



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 30 and 31

[EPA-HQ-OARM-2013-0705; FRL-9803-9]

Changes to Dispute Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule with request for comments.

SUMMARY: This regulatory update revises agency policies and procedures for certain pre-award and post-award assistance agreement disputes at the United States Environmental Protection Agency. This section provides a uniform process, including appropriate timelines, for the efficient, effective and timely resolution of assistance agreement disputes. This rule is exempt from the notice and comment requirements of the Administrative Procedure Act (APA) because it is a matter relating to agency management concerning grants.

DATES: *Effective date:* [insert date of publication in the Federal Register].

Comment date: Comments must be received on or before [insert date 60 days after publication in the Federal Register].

Applicability date: This interim final rule applies to disputes arising from agency decisions issued on or after [insert date of publication in the Federal Register]. Disputes arising from agency decisions issued prior to the effective date of this rule will remain subject to the procedures in the prior regulations.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OARM-2013-0705, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: January.elizabeth@epa.gov
- Mail: OARM Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460].
- Hand Delivery: EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. 20004. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>. Such deliveries are only accepted during the Docket's normal hours of operation: 8:30am to 4:30pm, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-OARM-2013-0705**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through

www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at Docket ID No. EPA-HQ-OARM-2013-0705. OARM Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OARM Docket is (202) 566-1752.

FOR FURTHER INFORMATION CONTACT: Elizabeth January, National Policy Training and Compliance Division in the Office of Grants and Debarment(3903R), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: 617-918-8655; fax number: 617-918-8555; e-mail address: january.elizabeth@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Affected Entities

Entities affected by this action are those that apply for and/or receive Federal financial assistance (grants, cooperative agreements or fellowships) from EPA including but not limited to: State and local governments, Indian Tribes, Intertribal Consortia, Institutions of Higher Education, Hospitals, and other Non-profit Organizations, and Individuals.

II. Background

On September 21, 2011, the EPA Office of Inspector General (OIG) issued a final audit report entitled “EPA Should Improve Timeliness for Resolving Audits under Appeal” (Report No. 11-P-0687, “Report”). The Report cited examples where appeals of Agency decisions to sustain some or all of the questioned costs in OIG audits of awards had been in resolution for 10 to 21 years. The Report recommended, among other things, reforms to EPA’s dispute resolution process for audit appeals, including establishing timelines and milestones for each step of the resolution process, limits on time extensions and the submission of additional documentation, and limits on the number of opportunities to request reconsideration of decisions by an Assistant Administrator or Regional Administrator. In response to the Inspector General dated December 19, 2011, EPA agreed to implement these reforms.

While the OIG’s recommended reforms specifically addressed the resolution of audit appeals, EPA believes there is merit to applying the reforms more broadly to ensure timely resolution of other types of disputes between the Agency and recipients of, or applicants for, an

assistance agreement. Accordingly, EPA is revising its assistance agreement dispute procedures in 40 CFR Parts 30 and 31 Subpart F to generally apply the OIG's recommendations to all monetary and non-monetary pre-award and post-award disputes. The only exception is for disputes involving applicants for competitive assistance agreements, which are governed by the procedures set forth at 70 FR 3629 et seq that can be found at <http://www.epa.gov/ogd/competition/70fr3629.pdf>. EPA is not addressing these procedures in this rulemaking since they currently provide a meaningful, timely and effective process for resolving assistance agreement competition-related disputes and disagreements.

In addition, this rule does not apply to any appeal process regarding an award official's determination that an entity is not qualified for an award that may be developed under guidance implementing Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. No. 110-417, as amended).

Consistent with the Report recommendations, this revision will streamline the resolution process for covered disputes by establishing submission and decision-making timelines for each stage of the process (with provisions for extensions in the interest of fairness and equity), specifying the contents of submissions and the administrative record, and, for Regional decisions, eliminating petitions for discretionary review to EPA Assistant Administrators. Viewed as a whole, EPA believes these reforms will make the dispute process more timely and efficient for applicants and recipients while providing them a full and fair opportunity to present their case.

Besides incorporating the OIG's recommendations, this revision updates the list of determinations made pursuant to other Agency decision-making processes that may affect

assistance agreements but that are not subject to review under this section or the Agency's procedures for resolving assistance agreement competition-related disputes or disagreements.

7 U.S.C. 135 *et seq.*, 15 U.S.C. 2601 *et seq.*, 33 U.S.C. 1251 *et seq.*, 42 U.S.C. 241, 242b, 243, 246, 300f, 300j-1, 300j-2, 300j-3, 1857 *et seq.*, 6901 *et seq.*, 7401 *et seq.*, 9601 *et seq.*, OMB Circular A-110 (64 FR 54926, October 8, 1999), 20 U.S.C. 4011 *et seq.*, and 33 U.S.C. 1401 *et seq.*

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). This action will provide a uniform process, including appropriate timelines for the efficient, effective and timely resolution of assistance agreement disputes.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR parts 30.63 and 31.70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2030-0020. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

Today's interim final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because this rule pertains to grants, which the APA expressly exempts from notice and comment rulemaking requirements. 5 U.S.C. 553(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action affects all applicants and recipients of EPA financial federal assistance and therefore no one entity type will be impacted disproportionately or significantly.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action affects all applicants and recipients of EPA financial federal assistance and therefore no one entity type will be impacted disproportionately. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action affects all applicants and recipients of EPA financial federal assistance and therefore no one entity type will be impacted disproportionately. Thus, Executive Order 13175 does not apply to this action. Although Executive Order 13175 does not apply to this action, EPA has made a conscious effort to engage tribal entities on changes to federal financial assistance requirements. EPA published materials summarizing these changes which can be found at <http://www.epa.gov/ogd/grants/regulations.htm>. EPA intends to host informational sessions tailored to tribal entities.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 F.R. 19885, April 23, 1997) because it is not economically significant as defined in EO 12866.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (EO) 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this final rule.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This interim final rule applies to disputes arising from agency decisions issued on or after [insert date of publication in the Federal Register].

Disputes arising from agency decisions issued prior to the effective date of this rule will remain subject to the procedures in the prior regulations.

List of Subjects

40 CFR Part 30

Environmental Protection, Accounting, Grant programs, Reporting and Recordkeeping Requirements

40 CFR Part 31

Environmental Protection, Accounting, Administrative Practice and Procedure, Grant programs, Reporting and Recordkeeping Requirements

Dated: January 6, 2014

Gina McCarthy,

Administrator

For the reasons set forth in the preamble, the Environmental Protection Agency amends 40 CFR parts 30 and 31 as follows:

PART 30 - UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

1. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 15 U.S.C. 2601 *et seq.*, 33 U.S.C. 1251 *et seq.*, 42 U.S.C. 241, 242b, 243, 246, 300f, 300j-1, 300j-2, 300j-3, 1857 *et seq.*, 6901 *et seq.*, 7401 *et seq.*, 9601 *et seq.*, and OMB Circular A-110 (64 FR 54926, October 8, 1999).

2. Revise § 30.63 to read as follows:

§ 30.63 Disputes.

Pre-award and post-award dispute procedures for EPA assistance agreements are outlined at 40 CFR part 31, subpart F.

PART 31 - UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

3. The authority citation for part 31 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 42 U.S.C. 7401 *et seq.*, 42 U.S.C. 6901 *et seq.*, 42 U.S.C. 300f *et seq.*, 7 U.S.C. 136 *et seq.*, 15 U.S.C. 2601 *et seq.*, 42 U.S.C. 9601 *et seq.*, 20 U.S.C. 4011 *et seq.*, and 33 U.S.C. 1401 *et seq.*

4. Revise subpart F, consisting of §§ 31.70 through 31.77, to read as follows:

Subpart F— Disputes

Sec.

31.70 Purpose and scope of this part.

31.71 Definitions.

31.72 Submission of Appeal.

31.73 Notice of receipt of Appeal to Affected Entity.

31.74 Determination of Appeal.

31.75 Request for review.

31.76 Notice of receipt of request for review.

31.77 Determination of request for review.

§ 31.70 Purpose and scope of this part.

(a) This section provides the process for the resolution of pre-award and post-award assistance agreement disputes as described in § 31.71, except for:

(1) Assistance agreement competition-related disputes; and

(2) Any appeal process relating to an award official's determination that an entity is not qualified for award that may be developed pursuant to guidance implementing Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. No. 110-417, as amended).

(b) Pre-award and post-award disagreements between affected entities and EPA related to an assistance agreement should be resolved at the lowest level possible. If an agreement cannot

be reached, absent any other applicable statutory or regulatory dispute provisions, affected entities must follow the dispute procedures outlined in this subpart.

(c) Determinations affecting assistance agreements made under other Agency decision-making processes are not subject to review under the procedures in this Subpart or the Agency's procedures for resolving assistance agreement competition-related disputes. These determinations include, but are not limited to:

(1) Decisions on requests for exceptions under § 31.6;

(2) Bid protest decisions under § 31.36(b)(12);

(3) National Environmental Policy Act decisions under part 6;

(4) Policy decisions of the EPA Internal Audit Dispute Resolution Process (formerly known as Audit Resolution Board.); and

(5) Suspension and Debarment Decisions under 2 CFR parts 180 and 1532.

§ 31.71 Definitions.

As used in this part:

Action Official (AO) is the EPA official who authors the Agency Decision to the Affected Entity regarding a pre-award or post-award matter.

Affected Entity is an entity that applies for and/or receives Federal financial assistance from EPA including but not limited to: State and local governments, Indian Tribes, Intertribal Consortia, Institutions of Higher Education, Hospitals, and other Non-profit Organizations, and Individuals.

Agency Decision is the Agency's initial pre-award or post-award determination. The Agency Decision is sent by the Action Official (AO) to the Affected Entity electronically and informs them of their dispute rights including appealing the Agency Decision to the DDO.

Assistance Agreement Appeal (or Appeal) is the letter an Affected Entity submits to the DDO to challenge an Agency Decision.

Dispute is a disagreement by an Affected Entity with a specific Agency Decision regarding a pre-award or post-award action.

Disputes Decision Official (DDO) is the designated agency official responsible for issuing a decision resolving an Appeal.

- (1) The DDO for a Headquarters Assistance Agreement Appeal is the Director of the Grants and Interagency Agreement Management Division in the Office of Grants and Debarment or designee. To help provide for a fair and impartial review, the AO for the challenged Agency Decision may not serve as the Headquarters DDO and the DDO cannot serve as the Review Official for the Appeal decision.
- (2) The DDO for a Regional Assistance Agreement Appeal is the official designated by the Regional Administrator to issue the written decision resolving the Appeal. To help provide for a fair and impartial review, the AO for the challenged Agency Decision may not serve as the Regional DDO and the DDO cannot serve as the Review Official for the Appeal decision.

Request for Review is the letter an Affected Entity submits to the designated Review Official to challenge the DDO's Appeal decision.

Review Official is the EPA official responsible for issuing a decision resolving an Affected Entity's request for review of a DDO's Appeal decision.

- (1) For a Headquarters DDO Appeal decision, the Review Official is the Director of the Office of Grants and Debarment or designee.

(2) For a Regional DDO Appeal decision, the Review Official is the Regional Administrator or designee.

§ 31.72 Submission of Appeal.

An Affected Entity or its authorized representative may dispute an Agency Decision by electronically submitting an Appeal to the DDO identified in the Agency Decision. In order for the DDO to consider the Appeal, it must satisfy the following requirements:

(a) *Timeliness.* The DDO must receive the Appeal no later than 30 calendar days from the date the Agency Decision is electronically sent to the Affected Entity. The DDO will dismiss any Appeal received after the 30-day period unless the DDO grants an extension of time to submit the Appeal. The Affected Entity must submit a written request for extension to the DDO before the expiration of the 30-day period. The DDO may grant a one-time extension of up to 30 calendar days when justified by the situation, which may include the unusual complexity of the Appeal or because of exigent circumstances.

(b) *Method of submission.* The Affected Entity must submit the Appeal electronically via email to the DDO, with a copy to the AO, using the email addresses specified in the Agency Decision within the 30-day period stated in paragraph (a) of this section.

(c) *Contents of Appeal.* The Appeal submitted to the DDO must include:

- (1) A copy of the disputed Agency Decision;
- (2) A detailed statement of the specific legal and factual grounds for the Appeal, including copies of any supporting documents;
- (3) The specific remedy or relief the Affected Entity seeks under the Appeal; and
- (4) The name and contact information, including email address, of the Affected Entity's designated point of contact for the Appeal.

§ 31.73 Notice of receipt of Appeal to Affected Entity.

Within 15 calendar days of receiving the Appeal, the DDO will provide the Affected Entity a written notice, sent electronically, acknowledging receipt of the Appeal.

- (a) *Timely Appeals.* If the Appeal was timely submitted, the notice of acknowledgement may identify any additional information or documentation that is required for a thorough consideration of the Appeal. The notice should provide no more than 30 calendar days for the Affected Entity to provide the requested information. If it is not feasible to identify such information or documentation in the notice the DDO may request it at a later point in time prior to Appeal resolution.
- (b) *Untimely Appeals.* If the DDO did not receive the Appeal within the required 30-day period, or any extension of it, the DDO will notify the Affected Entity that the Appeal is being dismissed as untimely and the Agency Decision of the AO becomes final. The notification will also identify the Review Official. The dismissal of an untimely Appeal

constitutes the final agency action, unless further review is sought in accordance with the requirements of § 31.75. In limited circumstances, the DDO may, as a matter of discretion, consider an untimely Appeal if doing so would be in the interests of fairness and equity.

§ 31.74 Determination of Appeal.

(a) *Record on Appeal.* In determining the merits of the Appeal, the DDO will consider the record related to the Agency Decision, any documentation that the Affected Entity submits with its Appeal, any additional documentation submitted by the Affected Entity in response to the DDO's request under § 31.73(a), and any other information the DDO determines is relevant to the Appeal provided the DDO gives notice of that information to the Affected Entity. The Affected Entity may not on its own initiative submit any additional documents.

(b) *Appeal decision.* The DDO will issue the Appeal decision within 180 calendar days from the date the Appeal is received by the DDO unless a longer period is necessary based on the complexity of the legal, technical and factual issues presented. The DDO will notify the Affected Entity if the expected decision will not be issued within the 180 day period and if feasible will indicate when the decision is expected to be issued. The Appeal decision will also identify the Review Official. The DDO will issue the Appeal decision electronically. The DDO's decision will constitute the final agency action unless the Affected Entity files a timely request for review in accordance with the Request for Review procedures in § 31.75.

§ 31.75 Request for review.

An Affected Entity may file an electronic written request for review of the DDO's Appeal decision to the appropriate Review Official within 15 calendar days from the date the Appeal decision is electronically sent to the Affected Entity. The request for review must comply with the following requirements:

(a) *Submission of request for review.* The request must be submitted to the Review Official identified in the Appeal decision as follows:

- (1) If a Headquarters DDO issued the Appeal decision, the request must be electronically submitted to the Director of the Office of Grants and Debarment, or designee, at the email address identified in the Appeal decision, with a copy to the DDO.
- (2) If the Appeal decision was issued by a DDO located in an agency Regional Office, the request for review must be electronically submitted to the Regional Administrator, or designee, at the email address identified in the Appeal decision, with a copy to the DDO.

(b) *Contents and grounds of request for review.* The request for review must include a copy of the DDO's Appeal decision and provide a detailed statement of the factual and legal grounds warranting reversal or modification of the Appeal decision. The only ground for review of a DDO's Appeal decision is that there was a clear and prejudicial error of law, fact or application of agency policy in deciding the Appeal.

(c) *Conducting the review.* In reviewing the Appeal decision, the Review Official will only consider the information that was part of the Appeal decision unless:

(i) The Affected Entity provides new information in the request for review that was not available to the DDO for the Appeal decision; and

(ii) The Review Official determines that the new information is relevant and should be considered in the interests of fairness and equity.

§ 31.76 Notice of receipt of request for review

Timeliness. The Review Official will provide the Affected Entity electronic written notice acknowledging receipt of the review request within 15 calendar days of receiving the request.

The Review Official will further provide a copy of the notice to the DDO.

(a) If the request was submitted in accordance with section § 31.75, the notice of acknowledgment will also advise the Affected Entity that the Review Official expects to issue a decision within 45 calendar days from the date they received the request.

(b) If the request for review was not submitted within the required 15 calendar day period, or does not allege reviewable grounds consistent with §31.75, the Review Official will notify the Affected Entity that the request is denied as untimely and/or for failing to state a valid basis for review. In limited circumstances, the Review Official may, as a matter of discretion, consider an untimely review if doing so would be in the interest of fairness and equity.

§ 31.77 Determination of request for review.

- (a) Within 15 calendar days of receiving a copy of the notice acknowledging the receipt of a timely and reviewable Request for Review, the DDO will submit the Appeal record to the Review Official.
- (b) The Review Official will issue a final written decision within 45 calendar days of the submission of the request for review unless a longer period is necessary based on the complexity of the legal, technical and factual issues presented.
 - (1) The Review Official will notify the Affected Entity if the expected decision will not be issued within the 45-day period and if feasible will indicate when the decision is expected to be issued.
 - (2) The Review Official's decision constitutes the final agency action and is not subject to further review within the agency.