

appropriated, and EPA has awarded, over \$2.0 billion in Federal grant assistance.

Section 105 contains two major administrative requirements to ensure the fiscal commitment and continued eligibility of a recipient agency. The recipient must: (1) contribute a share of the overall costs of its section 105-approved program (cost-share or match); and (2) expend annually an amount equal to or greater than its previous year's commitment (MOE). The amount of funding established under the second requirement is called the recipient's MOE level. These requirements have prompted state, local, and tribal agencies to contribute nearly \$3.5 billion of their own funds over the last 30 years in support of their efforts to prevent and control air pollution and implement national ambient air quality standards.

The 1990 Amendments, Public Law 101-549, amended the section 105 provisions on cost-sharing, MOE, and state grant allotments. In addition, Title V of the 1990 Amendments requires all states to establish operating permit programs. The Title V permit programs must include fee provisions to cover the costs of the permit programs. Many activities previously funded through section 105 grants are now required to be included within and funded through the Title V permits and fees.

This rulemaking amends the section 105 program grant regulations at 40 CFR part 35, subpart A to (1) further implement the 1990 Amendments; (2) ensure consistency between the regulations and the Act as amended; and (3) address the fiscal impact of Title V permit fee provisions on section 105 program grant recipients. The rule promulgated here provides increased flexibility to grant recipients in determining and setting expenditure levels and provides the regulatory linkage necessary for reasonable implementation of statutory provisions under both Titles I and V of the Act.

This interim final rule is consistent with Federal and Agency intent to: enhance the fiscal capacity of state and local governments to enable the effective implementation of their air pollution prevention and control responsibilities; reduce, where possible, any unnecessary administrative burdens associated with the receipt of Federal assistance; and help ensure the financial integrity of the air grant and permit fee programs.

The rule is published as an interim final rule (rather than as a proposed rule) in accordance with the Administrative Procedure Act, 5 U.S.C. 553(a), which exempts grant rules from

the notice and comment requirements for rulemaking. Nevertheless, EPA solicits public comment on this interim final rule. The rule takes effect today in order to allow for the prompt implementation of the provisions affecting the section 105 grant program, including waivers of the cost-sharing requirement.

## II. Discussion of Regulatory Changes

This section provides a more detailed explanation of the regulatory changes EPA intends to make to the existing 40 CFR part 35, subpart A.

### A. Maintenance of Effort Requirements

1. *Definition of recurrent and nonrecurrent expenditures.* Section 105 (c)(1) of the Act provides that no agency shall receive a section 105 grant during any fiscal year when its "recurrent expenditures" of non-Federal funds for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year. The 1990 Amendments require EPA to revise the current regulations which define applicable recurrent and nonrecurrent expenditures, and in so doing, to "give due consideration to exempting an agency from the limitations of this paragraph [MOE requirements] and subsection (a) of this section [cost-sharing requirements] due to periodic increases experienced by that agency from time to time in its annual expenditures for purposes acceptable to the Administrator for that fiscal year." Section 105(c)(1) of the Act, as amended. This rule revises the definition for recurrent expenditures and adds a new definition for nonrecurrent expenditures for the air grant program. As discussed in unit B.2. of this preamble, the regulations also provide for an exemption from the cost-sharing requirements in certain limited circumstances.

The current regulatory definition of "recurrent expenditures" in 40 CFR 35.105 provides that all expenditures, except those for equipment purchases with a unit acquisition cost of \$5,000 or more, are considered recurrent unless justified by the applicant as unique and approved by the Regional Administrator in the grant agreement. The revised definition being promulgated for the air grant program removes the \$5,000 limitation to recognize price changes due to inflation and changes in the nature and design of air pollution control equipment. Such changes have occurred since the last promulgation and are likely to continue. The revised definition will provide greater flexibility to air pollution control agencies in the MOE requirements by not subjecting

them to an artificial dollar ceiling and administratively burdensome justifications for basic purchases. This rule leaves in place the current definition of "recurrent expenditures" at 40 CFR 35.105 which will continue to be used in other continuing environmental programs governed by 40 CFR part 35, subpart A.

2. *Use of prior fiscal year data to determine MOE levels.* While the MOE provision requires that each recipient expend annually at least the same or greater amount of its own resources on its section 105 program as it did in the previous year, it often takes several months beyond the end of a fiscal year for EPA to determine the final expenditure amounts for the grants. In order to permit EPA to award the section 105 grants in a timely manner, even when the required fiscal data is not yet available, the 1990 Amendments revised section 105(c)(1) to allow EPA to compare an agency's prospective expenditure level to that of its second preceding fiscal year. When the preceding year's final fiscal data is received, EPA will then provide an official verification that the MOE requirements have been met. Section 35.210(a) has been revised to permit the use of data from the second preceding fiscal year as provided in the 1990 Amendments.

3. *Accounting relative to Title V programs.* States have expressed concern over how the transfer of resources from their section 105 grant program to their Title V program will affect the MOE requirement and their ability to continue to receive a Federal grant.

This concern and other grant and fee program transition issues prompted EPA to initiate, in May 1994, a workgroup to develop clear transition policies and procedures for regions and states to follow. The workgroup effort resulted in the issuance of a June 27, 1994 opinion from the Office of General Counsel on the ability of states to adjust MOE levels once Title V programs are approved. EPA also issued transition guidance on July 21, 1994 and August 28, 1994.

Based on the June 27, 1994 opinion, EPA has determined that a state's MOE level may be reduced to reflect the transfer of activities previously funded through its section 105 program to the Title V program without jeopardizing the state's continued eligibility for a section 105 grant. However, a state must maintain the level of effort associated with recurrent expenditures for activities that continue to be supported with section 105 program grants. This principle applies not only to the year in which the Title V program is initially