

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA-HQ-OW-2006-0765; FRL-XXXX-X]

[RIN 20XX-XXXX]

NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Rulemaking

SUMMARY: This document provides notice of a proposed rulemaking for public comment on EPA's *National Pollutant Discharge Elimination System (NPDES) Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula*. With this notice, EPA proposes using its Clean Water Act (CWA) Section 106 authority to provide a financial incentive to States to utilize an adequate fee program when implementing an authorized NPDES permit program. EPA proposes to amend its existing CWA Section 106 grant allotment regulation (40 CFR 35.162) to provide the Agency with the flexibility to allot separately a permit fee incentive amount. This action would not be effective prior to fiscal year 2008.

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

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-HQ-OW-2006-0765** by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: ow-docket@epa.gov Attention Docket ID No. OW-2006-0765

- Mail: Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., N.W., Washington, DC 20460.
- Hand Delivery: EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC, Attention Docket ID No. OW-2006-0765. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-OW-2006-0765**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at 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. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to Unit I.1 of the SUPPLEMENTARY INFORMATION

section of this document.

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 the Water 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 Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: Lena Ferris, Office of Water, Office of Wastewater Management, 4201M, Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460; telephone number: (202) 564-8831; fax number: (202) 501-2399; email address: ferris.lena@epa.gov .

SUPPLEMENTARY INFORMATION:

I. General Information

AFFECTED ENTITIES: State Agencies that are eligible to receive grants under Section 106 of the Clean Water Act (CWA).

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must

be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date, and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives; and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

3. *Specific Questions EPA is Soliciting for Comment.* In addition to overall general comments on any/all portions of the rulemaking, EPA is specifically requesting comments on the following four questions:

- 1) Is the proposed rulemaking incentive amount sufficient to encourage States to establish or expand their permit fee programs? If not, what amount should EPA consider?
- 2) Are there any non-financial incentives States may prefer that would

encourage States to establish or expand adequate permit fee programs?

- 3) Is the proposed permit fee collection formula, to be used in determining whether States receive a full share of the incentive, something that States can attain? If not, what barriers exist to States recovering the full 100% of NPDES program costs through permit fees? What alternatives would States recommend?
- 4) What impact may this rule have on the States and the NPDES permittees in the States?

II. BACKGROUND: Section 106 of the CWA authorizes the EPA to provide grants to State and interstate agencies to administer programs for the prevention, reduction, and elimination of water pollution, including the development and implementation of groundwater protection strategies. Section 106(b) of the CWA directs the EPA Administrator to make allotments “in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective states.” EPA’s regulations implementing Section 106 can be found at 40 C.F.R. 35.160 et seq. EPA’s current allotment formula for Section 106 grants establishes an allotment ratio for each State based on six components selected to reflect the extent of the water pollution problem in the respective states. These six components are surface water area, ground water use, water quality impairment, potential point sources, nonpoint sources, and the population of urbanized areas. 40 C.F.R. §35.162 (b)(1)(i). By including a component related to point sources, EPA recognizes the important role they play in determining the extent of pollution in a State.

This proposed rule will amend the state allotment formula to incorporate financial incentives for States to implement adequate NPDES fee programs. The Clean Water Act generally requires that all discharges of pollutants from a point source into waters of the United States obtain a permit under the NPDES program. A NPDES permit establishes pollutant discharge limits based on

treatment technology performance, the quality of the water into which pollutants are discharged, and the potential impact of the discharge on public health and the environment. The U.S. Environmental Protection Agency (EPA) oversees the NPDES program and also approves applications from States to administer and enforce the NPDES program in that State. Currently, 45 States are authorized by EPA to administer all or some parts of the NPDES program.

State water quality programs are funded with a mixture of State and federal dollars. Grants awarded under CWA Section 106 are States' primary source of federal funding. The growing complexity of water quality issues has prompted more States to implement NPDES permit fee programs. An estimated 41 States currently have permit fee programs in place, with such fees paying for all or a portion of the cost of the State's permit program.

A number of States still operate their permit programs with little or no reliance on permit fees. States can address permit program budget shortfalls through the implementation of permit fee programs that collect funds to cover the cost of issuing and administering permits. Funding permit programs with the support of permit fees allows States to use CWA Section 106 funds for other critical water quality programs.

EPA is committed to making our State surface water protection programs more sustainable through better resource management. As State Agencies carry out most of the day-to-day aspects of water quality functions, their responsibilities are expanding while they are simultaneously facing increasingly severe funding constraints. As a nation, billions of federal funds under the Water Pollution Control grants, together with State resources, have been spent to establish and maintain adequate measures for the prevention and control of surface and groundwater protection. Federal and State governments cannot carry out this responsibility alone. EPA is committed to

finding effective and efficient solutions to maintaining sustainable State water pollution control programs that continue to provide this nation with clean and protected water. All levels of government and the private sector must share in this commitment. This rulemaking is designed to provide an incentive to States to move toward greater sustainability in the way they manage and budget for environmental programs and to shift part of the financial burden to those who benefit from NPDES permits.

Under this proposal, EPA would allot funds for the permit fee incentive if there is an increase in the state allotment above the FY 2006 level. The amount of any allotment would be limited to three percent of the funds allotted under 40 C.F.R. 35.162(b) in FY 2006. Total funds allotted under 40 C.F.R. 35.162(b) in FY 2006 amounts to approximately \$169.3 million. Any funds above this amount would be allotted to States under 40 C.F.R. 35.162(b). As a result of this change, EPA would allot the State and Interstate CWA 106 grant funds in the following order: 2.6 percent will be set-aside for allotment to the Interstates in accordance with the existing Interstate allotment formula in 40 C.F.R. 35.162(c); next, funds may be allotted under 40 C.F.R. 162 (d); and finally, EPA may allot funds to States in accordance with this proposed permit fee incentive allotment formula, with the balance allotted to the States in accordance with the existing allotment formula under 40 C.F.R. 35.162(b).

The only States which would be eligible for this set-aside are those States which have been authorized by EPA to implement the NPDES program by the first day of the fiscal year, October 1, for which funds are appropriated by Congress. These states must also submit annually, by October 1, a certification to EPA which meets two additional requirements. First, the certification must include the total percentage of NPDES program costs recovered by the State through permit fee

collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs. This proposal defines NPDES program costs as all activities relating to permitting, enforcement, and compliance.

Second, the certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year, or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government. The concept of non-selective reduction is taken from the statutory requirements related to maintenance of effort from the Clean Air Act Section 105(c) and EPA's implementing regulations found at 40 C.F.R. Section 35.146. Under the Clean Air Act, EPA is prohibited from awarding grants to air pollution control agencies if state recurrent expenditures are not at least equal to such expenditures during the preceding state fiscal year. EPA can still award a grant even if there are decreases in such expenditures if EPA determines that the reduction is attributable to a non-selective reduction of all state programs. For example, a state legislature enacts budget cuts across all state agencies and does not target the air program. EPA is proposing to adopt a similar approach in this rulemaking.

After EPA determines the number of eligible states, each state will be eligible to receive up to a full share of the set-aside amount. EPA will determine the amount of a full share by dividing the set-aside amount by the number of eligible states. A full share will be the same amount for each eligible state. The percent of a full share that each eligible state will receive, however, will be determined by the following formula, based on the certification information described above.

(A) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(B) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total NPDES program costs; or

(C) A State will receive a full share if that State has collected permit fees which equal 100 percent of total NPDES program costs.

In other words, in its certification, a State must inform EPA of its total NPDES program costs and the percentage of which are recovered through permit fees. EPA would use the information from this certification to determine any additional amount a State would receive in its Section 106 grant based on this financial incentive allotment formula. If, for example, a State's total NPDES program costs are \$1 million, and the State collected \$750,000 in NPDES permit fees, a state would receive 25% of a full share in addition to the grant amount allotted to it under the current CWA Section 106 allotment formula.

III. STATUTORY AND EXECUTIVE ORDER REVIEWS: Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and is therefore not subject to OMB review. Because this grant action is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. Section 601 et.) or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub.L. 104-4). In addition, this action does not significantly or uniquely affect small governments. Although this action proposes to create new binding legal requirements, such requirements do not substantially and directly affect Indian Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action will not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action is not subject to Executive Order 13211, “Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action does not involve

technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. Section 272 note) do not apply. This action does not impose an additional information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Section 3501 et seq.). The Congressional Review Act, 5 U.S.C. Section 801 et seq., generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. Since this grant action, when finalized, will contain legally binding requirements, it is subject to the Congressional Review Act, and EPA will submit its final action in its report to Congress under the Act.

LIST OF SUBJECTS IN 40 CFR PART 35

Environmental protection, Administrative practices and procedures, Environmental program grants, Water pollution control.

Dated:

Benjamin H. Grumbles

Assistant Administrator, Office of Water

EPA amends 40 CFR Part 35 as follows:

1. The authority for citation for Part 35, Subpart A continues to read as follows:

AUTHORITY: 42 U.S.C. 7401 et seq.; 33 U.S.C. 1251 et seq; 42 U.S.C. 300f et seq; 42 U.S.C. 6901 et seq; 7 U.S.C. 136 et seq; 15 U.S.C. 2601 et seq; 42 U.S.C. 13101 et seq; Publ.L 104-134,

110 Stat. 1321, 1321-299 (1966); Pub.L. 105-65, 111 Stat. 1344, 1373 (1997).

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2. Section 35.162 is amended by adding the following new subsection:

(e) *Permit fee incentive allotment formula.* If there is an increase above the FY 2006 level in the total amount of funds allotted to States under subsection (b), EPA may award this increase as the permit fee incentive allotment to eligible States in accordance with this subsection. The amount of this annual allotment shall not be greater than three percent of the funds allotted under subsection (b) in FY 2006, and any funds above this amount shall be allotted to States under subsection (b).

(1) Each eligible State may receive up to a full share of this allotment, as determined by the following formula. A full share is the allotment amount divided by the number of eligible States:

(A) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(B) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total NPDES program costs; or

(C) A State will receive a full share if that State has collected permit fees which equal 100 percent of total NPDES program costs.

(2) The maximum share to any State under this subsection shall not exceed 50 percent of the State's previous year's total Section 106 allotment determined under subsection (b).

(3) Any funds left remaining after all shares have been allotted under this subsection will be re-allotted to the States under subsection (b).

(4) In order for a State to be eligible for this incentive, a State must: (A) be authorized by EPA to implement the NPDES program by the first day of the federal fiscal year, October 1, for which the funds have been appropriated, and (B) submit to EPA a certification meeting the requirements of paragraph (5) of this subsection.

(5) The certification required under paragraph (4) of this subsection must meet the following requirements:

- (A) The certification must be submitted annually to EPA by October 1; and
 - (B) The certification must include the total percentage of NPDES program costs, as defined in paragraph (6) of this subsection, recovered by the State through permit fee collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs; and
 - (C) The certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government.
- (6) NPDES program costs are defined as all permitting, enforcement, and compliance costs.