



# Federal Register

---

**Tuesday,  
December 19, 2006**

---

**Part V**

## **Environmental Protection Agency**

---

**40 CFR Part 6**

**Procedures for Implementing the National  
Environmental Policy Act and Assessing  
the Environmental Effects Abroad of EPA  
Actions; Proposed Rule**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 6

[EPA-HQ-OECA-2005-0062; FRL-8257-1]

RIN 2020-AA42

### Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

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

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

**DATES:** Comments must be received on or before February 20, 2007. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by the Office of Management and Budget (OMB) on or before January 18, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OECA-2005-0062, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* [hargrove.robert@epa.gov](mailto:hargrove.robert@epa.gov).

- *Fax:* 202-564-0072, Attention: Robert Hargrove.

- *Mail:* EPA-HQ-OECA-2005-0062, Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, Mailcode: 2201T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

- *Hand Delivery:* Public Reading Room, Room B102, Enforcement and Compliance Docket and Information Center, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OECA-2005-0062. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>, or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA

Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Public Reading Room, Room B102, Enforcement and Compliance Docket and Information Center, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OECA Docket is (202) 566-1752.

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

**SUPPLEMENTARY INFORMATION:** This preamble is organized according to the following outline:

- I. General Information
  - A. Does This Proposed Rule Apply to Me?
  - B. Tips for Preparing Your Comments
- II. Introduction
  - A. Statutory authority
  - B. Background
  - C. Exemptions From NEPA for Certain EPA Actions
  - D. EPA's Voluntary NEPA Policy and Procedures
- III. Purpose and Policy
- IV. Proposed Changes to the Regulations and Objectives of These Proposed Changes
  - A. Proposed Revision to the Title for EPA's Regulations at Part 6
- B. Restructuring and Standardizing EPA's NEPA Implementing Regulations
  1. Consolidate and Standardize the Procedural Provisions and Requirements of the Agency's Environmental Review Process Under NEPA
  2. Clarify the General Procedures Associated With Categorical Exclusions; Consolidate the Categories of Actions Subject to Categorical Exclusion; Amend Existing and Add New Categorical Exclusions; and Consolidate and Amend Existing and Add New Extraordinary Circumstances
  3. Consolidate and Amend the Listing of Actions that Generally Require an Environmental Impact Statement

4. Clarify the Procedural Requirements for Consideration of Applicable Environmental Review Laws and Executive Orders
5. Other Proposed Revisions Consistent With the CEQ Regulations
- C. Proposed amendments to EPA's Procedures for Implementing Executive Order 12114
  1. Amendment to Re-Designate the Subpart for EPA's Procedures Implementing Executive Order 12114
  2. Amendments to Update Office Names and Titles
  3. Amendment to Reference in the Executive Order 12114 Implementing Procedures to EPA's Voluntary NEPA Policy
  4. Amendment to Reference in the Executive Order 12114 Implementing Procedures to EPA's NEPA Implementing Procedures
  5. Amendments for Correction of Cross-References and Typographical Errors
- V. Proposed Amended and New Categories of Actions Eligible for Categorical Exclusion; Amended and New Extraordinary Circumstances; and Amended Listing of Actions That Generally Require an Environmental Impact Statement
- VI. Administrative Requirements
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act (RFA)
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
  - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution and Use
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

## I. General Information

### A. Does This Proposed Rule Apply to Me?

Those subject to the proposed rule include EPA employees who must comply with NEPA or Executive Order 12114, and certain grant and permit applicants who must submit environmental information documentation to EPA for their proposed projects.

*EPA's Procedures for Implementing NEPA.* As with EPA's current NEPA implementing regulations, compliance with the proposed regulations would be the responsibility of EPA's Responsible Officials. For applicant-proposed actions, certain procedures in the proposed NEPA regulations would

require those defined in the proposed regulations as applicants (that is, grant and permit applicants) to provide environmental information for EPA's use in its environmental review process.

Currently, EPA's NEPA implementing regulations apply, by subpart, to specific types of EPA proposed actions. For example, Subpart E applies to the award of wastewater treatment construction grants under Title II of the Clean Water Act, and Subpart F applies to EPA's environmental review process for issuance of new source National Pollutant Discharge Elimination System (NPDES) permits. The proposed regulations would consolidate and standardize the environmental review process applicable to all EPA proposed actions subject to NEPA, including those actions now specifically addressed in the current regulations and other actions subject to NEPA but not specifically addressed in the current regulations (e.g., certain EPA grant awards for special projects identified in the State and Tribal Assistance Grants (STAG) account authorized by Congress through the Agency's annual Appropriations Act, including grants for the Border Environmental Cooperation Commission/Border Environmental Infrastructure Fund and Colonias grant projects). As with EPA's current regulations, the proposed regulations would supplement and be used in conjunction with the government-wide Council on Environmental Quality (CEQ) NEPA Regulations (40 CFR Parts 1500–1508).

For additional information of interest to applicants, please see Preamble IV.B.5, "Other proposed revisions consistent with the CEQ Regulations. This section provides further information on proposed revisions that apply to applicants.

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

Today's proposed rule also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114 (42 U.S.C. 4321,

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

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

### B. Tips for Preparing Your Comments

*When submitting comments, remember to:*

(a) Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

(b) Follow directions for commenting according to the **ADDRESSES** section of this Preamble.

(c) Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

(d) Describe any assumptions and provide any technical information and/or data that you used.

(e) If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

(f) Provide specific examples to illustrate your concerns, and suggest alternatives.

(g) Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

(h) Make sure to submit your comments by the comment period deadline identified.

## II. Introduction

### A. Statutory Authority

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, establishes the federal government's national policy for protection of the environment. The Council on Environmental Quality Regulations (CEQ Regulations) at 40 CFR parts 1500 through 1508 establish procedures implementing this national policy. The CEQ Regulations (40 CFR 1505.1) require federal agencies to adopt and, as needed, revise their own NEPA implementing procedures to supplement the CEQ Regulations and to ensure their decision-making processes are consistent with NEPA.

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

### B. Background

The Environmental Protection Agency initially established its NEPA regulations as 40 CFR Part 6 (Part 6), Subparts A through H on April 14, 1975 (see 40 FR 16823). Subpart I was added on January 11, 1977 (see 42 FR 2450). On November 29, 1978, the Council on Environmental Quality (CEQ) promulgated regulations establishing uniform federal procedures for implementing NEPA (see 43 FR 55978). Section 103 of NEPA and the CEQ Regulations require federal agencies to adopt appropriate NEPA procedures to supplement those regulations. As a result, EPA amended its NEPA regulations on November 6, 1979, to make them consistent with the CEQ Regulations (see 44 FR 64177).

Under the Agency's 1979 Part 6 amendments, Subparts A through D described general NEPA procedures for preparing environmental reviews applicable to all EPA NEPA actions and established certain categorical exclusions. Subpart A contained an overview of EPA's NEPA regulations, including environmental impact statement (EIS) requirements for EPA legislative proposals and requirements for environmental information documents (EIDs) to be submitted to EPA by applicants, grantees, or permittees as required in Subparts E through I. Subpart B described the requirements for the content of an EIS prepared pursuant to Subparts E through I. Subpart C described the requirements for coordination of applicable environmental laws and

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

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

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

In 1985, the Agency promulgated procedural amendments and minor substantive amendments to its Part 6 NEPA regulations to accommodate changes in EPA's regulations for the construction grants program found at 40 CFR Part 35 (see 50 FR 26310). The modifications in the construction grants program changed the process that EPA grant recipients followed in planning

and building wastewater treatment facilities. The amendments to Subpart E and related sections of the EPA NEPA regulations streamlined and clarified the criteria and process for an environmental review and for preparing an EIS, including partitioning of the review process and the public involvement requirements. These amendments also included Office name and technical changes to reflect an Agency reorganization.

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

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

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

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

Certain EPA actions are exempt from the procedural requirements of NEPA, including the CEQ Regulations. Congress has provided specific statutory exemptions for certain EPA actions taken under the Clean Water Act (CWA) and all EPA actions taken under the Clean Air Act (CAA). Specifically, under CWA Section 511(c)(1), EPA is exempt from preparing EISs for all actions taken under the CWA except for issuance of NPDES permits under CWA Section 402 for "new sources" as defined in Section 306, and for Federal financial assistance provided for assisting construction of publicly owned

treatment works under CWA Section 201 (33 U.S.C. 1371(c)). Under the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)), all actions taken under the CAA are deemed not to be major federal actions significantly affecting the environment.

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

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

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

In 1974, EPA Administrator Russell Train determined that the Agency could voluntarily prepare EISs for certain regulatory activities that were exempt from NEPA. In 1998, Administrator Carol Browner amended this policy to permit the preparation of non-EIS NEPA documents for certain EPA regulatory actions. The Agency's current "Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents" (see 63 FR 58045) sets out the policy and procedures EPA uses when preparing environmental review documents under the Voluntary NEPA Policy. This proposed rule does not make any

changes to the voluntary NEPA policy and procedures. However, the proposed rule can serve as a framework for the preparation of voluntary NEPA documents.

### **III. Purpose and Policy**

This proposed rule has two purposes. The first purpose is to update and revise EPA's procedures for implementing the procedural requirements of NEPA and the CEQ Regulations by restructuring and standardizing these regulations (see Section IV below). The revised NEPA procedures would continue to be consistent with the declaration of national environmental policy as stated in Title I, Section 101(a) of NEPA (42 U.S.C. 4331(a)). Under the proposed NEPA rule, EPA's environmental review process would continue to ensure that, when required, environmental information is available and taken into account before EPA makes a finding of no significant impact or signs a Record of Decision. The NEPA environmental review process would continue to include: identification of alternatives to the proposed action, description of the affected environment, and analyses of the environmental consequences. For proposed actions subject to NEPA, EPA would continue to prepare environmental impact statements (EISs) for major federal actions significantly affecting the quality of the human environment. As part of its NEPA environmental review process, EPA also would continue to determine the applicability of other laws and executive orders early in the planning process and incorporate applicable requirements as early in the NEPA review process as possible. EPA's NEPA implementing regulations will be amended in consultation with the Council on Environmental Quality (see 40 CFR 1507.3(a)).

The second purpose of today's proposed rule is to make minor, technical amendments to Subpart D, "Assessing the Environmental Effects Abroad of EPA Actions," which contains the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions." The scope of this portion of the proposed regulations is limited to these minor, technical changes. These minor, technical changes are described in the Preamble in Section IV.C. and include amendments to: Re-designate the subpart for EPA's procedures implementing Executive Order 12114; update office names and titles and the references to EPA's Voluntary NEPA Policy and NEPA implementing

procedures; and correct cross-references and typographical errors.

### **IV. Proposed Changes to the Regulations and Objectives of These Proposed Changes**

#### *A. Proposed Revision to the Title for EPA's Regulations at Part 6*

EPA proposes to retitle its regulations at Part 6 to clarify that the proposed rule includes two sets of Agency procedures: the Agency's procedures for implementing the National Environmental Policy Act; and the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions." Both sets of implementing procedures are currently, and will remain, in Part 6. However, EPA believes the proposed amended title will clarify that the procedures implementing Executive Order 12114 are not based on NEPA authority and do not impose NEPA compliance requirements on EPA.

#### *B. Restructuring and Standardizing EPA's NEPA Implementing Regulations*

Restructuring and standardizing EPA's NEPA implementing procedures will clarify that the regulations apply to all proposed actions that are subject both to EPA's control and responsibility and NEPA, including actions not specifically addressed in the current regulations (e.g., certain grants awarded for special projects identified in the STAG account authorized through the Agency's annual Appropriations Act). The proposed revisions also take into account the environmental review exemptions to NEPA established by Congress and the courts.

This proposed rule would restructure and amend EPA's NEPA implementing regulations in order to: (1) Consolidate and standardize the procedural provisions and requirements of the Agency's environmental review process under NEPA; (2) clarify the general procedures associated with categorical exclusions, consolidate the categories of actions subject to categorical exclusion, amend existing and add new categorical exclusions, and consolidate and amend existing and add new extraordinary circumstances; (3) consolidate and amend the listing of actions that generally require an EIS; (4) clarify the procedural requirements for consideration of applicable environmental review laws and executive orders; and (5) incorporate other proposed revisions consistent with the CEQ Regulations. Preamble sections IV.B.1 through 5 summarize the objectives of these proposed changes.

1. Consolidate and Standardize the Procedural Provisions and Requirements of the Agency's Environmental Review Process Under NEPA

Currently, as discussed in Section II above, EPA's NEPA implementing regulations apply, by subpart, to specific actions. The proposed regulations would consolidate the definitions and environmental review procedures in a single set of definitions and environmental review procedures applicable to all EPA proposed actions subject to NEPA.

The proposed regulations also would consolidate the notification and public participation procedures that apply to all EPA proposed actions subject to NEPA. The proposed regulations no longer require a public meeting or hearing as part of the NEPA process. However, consistent with the CEQ Regulations (40 CFR 1506.6(c)), the Agency will hold meetings and/or hearings when appropriate or in accordance with statutory requirements. This does not diminish the Agency's commitment to NEPA's requirement for full public disclosure. The proposed regulations also state the conditions for notification of and consultation with state and local governments, and federally-recognized Indian tribes (tribes) and for public participation.

2. Clarify the General Procedures Associated With Categorical Exclusions; Consolidate the Categories of Actions Subject to Categorical Exclusion; Amend Existing and Add New Categorical Exclusions; and Consolidate and Amend Existing and Add New Extraordinary Circumstances

Currently, EPA's NEPA implementing regulations include general and, by subpart, action-specific categorical exclusions and extraordinary circumstances. The proposed regulations would consolidate the categorical exclusions and extraordinary circumstances in a single location. Thus, the procedures for determining if a proposed action fits within a categorical exclusion or involves any extraordinary circumstances would be applicable to all EPA actions subject to NEPA.

The proposed regulations also propose amending existing and adding new categories of actions for categorical exclusion as discussed in Section V below, Proposed Amended and New Categories of Actions Eligible for Categorical Exclusion; Amended and New Extraordinary Circumstances; and Amended Listing of Actions that

Generally Require an Environmental Impact Statement.

3. Consolidate and Amend the Listing of Actions That Generally Require an Environmental Impact Statement

Currently, some subparts of EPA's NEPA implementing regulations list proposed actions that generally require EISs, and one also lists proposed actions that generally require EAs. The proposed regulations would consolidate and amend the criteria for actions that generally require EISs. These criteria for actions that generally require EISs in the proposed regulations would be applicable to all EPA actions subject to NEPA.

4. Clarify the Procedural Requirements for Consideration of Applicable Environmental Review Laws and Executive Orders

Currently, Subpart C of EPA's NEPA implementing regulations focuses on integrating the requirements of applicable environmental laws and executive orders with environmental review requirements independent of NEPA with the Agency's NEPA environmental review procedures. Subpart C also provides a brief outline of the provisions of certain environmental laws and executive orders and EPA implementing procedures, including but not limited to: The National Historic Preservation Act (16 U.S.C. 470 *et seq.*); the Archaeological and Historic Preservation Act (16 U.S.C. 469 *et seq.*); Executive Order 11593, "Protection and Enhancement of the Cultural Environment;" the Historic Sites Act (16 U.S.C. 461 *et seq.*); Executive Order 11990, "Protection of Wetlands;" Executive Order 11988, "Floodplain Management;" the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*); the Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*); the Wild and Scenic Rivers Act (16 U.S.C. 1274 *et seq.*); the Coastal Barrier Resources Act (16 U.S.C. 3501 *et seq.*); the Fish and Wildlife Coordination Act (16 U.S.C. *et seq.*); the Endangered Species Act (16 U.S.C. 1531 *et seq.*); and air quality conformity pursuant to the Clean Air Act (42 U.S.C. 7476(c) and 42 U.S.C. 7616). Appendix A provides EPA's "Statement of Procedures on Floodplain Management and Wetlands Protection." The proposed NEPA regulations would remove the outlines and Appendix A, and replace them with the general procedural requirement to determine, to the fullest extent possible, the applicability of other environmental laws and executive orders early in the planning process, and to incorporate

applicable requirements as early in the NEPA review process as possible. This general procedural requirement would be applicable to all EPA actions subject to NEPA. This revision also would eliminate the need to amend the regulations whenever the laws and executive orders change. Moreover, today, the environmental review laws, regulations, and executive orders are available through the Internet (for example, many executive orders are linked through CEQ's Web site on NEPA.net at: <http://ceq.eh.doe.gov/nepa/regs/executiveorders.htm>). Guidance documents have been issued by the responsible oversight agencies, CEQ, and EPA for many of these including those frequently addressed in a NEPA review. (For example, see: CEQ guidance documents available at: <http://ceq.eh.doe.gov/nepa/regs/guidance.html>; and EPA guidance such as "Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses," EPA, April 1998.)

5. Other Proposed Revisions Consistent With the CEQ Regulations

*Consolidate and standardize the definitions in the existing regulations.* The proposed NEPA implementing regulations would consolidate and standardize the definitions in EPA's current NEPA regulations, as well as adding new definitions. Currently, EPA's NEPA implementing regulations apply, by subpart, to specific actions. The proposed regulations would consolidate the definitions in a single set of definitions applicable to all EPA actions subject to NEPA. For example, the proposed NEPA rule defines the term "action," and replaces the terms "grantee," "applicant" and "permit applicant" with the single defined term "applicant." The current regulations define and list by title the specific EPA officials responsible for the various program and action-specific actions identified by subpart. In the proposed rule, the Responsible Official would be defined simply and without title as the EPA official responsible for compliance with NEPA for individual actions thereby precluding the need for technical change to the regulations whenever there is an Agency reorganization and/or change to the title of an organizational unit or management position. Generally, the Responsible Official is an Assistant Administrator or a Regional Administrator, and the NEPA Official is the EPA official responsible for overall review of EPA's NEPA compliance (currently the Director of the Office of Federal Activities within

the Office of Enforcement and Compliance Assurance).

*Delegation of responsibilities.*

Currently, Subpart G of EPA's NEPA implementing regulations provides for delegation of responsibilities for carrying out the environmental review process by EPA's Office of Research and Development; other subparts are silent regarding delegation of responsibilities. In order to clarify and standardize the regulations, the proposed NEPA rule would standardize the delegation of responsibilities by stating that the NEPA-related responsibilities may be delegated to a level no lower than the Branch Chief or equivalent organizational level.

*Clarify the general requirements for an environmental assessment.*

Consistent with the CEQ Regulations at §§ 1501.3 and 1508.9, and considering the information contained in "The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation" (September 2003), the proposed NEPA regulations would include specific elements that generally must be addressed in an EA such as the need for the proposed action, the alternatives considered, description of the affected environment, and the environmental impacts of the proposed action and the alternatives.

*Consolidate and standardize the procedures that apply to applicants.*

Currently, EPA's NEPA implementing regulations include, by subpart, procedures applicable to certain grantees and new source NPDES permit applicants. These procedures require those grantees and permit applicants (together referred to as applicants) to submit information to the Responsible Official for use in EPA's environmental review process. The proposed NEPA regulations would consolidate and standardize these procedures in Subpart C, "Requirements for Environmental Information Documents and Third-Party Agreements." These procedures would be applicable to all applicant-proposed actions subject to NEPA.

Compliance with the proposed NEPA regulations would be the responsibility of the Responsible Official. The proposed NEPA regulations require the applicant to submit an environmental information document (EID) unless the action is categorically excluded or the applicant prepares and submits a draft EA and supporting documents. As appropriate and according to the proposed procedures in Subpart C, the applicant would be able to submit information to the Responsible Official regarding the applicability of a categorical exclusion to the applicant's pending action. The Responsible

Official would notify the applicant if the Responsible Official determines that the action is categorically excluded; if EPA needs additional information to support the application of a categorical exclusion; or if the submitted information does not support the application of a categorical exclusion and an EA or an EIS and supporting documents would be required for the project. The Responsible Official also would notify the applicant if an EID would not be required. Unless so notified or unless the applicant and Responsible Official implement a third-party agreement, the applicant, in consultation with the Responsible Official, would prepare an EID that is of sufficient scope to enable the Responsible Official to prepare an EA or, if necessary, an EIS.

*C. Proposed Amendments to EPA's Procedures for Implementing Executive Order 12114*

Today's proposed rule also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," included in EPA's proposed regulations in Subpart D, "Assessing the Environmental Effects Abroad of EPA Actions." These proposed amendments are described below. For this subpart, the scope of the proposal is limited to these minor, technical amendments and EPA is requesting comments only on these amendments.

1. Amendment to Re-Designate the Subpart for EPA's Procedures Implementing Executive Order 12114

Currently, EPA's procedures implementing Executive Order 12114 are in Part 6 at Subpart J. As part of the overall restructuring of Part 6, these procedures are proposed to be re-designated as Subpart D. The sections in this subpart are proposed to be re-numbered accordingly; § 6.1001 would become § 6.400, § 6.1002 would become § 6.401, § 6.1003 would become § 6.402, § 6.1004 would become § 6.403, § 6.1005 would become § 6.404, § 6.1006 would become § 6.405, and § 6.1007 would become § 6.406, respectively and in accordance with **Federal Register** numbering, in the proposed rule.

2. Amendments To Update Office Names and Titles

In 1981 when Subpart J was included in Part 6, the Office of Environmental Review (OER) housed the EPA official responsible for overall review of EPA's NEPA compliance as required by 40 CFR 1507.2(a). Today, this responsibility resides in the Office of

Federal Activities (OFA). The proposed rule contains amendments to update this information. Likewise, the proposed rule also contains amendments to update other office names and titles. The following proposed office name and title amendments are identified according to the paragraph numbers in the proposed rule; e.g., § 6.401(a)(5) in the proposed rule corresponds to § 6.1002(a)(5) in the current rule, § 6.403(b)(1) in the proposed rule corresponds to § 6.1004(b)(1) in the current rule, § 6.405 in the proposed rule corresponds to § 6.1006 in the current rule, and § 6.406 in the proposed rule corresponds to § 6.1007 in the current rule. In § 6.401(a)(5), "OER" would be amended to "OFA". In § 6.403(b)(1), "The Assistant Administrator for Water and Waste Management" would be amended to "The Assistant Administrator for Water". In § 6.405, "the Director, Office of Environmental Review (OER)" would be amended to "the Director, Office of Federal Activities (OFA)"; "Director Office of International Activities (OIA)" would be amended to "Assistant Administrator, Office of International Affairs (OIA)"; "Director, OER" would be amended to "Director, OFA"; and "Director, OIA" would be amended to "Assistant Administrator, OIA". In § 6.406, paragraphs (a) through (c), "OER" would be amended to "OFA".

3. Amendment to Reference in the Executive Order 12114 Implementing Procedures to EPA's Voluntary NEPA Policy

Currently, EPA's procedures for implementing Executive Order 12114 reference EPA's Voluntary EIS Policy dated October 21, 1974. The Agency revised this policy in 1998. For this reason and to clarify the applicability of these procedures to ocean dumping activities in the global commons under section 102(a) of the MPRSA, in § 6.403(b)(1), the sentences: "For ocean dumping site designations prescribed pursuant to section 102(c) of the MPRSA and 40 CFR part 228, EPA shall prepare an environmental impact statement consistent with the requirements of EPA's Procedures for the Voluntary Preparation of Environmental Impact Statements dated October 21, 1974 (see 30 FR 37419). Also EPA shall prepare an environmental impact statement for the establishment or revision of criteria under section 102(a) of MPRSA." would be amended to: "For ocean dumping site designations prescribed pursuant to section 102(c) of the MPRSA and 40 CFR part 228, and for the establishment or revision of criteria under section

102(a) of the MPRSA, EPA shall prepare appropriate environmental documents consistent with EPA's Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents dated October 29, 1998 (see 63 FR 58045)." This proposed amendment is identified according to the paragraph number in the proposed rule; e.g., § 6.403(b)(1) in the proposed rule corresponds to § 6.1004(b)(1) in the current rule.

#### 4. Amendment to Reference in the Executive Order 12114 Implementing Procedures to EPA's NEPA Implementing Procedures

Currently, EPA's procedures for implementing Executive Order 12114 reference § 6.506 of EPA's current NEPA implementing procedures. Because EPA proposes to restructure its NEPA implementing procedures, in § 6.403(d), "40 CFR 6.506 details" would be amended to "40 CFR part 6, subparts A through C, detail". This proposed amendment is identified according to the paragraph number in the proposed rule; e.g., § 6.403(d) in the proposed rule corresponds to § 6.1004(d) in the current rule.

#### 5. Amendments for Correction of Cross-References and Typographical Errors

In § 6.400(a), "the Marine Protection Research and Sanctuaries Act" would be amended to "the Marine Protection, Research, and Sanctuaries Act". In § 6.401(a), "of by EPA as set forth below:" would be amended to "of EPA as follows:". In § 6.401(a)(5), "(see § 6.1007(c))." would be amended to "(see § 6.406(c))." In § 6.401, "(b) [Reserved]." would be added to meet the **Federal Register** requirement for a second paragraph in this section. In § 6.403(d), "or water quality agreements" would be amended to "of water quality agreements" in the sentence, "Where water quality impacts identified in a facility plan are the subject of water quality agreements with Canada or Mexico, nothing in these regulations shall impose on the facility planning process coordination and consultation requirements in addition to those required by such agreements." These proposed amendments are identified according to the paragraph numbers in the proposed rule; e.g., § 6.400(a) in the proposed rule corresponds to § 6.1001(a) in the current rule, § 6.401(a) in the proposed rule corresponds to § 6.1002(a) in the current rule, § 6.401(a)(5) in the proposed rule corresponds to § 6.1002(a)(5) in the current rule, § 6.401 in the proposed rule corresponds to § 6.1002 in the current rule, and § 6.403(d) in the

proposed rule corresponds to § 6.1004(d) in the current rule.

#### V. Proposed Amended and New Categories of Actions Eligible for Categorical Exclusion; Amended and New Extraordinary Circumstances; and Amended Listing of Actions That Generally Require an Environmental Impact Statement

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

Pursuant to CEQ's Regulations that are applicable to all Federal agencies for implementing the procedural provisions of NEPA, Federal agencies must, to the fullest extent possible, reduce paperwork and accumulation of extraneous background data and emphasize real environmental issues and alternatives. (40 CFR 1500.2(b)) CEQ's Regulations (40 CFR 1507.3(b)(2)(ii)) provide that agencies are to adopt their own implementing procedures to supplement CEQ's NEPA implementing procedures, including specific criteria for and identification of classes of action which normally do not require either an environmental impact statement or an environmental assessment (e.g., categorical exclusions (see 40 CFR 1508.4)).

As part of the amendments to its NEPA implementing regulations, the Agency is proposing to amend existing and add new categories of actions eligible for categorical exclusion. Consistent with the CEQ Regulations at § 1508.4, the proposed rule would define "categorical exclusion" to mean "a category of actions that does not individually or cumulatively have a significant effect on the human environment \* \* \*" and have been found by EPA to have no such effect. The proposed rule would require that to find that a proposed action is categorically excluded, EPA's Responsible Official must determine that the proposed action fits within a categorical exclusion listed in the proposed regulations, and the proposed action does not involve any extraordinary circumstances. Some of EPA's proposed new categorical exclusions are essentially the same as categorical exclusions of other Federal agencies; others are more specific to EPA.

Consistent with the CEQ Regulations at § 1508.4, the proposed rule would define "extraordinary circumstances" to mean "those circumstances \* \* \* that may cause a significant environmental effect such that an action that otherwise meets the requirements of a categorical exclusion may not be categorically excluded." Like its current NEPA implementing regulations, EPA's proposed rule includes a list of extraordinary circumstances. Some are generally the same as those in its current NEPA implementing regulations, some are new, and some are proposed amendments based on current extraordinary circumstances, the criteria for actions that generally require environmental impact statements (EISs), and NEPA's policy direction to emphasize real environmental issues and alternatives. The extraordinary circumstances would be consolidated in the proposed rule. As required by CEQ's Regulations, the proposed rule also includes a consolidated listing of actions that generally require an EIS (see 40 CFR 1507.3(b)(2)(i)).

The proposed amendments to EPA's NEPA implementing regulations include: (1) Consolidating and standardizing the procedural provisions and requirements of the Agency's environmental review process under NEPA; (2) clarifying the general procedures associated with categorical exclusions, consolidating the categories of actions subject to categorical exclusion, amending existing and adding new categorical exclusions, and consolidating and amending existing and adding new extraordinary circumstances; (3) consolidating and amending the listing of actions that generally require environmental impact statements; (4) clarifying the procedural requirements for consideration of applicable environmental review laws and executive orders; and (5) incorporating other proposed revisions consistent with CEQ's Regulations. The general reasons for the amended and new categorical exclusions, extraordinary circumstances, and criteria for actions that generally require an EIS are as follows:

(1) Consolidation and standardization of the procedural provisions and requirements of the Agency's environmental review process under NEPA

The proposed regulations would consolidate and standardize the environmental review process applicable to all EPA actions subject to NEPA, including those actions now specifically addressed in the current regulations and other actions subject to



NEPA but not specifically addressed in the current regulations (e.g., certain grants awarded for special projects identified in the State and Tribal Assistance Grants (STAG) account authorized by Congress through the Agency's annual Appropriations Act).

(2) Clarify the general procedures associated with categorical exclusions, consolidate the categories of actions subject to categorical exclusion, amend existing and add new categorical exclusions, and consolidate and amend existing and add new extraordinary circumstances

Currently, EPA's NEPA implementing regulations include general and, by subpart, program-specific categorical exclusions and extraordinary circumstances. The proposed regulations would consolidate the categorical exclusions and extraordinary circumstances in a single location. Thus, the procedures for determining if a proposed action fits within a categorical exclusion or involves any extraordinary circumstances would be the same for all EPA actions subject to NEPA.

(3) Consolidate and amend the listing of actions that generally require an environmental impact statement

Currently, some subparts of EPA's NEPA implementing regulations list actions that generally require EISs, and one also lists specific actions that generally require EAs. The proposed regulations would consolidate and amend the criteria for actions that generally require EISs. These criteria for actions that generally require EISs in the proposed regulations would be applicable to all EPA actions subject to NEPA.

EPA's NEPA regulations apply to the actions and decisions of EPA that are subject to NEPA's procedural requirements in order to ensure that environmental information is available to the Agency's decision-makers and the public before decisions are made and before actions are taken. This includes actions such as the award of wastewater treatment construction grants under Title II of the Clean Water Act, EPA's issuance of new source National Pollutant Discharge Elimination System (NPDES) permits, certain research and development projects, EPA actions involving renovations at or new construction of EPA facilities, and certain grants awarded for special projects identified in the STAG account authorized by Congress through the Agency's annual Appropriations Act. EPA actions subject to NEPA that are based on applicant proposals may

include any of these except EPA actions for construction of special purpose facilities or facility renovations. As with EPA's current NEPA implementing regulations, compliance with the proposed NEPA regulations would be the responsibility of EPA's Responsible Officials and certain grant or permit applicants who must submit environmental information documentation to EPA for their proposed projects.

Currently, EPA's NEPA implementing regulations apply, by subpart, to specific actions. For example, Subpart E applies to the award of wastewater treatment construction grants under Title II of the Clean Water Act, and Subpart F applies to EPA's environmental review process for issuance of new source NPDES permits. The proposed regulations would consolidate and standardize the environmental review process applicable to all EPA actions subject to NEPA, including those actions now specifically addressed in the current regulations and other actions subject to NEPA but not specifically addressed in the current regulations (e.g., certain grants awarded for special projects identified in the STAG account.) As with EPA's current regulations, the proposed regulations would supplement and be used in conjunction with the CEQ Regulations. Certain EPA actions are exempt from the procedural requirements of NEPA and would remain exempt under the proposed rule.

EPA is proposing to consolidate and standardize the environmental review process applicable to all EPA actions subject to NEPA. As part of this process, EPA is consolidating the categories of actions eligible for categorical exclusion, and amending existing and adding new categorical exclusions. CEQ's Regulations state that Federal agencies must implement NEPA procedures, in part, "to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives." (40 CFR 1500.2(b)) EPA believes that the proposed amended and identification of new categorical exclusions meets the intent of this NEPA policy as paperwork is reduced or eliminated for EPA's Responsible Officials and applicants. Likewise, EPA's attention will be focused on proposed actions with real environmental issues and the associated analysis of alternatives, including mitigation measures, that will eliminate or reduce the project's environmental impacts.

The NEPA Task Force Report to the Council on Environmental Quality notes that federal agency administrative

records prepared to support categorical exclusions may include documentation of: Professional staff and expert opinions; research study results; past NEPA action records; and similar categorical exclusion actions by other agencies. ["Modernizing NEPA Implementation, Chapter 5, Categorical Exclusions," The NEPA Task Force Report to the Council on Environmental Quality, September 2003]

*Categorical Exclusions.* EPA's proposed rule identifies 15 categories of action eligible for categorical exclusion included in two listings. The first five proposed categorical exclusions, listed in the proposed rule at § 6.204(a)(1)(i) through (v), are more likely to involve extraordinary circumstances and require the EPA Responsible Official to document a determination that a categorical exclusion applies. It is also EPA's opinion that these actions generally do not pose the potential for environmental impacts, and that confirmation there are no extraordinary circumstances would satisfy a determination that the use of a CE is appropriate. The first three of these are substantially the same as, or similar to, categorical exclusions in EPA's current NEPA implementing regulations with amendments to clarify their applicability to all EPA actions subject to NEPA and to clarify the intended applicability of the categorical exclusion. Proposed categorical exclusion (i) is similar to other Federal agencies' categorical exclusions (in general terms, minor rehabilitation). Proposed categorical exclusions (ii) and (iii) are specific to EPA and are similar to current EPA categorical exclusions; they have been documented as proposed categorical exclusions through past NEPA action records. Categorical exclusion (iv) is a proposed new categorical exclusion based on EPA's past NEPA action records. Categorical exclusion (v) is a proposed new categorical exclusion based on EPA's view that these actions for award of funds are not likely to have the potential for environmental impacts because the project for which the grant is being awarded was completed prior to the date the appropriation was enacted. However, EPA has discretion to award these grants, so they should be screened to determine whether there may be extraordinary circumstances associated with the completed project that should be addressed by conducting a NEPA review (e.g., avoidance or mitigation of potential impacts).

It is EPA's view that the next 10 listed categorical exclusions are generally administrative in nature, do not generally involve extraordinary

circumstances and do not require the EPA Responsible Official to document a determination that a categorical exclusion applies (see proposed rule, § 6.204(a)(2)(i) through (x)). One of these proposed categorical exclusions is substantially the same as one in EPA's current Part 6 rule. The other 9 are proposed new categorical exclusions, one of which incorporates three of the categorical exclusions in EPA's current NEPA implementing regulations. These proposed new categorical exclusions are generally for actions involving administrative procedures of the Agency. Most are similar to other Federal agencies' categorical exclusions, and some are also based on EPA's view that they are administrative in nature and generally do not involve extraordinary circumstances. In any case, even for these categorical exclusions, the Responsible Official would be required to ensure that none of the extraordinary circumstances applies to the action.

EPA's "Supporting Statement for Amended and New Categorical Exclusions, Extraordinary Circumstances, and Criteria for Actions that Generally Require EISs under 40 CFR Part 6: 'Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions'" is available in the docket for this proposed rulemaking at [www.regulations.gov](http://www.regulations.gov) and provides specific reasons for the proposed amended and new categorical exclusions included in EPA's proposed rule. EPA's documentation includes: references to EPA projects documented with environmental assessments and findings of no significant impact; reference to other Federal agencies with similar provisions for categorical exclusions; and statements of EPA's opinion.

*Extraordinary Circumstances.* EPA's proposed rule identifies 10 extraordinary circumstances in the proposed rule at § 6.204(b)(1) through (10). Four of the proposed extraordinary circumstances are substantially the same as the eight in EPA's current regulations, and one of the proposed new extraordinary circumstances combines the elements of two in the current regulations. This proposed rule updates and amends the current extraordinary circumstances to clarify the conditions for their applicability, and consolidates all of the extraordinary circumstances into a single listing that would be applicable to all EPA actions subject to NEPA. EPA is also proposing six new extraordinary circumstances based on NEPA's policy direction to

emphasize real environmental issues and alternatives and on consideration of EPA's proposed criteria for actions that generally require an EIS. EPA believes there is a relationship between the extraordinary circumstances and the criteria for actions that generally require EISs. EPA notes, however, that extraordinary circumstances are used to help the Responsible Official determine whether, or not, a categorical exclusion applies to the proposed action, and that the criteria for actions that generally require an EIS are criteria that generally, but not always, require an EIS.

EPA's "Supporting Statement for Amended and New Categorical Exclusions, Extraordinary Circumstances, and Criteria for Actions that Generally Require EISs under 40 CFR Part 6: 'Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions'" is available in the docket for this proposed rulemaking at [www.regulations.gov](http://www.regulations.gov) and provides specific reasons for the amended and new extraordinary circumstances included in the proposed rule. In summary, the intent is to standardize the essential concepts and combine the variously stated criteria into a consolidated set of extraordinary circumstances applicable to all EPA actions subject to NEPA. The proposed extraordinary circumstances are not intended to be a listing of requirements for preparing EISs. Rather, they are to be used to determine whether a categorical exclusion applies to the action. If not, the EPA Responsible Official may prepare an environmental assessment to determine whether a finding of no significant impact, or an EIS, is the appropriate NEPA document for the project, or the Responsible Official proceeds directly with preparing an EIS.

*Criteria for Actions that Generally Require EISs.* EPA's proposed rule identifies 11 criteria for actions that generally require an EIS. These proposed criteria are substantially the same as, or similar to, 16 of the 17 criteria in EPA's current NEPA implementing regulations. The criterion in EPA's current rule at § 6.509(b), 'the project is highly controversial,' is not included in the proposed criteria for actions that generally require EISs because EPA believes that the potential environmental impacts of such a project may not necessarily rise to the level of significance such that an EIS is generally required; e.g., an environmental assessment with provisions for mitigation could be the appropriate level of environmental review for the action. Further, as stated

in the current rule, there is no direct tie to environmental impacts. Rather, EPA's proposed rule includes an extraordinary circumstance at § 6.204(b)(8) that addresses this concept, including the potential for environmental impact.

EPA's "Supporting Statement for Amended and New Categorical Exclusions, Extraordinary Circumstances, and Criteria for Actions that Generally Require EISs under 40 CFR Part 6: 'Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions'" is available in the docket for this proposed rulemaking at [www.regulations.gov](http://www.regulations.gov) and provides specific reasons for the amended criteria for actions that generally require EISs included in the proposed rule. In summary, the intent is to standardize the essential concepts and combine the variously stated criteria into a consolidated set of criteria for actions that generally require EISs that are applicable to all EPA actions subject to NEPA. The proposed criteria are not intended to be a listing of requirements for preparing EISs in all cases. This is because not all actions examined under the criteria rise to the level of significance such that EISs are required (e.g., an environmental assessment with provisions for mitigation could be the appropriate level of environmental review for an action).

In keeping with the public comment process for this proposed rulemaking, EPA is interested in the public's comments on these proposed amended and new categorical exclusions, extraordinary circumstances, and criteria for actions that generally require an EIS.

## VI. Administrative Requirements

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

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

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. The total annual public reporting and recordkeeping burden for this collection of information is estimated at 48,147 hours and

\$3,823,740 for contractor hours and costs, direct labor hours and costs, and O&M costs. This burden reflects the annual preparation of documentation for an anticipated 312 applicant-proposed projects that may be documented with a CE, or an EA/FONSI, or an EIS/ROD. Under the proposed rule, EPA assumes there will be approximately 300 grantee projects annually with about 60% of these projects documented with a CE, and about 40% with an EA/FONSI. In addition, EPA estimates that one project will have an EIS/ROD completed during the 3-year period of this ICR. For permit applicants, EPA assumes there will be approximately 12 projects annually with about 11 documented with an EA/FONSI. In addition, EPA estimates one project will have an EIS/ROD completed annually. None will be documented initially with a CE. Over a 3-year period, EPA anticipates 937 applicant-proposed projects with a 3-year total burden estimate of 144,440 hours and \$11,471,220. Under the current rule, the individual cost for each type of documentation is the same. However, EPA estimates that 50% of grantee projects are documented with a CE, and 50% are documented with an EA/FONSI. Approximately one project will have an EIS/ROD completed per three-year period, and project estimates for permit applicants are approximately the same (11 projects documented with an EA/FONSI; 1 project documented with an EIS/ROD). The total burden of the current rule is 54,497 hours and \$4,275,180. The proposed rule would decrease the number of hours spent on documentation by 6,350 hours, and would have an annual yearly savings of \$451,440. Over a three-year period, the proposed rule would decrease burden by 19,050 hours and \$1,354,320. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

#### B. Paperwork Reduction Act

The information collection requirements of this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2243.02.

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

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

Those subject to the proposed rule include EPA employees who must comply with NEPA and certain grant and permit applicants who must submit environmental information to EPA for their proposed projects. The EPA Responsible Official is responsible for the environmental review process, including any categorical exclusion determination or the scope, accuracy, and contents of a final environmental assessment (EA) or environmental impact statement (EIS) and any associated documents. The applicant contributes by submitting environmental information to EPA as part of the environmental review process. The information collected from grant or permit applicants is one-time only on a per-project basis for EPA actions subject to NEPA that are based on applicant proposals. Grantees (primarily grants for special projects identified in EPA's State and Tribal Assistance Grants (STAG) account) or permit applicants (for new source NPDES permits issued by EPA) are required to provide environmental information to EPA as part of the

environmental review process unless the EPA Responsible Official decides to prepare the NEPA documents without assistance from the applicant. If the applicant cannot afford to provide the required environmental information to EPA, then EPA would undertake the environmental review without input from the applicant. Further, grantees may be grant-eligible for certain costs associated with providing environmental information to EPA; permit applicants are not eligible for EPA financial assistance.

The NEPA review for a project may result in a categorical exclusion (CE), or an EA documented with a finding of no significant impact (EA/FONSI), or an EIS documented with a record of decision (EIS/ROD). (EPA assumes a project may be documented with a CE only for grantee-proposed projects. EPA does not anticipate that an initial new source NPDES permit application would be documented with a CE.) For any specific project, only one of these levels of documentation is generally prepared. Applicants may submit an environmental information document (EID) to EPA as part of the environmental review process. Alternately, an applicant may submit a draft EA or a draft EIS and supporting documents. Applicants may prepare and submit the information directly, or may enter a third-party contract agreement with EPA for preparation of an EA or EIS and supporting documentation. For purposes of determining the maximum costs to applicants for this ICR, EPA assumed that grant and permit applicants would expend time and contractor costs to submit: (1) Information to support application of a CE with environmental information prepared directly by the applicant's contractor; or (2) a draft EA and supporting documents prepared directly by the applicant's contractor; or (3) a draft and final EIS and supporting documents prepared by the applicant's contractor under a third-party contract agreement with EPA.

Based on EPA's past experience, under the proposed rule, EPA anticipates there will be approximately 300 grantee projects annually with about 60% of these projects documented with a CE, and about 40% with an EA/FONSI. In addition, EPA estimates that one project (less than one percent of the total annual grantee projects) will have an EIS/ROD completed during the 3-year period of this ICR. For permit applicants, EPA assumes there will be approximately 12 projects annually with about 11 of the projects documented with an EA/FONSI. In addition, EPA estimates one project will have an EIS/

ROD completed annually. None will be documented initially with a CE. EPA estimated the one-time costs for applicants to prepare the environmental documentation by including contractor hours and costs, direct labor hours and costs, and O&M for documentation submitted to EPA to support a CE determination, or an EA/FONSI, or an EIS/ROD. For a grantee, EPA estimates an applicant's one-time costs for submitting environmental information will be: 45 hours and \$3,292 for CE documentation, or 260 hours and \$18,340 for EA/FONSI documentation, or 2,840 hours and \$324,480 for EIS/ROD documentation. For a permit applicant, EPA estimates an applicant's one-time costs for submitting environmental information will be: 460 hours and \$53,940 for EA/FONSI documentation, or 2,840 hours and \$328,880 for EIS/ROD documentation. These figures may vary depending on the complexity of issues associated with the project and the availability of relevant information, particularly for EISs. (For example, EPA's experience with a limited number of EISs has included one-time costs ranging from nominal for information submitted by letter to supplement an existing oil and gas extraction EIS to over a million dollars for new EISs for a mining project and an oil and gas extraction project with multiple complex issues.) EPA believes the calculations for this ICR are representative of most projects.

For purposes of this ICR, the total annual public reporting and recordkeeping burden for this collection of information is estimated at 48,147 hours and \$3,823,740 for contractor hours and costs, direct labor hours and costs, and O&M costs. This burden reflects the annual submission of documentation for an anticipated 312 applicant-proposed projects that may be documented with a CE, or an EA/FONSI, or an EIS/ROD. Under the proposed rule, EPA assumes there will be approximately 300 grantee projects annually with about 60% of these projects documented with a CE, and about 40% with an EA/FONSI. In addition, EPA estimates that one project will have an EIS/ROD completed during the 3-year period of this ICR. For permit applicants, EPA assumes there will be approximately 12 projects annually with about 11 documented with an EA/FONSI. In addition, EPA estimates one project will have an EIS/ROD completed annually. None will be documented initially with a CE. The total burden estimate for this ICR reduces the burden of the previous collection by 6,350 hours and \$451,440 (the previous

collection estimated that there were approximately 300 grantee projects annually with about 50% of these projects documented with a CE and about 50% documented with an EA/FONSI. Approximately one project completed an EIS/ROD during the 3-year period of the ICR). Over the 3-year period of this ICR, EPA anticipates 937 applicant-proposed projects with a 3-year total burden estimate of 144,440 hours and \$11,471,220. For the 3-year period of this ICR, the proposed rule would reduce the total burden by 19,050 hours and \$1,354,320. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this proposed rule, which includes this ICR, under Docket ID number EPA-HQ-OECA-2005-0062. Submit any comments related to the ICR for this proposed rule to EPA and OMB. See **ADDRESSEES** section of the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 19, 2006, a comment to OMB is best assured of having its full effect if OMB receives it by January 18, 2007. The final rule will respond to any OMB or public

comments on the information collection requirements contained in this proposal.

### *C. Regulatory Flexibility Act (RFA)*

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

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

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We are proposing amendments to the Agency's procedures for implementing the requirements of the National Environmental Policy Act of 1969 (NEPA). This proposed rule also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions."

Certain applicants must submit environmental information to EPA as part of the process of complying with either NEPA or Executive Order 12114. EPA's Executive Order 12114 procedures further the purpose of NEPA and provide that EPA may be guided by these procedures to the extent they are applicable. Therefore, when EPA conducts an environmental assessment pursuant to its Executive Order 12114 procedures, the Agency generally follows its NEPA procedures.

This proposed rule is applicable to certain EPA actions subject to NEPA, including certain applicant-proposed projects. Because the projects are proposed by the applicants, who are non-federal entities, including small businesses and small governments, EPA does not know what projects will be proposed, when they will be proposed, or what level of NEPA review will be

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

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

Although this proposed rule will not have a significant economic impact on

a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this proposed rule on small entities. The environmental information submitted by an applicant under the proposed rule is one-time only for EPA actions subject to NEPA based on applicant proposals; i.e., actions proposed by grantees seeking funding assistance from EPA or for an NPDES permit application initiated by the permit applicant. In either case, EPA assumes the action will directly benefit the applicant (such as a grantee seeking STAG funding for renovation of a community drinking water system, or a permit applicant seeking an NPDES permit from EPA to further the applicant's business interests). Nonetheless, if the applicant cannot afford to provide the required environmental information to EPA, then EPA would undertake the environmental review without input from the applicant. (Applicants would normally be requested to demonstrate financial hardship, including inability to provide the requested environmental information.) Grantees may be grant-eligible for certain costs associated with providing environmental information to EPA; permit applicants are not eligible for EPA financial assistance. Further, EPA has attempted to reduce the cost on all entities, including small entities, through the following provisions of the proposed rule: Section 6.300 provides that an EID is not required when the action is categorically excluded, or the applicant will prepare a draft EA and supporting documents. The Responsible Official may prepare the NEPA documents without assistance from the applicant. Section 6.302 provides that the Responsible Official may prepare generic guidance for categories of actions involving a large number of applicants; and must ensure early involvement of applicants, consult with the applicant and provide guidance describing the scope and level of environmental information required, and provide guidance on a project-by-project basis to any applicant seeking assistance. This Section also provides that the Responsible Official must consider the extent to which the applicant is capable of providing the required information, must not require the applicant to gather data or perform analyses that unnecessarily duplicate either existing data or the results of existing analyses available to EPA, and must limit the request for environmental information to that necessary for the environmental review. Section 6.303 provides that an applicant may enter into a third-party agreement with EPA.

For grantees, third-party agreement contractor costs may be grant-eligible. Permit applicants are not eligible for EPA financial assistance.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

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

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

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

EPA is proposing to amend its procedures for implementing the requirements of the National

Environmental Policy Act of 1969 (NEPA). Today's proposed rule also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions."

EPA is collecting information from certain applicants as part of the process of complying with either NEPA or Executive Order 12114. EPA's Executive Order 12114 procedures further the purpose of NEPA and provide that EPA may be guided by these procedures to the extent they are applicable.

Therefore, when EPA conducts an environmental assessment pursuant to its Executive Order 12114 procedures, the Agency generally follows its NEPA procedures. For purposes of UMRA, applicant-proposed projects subject to either NEPA or Executive Order 12114 are addressed through the NEPA assessment process.

Those subject to the proposed NEPA rule include EPA employees who must comply with NEPA and certain grant and permit applicants who must submit environmental information to EPA for their proposed projects. The EPA Responsible Official is responsible for the environmental review process, including any categorical exclusion (CE) determination or the scope, accuracy, and contents of a final environmental assessment (EA) or environmental impact statement (EIS) and any associated documents. The applicant contributes by submitting environmental information to EPA as part of the environmental review process. The information submitted by grant or permit applicants is one-time only on a per-project basis for EPA actions subject to NEPA that are based on applicant proposals. Grantees are generally governmental jurisdictions, including State and local governments, and tribes applying to EPA for special projects identified in EPA's State and Tribal Assistance Grants (STAG account) or private sector applicants for new source NPDES permits issued by EPA. Applicants are required to provide environmental information to EPA as part of the environmental review process unless the EPA Responsible Official decides to prepare the NEPA documents without assistance from the applicant. If the applicant, including governmental grantees, cannot afford to provide the required environmental information to EPA, then EPA would undertake the environmental review without input from the applicant. Further, governmental grantees may be grant-eligible for certain costs associated with providing environmental information to EPA.

The NEPA review for a project may result in a CE determination, or an EA documented with a finding of no significant impact (EA/FONSI), or an EIS documented with a record of decision (EIS/ROD). For any specific project, only one of these levels of documentation is generally prepared. Applicants may submit an environmental information document (EID) to EPA as part of the environmental review process. Alternately, an applicant may submit a draft EA or a draft EIS and supporting documents. Applicants may prepare and submit the information directly, or may enter a third-party contract agreement with EPA for preparation of an EA or EIS and supporting documentation. Governmental grantees may be grant-eligible for certain costs associated with providing environmental information to EPA, including certain third-party contract costs; private sector permit applicants are not eligible for EPA financial assistance. For purposes of maximum cost estimates to applicants for UMRA purposes, EPA assumed that applicants would expend time and contractor costs to submit: (1) Information to support application of a CE with environmental information prepared directly by the applicant's contractor; or (2) a draft EA and supporting documents prepared directly by the applicant's contractor; or (3) a draft and final EIS and supporting documents prepared by the applicant's contractor under a third-party contract agreement with EPA.

Based on EPA's past experience, under the proposed rule, EPA anticipates there will be approximately 300 grantee projects annually with about 60% of these projects documented with a CE, and about 40% with an EA/FONSI. In addition, EPA estimates that one project (less than one percent of the total annual grantee projects) will have an EIS/ROD completed during a 3-year period. For permit applicants, EPA assumes there will be approximately 12 projects annually with about 11 of the projects documented with an EA/FONSI. In addition, EPA estimates one project will have an EIS/ROD completed annually. None of the projects will be documented initially with a CE. EPA estimated one-time costs for applicants to prepare the environmental documentation by including contractor hours and costs, direct labor hours and costs, and O&M for documentation submitted to EPA to support a CE determination, or an EA/FONSI, or an EIS/ROD. For a grantee, EPA estimates an applicant's one-time costs for submitting environmental information

will be: \$3,292 for CE documentation, or \$18,340 for EA/FONSI documentation, or \$324,480 for EIS/ROD documentation. For a permit applicant, EPA estimates an applicant's one-time costs for submitting environmental information will be: \$53,940 for EA/FONSI documentation, or \$328,880 for EIS/ROD documentation. These figures may vary depending on the complexity of issues associated with the project and the availability of relevant information, particularly for EISs. (For example, EPA's experience with a limited number of EISs has included one-time costs ranging from nominal for information submitted by letter to supplement an existing oil and gas extraction EIS to over a million dollars for new EISs for a mining project and an oil and gas extraction project with multiple complex issues.) EPA believes the calculation for this UMRA assessment is representative of most projects. On an annual one-time submission basis, EPA's aggregate estimate for applicants is \$3,823,740 for contractor hours and costs, direct labor hours and costs, including third-year costs for an EIS/ROD for one grantee project. The requirement in today's proposed rule for applicants to submit one-time, project-specific environmental information does not impose substantial compliance costs on applicants, including governmental grantees, because it is not likely to result in the expenditure by applicants, including State and local governments, and tribes, in the aggregate, or the private sector, of \$100 million or more in any one year. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

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

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Neither the proposed amendments to EPA's NEPA implementing regulations nor the minor, technical amendments to EPA's procedures implementing Executive Order 12114 have federalism implications. They will not have substantial direct effects on the States, on the relationship between the national

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

Although this proposed rule does not have federalism implications, as with EPA's current rule, some parts of the proposed NEPA regulations might require EPA to involve the States in the NEPA environmental review process. For example, § 6.202 encourages early coordination and cooperation with federal agencies, state and local governments, and tribes with jurisdiction by law or special expertise. Section 6.203 requires the Responsible Official to ensure meaningful public participation. EPA anticipates that State and local governments would participate in the public participation

process. Section 6.204 of the proposed NEPA regulations lists extraordinary circumstances that would bar the Responsible Official from determining that a categorical exclusion applies to the action. The Responsible Official may ask the relevant State for assistance in determining whether the proposed action meets these criteria.

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

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have tribal implications, as specified in Executive Order 13175.

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

Although this proposed rule does not have Executive Order 13175 implications, as with EPA's current rule, some parts of the proposed NEPA

regulations might require EPA to involve tribes in the environmental review process. For example, § 6.202 encourages early coordination and cooperation with federal agencies, state and local governments, and tribes with jurisdiction by law or special expertise. Section 6.203 requires the Responsible Official to ensure meaningful public participation. EPA anticipates that tribes would participate in the public participation process as appropriate. Section 6.204 of the proposed NEPA regulations lists extraordinary circumstances that would bar the Responsible Official from determining that a categorical exclusion applies to the action. The Responsible Official may ask the relevant tribe for assistance in determining whether the proposed action meets these criteria.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule, including the proposed amendments to EPA's NEPA implementing procedures and the proposed minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution and Use*

This proposed rule is not a "significant energy action" as defined in

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Today's proposed rule includes EPA's proposed amendments to its procedures for implementing the requirements of the National Environmental Policy Act of 1969 and minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions." It does not impose new regulatory obligations related to energy supply, distribution, or use of energy on EPA, state or local governments, tribes, or individual applicants required to provide environmental information to EPA for certain grants or permits. Therefore, we have concluded that this proposed rule is not likely to have any adverse energy effects.

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

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking, which includes EPA's proposed amendments to its procedures for implementing the requirements of the National Environmental Policy Act of 1969 and minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

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

EPA maintains an ongoing commitment to ensure environmental justice for all people, regardless of race, color, national origin, or income. Ensuring environmental justice means not only protecting human health and the environment for everyone, but also ensuring that all people are treated fairly and given the opportunity to participate meaningfully in the development, implementation, and enforcement of environmental laws, regulations, and policies. In recognizing that minority and/or low-income communities frequently may be exposed disproportionately to environmental harms and risks, EPA works to protect these and other burdened communities from adverse human health and environmental effects of its programs, consistent with existing environmental and civil rights laws, and their implementing regulations, as well as Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." (59 FR 7629 (Feb. 11, 1994)). Executive Order 12898 establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and/or low-income populations. In developing this proposed rule in compliance with Executive Order 12898, EPA determined that the proposed rule did not raise any environmental justice concerns.

Today's proposed rule, including the proposed amendments to EPA's NEPA implementing procedures and the proposed minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, does not impose new regulatory program, policy, or activity obligations on EPA, state or local governments, tribes, or individual applicants required to provide environmental information to EPA for certain grants or permits. Therefore, we have concluded that this proposed rule is not likely to have any adverse effects on minority or low-income populations, including tribes. However, the proposed NEPA rule at § 6.201 requires that for specific projects, consistent with 40 CFR

1500.5(g) and 1502.25, the EPA Responsible Official must determine the applicability of executive orders, including Executive Order 12898, and should incorporate applicable requirements as early in the NEPA review process as possible. In addition, § 6.203(a)(5) and (c)(3)(iv) require the Responsible Official to choose public participation methods and engage in outreach designed to reach those in "potentially affected communities where the proposed action is known or expected to have potentially significant environmental impacts or where the proposed action may have disproportionately high and adverse human health or environmental effects in any communities, including minority communities, low-income communities, or federally-recognized Indian tribal communities." EPA provides guidance to Responsible Officials and EPA staff on incorporating environmental justice concerns into the NEPA analysis. See "Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses," "April 1998.

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

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

Dated: December 11, 2006.

**Stephen L. Johnson,**  
*Administrator.*

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

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

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

- 6.100 Policy and Purpose.
- 6.101 Applicability.
- 6.102 Definitions.
- 6.103 Responsibilities of the NEPA Official and Responsible Officials.

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

- 6.200 General requirements.
- 6.201 Coordination with other environmental review requirements.
- 6.202 Interagency cooperation.
- 6.203 Public participation.
- 6.204 Categorical exclusions and extraordinary circumstances.



- 6.205 Environmental assessments.
- 6.206 Findings of no significant impact.
- 6.207 Environmental impact statements.
- 6.208 Records of decision.
- 6.209 Filing requirements for EPA EISs.
- 6.210 Emergency circumstances.

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

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

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

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

**Authority:** 42 U.S.C. 4321 *et seq.*, 7401–7671q. Subpart D also issued under 42 U.S.C. 4321, note, E.O. 12114, 44 FR 1979, 3 CFR, 1979 Comp., p. 356.

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

**§ 6.100 Policy and Purpose.**

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

(b) Through this proposed rule, EPA adopts the CEQ's regulations (40 CFR Parts 1500–1508) implementing NEPA; subparts A through C of this part supplement those regulations, for actions proposed by EPA that are subject to NEPA requirements. Subparts A through C are to be used in conjunction with the CEQ Regulations.

**§ 6.101 Applicability.**

(a) Subparts A through C apply to the proposed actions of EPA that are subject

to NEPA. EPA actions subject to NEPA include the award of wastewater treatment construction grants under Title II of the Clean Water Act, EPA's issuance of new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act, certain research and development projects, development and issuance of regulations, EPA actions involving renovations or new construction of facilities, and certain grants awarded for special projects identified in the State and Tribal Assistance Grants (STAG) account authorized by Congress through the Agency's annual Appropriations Act.

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

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

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

(e) When the Responsible Official decides to perform an environmental review under EPA's Voluntary NEPA Policy (see 63 FR 58045), the Responsible Official generally will follow the procedures set out in subparts A through C of this part.

(f) Subparts A through C of this part do not apply to the actions of EPA for which NEPA review is not required, including proposed actions for which analyses that have been conducted under another statute have been determined to be functionally equivalent to NEPA.

**§ 6.102 Definitions.**

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

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

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

(i) Filed an application for federal assistance; or

(ii) Applied to EPA for a permit.

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

(4) *Environmental information document (EID)* means a written analysis prepared by an applicant that provides sufficient information for the Responsible Official to undertake an

environmental review and prepare either an EA and FONSI or an EIS and record of decision (ROD) for the proposed action.

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

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

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

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

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

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

(a) The NEPA Official will:

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

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

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

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

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

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

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

(8) Consult with Responsible Officials and CEQ regarding the addition, amendment, or deletion of a categorical exclusion.

(b) For individual proposed actions, the Responsible Official will:

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

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

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

(4) Coordinate with the NEPA Official and other Responsible Officials, as appropriate, on resolving issues involving EPA-wide NEPA policy and procedures and/or unresolved conflicts with other federal agencies, state and local governments, and federally-recognized Indian tribes, and/or advising the Administrator when necessary.

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

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

(7) Upon request of an applicant and consistent with 40 CFR 1501.8, set time limits on the NEPA review appropriate to individual proposed actions.

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

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

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

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

#### § 6.200 General requirements.

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

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

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

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

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

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

(4) Involve other agencies and the public, as appropriate, in the environmental review process for proposed actions that are not categorically excluded to:

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

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

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

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

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

(2) Plan adequate time and funding for the NEPA review and preparation of the NEPA documents. Planning includes consideration of whether an

applicant will be required to prepare an EID for the proposed action.

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

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

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

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

(2) Consider the relevant NEPA documents, public and other agency comments (if any) on those documents, and EPA responses to those comments, as part of consideration of the action (see 40 CFR 1505.1(d)).

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

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

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

(g) For applicant-related proposed actions:

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

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

a third-party agreement with the applicant.

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

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

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

Consistent with 40 CFR 1500.5(g) and 1502.25, the Responsible Official must determine the applicability of other environmental laws and executive orders, to the fullest extent possible. The Responsible Official should incorporate applicable requirements as early in the NEPA review process as possible.

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

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

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

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

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

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

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

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

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

(5) The Responsible Official must use appropriate communication procedures to ensure meaningful public participation throughout the NEPA process. The Responsible Official must make reasonable efforts to involve the potentially affected communities where the proposed action is expected to have environmental impacts or where the proposed action may have human health or environmental effects in any communities, including minority communities, low-income communities, or federally-recognized Indian tribal communities.

(b) *EA and FONSI requirements.* At least thirty (30) calendar days before making the decision on whether, and if so how, to proceed with a proposed action, the Responsible Official must make available to the interested federal agencies, state and local governments, federally-recognized Indian tribes and the affected public the EA and preliminary FONSI for review and comment. The Responsible Official must respond to any substantive comments received and finalize the EA and FONSI before making a decision on the proposed action. Where circumstances make it necessary to take the action without observing the 30-

calendar-day comment period, the Responsible Official must notify the NEPA Official before taking such action. If the NEPA Official determines that a reduced comment period would be in the best interest of the Government, the NEPA Official will inform the Responsible Official, as soon as possible, of this approval.

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

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

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

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

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

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

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

communities, or federally-recognized Indian tribal communities.

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

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

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

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

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

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

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

(i) Actions at EPA owned or operated facilities involving routine facility maintenance, repair, and grounds-keeping; minor rehabilitation, restoration, renovation, or revitalization

of existing facilities; functional replacement of equipment, acquisition and installation of equipment, or construction of new minor ancillary facilities adjacent to or on the same property as existing facilities.

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

(iii) Actions in unsewered communities relating to the use of proposed wastewater on-site technologies where such technologies replace existing systems.

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

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

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

(i) Procedural, ministerial, administrative, financial, personnel, and management actions necessary to

support the normal conduct of EPA business.

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

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

(iv) Actions relating to or conducted completely within a permanent, existing contained facility, such as a laboratory, or other enclosed building, provided that reliable and scientifically sound methods are used to appropriately dispose of wastes and safeguards exist to prevent hazardous, toxic and radioactive materials in excess of allowable limits from entering the environment. Where such activities are conducted at laboratories, the Lab Director or other appropriate official must certify in writing that the laboratory follows good laboratory practices and adheres to all applicable federal, state, local and federally-recognized Indian tribal laws and regulations. This category does not include activities related to construction and/or demolition within the facility (see paragraph (a)(1)(i) of this section).

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

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

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

governments, or public or private entities.

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

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

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

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

(1) The proposed action is known or expected to have potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time (see 40 CFR 1508.25(a)).

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

(3) The proposed action may significantly affect federally listed threatened or endangered species or their critical habitat.

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

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

(6) The proposed action has the potential to cause significant adverse air quality effects.

(7) The proposed action will likely have a significant effect on the pattern and type of land use (industrial,

commercial, agricultural, recreational, residential) or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans.

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

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

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

(c) The Responsible Official may request that an applicant submit sufficient information to enable the Responsible Official to determine whether a categorical exclusion applies to the applicant's proposed action or whether an exceptional circumstance applies. Pursuant to Subpart C of this part, applicants are not required to prepare EIDs for actions that are being considered for categorical exclusion.

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

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

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

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

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

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

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

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

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

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

#### **§ 6.205 Environmental assessments.**

(a) The Responsible Official must prepare an environmental assessment (EA) (see 40 CFR 1508.9) for a proposed action that is expected to result in environmental impacts and the significance of the impacts is not known. An EA is not required if the proposed action is categorically excluded, or if the Responsible Official has decided to prepare an EIS. (See 40 CFR 1501.3.) Types of actions that typically require the preparation of an EA include: the award of wastewater treatment construction grants under Title II of the Clean Water Act; EPA's issuance of new source NPDES permits under section 402 of the Clean Water Act; EPA actions involving renovations or new construction of facilities; certain grants awarded for special projects identified in the State and Tribal Assistance Grants (STAG) account authorized by Congress through the Agency's annual Appropriations Act; and research and development projects, such as initial field demonstration of a new technology, field trials of a new product or new uses of an existing technology, alteration of a local habitat by physical or chemical means, or actions that may result in the release of radioactive, hazardous, or toxic substances, or biota.

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

(c) An EA must include:

(1) A brief discussions of:

(i) The need for the proposed action;

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

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

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

(v) Other applicable environmental laws and executive orders.

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

(3) Identification and description of any mitigation measures considered, including any mitigation measures that must be adopted to ensure the action will not have significant impacts; and

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

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

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

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

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

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

(c) In addition, the FONSI, must include:

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

(2) The date of issuance; and

(3) The signature of the Responsible Official.

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

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

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

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

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

#### **§ 6.207 Environmental impact statements.**

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

(1) An EIS must be prepared consistent with 40 CFR part 1502.

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

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

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

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

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

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

(vi) The proposed action is likely to significantly affect the environment

through the release of radioactive, hazardous or toxic substances, or biota.

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

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

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

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

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

(3) EISs are typically prepared for the following actions:

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

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

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

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

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

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

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

(d) An EIS must:

(1) Comply with all requirements at 40 CFR parts 1500–1508;

(2) Analyze all reasonable alternatives and the no action alternative (which may be the same as denying the action).

Assess the no action alternative even when the proposed action is specifically required by legislation or a court order.

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

(4) Summarize any coordination or consultation undertaken with any federal agency, state and/or local government, and/or federally-recognized Indian tribe, including copies or summaries of relevant correspondence.

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

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

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

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

#### **§ 6.208 Records of decision.**

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

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

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

(2) Any commitments to mitigation; and

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

(c) In addition, the ROD must include:

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

(2) The date of issuance; and

(3) The signature of the Responsible Official.

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

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

(f) Upon issuance of the ROD, the Responsible Official may proceed with the action subject to any mitigation measures described in the ROD. The Responsible Official must ensure adequate monitoring of mitigation measures identified in the ROD.

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

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

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

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

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

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

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

environmental review process.

Consistent with 40 CFR 1506.11, the Responsible Official and the NEPA Official should consult with CEQ about alternative arrangements at the earliest opportunity.

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

#### **§ 6.300 Applicability.**

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

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

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

(1) The action has been categorically excluded; or

(2) The applicant will prepare and submit an EA or EIS and supporting documents.

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

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

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

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

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

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

the proposed project. (See 40 CFR 1501.2(d)(2).)

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

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

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

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

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

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

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

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

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

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

(d) If, prior to completion of the environmental review for a project, the Responsible Official receives notification from the applicant under section 6.301(e) and determines that its actions would result in significant impacts or would limit alternatives, the Responsible Official must notify the applicant promptly that EPA will take appropriate action to ensure that the objectives and procedures of NEPA are achieved (see 40 CFR 1506.1(b)). Such actions may include withholding grant funds or denial of permits.

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

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

(g) The Responsible Official must have reviewed and taken responsibility for the completed NEPA documents before rendering a final decision on the proposed action.

### **§ 6.303 Third-party agreements.**

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

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

(2) The Responsible Official, in consultation with the applicant, must

ensure that the contractor is qualified to prepare an EA or EIS, and that the substantive terms of the contract specify the information to be developed, and the procedures for gathering, analyzing and presenting the information;

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

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

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

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

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

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

#### **§ 6.400 Purpose and policy.**

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



1401 *et seq.*). It should be noted, however, that in fulfilling its responsibilities under Executive Order 12114, EPA shall be guided by CEQ regulations only to the extent that they are made expressly applicable by this subpart. The procedures set forth below reflect EPA's duties and responsibilities as required under the Executive Order and satisfy the requirement for issuance of procedures under section 2-1 of the Executive Order.

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

#### § 6.401 Applicability.

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

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

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

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

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

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

(b) [Reserved].

#### § 6.402 Definitions.

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

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

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

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

Preparation of National Environmental Policy Act (NEPA) Documents dated October 29, 1998 (see 63 FR 58045).

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

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

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

requirements in addition to those required by such agreements.

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

**§ 6.404 Lead or cooperating agency.**

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

(b) *Cooperating Agency.* Under Section 2–4(d) of the Executive Order, Federal agencies with special expertise

are encouraged to provide appropriate resources to the agency preparing environmental documents in order to avoid duplication of resources. In working with a lead agency, EPA shall to the fullest extent possible serve as a cooperating agency in accordance with 40 CFR 1501.6. When other program commitments preclude the degree of involvement requested by the lead agency, the responsible EPA official shall so inform the lead agency in writing.

**§ 6.405 Exemptions and considerations.**

Under section 2–5(b) and (c) of the Executive Order, Federal agencies may provide for modifications in the contents, timing and availability of documents or exemptions from certain requirements for the environmental review and assessment. The responsible official, in consultation with the Director, Office of Federal Activities (OFA), and the Assistant Administrator, Office of International Affairs (OIA), may approve modifications for situations described in section 2–5(b). The responsible official, in consultation with the Director, OFA and Assistant Administrator, OIA, shall obtain exemptions from the Administrator for situations described in section 2–5(c).

The Department of State and the Council on Environmental Quality shall be consulted as soon as possible on the utilization of such exemptions.

**§ 6.406 Implementation.**

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

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

(c) *Unidentified activities.* The responsible official shall consult with OFA and OIA to establish the type of environmental review or document appropriate for any new EPA activities or requirements imposed upon EPA by statute, international agreement or other agreements.

[FR Doc. E6–21402 Filed 12–18–06; 8:45 am]

**BILLING CODE 6560–50–P**