

(a) In addition to the notification of project changes required under § 30.900–1 of this chapter, the Regional Administrator's and (where necessary) the State agency's prior written approval is required for:

(1) Project changes which may—

(i) Substantially alter the design and scope of the project;

(ii) Alter the type of treatment to be provided;

(iii) Substantially alter the location, size, capacity, or quality of any major item of equipment; or

(iv) Increase the amount of Federal funds needed to complete the project.

However, prior EPA approval is not required for changes to correct minor errors, minor changes, or emergency changes; and

(2) Subagreement amendments amounting to more than $100,000 for which EPA review is required under §§ 35.937–6(b) and 35.938–5 (d) and (g).

(b) No approval of a project change under § 30.900 of this chapter shall obligate the United States to any increase in the amount of the grant or grant payments unless a grant increase is also approved under § 35.955. This does not preclude submission or consideration of a request for a grant amendment under § 30.900–1 of this chapter.

§ 35.935–12 Operation and maintenance.

(a) The grantee must make provision satisfactory to the Regional Administrator for assuring economic and effective operation and maintenance of the treatment works in accordance with a plan of operation approved by the State water pollution control agency or, as appropriate, the interstate agency.

(b) As a minimum, the plan shall include provision for:

(1) An operation and maintenance manual for each facility;

(2) An emergency operating and response program;

(3) Properly trained management, operation and maintenance personnel;

(4) Adequate budget for operation and maintenance;

(5) Operational reports;

(6) Provisions for laboratory testing and monitoring adequate to determine influent and effluent characteristics and removal efficiencies as specified in the terms and conditions of the NPDES permit;

(7) An operation and maintenance program for the sewer system.

(c) Except as provided in paragraphs (d) and (e) of this section, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of any step 3 project unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft; or

(2) More than 90 percent of the Federal share unless the grantee has furnished a satisfactory final operation and maintenance manual.

(d) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft, or

(2) More than 90 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a satisfactory final operation and maintenance manual.

(e) In multiple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless the operation and maintenance manual (or those portions associated with the operating elements of the

treatment works) submitted by the grantee has been approved by the Regional Administrator.

§ 35.935–13 Submission and approval of user charge systems.

The grantee shall obtain the approval of the Regional Administrator of its system of user charges. (See also § 35.929 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974,* (1) Except as paragraph (a)(2) of this section provides, the grantee must obtain the Regional Administrator's approval of its system of user charges based on actual use which complies with § 35.929–1(a). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of user charges nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) A grantee which desires approval of a user charge system based on ad valorem taxes in accordance with § 35.929–1(b) shall submit to the Regional Administrator by July 24, 1978, evidence of compliance of its system with the criteria in § 35.929–1 (b)(1) through (b)(3). As soon as possible, the Regional Administrator shall advise the grantee if the system complies with § 35.929–1 (b)(1). The Regional Administrator's determination may be appealed in accordance with subpart J, ''Disputes,'' of part 30 of this subchapter.

(i) *Grantees whose ad valorem tax systems meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Any step 3 payments held by the Regional Administrator at 50 percent or 80 percent for failure to comply with the requirement for development of a user charge system shall be released. However, the grantee shall obtain approval of its user charge system by June 30, 1979 or no further payments will be made until the sytem is approved and the grants may be terminated or annulled.

(ii) *Grantees whose ad valorem tax systems do not meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Step 3 grants will continue to be administered in accordance with paragraph (a)(1) of this section.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its user charge system based on actual use or ad valorem taxes before July 1, 1979. The Regional Administrator may not make any payments on these grants, may terminate or annul these grants, and may not award any new step 3 grants to the same grantee after June 30, 1979, if the user charge system has not been approved. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The Regional Administrator may not award step 3 grant assistance unless he has approved the user charge system based on actual use or ad valorem taxes. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

§ 35.935–14 Final inspection.

The grantee shall notify the Regional Administrator through the State agency of the completion of step 3 project construction. The Regional Administrator shall cause final inspection to be made within 60 days of the receipt of the notice. When final inspection is completed and the Regional Administrator determines that the treatment works have been satisfactorily constructed in accordance with the grant agreement, the grantee may make a request for final payment under § 35.945(e).

§ 35.935–15 Submission and approval of industrial cost recovery system.

The grantee shall obtain the approval of the Regional Administrator of its system of industrial cost recovery. (See also § 35.928 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974.* (1) The grantee must obtain the approval of the Regional Administrator for the system of industrial cost recovery (see § 35.928 *et seq.*). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of industrial cost recovery nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) Payments of grantees held under paragraph (a)(1) of this section shall be released after April 25, 1978. However, the grantee shall obtain approval of its industrial cost recovery system by June 30, 1979, or no further payments will be made until the system is approved.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its industrial cost recovery system under these regulations, except for the ordinance and rates, before July 1, 1979. The Regional Administrator shall not make any payments on these grants and shall not award any new step 3 grants to the same grantee after June 30, 1979, if the industrial cost recovery system, except for the ordinance and rates, has not been approved. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The grantee must obtain the Regional Administrator's approval of the industrial cost recovery system under these regulations, except for the ordinance and rates, before grant award. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

§ 35.935–16 Sewer use ordinance and evaluation/rehabilitation program.

(a) The grantee must obtain the approval of the Regional Administrator of its sewer use ordinance under § 35.927–4.

(b) Except as provided in paragraphs (c) and (d) of this section, the Regional Administrator shall not pay more than 80 percent of the Federal share of any step 3 project unless he has approved the grantee's sewer use ordinance, and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(c) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay more than 80 percent of the Federal share of the total of all interdependent step 3 segments unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(d) In mulitple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

§ 35.935–17 Training facility.

If assistance has been provided for the construction of a treatment works required to train and upgrade waste treatment personnel under §§ 35.930–1(b) and 35.920–3(e), the grantee must operate the treatment works as a training facility for a period of at least 10 years after construction is completed.

§ 35.935–18 Value engineering.

A grantee must comply with the applicable value engineering requirements of § 35.926.

§ 35.935–19 Municipal pretreatment program.

The grantee must obtain approval by the Regional Administrator of the municipal pretreatment program in accordance with part 403 of this chapter. Prior to granting such approval, the Regional Administrator shall not pay more than 90 percent of the Federal share of any step 3 project or cost of step 3 work under a step 2=3 project awarded after October 1, 1978, except that for any such grant assistance awarded before December 31, 1980, the Regional Administrator may continue grant payments if he determines that significant progress has been made (and is likely to continue) toward the development of an approvable pretreatment program and that withholding of grant payments would not be in the best interest of protecting the environment.

§ 35.935–20 Innovative processes and techniques.

If the grantee receives 85-percent grant assistance for innovative processes and techniques, the following conditions apply during the 5-year period following completion of construction:

(a) The grantee shall permit EPA personnel and EPA designated contractors to visit and inspect the treatment works at any reasonable time in order to review the operation of the innovative processes or techniques.

(b) If the Regional Administrator requests, the grantee will provide EPA with a brief written report on the construction, operation, and costs of operation of the innovative processes or techniques.

§ 35.936 Procurement.

(a) Sections 35.936 through 35.939 set forth policies and minimum standards for procurement of architectural or engineering services as defined in § 35.937 and construction contracts as described in § 35.938 by grantees under all steps of grants for construction of treatment works. Acquisition of real property shall be conducted in accordance with part 4, subpart F of this chapter. Other procurements of goods and services shall be conducted in accordance with the provisions of part 33 of this subchapter.

(b) This subpart does not apply to work beyond the scope of the project for which grant assistance is awarded (i.e., ineligible work).

§ 35.936–1 Definitions.

As used in §§ 35.936 through 35.939, the following words and terms shall have the meaning set forth below. All terms not defined herein shall have the meaning given to them in § 30.135 of this subchapter, and in § 35.905.

(a) *Grant agreement.* The written agreement and amendments thereto between EPA and a grantee in which the terms and conditions governing the grant are stated and agreed to by both parties under § 30.345 of this subchapter.

(b) *Subagreement.* A written agreement between an EPA grantee and another party (other than another public agency) and any tier of agreement thereunder for the furnishing of services, supplies, or equipment necessary to complete the project for which a grant was awarded, including contracts and subcontracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements subject to State or local personnel systems. (See §§ 35.937–12 and 35.938–9 regarding subcontracts of any tier under prime contracts for architectural or engineering services or construction awarded by the grantee—generally applicable only to subcontracts in excess of $10,000.)

(c) *Contractor.* A party to whom a subagreement is awarded.

(d) *Grantee.* Any municipality which has been awarded a grant for construction of a treatment works under this subpart. In addition, where appropriate in §§ 35.936 through 35.939, grantee may also refer to an applicant for a grant.

§ 35.936–2 Grantee procurement systems; State or local law.

(a) *Grantee procurement systems.* Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial, or local laws and ordinances to the extent that these systems and procedures do not conflict

with the minimum requirements of this subchapter.

(b) *State or local law.* The Regional Administrator will generally rely on a grantee's determination regarding the application of State or local law to issues which are primarily determined by such law. The Regional Administrator may request the grantee to furnish a written legal opinion adequately addressing any such legal issues. The Regional Administrator will accept the grantee's determination unless he finds that it does not have a rational basis.

(c) *Preference.* State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant.

§ 35.936–3 Competition.

EPA's policy is to encourage free and open competition appropriate to the type of project work to be performed.

§ 35.936–4 Profits.

Only fair and reasonable profits may be earned by contractors in subagreements under EPA grants. See § 35.937–7 for discussion of profits under negotiated subagreements for architectural or engineering services, and § 35.938–5(f) for discussion of profits under negotiated change orders to construction contracts. Profit included in a formally advertised, competitively bid, fixed price construction contract awarded under § 35.938 is presumed reasonable.

§ 35.936–5 Grantee responsibility.

(a) The grantee is responsible for the administration and successful accomplishment of the project for which EPA grant assistance is awarded. The grantee is responsible for the settlement and satisfaction of all contractual and administrative issues arising out of subagreements entered into under the grant (except as § 35.936–6 provides) in accordance with sound business judgment and good administrative practice. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of contracts, protests of award, claims, disputes, and other related procurement matters.

(b) With the prior written approval of the Regional Administrator, the grantee may retain an individual or firm to perform these functions. Such an agent acts for the grantee and is subject to the provisions of this subpart which apply to the grantee.

(c) In accordance with § 35.970, a grantee may request technical and legal assistance from the Regional Administrator for the administration and enforcement of any contract related to treatment works that are assisted by an EPA grant. The Regional Administrator's assistance does not release the grantee from those responsibilities identified in paragraph (a) of this section.

§ 35.936–6 EPA responsibility.

Generally, EPA will only review grantee compliance with Federal requirements applicable to a grantee's procurement. However, where specifically provided in this chapter (e.g., §§ 8.8(j) and 35.939), EPA is responsible for determining compliance with Federal requirements.

§ 35.936–8 Privity of contract.

Neither EPA nor the United States shall be a party to any subagreement (including contracts or subcontracts), nor to any solicitation or request for proposals. (See §§ 35.937–9(a), 35.938–4(c)(5), and appendices C–1 and C–2 to this subpart for the required solicitation statement and contract provisions.) However, in accordance with § 35.970 the Regional Administrator, if a grantee requests, may provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made.

§ 35.936–9 Disputes.

Only an EPA grantee may initiate and prosecute an appeal to the Administrator under the disputes provision of a grant with respect to its subagreements (see subpart J of part 30 of this subchapter). Neither a contractor nor a subcontractor may prosecute an appeal under the disputes provisions of a grant in its own name or interest.

§ 35.936–10 Federal procurement regulations.

Regulations applicable to direct Federal procurement shall not be applicable to subagreements under grants except as stated in this subchapter.

§ 35.936–11 General requirements for subagreements.

Subagreements must:

(a) Be necessary for and directly related to the accomplishment of the project work;

(b) Be in the form of a bilaterally executed written agreement (except for small purchases of $10,000 or less);

(c) Be for monetary or in-kind consideration; and

(d) Not be in the nature of a grant or gift.

§ 35.936–12 Documentation.

(a) Procurement records and files for purchases in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Justification for lack of competition if competition appropriate to the type of project work to be performed is required but is not obtained; and

(3) Basis for award cost or price.

(b) The grantee or contractors of the grantee must retain procurement documentation required by § 30.805 of this subchapter and by this subpart, including a copy of each subagreement, for the period of time specified in § 30.805. The documentation is subject to all the requirements of § 30.805. A copy of each subagreement must be furnished to the project officer upon request.

§ 35.936–13 Specifications.

(a) *Nonrestrictive specifications.* (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words ''or equal.'' If brand or trade names are specified, the grantee must be prepared to identify to the Regional Administrator or in any protest action the salient requirements (relating to the minimum needs of the project) which must be met by any offeror. The single base bid method of solicitation for equipment and parts for determination of a low, responsive bidder may not be utilized. With regard to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the material.

(2) Project specifications shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, except to the extent that innovative technologies may be used under § 35.908 of this subpart.

(b) *Sole source restriction.* A specification shall not require the use of structures, materials, equipment, or processes which are known to be available only from a sole source, unless the Regional Administrator determines that the grantee's engineer has adequately justified in writing that the proposed use meets the particular project's minimum needs or the Regional Administrator determines that use of a single source is necessary to promote innovation (see § 35.908). Sole source procurement must be negotiated under § 33.500 *et seq.*, including full cost review.

(c) *Experience clause restriction.* The general use of experience clauses requiring equipment manufacturers to have a record of satisfactory operation for a specified period of time or of bonds or deposits to guarantee replacement in the event of failure is restricted to special cases where the grantee's engineer adequately justifies any such requirement in writing. Where such justification has been made, submission of a bond or deposit shall be permitted instead of a specified experience period. The period of time for which the bond or deposit is required should not exceed the experience period specified. No experience restriction will be permitted which unnecessarily reduces competition or innovation.

(d) *Buy American*—(1) *Definitions.* As used in this subpart, the following definitions apply:

(i) *Construction material* means any article, material, or supply brought to the construction site for incorporation in the building or work.

(ii) *Component* means any article, material, or supply directly incorporated in construction material.

(iii) *Domestic construction material* means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

(iv) *Nondomestic construction material* means a construction material other than a domestic construction material.

(2) *Domestic preference.* Domestic construction material may be used in preference to nondomestic materials if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic materials including all costs of delivery to the construction site, any applicable duty, whether or not assessed. Computations will normally be based on costs on the date of opening of bids or proposals.

(3) *Waiver.* The Regional Administrator may waive the Buy American provision based upon those factors that he considers relevant, including:

(i) Such use is not in the public interest;

(ii) The cost is unreasonable;

(iii) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(iv) The articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project; or

(v) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(4) *Contract provision.* Notwithstanding any other provision of this subpart, bidding documents and construction contracts for any step 3 project for which the Regional Administrator receives an application after February 1, 1978, shall contain the ''Buy American'' provision which requires use of domestic construction materials in preference to nondomestic construction materials.

(5) *Substitution.* If a nondomestic construction material or component is proposed for use, a bidder or contractor may substitute an approved domestic material or component (at no change in price), if necessary to comply with this subsection.

(6) *Procedures.* The Regional Administrator may use the appropriate procedures of § 35.939 in making the determinations with respect to this subsection. He shall generally observe the Buy American procedures, regulations, precedents, and requirements of other Federal departments and agencies.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

§ 35.936–14 Force account work.

(a) A grantee must secure the project officer's prior written approval for use of the force account method for (1) any step 1 or step 2 work in excess of $10,000; (2) any sewer rehabilitation work in excess of $25,000 performed during step 1 (see § 35.927–3(a)); or (3) any step 3 work in excess of $25,000; unless the grant agreement stipulates the force account method.

(b) The project officer's approval shall be based on the grantee's demonstration that he possesses the necessary competence required to accomplish such work and that (1) the work can be accomplished more economically by the use of the force account method, or (2) emergency circumstances dictate its use.

(c) Use of the force account method for step 3 construction shall generally be limited to minor portions of a project.

§ 35.936–15 Limitations on subagreement award.

No subagreement shall be awarded:

(a) To any person or organization which does not meet the responsibility standards in § 30.340–2 (a) through (d) and (g) of this subchapter;

(b) If any portion of the contract work not exempted by § 30.420–3(b) of this subchapter will be performed at a facility listed by the Director, EPA Office of Federal Activities, in violation of the antipollution requirements of the Clean Air Act and the Clean Water Act, as set forth in § 30.420–3 of this subchapter and 40 CFR part 15 (Administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts, grants, or loans); or

(c) To any person or organization which is ineligible under the conflict of interest requirements of § 30.420–4 of this subchapter.

§ 35.936–16 Code or standards of conduct.

(a) The grantee must maintain a code or standards of conduct which shall govern the performance of its officers, employees, or agents in the conduct of project work, including procurement and expenditure of project funds. The grantee's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors. The grantee must avoid personal or organizational conflicts of interest or noncompetitive procurement practices which restrict or eliminate competition or otherwise restrain trade.

(b) To the extent permissible by State or local law or formal institutional requirements and procedures, the standards shall provide for penalties, sanctions, or other adequate disciplinary actions to be instituted for project-related violations of law or of the code or standards of conduct by either the grantee officers, employees, or agents, or by contractors or their agents.

(c) The grantee must inform the project officer in writing of each serious allegation of a project-related violation and of each known or proven project-related violation of law or code or standards of conduct, by its officers, employees, contractors, or by their agents. The grantee must also inform the project officer of the prosecutive or disciplinary action the grantee takes, and must cooperate with Federal officials in any Federal prosecutive or disciplinary action. Under § 30.245 of this subchapter, the project officer must notify the Director, EPA Security and Inspection Division, of all notifications from the grantee.

(d) EPA shall cooperate with the grantee in its disciplinary or prosecutive actions taken for any apparent project-related violations of law or of the grantee's code or standards of conduct.

§ 35.936–17 Fraud and other unlawful or corrupt practices.

All procurements under grants are covered by the provisions of § 30.245 of this subchapter relating to fraud and other unlawful or corrupt practices.

§ 35.936–18 Negotiation of subagreements.

(a) Formal advertising, with adequate purchase descriptions, sealed bids, and public openings shall be the required method of procurement unless negotiation under paragraph (b) of this section is necessary to accomplish sound procurement.

(b) All negotiated procurement shall be conducted in a manner to provide to the maximum practicable extent open and free competition appropriate to the type of project work to be performed. The grantee is authorized to negotiate subagreements in accordance with the applicable procedures of this subchapter (see §§ 35.937 *et seq.* and 35.500 *et seq.*) if any of the following conditions exist:

(1) Public exigency will not permit the delay incident to formally advertised procurement (e.g., an emergency procurement).

(2) The aggregate amount involved does not exceed $10,000 (see § 35.936–19 for small purchases).

(3) The material or service to be procured is available from only one person or entity. If the procurement is expected to aggregate more than $10,000, the grantee must document its file

with a justification of the need for noncompetitive procurement, and provide such documentation to the project officer on request.

(4) The procurement is for personal or professional services (including architectural or engineering services) or for any service that a university or other educational institution may render.

(5) No responsive, responsible bids at acceptable price levels have been received after formal advertising, and, with respect to procurement under §35.938–4, the Regional Administrator's prior written approval has been obtained.

(6) The procurement is for materials or services where the prices are established by law.

(7) The procurement is for technical items or equipment requiring standardization and interchangeability of parts with existing equipment.

(8) The procurement is for experimental, developmental or research services.

§35.936–19 Small purchases.

(a) A small purchase is the procurement of materials, supplies, and services when the aggregate amount involved in any one transaction does not exceed $10,000. The small purchase limitation of $10,000 applies to the aggregate total of an order, including all estimated handling and freight charges, overhead, and profit to be paid under the order. In arriving at the aggregate amount involved in any one transaction, all items which should properly be grouped together must be included. Reasonable competition shall be obtained.

(b) Subagreements for small purchases need not be in the form of a bilaterally executed written agreement. Where appropriate, unilateral purchase orders, sales slips, memoranda of oral price quotations, and the like may be used to minimize paperwork. Retention in the purchase files of these documents and of written quotations received, or references to catalogs or printed price lists used, will suffice as the record supporting the price paid.

§35.936–20 Allowable costs.

(a) Incurring costs under subagreements which are not awarded or administered in compliance with this part or part 33 of this subchapter, as appropriate, shall be cause for disallowance of those costs.

(b) Appropriate cost principles which apply to subagreements under EPA grants are identified in §30.710 of this subchapter. Under that section, the contractor's actual costs, direct and indirect, eligible for Federal participation in a cost reimbursement contract shall be those allowable under the applicable provisions of 41 CFR 1–15.2 (Principles and Procedures for Use in Cost-Reimbursement Type Supply and Research Contracts With Commercial Organizations) and 41 CFR 1–15.4 (Construction and Architect-Engineer Contracts).

(c) Reasonable costs of compliance with the procurement and project management requirements of these regulations are allowable costs of administration under the grant. Costs of announcement, selection, negotiation, and cost review and analysis in connection with procurement of architectural or engineering services are allowable, even when conducted before award of the grant. Legal and engineering costs which a grantee is required to incur in a protest action under §35.939 are allowable.

§35.936–21 Delegation to State agencies; certification of procurement systems.

(a) Under §35.912 and subpart F of this part, the Regional Administrator may delegate authority to a State agency to review and certify the technical and administrative adequacy of procurement documentation required under these sections.

(b) If a State agency believes that State laws which govern municipal procurement include the same requirements or operate to provide the same protections as do §§35.936, 35.937 and 35.938, the State may request the Administrator to approve the State system instead of the procedures of these sections. EPA shall review the State system to determine its adequacy.

(c) If a State agency determines that an applicant's procurement ordinances

or applicable statutes include the same requirements or operate to provide the same protections as do §§ 35.936, 35.937 and 35.938, the State may certify (accompanied by appropriate documentation) the adequacy of the municipality's ordinances and statutes and request the Administrator to approve the municipality's system instead of the procedures of these sections. EPA shall conduct or may request the State to conduct a review of the municipality's system to determine its adequacy.

§ 35.936–22 Bonding and insurance.

(a) On contracts for the building and erection of treatment works or contracts for sewer system rehabilitation exceeding $100,000, each bidder must furnish a bid guarantee equivalent to 5 percent of the bid price. In addition, the contractor awarded a construction contract for the building and erection of treatment works or sewer system rehabilitation must furnish performance and payment bonds, each of which shall be in an amount not less than 100 percent of the contract price. Construction contracts less than $100,000 shall be subject to State and local requirements for bid guarantees, performance bonds, and payment bonds. For contracts or subcontracts in excess of $100,000 the Regional Administrator may authorize the grantee to use its own bonding policies and requirements if he determines, in writing, that the Government's interest is adequately protected.

(b) Contractors should obtain such construction insurance (e.g., fire and extended coverage, workmen's compensation, public liability and property damage, and ''all risk'' builder's risk or installation floater coverage) as is required by State or local law or the grantee or as is customary and appropriate. Under the Flood Disaster Protection Act of 1973, a contractor must purchase flood insurance to cover his risk of loss if the grantee has not purchased the insurance (see § 30.405–10 of this subchapter).

§ 35.937 Subagreements for architectural or engineering services.

(a) *Applicability.* Except as § 35.937–2 otherwise provides, the provisions of §§ 35.937 through 35.937–11 apply to all subagreements of grantees for architectural or engineering services where the aggregate amount of services involved is expected to exceed $10,000. The provisions of §§ 35.937–2, 35.937–3, and 35.937–4 are not required, but may be followed, where the population of the grantee municipality is 25,000 or less according to the most recent U.S. census. When $10,000 or less of services (e.g., for consultant or consultant subcontract services) is required, the small purchase provisions of § 35.936–19 apply.

(b) *Policy.* Step 1, step 2, or administration or management of step 3 project work may be performed by negotiated procurement of architectural or engineering services. The Federal Government's policy is to encourage public announcement of the requirements for personal and professional services, including engineering services. Subagreements for engineering services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. All negotiated procurement shall be conducted in a manner that provides to the maximum practicable extent, open and free competition. Nothing in this subpart shall be construed as requiring competitive bids or price competition in the procurement of architectural or engineering services.

(c) *Definitions.* As used in §§ 35.937 through 35.937–11 the following words and terms mean:

(1) *Architectural or engineering services.* Those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programing, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operation and maintenance manuals, and other related services.

(2) *Engineer.* A professional firm or individual engaged to provide services

as defined in paragraph (c)(1) of this section by subagreement under a grant.

§ 35.937–1 Type of contract (subagreement).

(a) *General.* Cost-plus-percentage-of-cost and percentage-of-construction-cost contracts are prohibited. Cost reimbursement, fixed price, or per diem contracts or combinations of these may be negotiated for architectural or engineering services. A fixed price contract is generally used only when the scope and extent of work to be performed is clearly defined. In most other cases, a cost reimbursement type of contract is more appropriate. A per diem contract may be used if no other type of contract is appropriate. An incentive fee may be used if the grantee submits an adequate independent cost estimate and price comparison under § 35.937–6.

(b) *Cost reimbursement contracts.* Each cost reimbursement contract must clearly establish a cost ceiling which the engineer may not exceed without formally amending the contract and a fixed dollar profit which may not be increased except in case of a contract amendment to increase the scope of work.

(c) *Fixed price contracts.* An acceptable fixed price contract is one which establishes a guaranteed maximum price which may not be increased unless a contract amendment increases the scope of work.

(d) *Compensation procedures.* If, under either a cost reimbursement or fixed price contract, the grantee desires to use a multiplier type of compensation, all of the following must apply:

(1) The multiplier and the portions of the multiplier allocable to overhead and allocable to profit have been specifically negotiated;

(2) The portion of the multiplier allocable to overhead includes only allowable items of cost under the cost principles of 41 CFR 1–15.2 and 1–15.4;

(3) The portions of the multiplier allocable to profit and allocable to overhead have been separately identified in the contract; and

(4) The fixed price contract includes a guaranteed maximum price for completion of the specifically defined scope of work; the cost reimbursement contract includes a fixed dollar profit which may not be increased except in case of a contract amendment which increases the scope of work.

(e) *Per diem contracts.* A per diem agreement expected to exceed $10,000 may be utilized only after a determination that a fixed price or cost reimbursement type contract is not appropriate. Per diem agreements should be used only to a limited extent, e.g., where the first task under a step 1 grant involves establishing the scope and cost of succeeding step 1 tasks, or for incidental services such as expert testimony or intermittent professional or testing services. (Resident engineer and resident inspection services should generally be compensated under paragraph (b) or (c) of this section.) Cost and profit included in the per diem rate must be specifically negotiated and displayed separately in the engineer's proposal. The contract must clearly establish a price ceiling which may not be exceeded without formally amending the contract.

§ 35.937–2 Public notice.

(a) *Requirement.* Adequate public notice as paragraph (a)(1) or (2) of this section provide, must be given of the requirement for architectural or engineering services for all subagreements with an anticipated price in excess of $25,000 except as paragraph (b) of this section provides. In providing public notice under paragraphs (a)(1) and (2) of this section, grantees must comply with the policies in §§ 35.936–2(c), 35.936–3, and 35.936–7.

(1) *Public announcement.* A notice of request for qualifications should be published in professional journals, newspapers, or publications of general circulation over a reasonable area and, in addition, if desired, through posted public notices or written notification directed to interested person, firms, or professional organizations inviting the submission of statements of qualifications. The announcement must clearly state the deadline and place for submission of qualification statements.

(2) *Prequalified list.* As an alternative to publishing public notice as in paragraph (b) of this section, the grantee may secure or maintain a list of qualified candidates. The list must:

(i) Be developed with public notice procedures as in paragraph (a)(1) of this section;

(ii) Provide for continuous updating; and

(iii) Be maintained by the grantee or secured from the State or from a nearby political subdivision.

(b) *Exceptions.* The public notice requirement of this section and the related requirements of §§ 35.937–3 and 35.937–4 are not applicable, but may be followed, in the cases described in paragraphs (b) (1) through (3) of this section. All other appropriate provisions of this section, including cost review and negotiation of price, apply.

(1) Where the population of the grantee municipality is 25,000 or less according to the latest U.S. census.

(2) For step 2 or step 3 of a grant, if:

(i) The grantee is satisfied with the qualifications and performance of an engineer who performed all or any part of the step 1 or step 2 work;

(ii) The engineer has the capacity to perform the subsequent steps; and

(iii) The grantee desires the same engineer to provide architectural or engineering services for the subsequent steps.

(3) For subsequent segments of design work under one grant if:

(i) A single treatment works is segmented into two or more step 3 projects;

(ii) The step 2 work is accordingly segmented so that the initial contract for preparation of construction drawings and specifications does not cover the entire treatment works to be built under one grant; and

(iii) The grantee desires to use the same engineering firm that was selected for the initial segment of step 2 work for subsequent segments.

§ 35.937–3 Evaluation of qualifications.

(a) The grantee shall review the qualifications of firms which responded to the announcement or were on the prequalified list and shall uniformly evaluate the firms.

(b) Qualifications shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills).

(c) Criteria which should be considered in the evaluation of candidates for submission of proposals should include:

(1) Specialized experience and technical competence of the candidate or firm and its personnel (including a joint venture, association or professional subcontract), considering the type of services required and the complexity of the project;

(2) Past record of performance on contracts with the grantee, other government agencies or public bodies, and with private industry, including such factors as control of costs, quality of work, and ability to meet schedules;

(3) The candidate's capacity to perform the work (including any specialized services) within the time limitations, considering the firm's current and planned workload;

(4) The candidate's familiarity with types of problems applicable to the project; and

(5) Avoidance of personal and organizational conflicts of interest prohibited under State and local law and § 35.936–16.

§ 35.937–4 Solicitation and evaluation of proposals.

(a) Requests for professional services proposals must be sent to no fewer than three candidates who either responded to the announcement or who were selected from the prequalified list. If, after good faith effort to solicit qualifications in accordance with § 35.937–2, fewer than three qualified candidates respond, all qualified candidates must be provided requests for proposals.

(b) Requests for professional services proposals must be in writing and must contain the information necessary to enable a prospective offeror to prepare a proposal properly. The request for proposals must include the solicitation statement in § 35.937–9(a) and must inform offerors of the evaluation criteria, including all those in paragraph (c) of this section, and of the relative importance attached to each criterion (a numerical weighted formula need not be utilized).

(c) All proposals submitted in response to the request for professional services proposals must be uniformly

evaluated. Evaluation criteria shall include, as a minimum, all criteria stated in §35.937–3(c) of this subpart. The grantee shall also evaluate the candidate's proposed method to accomplish the work required, including, where appropriate, demonstrated capability to explore and develop innovative or advanced techniques and designs. The grantee's evaluation shall comply with §35.936–7.

(d) Proposals shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills. Oral (including telephone) or written interviews should be conducted with top rated proposers, and information derived therefrom shall be treated on a confidential basis, except as required to be disclosed under State or local law or to EPA under §35.937–6.

(e) At no point during the procurement process shall information be conveyed to any candidate which would provide an unfair competitive advantage.

§35.937–5 Negotiation.

(a) Grantees are responsible for negotiation of their contracts for architectural or engineering services. Contract procurement including negotiation may be performed by the grantee directly or by another non-Federal governmental body, person or firm retained for the purpose. Contract negotiations may include the services of technical, legal, audit, or other specialists to the extent appropriate.

(b) Negotiations may be conducted in accordance with State or local requirements, as long as they meet the minimum requirements as set forth in this section. In the absence of State or local statutory or code requirements, negotiations may be conducted by the grantee under procedures it adopts based upon Public Law 92–582, 40 U.S.C. 541–544 (commonly known as the ''Brooks Bill'') or upon the negotiation procedures of 40 CFR 33.510–2.

(c) The object of negotiations with any candidate shall be to reach agreement on the provisions of the proposed contract. The grantee and the candidate shall discuss, as a minimum:

(1) The scope and extent of work and other essential requirements;

(2) Identification of the personnel and facilities necessary to accomplish the work within the required time, including where needed, employment of additional personnel, subcontracting, joint ventures, etc.;

(3) Provision of the required technical services in accordance with regulations and criteria established for the project; and

(4) A fair and reasonable price for the required work, to be determined in accordance with the cost and profit considerations set forth in §§35.937–6 and 35.937–7, and payment provisions.

§35.937–6 Cost and price considerations.

(a) *General.* EPA policy is that the cost or price of all subagreements and amendments to them must be considered. For each subagreement in excess of $10,000 but not greater than $100,000, grantees shall use the procedures described in paragraph (c) of this section, or an equivalent process.

(b) *Subagreements over $100,000.* For each subagreement expected to exceed $100,000, or for two subagreements which aggregate more than $100,000 awarded to an engineer for work on one step, or where renegotiation or amendment of a subagreement will result in a contract price in excess of $100,000, or where the amendment itself is in excess of $100,000, the provisions of this paragraph (b) shall apply.

(1) The candidate(s) selected for negotiation shall submit to the grantee for review sufficient cost and pricing data as described in paragraph (c) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(2) The grantee shall submit to the EPA Project Officer for review (i) documentation of the public notice of need for architectural or engineering services, and selection procedures used, in those cases where §§35.937–2, 35.937–3 and 35.937–4 are applicable; (ii) the cost and pricing data the selected engineer submitted; (iii) a certification of review and acceptance of the selected engineer's cost or price; and (iv) a copy of

the proposed subagreement. The EPA Project Officer will review the complete subagreement action and approve the grantee's compliance with appropriate procedures before the grantee awards the subagreement. The grantee shall be notified upon completion of review.

(c) *Cost review.* (1) The grantee shall review proposed subagreement costs.

(2) As a minimum, proposed subagreement costs shall be presented on EPA form 5700–41 on which the selected engineer shall certify that the proposed costs reflect complete, current, and accurate cost and pricing data applicable to the date of anticipated subagreement award.

(3) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price contracts and a maximum total dollar amount of profit shall be set forth separately in the cost summary for cost reimbursement contracts.

(4) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed subagreement costs. EPA normally requires more detailed documentation only when the selected engineer is unable to certify that the cost and pricing data used are complete, current, and accurate. EPA may, on a selected basis, perform a preaward cost analysis on any subagreement. Normally, a provisional overhead rate will be agreed upon before contract award.

(5) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used to determine the allowability of costs under grants. The engineer's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the subagreement, this subpart and the cost principles included in 41 CFR 1–15.2 and 1–15.4. Examples of cost which are not allowable under those cost principles include entertainment, interest on borrowed capital and bad debts.

(6) The engineer shall have an accounting system which accounts for costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation, and segregation of allowable and unallowable project costs among projects. Allowable project costs shall be determined in accordance with paragraph (c)(5) of this section. The engineer must propose and account for costs in a manner consistent with his normal accounting procedures.

(7) Subagreements awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where the Regional Administrator determines that such certification was not based on complete, current, and accurate cost and pricing data or not based on costs allowable under the appropriate FPR cost principles (41 CFR 1–15.2 and 1–15.4) at the time of award.

§ 35.937–7 Profit.

The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the firm's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of subagreements under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on Federal procurement principles, it may vary from the firm's definition of profit for other purposes.) Profit on a subagreement and each amendment to a subagreement under a grant should be sufficient to attract engineers who possess talents and skills necessary to the accomplishment of project objectives, and to stimulate efficient and expeditious completion of the project. Where cost review is performed, the grantee should review the estimate of profit as he reviews all other elements of price.

§ 35.937–8 Award of subagreement.

After the close of negotiations and after review and approval by the EPA Project Officer if required under § 35.937–6(b), the grantee may award the

contract. Unsuccessful candidates should be notified promptly.

§ 35.937–9 Required solicitation and subagreement provisions.

(a) *Required solicitation statement.* Requests for qualifications or proposals must include the following statement, as well as the proposed terms of the subagreement.

> Any contract awarded under this request for (qualifications/professional proposals) is expected to be funded in part by a grant from the United States Environmental Protection Agency. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939. Neither the United States nor the United States Environmental Protection Agency is nor will be a party to this request for (qualifications/professional proposals) or any resulting contract.

(b) *Content of subagreement.* Each subagreement must adequately define:

(1) The scope and extent of project work;

(2) The time for performance and completion of the contract work, including where appropriate, dates for completion of significant project tasks;

(3) Personnel and facilities necessary to accomplish the work within the required time;

(4) The extent of subcontracting and consultant agreements; and

(5) Payment provisions in accordance with § 35.937–10.

If any of these elements cannot be defined adequately for later tasks or steps at the time of contract execution, the contract should not include the subsequent tasks or steps at that time.

(c) *Required subagreement provisions.* Each consulting engineering contract must include the provisions set forth in appendix C–1 to this subpart.

§ 35.937–10 Subagreement payments—architectural or engineering services.

The grantee shall make payment to the engineer in accordance with the payment schedule incorporated in the engineering agreement or in accordance with paragraph 7b of appendix C–1 to this subpart. Any retainage is at the option of the grantee. No payment request made by the Engineer under the agreement may exceed the estimated amount and value of the work and services performed.

§ 35.937–11 Applicability to existing contracts.

Some negotiated engineering subagreements already in existence may not comply with the requirements of §§ 35.936 and 35.937. Appendix D to this subpart contains EPA policy with respect to these subagreements and must be implemented before the grant award action for the next step under the grant.

§ 35.937–12 Subcontracts under subagreements for architectural or engineering services.

(a) Neither award and execution of subcontracts under a prime contract for architectural or engineering services, nor the procurement and negotiation procedures used by the engineer in awarding such subcontracts are required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.937 except as provided in paragraphs (b), (c), and (d) of this section.

(b) The award or execution of subcontracts in excess of $10,000 under a prime contract for architectural or engineering services and the procurement procedures used by the engineer in awarding such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) Section 35.936–7 (Small and minority business);

(3) Section 35.936–15 (Limitations on subagreement award);

(4) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(5) Section 35.937–6 (Cost and price considerations);

(6) Section 35.937–7 (Profit);

(7) Prohibition of percentage-of-construction-cost and cost-plus-percentage-of-cost contracts (see § 35.937–1); and

(8) Applicable subagreement clauses (see appendix C–1, clauses 9, 17, 18; note clause 10).

(c) The applicable provisions of this subpart shall apply to lower tier subagreements where an engineer acts as

an agent for the grantee under a management subagreement (see § 35.936–5(b)).

(d) If an engineer procures items or services (other than architectural or engineering services) which are more appropriately procured by formal advertising or competitive negotiation procedures, the applicable procedures of § 35.938 or of part 33 shall be observed.

§ 35.938 Construction contracts (subagreements) of grantees.

§ 35.938–1 Applicability.

This section applies to construction contracts (subagreements) in excess of $10,000 awarded by grantees for any step 3 project.

§ 35.938–2 Performance by contract.

The project work shall be performed under one or more contracts awarded by the grantee to private firms, except for force account work authorized by § 35.936–14.

§ 35.938–3 Type of contract.

Each contract shall be a fixed price (lump sum or unit price or a combination of the two) contract, unless the Regional Administrator gives advance written approval for the grantee to use some other acceptable type of contract. The cost-plus-percentage-of-cost contract shall not be used in any event.

§ 35.938–4 Formal advertising.

Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with § 35.936–18. Formal advertising shall be in accordance with the following:

(a) *Adequate public notice.* The grantee will cause adequate notice to be given of the solicitation by publication in newspapers or journals of general circulation beyond the grantee's locality (statewide, generally), inviting bids on the project work, and stating the method by which bidding documents may be obtained or examined. Where the estimated cost of step 3 construction is $10 million or more, the grantee must generally publish the notice in trade journals of nationwide distribution. The grantee should, in addition, solicit bids directly from bidders if it maintains a bidders list.

(b) *Adequate time for preparing bids.* Adequate time, generally not less than 30 days, must be allowed between the date when public notice under paragraph (a) of this section is first published and the date by which bids must be submitted. Bidding documents (including specifications and drawings) shall be available to prospective bidders from the date when such notice is first published.

(c) *Adequate bidding documents.* The grantee shall prepare a reasonable number of bidding documents (invitations for bids) and shall furnish them upon request on a first-come, first-served basis. The grantee shall maintain a complete set of bidding documents and shall make them available for inspection and copying by any party. The bidding documents shall include:

(1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule. (Drawings and specifications may be made available for inspection and purchase, instead of being furnished.);

(2) The terms and conditions of the contract to be awarded;

(3) A clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract;

(4) Responsibility requirements or criteria which will be employed in evaluating bidders;

(5) The following statement:

> Any contract or contracts awarded under this invitation for bids are expected to be funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is or will be a party to this invitation for bids or any resulting contract. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939.;

and

(6) A copy of §§ 35.936, 35.938, and 35.939.

(d) *Sealed bids.* The grantee shall provide for bidding by sealed bid and for the safeguarding of bids received until public opening.

(e) *Addenda to bidding documents.* If a grantee desires to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the addenda shall be communicated in writing to all firms which have obtained bidding documents in time to be considered before the bid opening time.

(f) *Bid modifications.* A firm which has submitted a bid shall be allowed to modify or withdraw its bid before the time of bid opening.

(g) *Public opening of bids.* The grantee shall provide for a public opening of bids at the place, date and time announced in the bidding documents.

(h) *Award to the low, responsive, responsible bidder.* (1) After bids are opened, the grantee shall evaluate them in accordance with the methods and criteria set forth in the bidding documents.

(2) The grantee may reserve the right to reject all bids. Unless all bids are rejected for good cause, award shall be made to the low, responsive, responsible bidder.

(3) If the grantee intends to make the award to a firm which did not submit the lowest bid, he shall prepare a written statement before any award, explaining why each lower bidder was deemed nonresponsible or nonresponsive, and shall retain it in his files.

(4) State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids.

(5) If an unresolved procurement review issue or a protest relates only to award of a subcontract or procurement of a subitem under the prime contract, and resolution of that issue or protest is unduly delaying performance of the prime contract, the Regional Administrator may authorize award and performance of the prime contract before resolution of the issue or protest, if the Regional Administrator determines that:

(i) Resolution of the protest—

(A) Will not affect the placement of the prime contract bidders; and

(B) Will not materially affect initial performance of the prime contract; and that

(ii) Award of the prime contract—

(A) Is in the Government's best interest;

(B) Will not materially affect resolution of the protest; and

(C) Is not barred by State law.

(6) The grantee shall not reject a bid as nonresponsive for failure to list or otherwise indicate the selection of a subcontractor(s) or equipment, unless the grantee has unambiguously stated in the solicitation documents that such failure to list shall render a bid nonresponsive and shall cause rejection of a bid.

§ 35.938–5 Negotiation of contract amendments (change orders).

(a) *Grantee responsibility.* Grantees are responsible for negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by his engineer. During negotiations with the contractor the grantee shall:

(1) Make certain that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

(2) Assure that the contractor demonstrates that he will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

(3) Assure a fair and reasonable price for the required work.

(b) *Changes in contract price or time.* The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with paragraph (c) or (d) of this section, as appropriate. The value of any work covered by a change order or of any claim for increase or decrease in the contract price shall be determined by the method set forth in paragraphs (b) (1) through (3) of this section which is most advantageous to the grantee.

(1) *Unit prices*—(i) *Original bid items.* Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15 percent of the original bid quantity and the total dollar change of that bid item is significant, the grantee shall review the unit price to determine if a new unit price should be negotiated.

(ii) *New items.* Unit prices of new items shall be negotiated.

(2) A lump sum to be negotiated.

(3) *Cost reimbursement*—the actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

(c) For each change order not in excess of $100,000 the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(d) For each change order in excess of $100,000, the contractor shall submit to the grantee for review sufficient cost and pricing data as described in paragraphs (d) (1) through (6) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(1) As a minimum, proposed change order costs shall be presented on EPA Form 5700–41 on which the contractor shall certify that proposed costs reflect complete, current, and accurate cost and pricing data applicable to the date of the change order.

(2) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price change orders and a specific total dollar amount of profit will be set forth separately in the cost summary for cost reimbursement change orders.

(3) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed change order costs. EPA normally requires more detailed documentation only when the contractor is unable to certify that proposed change order cost data are complete, current, and accurate. EPA may, on a selected basis, perform a detailed cost analysis on any change order.

(4) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used for the determination and allowability of costs under grants. The contractor's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the contract, this subpart and the cost principles included in 41 CFR 1–15.2 and 1–15.4. Examples of costs which are not allowable under those cost principles include, but are not limited to, entertainment, interest on borrowed capital and bad debts.

(5) For costs under cost reimbursement change orders, the contractor shall have an accounting system which accounts for such costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation and segregation of allowable and unallowable change orders. Allowable change order costs shall be determined in accordance with paragraph (d)(4) of this section. The contractor must propose and account for such costs in a manner consistent with his normal accounting procedures.

(6) Change orders awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where subsequent audit substantiates that such certification was not based on complete, current and accurate cost and pricing data and on costs allowable under the appropriate FPR cost principles (41 CFR 1–15.2 and 1–15.4) at the time of change order execution.

(e) *EPA review.* In addition to the requirements of §§ 35.935–10 (copies of contract documents) and 35.935–11 (project changes), the grantee shall submit, before the execution of any change order in excess of $100,000, to the EPA Project Officer for review:

(1) The cost and pricing data the contractor submitted;

(2) A certification of review and acceptance of the contractor's cost or price; and

(3) A copy of the proposed change order.

(f) *Profit.* The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit

based on the contractor's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of negotiated change orders to construction contracts under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. The grantee should review the estimate or profit as he reviews all other elements of price.

(g) *Related work.* Related work shall not be split into two amendments or change orders merely to keep it under $100,000 and thereby avoid the requirements of paragraph (d) of this section. For change orders which include both additive and deductive items:

(1) If any single item (additive or deductive) exceeds $100,000, the requirements of paragraph (d) of this section shall be applicable.

(2) If no single additive or deductive item has a value of $100,000, but the total price of the change order is over $100,000, the requirements of paragraph (d) of this section shall be applicable.

(3) If the total of additive items of work in the change order exceeds $100,000, or the total of deductive items of work in the change order exceeds $100,000, and the net price of the change order is less than $100,000, the requirements of paragraph (d) of this section shall apply.

§ 35.938–6 Progress payments to contractors.

(a) *Policy.* EPA policy is that, except as State law otherwise provides, grantees should make prompt progress payments to prime contractors and prime contractors should make prompt progress payment to subcontractors and suppliers for eligible construction, material, and equipment costs, including those of undelivered specifically manufactured equipment, incurred under a contract under an EPA construction grant.

(b) *Conditions of progress payments.* For purposes of this section, progress payments are defined as follows:

(1) Payments for work in place.

(2) Payments for materials or equipment which have been delivered to the construction site, or which are stockpiled in the vicinity of the construction site, in accordance with the terms of the contract, when conditional or final acceptance is made by or for the grantee. The grantee shall assure that items for which progress payments have been made are adequately insured and are protected through appropriate security measures. Costs of such insurance and security are allowable costs in accordance with § 35.940.

(3) Payments for undelivered specifically manufactured items or equipment (excluding off-the-shelf or catalog items), as work on them progresses. Such payments must be made if provisions therefor are included in the bid and contract documents. Such provisions may be included at the option of the grantee only when all of the following conditions exist:

(i) The equipment is so designated in the project specifications;

(ii) The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and

(iii) A fabrication period of more than 6 months is anticipated.

(c) *Protection of progress payments made for specifically manufactured equipment.* The grantee will assure protection of the Federal interest in progress payments made for items or equipment referred to in paragraph (b)(3) of this section. This protection must be acceptable to the grantee and must take the form of:

(1) Securities negotiable without recourse, condition or restrictions, a progress payment bond, or an irrevocable letter of credit provided to the grantee through the prime contractor by the subcontractor or supplier; and,

(2) For items or equipment in excess of $200,000 in value which are manufactured in a jurisdiction in which the Uniform Commercial Code is applicable, the creation and perfection of a security interest under the Uniform Commercial Code reasonably adequate to protect the interests of the grantee.

(d) *Limitations on progress payments for specifically manufactured equipment.* (1) Progress payments made for specifically manufactured equipment or items shall be limited to the following:

(i) A first payment upon submission by the prime contractor of shop drawings for the equipment or items in an

amount not exceeding 15 percent of the contract or item price plus appropriate and allowable higher tier costs; and

(ii) Subsequent to the grantee's release or approval for manufacture, additional payments not more frequently than monthly thereafter up to 75 percent of the contract or item price plus appropriate and allowable higher tier costs. However, payment may also be made in accordance with the contract and grant terms and conditions for ancillary onsite work before delivery of the specifically manufactured equipment or items.

(2) In no case may progress payments for undelivered equipment or items under paragraph (d)(1)(i) or (d)(1)(ii) of this section be made in an amount greater than 75 percent of the cumulative incurred costs allocable to contract performance with respect to the equipment or items. Submission of a request for any such progress payments must be accompanied by a certification furnished by the fabricator of the equipment or item that the amount of progress payment claimed constitutes not more than 75 percent of cumulative incurred costs allocable to contract performance, and in addition, in the case of the first progress payment request, a certification that the amount claimed does not exceed 15 percent of the contract or item price quoted by the fabricator.

(3) As used in this section, the term *costs allocable to contract performance* with respect to undelivered equipment or items includes all expenses of contract performance which are reasonable, allocable to the contract, consistent with sound and generally accepted accounting principles and practices consistently applied, and which are not excluded by the contract.

(e) *Enforcement.* A subcontractor or supplier which is determined by the Regional Administrator to have frustrated the intent of the provisions regarding progress payments for major equipment or specifically manufactured equipment through intentional forfeiture of its bond or failure to deliver the equipment may be determined nonresponsible and ineligible for further work under EPA grants.

(f) *Contract provisions.* Where applicable, appropriate provisions regarding progress payments must be included in each contract and subcontract. Grantees must use clauses acceptable to the EPA Regional Administrator.

(g) *Implementation.* The foregoing progress payments policy should be implemented in invitations for bids under step 3 grants. If provision for progress payments is made after contract award, it must be for consideration that the grantee deems adequate.

§ 35.938–7 Retention from progress payments.

(a) The grantee may retain a portion of the amount otherwise due the contractor. Except as State law otherwise provides, the amount the grantee retains shall be limited to the following:

(1) Withholding of not more than 10 percent of the payment claimed until work is 50 percent complete;

(2) When work is 50 percent complete, reduction of the withholding to 5 percent of the dollar value of all work satisfactorily completed to date, provided that the contractor is making satisfactory progress and there is no specific cause for greater withholding;

(3) When the work is substantially complete (operational or beneficial occupancy), the withheld amount shall be further reduced below 5 percent to only that amount necessary to assure completion.

(4) The grantee may reinstate up to 10 percent withholding if the grantee determines, at its discretion, that the contractor is not making satisfactory progress or there is other specific cause for such withholding.

(5) The grantee may accept securities negotiable without recourse, condition or restrictions, a release of retainage bond, or an irrevocable letter of credit provided by the contractor instead of all or part of the cash retainage.

(b) The foregoing retention policy shall be implemented with respect to all step 3 projects for which plans and specifications are approved after March 1, 1976. Appropriate provision to assure compliance with this policy must be included in the bid documents for such projects initially or by addendum before the bid submission date, and as a special condition in the grant agreement or in a grant amendment. For all previous active projects, the grantee

may implement the foregoing policy through contract amendment upon written request to the grantee by the contractor upon consideration that the grantee deems adequate.

(c) Under § 30.620–3 of this subchapter, a grantee who delays disbursement of grant funds will be required to credit to the United States all interest earned on those funds.

§ 35.938–8 Required construction contract provisions.

Each construction contract must include the ''Supplemental General Conditions'' set forth in appendix C–2 to this subpart.

§ 35.938–9 Subcontracts under construction contracts.

(a) The award or execution of subcontracts by a prime contractor under a construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by prime contractors in awarding or executing subcontracts are not required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.938 except those specifically stated in this section. In addition, the bid protest procedures of § 35.939 are not available to parties executing subcontracts with prime contractors except as specifically provided in that section.

(b) The award or execution of subcontracts by a prime contractor under a formally advertised, competitively bid, fixed price construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by such prime contractors in awarding or executing such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) [Reserved]

(3) Section 35.936–13 (Specifications);

(4) Section 35.936–15 (Limitations on subagreement award);

(5) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(6) Section 35.938–5(d) (Negotiation of contract amendments); and

(7) Applicable subagreement clauses (see appendix C–2, clauses 8, 10, 14, 15, 16; note clause 11).

(c) The award of subcontracts under construction contracts not described above in paragraph (b) of this section and the procurement and negotiation procedures of prime contractors on contracts not meeting that description must comply with paragraphs (b)(1) through (4) of this section as well as the principles of § 35.938–5.

[43 FR 44049, Sept. 27, 1978, as amended at 73 FR 15922, Mar. 26, 2008]

§ 35.939 Protests.

(a) *General.* A protest based upon an alleged violation of the procurement requirements of §§ 35.936 through 35.938–9 of this subpart may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest. Any such protest must be received by the grantee within the time period in paragraph (b)(1) of this section. The grantee is responsible for resolution of the protest before the taking of the protested action, in accordance with paragraph (d) of this section, except as otherwise provided by paragraph (j) or (k) or § 35.938–4(h)(5). The Regional Administrator will review grantee protest determinations in accordance with paragraph (e) of this section, if a timely request for such review is filed under paragraph (b)(2) of this section. In the case of protests which he determines are untimely, frivolous, or without merit, the Regional Administrator may take such actions as are described in paragraphs (f)(7), (i)(2), and (k) of this section.

(b) *Time limitations.* (1) A protest under paragraph (d) of this section should be made as early as possible during the procurement process (for example, immediately after issuance of a solicitation for bids) to avoid disruption of or unnecessary delay to the procurement process. A protest authorized by paragraph (d) of this section must be received by the grantee within 1 week after the basis for the protest is known or should have been known, whichever is earlier (generally, for formally advertised procurement, after bid opening, within 1 week after the basis for the protest is, or should have been, known).

(i) However, in the case of an alleged violation of the specification requirements of § 35.936–13 (e.g., that a product

fails to qualify as an ''or equal'') or other specification requirements of this subpart, a protest need not be filed prior to the opening of bids. But the grantee may resolve the issue before receipt of bids or proposals through a written or other formal determination, after notice and opportunity to comment is afforded to any party with a direct financial interest.

(ii) In addition, where an alleged violation of the specification requirements of §35.936–13 or other requirements of this subpart first arises subsequent to the receipt of bids or proposals, the grantee must decide the protest if the protest was received by the grantee within 1 week of the time that the grantee's written or other formal notice is first received.

(2) A protest appeal authorized by paragraph (e) of this section must be received by the Regional Administrator within 1 week after the complainant has received the grantee's determination.

(3) If a protest is mailed, the complaining party bears the risk of nondelivery within the required time period. It is suggested that all documents transmitted in accordance with this section be mailed by certified mail (return receipt requested) or otherwise delivered in a manner which will objectively establish the date of receipt. Initiation of protest actions under paragraph (d) or (e) of this section may be made by brief telegraphic notice accompanied by prompt mailing or other delivery of a more detailed statement of the basis for the protest. Telephonic protests will not be considered.

(c) *Other initial requirements.* (1) The initial protest document must briefly state the basis for the protest, and should—

(i) Refer to the specific section(s) of this subpart which allegedly prohibit the procurement action;

(ii) Specifically request a determination pursuant to this section;

(iii) Identify the specific procurement document(s) or portion(s) of them in issue; and

(iv) Include the name, telephone number, and address of the person representing the protesting party.

(2) The party filing the protest must concurrently transmit a copy of the initial protest document and any attached documentation to all other parties with a direct financial interest which may be adversely affected by the determination of the protest (generally, all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied or sustained) and to the appropriate EPA Regional Administrator.

(d) *Grantee determination.* (1) The grantee is responsible for the initial resolution of protests based upon alleged violations of the procurement requirements of this subpart.

(2) When the grantee receives a timely written protest, he must defer the protested procurement action (see paragraph (h) of this section) and:

(i) Afford the complaining party and interested parties an opportunity to present arguments in support of their views in writing or at a conference or other suitable meeting (such as a city council meeting),

(ii) Inform the complainant and other interested parties of the procedures which the grantee will observe for resolution of the protest;

(iii) Obtain an appropriate extension of the period for acceptance of the bid and bid bond(s) of each interested party, where applicable; failure to agree to a suitable extension of such bid and bid bond(s) by the party which initiated the protest shall be cause for summary dismissal of the protest by the grantee or the Regional Administrator; and

(iv) Promptly deliver (preferably by certified mail, return receipt requested, or by personal delivery) its written determination of the protest to the complaining party and to each other participating party.

(3) The grantee's determination must be accompanied by a legal opinion addressing issues arising under State, territorial, or local law (if any) and, where step 3 construction is involved, by an engineering report, if appropriate.

(4) The grantee should decide the protest as promptly as possible—generally within 3 weeks after receipt of a protest, unless extenuating circumstances require a longer period of time for proper resolution of the protest.

(e) *Regional Administrator review.* (1) A party with a direct financial interest adversely affected by a grantee determination made under paragraph (d) with respect to a procurement requirement of this subpart may submit a written request to the Regional Administrator for his review of such determination. Any such request must be in writing, must adequately state the basis for the protest (including reference to the specific section(s) of this subpart alleged to prohibit the procurement action), and must be received by the Regional Administrator within 1 week after the complaining party has received the grantee's determination of the protest. A copy of the grantee's determination and other documentation in support of the request for review shall be transmitted with the request.

(2) The Regional Counsel or his delegee will afford both the grantee and the complaining party, as well as any other party with a financial interest which may be adversely affected by determination of the protest, an opportunity to present arguments in support of their views in writing or at a conference at a time and place convenient to the parties as determined by the Regional Counsel or his delegee, and he shall thereafter promptly submit in writing his report and recommendations (or recommended determination) concerning the protest to the Regional Administrator.

(3) Any such conference should be held within not more than 10 days after receipt of the request for review and the report should be transmitted to the Regional Administrator within 10 days after the date set for receipt of the participants' written materials or for the conference. The Regional Administrator should transmit his determination of the protest with an adequate explanation thereof to the grantee and simultaneously to each participating party within 1 week after receipt of the report and recommendations. His determination shall constitute final agency action, from which there shall be no further administrative appeal. The Regional Counsel may extend these time limitations, where appropriate.

(4) The Regional Administrator may review the record considered by the grantee, and any other documents or arguments presented by the parties, to determine whether the grantee has complied with this subpart and has a rational basis for its determination.

(5) If a determination is made by the Regional Administrator which is favorable to the complainant, the grantee's procurement action (for example, contract award) must be taken in accordance with such determination.

(f) *Procedures.* (1) Where resolution of an issue properly raised with respect to a procurement requirement of this subpart requires prior or collateral resolution of a legal issue arising under State or local law, and such law is not clearly established in published legal decisions of the State or other relevant jurisdiction, the grantee or Regional Administrator may rely upon:

(i) An opinion of the grantee's legal counsel adequately addressing the issue (see § 35.936–2(b));

(ii) The established or consistent practice of the grantee, to the extent appropriate; or

(iii) The law of other States or local jurisdictions as established in published legal decisions; or

(iv) If none of the foregoing adequately resolve the issue, published decisions of the Comptroller General of the United States (U.S. General Accounting Office) or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(2) For the determination of Federal issues presented by the protest, the Regional Administrator may rely upon:

(i) Determinations of other protests decided under this section, unless such protests have been reversed; and

(ii) Decisions of the Comptroller General of the United States or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(3) The Regional Counsel may establish additional procedural requirements or deadlines for the submission of materials by parties or for the accomplishment of other procedures. Where time limitations are established by this section or by the Regional Counsel, participants must seek to accomplish the required action as

promptly as possible in the interest of expediting the procurement action.

(4) A party who submits a document subsequent to initiation of a protest proceeding under paragraph (d) or (e) of this section must simultaneously furnish each other party with a copy of such document.

(5) The procedures established by this section are not intended to preclude informal resolution or voluntary withdrawal of protests. A complainant may withdraw its appeal at any time, and the protest proceeding shall thereupon be terminated.

(6) The Regional Administrator may utilize appropriate provisions of this section in the discharge of his responsibility to review grantee procurement under 40 CFR 35.935–2.

(7) A protest may be dismissed for failure to comply with procedural requirements of this section.

(g) *Burden of proof.* (1) In proceedings under paragraphs (d) and (e) of this section, if the grantee proposes to award a formally advertised, competitively bid, fixed price contract to a party who has submitted the apparent lowest price, the party initiating the protest will bear the burden of proof in the protest proceedings.

(2) In the proceedings under paragraph (e) of this section—

(i) If the grantee proposes to award a formally advertised, competitively bid, fixed-price contract to a bidder other than the bidder which submitted the apparent lowest price, the grantee will bear the burden of proving that its determination concerning responsiveness is in accordance with this subchapter; and

(ii) If the basis for the grantee's determination is a finding of nonresponsibility, the grantee must establish and substantiate the basis for its determination and must adequately establish that such determination has been made in good faith.

(h) *Deferral of procurement action.* Upon receipt of a protest under paragraph (d) of this section, the grantee must defer the protested procurement action (for example, defer the issuance of solicitations, contract award, or issuance of notice to proceed under a contract) until 10 days after delivery of its determination to the participating parties. (The grantee may receive or open bids at it own risk, if it considers this to be in its best interest; and see § 35.938–4(h)(5).) Where the Regional Administrator has received a written protest under paragraph (e) of this section, he must notify the grantee promptly to defer its protested procurement action until notified of the formal or informal resolution of the protest.

(i) *Enforcement.* (1) Noncompliance with the procurement provisions of this subchapter by the grantee shall be cause for enforcement action in accordance with one or more of the provisions of § 35.965 of this subpart.

(2) If the Regional Administrator determines that a protest prosecuted pursuant to this section is frivolous, he may determine the party which prosecuted such protest to be nonresponsible and ineligible for future contract award (see also paragraph (k) of this section).

(j) *Limitation.* A protest may not be filed under this section with respect to the following:

(1) Issues not arising under the procurement provisions of this subchapter; or

(2) Issues relating to the selection of a consulting engineer, provided that a protest may be filed only with respect to the mandatory procedural requirements of §§ 35.937 through 35.937–9;

(3) Issues primarily determined by State or local law or ordinances and as to which the Regional Administrator, upon review, determines that there is no contravening Federal requirement and that the grantee's action has a rational basis (see paragraph (e)(4) of this section).

(4) Provisions of Federal regulations applicable to direct Federal contracts, unless such provisions are explicitly referred to or incorporated in this subpart;

(5) Basic project design determinations (for example, the selection of incineration versus other methods of disposal of sludge);

(6) Award of subcontracts or issuance of purchase orders under a formally advertised, competitively bid, lump-sum construction contract. However, protest may be made with respect to alleged violation of the following:

(i) Specification requirements of §35.936–13; or

(ii) Provisions of this subpart applicable to the procurement procedures, negotiation or award of subcontracts or issuance of purchase orders under §§35.937–12 (subcontracts under subagreements for architectural or engineering services) or §35.938–9 (subcontracts under construction contracts).

(k) *Summary disposition.* The Regional Administrator may summarily dismiss a protest, without proceedings under paragraph (d) or (e) of this section, if he determines that the protest is untimely, frivolous or without merit—for example, that the protested action of the grantee primarily involves issues of State or local law. Any such determination shall refer briefly to the facts substantiating the basis for the determination.

(l) *Index.* The EPA General Counsel will publish periodically as a notice document in the FEDERAL REGISTER an index of Regional Administrator protest determinations. (See, e.g., 43 FR 29085, July 5, 1978.)

§35.940 Determination of allowable costs.

The grantee will be paid, upon request in accordance with §35.945, for the Federal share of all necessary costs within the scope of the approved project and determined to be allowable in accordance with §30.705 of this chapter, this subpart, and the grant agreement.

§35.940–1 Allowable project costs.

Allowable costs include:

(a) Costs of salaries, benefits, and expendable material the grantee incurs for the project, except as provided in §35.940–2(g);

(b) Costs under construction contracts;

(c) Professional and consultant services;

(d) Facilities planning directly related to the treatment works;

(e) Sewer system evaluation (§35.927);

(f) Project feasibility and engineering reports;

(g) Costs required under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4621 *et seq.*, 4651 *et seq.*), and part 4 of this chapter;

(h) Costs of complying with the National Environmental Policy Act, including costs of public notices and hearings;

(i) Preparation of construction drawings, specifications, estimates, and construction contract documents;

(j) Landscaping;

(k) Removal and relocation or replacement of utilities, for which the grantee is legally obligated to pay;

(l) Materials acquired, consumed, or expended specifically for the project;

(m) A reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operations;

(n) Development and preparation of an operation and maintenance manual;

(o) A plan of operation, in accordance with guidance issued by the Administrator;

(p) Start-up services for new treatment works, in accordance with guidance issued by the Administrator;

(q) Project identification signs (§30.625–3 of this chapter);

(r) Development of a municipal pretreatment program approvable under part 403 of this chapter, and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program;

(s) Costs of complying with the procurement requirements of these regulations (see §35.936–20).

(t) Reasonable costs of public participation incurred by grantees which are identified in a public participation work plan, or which are otherwise approved by EPA, shall be allowable.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§35.940–2 Unallowable costs.

Costs which are not necessary for the construction of a treatment works project are unallowable. Such costs include, but are not limited to:

(a) Basin or areawide planning not directly related to the project;

(b) Bonus payments not legally required for completion of construction before a contractual completion date;

(c) Personal injury compensation or damages arising out of the project,

whether determined by adjudication, arbitration, negotiation, or otherwise;

(d) Fines and penalties due to violations of, or failure to comply with, Federal, State, or local laws;

(e) Costs outside the scope of the approved project;

(f) Interest on bonds or any other form of indebtedness required to finance the project costs;

(g) Ordinary operating expenses of local government, such as salaries and expenses of a mayor, city council members, or city attorney, except as provided in § 35.940–4;

(h) Site acquisition (for example, sewer rights-of-way, sewage treatment plantsite, sanitary landfills and sludge disposal areas) except as otherwise provided in § 35.940–3(a);

(i) Costs for which payment has been or will be received under another Federal assistance program;

(j) Costs of equipment or material procured in violation of § 35.938–4(h);

(k) Costs of studies under § 35.907 (d)(6) and (7) when performed solely for the purpose of seeking an allowance for removal of pollutants under part 403 of this chapter;

(l) Costs of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works;

(m) Construction of privately-owned treatment works, including pretreatment facilities, except as authorized by section 201(h) of the Act and § 35.918;

(n) Preparation of a grant application, including a plan of study.

§ 35.940–3 Costs allowable, if approved.

Certain direct costs are sometimes necessary for the construction of a treatment works. The following costs are allowable if reasonable and if the Regional Administrator approves them in the grant agreement.

(a) Land acquired after October 17, 1972, that will be an integral part of the treatment process, or that will be used for ultimate disposal of residues resulting from such treatment (for example, land for spray irrigation of sewage effluent).

(b) Land acquired after December 26, 1977, that will be used for storage of treated wastewater in land treatment systems before land application.

(c) Land acquired after December 26, 1977, that will be used for composting or temporary storage of compost residues which result from wastewater treatment, if EPA has approved a program for use of the compost.

(d) Acquisition of an operable portion of a treatment works. This type of acquisition is generally not allowable except when determined by the Regional Administrator in accordance with guidance issued by the Administrator.

(e) Rate determination studies required under § 35.925–11.

(f) A limited amount of end-of-pipe sampling and associated analysis of industrial discharges to municipal treatment works as provided in § 35.907(f).

§ 35.940–4 Indirect costs.

Indirect costs shall be allowable in accordance with an indirect cost agreement negotiated and incorporated in the grant agreement. An indirect cost agreement must identify those cost elements allowable under § 35.940–1. Where the benefits derived from indirect services cannot be readily determined, a lump sum for overhead may be negotiated if EPA determines that this amount will be approximately the same as the actual indirect costs.

§ 35.940–5 Disputes concerning allowable costs.

The grantee should seek to resolve any questions relating to cost allowability or allocation at its earliest opportunity (if possible, before execution of the grant agreement). Final determinations concerning the allowability of costs shall be conclusive unless appealed within 30 days in accordance with the ''Disputes'' provisions of part 30, subpart J, of this subchapter.

§ 35.945 Grant payments.

The grantee shall be paid the Federal share of allowable project costs incurred within the scope of an approved project and which are currently due and payable from the grantee (i.e., not including withheld or deferred amounts), subject to the limitations of §§ 35.925–18, 35.930–5, 35.930–6, and 35.965 (b) and (c), up to the grant amount set forth in the grant agreement and any

amendments thereto. Payments for engineering services for step 1, 2 or 3 shall be made in accordance with § 35.937–10 and payments for step 3 construction contracts shall be made in accordance with §§ 35.938–6 and 35.938–7. All allowable costs incurred before initiation of construction of the project must be claimed in the application for grant assistance for that project before the award of the assistance or no subsequent payment will be made for the costs.

(a) *Initial request for payment.* Upon award of grant assistance, the grantee may request payment for the unpaid Federal share of actual or estimated allowable project costs incurred before grant award subject to the limitations of § 35.925–18. Payment for such costs shall be made in accordance with the negotiated payment schedule included in the grant agreement.

(b) *Interim requests for payment.* The grantee may submit requests for payments for allowable costs in accordance with the negotiated payment schedule included in the grant agreement. Upon receipt of a request for payment, subject to the limitations set forth in § 30.615–3 of this subchapter and §§ 35.935–12, 35.935–13, and 35.935–16, the Regional Administrator shall cause to be disbursed from available appropriated funds such amounts as are necessary so that the total amount of Federal payments to the grantee for the project is equal to the Federal share of the actual or estimated allowable project costs incurred to date, as certified by the grantee in its most recent request for payment. Generally, payments will be made within 20 days after receipt of a request for payment.

(c) *Adjustment.* At any time before final payment under the grant, the Regional Administrator may cause any request(s) for payment to be reviewed or audited. Based on such review or audit, any payment may be reduced for prior overpayment or increased for prior underpayment.

(d) *Refunds, rebates, credits, etc.* The Federal share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be credited to the current State allotment or paid to the United States. Reasonable expenses incurred by the grantee for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable under the grant when approved by the Regional Administrator.

(e) *Final payment.* After completion of final inspection under § 35.935–14, approval of the request for payment which the grantee designates as the ''final payment request,'' and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the Regional Administrator shall pay to the grantee any balance of the Federal share of allowable project costs which has not already been paid. The grantee must submit the final payment request promptly after final inspection.

(f) *Assignment and release.* By its acceptance of final payment, the grantee agrees to assign to the United States the Federal share of refunds, rebates, credits or other amounts (including any interest) properly allocable to costs for which the grantee has been paid by the Government under the grant. The grantee thereby also releases and discharges the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to exceptions previously specified in writing between the Regional Administrator and the grantee.

(g) *Payment of costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.* Notwithstanding the provisions of paragraph (a) of this section, if the Regional Administrator determines it is necessary for the expeditious completion of a project, he may make advance payment after grant award under § 4.502(c) of this subchapter for the EPA share of the cost of any payment of relocation assistance by the grantee. The requirements in § 30.615–1 (b) and (d) of this subchapter apply to any advances of funds for assistance payments.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.950 Suspension, termination or annulment of grants.

Grants may be suspended under § 30.915, or terminated or annulled under § 30.920. The State agency shall be concurrently notified in writing of any such action.

§ 35.955 Grant amendments to increase grant amounts.

Grant agreements may be amended under § 30.900–1 of this chapter for project changes which have been approved under §§ 30.900 and 35.935–11 of this subchapter. However, no grant agreement may be amended to increase the amount of a grant unless the State agency has approved the grant increase from available State allotments and reallotments under § 35.915.

§ 35.960 Disputes.

(a) The Regional Administrator's final determination on the ineligibility of a project (see § 35.915(h)) or a grant applicant (see § 35.920–1), on the Federal share (see § 35.930–5(b)), or on any dispute arising under a grant shall be final and conclusive unless the applicant or grantee appeals within 30 days from the date of receipt of the final determination. (See subpart J of part 30 of this subchapter.)

(b) The EPA General Counsel will publish periodically as a Notice document in the FEDERAL REGISTER a digest of grant appeals decisions.

§ 35.965 Enforcement.

If the Regional Administrator determines that the grantee has failed to comply with any provision of this subpart, he may impose any of the following sanctions:

(a) The grant may be terminated or annulled under § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to 10 percent may be withheld (see § 30.615–3 of this chapter);

(d) Project work may be suspended under § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted if it is legally available and appropriate.

§ 35.970 Contract enforcement.

(a) *Regional Administrator authority.* At the request of a grantee, the Regional Administrator is authorized to provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made and to intervene in any civil action involving the enforcement of such contracts, including contract disputes which are the subject of either arbitration or court action. Any assistance is to be provided at the discretion of the Regional Administrator and in a manner determined to best serve the public interest. Factors which the Regional Administrator may consider in determining whether to provide assistance are:

(1) Available agency resources.

(2) Planned or ongoing enforcement action.

(3) The grantee's demonstration of good faith to resolve contract matters at issue.

(4) The grantee's adequate documentation.

(5) The Federal interest in the contract matters at issue.

(b) *Grantee request.* The grantee's request for technical or legal assistance should be submitted in writing and be accompained by documentation adequate to inform the Regional Administrator of the nature and necessity of the requested assistance. A grantee may orally request assistance from the Regional Administrator on an emergency basis.

(c) *Privity of contract.* The Regional Administrator's technical or legal involvement in any contract dispute will not make EPA a party to any contract entered into by the grantee. (See § 35.936–8.)

(d) *Delegation to States.* The authority to provide technical and legal assistance in the administration of contract matters described in this section may

be delegated to a State agency under subpart F of this part if the State agency can demonstrate that it has the appropriate legal authority to undertake such functions.

APPENDIX A TO SUBPART E OF PART 35—COST-EFFECTIVENESS ANALYSIS GUIDELINES

1. *Purpose.* These guidelines represent Agency policies and procedures for determining the most cost-effective waste treatment management system or component part.

2. *Authority.* These guidelines are provided under sections 212(2)(C) and 217 of the Clean Water Act.

3. *Applicability.* These guidelines, except as otherwise noted, apply to all facilities planning under step 1 grant assistance awarded after September 30, 1978. The guidelines also apply to State or locally financed facilities planning on which subsequent step 2 or step 3 Federal grant assistance is based.

4. *Definitions.* Terms used in these guidelines are defined as follows:

a. *Waste treatment management system.* Used synonymously with ''complete waste treatment system'' as defined in §35.905 of this subpart.

b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

c. *Planning period.* The period over which a waste treatment management system is evaluated for cost-effectiveness. The planning period begins with the system's initial operation.

d. *Useful life.* The estimated period of time during which a treatment works or a component of a waste treatment management system will be operated.

e. *Disaggregation.* The process or result of breaking down a sum total of population or economic activity for a State or other jurisdiction (i.e., designated 208 area or SMSA) into smaller areas or jurisdictions.

5. *Identification, selection, and screening of alternatives.* a. *Identification of alternatives.* All feasible alternative waste management systems shall be initially identified. These alternatives should include systems discharging to receiving waters, land application systems, on-site and other non-centralized systems, including revenue generating applications, and systems employing the reuse of wastewater and recycyling of pollutants. In identifying alternatives, the applicant shall consider the possibility of no action and staged development of the system.

b. *Screening of alternatives.* The identified alternatives shall be systematically screened to determine those capable of meeting the applicable Federal, State and local criteria.

c. *Selection of alternatives.* The identified alternatives shall be initially analyzed to determine which systems have cost-effective potential and which should be fully evaluated according to the cost-effectiveness analysis procedures established in the guidelines.

d. *Extent of effort.* The extent of effort and the level of sophistication used in the cost-effectiveness analysis should reflect the project's size and importance. Where processes or techniques are claimed to be innovative technology on the basis of the cost reduction criterion contained in paragraph 6e(1) of appendix E to this subpart, a sufficiently detailed cost analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

6. *Cost-effectiveness analysis procedures.*

a. *Method of analysis.* The resources costs shall be determined by evaluating opportunity costs. For resources that can be expressed in monetary terms, the analysis will use the interest (discount) rate established in paragraph 6e. Monetary costs shall be calculated in terms of present worth values or equivalent annual values over the planning period defined in section 6b. The analysis shall descriptively present nonmonetary factors (e.g., social and environmental) in order to determine their significance and impact. Nonmonetary factors include primary and secondary environmental effects, implementation capability, operability, performance reliability and flexibility. Although such factors as use and recovery of energy and scarce resources and recycling of nutrients are to be included in the monetary cost analysis, the non-monetary evaluation shall also include them. The most cost-effective alternative shall be the waste treatment management system which the analysis determines to have the lowest present worth or equivalent annual value unless nonmonetary costs are overriding. The most cost-effective alternative must also meet the minimum requirements of applicable effluent limitations, groundwater protection, or other applicable standards established under the Act.

b. *Planning period.* The planning period for the cost-effectiveness analysis shall be 20 years.

c. *Elements of monetary costs.* The monetary costs to be considered shall include the total value of the resources which are attributable to the waste treatment management system or to one of its component parts. To determine these values, all monies necessary for capital construction costs and operation and maintenance costs shall be identified.

(1) Capital construction costs used in a cost-effective analysis shall include all contractors' costs of construction including

overhead and profit, costs of land, relocation, and right-of-way and easement acquisition; costs of design engineering, field exploration and engineering services during construction; costs of administrative and legal services including costs of bond sales; start-up costs such as operator training; and interest during construction. Capital construction costs shall also include contingency allowances consistent with the cost estimate's level of precision and detail.

(2) The cost-effectiveness analysis shall include annual costs for operation and maintenance (including routine replacement of equipment and equipment parts). These costs shall be adequate to ensure effective and dependable operation during the system's planning period. Annual costs shall be divided between fixed annual costs and costs which would depend on the annual quantity of waste water collected and treated. Annual revenues generated by the waste treatment management system through energy recovery, crop production, or other outputs shall be deducted from the annual costs for operation and maintenance in accordance with guidance issued by the Administrator.

d. *Prices.* The applicant shall calculate the various components of costs on the basis of market prices prevailing at the time of the cost-effectiveness analysis. The analysis shall not allow for inflation of wages and prices, except those for land, as described in paragraph 6h(1) and for natural gas. This stipulation is based on the implied assumption that prices, other than the exceptions, for resources involved in treatment works construction and operation, will tend to change over time by approximately the same percentage. Changes in the general level of prices will not affect the results of the cost-effectiveness analysis. Natural gas prices shall be escalated at a compound rate of 4 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified use of a greater or lesser percentage based upon regional differentials between historical natural gas price escalation and construction cost escalation. Land prices shall be appreciated as provided in paragraph 6h(1). Both historical data and future projections support the gas and land price escalations relative to those for other goods and services related to waste water treatment. Price escalation rates may be updated periodically in accordance with Agency guidelines.

e. *Interest (discount) rate.* The rate which the Water Resources Council establishes annually for evaluation of water resource projects shall be used.

f. *Interest during construction.* (1) Where capital expenditures can be expected to be fairly uniform during the construction period, interest during construction may be calculated at $I=1/2PCi$ where:

I=the interest accrued during the construction period,
P=the construction period in years,
C=the total capital expenditures,
i=the interest rate (discount rate in section 6e).

(2) Where expenditures will not be uniform, or when the construction period will be greater than 4 years, interest during construction shall be calculated on a year-by-year basis.

g. *Useful life.* (1) The treatment works' useful life for a cost-effectiveness analysis shall be as follows:

Land—permanent.
Waste water conveyance structures (includes collection systems, outfall pipes, interceptors, force mains, tunnels, etc.)—50 years.
Other structures (includes plant building, concrete process tankage, basins, lift stations structures, etc.)—30–50 years.
Process equipment—15–20 years.
Auxiliary equipment—10–15 years.

(2) Other useful life periods will be acceptable when sufficient justification can be provided. Where a system or a component is for interim service, the anticipated useful life shall be reduced to the period for interim service.

h. *Salvage value.* (1) Land purchased for treatment works, including land used as part of the treatment process or for ultimate disposal of residues, may be assumed to have a salvage value at the end of the planning period at least equal to its prevailing market value at the time of the analysis. In calculating the salvage value of land, the land value shall be appreciated at a compound rate of 3 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified the use of a greater or lesser percentage based upon historical differences between local land cost escalation and construction cost escalation. The land cost escalation rate may be updated periodically in accordance with Agency guidelines. Right-of-way easements shall be considered to have a salvage value not greater than the prevailing market value at the time of the analysis.

(2) Structures will be assumed to have a salvage value if there is a use for them at the end of the planning period. In this case, salvage value shall be estimated using straight line depreciation during the useful life of the treatment works.

(3) The method used in paragraph 6h(2) may be used to estimate salvage value at the end of the planning period for phased additions of process equipment and auxiliary equipment.

(4) When the anticipated useful life of a facility is less than 20 years (for analysis of interim facilities), salvage value can be

claimed for equipment if it can be clearly demonstrated that a specific market or reuse opportunity will exist.

7. *Innovative and alternative wastewater treatment processes and techniques.*

a. Beginning October 1, 1978, the capital costs of publicly owned treatment works which use processes and techniques meeting the criteria of appendix E to this subpart and which have only a water pollution control function, may be eligible if the present worth cost of the treatment works is not more than 115 percent of the present worth cost of the most cost-effective pollution control system, exclusive of collection sewers and interceptors common to the two systems being compared, by 115 percent, except for the following situation.

b. Where innovative or alternative unit processes would serve in lieu of conventional unit processes in a conventional waste water treatment plant, and the present worth costs of the nonconventional unit processes are less than 50 percent of the present worth costs of the treatment plant, multiply the present worth costs of the replaced conventional processes by 115 percent, and add the cost of nonreplaced unit processes.

c. The eligibility of multipurpose projects which combine a water pollution control function with another function, and which use processes and techniques meeting the criteria of appendix E to this subpart, shall be determined in accordance with guidance issued by the Administrator.

d. The above provisions exclude individual systems under §35.918. The regional Administrator may allow a grantee to apply the 15-percent preference authorized by this section to facility plans prepared under step 1 grant assistance awarded before October 1, 1978.

8. *Cost-effective staging and sizing of treatment works.*

a. *Population projections.* (1) The disaggregation of State projections of population shall be the basis for the population forecasts presented in individual facility plans, except as noted. These State projections shall be those developed in 1977 by the Bureau of Economic Analysis (BEA), Department of Commerce, unless, as of June 26, 1978, the State has already prepared projections. These State projections may be used instead of the BEA projections if the year 2000 State population does not exceed that of the BEA projection by more than 5 percent. If the difference exceeds this amount, the State must either justify or lower its projection. Justification must be based on the historical and current trends (e.g., energy and industrial development, military base openings) not taken into account in the BEA projections. The State must submit for approval to the Administrator the request and justification for use of State projections higher than the BEA projections. By that time, the State shall issue a public notice of the request. Before the Administrator's approval of the State projection, the Regional Administrator shall solicit public comments and hold a public hearing if important issues are raised about the State projection's validity. State projections and disaggregations may be updated periodically in accordance with Agency guidelines.

(2) Each State, working with designated 208 planning agencies, organizations certified by the Governor under section 174(a) of the Clean Air Act, as amended, and other regional planning agencies in the State's nondesignated areas, shall disaggregate the State population projection among its designated 208 areas, other standard metropolitan statistical areas (SMSA's) not included in the 208 area, and non-SMSA counties or other appropriate jurisdictions. States that had enacted laws, as of June 26, 1978, mandating disaggregation of State population totals to each county for areawide 208 planning may retain this requirement. When disaggregating the State population total, the State shall take into account the projected population and economic activities identified in facility plans, areawide 208 plans and municipal master plans. The sum of the disaggregated projections shall not exceed the State projection. Where a designated 208 area has, as of June 26, 1978, already prepared a population projection, it may be used if the year 2000 population does not exceed that of the disaggregated projection by more than 10 percent. The State may then increase its population projection to include all such variances rather than lower the population projection totals for the other areas. If the 208 area population forecast exceeds the 10 percent allowance, the 208 agency must lower its projection within the allowance and submit the revised projection for approval to the State and the Regional Administrator.

(3) The State projection totals and the disaggregations will be submitted as an output of the statewide water quality management process. The submission shall include a list of designated 208 areas, all SMSA's, and counties or other units outside the 208 areas. For each unit the disaggregated population shall be shown for the years 1980, 1990, and 2000. Each State will submit its projection totals and disaggregations for the Regional Administrator's approval before October 1, 1979. Before this submission, the State shall hold a public meeting on the disaggregations and shall provide public notice of the meeting consistent with part 25 of this chapter. (See §35.917(e).)

(4) When the State projection totals and disaggregations are approved they shall be used thereafter for areawide water quality management planning as well as for facility planning and the needs surveys under section

516(b) of the Act. Within areawide 208 planning areas, the designated agencies, in consultation with the States, shall disaggregate the 208 area projections among the SMSA and non-SMSA areas and then disaggregate these SMSA and non-SMSA projections among the facility planning areas and the remaining areas. For those SMSA's not included within designated 208 planning areas, each State, with assistance from appropriate regional planning agencies, shall disaggregate the SMSA projection among the facility planning areas and the remaining areas within the SMSA. The State shall check the facility planning area forecasts to ensure reasonableness and consistency with the SMSA projections.

(5) For non-SMSA facility planning areas not included in designated areawide 208 areas, the State may disaggregate population projections for non-SMSA counties among facility planning areas and remaining areas. Otherwise, the grantee is to forecast future population growth for the facility planning area by linear extrapolation of the recent past (1960 to present) population trends for the planning area, use of correlations of planning area growth with population growth for the township, county or other larger parent area population, or another appropriate method. A population forecast may be raised above that indicated by the extension of past trends where likely impacts (e.g., significant new energy developments, large new industries, Federal installations, or institutions) justify the difference. The facilities plan must document the justification. These population forecasts should be based on estimates of new employment to be generated. The State shall check individual population forecasts to insure consistency with overall projections for non-SMSA counties and justification for any difference from past trends.

(6) Facilities plans prepared under step 1 grant assistance awarded later than 6 months after Agency approval of the State disaggregations shall follow population forecasts developed in accordance with these guidelines.

b. *Wastewater flow estimates.* (1) In determining total average daily flow for the design of treatment works, the flows to be considered include the average daily base flows (ADBF) expected from residential sources, commercial sources, institutional sources, and industries the works will serve plus allowances for future industries and nonexcessive infiltration/inflow. The amount of nonexcessive infiltration/inflow not included in the base flow estimates presented herein, is to be determined according to the Agency guidance for sewer system evaluation or Agency policy on treatment and control of combined sewer overflows (PRM 75–34).

(2) The estimation of existing and future ADBF, exclusive of flow reduction from combined residential, commercial and institutional sources, shall be based upon one of the following methods:

(a) *Preferred method.* Existing ADBF is estimated based upon a fully documented analysis of water use records adjusted for consumption and losses or on records of wastewater flows for extended dry periods less estimated dry weather infiltration. Future flows for the treatment works design should be estimated by determining the existing per capita flows based on existing sewered resident population and multiplying this figure by the future projected population to be served. Seasonal population can be converted to equivalent full time residents using the following multipliers:

Day-use visitor.....0.1–0.2
Seasonal visitor 0.5–0.8

The preferred method shall be used wherever water supply records or wastewater flow data exist. Allowances for future increases of per capita flow over time will not be approved.

(b) *Optional method.* Where water supply and wastewater flow data are lacking, existing and future ADBF shall be estimated by multiplying a gallon per capita per day (gpcd) allowance not exceeding those in the following table, except as noted below, by the estimated total of the existing and future resident populations to be served. The tabulated ADBF allowances, based upon several studies of municipal water use, include estimates for commercial and institutional sources as well as residential sources. The Regional Administrator may approve exceptions to the tabulated allowances where large (more than 25 percent of total estimated ADBF) commercial and institutional flows are documented.

Description	Gallons per capita per day
Non-SMSA cities and towns with projected total 10-year populations of 5,000 or less	60–70
Other cities and towns	65–80

c. *Flow reduction.* The cost-effectiveness analysis for each facility planning area shall include an evaluation of the costs, cost savings, and effects of flow reduction measures unless the existing ADBF from the area is less than 70 gpcd, or the current population of the applicant municipality is under 10,000, or the Regional Administrator exempts the area for having an effective existing flow reduction program. Flow reduction measures include public education, pricing and regulatory approaches or a combination of these. In preparing the facilities plan and included cost effectiveness analysis, the grantee shall, as a minimum:

(1) Estimate the flow reductions implementable and cost effective when the

treatment works become operational and after 10 and 20 years of operation. The measures to be evaluated shall include a public information program; pricing and regulatory approaches; installation of water meters, and retrofit of toilet dams and low-flow showerheads for existing homes and other habitations; and specific changes in local ordinances, building codes or plumbing codes requiring installations of water saving devices such as water meters, water conserving toilets, showerheads, lavatory faucets, and appliances in new homes, motels, hotels, institutions, and other establishments.

(2) Estimate the costs of the proposed flow reduction measures over the 20-year planning period, including costs of public information, administration, retrofit of existing buildings and the incremental costs, if any, of installing water conserving devices in new homes and establishments.

(3) Estimate the energy reductions; total cost savings for wastewater treatment, water supply and energy use; and the net cost savings (total savings minus total costs) attributable to the proposed flow reduction measures over the planning period. The estimated cost savings shall reflect reduced sizes of proposed wastewater treatment works plus reduced costs of future water supply facility expansions.

(4) Develop and provide for implementing a recommended flow reduction program. This shall include a public information program highlighting effective flow reduction measures, their costs, and the savings of water and costs for a typical household and for the community. In addition, the recommended program shall comprise those flow reduction measures which are cost effective, supported by the public and within the implementation authority of the grantee or another entity willing to cooperate with the grantee.

(5) Take into account in the design of the treatment works the flow reduction estimated for the recommended program.

d. *Industrial flows.* (1) The treatment works' total design flow capacity may include allowances for industrial flows. The allowances may include capacity needed for industrial flows which the existing treatment works presently serves. However, these flows shall be carefully reviewed and means of reducing them shall be considered. Letters of intent to the grantee are required to document capacity needs for existing flows from significant industrial users and for future flows from all industries intending to increase their flows or relocate in the area. Requirements for letters of intent from significant industrial dischargers are set forth in §35.925–11(c).

(2) While many uncertainties accompany forecasting future industrial flows, there is still a need to allow for some unplanned future industrial growth. Thus, the cost-effective (grant eligible) design capacity and flow of the treatment works may include (in addition to the existing industrial flows and future industrial flows documented by letters of intent) a nominal flow allowance for future nonidentifiable industries or for unplanned industrial expansions, provided that 208 plans, land use plans and zoning provide for such industrial growth. This additional allowance for future unplanned industrial flow shall not exceed 5 percent (or 10 percent for towns with less than 10,000 population) of the total design flow of the treatment works exclusive of the allowance or 25 percent of the total industrial flow (existing plus documented future), whichever is greater.

e. *Staging of treatment plants.* (1) The capacity of treatment plants (i.e., new plants, upgraded plants, or expanded plants) to be funded under the construction grants program shall not exceed that necessary for wastewater flows projected during an initial staging period determined by one of the following methods:

(a) *First method.* The grantee shall analyze at least three alternative staging periods (10 years, 15 years, and 20 years). He shall select the least costly (i.e., total present worth or average annual cost) staging period.

(b) *Second method.* The staging period shall not exceed the period which is appropriate according to the following table.

STAGING PERIODS FOR TREATMENT PLANTS

Flow growth factors (20 years) [1]	Staging period [2] (years)
Less than 1.3	20
1.3 to 1.8	15
Greater than 1.8	10

[1] Ratio of wastewater flow expected at end of 20 year planning period to initial flow at the time the plant is expected to become operational.

[2] Maximum initial staging period.

(2) A municipality may stage the construction of a treatment plant for a shorter period than the maximum allowed under this policy. A shorter staging period might be based upon environmental factors (secondary impacts, compliance with other environmental laws under §35.925–14, energy conservation, water supply), an objective concerning planned modular construction, the utilization of temporary treatment plants, or attainment of consistency with locally adopted plans including comprehensive and capital improvement plans. However, the staging period in no case may be less than 10 years, because of associated cost penalties and the time necessary to plan, apply for and receive funding, and construct later stages.

(3) The facilities plan shall present the design parameters for the proposed treatment plant. Whenever the proposed treatment plant components' size or capacity would exceed the minimum reliability requirements suggested in the EPA technical bulletin,

''Design Criteria for Mechanical, Electric, and Fluid System and Component Reliability,'' a complete justification, including supporting data, shall be provided to the Regional Administrator for his approval.

f. *Staging of interceptors.* Since the location and length of interceptors will influence growth, interceptor routes and staging of construction shall be planned carefully. They shall be consistent with approved 208 plans, growth management plans and other environmental laws under §35.925–14 and shall also be consistent with Executive orders for flood plains and wetlands.

(1) Interceptors may be allowable for construction grant funding if they eliminate existing point source discharges and accommodate flows from existing habitations that violate an enforceable requirement of the Act. Unless necessary to meet those objectives, interceptors should not be extended into environmentally sensitive areas, prime agricultural lands and other undeveloped areas (density less than one household per 2 acres). Where extension of an interceptor through such areas would be necessary to interconnect two or more communities, the grantee shall reassess the need for the interceptor by further consideration of alternative wastewater treatment systems. If the reassessment demonstrates a need for the interceptor, the grantee shall evaluate the interceptor's primary and secondary environmental impacts, and provide for appropriate mitigating measures such as rerouting the pipe to minimize adverse impacts or restricting future connections to the pipe. Appropriate and effective grant conditions (e.g., restricting sewer hookups) should be used where necessary to protect environmentally sensitive areas or prime agricultural lands from new development. NPDES permits shall include the conditions to insure implementation of the mitigating measures when new permits are issued to the affected treatment facilities in those cases where the measures are required to protect the treatment facilities against overloading.

(2) Interceptor pipe sizes (diameters for cylindrical pipes) allowable for construction grant funding shall be based on a staging period of 20 years. A larger pipe size corresponding to a longer staging period not to exceed 40 years may be allowed if the grantee can demonstrate, wherever water quality management plans or other plans developed for compliance with laws under §35.925–14 have been approved, that the larger pipe would be consistent with projected land use patterns in such plans and that the larger pipe would reduce overall (primary plus secondary) environmental impacts. These environmental impacts include:

(a) *Primary impacts.* (i) Short-term disruption of traffic, business and other daily activities.

(ii) Destruction of flora and fauna, noise, erosion, and sedimentation.

(b) *Secondary impacts.* (i) Pressure to rezone or otherwise facilitate unplanned development.

(ii) Pressure to accelerate growth for quicker recovery of the non-Federal share of the interceptor investments.

(iii) Effects on air quality and environmentally sensitive areas by cultural changes.

(3) The estimation of peak flows in interceptors shall be based upon the following considerations:

(a) Daily and seasonal variations of pipe flows, the timing of flows from the various parts of the tributary area, and pipe storage effects.

(b) The feasibility of off-pipe storage to reduce peak flows.

(c) The use of an appropriate peak flow factor that decreases as the average daily flow to be conveyed increases.

9. *State guidelines.* If a State has developed or chooses to develop comprehensive guidelines on cost-effective sizing and staging of treatment works, the Regional Administrator may approve all or portions of the State guidance for application to step 1 facility plans. Approved State guidance may be used instead of corresponding portions of these guidelines, if the following conditions are met:

a. The State guidance must be at least as stringent as the provisions of these guidelines.

b. The State must have held at least one public hearing on proposed State guidance, under regulations in part 25 of this chapter, before submitting the guidance for Agency approval.

10. *Additional capacity beyond the cost-effective capacity.* Treatment works which propose to include additional capacity beyond the cost-effective capacity determined in accordance with these guidelines may receive Federal grant assistance if the following requirements are met:

a. The facilities plan shall determine the most cost-effective treatment works and its associated capacity in accordance with these guidelines. The facilities plan shall also determine the actual characteristics and total capacity of the treatment works to be built.

b. Only a portion of the cost of the entire proposed treatment works including the additional capacity shall be eligible for Federal funding. The portion of the cost of construction which shall be eligible for Federal funding under sections 203(a) and 202(a) of the Act shall be equivalent to the estimated construction costs of the most cost-effective treatment works. For the eligibility determination, the costs of construction of the actual treatment works and the most cost-effective treatment works must be estimated on a consistent basis. Up-to-date cost curves

published by EPA's Office of Water Program Operations or other cost estimating guidance shall be used to determine the cost ratios between cost-effective project components and those of the actual project. These cost ratios shall be multiplied by the step 2 cost and step 3 contract costs of actual components to determine the eligible step 2 and step 3 costs.

c. The actual treatment works to be built shall be assessed. It must be determined that the actual treatment works meets the requirements of the National Environmental Policy Act and all applicable laws, regulations, and guidance, as required of all treatment works by §§35.925–8 and 35.925–14. Particular attention should be given to assessing the project's potential secondary environmental effects and to ensuring that air quality standards will not be violated. The actual treatment works' discharge must not cause violations of water quality standards.

d. The Regional Administrator shall approve the plans, specifications, and estimates for the actual treatment works under section 203(a) of the Act, even though EPA will be funding only a portion of its designed capacity.

e. The grantee shall satisfactorily assure the Agency that the funds for the construction costs due to the addtional capacity beyond the cost-effective treatment works' capacity as determined by EPA (i.e., the ineligible portion of the treatment works), as well as the local share of the grant eligible portion of the construction costs will be available.

f. The grantee shall execute appropriate grant conditions or releases providing that the Federal Government is protected from any further claim by the grantee, the State, or any other party for any of the costs of construction due to the additional capacity.

g. Industrial cost recovery shall be based upon the portion of the Federal grant allocable to the treatment of industrial wastes.

h. The grantee must implement a user charge system which applies to the entire service area of the grantee, including any area served by the additional capacity.

APPENDIX B TO SUBPART E OF PART 35—FEDERAL GUIDELINES—USER CHARGES FOR OPERATION AND MAINTENANCE OF PUBLICLY OWNED TREATMENT WORKS

(a) *Purpose.* To set forth advisory information concerning user charges based on actual use pursuant to section 204 of the Clean Water Act, hereinafter referred to as the Act. Applicable requirements are set forth in subpart E (40 CFR part 35).

(b) *Authority.* The authority for establishment of the user charge guidelines is contained in section 204(b)(2) of the Act.

(c) *Background.* Section 204(b)(1) of the Act provides that after March 1, 1973, Federal grant applicants shall be awarded grants only after the Regional Administrator has determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services will pay its proportionate share of the costs of operation and maintenance, including replacement. The intent of the Act with respect to user charges is to distribute the cost of operation and maintenance of publicly owned treatment works to the pollutant source and to promote self-sufficiency of treatment works with respect to operation and maintenance costs. The 1977 Amendments amended section 204(b) to allow grantees to establish user charge systems based on ad valorem taxes. This appendix does not apply to ad valorem user charge systems.

(d) *Definitions*—(1) *Replacement.* Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary to maintain the capacity and performance during the service life of the treatment works for which such works were designed and constructed. The term ''operation and maintenance'' includes replacement.

(2) *User charge.* A charge levied on users of treatment works for the cost of operation and maintenance of such works.

(e) *Classes of users.* At least two basic types of user charge systems are common. The first is to charge each user a share of the treatment works operation and maintenance costs based on his estimate of measured proportional contribution to the total treatment works loading. The second system establishes classes for users having similar flows and waste water characteristics; i.e., levels of biochemical oxygen demand, suspended solids, etc. Each class is then assigned its share of the waste treatment works operation and maintenance costs based on the proportional contribution of the class to the total treatment works loading. Either system is in compliance with these guidelines.

(f) *Criteria against which to determine the adequacy of user charges.* The user charge system shall be approved by the Regional Administrator and shall be maintained by the grantee in accordance with the following requirements:

(1) The user charge system must result in the distribution of the cost of operation and maintenance of treatment works within the grantee's jurisdiction to each user (or user class) in proportion to such user's contribution to the total wastewater loading of the treatment works. Factors such as strength, volume, and delivery flow rate characteristics shall be considered and included as the basis for the user's contribution to ensure a proportional distribution of operation and maintenance costs to each user (or user class).

(2) For the first year of operation, operation and maintenance costs shall be based

upon past experience for existing treatment works or some other rational method that can be demonstrated to be applicable.

(3) The grantee shall review user charges annually and revise them periodically to reflect actual treatment works operation and maintenance costs.

(4) The user charge system must generate sufficient revenue to offset the cost of all treatment works operation and maintenance provided by the grantee.

(5) The user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works accepting wastewaters from treatment works owned by others, then the subscribers receiving waste treatment services from the grantee shall have adopted user charge systems in accordance with these guidelines. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority.

(g) *Model user charge systems.* The user charge system adopted by the applicant must result in the distribution of treatment works operation and maintenance costs to each user (or user class) in approximate proportion to his contribution to the total wastewater loading of the treatment works. The following user charge models can be used for this purpose; however, the applicant is not limited to their use. The symbols used in the models are as defined below:

C_T = Total operation and maintenance (O. & M.) costs per unit of time.
C_u = A user's charge for O. & M. per unit of time.
C_s = A surcharge for wastewaters of excessive strength.
V_c = O&M cost for transportation and treatment of a unit of wastewater volume.
V_u = Volume contribution from a user per unit of time.
V_T = Total volume contribution from all users per unit of time.
B_c = O&M cost for treatment of a unit of biochemical oxygen demand (BOD).
B_u = Total BOD contribution from a user per unit of time.
B_T = Total BOD contribution from all users per unit of time.
B = Concentration of BOD from a user above a base level.
S_c = O&M cost for treatment of a unit of suspended solids.
S_u = Total suspended solids contribution from a user per unit of time.
S = Concentration of SS from a user above a base level.
P_c = O&M cost for treatment of a unit of any pollutant.
P_u = Total contribution of any pollutant from a user per unit of time.
P_T = Total contribution of any pollutant from all users per unit of time.
P = Concentration of any pollutant from a user above a base level.

(1) *Model No. 1.* If the treatment works is primarily flow dependent or if the BOD, suspended solids, and other pollutant concentrations discharged by all users are approximately equal, then user charges can be developed on a volume basis in accordance with the model below:

$C_u = C_T/V_T(V_u)$

(2) *Model No. 2.* When BOD, suspended solids, or other pollutant concentrations from a user exceed the range of concentration of these pollutants in normal domestic sewage, a surcharge added to a base charge, calculated by means of Model No. 1, can be levied. The surcharge can be computed by the model below:

$C_s = [B_c(B)=S_c(S)=P_c(P)]V_u$

(3) *Model No. 3.* This model is commonly called the ''quantity/quality formula'':

$C_u = V_c\ V_u=B_c\ B_u=S_c\ S_u=P_c\ P_u$

(h) *Other considerations.* (1) Quantity discounts to large volume users will not be acceptable. Savings resulting from economies of scale should be apportioned to all users or user classes.

(2) User charges may be established based on a percentage of the charge for water usage only in cases where the water charge is based on a constant cost per unit of consumption.

[39 FR 5270, Feb. 11, 1974]

APPENDIX C–1 TO SUBPART E OF PART 35—REQUIRED PROVISIONS—CONSULTING ENGINEERING AGREEMENTS

1. GENERAL

(a) The owner and the engineer agree that the following provisions apply to the EPA grant-eligible work to be performed under

this agreement and that such provisions supersede any conflicting provisions of this agreement.

(b) The work under this agreement is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor the U.S. Environmental Protection Agency (hereinafter, ''EPA'') is a party to this agreement. This agreement which covers grant-eligible work is subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939 in effect on the date of execution of this agreement. As used in these clauses, the words ''the date of execution of this agreement'' mean the date of execution of this agreement and any subsequent modification of the terms, compensation or scope of services pertinent to unperformed work.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or this agreement.

2. RESPONSIBILITY OF THE ENGINEER

(a) The engineer shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by the engineer under this agreement. The engineer shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in his designs, drawings, specifications, reports, and other services.

(b) The engineer shall perform such professional services as may be necessary to accomplish the work required to be performed under this agreement, in accordance with this agreement and applicable EPA requirements in effect on the date of execution of this agreement.

(c) The owner's or EPA's approval of drawings, designs, specifications, reports, and incidental engineering work or materials furnished hereunder shall not in any way relieve the engineer of responsibility for the technical adequacy of his work. Neither the owner's nor EPA's review, approval or acceptance of, nor payment for, any of the services shall be construed to operate as a waiver of any rights under this agreement or of any cause of action arising out of the performance of this agreement.

(d) The engineer shall be and shall remain liable, in accordance with applicable law, for all damages to the owner or EPA caused by the engineer's negligent performance of any of the services furnished under this agreement, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The engineer shall not be responsible for any time delays in the project caused by circumstances beyond the engineer's control. Where innovative processes or techniques (see 40 CFR 35.908) are recommended by the engineer and are used, the engineer shall be liable only for gross negligence to the extent of such use.

3. SCOPE OF WORK

The services to be performed by the engineer shall include all services required to complete the task or Step in accordance with applicable EPA regulations (40 CFR part 35, subpart E in effect on the date of execution of this agreement) to the extent of the scope of work as defined and set out in the engineering services agreement to which these provisions are attached.

4. CHANGES

(a) The owner may, at any time, by written order, make changes within the general scope of this agreement in the services or work to be performed. If such changes cause an increase or decrease in the engineer's cost of, or time required for, performance of any services under this agreement, whether or not changed by any order, an equitable adjustment shall be made and this agreement shall be modified in writing accordingly. The engineer must assert any claim for adjustment under this clause in writing within 30 days from the date of receipt by the engineer of the notification of change, unless the owner grants a further period of time before the date of final payment under this agreement.

(b) No services for which an additional compensation will be charged by the engineer shall be furnished without the written authorization of the owner.

(c) In the event that there is a modification of EPA requirements relating to the services to be performed under this agreement after the date of execution of this agreement, the increased or decreased cost of performance of the services provided for in this agreement shall be reflected in an appropriate modification of this agreement.

5. TERMINATION

(a) Either party may terminate this agreement, in whole or in part, in writing, if the other party substantially fails to fulfill its obligations under this agreement through no fault of the terminating party. However, no such termination may be affected unless the other party is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate and (2) an opportunity for consultation with the terminating party before termination.

(b) The owner may terminate this agreement, in whole or in part, in writing, for its convenience, if the termination is for good cause (such as for legal or financial reasons, major changes in the work or program requirements, initiation of a new step) and the engineer is given (1) not less than ten (10) calendar days written notice (delivered by

certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party before termination.

(c) If the owner terminates for default, an equitable adjustment in the price provided for in this agreement shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the engineer at the time of termination may be adjusted to the extent of any additional costs the owner incurs because of the engineer's default. If the engineer terminates for default or if the owner terminates for convenience, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the engineer for services rendered and expenses incurred before the termination, in addition to termination settlement costs the engineer reasonably incurs relating to commitments which had become firm before the termination.

(d) Upon receipt of a termination action under paragraph (a) or (b) of this section 5., the engineer shall (1) promptly discontinue all services affected (unless the notice directs otherwise), and (2) deliver or otherwise make available to the owner all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as the engineer may have accumulated in performing this agreement, whether completed or in process.

(e) Upon termination under paragraph (a) or (b) of this section 5., the owner may take over the work and prosecute the same to completion by agreement with another party or otherwise. Any work the owner takes over for completion will be completed at the owner's risk, and the owner will hold harmless the engineer from all claims and damages arising out of improper use of the engineer's work.

(f) If, after termination for failure of the engineer to fulfill contractual obligations, it is determined that the engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the owner. In such event, adjustment of the price provided for in this agreement shall be made as paragraph (c) of this clause provides.

6. REMEDIES

Except as this agreement otherwise provides, all claims, counter-claims, disputes, and other matters in question between the owner and the engineer arising out of or relating to this agreement or the breach of it will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

7. PAYMENT

(a) Payment shall be made in accordance with the payment schedule incorporated in this agreement as soon as practicable upon submission of statements requesting payment by the engineer to the owner. If no such payment schedule is incorporated in this agreement, the payment provisions of paragraph (b) of this clause shall apply.

(b) The engineer may request monthly progress payments and the owner shall make them as soon as practicable upon submission of statements requesting payment by the engineer to the owner. When such progress payments are made, the owner may withhold up to ten (10) percent of the vouchered amount until satisfactory completion by the engineer of work and services within a step called for under this agreement. When the owner determines that the work under this agreement or any specified task hereunder is substantially complete and that the amount of retained percentages is in excess of the amount considered by him to be adequate for his protection, he shall release to the engineer such excess amount.

(c) No payment request made under paragraph (a) or (b) of this clause shall exceed the estimated amount and value of the work and services performed by the engineer under this agreement. The engineer shall prepare the estimates of work performed and shall supplement them with such supporting data as the owner may require.

(d) Upon satisfactory completion of the work performed under this agreement, as a condition precedent to final payment under this agreement or to settlement upon termination of the agreement, the engineer shall execute and deliver to the owner a release of all claims against the owner arising under or by virtue of this agreement, other than such claims, if any, as may be specifically exempted by the engineer from the operation of the release in stated amounts to be set forth therein.

8. PROJECT DESIGN

(a) In the performance of this agreement, the engineer shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, consistent with 40 CFR 35.936–3 and 35.936–13 in effect on the date of execution of this agreement, except to the extent to which innovative technology may be used under 40 CFR 35.908 in effect on the date of execution of this agreement.

(b) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which

would require the use of structures, machines, products, materials, construction methods, equipment, or processes which the engineer knows to be available only from a sole source, unless the engineer has adequately justified the use of a sole source in writing.

(c) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which would be restrictive in violation of section 204(a)(6) of the Clean Water Act. This statute requires that no specification for bids or statement of work shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing, or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words ''or equal.'' With regard to materials, if a single material is specified, the engineer must be prepared to substantiate the basis for the selection of the material.

(d) The engineer shall report to the owner any sole-source or restrictive design or specification giving the reason or reasons why it is necessary to restrict the design or specification.

(e) The engineer shall not knowingly specify or approve the performance of work at a facility which is in violation of clean air or water standards and which is listed by the Director of the EPA Office of Federal Activities under 40 CFR part 15.

9. AUDIT; ACCESS TO RECORDS

(a) The engineer shall maintain books, records, documents, and other evidence directly pertinent to performance on EPA grant work under this agreement in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this agreement. The engineer shall also maintain the financial information and data used by the engineer in the preparation or support of the cost submission required under 40 CFR 35.937–6(b) in effect on the date of execution of this agreement and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, owner, and [the State water pollution control agency] or any of their duly authorized representatives shall have access to such books, records, documents, and other evidence for inspection, audit, and copying. The engineer will provide proper facilities for such access and inspection.

(b) The engineer agrees to include paragraphs (a) through (e) of this clause in all his contracts and all tier subcontracts directly related to project performance that are in excess of $10,000.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The engineer agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a), provided that the engineer is afforded the opportunity for an audit exit conference and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final audit report will include written comments of reasonable length, if any, of the engineer.

(e) The engineer shall maintain and make available records under paragraphs (a) and (b) of this clause during performance on EPA grant work under this agreement and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any ''Dispute'' appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until 3 years after the date of resolution of such appeal, litigation, claim, or exception.

10. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(*This clause is applicable if the amount of this agreement exceeds $100,000.*)

(a) If the owner or EPA determines that any price, including profit, negotiated in connection with this agreement or any cost reimbursable under this agreement was increased by any significant sums because the engineer or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700–41), then such price, cost, or profit shall be reduced accordingly and the agreement shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the remedies clause of this agreement.

(*Note: Since the agreement is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the engineer may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the engineer. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.*)

11. SUBCONTRACTS

(a) Any subcontractors and outside associates or consultants required by the engineer in connection with services under this agreement will be limited to such individuals or firms as were specifically identified and agreed to during negotiations, or as the owner specifically authorizes during the performance of this agreement. The owner must give prior approval for any substitutions in or additions to such subcontractors, associates, or consultants.

(b) The engineer may not subcontract services in excess of thirty (30) percent (or _____ percent, if the owner and the engineer hereby agree) of the contract price to subcontractors or consultants without the owner's prior written approval.

12. LABOR STANDARDS

To the extent that this agreement involves ''construction'' (as defined by the Secretary of Labor), the engineer agrees that such construction work shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a—276a–7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (Equal Employment Opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or EPA. The engineer further agrees that this agreement shall include and be subject to the ''Labor Standards Provisions for Federally Assisted Construction Contracts'' (EPA form 5720–4) in effect at the time of execution of this agreement.

13. EQUAL EMPLOYMENT OPPORTUNITY

In accordance with EPA policy as expressed in 40 CFR 30.420–5, the engineer agrees that he will not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, or national origin.

14. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936–7, the engineer agrees that qualified small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

15. COVENANT AGAINST CONTINGENT FEES

The engineer warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty the owner shall have the right to annul this agreement without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

16. GRATUITIES

(a) If it is found, after notice and hearing, by the owner that the engineer, or any of the engineer's agents or representatives, offered or gave gratuities (in the form of entertainment, gifts, or otherwise), to any official, employee, or agent of the owner, of the State, or of EPA in an attempt to secure a contract or favorable treatment in awarding, amending, or making any determinations related to the performance of this agreement, the owner may, by written notice to the engineer, terminate the right of the engineer to proceed under this agreement. The owner may also pursue other rights and remedies that the law or this agreement provides. However, the existence of the facts upon which the owner bases such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this agreement.

(b) In the event this agreement is terminated as provided in paragraph (a) hereof, the owner shall be entitled: (1) To pursue the same remedies against the engineer as it could pursue in the event of a breach of the contract by the engineer, and (2) as a penalty, in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the costs the engineer incurs in providing any such gratuities to any such officer or employee.

17. PATENTS

If this agreement involves research, developmental, experimental, or demonstration work and any discovery or invention arises or is developed in the course of or under this agreement, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30, in effect on the date of execution of this agreement, including appendix B of part 30. In such case, the engineer shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The engineer agrees that the disposition of rights to inventions made under this agreement shall be in accordance with the terms and conditions of appendix B. The engineer shall include appropriate patent provisions to achieve the purpose of this condition in all subcontracts

involving research, developmental, experimental, or demonstration work.

18. COPYRIGHTS AND RIGHTS IN DATA

(a) The engineer agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with EPA grant funds), technical reports, operating manuals, and other work submitted with a step 1 facilities plan or with a step 2 or step 3 grant application or which are specified to be delivered under this agreement or which are developed or produced and paid for under this agreement (referred to in this clause as ''Subject Data'') are subject to the rights in the United States, as set forth in subpart D of 40 CFR part 30 and in appendix C to 40 CFR part 30, in effect on the date of execution of this agreement. These rights include the right to use, duplicate, and disclose such subject data, in whole or in part, in any manner for any purpose whatsoever, and to have others do so. For purposes of this clause, ''grantee'' as used in appendix C refers to the engineer. If the material is copyrightable, the engineer may copyright it, as appendix C permits, subject to the rights in the Government in appendix C, but the owner and the Federal Government reserve a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such materials, in whole or in part, and to authorize others to do so. The engineer shall include appropriate provisions to achieve the purpose of this condition in all subcontracts expected to produce copyrightable subject data.

(b) All such subject data furnished by the engineer pursuant to this agreement are instruments of his services in respect of the project. It is understood that the engineer does not represent such subject data to be suitable for reuse on any other project or for any other purpose. If the owner reuses the subject data without the engineer's specific written verification or adaptation, such reuse will be at the risk of the owner, without liability to the engineer. Any such verification or adaptation will entitle the engineer to further compensation at rates agreed upon by the owner and the engineer.

APPENDIX C–2 TO SUBPART E OF PART 35—REQUIRED PROVISIONS—CONSTRUCTION CONTRACTS

SUPPLEMENTAL GENERAL CONDITIONS

1. GENERAL

(a) The owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.

(b) This contract is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is a party to this contract. This contract is subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939 in effect on the date of execution of this contract.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or under this contract.

2. CHANGES

(a) The owner may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the owner-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the owner, which causes any such change, shall be treated as a change order under this clause, if the contractor gives the owner written notice stating the date, circumstances, and source of the order and if the contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the owner shall be treated as a change under this clause or shall entitle the contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this

contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. However, except for claims based on defective specifications, no claim for any change under paragraph (b) of this section 2., shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as there required. Also, in the case of defective specifications for which the owner is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under paragraph (b) of this section 2., submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period. The statement of claim hereunder may be included in the notice under paragraph (b) of this section 2.

(f) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

3. DIFFERING SITE CONDITIONS

(a) The contractor shall promptly, and before such conditions are disturbed, notify the owner in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The owner shall promptly investigate the conditions. If he finds that such conditions do materially differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in paragraph (a) of this clause, except that the owner may extend the prescribed time.

(c) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

4. SUSPENSION OF WORK

(a) The owner may order the contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the owner.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the owner in administration of this contract, or by his failure to act within the time specfied in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the contractor shall have notified the owner in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

5. TERMINATION FOR DEFAULT; DAMAGES FOR DELAY; TIME EXTENSIONS

(a) If the contractor refuses or fails to prosecute the work, or any separable part of the work, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the owner may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the owner may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and use in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the owner resulting from his refusal or failure to complete the work within the specified time.

(b) If the contract provides for liquidated damages, and if the owner terminates the contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be

required for final completion of the work together with any increased costs the owner incurs in completing the work.

(c) If the contract provides for liquidated damages and if the owner does not terminate the contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The contractor's right to proceed shall not be terminated nor the contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the owner in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers; and

(2) The contractor, within 10 days from the beginning of any such delay (unless the owner grants a further period of time before the date of final payment under the contract), notifies the owner in writing of the causes of delay. The owner shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension. His findings of fact shall be final and conclusive on the parties, subject only to appeal as the remedies clause of this contract provides.

(e) If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under this clause, or that the delay was excusable under this clause, the rights and obligations of the parties shall be the same as if the notice of termination has been issued under the clause providing for termination for convenience of the owner.

(f) The rights and remedies of the owner provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in paragraph (d)(1) of this clause, the term ''subcontractors or suppliers'' means subcontractors or suppliers at any tier.

6. TERMINATION FOR CONVENIENCE

(a) The owner may terminate the performance of work under this contract in accordance with this clause in whole, or from time to time in part, whenever the owner shall determine that such termination is in the best interest of the owner. Any such termination shall be effected by delivery to the contractor of a notice of termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a notice of termination, and except as otherwise directed by the owner, the contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the notice of termination;

(2) Place no further orders or subcontracts for materials, services, or facilities except as necessary to complete the portion of the work under the contract which is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination;

(4) Assign to the owner, in the manner, at the times, and to the extent directed by the owner, all of the right, title, and interest of the contractor under the orders and subcontracts so terminated. The owner shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the owner to the extent he may require. His approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title to the owner, and deliver in the manner, at the times, and to the extent, if any, directed by the owner, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the notice of termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the owner;

(7) Use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices that the owner directs or authorizes, any property of the types referred to in paragraph (b)(6) of this clause, but the contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed and at a price or prices approved by the owner. The proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the owner to the contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the owner may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the notice of termination; and

(9) Take such action as may be necessary, or as the owner may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the owner has or may acquire an interest.

(c) After receipt of a notice of termination, the contractor shall submit to the owner his termination claim, in the form and with the certification the owner prescribes. Such claim shall be submitted promptly but in no event later than 1 year from the effective date of termination, unless one or more extensions in writing are granted by the owner upon request of the contractor made in writing within such 1-year period or authorized extension. However, if the owner determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such 1-year period or extension. If the contractor fails to submit his termination claim within the time allowed, the owner may determine, on the basis of information available to him, the amount, if any, due to the contractor because of the termination. The owner shall then pay to the contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the contractor and the owner may agree upon the whole or any part of the amount or amounts to be paid to the contractor because of the total or partial termination of work under this clause. The amount or amounts may include a reasonable allowance for profit on work done. However, such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the contractor in the event of failure of the contractor and the owner to agree upon the whole amount to be paid to the contractor because of the termination of work under this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (d).

(e) If the contractor and the owner fail to agree, as paragraph (d) of this section 6., provides, on the whole amount to be paid to the contractor because of the termination of work under this clause, the owner shall determine, on the basis of information available to him, the amount, if any, due to the contractor by reason of the termination and shall pay to the contractor the amounts determined as follows:

(1) For all contract work performed before the effective date of the notice of termination, the total (without duplication of any items) of—

(i) The cost of such work;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as paragraph (b)(5) of this clause provides. This cost is exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor before the effective date of the notice of termination. These amounts shall be included in the cost on account of which payment is made under paragraph (1)(i) of this section 6.; and

(iii) A sum, as profit on paragraph (1)(i) of this section 6., that the owner determines to be fair and reasonable. But, if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this paragraph (1)(iii) of this section 6., and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(2) The reasonable cost of the preservation and protection of property incurred under paragraph (b)(9) of this clause; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract. The total sum to be paid to the contractor under paragraph (e)(1) of this clause shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the owner shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor under paragraph (1) of this clause 6., the fair value, as determined by the owner of property which is destroyed, lost, stolen, or damaged, to the extent that it is un-deliverable to the owner, or to a buyer under paragraph (b)(7) of this clause.

(f) The contractor shall have the right to dispute under the clause of this contract entitled ''Remedies,'' from any determination the owner makes under paragraph (c) or (e) of this clause. But, if the contractor has failed to submit his claim within the time provided in paragraph (c) of this clause and has failed to request extension of such time, he shall have no such right of appeal. In any case where the owner has determined the amount due under paragraph (c) or (e) of this clause, the owner shall pay to the contractor the following: (1) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the owner or (2) if a ''Remedies'' proceeding

is initiated, the amount finally determined in such ''Remedies'' proceeding.

(g) In arriving at the amount due the contractor under this clause there shall be deducted (1) all unliquidated advance or other payments on account theretofore made to the contractor, applicable to the terminated portion of this contract, (2) any claim which the owner may have against the contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things kept by the contractor or sold, under the provisions of this clause, and not otherwise recovered by or credited to the owner.

(h) If the termination hereunder be partial, before the settlement of the terminated portion of this contract, the contractor may file with the owner a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the notice of termination). Such equitable adjustment as may be agreed upon shall be made in the price or prices. Nothing contained herein shall limit the right of the owner and the contractor to agree upon the amount or amounts to be paid to the contractor for the completion of the continued portion of the contract when the contract does not contain an established contract price for the continued portion.

7. REMEDIES

Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the owner and the contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

8. LABOR STANDARDS

The contractor agrees that ''construction'' work (as defined by the Secretary of Labor) shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a—276a–7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327–33);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (equal employment opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or EPA. The contractor further agrees that this contract shall include and be subject to the ''Labor Standards Provisions for Federally assisted Construction Contracts'' (EPA form 5720–4) in effect at the time of execution of this agreement.

9. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936–7, the contractor agrees that small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

10. AUDIT; ACCESS TO RECORDS

(a) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on EPA grant work under this contract in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this contract. The contractor shall also maintain the financial information and data used by the contractor in the preparation or support of the cost submission required under 40 CFR 35.938–5 in effect on the date of execution of this contract for any negotiated contract or change order and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, owner, and (the State water pollution control agency) or any of their authorized representatives shall have access to such books, records, documents and other evidence for the purpose of inspection, audit and copying. The contractor will provide proper facilities for such access and inspection.

(b) If this contract is a formally advertised, competitively awarded, fixed price contract, the contractor agrees to make paragraphs (a) through (f) of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to include paragraphs (a) through (f) of this clause in all his contracts in excess of $10,000 and all tier subcontracts in excess of $10,000 and to make paragraphs (a) through (f) of this clause applicable to all change orders directly related to project performance.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The contractor agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a) of this clause 10., provided that the contractor is afforded the opportunity for an audit exit conference, and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that

the final EPA audit report will include written comments of reasonable length, if any, of the contractor.

(e) Records under paragraphs (a) and (b) of this clause 10., shall be maintained and made available during performance on EPA grant work under this contract and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any ''Dispute'' appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until three years after the date of resolution of such appeal, litigation, claim or exception.

(f) The right of access which this clause confers will generally be exercised (with respect to financial records) under (1) negotiated prime contracts, (2) negotiated change orders or contract amendments in excess of $10,000 affecting the price of any formally advertised, competitively awarded, fixed price contract, and (3) subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract. However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, such right of access may be exercised under any type of contract or subcontract (1) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor, (2) if there is any indication that fraud, gross abuse, or corrupt practices may be involved or (3) if the contract is terminated for default or for convenience.

11. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(*This clause is applicable to (1) any negotiated prime contract in excess of $100,000; (2) negotiated contract amendments or change orders in excess of $100,000 affecting the price of a formally advertised, competitively awarded, fixed price contract; or (3) any subcontract or purchase order in excess of $100,000 under a prime contract other than a formally advertised, competitively awarded, fixed price contract. Change orders shall be determined to be in excess of $100,000 in accordance with 40 CFR 35.938–5(g). However, this clause is not applicable for contracts or subcontracts to the extent that they are awarded on the basis of effective price competition.*)

(a) If the owner or EPA determines that any price (including profit) negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant sums because the contractor, or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700–41), then such price or cost or profit shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the Remedies clause of this contract.

(*Note: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.*)

12. COVENANT AGAINST CONTINGENT FEES

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the owner shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

13. GRATUITIES

(a) If the owner finds, after notice and hearing, that the contractor or any of the contractor's agents or representatives offered or gave gratuities (in the form of entertainment, gifts, or otherwise) to any official, employee or agent of the owner, of the State, or of EPA in an attempt to secure a contract or favorable treatment in the awarding, amending, or making any determinations related to the performance of this contract, the owner may, by written notice to the contractor, terminate the right of the contractor to proceed under this contract. The owner may also pursue other rights and remedies that the law or this contract provides. However, the existence of the facts upon which the owner makes such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this contract.

(b) In the event this contract is terminated as provided in paragraph (a) of this clause, the owner shall be entitled (1) to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor, and (2) as a penalty in addition to any other damages to

which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the costs the contractor incurs in providing any such gratuities to any such officer or employee.

14. PATENTS

If this contract involves research, developmental, experimental, or demonstration work, and any discovery or invention arises or is developed in the course of or under this contract, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30, in effect on the date of execution of this contract, including appendix B of part 30. In such case, the contractor shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The contractor agrees that the disposition of rights to inventions made under this contract shall be in accordance with the terms and conditions of appendix B. The contractor shall include appropriate patent provisions to achieve the intent of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

15. COPYRIGHTS AND RIGHTS IN DATA

The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with EPA grant funds), technical reports, operating manuals, and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as ''Subject Data'') are subject to the rights in the United States, as set forth in subpart D of 40 CFR part 30 and in appendix C to 40 CFR part 30, in effect on the date of execution of this contract. These rights include the right to use, duplicate and disclose such Subject Data, in whole or in part, in any manner for any purpose whatsoever, and to have others do so. For purposes of this clause, ''grantee'' as used in appendix C refers to the contractor. If the material is copyrightable, the contractor may copyright it, as appendix C permits, subject to the rights in the Government as set forth in appendix C, but the owner and the Federal Government reserve a royalty-free, nonexclusive, and irrevocable license to reproduce, publish and use such materials, in whole or in part, and to authorize others to do so. The contractor shall include provisions appropriate to achieve the intent of this condition in all subcontracts expected to produce copyrightable Subject Data.

16. PROHIBITION AGAINST LISTED VIOLATING FACILITIES

(*Applicable only to a contract in excess of $100,000 and when otherwise applicable under 40 CFR part 15.*)

(a) The contractor agrees as follows:

(1) To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, *et seq.*, as amended by Pub. L. 92–604) and section 308 of the Clean Water Act (33 U.S.C. 1251, as amended), respectively, which relate to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the award of this contract.

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency list of violating facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from the listing.

(3) To use his best efforts to comply with clean air and clean water standards at the facilities in which the contract is being performed.

(4) To insert the substance of the provisions of this clause, including this paragraph (4), in any nonexempt subcontract.

(b) The terms used in this clause have the following meanings:

(1) The term *Air Act* means the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(2) The term *Water Act* means the Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*).

(3) The term *Clean Air Standards* means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Air Act (42 U.S.C. 1857c–5(d)), an approved implementation procedure or plan under section 111(c) or section 111(d), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c–7(d)).

(4) The term *Clean Water Standards* means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term *Compliance* means compliance with clean air or water standards. Compliance shall also mean compliance with a

schedule or plan ordered or approved by a court of competent jurisdiction, the Envrionmental Protection Agency or an Air or Water Pollution Control Agency in accordance with the requirements of the Air Act or Water Act and regulations.

(6) The term *Facility* means any building, plant, installation, structure, mine, vessel, or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be used in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are located in one geographical area.

17. BUY AMERICAN

In accordance with section 215 of the Clean Water Act, and implementing EPA regulations and guidelines, the contractor agrees that preference will be given to domestic construction material by the contractor, subcontractors, materialmen, and suppliers in the performance of this contract.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

APPENDIX D TO SUBPART E OF PART 35—EPA TRANSITION POLICY—EXISTING CONSULTING ENGINEERING AGREEMENTS

A. ACCESS TO RECORDS—AUDIT

1. *Access clause.* After June 30, 1975, a construction grant for Steps 1, 2 or 3 will not be awarded nor will initiation of Step 1 work be approved under 40 CFR 35.917(e) or 35.925–18(a)(3), unless an acceptable records and access clause is included in the consulting engineering subagreement. The clause contained in appendix C–1 shall be used on or after March 1, 1976. The clause required by former PG–53 or approved as an alternate thereto may be used for all contracts under grants awarded before March 1, 1976.

2. *EPA exercise of right of access to records.* Under applicable statutory and regulatory provisions, EPA has a broad right of access to grantees' consulting engineers' records pertinent to performance of EPA project work. The extent to which EPA will exercise this right of access will depend upon the nature of the records and upon the type of agreement.

a. In order to determine where EPA shall exercise its right of access, engineers' project-related records have been divided into three categories:

(1) *Category A:* Records that pertain directly to the professional, technical and other services performed, excluding any type of financial records of the consulting engineer.

(2) *Category B:* Financial records of the consulting engineer pertaining to the direct costs of professional, technical and other services performed, excluding financial records pertaining to profit and overhead or other indirect costs.

(3) *Category C:* Financial records of the consulting engineer excluded from category B.

b. In all cases, EPA will exercise its right of access to Category A records. Also, where there is an indication that fraud, gross abuse, or corrupt practices may be involved, EPA will exercise its right of access to records in all categories. Otherwise, access to consulting engineers' financial records (categories B and C) will depend principally upon the method(s) of compensation stipulated in the agreement:

(1) *Agreements based upon a percentage of construction cost.* Category B and C records will not be audited. However, terms of the agreement, including the total amount of compensation, will be evaluated for fairness, reasonableness, and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties relied on or used in negotiation of the agreement. Such evaluation shall also consider comparable contracts for which EPA grants have been awarded.

(2) *Agreements based upon salary cost times a multiplier including profit.* Category B records will be audited. Category C records will not be audited. However, terms of the agreement, including the total amount of compensation and the multiplier, will be evaluated for fairness and reasonableness and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties relied on or used in negotiation of the agreement. Such evaluation shall also consider comparable contracts for which EPA grants have been awarded. Items of overhead or other indirect costs will only be audited to the extent necessary to assure that types of costs found both in overhead and reimbursable direct costs, if any, are properly charged.

(3) *Per diem agreements.* Category B records will be audited. Category C records will not be audited. Audit will be performed to the extent necessary to determine that hours claimed and classes of personnel used were properly supported. The per diem rates will be evaluated according to the appropriate portions of paragraphs A.2.b. (1) and (2) of this appendix.

(4) *Cost plus a fixed fee (profit).* All direct costs, overhead, and other indirect costs claimed will be audited to determine that they are reasonable, allowable, and properly supported by the consulting engineer's records. The amount of fixed fee will not be questioned unless the total compensation appears unreasonable when evaluated according to paragraphs A.2.b. (1) and (2) of this appendix.

(5) *Fixed price lump sum contracts.* Category B and C records will not be audited. The contract amount will not be questioned unless the total compensation appears unreasonable when evaluated in accordance with appropriate portions of paragraphs A.2.b. (1) and (2) of this appendix.

c. If an agreement covers both grant-eligible and ineligible work, access to records will be exercised to the extent necessary to allocate contract work or costs between work grant-eligible for title II construction grant assistance and ineligible work or costs.

d. Under agreements that use two or more methods of compensation, each part of the agreement will be separately audited according to the appropriate paragraph of paragraph (b)(2) of this section.

e. Any audited firm and the grantee will be afforded opportunity for an audit exit conference and an opportunity to receive and comment upon the pertinent portions of each draft audit report. The final audit report will include the written comments, if any, of the audited parties in addition to those of the appropriate State and/or Federal agency(ies).

B. TYPE OF CONTRACT

1. The percentage-of-construction-cost type of contract, and the multiplier contract, where the multiplier includes profit, may not be used for step 1 or step 2 work initiated after June 30, 1975, when the step 1 or step 2 grant is awarded after June 30, 1975. (A multiplier type of compensation may be used only under acceptable types of contracts; see 40 CFR 35.937–1(d).)

2. Step 1 and step 2 work performed under the percentage-of-construction-cost type of contract and the multiplier contract, where the multiplier includes profit, will be reimbursed and such contracts will not be questioned where such costs are reimbursed in conjunction with a step 3 grant award within the scope of step 2 work contracted for prior to July 1, 1975. However, the current step 2 work will not be continued indefinitely for multiple, subsequent step 3 projects in order to avoid modifying the consultant agreement.

3. Where step 2 work is initiated after June 30, 1975, under contracts prohibited by paragraphs B.1. and B.2. of this appendix, EPA approval may not be given nor grant assistance awarded until the contract's terms of compensation have been renegotiated.

4. Establishing an ''upset'' figure (an upper limit which cannot be exceeded without a formal amendment to the agreement) under a multiplier contract, where the multiplier includes profit, is not acceptable where renegotiation of such contracts is required. In such renegotiation, the amount of profit must be specifically identified.

5. Total allowable contract costs for grant payment for a contract based on a percentage-of-construction-cost will be based on the following:

a. Where work for the design step is essentially continuous from start of design to bidding, and bid opening for step 3 construction occurs within 1 year after substantial completion of step 2 design work, the total allowable contract costs for grant payment may not exceed an amount based upon the low, responsive, responsible bid for construction.

b. Where work for the design step is not essentially continuous from start of design to bidding, or 1 year or more elapses between substantial completion of step 2 design work and bid opening for step 3 construction, the total allowable contract costs for grant payment may not exceed an amount based upon the lower of:

(1) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus an escalation of this construction cost estimate of up to 5 percent, but not to exceed the consulting engineer's total compensation based on the low, responsive, responsible bid for construction, or

(2) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus a consulting engineer's compensation esclation not to exceed $50,000, but not to exceed the consulting engineer's total compensation based upon the low, responsive, responsible bid for construction.

c. Where the low, responsive, responsible bid for construction would have resulted in a higher consulting engineer's total compensation than paragraph b. of this clause, provides, the Regional Administrator may also consider a reasonable additional compensation for updating the plans and specifications, revising cost estimates, or similar services.

d. The limitations of paragraph B5 apply to all grants awarded under subpart E except that—

(1) If the Regional Administrator had made final payment on a project before December 17, 1975, the limitations do not apply; and

(2) For other projects on which construction for the building and erection of a treatment works was initiated prior to December 17, 1975, the limitations do not apply to any request for engineering fee increases attributable to construction contract awards or

change orders approved by the grantee prior to December 17, 1975.

6. Where renegotiation is required under this appendix D, such renegotiation is subject to 40 CFR 35.937–1, 35.937–6, 35.937–7, 35.937–9, and 35.937–10.

C. ANNOUNCEMENT AND SELECTION

The requirements of 40 CFR 35.937–2 through 35.937–4 shall not apply to step 1 work where the step 1 grant was awarded or the initiation of step 1 work was approved by EPA (under 40 CFR 35.917(e)) before March 1, 1976, nor to subsequent step 2 and step 3 work in accordance with 40 CFR 35.937–2(d), if the grantee is satisfied with the qualifications and performance of the engineer employed.

D. REQUIRED CONSULTING ENGINEERING PROVISIONS

Effective March 1, 1976, the subagreement clauses required under appendix C–1 must be included in the consulting engineering subagreement before grant assistance for step 1, 2 or 3 will be awarded and before initiation of step 1 work will be approved under 40 CFR 35.917(e) or 35.925–18(a) 3.

E. ENFORCEMENT

1. Refusal by a consulting engineer to insert the required access clause, or to allow access to its records, or to renegotiate a consulting engineering contract according to the foregoing requirements, will render costs incurred under such contract unallowable. Accordingly, all such costs will be questioned and disallowed pending compliance with this appendix.

2. Where the Regional Administrator determines that the time required to comply with the access to records and type of contract provisions of this appendix will unduly delay award of grant assistance, he may award the grant assistance conditioned upon compliance with this appendix within a specified period of time. In such event, no grant payments for the affected engineering work may be made until such compliance has been obtained.

APPENDIX E TO SUBPART E OF PART 35—INNOVATIVE AND ALTERNATIVE TECHNOLOGY GUIDELINES

1. *Purpose.* These guidelines provide the criteria for identifying and evaluating innovative and alternative waste water treatment processes and techniques. The Administrator may publish additional information.

2. *Authority.* These guidelines are provided under section 304(d)(3) of the Clean Water Act.

3. *Applicability.* These guidelines apply to:

a. The analysis of innovative and alternative treatment processes and techniques under §35.917–1(d)(8);

b. Increased grants for eligible treatment works under §§35.930–5 (b) and (c) and 35.908(b)(1);

c. The funding available for innovative and alternative processes and techniques under §35.915–1(b);

d. The funding available for alternatives to conventional treatment works for small communities under §35.915–1(e);

e. The cost-effectiveness preference given innovative and alternative processes and techniques in section 7 of appendix A to this subpart;

f. The treatment works that may be given higher priority on State project priority lists under §35.915(a)(1)(iii);

g. Alternative and innovative treatment systems in connection with Federal facilities;

h. Individual systems authorized by §35.918, as modified in that section to include unconventional or innovative sewers;

i. The access and reports conditions in §35.935–20.

4. *Alternative processes and techniques.* Alternative waste water treatment processes and techniques are proven methods which provide for the reclaiming and reuse of water, productively recycle waste water constituents or otherwise eliminate the discharge of pollutants, or recover energy.

a. In the case of processes and techniques for the treatment of effluents, these include land treatment, aquifer recharge, aquaculture, silviculture, and direct reuse for industrial and other nonpotable purposes, horticulture and revegetation of disturbed land. Total containment ponds and ponds for the treatment and storage of waste water prior to land application and other processes necessary to provide minimum levels of preapplication treatment are considered to be part of alternative technology systems for the purpose of this section.

b. For sludges, these include land application for horticultural, silvicultural, or agricultural purposes (including supplemental processing by means such as composting or drying), and revegetation of disturbed lands.

c. Energy recovery facilities include codisposal measures for sludge and refuse which produce energy; anaerobic digestion facilities (*Provided,* That more than 90 percent of the methane gas is recovered and used as fuel); and equipment which provides for the use of digester gas within the treatment works. Self-sustaining incineration may also be included provided that the energy recovered and productively used is greater than the energy consumed to dewater the sludge to an autogenous state.

d. Also included are individual and other onsite treatment systems with subsurface or other means of effluent disposal and facilities constructed for the specific purpose of septage treatment.

e. The term ''alternative'' as used in these guidelines includes the terms ''unconventional'' and ''alternative to conventional'' as used in the Act.

f. The term ''alternative'' does not include collector sewers, interceptors, storm or sanitary sewers or the separation thereof; or major sewer rehabilitation, except insofar as they are alternatives to conventional treatment works for small communities under §35.915–1(e) or part of individual systems under §35.918.

5. *Innovative processes and techniques.* Innovative waste water treatment processes and techniques are developed methods which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of meeting the national goals of cost reduction, increased energy conservation or recovery, greater recycling and conservation of water resources (including preventing the mixing of pollutants with water), reclamation or reuse of effluents and resources (including increased productivity of arid lands), improved efficiency and/or reliability, the beneficial use of sludges or effluent constituents, better management of toxic materials or increased environmental benefits. For the purpose of these guidelines, innovative waste water treatment processes and techniques are generally limited to new and improved applications of those alternative processes and techniques identified in accordance with paragraph 4 of these guidelines, including both treatment at centralized facilities and individual and other onsite treatment. Treatment processes based on the conventional concept of treatment (by means of biological or physical/chemical unit processes) and discharge to surface waters shall not be considered innovative waste water treatment processes and techniques except where it is demonstrated that these processes and techniques, as a minimum, meet either the cost-reduction or energy-reduction criterion described in section 6 of these guidelines. Treatment and discharge systems include primary treatment, suspended-growth or fixed-growth biological systems for secondary or advance waste water treatment, physical/chemical treatment, disinfection, and sludge processing. The term ''innovative'' does not include collector sewers, interceptors, storm or sanitary sewers or the separation of them, or major sewer rehabilitation, except insofar as they meet the criteria in paragraph 6 of these guidelines and are alternatives to conventional treatment works for small communities under §35.915–1(e) or part of individual systems under §35.918.

6. *Criteria for determining innovative processes and techniques.* a. The Regional Administrator will use the following criteria in determining whether a waste water treatment process or technique is innovative. The criteria should be read in the context of paragraph 5. These criteria do not necessarily preclude a determination by the Regional Administrator that a treatment system is innovative because of local variations in geographic or climatic conditions which affect treatment plant design and operation or because it achieves significant public benefits through the advancement of technology which would otherwise not be possible. The Regional Administrator should consult with EPA headquarters about determinations made in other EPA regions on similar processes and techniques.

b. New or improved applications of alternative waste water treatment processes and techniques may be innovative for the purposes of this regulation if they meet one or more of the criteria in paragraphs e(1) through e(6) of this paragraph. Treatment and discharge systems (*i.e.*, systems which are not new or improved applications of alternative waste water treatment processes and techniques in accordance with paragraph 4 of these guidelines) must meet the criteria of either paragraph 6e(1) or 6e(2), as a minimum, in order to be innovative for the purposes of these guidelines.

c. These six criteria are essentially the same as those used to evaluate any project proposed for grant assistance. The principal difference is that some newly developed processes and techniques may have the potential to provide significant advancements in the state of the art with respect to one or more of these criteria. Inherent in the concept of advancement of technology is a degree of risk which is necessary to initially demonstrate a method on a full, operational scale under the circumstances of its contemplated use. This risk, while recognized to be a necessary element in the implementation of innovative technology, must be minimized by limiting the projects funded to those which have been fully developed and shown to be feasible through operation on a smaller scale. The risk must also be commensurate with the potential benefits (*i.e.*, greater potential benefits must be possible in the case of innovative technology projects where greater risk is involved).

d. Increased Federal funding under §35.908(b) may be made only from the reserve in §35.915–1(b). The Regional Administrator may fund a number of projects using the same type of innovative technology if he desires to encourage certain innovative processes and techniques because the potential benefits are great in comparison to the risks, or if operation under differing conditions of climatic, geology, etc., is desirable to demonstrate the technology.

e. The Regional Administrator will use the following criteria to determine whether waste water treatment processes and techniques are innovative:

(1) The life cycle cost of the eligible portion of the treatment works excluding conventional sewer lines is at least 15 percent less than that for the most cost-effective alternative which does not incorporate innovative waste water treatment processes and techniques (*i.e.*, is no more than 85 percent of the life cycle cost of the most cost-effective noninnovative alternative).

(2) The net primary energy requirements for the operation of the eligible portion of the treatment works excluding conventional sewer lines are at least 20 percent less than the net energy requirements of the least net energy alternative which does not incorporate innovative waste water treatment processes and techniques (*i.e.*, the net energy requirements are no more than 80 percent of those for the least net energy noninnovative alternative). The least net energy noninnovative alternative must be one of the alternatives selected for analysis under section 5 of appendix A.

(3) The operational reliability of the treatment works is improved in terms of decreased susceptibility to upsets or interference, reduced occurrence of inadequately treated discharges and decreased levels of operator attention and skills required.

(4) The treatment works provides for better management of toxic materials which would otherwise result in greater environmental hazards.

(5) The treatment works results in increased environmental benefits such as water conservation, more effective land use, improved air quality, improved ground water quality, and reduced resource requirements for the construction and operation of the works.

(6) The treatment works provide for new or improved methods of joint treatment and management of municipal and industrial wastes that are discharged into municipal systems.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

Subparts F–G [Reserved]

Subpart H—Cooperative Agreements for Protecting and Restoring Publicly Owned Freshwater Lakes

AUTHORITY: Sections 314, 501 and 518, Clean Water Act (86 Stat. 816, 33 U.S.C. 1251 *et seq.*).

SOURCE: 45 FR 7792, Feb. 5, 1980, unless otherwise noted.

§ 35.1600 Purpose.

This subpart supplements the EPA general grant regulations and procedures (part 31 of this chapter) and establishes policies and procedures for cooperative agreements to assist States and Indian tribes treated as States in carrying out approved methods and procedures for restoration (including protection against degradation) of publicly owned freshwater lakes.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1603 Summary of clean lakes assistance program.

(a) Under section 314 of the Clean Water Act, EPA may provide financial assistance to States to implement methods and procedures to protect and restore publicly owned freshwater lakes. Although cooperative agreements may be awarded only to States, these regulations allow States, through substate agreements, to delegate some or all of the required work to substate agencies.

(b) Only projects that deal with publicly owned freshwater lakes are eligible for assistance. The State must have assigned a priority to restore the lake, and the State must certify that the lake project is consistent with the State Water Quality Management Plan (§ 35.1521) developed under the State/EPA Agreement. The State/EPA Agreement is a mechanism for EPA Regional Administrators and States to coordinate a variety of programs under the Clean Water Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act and other laws administered by EPA.

(c) These regulations provide for Phase 1 and 2 cooperative agreements. The purpose of a Phase 1 cooperative agreement is to allow a State to conduct a diagnostic-feasibility study to determine a lake's quality, evaluate possible solutions to existing pollution problems, and recommend a feasible program to restore or preserve the quality of the lake. A Phase 2 cooperative agreement is to be used for implementing recommended methods and procedures for controlling pollution entering the lake and restoring the lake.