

**DEPARTMENT OF EDUCATION****34 CFR Part 371**

RIN 1820-AB63

[Docket ID ED-2009-OSERS-0008]

**Vocational Rehabilitation Service Projects for American Indians With Disabilities**

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Interim final rule; Request for Comments.

**SUMMARY:** The Secretary amends the regulations for the American Indian Vocational Rehabilitation Services (AIVRS) program to permit a consortium of Indian Tribes to establish a separate legal entity to apply for a grant under this program. This change is needed to provide the flexibility required by the Department to make grants to Indian Tribes that choose to form a consortium and, rather than authorizing one of the Indian Tribes of the consortium to serve as the grantee, create a separate legal entity that serves as the grantee on behalf of the consortium and that is responsible for using the grant funds to provide services to all the Indian Tribes in the consortium.

**DATES:** These regulations are effective August 12, 2009. We must receive your comments by September 11, 2009.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under "How To Use This Site."

- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these interim final regulations, address them to Thomas E. Finch, U.S. Department of Education, 400 Maryland Avenue, SW., room 5059, Potomac Center Plaza (PCP), Washington, DC 20006-8544.

*Privacy Note:* The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand

delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at <http://www.regulations.gov>. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

**FOR FURTHER INFORMATION CONTACT:**

Thomas E. Finch. Telephone: 202-245-7343 or via the Internet:

[tom.finch@ed.gov](mailto:tom.finch@ed.gov).

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:****Invitation To Comment**

We invite you to submit comments regarding these interim final regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the interim final regulations that each of your comments address and to arrange your comments in the same order as the interim final regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these interim final regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period you may inspect all public comments about these interim final regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 5059, PCP, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these interim final

regulations. If you want to schedule an appointment for this type of aid, please contact Thomas E. Finch. Telephone number (202) 245-7343 or e-mail: [tom.finch@ed.gov](mailto:tom.finch@ed.gov).

**Executive Order 13175**

Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments") provides that each Federal agency must have an accountable process to ensure regular and meaningful consultation and collaboration with Indian Tribal governments or their representative organizations in the development of regulatory policies that have Tribal implications. As part of this process, before publishing these interim final regulations, we have consulted through meetings, telephone calls, and correspondence with the Consortia of Administrators for Native American Rehabilitation that represents all the AIVRS projects across the country, several Indian Tribes, Alaskan Regional Corporations, Native Alaskan Villages, the Native Alaskan Associations, as well as interested parties in Congress. We are specifically inviting input from Indian Tribal officials concerning these interim final regulations as part of the process of consultation required by the Executive order.

**Background**

The AIVRS program, authorized by section 121 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 741), provides authority for the Commissioner of the Rehabilitation Services Administration (RSA) in the Office of Special Education and Rehabilitative Services of the Department of Education to make grants to the governing bodies of Indian Tribes located on Federal and State reservations (and consortia of such governing bodies) to pay 90 percent of the costs of vocational rehabilitation services for American Indians who are individuals with disabilities residing on or near such reservations. The term *governing bodies of Indian Tribes* is defined in the regulations at 34 CFR 371.4 as "those duly elected or appointed representatives of an Indian Tribe or of an Alaskan native village. These representatives must have the authority to enter into contracts, agreements, and grants on behalf of their constituency." Section 371.4 also defines the term *consortium* as "two or more eligible governing bodies of Indian Tribes that make application as a single applicant under an agreement whereby each governing body is legally responsible for carrying out all of the activities in the application."

The regulatory definition of the term *consortium* permits groups of applicants to apply only if one member of the group applies for the grant on behalf of the consortium and serves as the grantee. In order to recognize that Indian Tribes may organize themselves by establishing separate legal entities to apply on their behalf for Federal program funds, the Department amends the definition of the term *consortium* to expressly allow the governing bodies of Indian Tribes in the consortium to create a separate legal entity to apply for a grant on behalf of the Tribes in the consortium. As the applicant, the separate legal entity would be governed by the regulations that apply to the AIVRS program pursuant to § 371.3.

On May 14, 2009, we published in the **Federal Register** (74 FR 22729) a notice inviting applications for new awards for fiscal year (FY) 2009 for the AIVRS program. The original notice for the FY 2009 AIVRS program competition established a July 23, 2009, deadline date for eligible applicants to apply for funding under this program. To ensure that the change in the regulatory definition of the term *consortium* applies to entities applying for a FY 2009 grant, we are reopening the competition and establishing a new deadline for the submission of applications. Applicants that submitted applications by the July 23, 2009, deadline date in accordance with the terms of the May 14, 2009 notice inviting applications are not required to submit new applications. Only groups of Indian Tribes that seek to apply for funding under the AIVRS program using a separate legal entity as the applicant are permitted to submit a new application under the new deadline. The notice reopening the FY 2009 competition for the AIVRS program is published elsewhere in this issue of the **Federal Register**.

#### **Waiver of Rulemaking and Delayed Effective Date**

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department is generally required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to establishing a final rule. However, we are waiving the notice-and-comment rulemaking requirements under the APA. Section 553(b) of the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Although these

regulations are subject to the APA's notice-and-comment requirements, the Secretary has determined that it would be contrary to the public interest and impracticable to conduct notice-and-comment rulemaking.

It has come to the Department's attention that certain entities receiving AIVRS program grants do not meet the current definition of the term *governing bodies of Indian Tribes* or the term *consortium*, but rather are nonprofit associations created by the governing bodies of Indian Tribes to provide health, social, and welfare services (including vocational rehabilitation services) to the member Indian Tribes. Some of the Indian Tribes served by these nonprofit associations will be among the applicants in the FY 2009 AIVRS program competition and there are others who are due to receive continuation grants for FY 2009.

For many small Indian Tribes and Alaskan native villages, the only effective and efficient way for their members to receive health, social, and welfare services is for the Tribes or villages to join together and create a separate legal entity to apply for and administer grants and contracts from the Federal and State governments. Other Department and Federal agency programs accept applications from groups of Indian Tribes submitted by these separate legal entities. If the Department had to conduct notice-and-comment rulemaking to implement the change in the definition of the term *consortium* for purposes of the AIVRS program, it could not do so in time to permit it to make new and continuation awards to eligible applicants that apply through these separate legal entities for FY 2009, which would result in the disruption of services to hundreds of American Indians with disabilities who currently receive services through grants provided to these entities. Such a denial of services to the intended beneficiaries of the AIVRS program would be contrary to the public interest; this harm to the public interest outweighs the value that would be gained from notice-and-comment rulemaking in this instance because the regulatory change sought merely adopts an accepted practice used by many Indian Tribes to apply for and administer Federal programs.

In addition, even on an extremely expedited timeline, it is impracticable for the Department to conduct notice-and-comment rulemaking and then promulgate final regulations in time to make new and continuation awards to eligible applicants that apply through these separate legal entities for FY 2009 under the AIVRS program. Publishing a

notice of proposed rulemaking, reviewing the public comments and issuing final regulations normally takes at least six months, and this could not be accomplished prior to September 30, 2009, the date by which FY 2009 funds have to be obligated under the AIVRS program. Issuing interim final regulations permits the Department to consider applications under the competition for new awards submitted by applicants affected by the change in the definition of the term *consortium* and to make continuation awards to certain applicants that will meet the changed definition and can then continue providing vocational rehabilitation services to American Indians with disabilities.

Based upon this information, and in order to make timely grant awards for FY 2009, the Secretary is issuing these interim final regulations without first publishing proposed regulations for public comment.

Although the Department is adopting these regulations on an interim final basis, the Department requests public comment on these regulations. After consideration of public comments, the Secretary will publish final regulations.

The APA also requires that a substantive rule be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). For the reasons outlined in the preceding paragraphs, the Secretary has determined that a delayed effective date for these interim final regulations is unnecessary and contrary to the public interest, and that good cause exists to waive the requirement for a delayed effective date.

#### **Significant Regulations**

We discuss substantive issues under the sections of the interim final regulations to which they pertain.

*Statute:* Section 121(a) of the Rehabilitation Act of 1973, as amended, provides that the Commissioner of RSA may make grants to the governing bodies of Indian Tribes located on Federal and State reservations (and consortia of such governing bodies) to pay 90 percent of the costs of vocational rehabilitation services for American Indians who are individuals with disabilities residing on or near such reservations.

*Current Regulations:* Current § 371.4 defines the term *consortium* as two or more eligible governing bodies of Indian Tribes that make application as a single applicant under an agreement whereby each governing body is legally responsible for carrying out all of the activities in the application.

*Regulations:* We are amending the definition of the term *consortium* in section 371.4 to provide that a *consortium* means two or more eligible governing bodies of Indian Tribes that apply for an award under this program by either: (1) Designating one governing body to apply for the grant; or (2) establishing and designating a separate legal entity to apply for the grant.

*Reason:* Although the regulations under the AIVRS program have not changed in several years, Indian Tribes have evolved in the ways that they have chosen to procure and deliver social services. Many Indian Tribes have found it more effective to join together and create one separate legal organization to apply for Federal funds on their behalf and to deliver services to the members of those Indian Tribes because they share the need for such services. This separate legal organization is generally a nonprofit association that provides health, social and welfare services (in this case, vocational rehabilitation services) to the members of the Indian Tribes that created this association. However, a nonprofit association does not meet the current definition of the term *governing body of an Indian Tribe* or the term *consortium* and, therefore, cannot serve as the grantee for a consortium of Indian Tribes under the AIVRS program.

Many of the Indian Tribes that choose to form a consortium and establish a separate legal entity to apply for grants and administer health, social, and welfare services to its member Tribes would not, on their own, be able to assume responsibility for a AIVRS program grant because of their small size or isolated location, or because they lack the necessary infrastructure and internal controls to administer an AVRIS program grant. It has become apparent that the Department's current definition of the term *consortium* constrains the intended recipients of an AIVRS grant from applying for funds under the program and from delivering services to the intended beneficiaries of AIVRS program funding—the American Indians with disabilities. Therefore, the Department has determined that it is appropriate to revise the regulatory definition of the term *consortium* so that a group of governing bodies of Indian Tribes may establish a separate legal entity to serve as the applicant and grantee on behalf of eligible Indian Tribes applying for a grant as part of a consortium. The Department believes that this regulatory change is essential in order to keep pace with the practical realities of the Indian community, to respect how the sovereign Indian Tribes have decided to organize themselves to

receive Federal program funds, and to provide for as much flexibility as possible within the statutory requirements of the program to award funds to intended recipients. These separate legal entities, established by consortia of Indian Tribes, already receive grants under certain Department programs as well as programs administered by other Federal agencies, and this change will align the AIVRS program with these other programs.

#### Other Changes

*Statute:* None.

*Current Regulations:* Part 371 currently identifies “29 U.S.C. 711(c) and 750, unless otherwise noted” as the statutory authority for the regulations in this part.

*Regulations:* We are updating the authority citation for 34 part 371 to be 29 U.S.C. 709(c) and 741, unless otherwise noted.

*Reason:* We are updating the authority citation for this part because it has not been updated since the 1992 amendments to the Rehabilitation Act of 1973.

#### Executive Order 12866

##### 1. Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is “significant” and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an “economically significant” rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Pursuant to the terms of the Executive order, it has been determined that this regulatory action is not a significant regulatory action subject to OMB review under section 3(f) of Executive Order 12866.

##### 1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action and have determined that this rule will not impose additional costs to applicants, grantees, or the Federal government, as the Department is proposing only to expand how eligible applicants can apply for and administer grants under this program. The rule, changing the definition of the term *consortium*, is not expected to result in increased costs to Indian Tribes in applying for an AIVRS grant or in implementing an AIVRS project. Moreover, the benefits of this regulatory action far outweigh any unforeseen administrative costs to the Federal government in administering the program. Some Indian Tribes, particularly those for whom it would be difficult to assume responsibility for an AIVRS grant because of their small size, isolated location, or lack of the necessary infrastructure, have found it more effective to join together and create one separate legal organization to apply for Federal funds on their behalf and to deliver services to the members of those Indian Tribes. This regulatory change would benefit such Indian Tribes by providing them the flexibility to establish a separate legal entity to serve as the applicant and grantee on behalf of eligible Indian Tribes applying for a grant as part of a consortium, rather than requiring one of the Indian Tribes of the consortium to serve as the grantee.

We have also determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions, alter the rights and obligations of recipients, or raise new legal or policy issues.

##### 2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on “Plain Language in Government Writing” require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these interim final regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the interim final regulations clearly stated?
- Do the interim final regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the interim final regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

- Would the interim final regulations be easier to understand if we divided them into more (but shorter) sections? (A “section” is preceded by the symbol “§” and a numbered heading; for example, § 371.4 What definitions apply to this program?)

- Could the description of the interim final regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the interim final regulations easier to understand? If so, how?

- What else could we do to make the interim final regulations easier to understand?

To send any comments that concern how the Department could make these interim final regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

**Regulatory Flexibility Act Certification**

The Secretary certifies that these interim final regulations will not have a significant economic impact on a substantial number of small entities. These interim final regulations affect Indian Tribal governments and nonprofit organizations. The U.S. Small Business Administration (SBA) Size Standards define these institutions as “small entities” if they are for-profit or nonprofit institutions with total annual revenue below \$5,000,000 or if they are institutions controlled by governmental entities with populations below 50,000.

Although some Indian Tribal governments and nonprofit organizations may meet the definition of “small entities,” these interim final regulations do not impose new costs on these entities.

**Electronic Access to This Document**

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To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

*Note:* The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number: 84.250A AIVRS Program)

**List of Subjects in 34 CFR Part 371**

Grant programs—Indians, Grant programs—social programs, Indians vocational rehabilitation.

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: August 6, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

■ For the reasons discussed in the preamble, the Secretary amends part 371 of title 34 of the Code of Federal Regulations as follows:

**PART 371—VOCATIONAL REHABILITATION SERVICE PROJECTS FOR AMERICAN INDIANS WITH DISABILITIES**

■ 1. The authority citation for part 371 is revised to read as follows:

**Authority:** 29 U.S.C. 709(c) and 741, unless otherwise noted.

■ 2. Section 371.4 is amended by revising the definition of “consortium” in paragraph (b) to read as follows:

**§ 371.4 What definitions apply to this program?**

\* \* \* \* \*

(b) \* \* \*

*Consortium* means two or more eligible governing bodies of Indian Tribes that apply for an award under this program by either:

(i) Designating one governing body to apply for the grant; or

(ii) Establishing and designating a separate legal entity to apply for the grant.

\* \* \* \* \*

[FR Doc. E9–19335 Filed 8–11–09; 8:45 am]

**BILLING CODE 4000–01–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 55**

[EPA–R03–OAR–2009–0238; FRL–8936–4]

**Outer Continental Shelf Air Regulations Consistency Update for Delaware**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving the updates of the Outer Continental Shelf (OCS) Air

Regulations for Delaware. Requirements applying to OCS sources located within 25 miles of a State’s seaward boundary must be updated periodically to maintain continuity and ensure consistency with the regulations of the corresponding onshore area (COA), as mandated by section 328(a)(1) of the Clean Air Act (CAA). The intended effect of approving the OCS regulations for Delaware is to regulate air emissions from OCS sources in accordance with the requirements of the COA.

**DATES:** *Effective Date:* This rule is effective on September 11, 2009.

The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of September 11, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2009–0238. All documents in the docket are listed in the <http://www.regulations.gov> Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

**FOR FURTHER INFORMATION CONTACT:** Amy Caprio, (215) 814–2156 or by e-mail at [caprio.amy@epa.gov](mailto:caprio.amy@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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**I. Background and Purpose**

Section 328(a) of the Clean Air Act (CAA) requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of a State’s seaward boundary that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable rules of the corresponding onshore area (COA) into 40 CFR part 55.

On April 29, 2008 (74 FR 19472), EPA proposed to incorporate various