CROSS-CUTTING FEDERAL AUTHORITIES:

A HANDBOOK ON THEIR APPLICATION IN THE CLEAN WATER AND DRINKING WATER STATE REVOLVING FUND PROGRAMS

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SECTION I: INTRODUCTION

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Purpose

This handbook describes how cross-cutting federal authorities apply to projects and activities receiving assistance under the Clean Water State Revolving Fund (CWSRF) program authorized by Title VI of the Clean Water Act and the Drinking Water State Revolving Fund (DWSRF) program authorized by section 1452 of the Safe Drinking Water Act (together, the SRF programs). The basic rules for complying with cross-cutting federal authorities in the two programs are set-out in the CWSRF regulations at 40 C.F.R. § 35.3145 and in the DWSRF regulations at 40 C.F.R. § 35.3575.

Cross-cutting federal authorities are the requirements of other federal laws and Executive Orders that apply in federal financial assistance programs. Often, these authorities are expressly applied by the statute authorizing the assistance itself. More frequently, the requirements are not cited in the authorizing statute, but apply broadly by their own terms to a wide range of federal financial assistance programs. In the SRF programs, these include environmental laws such as the Endangered Species Act, the National Historic Preservation Act and executive orders on the protection of wetlands and flood plains, social policy authorities such as executive orders on equal employment opportunity in federally assisted programs, and economic authorities such as rules implementing executive orders on the debarment and suspension of persons who have engaged in misconduct.

In the SRF programs, the requirements of cross-cutting federal authorities apply to projects and activities whose cumulative SRF funding equals the amount of the capitalization grant. Generally, projects and activities funded with monies in amounts greater than the capitalization grant amount are not subject to these requirements. However, all programs, projects and activities undertaken in the SRF programs are subject to federal anti-discrimination laws, including the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, section 13 of the Federal Water Pollution Control Act Amendments of 1972, and Executive Order 11246 on affirmative action in federal contracting.

The Environmental Protection Agency (EPA) retains ultimate responsibility for ensuring that states and assistance recipients comply with the cross-cutting federal authorities. However, because of the unique nature of the SRF programs – which are managed by the states who, unlike EPA, have a direct relationship with the recipients that must comply with the authorities – compliance activities are carried out mainly by the states and assistance recipients, to the extent authorized under each cross-cutter.

This handbook is intended to serve as an information resource for EPA regional personnel with responsibilities for the SRF programs, for state SRF program managers, and for assistance recipients in the two programs. It summarizes the requirements of applicable cross-cutting authorities that are pertinent to the SRF programs, and the procedures states and recipients must follow to attain compliance. More detailed procedures must be worked out between the EPA regional offices and the states as part of the capitalization grant agreement process. State SRF program managers and assistance recipients should also refer to the applicable laws and regulations for the actual requirements of the law (this handbook is a mere

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summary) to ensure that new requirements have not been enacted by statute or implemented by regulation. Finally, SRF personnel should be aware that the list of applicable cross-cutters in this handbook may change if revisions to existing laws are made or new laws are enacted.

The State Revolving Fund Programs

The Water Quality Act of 1987, Pub. L. No. 100-4, established the CWSRF program in the new title VI of the Federal Water Pollution Control Act, which is more commonly known as the Clean Water Act (CWA). 33 U.S.C. § 1251, *et. seq*. Under Title VI, 33 U.S.C. § § 1381 - 1387, EPA awards grants to states (capitalization grants) to establish and capitalize revolving funds. From these funds, which are further capitalized by a 20 percent match and other state contributions, the states may provide loans and other types of assistance for the construction of publicly owned wastewater treatment facilities, the implementation of non-point source management programs, and the development and implementation of estuary conservation and management plans.

The Drinking Water State Revolving Fund (DWSRF) program at section 1452 of the Safe Drinking Water Act (SDWA), was authorized by the SDWA Amendments of 1996, Pub. L. No. 104-182, 42 U.S.C. § 300j-12. The DWSRF was created to assist public water systems maintain or achieve compliance with the drinking water standards of the SDWA and to protect public health. As in the CWSRF, EPA awards grants to states to capitalize revolving funds, which are further capitalized by the required state match and any other funding the state contributes to the DWSRF. The DWSRF may provide low cost loans and other types of assistance to eligible public water systems. In contrast to the CWSRF program, a state can also set aside up to 31% of its DWSRF capitalization grant funds and use the funds for state drinking water programs and activities that support source water protection and enhance water systems management (e.g., operator certification, capacity development). The amount of a capitalization grant that is used for these “set-aside” purposes is not deposited in the state’s revolving fund.

Under the SDWA, a state may administer its DWSRF in combination with other state loan funds unless expressly prohibited by state law. 42 U.S.C. §300j-12(g)(1). The funds must be accounted for separately and used solely for specified purposes. One year after a DWSRF program receives its first capitalization grant, it may transfer up to one-third of the amount of its DWSRF capitalization grant(s) to its CWSRF or an equivalent amount from its CWSRF to its DWSRF. By allowing states to transfer funds between the CWSRF and DWSRF programs, Congress indicated its intent for the two SRFS to be implemented and managed in a similar manner. EPA developed policies and procedures for the DWSRF that are consistent with the previously established CWSRF.

State Revolving Funds and Cross- Cutting Authorities

The structure and intent of the SRF programs are substantially different from that of

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most EPA grant programs, such as the CWA construction grant program.[1] These differences affect the application of federal cross-cutting authorities. Significant among these differences is the relationship between the federal government and the ultimate assistance recipient. In the CWA construction grant program (and, still, in most other Agency grant programs), EPA awarded grants directly to the local recipient for an identified project or activity. EPA remained involved at the project level, ensuring that these projects complied with cross-cutting authorities in accordance with federal regulations applicable to activities directly funded by federal agencies.[2] In the SRF programs, grant funds flow from EPA to the SRFs, which are further capitalized by the required state matching contribution. States may also provide funds from other sources, such as bond proceeds, if the state elects to leverage SRF assets. These funds are then made available by the state, not by EPA, to local recipients as loans or other types of non-grant assistance. EPA does not select or approve projects to receive SRF assistance. Those decisions are made by the states, which must set priorities for funding based on the requirements of the two statutes. *See* CWA § § 603(g) and 606(c), SDWA § 1452(b).

In enacting the SRF programs, Congress intended to place the responsibility for financing water infrastructure needs and managing these programs on the states. See. e.g., S. Rep. No. 99-50 at 8, 99th Cong. 1st sess.(1985), H. Rep. No. 104-632 at 11, 104th Cong. 2d sess. (1996). Unlike the CWA construction grants program, in the SRF programs the states, rather than EPA, play a paramount role in day-to-day project level activities. For the most part, EPA's role in the SRFs is limited to ensuring that the state-established programs comply with the requirements of CWA title VI and SDWA section 1452, and annually reviewing the performance of the state programs. Although EPA will remain ultimately responsible for ensuring compliance with cross-cutting federal authorities, it will do so largely through its review of state programs.

Application of Cross-Cutting Authorities in the SRF Programs Generally

In the SRF programs, compliance with federal cross-cutting authorities begins with a commitment made by the state SRF agency to comply, and to require certain recipients to comply, with applicable authorities. 40 C.F.R. § 35.3145 (CWSRF); 40 C.F.R. § 35.3575 (DWSRF). This commitment is explicitly contained in the capitalization grant or operating agreements. The EPA regional office reviews a state's compliance with cross-cutters as part of the Annual Review.

Cross-cutters apply to the SRF agency as the grant recipient and to projects and

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[1] The CWA's Title II construction grant program was the predecessor to the CWSRF program. It was a more traditional federal financial assistance program under which federal funds were granted directly to local communities for the construction of wastewater facilities. 1990 was the last year in which Congress appropriated funds for Title II.

[2] Although EPA retained final authority over cross-cutter activities, in the CWA's construction grants program, much of the work involved in attaining compliance was carried out by the grant recipient or by the delegated state agency. *See e.g.*, 40 C.F.R. § 35.3015.

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activities receiving federal financial assistance.[3] Because SRFs may consist of funds from several sources (federal grants, state match, loan repayments, or bond proceeds), states must apply cross-cutter requirements to projects whose cumulative funding is equal to the amount of the federal capitalization grant.

Application of Cross-Cutting Federal Authorities in the CWSRF Program

To ensure that the federal interest in the fund is protected, the CWSRF program requires that cross-cutting authorities requirements must be met by projects or activities whose cumulative funding equals the amount of the federal capitalization grant to the state.[4]

The state decides which projects will be used to meet this requirement and must ensure that these projects comply with federal cross-cutting authorities.[5] Once the state determines which projects will receive funding that cumulatively equals the amount of the capitalization grant, other projects funded with CWSRF monies are not generally subject to cross-cutting authorities.[6] However, the state may require compliance with cross-cutters by projects whose cumulative funding is greater than the amount of the federal capitalization grant. If the state does this, it may bank the excess to meet future requirements.[7]

Application of Cross-Cutting Federal Authorities in the DWSRF Program

Because of its similarities to the CWSRF, and because many aspects of the two

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[3] This describes only those cross-cutting requirements that apply at the project level in the SRF programs. It does not address cross-cutting authorities that apply only to the state as the grant recipient (e.g., The Drug-Free Workplace Act, Pub. L. No. 100-690 (1988)) nor those that apply whether or not federal assistance is involved (e.g., the Occupational Safety and Health Act, Pub. L. No. 91-596).

[4] Title VI of the CWA used the term "directly made available by" capitalization grants to delineate the federal interest, see CWA § 602(b)(6), but this phrase was also used for a more specific purpose of identifying projects which must comply with several identified requirements, including requirements carried over from the CWA Title II construction grant program.

[5] To the extent each cross-cutting authority permits, project-level involvement by EPA will be limited to cases in which disputes arise concerning compliance.

[6] All programs, projects, and activities undertaken by the SRF programs are subject to the federal anti-discrimination laws, including the Civil Rights Act of 1964, Pub. L. No 88-352 §601,78 Stat. 252 (codified as amended at 42 U.S.C. §2000d), the Rehabilitation Act of 1973, Pub. L. No. 93-1123, 87 Stat 355 (codified as amended at 29 U.S.C. § 794), and the Older Americans Amendments of 1975, Pub. L. No. 94-135, § 303, 89 Stat. 713, 728 (codified at 42 U.S.C. § 6102). Further, these broader anti-discrimination laws apply by their own terms to the entire organization receiving federal financial assistance, not just to the project itself.

[7] Required compliance under the minority-owned and women-owned business enterprise (DBE) laws by projects whose cumulative funding is greater than the amount of the federal capitalization grant is not "bankable."

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programs are often run in conjunction by the states, the concept that cross-cutting authorities apply to projects and activities whose cumulative funding equals the amount of the grant has been applied to the DWSRF program. Unlike the CWSRF, however, as much as 31% of the DWSRF capitalization grant can be set aside and used for state program activities and certain local initiatives. Because these "set-aside" funds are held in accounts outside the loan fund, only federal dollars are used to support set-aside activities (with the possible exception of a 1:1 cash match a state may provide to support one of the allowable set-asides. See 42 U.S.C. § 300j-12(g)(2)). Therefore, federal cross-cutters must be applied to all set-aside expenditures. A state cannot meet the cross-cutting requirement for set-aside activities by applying cross-cutting authorities to an excess of projects receiving assistance from the loan fund. For infrastructure projects receiving assistance from the DWSRF loan fund, requirements imposed by cross-cutters will only apply to those projects whose cumulative funding is equal to the amount of the capitalization grant deposited into the loan fund (i.e., the capitalization grant less the amount directed to set-asides).

As an example, State A's drinking water capitalization grant is $1.3 million this year. State A will use $300,000 of the grant to fund set-aside activities. The state will be required to ensure compliance with cross-cutter authorities on the entire $300,000 used for set-asides, to the extent that the use of those funds implicate the authorities.[8] The remaining $1 million of the grant, and other state funding, including the state's required match, brings the total deposit to the DWSRF loan fund to $1.6 million. State A has 10 projects on its priority list. One project is eligible for a $300,000 loan, another for a $200,000 loan, 2 projects are each eligible for loans of up to $250,000, and the remaining 6 projects are each eligible for loans of $100,000. State A has determined that the four projects eligible for the largest loans (totaling the capitalization grant of $1 million deposited into the Fund) will be the projects that must comply with federal cross-cutting requirements. The other six projects funded with the remaining $600,000 are not subject to these requirements. However, State A is going to require compliance by all 10 projects, and next year, if the capitalization grant amount deposited into the fund remains at $1 million, the state will have a credit of $600,000 that it can apply towards cross-cutting requirements for projects receiving assistance from the loan fund.

Structure of the Handbook

The cross-cutting authorities are arranged in this handbook according to three general categories: Environmental, Social Policy, and Economic and Miscellaneous authorities. Each section begins with a brief description of the overall category. For example, the Environmental Authorities section is preceded by a discussion of how the process for complying with cross-cutting environmental authorities should be accomplished in conjunction with an approved state environmental review process (SERP).

Within each category, each individual cross-cutter is presented. The particular authority

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[8] In most cases, the activities being conducted under the set-asides will not implicate factors that require application of cross-cutting authorities. For example, using set-aside funds for the salaries of staff administering the program is not an "undertaking" that will have an "effect" on historic properties under section 106 of the National Historic Preservation Act.

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is briefly described and a relevant excerpt is usually quoted, with citations given to both the Public Law and the United States Code. This general discussion is followed by a summary of the implementation process under the CWSRF and the DWSRF. Citations to implementing regulations and other useful documents are included whenever appropriate.[9]

A Note on Conventions Used in the Handbook

For ease of both the drafting and the use of this handbook, certain short-hand phrases are often used to describe various institutions. The Environmental Protection Agency is referred to throughout as **EPA**. The state agency primarily responsible for administering the SRF program is referred to as the **SRF agency.**[10] The EPA regional office that is overseeing the state's SRF program is referred to simply as the **EPA regional office**. Where an environmental cross-cutting authority is the responsibility of another office in the EPA Region, that office is called the **EPA regional program office**. A federal government agency other than EPA that has statutory responsibility for a cross-cutting federal authority is termed the **responsible federal agency**, while its state counterpart, if one exists, is designated the **responsible state agency**.

In the SRF programs, the entity initially responsible for compliance activities is designated as the **SRF assistance recipient** or simply the **assistance recipient** (e.g., a municipality or public water system). Compliance activities in the SRF programs may, and in some instances, must, occur before assistance is awarded.

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[9] With the exception of NEPA, where states follow the EPA approved "State environmental review process," in carrying out the federal cross-cutting requirements, states must follow the applicable regulations and prescribed processes since the states are complying with the cross-cutters on EPA's behalf.

[10] The term "SRF agency" will be used to describe the various combinations of environmental agencies primarily responsible for the implementation of the CWA and the SDWA as well as any other agencies or departments with delegated authority to implement the SRF programs.

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SECTION II: ENVIRONMENTAL AUTHORITIES

A. National Environmental Policy Act
Pub. L. No. 91-190 (1970)
42 U.S.C. § 4321 et. seq.

The National Environmental Policy Act (NEPA), which was signed into law on January 1, 1970, instructs federal agencies to thoroughly analyze the environmental consequences of their actions in an open and public manner. NEPA was the first statute to incorporate the "impact statement" approach to federal agency decision-making processes. The impact statement requirement directs responsible federal officials to prepare detailed environmental assessments for "major federal actions significantly affecting the quality of the human environment" (42 U.S.C. § 4332(C)). The cross-cutting effect of this requirement extends to nearly all federal financial assistance programs.

NEPA does not require that agencies achieve a particular environmental result in their undertakings. Instead, it directs agencies to adhere to a process that aims to minimize the adverse environmental impacts of their activities. EPA's NEPA regulations at 40 C.F.R. Part 6, Subpart C, incorporate requirements that are designed to result in compliance with the substantive requirements of a host of other, more specifically focused environmental laws, such as the Clean Air Act (CAA) and the Endangered Species Act.

EPA regulations at 40 C.F.R. §35.3140 and §35.3580 require recipients to conduct an environmental review, or NEPA-like review, for projects and activities funded with SRF program funds. State SRF recipients may comply with the environmental review requirement by complying with EPA's NEPA regulations at 40 C.F.R. Part 6.[11] The specific application of the NEPA-like review in the SRF programs is detailed below.

NEPA Implementation in the SRF Programs

1. The Clean Water Act

Under the Clean Water Act and 40 C.F.R. § 35.3140(a), EPA requires that all section 212 projects undergo a NEPA-like environmental review. These projects include the familiar wastewater treatment projects as well as nonpoint source pollution control and estuary projects that can also fit the definitions of "construction" and "treatment works" in CWA § 212.

Because of the nature of the CWSRF program – conferring, as it does, a greater responsibility on the states than in traditional grant programs – and because EPA seeks to promote an environmental ethic in the states, the Agency has required states to adopt procedures for conducting environmental reviews that are consistent with the intent of NEPA but that are carried out solely by state agencies under state statutes and policies. 40 C.F.R.

[11] EPA's Part 6 NEPA regulations are currently under review. EPA will advise states if this review results in any changes or new requirements which may have an impact on the SRF.

§35.3140. States still have the option to adopt the federal regulations set out at 40 C.F.R. Part 6, or to apply their own "NEPA-like" process for conducting reviews.

EPA's regulations implementing the CWSRF program at 40 C.F.R. Part 35 Subpart K extract the fundamental principles of EPA's 40 C.F.R. Part 6 NEPA regulations in a way that fits the unique structure of the CWSRF program. They set forth the minimum requirements that must be incorporated in state environmental review processes (SERPs) for all projects. These requirements allow state agencies to distinguish between the environmental review procedures that must be applied to projects that receive funds equaling the amount of the grant, and that are the focus of this handbook, and alternative procedures that may be applied to other projects. The Regional Administrator must review and approve the SERP and any subsequent significant changes to the SERP using the criteria at Appendix A to 40 C.F.R. Part 35, Subpart K. In general terms, the Regional Administrator will approve a SERP that contains the following elements:

- proper legal authority to conduct environmental reviews;
- an interdisciplinary approach for identifying and mitigating any environmental effects caused by the projects;
- a procedure to fully document the information, processes and premises that influence decisions;
- public notice and participation procedures; and,
- a process for evaluating alternatives and measures to avoid, minimize, or mitigate adverse impacts.

2. The Safe Drinking Water Act

The DWSRF environmental review process, see 40 C.F.R. § 35.3580, is based on the principles developed for the CWSRF program.

Projects whose cumulative funding equals the amount of the capitalization grant must be reviewed under a SERP that is functionally equivalent to EPA's NEPA review or the "NEPA-like" review process created by the state. 40 C.F.R. § 35.3580(c). As noted in the Introduction, because all set-aside activities are funded with federal dollars they must meet federal cross-cutting authorities to the extent that they are implicated. This includes environmental review. In most cases, the use of the funds for activities conducted under set-asides (e.g., funding state staff positions, contracts to provide technical assistance) will not implicate environmental review requirements, because these activities do not have a significant effect on the environment.

The Regional Administrator must review and approve the SERP and any subsequent significant changes to the SERP using the criteria at Appendix A to 40 C.F.R. Part 35, Subpart L. In general terms, the Regional Administrator will approve a SERP that contains the following elements:

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- proper legal authority to conduct environmental reviews;
- an interdisciplinary approach for identifying and mitigating any environmental effects caused by the projects;
- a procedure to fully document the information, processes and premises that influence decisions;
- public notice and participation procedures; and,
- a process for evaluating alternatives and measures to avoid, minimize, or mitigate adverse impacts.

3. Tier II SERPS

States must conduct environmental reviews of CWSRF and DWSRF projects, but for those activities funded in an amount greater than the capitalization grant, a state may elect to apply an alternative SERP (i.e., Tier II review). *See* 40 C.F.R. § 35.3140(c) and 40 C.F.R. § 35.3580(d).

4. The SERP and Compliance with Other Environmental Authorities

The intent underlying the SERP process is to ensure that recipients consider environmental impacts early in the planning process, to resolve compliance issues through prudent planning, and to integrate under the SERP umbrella procedures for compliance with the other cross-cutting environmental laws. Most of these other environmental authorities must also be addressed early in the planning process of a project or activity. As stated previously, in the SRF programs, compliance with federal cross-cutting authorities begins with a commitment made by the state SRF agency to comply, and to require certain assistance recipients to comply, with the applicable cross-cutters. States may also receive compliance assistance through the appropriate official in the EPA regional program office.

With some variations to account for differences in the laws or in the roles of the different levels of government, there is a series of steps in the process of achieving compliance with the environmental cross-cutters through the SERP process.

(1) With the assistance of the SRF agency, the assistance recipient must first conduct the necessary studies and analyses and prepare documentation demonstrating that the proposed project is in compliance with the cross-cutting environmental authorities, or that appropriate mitigation measures are included in its planning. These studies should be done in conjunction with the SERP's broader environmental analysis. The assistance recipient may also need to consult with representatives of responsible state agencies on particular cross-cutters to resolve compliance issues before the state-level review begins.

(2) The state SRF agency conducts an independent review of the documents prepared in step one and drafts the SERP documentation, which should include a preliminary

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determination regarding compliance with relevant cross-cutters, or the measures the assistance recipient must take to achieve compliance.

(3) The state SRF agency must notify the responsible state or federal agency of its findings. If the responsible state or federal agency concurs in the SRF agency's determination (for example, where the Fish and Wildlife Service issues a "No Affect" letter), the SRF agency may then issue its final decision document and proceed with the project. If the responsible state or federal agency objects to the SRF agency's findings, the SRF agency must either revise its findings or seek to resolve outstanding issues directly with the responsible agency.

When the SRF agency and the responsible federal agency cannot resolve issues between themselves, these issues must be raised with the EPA regional office. During this process, the EPA regional office may consult with the responsible federal agencies. The SRF agency must maintain a file on each project, which documents the SRF agency's actions with respect to environmental cross-cutters (e.g., including the letter requesting comments on the preliminary determination and a summary of comments).

5. The SERP and Compliance with Environmental Justice

Executive Order No.12898, signed February 11, 1994, directs all federal agencies to "make achieving environmental justice part of its mission." Each agency is required to identify and address any "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." EPA has defined its vision of environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." Further, environmental justice requires that "no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from . . . the execution of federal, state, local, and tribal programs and policies." (www.epa.gov/compliance/environmentaljustice/).
One vehicle for EPA's efforts to address environmental justice concerns is the NEPA analysis. As a matter of policy, EPA has integrated environmental justice concepts into NEPA analyses through guidelines outlining the steps that should be taken to ensure environmental justice concerns have been addressed during the NEPA process. Identifying potential adverse effects on minority and low-income populations, as well as encouraging early public participation and the development of alternative or mitigating options is emphasized. Like NEPA's procedural requirements, the purpose of the SERP process is to help ensure that environmental consequences are fully considered and addressed before actions are taken. Therefore, states must comply with Executive Order No. 12898 by integrating environmental justice into their SERP process.

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B. Historic Resources

National Historic Preservation Act
Pub. L. No. 89-665, as amended, 80 Stat. 917 (1966)
16 U.S.C. §470 *et. seq.*

The National Historic Preservation Act (NHPA) embodies a long-standing national policy to preserve historic sites, buildings, structures, districts and objects of national, state, tribal, local, and regional significance and, among other things, to protect such historic properties from adverse impacts caused by activities undertaken or funded by federal agencies. NHPA expanded the scope of the 1935 Historic Sites Act, Pub. L. No. 74-292 by establishing the National Register of Historic Places, a listing of historical and cultural resources maintained by the U.S. Department of the Interior (DOI).

The fundamental responsibilities of federal agencies are expressed in Section 106 of the Act, which reads:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act (16 U.S.C. §§ 470i *et. seq.*) a reasonable opportunity to comment with regard to such undertaking.
> *16 U.S.C. §470(f)*[12]

The NHPA is administered by the DOI and the Advisory Council on Historic Preservation (the Council). The Council implements section106 of the NHPA and has promulgated regulations for consultation regarding how to determine the effects of federal agency undertakings on historic properties. 36 C.F.R. Part 800. Although under certain circumstances the Council may become directly involved in such consultations, the procedures generally call for consultation between the federal agency and relevant state or tribal historic preservation officers (SHPOs and THPOs) and other interested parties.

Implementation in the SRF Programs

The SRF agency, in consultation with the Advisory Council or SHPO/THPO, as well as other interested parties, must first determine whether a project might affect historic properties that are included or eligible for inclusion on the National Register. This step is done by

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[12] Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: those carried out by or on behalf of the agency; those carried out with federal financial assistance; those requiring a federal permit, license, or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency. 16 U.S.C. § 470w(7), 36 C.F.R. § 800.16(y).

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identifying whether there are historic properties in the project area. The SRF agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Unlisted properties are evaluated against the National Park Service's published National Register criteria, in consultation with the SHPO/THPO and any Indian Tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If the SRF agency finds that historic properties are present, the next step is to assess possible adverse effects. Again, consultation must occur with the SHPO/THPO and other interested parties. If they agree that there will be no adverse effect, the agency proceeds with the undertaking and any agreed upon conditions. If the parties cannot agree or they find that there is an adverse effect, the agency begins consultation to identify ways to avoid, minimize, or mitigate adverse effects. This process also requires consultation with the SHPO/THPO and others, including Indian Tribes and Native Hawaiian organizations, local governments, and members of the public.

Before the SRF agency issues its environmental decision document on the project, the 106 process should be completed. If, because of disagreement among the appropriate parties, the SRF agency cannot issue a determination that no historic or cultural properties are in the project area, that resources do exist in the project area but will not be adversely affected, or that adequate mitigating measures will be taken to avoid or reduce adverse effects to resources in the project area, the SRF agency must notify the EPA regional office. The EPA regional office will then enter into consultations with all parties to resolve the dispute.

Additional References

- 36 C.F.R. Part 800. Protection of Historic Properties. See also www.achp.gov for additional reference materials and guidance.
- Programmatic Agreement Among the Environmental Protection Agency, The Advisory Council On Historic Preservation, And The National Conference Of State Historic Preservation Officers Concerning Compliance With The National Historic Preservation Act Under EPA's State Water Pollution Control Revolving Fund Program (1991).[13]

Archeological and Historic Preservation Act
Pub. L. No. 93-291 (1974)
16 U.S.C. §469a-1

The intent of the Archeological and Historic Preservation Act (AHPA) is to limit the loss of important historical data that would result from federal, or federally authorized, construction

[13] EPA has entered into a Programmatic Agreement with the Council and the National Conference of State Historic Preservation Officers establishing procedures for NHPA compliance in the CWSRF program. Because the two programs are similar, the DWSRF program follows the programmatic agreement as a matter of practice. Under this agreement, the SRF agency in the first instance carries out the responsibilities of the NHPA section 106 process.

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activities. Unlike section 106 of the NHPA, which principally addresses adverse effects to historic properties identified within a project area prior to project initiation, the requirements of the AHPA are typically invoked when historic properties are discovered after the project has begun and potential adverse effects may occur. (The NHPA regulations do have a provision that addresses late discoveries of historic properties).

The AHPA requires federal agencies to identify relics, specimens, and other forms of scientific, prehistorical, historical, or archaeologic data that may be lost during the construction of federally sponsored projects and to nominate for the register resources under the agency's control, to ensure that these resources are not inadvertently transferred, sold, demolished or substantially altered, or allowed to deteriorate significantly. If such items are discovered, the DOI must be notified to recover the data or recommend measures to mitigate potential losses. The Department's standards and guidelines (48 Fed. Reg. 44716 (Sept. 9, 1983)) detail accepted archeological preservation activities and methods. This publication is the standard for all data recovery activities undertaken in the SRF programs for discovery situations under the AHPA, or for avoiding or mitigating adverse impacts on known historic properties under the NHPA.

16 U.S.C. § 469a-1 reads in part:

(a) Notification and request for preservation of data

> Whenever any federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any federal construction project or federally licensed project, activity or program, may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary [of the Interior], in writing, and shall provide the Secretary with appropriate information concerning the program, project or activity. Such agency may request the Secretary to undertake the recovery, protection, and preservation of such data . . . . "

When discoveries are made on a project that required the involvement of the SHPO/THPO during the early planning stages of the project, compliance with the AHPA can be satisfied by continuing to work through the SHPO/THPO under procedures of the NHPA. Alternatively, whether or not it is necessary to consult with the SHPO/THPO on a project involving NHPA compliance, compliance with the AHPA may be accomplished by working directly with the DOI, National Park Service's Departmental Consulting Archeologist.

Implementation in the SRF Programs

The SRF agency may involve the SHPO/THPO in determining the significance of discoveries of scientific, prehistoric, historical, or archeological data made during construction. Agreements for data recovery, and mitigation measures if necessary, made between the SRF agency and the SHPO/THPO will satisfy EPA's compliance obligations. The EPA regional office needs to be notified and involved only when disputes cannot be resolved. If, however, the SRF agency fails to work through the SHPO/THPO, the EPA regional office must be notified and will coordinate with the DOI to ensure compliance with the AHPA.

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Recovery or mitigation measures may require alteration of the project's approved plans. The results of the consultations and approved data recovery mitigation plan must be included in the assistance recipient's environmental documentation for the project.

C. Environmentally Sensitive Lands

Protection of Wetlands [14]
Executive Order No. 11990 (1977), as amended by Executive Order No. 12608 (1997)

A national policy aimed at protecting wetlands, which include marshes, swamps, bogs, ponds, and other areas that are regularly inundated with water, has been pursued, at least implicitly, since the passage of the Rivers and Harbors Act of 1899. A number of laws, including the CWA and the Coastal Zone Management Act, Pub. L. No. 92-583, 16 U.S.C. §1451 et. seq., in some manner regulate the management of wetlands.

National wetlands policy applicable to the activities of federal agencies is set forth in Executive Order No. 11990, which was issued by President Carter in 1977 and which President Clinton amended 20 years later by Executive Order No. 12608. The Executive Order broadly directs all agencies of the federal government to carefully consider the effects on wetlands from the discharge of any of their responsibilities, and to minimize the destruction, loss, or degradation of wetlands in any manner when there are feasible alternatives to the action. Section 2(a) of the order requires that:

> . . . each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

The Executive Order also requires public notice of any plans to support new construction in wetlands.

Implementation in the SRF Programs

SRF assistance recipients must first determine, in consultation with the state environmental agency, whether a proposed project will be located in or affect a wetland.[15] If so, further consultations must be held to develop and evaluate alternative locations for the project or other mitigating measures.

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[14] *See also* Pub. L. No. 99-645, 1998, as codified at 16 U.S.C. § 3901 *et. seq.*

[15] Under 16 U.S.C. § 3931, the DOI is directed to prepare the National Wetlands Inventory Maps and other documents as part of the National Wetlands Inventory Project. (1998).

If this evaluation determines that there are no practicable alternatives that would avoid impacts to wetlands, the assistance recipient, in consultation with the state environmental agency, shall design or modify the project to minimize adverse impacts to the wetlands and provide an opportunity for public review and comment on the proposed project.

Two other important aspects of complying with Executive Order No. 11990 in the SRF programs must be considered by the assistance recipient. Under the EPA's "no net loss of wetlands" policy, where natural wetlands will be destroyed by project construction, assistance recipients must devise plans to construct substitute or "mitigation" wetlands. Secondly, the recipient should seek the assistance of the U.S. Fish and Wildlife Service when developing measures to mitigate adverse impacts on wetlands, to ensure that these measures adequately protect the diversity and the habitat of species living in the affected wetland.

During the environmental review of the project, the SRF agency must furnish both the U.S. Fish and Wildlife Service and the EPA regional office with documentation demonstrating that (1) all alternatives to locating the project in or affecting the wetland were carefully considered, (2) the alternative selected was the only practicable one, and (3) adequate measures will be taken to mitigate damage to the wetland, including its natural systems. The SRF agency will be responsible for ensuring that any comments by the Service and the EPA regional office are taken into account in the project's design.

Additional References

- 40 C.F.R. Part 6 Appendix A: Statement of Procedures on Floodplain Management and Wetlands Protection.

Flood Plain Management
Executive Order No. 11988 (1977), as amended by Executive Order No. 12148 (1979)

Federal policy designed to promote the prudent management of flood plains has been in effect since 1968, with the passage of the National Flood Insurance Act. Pub. L. No. 90-448, 42 U.S.C. § 4001 *et seq*. By providing federal subsidies for private flood insurance and by requiring flood-prone communities to have the insurance as a condition to receiving federal assistance, that law and the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 939 (1973), recognized the serious economic and environmental damage that can result from flooding in developed lowland areas.

Executive Order No. 11988 regulates the actions of federal agencies that affect flood plains.[16] This order requires all agencies undertaking, financing, or assisting proposed activities to determine whether they will occur in or affect a flood plain and to evaluate potential measures to avoid adversely affecting the plain. Locations of flood plains can be determined by examining

[16] Executive Order No. 12148, 3 C.F.R. §412, transferred functions for flood plain management to the Federal Emergency Management Agency.

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maps available from the U.S. Department of Housing and Urban Development, Federal Emergency Management Agency (FEMA), the U.S. Department of Agriculture, and state water resource planning agencies. Agencies must select, if they are available, viable alternative locations for their undertakings that will not affect flood plains.

If construction or improvements will be undertaken or supported in a flood plain because no practicable alternative locations are available, and the SRF agency has otherwise complied with the Executive Order, measures must be taken to minimize the risk of flood damage to or within the flood plain, such as flood proofing the facility to be constructed, elevating structures above base flood levels, or providing compensatory flood storage. In addition, public review is required for each plan or proposal for action taking place within a flood plain.

Implementation in the SRF Programs

In consultation with the state SRF agency, the SRF assistance recipient must first determine whether the proposed project will be located in or affect a flood plain.

If the proposed project will be located in or will affect a flood plain, the assistance recipient must prepare a flood plain/wetlands assessment. If there are no practicable alternatives to the proposed site, the assistance recipient must document the mitigating measures or design modifications that will be taken to reduce the threats from locating the project in the flood plain. In conjunction with the public notice procedures in the SERP, the project area community must be informed why the proposed project is to be located in a flood plain.

The environmental information documentation describing mitigating and design measures must be submitted by the assistance recipient to the SRF agency, which prepares a preliminary finding on whether the assistance recipient has complied with Executive Order No. 11988. Notice of this finding should be given to FEMA, which may provide recommendations for improving mitigation measures or further modifying the project's design to enhance flood protection.

Additional References

- 40 C.F.R. Part 6 Appendix A: Statement of Procedures on Flood Plain Management and Wetlands Protection.
- 43 Fed. Reg. 6030 (1978): Water Resources Council's Flood Plain Management Guidelines issued to aid all other federal agencies in amending their regulations and procedures to comply with Executive Order No. 11988. The Guidelines include an eight-step decision-making process.
- "Further Advice on Executive Order 11988 Flood Plain Management," issued by FEMA and the Interagency Task Force on Flood Plain Management, in 1987.

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Farmland Protection Policy Act
Pub. L. No. 97-98 (1981)
7 U.S.C. §4201 et. seq.

In the 1970s, federal assistance for large-scale construction projects became pervasive and concerns developed in several agencies that many projects were being undertaken without due regard to their effect on the productive capacity of the nation's agricultural lands. These concerns gave rise to a series of policy statements, issued by the U.S. Department of Agriculture, the Council on Environmental Quality and the EPA (*EPA Policy to Protect Environmentally Significant Agricultural Lands*, signed by the Administrator on September 8, 1978), instructing federal program managers to more carefully consider the effect of a project on agricultural land and to take alternative or mitigating measures, when appropriate, to ensure that valuable farmland is preserved.

This policy direction culminated in 1981 with the passage of the Farmland Protection Policy Act, which was included in the 1981 Farm Bill (Agriculture and Food Act of 1981, Pub. L. No. 97-98, 7 U.S.C. § 4201 *et. seq.*). In the Act, Congress directed federal agencies to use criteria developed by the Soil Conservation Service (SCS) to identify the potential adverse effects of federal programs on farmland and its conversion to nonagricultural uses, to mitigate these effects, and to ensure that programs are carried out in a manner that is compatible with the farmland preservation policies of state and local governments, and private organizations.

7 U.S.C. § 4202(b) calls upon all federal agencies to:

> . . . identify and take into account the adverse effects of federal programs on the preservation of farmland; consider alternative actions, as appropriate, that could lessen such adverse effects; and assure that such federal programs, to the extent practicable, are compatible with state, unit of local government, and private programs and policies to protect farmland.

Implementation in the SRF Programs

Early in the planning phase of a project, the SRF agency and SRF assistance recipient should seek technical assistance from the state conservationist or local representative regarding the alternative sites proposed for the project. The state conservationist can offer advice on what further actions must be taken by the assistance recipient and the SRF agency to further evaluate important farmlands; the significance of all identified important farmlands; the sizing of the project as it relates to secondary growth; the continued viability of farming and farm support services in the project area; and alternatives or mitigation measures the SRF agency and assistance recipient should take to reduce potential adverse effects on important farmlands.

Before proceeding with the project, the SRF agency must notify the state conservationist or local representative about measures that the SRF assistance recipient will take to avoid, minimize, or mitigate effects on important farmlands.

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Additional References

- 7 C.F.R. Part 658: Department of Agriculture criteria for identifying and taking into account the adverse effects of federal programs on the preservation of farmlands.
- *EPA Policy to Protect Environmentally Significant Agricultural Lands*, September 8, 1978.

D. Coastal Area Protection

Coastal Zone Management Act
Pub. L. No. 92-583 (1972), as amended
16 U.S.C. § 1451 *et. seq.*

In 1972, Congress amended the Marine Resources and Engineering Development Act to establish a national policy for the protection, beneficial use, and effective management and development of the nation's coastal zones.[17] The Act is also applicable to the coasts of the Great Lakes. The Coastal Zone Management Act, Pub. L. No. 101-508, 104 Stat. 1388-300 (1990), authorizes the Secretary of Commerce to assist states in the development of management plans designed to regulate land and water use in coastal areas. The Act also calls on all federal agencies to ensure that their activities in coastal areas are consistent with the state coastal zone management plans that have been approved by the Department of Commerce.

16 U.S.C. §1456(c)(1)(A) states:

> (c)(1)(A) Each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs.

Generally, before any federally supported activity can be undertaken in a coastal zone, a determination that the project is consistent with the coastal zone management plan (consistency determination) must be secured from the responsible state agency.

Implementation in the SRF Programs

The Coastal Zone Management Act places primary responsibility for complying with its provisions in the state Coastal Zone Management agency. SRF assistance recipients should

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[17] The coastal zone encompasses coastal waters including the lands therein and thereunder and the adjacent shore lands and the waters therein and thereunder. The coastal zone includes islands, intertidal areas, salt marshes, wetlands and beaches. The zone extends inland from the shorelines only to the extent necessary to control the shore lands. See 16 U.S.C. § 1453(1)

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consult directly with the state Coastal Zone Management agency during the planning stages to ensure that the project will be consistent with the state's coastal zone management plan. Consistency can be achieved through appropriate siting of the facility and its components or by incorporating adequate mitigating measures in the project's design. The SRF assistance recipient must then provide the SRF agency with documentation that the project is consistent with the coastal zone management plan. The SRF agency will review the documentation and may propose additional mitigating measures before forwarding a certification of consistency to the state Coastal Zone Management agency. If the Coastal Zone Management agency determines that the project is consistent with the state management plan (a consistency determination), the SRF assistance may be provided.

If the Coastal Zone Management agency cannot issue a consistency determination, the SRF agency must resume consultation with the assistance recipient and the Coastal Zone Management agency in an effort to resolve consistency issues. Conflicts can be addressed through informal discussions with the Coastal Zone Management Act's administering agencies, the National Oceanic and Atmospheric Administration (NOAA), or through mediation by the Department of Commerce, Office of Ocean and Coastal Resource Management.

Additional References

- 15 C.F.R. Part 930 Subpart F: Consistency for Federal Assistance to State and Locals with Approved Coastal Zone Management Programs.
- 15 C.F.R. Part 923: Coastal Zone Management Program Regulations.

Coastal Barriers Resources Act
Pub. L. No. 97-348, 96 Stat. 1653 (1982)
16 U.S.C. §3501 *et. seq.*

In 1982, Congress enacted legislation intended to discourage development in the Coastal Barrier Resources System,[18] a collection of undeveloped and ecologically sensitive barrier formations along the Atlantic and Gulf Coasts of the United States, and the shore areas of the Great Lakes. The Coastal Barrier Resources Act restricts federal financial expenditures and assistance that would encourage development in the Coastal Barriers Resources System and the adjacent wetlands, marshes, estuaries, inlets, and near-shore waters. 16 U.S.C. § 3504(a) reads in part:

[18] The Coastal Barrier Resources System is established at 16 U.S.C. §3503. The areas in the system are depicted on maps on file with the Secretary of DOI titled, "Coastal Barrier Resources System."

Limitations on Federal Expenditures Affecting the System

(a) . . . no new expenditures or new financial assistance may be made available under authority of any federal law for any purpose within the [Coastal Barrier Resources System], including, but not limited to --

(1) the construction or purchase of any structure, appurtenance, facility, or related infrastructure . . . .

16 U.S.C. §3505 provides a number of exceptions to this limitation on federal funding, including exceptions for facilities necessary to explore and extract energy resources and for "the maintenance, replacement, reconstruction, or repair, but not the expansion of, publicly-owned or operated . . . structures or facilities that are essential links in a larger network or system." 16 U.S.C. §3505(a)(3).

Implementation in the SRF Programs

During the planning phase of a proposed project and with the assistance of the state SRF agency, the SRF assistance recipient should consult with the state Coastal Zone Management agency to determine whether a proposed project will have an effect on the Coastal Barrier Resources System and, if so, the alternative sites or mitigating measures that must be incorporated in the project's design.

The state SRF agency must then provide the state Coastal Zone Management agency and the U.S. Fish and Wildlife Service with a certification, supported by sufficient documentation, that the proposed project will not affect the system, or documentation on the alternative site or mitigating measures that will be taken to avoid any effect on the system. The U.S. Fish and Wildlife Service is responsible for commenting on this information directly to the state SRF agency or the Coastal Zone Management program. Any recommendations offered by the U.S. Fish and Wildlife Service or the Coastal Zone Management agency to further minimize the effect of the proposed project must be considered for integration in the project's design by the SRF agency before it may provide assistance.

Additional References

- 48 Fed. Reg. 45664 (1983): DOI, U.S. Fish and Wildlife Service, Coastal Barrier Act Advisory Guidelines.

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E. Wild and Scenic Rivers Act
Pub. L. No. 90-542, 82 Stat. 913 (1968)
16 U.S.C. §1271 *et. seq.*

Congress passed the Wild and Scenic Rivers Act to preserve the special scenic, cultural, historic, recreational, geologic, and fish and wildlife values of the nation's free flowing rivers and related adjacent land. The Act established the national Wild and Scenic River System, which includes rivers designated by Act of Congress and rivers that the Secretary of the DOI approves for addition to the list upon the petition of state governors. The Wild and Scenic Rivers Act establishes requirements for proposed projects that may effect the river, river segments, or the adjacent land.

The Wild and Scenic Rivers Act prohibits federal assistance for water resource projects[19] that would have direct and adverse effects on, invade, or unreasonably diminish, the special values of a designated wild and scenic river. This restraint is contained in 16 U.S.C. §1278(a), which reads in part:

> . . . no department or agency of the United States shall assist by loan, grant, or otherwise in the construction of any water resource project that would have a direct and adverse effect on the values for which such river was established.

Similar language is used to describe the protection due rivers that are being studied for possible inclusion in the system (study rivers). 16 U.S.C. §1278(b).

Implementation in the SRF Programs

During the planning of a proposed project, the SRF assistance recipient should consult with appropriate state or federal officials and the SRF agency to determine whether the project or any alternatives under consideration may affect a designated or study river. The appropriate agency is the one that has jurisdiction over the rivers in the project area and includes the National Park Service, the U.S. Forest Service, or, in some cases, the DOI's Bureau of Land Management (BLM). The cross-cutting requirements of the Wild and Scenic Rivers Act are satisfied if there are no designated or study rivers in the project area, or if the project will not have a direct and adverse effect on a designated or study river.

With the assistance of the SRF agency and other appropriate state and federal officials, the SRF assistance recipient must evaluate further the alternatives under consideration that may affect a wild and scenic river. If those evaluations demonstrate that an alternative will have an adverse effect on a wild and scenic river, it must be eliminated from consideration and other alternatives or planning adjustments must be pursued.

Documentation of any evaluations done by the assistance recipient to determine the

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[19] "Water resource projects" are defined in the Services' regulations to include "construction of developments which would affect the free-flowing characteristics of a designated or proposed Wild and Scenic River or Study River." "Construction" is defined as any action carried out with federal assistance affecting the free-flowing characteristics or the scenic or natural values of a Wild and Scenic River or a Study River." 36 C.F.R. § 297.3.

effect of a proposed alternative on a wild and scenic river, along with documentation demonstrating that the selected plan will not adversely affect the river, must be furnished to the SRF agency. The SRF agency must then submit this information for review and comment to the federal agency charged with administering the river at least 60 days in advance of the planned action. 16 U.S.C. § 1278(a). SRF assistance cannot be provided to the applicant without the consent of the federal administering agency.

Additional References

- 36 C.F.R. Part 297 Subpart A: Wild and Scenic Rivers, Water Resources Projects.
- 47 Fed. Reg. 39457 (1982): Joint DOI National Park Service and Department of Agriculture (DOA) Forest Service Final Revised Guidelines for Eligibility Classification and Management of River Areas.

F. Endangered Species Act
Pub. L. No. 93-205 (1973), as amended
16 U.S.C. §1531 *et. seq.*

Congress passed the Endangered Species Act in response to the risks posed to plants, fish, and wildlife by development and economic growth. The DOI's U.S. Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service prepare and maintain a list of endangered and threatened species. The Act requires all federal agencies to ensure that their activities are not likely to jeopardize, destroy, or adversely modify listed or proposed endangered and threatened species, or the designated critical habitat on which they depend. The Act also prohibits federal agencies and all other "persons" from "taking," e.g., harming (including, in some cases, habitat modification), harassing, or killing, endangered, and most threatened, animal species, without prior authorization for incidental taking from the applicable Service.

Actions that may affect listed species or their critical habitat must be reviewed through a consultation process between the federal agency and either the U.S. Fish and Wildlife Service, which is responsible for terrestrial and freshwater species, or the National Marine Fisheries Service, which is responsible for most marine species. Federal agencies also must "confer" with the Service(s) if their actions are likely to jeopardize the continued existence of species proposed for listing or result in the destruction or adverse modification of habitat proposed for designation as critical. The consultation and conference processes are established by Section 7 of the Act, which reads in part:

> (a) Federal Agency Actions and Consultations.
> * * * * *
> (2) Each federal agency shall, in conjunction with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered

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species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states, to be critical. . . .
* * * * *
(4) Each federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.
16 U.S.C. §§1536(a)(2)and (4)

Finally, all "persons" in the U.S., including federal agencies, states, and other non-federal entities, are prohibited from "taking" (e.g., harming, harassing, or killing) individuals of listed animal species under section 9 of the ESA. Detailed regulations governing consultation, conferences, and take issues associated with agency actions are set forth at 50 CFR Part 402. These regulations allow for federal agencies to fulfill certain ESA duties through designated non-federal representatives. 50 CFR § 402.08.

Implementation in the SRF Programs

During project planning, the SRF assistance recipient should obtain a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area and consult with the regional office of the appropriate Service to determine whether any listed or proposed species or critical habitat may be affected by the proposed project. The project can proceed if the state SRF agency conclusively determines that listed or proposed species or critical habitat will not be affected in any way -- adversely or beneficially, directly or indirectly – by the project or interrelated or interdependent activities.

If the proposed project may affect a listed or proposed species or critical habitat, the state SRF agency and the appropriate Service must consult to determine the nature of that effect. A biological assessment must be prepared by the SRF agency (with the SRF assistance recipient's assistance, if appropriate) to serve as a basis for the determination that there will be no likely adverse effect on any listed species or critical habitat, or to support EPA in formal consultation with the appropriate service.[20] In order for the consultation to be concluded through an informal process, the appropriate service must provide written concurrence with the determination that the action is not likely to adversely affect listed species or critical habitat. In other words, the consultation does not conclude until the Service issues either (1) a biological opinion or (2) a concurrence letter agreeing that the action is not likely to adversely affect any listed species (informal consultation).

When formal consultation is necessary, the appropriate Service will render a biological opinion. If the opinion concludes that a proposed project is likely to jeopardize a listed species

[20] While biological assessments are mandated for "major construction activities" as defined by the Act's regulations, they are not mandatory for projects that are not "major construction activities." In that case, however, a biological evaluation or other analysis similar to a biological assessment that analyzes the project's potential effects on species and critical habitat is required in order for the consultation process to proceed.

or destroy or adversely modify a critical habitat, the Service will propose reasonable and prudent alternatives to the project that will not result in jeopardy of destruction or adverse modification, if possible. The EPA regional office, after consulting with the state SRF agency, will likely require an alternative or modified plan for the project that is not likely to jeopardize the species or habitat. In addition, if the opinion concludes that the proposed project will result in the incidental "taking" of a listed animal species, the Service generally will provide an incidental take statement that authorizes take so long as the state SRF agency and the SRF assistance recipient comply with specified reasonable and prudent measures necessary or appropriate to minimize impact on the species, and terms and conditions to implement those reasonable and prudent measures.

For either informal or formal consultation, ESA consultation does not conclude until the Service issues either (1) a concurrence letter agreeing that the action is not likely to adversely affect any listed species (informal consultation) or (2) a biological opinion (formal consultation). There are time frames by which the Service is supposed to respond, but the SRF agency cannot proceed until the Service acts.

Additional References

- 50 C.F.R. Part 402: DOI and Department of Commerce Procedures for Implementing Section 7 of the Endangered Species Act.
- 50 C.F.R. 17.11 and 17.12: U.S. Fish and Wildlife Lists of Endangered or Threatened Species.
- 50 C.F.R. 17.95, 17.96 and Part 226: U.S. Fish and Wildlife Critical Habitats.
- 50 C.F.R. 222.23(a) and 227.4: National Marine Fisheries Service's List of Endangered or Threatened Marine Species.
- Final Endangered Species Act Consultation Handbook for Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, U.S. Fish & Wildlife Service and National Marine Fisheries Service (March 1998), found at http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm

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G. Essential Fish Habitat Consultation Process under the Magnuson-Stevens Fishery Conservation and Management Act

Pub. L. 94-265 (1976), as amended

16 U.S.C. §1801 et. seq.

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended, was designed to manage and conserve national fishery resources. Eight Regional Fishery Management Councils (RFMC) were established to maintain the fisheries in their

geographic region through Fishery Management Plans (FMP). The National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS), evaluates FMP and issues necessary regulations.

In 1996, reflecting Congressional concern with marine habitat loss, the MSA was amended. The Sustainable Fisheries Act of 1996 added new requirements for the identification and protection of Essential Fish Habitat (EFH)[21] for species included in the fishery management unit. Each RFMC was required to designate EFH in its region, as well as identify adverse effects on EFH. Federal agencies are required to consult with the NMFS regarding "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter." 16 U.S.C. § 1855(b)(2).

The NMFS issued final EFH regulations in 2002 for coordination and consultation with federal and state agencies concerning actions that may adversely effect EFH. (50 C.F.R. 600.905 et. seq.). Actions completed prior to an EFH designation will not require a consultation; however renewals, reviews or substantial revisions will require a consultation if the renewal, review or revision may adversely affect EFH. Importantly, "EFH consultation is required for any federal funding of actions that may adversely effect EFH." (50 C.F.R. 600.920(a)(1)).

Implementation in the SRF Programs

EFH consultations are only required for actions that may adversely effect EFH. Thus, with the assistance of the SRF agency, the assistance recipient must first determine whether a proposed project may adversely effect EFH. The NMFS will make maps and/or other information on the locations of EFH available as well as provide information on ways to promote conservation of EFH, in order to facilitate this assessment. If an action may adversely effect EFH, the SRF assistance recipient must complete an EFH consultation in conjunction, generally within the SERP process.

When a SERP document is transmitted to the NMFS for comment, the document or the transmittal letter should clearly state that the agency is initiating EFH consultation. For example, if the agency wants to use the EA process for EFH consultation, it must give the NMFS a draft EA and delay signing a Finding of No Significant Impact (FONSI) until after the agency responds to NMFS EFH recommendations. If an agency does not wish to provide a draft EA to the NMFS, it may use some other process for EFH consultation.

If an SRF assistance recipient prepares an EFH Assessment, it must provide that assessment to NMFS for comment. The NMFS will respond informally or in writing. The NMFS

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[21]EFH is defined as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." 16 U.S.C. 1802(10). The NMFS has further interpreted this statutory definition at 50 C.F.R. 600.10.

comments may include EFH Conservation Recommendations, if appropriate. If so, the SRF recipient must respond to any NMFS EFH Conservation Recommendations, explaining the project's proposed measures for addressing, avoiding or mitigating the adverse effect of the project on EFH. In the event that such a response is inconsistent with the Conservation Recommendations, the SRF agency should first consult with the EPA regional office before explaining the reasons for not following the recommendations.

Additional References

- 50 C.F.R. 600.920 Federal agency consultation with the Secretary. Includes details on the requirements of EFH Assessments. "EFH Assessment Template issued by Habitat Conservation Division, National Marine Fisheries Service, June 14, 2001, available at www.nwr.noaa.gov/1habcon/habweb/efh/templates/efh_assessment_template.pdf.
- Essential Fish Habitat Consultation Guidance" issued by Office of Habitat Conservation, National Marine Fisheries Service, available at www.nmfs.noaa.gov/habitat/efh/Consultation/TOC.html.
- Guidance for Integrating Magnuson-Stevens Fishery Conservation and Management Act EFH Consultations with Endangered Species Act Section 7 Consultations" issued by National Marine Fisheries Service, January 2001, available at www.nmfs.noaa.gov/habitat/habitatprotection/images/guidance1.pdf.
- National Finding for use of Endangered Species Act Section 7 Consultation Process to Complete Essential Fish Habitat Consultations" issued by National Marine Fisheries Service, February 28, 2001, available at w.nwr.noaa.gov/1habcon/habweb/efh/national_finding_2-01.pdf

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H. Clean Air Act Conformity

Pub. L. No. 95-95 (1977), as amended

42 U.S.C. §7401 *et. seq.*

Because of the nature and scope of the problem to be remedied, the Clean Air Act (CAA) imposes responsibilities for its implementation on all levels of government. Among other things, the Act directs EPA to set ambient air quality standards, which are airborne pollutant levels that are sufficient to protect the public health and welfare. Each state must develop an implementation plan (SIP), describing how it will attain, maintain and enforce the air quality standards. Developing the SIP, and implementing its provisions for controlling direct and indirect emissions, is done in consultation with state air agencies and other government organizations.

Section 176(c) of the Act prohibits any federal assistance for an activity within a non-attainment or maintenance area that fails to conform to an applicable SIP. This broad provision reads in part:

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to a [State Implementation Plan].

42 U.S.C. § 7506(c)

Implementation in the SRF programs

Section 176(c) is implemented through regulations published by the EPA (40 C.F.R. § 93.150 et seq (Determining Conformity of General Federal Actions to State or Federal Implementation Plans)). If a state has adopted its own set of general conformity regulations and EPA has approved them into the SIP, those regulations must be followed. The SRF assistance recipient must first determine the direct and indirect emissions from the proposed project. If a project's emissions for each nonattainment pollutant are below the de minimis thresholds set forth in the applicable regulation, no further analysis is necessary and the project is presumed to conform. If the total of direct and indirect emissions is above the applicable de minimis levels and the project is otherwise not exempt from a conformity determination, the project must be found to conform to the SIP pursuant to one of the criteria listed in the regulation. The SRF agency, in consultation with the responsible state air agency and others, must take public comment on a proposed conformity determination. Projects cannot proceed unless they are found to conform. The conformity analysis can be included in the environmental review documents.

Additional References

- General Conformity Guidance: Question and Answers (July 13, 1994 and October 19, 1994 (which addresses issues with respect to SRF funded projects) found at www.epa.gov/ttn/oarpg/genconformity.html.

I . Safe Drinking Water Act
Pub. L. No. 93-523 (1974), as amended
42 U.S.C. 300f *et. seq.*

In 1974, Congress passed the first comprehensive SDWA. The Act required water supply systems in the United States to meet certain minimum national standards to protect the public health. Under the Act, EPA is required to set standards for the wide range of contaminants that can be present in drinking water supplies. EPA's drinking water regulations are codified at 40 C.F.R. 141-143. The SDWA was significantly amended in 1976, 1986, and

1996.

In the 1974 Act, Congress emphasized preventing contamination of aquifers that are the sole source of drinking water for a community. Section 1424 of the SDWA directs EPA, upon determining that a sole source aquifer may be at risk of contamination, to publish notice of that determination in the Federal Register. In accordance with Section 1424(e) of the SDWA, 42 U.S.C. §300h-3(e), after the notice is published:

> . . . no commitment for federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator [of EPA] determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

Implementation in the SRF Programs

Before the SRF agency can approve project plans, SRF assistance recipients must contact state officials to determine whether a sole source aquifer is in the vicinity of the proposed project. If a sole source aquifer is in the project planning area, then the assistance recipient, in consultation with state ground water officials, must conduct investigations to determine if the aquifer could be contaminated by the project.

If the project could potentially affect ground water supplies, the assistance recipient, in consultation with ground water officials, must elect an alternative site or devise adequate mitigating measures. In the latter case, the state SRF agency must advise the EPA regional office of the assistance recipient's plans. If the EPA regional office requires additional mitigating measures, the SRF agency and the assistance recipient, with the assistance of the EPA regional office, must integrate these measures into the project's design.

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SECTION III: SOCIAL POLICY AUTHORITIES

One way in which Congress and the Executive Branch have advanced certain social policy objectives is by linking the accomplishment of those objectives to federal assistance. For example, recipients of construction assistance under most federal programs must comply with the Executive Orders designed to ensure equal employment opportunity and to increase the participation of disadvantaged business enterprises (DBEs) in federally assisted programs and activities.

Prominent among the cross-cutting social policy authorities are four anti-discrimination laws that have special status in federally assisted programs or activities and in the SRF programs. Title VI of the Civil Rights Act of 1964 (Title VI), and the three anti-discrimination laws that were modeled on it — Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), the Age Discrimination Act of 1975 (Age Discrimination Act), and Title IX of the Education Amendments of 1972 (Title IX),[22] — prohibit discrimination in any federally assisted program on the basis of race, color, national origin, sex, handicap, or age. Unlike other cross-cutting authorities that apply only to the federally funded program or activity, the prohibitions of these laws generally apply to the entire operation of the organization receiving the assistance. For example, if a local school system receives federal funds to upgrade its libraries, it must comply with the civil rights laws in other aspects of its programs, including those that do not receive federal financial assistance. The legislative history of the Civil Rights Restoration Act also makes clear that, where one level or department of government receives federal financial assistance for distribution to another level or department of government, both recipients must comply with the civil rights laws.

Consequently, the state SRF agency and all recipients of SRF assistance, must comply with Title VI, the Rehabilitation Act, and the Age Discrimination Act. The CWSRF recipients must also comply with Section 13 of the federal Water Pollution Control Act Amendments of 1972 (Section 13), which prohibits sex-based discrimination in CWA programs. Section 13 of the CWA instructs EPA to enforce its requirements according to rules similar to those used to enforce the requirements of the other civil rights laws.

Because the details of implementing these four laws are the same, they will be treated collectively in this section. Implementation of the other social policy authorities will be discussed individually.

[22] Title IX of the Education Act Amendments applies only to education programs and therefore will not be discussed.

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A. Civil Rights Laws (i.e., Super Cross-Cutters)

Title VI of the Civil Rights Act of 1964
42 U.S.C. § 2000d

Section 13 of the Federal Water Pollution Control Act Amendments of 1972
33 U.S.C. § 1251

Section 504 of the Rehabilitation Act of 1973
29 U.S.C. § 794

The Age Discrimination Act of 1975
42 U.S.C. § 6102

These four laws prohibit discrimination in the provision of services or benefits, on the basis of race, color, national origin, sex, handicap or age, in programs or activities receiving federal financial assistance. If, for example, a municipality receives SRF assistance to build a wastewater treatment plant, it may not decline to provide service from that plant to a particular neighborhood because of its racial composition. As the preface to this section noted, Title VI, the Rehabilitation Act, and the Age Discrimination Act were amended in 1988 to clarify that their anti-discrimination provisions apply to the entire operations of an assistance recipient, not just to the specific program, project, or activity that is the objective of the assistance. The reach of these statutes and Section 13, which contains language instructing EPA to treat its sex discrimination provisions in a manner similar to the Civil Rights Act, extends beyond that of other cross-cutting authorities.

The following excerpts from the four laws demonstrate their prohibition of various forms of discrimination that are prohibited in federally assisted programs and activities:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.
>
> *Title VI*

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> No person in the United States shall, on the ground of sex be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal assistance under . . . the federal Water Pollution Control Act. . . .
>
> *Section 13* [23]

> (n)o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance . . . .
>
> *Rehabilitation Act*

> (n)o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving financial assistance.
>
> *Age Discrimination Act*

Implementation in the SRF Programs

Because of the extraordinary reach of the civil rights laws, all assistance recipients must comply with these "super cross-cutters." Pursuant to EPA's regulations on "Nondiscrimination in Programs receiving Federal Assistance from the Environmental Protection Agency," the SRF agency must agree, and require all assistance recipients to agree, not to discriminate on the basis of race, color, national origin or sex. 40 C.F.R. Part 7.[24]

Recipients of federal assistance are required to collect and maintain information to show compliance with the laws. This information includes a list of discrimination complaints, reports of any compliance reviews conducted by other agencies, descriptions of any pending discrimination-based lawsuits, and data on the racial, ethnic, national origin, sex, and handicap characteristics of populations served. If there is "reason to believe" that discrimination may be occurring based on this review, the matter will be referred to the EPA Regional Director of Civil Rights for appropriate action.

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[23]Section 13 only applies to the CWSRF.

[24]The fact that the regulations do not address discrimination on the basis of age *does not* exempt recipients from compliance with the later-enacted Age Discrimination Act.

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B. Equal Employment Opportunity
Executive Order No. 11246 (1965)

Through a series of Executive Orders, and a decision by the Equal Employment Opportunity Commission, the federal government has established a national policy designed to battle discrimination based on race, color, sex, religion, and national origin in federal assistance programs and to enhance hiring, training, and promotion opportunities for minorities and women in construction programs financed, in part, by federal dollars. Chief among these directives is Executive Order No. 11246, which requires all federal contracting agencies to include certain nondiscrimination and "affirmative action" provisions in all contracts and to require the recipients of federal contracts to include these provisions in subcontracts. The provisions commit the contractor or subcontractor to maintain a policy of non-discrimination in the treatment of employees, to make this policy known to employees, and to recruit, hire, and train employees without regard to race, color, sex, religion, or national origin.

Executive Order No. 11246 was signed by President Johnson on September 24, 1965 and has been amended by subsequent administration directives. Part III of the order applies equal employment opportunity principles to federally assisted construction programs.

> PART III - NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS
>
> Sec. 301. Each executive department and agency which administers a program involving federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract,[25] that the applicant for federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the federal government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order . . . .

Section 202 contains seven clauses that must be included in construction contracts. These clauses commit the contractor or subcontractor to refrain from discrimination in its treatment of employees and to undertake certain affirmative action practices.

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[25] The Executive Order defines "Construction contract" as "any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property." Executive Order 11246, §302(a).

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The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is responsible for implementing the Executive Order and for providing guidance and regulations for use by other agencies of the federal government. Contracting agencies are authorized to conduct compliance reviews and to cancel, terminate, or suspend contracts if these reviews or investigations of complaints reveal that contractors or subcontractors are failing to abide by the provisions of the Executive Order.

Implementation in the SRF Programs

The SRF agency must agree to require recipients of assistance for projects whose cumulative funding equals the amount of capitalization grants to include in contracts the seven equal employment opportunity clauses of Executive Order No. 11246. This requirement does not apply to exempted contracts; typically those under $10,000.

If the contract is to be performed in an area that has been designated by the OFCCP for special treatment, mainly metropolitan areas, contractors and subcontractors must agree to undertake affirmative action programs in accordance with regulations and other directives promulgated by that Office.

Additional References

- 41 C.F.R. Part 60 (1997): Department of Labor Regulations on Equal Employment Opportunity.

C. Disadvantage Business Enterprise Provisions

Promoting the Use of Small, Minority, and Women-owned Businesses
Executive Orders No. 11625, 12138, and 12432

Section 129 of the Small Business Administration Reauthorization and Amendment Act of 1988 Pub. L. No. 100-590

Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 Pub. L. No. 102-389

Since the early 1970s, the federal government has pursued a policy designed to increase the participation of disadvantage business enterprises (DBEs) in the financial

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assistance programs of federal agencies and in contracts awarded by state and local recipients of federal assistance.

The inception of this policy was Executive Order No. 11625, which was signed by President Nixon on October 13, 1971. The Executive Order directed the Secretary of Commerce to coordinate the activities of all federal agencies in promoting opportunities for minority-owned business. This directive was followed by President Carter's Executive Order No. 12138 (May 18, 1979), which extends the policy to include business enterprises owned by women and prohibited discrimination against these entities by recipients of federal assistance. President Reagan's Executive Order No. 12432 (July 14, 1983) sets forth in more detail the responsibilities of federal agencies for monitoring, maintaining data, and reporting on the results of their efforts related to minority business development.

The Executive Orders impose far-reaching responsibilities on agencies and departments of the Federal Government, first through the Secretary of Commerce, who:

> (W)ith the participation of other federal departments and agencies as appropriate, (is authorized to) develop comprehensive plans and specific program goals for the minority enterprise program, establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of federal support in achieving the objectives established by this order.
>
> *(Executive Order No. 11625, §1(b)(1))*

Later Executive Orders impose obligations directly upon each federal agency and department. For example, President Carter's National Women's Business Enterprise Policy requires that:

> (E)ach department or agency empowered to extend federal financial assistance to any program or activity shall issue regulations requiring the recipient of such assistance to take appropriate action in support of women's business enterprise and to prohibit actions or policies which discriminate against women's business enterprise on the ground of sex.
>
> *(Executive Order No.12138, §1-101(c))*

EPA's fiscal year 1993 Appropriations Act, Pub. L. No. 102-389, is the primary source of the Agency's DBE program for procurement under federal financial assistance. In the Appropriations Act, Congress established a goal of eight percent DBE participation in procurement under EPA financial assistance programs.

Following the Supreme Court decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), federal affirmative action programs that use racial or ethnic criteria as a basis for decision-making are subject to strict judicial scrutiny. In response to *Adarand*, EPA has

modified its DBE program to replace the 8% statutory goal with a fair share goal for procurement under assistance that is negotiated with recipients based on the availability of DBE businesses in the relevant geographic market. EPA is currently revising its various specific DBE regulatory provisions to reflect the narrow tailoring requirements of *Adarand* which will be promulgated as a new Part 33.

Implementation in the SRF Programs

Requirements for states to encourage participation by disadvantaged businesses in the SRF programs are set forth in the EPA's regulations at 40 C.F.R. §35.3145(d) and (e)(CWSRF) and 40 C.F.R. § 35.3575(d). Generally, recipients of assistance in an amount equal to the capitalization grant must take "six affirmative steps" that are intended to promote the participation of disadvantaged business enterprises in their projects and activities, and thereby increase the likelihood that the state will achieve its fair share objective. During the procurement phase for the project, the assistance recipients must, to the extent practicable:

- place qualified disadvantaged businesses on solicitation lists;

- assure that disadvantaged businesses are solicited whenever they are potential sources;

- divide project requirements into smaller tasks when possible to maximize participation by disadvantaged businesses;

- establish delivery schedules that encourage disadvantaged business participation;

- obtain assistance from Federal offices responsible for promoting disadvantaged business participation and;

- require prime contractors to follow the previous steps when awarding subcontracts.

There may be additional SRF-specific provisions of the new DBE Part 33 once it has been finalized.

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SECTION IV: ECONOMIC AND MISCELLANEOUS AUTHORITIES

The primary aim of the authorities discussed in this section differs somewhat from that of the environmental and social authorities. Where Congress and the Executive Branch seek to accomplish certain national goals by requiring compliance with cross-cutting environmental and social policy authorities, the objective of cross-cutting economic and miscellaneous authorities is to more directly regulate the expenditure of federal funds. Thus, these authorities prohibit providing assistance to a facility that has enjoyed an economic advantage from its failure to comply with the CAA or the CWA, (Executive Order No. 11738, 3 C.F.R. 799 (1973)), or prohibit assistance recipients from entering into a procurement contract with a corporation that has been barred or suspended from doing business with the federal government.

The sources for many of the economic and miscellaneous authorities are Executive Orders, Congressional appropriations, and government-wide policies promulgated by the Office of Management and Budget (OMB). These authorities typically serve as the source for rules governing the operations of federal agencies rather than as the roots of significant national policy.

A. Prohibitions Relating to Violators of the Clean Air Act and the Clean Water Act with Respect to Federal Contracts, Grants, or Loans

Executive Order No. 11738 (1973)
Section 306 of the Clean Air Act,
42 U.S.C. § 7606, and
Section 508 of the Clean Water Act,
33 U.S.C § 1368

Both the CAA and the CWA prohibit federal agencies from procuring goods or services from—or extending assistance by way of grant, loan or contract to — persons who have been convicted of violations of either law. Executive Order No. 11738 was issued to coordinate enforcement of these provisions by conferring certain responsibilities on the EPA Administrator. Under section 2(b) of Executive Order No. 11738, the Administrator

> shall. . . designate facilities which have given rise to a conviction for an offense under (the criminal provisions of the CAA and the CWA).

The Executive Order also prohibits federal agencies from extending assistance to facilities that are not in compliance with either Act. Section 3(b) of Executive Order No. 11738 provides that:

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(N)o federal agency authorized to extend federal assistance by way of grant, loan or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

The prohibition of section 3(b) does not apply if the purpose of the assistance is to remedy the cause of the CAA or CWA violation.

Implementation in the SRF Programs

The SRF agency must agree to advise assistance recipients that they may not procure goods, services, or materials from listed suppliers. The state must also certify that assistance to facilities that are not in compliance with the laws will be extended to remedy the problems giving rise to the violation.

Additional References

- Excluded Parties Listing System: http://epls.arnet.gov/

B. Debarment and Suspension
Executive Order No. 12549 (1986)

On February 18, 1986, the White House instructed OMB to coordinate a government-wide policy for excluding certain individuals and businesses from participation in federal assistance programs. OMB responded to Executive Order No.12549 by issuing guidelines for development of a "common rule" on debarment and suspension in non-procurement activities. Agencies were required by OMB to adopt the common rule to provide uniformity, but were allowed to make additions to suit specific needs. EPA's version of the common rule was published at 53 Fed. Reg. 19195 (1988) and is codified at 40 C.F.R. Part 32 (1997).

It is the policy of the Executive Order and regulations issued thereunder to protect the federal interest, and thereby the interest of the public, by excluding individuals and businesses who, by their actions, have relinquished their claim to certain federal assistance programs. A person or business can be debarred from participation in assistance programs for conviction or for civil judgments for offenses such as fraud, antitrust violations, embezzlement or theft, or for serious violations of the terms of public agreements or transactions. There are other causes as well that can be established administratively by a preponderance of the evidence. Suspension can be imposed when adequate evidence exists that a person or business is engaging in activities that would give rise to debarment.

The regulations specify the programs and activities covered by the Executive Order, the

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minimum due process standards that the EPA must follow before finding a person ineligible, including the appeal process, and the consequences of a debarment or suspension action — the exclusion for a period of time from participation in any similar assistance programs administered by any federal agency.

Implementation in the SRF Programs

A company or individual who is debarred or suspended cannot participate in primary and lower tiered covered transactions. These transactions include SRF loans and contracts and subcontracts awarded with SRF loan funds.

Under 40 C.F.R. 32.510, the SRF agency must submit a certification stating that it shall not knowingly enter into any transaction with a person who is proposed for debarment, suspended, declared ineligible, or voluntarily excluded from participation in the SRF program. This certification is reviewed by the EPA regional office before the capitalization grant is awarded.

A recipient of SRF assistance directly made available by capitalization grants must provide a certification that it will not knowingly enter into a contract with anyone who is ineligible under the regulations to participate in the project. Contractors on the project have to provide a similar certification prior to the award of a contract and subcontractors on the project have to provide the general contractor with the certification prior to the award of any subcontract.

In addition to actions taken under 40 C.F.R. Part 32, there are a wide range of other sanctions that can render a party ineligible to participate in the SRF program. Lists of debarred, suspended and otherwise ineligible parties are maintained by the General Services Administration and should be checked by the SRF agency and all recipients of funds directly made available by capitalization grants to ensure the accuracy of certifications.

Additional References

- 40 C.F.R. Part 32: EPA Regulations on Debarment and Suspension.
- Excluded Parties Listing System: http://epls.arnet.gov/

C. Demonstration Cities and Metropolitan Development Act
Pub. L. No. 89-754 (1966), as amended
42 U.S.C. § 3331 *et. seq.*

During the 1960s, as the pace of growth in the nation's urban areas quickened, a host of federal programs were established to provide assistance in these areas for housing, roads, hospitals, water supply, and wastewater treatment. The sheer number of these programs

began to complicate the planning efforts of local officials.

In 1966, Congress enacted the Demonstration Cities and Metropolitan Development Act, title II of which instructed federal agencies to consult with local officials to ensure smoother coordination of their assistance programs and to ensure that projects funded under federal programs are consistent with local planning requirements.

The coordination and consultation directions (42 U.S.C. § 3334(a)) read in part:

> (a) All applications . . . for federal loans or grants to assist in carrying out open-space land projects or for the planning or construction of . . . water supply and distribution facilities, sewerage facilities and waste treatment works . . . and water development projects . . . within any metropolitan area shall be submitted for review—
>
> (1) to any area wide agency which is designated to perform metropolitan or regional planning for the area . . . and which is, to the greatest practicable extent, composed of or responsible to the elected officials . . . .

Implementation in the SRF Programs

Responsibility for following intergovernmental review procedures in the SRF program rests with the SRF agency. The SRF agency must contact the state's single point of contact as early as possible to determine whether capitalization grant applications are subject to the state's intergovernmental review process and what materials must be submitted. Single points of contact and other reviewers should send their comments concerning applications for capitalization grants to the grant applicant who will include them in the grant application package submitted to the EPA regional office no later than 60 days after receipt of an application and other required materials for review. The state may require the SRF agency to submit individual assistance agreements to the single point of contact for review as well.

D. Uniform Relocation Assistance and Real Property Acquisition Policies Act
Pub. L. No. 91-646 (1971), as amended
42 U.S.C. §§ 4601-4655

The Uniform Relocation Assistance and Real Property Acquisition Policies Act establishes a uniform policy for fair and equitable treatment of persons who are displaced from their homes, farms, or businesses to make way for federal or federally assisted projects. It provides basic guidelines for negotiating the acquisition of real property by the federal government. The Act also requires agencies to reimburse individuals for actual and reasonable expenses incident to relocation, such as moving costs, direct loss of tangible personal property associated with moving or discontinuing a business, and expenses involved in searching for a replacement home or business site.

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Section 305 of the Act prohibits federal agencies from:

> approv(ing) any program or project or any grant to, or contract or agreement with, a state agency or person provided such authority by regulation under which federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property . . . unless (the state provides assurances) that—
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under state law, by the land acquisition policies (of title III of the Act), and
>
> (2) property owners will be paid or reimbursed for necessary expenses as specified (in the title III provisions).
>
> *(42 U.S.C. § 4655 (1988))*

The Act was significantly amended in 1987 by the Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 132 . The 1987 Amendments assigned implementation responsibility to the Department of Transportation. The amendments also enhanced state and local autonomy by authorizing certification of state and local programs which are carried out in accordance with state laws that are consistent with the Act. (42 U.S.C. § 4606 (1988)).

The Act was further amended in 1997 to provide that a displaced person is not eligible to receive relocation payments or any other assistance under the Act if the displaced person is an alien not lawfully present in the United States, unless such ineligibility would result in exceptionally and extremely unusual hardship to the alien's spouse, parent, or child and such relative is a citizen or an alien admitted for permanent residence. (42 U.S.C. § 4605).

Implementation in the SRF Programs

Projects or activities receiving SRF assistance in an amount equal to the capitalization grant must comply with the Act's implementing regulations at 49 CFR 24.101 through 24.105. The cost of complying with the Act is an eligible cost that can be included in the SRF loan. The state SRF agency must certify that state rules governing land acquisition and relocation assistance are consistent with the purposes of the Uniform Relocation Act or that SRF assistance recipients will comply with federal law, and that assistance recipients will be required to comply with the appropriate rules. A key aspect of the law is to require use of a professional appraisal to determine the fair market value as a basis for establishing the offer price. In the DWSRF program there is a specific requirement in the SDWA that any land acquired must be from a willing seller. SDWA §1452(a)(2)). The term "willing seller" means that the property owner voluntarily agrees to the terms and conditions of the purchase without compulsion to sell.

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Additional References

- 49 C.F.R. Part 24 (Department of Transportation regulations incorporated by reference at 40 C.F.R. Part 4)

E. Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

Executive Order No. 13202 (2001), as amended by Executive Order No. 13208 (2001)

Executive Order No. 13202, signed February 17, 2001 and amended April 4, 2001, requires all executive agencies that award construction contracts, issue grants or otherwise fund construction contracts after February 17, 2001 to ensure Government neutrality toward contractors' labor relations. The Executive Order prohibits discrimination against contractors and their employees in construction contracts based upon labor affiliation or lack thereof. In addition, the executive agency must not insist upon, nor forbid, project labor agreements. More concretely, bidding specifications, project agreements and other controlling documents must not require, prohibit or otherwise discriminate, with respect to labor affiliation or lack thereof. However, the Executive Order does not prohibit contractors and subcontractors from affiliating with labor organizations or voluntarily entering into labor agreements. Section 3 of the Executive Order addresses grant recipients specifically, mandating that:

> To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1 (a) or (b) of this order.

Implementation in the SRF Programs

Grants awarded to SRF assistance recipients after February 17, 2001 are subject to the provisions of Executive Order No. 13202. Grants awarded between January 25 and October 18, 2002, the period during which the OMB suspended implementation of the Order, are not subject to its provisions.

SRF assistance recipients must ensure that bid specifications, project agreements, and other controlling documents for construction contracts awarded after February 17, 2001 do not require or prohibit agreements with labor organizations. Further, SRF assistance recipients and any construction manager acting upon their behalf must not otherwise discriminate against bidders, offerors, contractors, or subcontractors for entering into, or refusing to enter into,

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agreements with labor organizations.

SRF assistance recipients otherwise subject to the provisions of the Executive Order may qualify for an exemption. Under Subsection 5(c), EPA must find that the recipient of federal funding was a party to a project labor agreement or other controlling agreement as of the date of the original Order and one or more construction contracts have been awarded under such agreement as of the date of the original Order.

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