Section 3-306. "Consistent with Title IV of the Federal Acquisition Streamlining Act of 1994 (FASA)..."

Title IV of the Federal Acquisition Streamlining Act (FASA) raised the simplified acquisition threshold to \$100,000 (i.e., contracts for the purchase of goods and services that have an anticipated value greater than \$2,500 but not greater than \$100,000 are subject to simplified acquisition procedures). To be consistent with FASA, EPA believes that only competitive acquisition solicitations that are expected to result in a contract exceeding \$100,000, including options, should include the certifications required by E.O. 12969 (the certification should also be incorporated into the resultant contract).

Section 4-401. "Not later than September 30, 1995, the EPA shall publish. . . ."

The publication of today's Notice satisfies the requirement of this section. Section 4-402. "Within 30 days of the issuance of the guidance. . . ."

All Federal agencies must comply with the provisions of the E.O by October 30, 1995, and the E.O. requires that these provisions be implemented and incorporated into the Federal Acquisition Regulations (FAR). The FAR Secretariat has assigned the effort to amend the FAR pursuant to E.O. 12969 as FAR Case 95-305.

Once FAR Case 95-305 is published as an interim final rule, Federal agencies, offerors, and Federal contractors must follow those regulations. In the event that FAR Case 95-305 is not published as an interim rule by October 30, 1995, EPA is providing this Notice, including a model certification and contract clause, to assist Federal agencies in their compliance efforts. Pending implementation in the FAR, EPA encourages certifications such as this model to be included in all competitive solicitations (and resultant contracts) expected to result in a contract exceeding \$100,000 that are issued on or after 30 days following publication of this guidance in the Federal Register in order to comply with E.O. 12969. Section 4-403. "For all contracts expected to exceed \$500,000. . . .

E.O. 12969 requires compliance by Federal agencies "to the greatest extent practical"; however, it makes clear that impracticability determinations should not be made lightly. Because the facilities of offerors likely to be affected by E.O. 12969 already have an obligation to report under EPCRA section 313 and PPA section 6607, it is difficult to foresee instances when it would be impracticable for a Federal

agency to include a TRI certification requirement as an eligibility criterion in its affected solicitations.

However, E.O. 12969 does recognize that there are or may be unforeseen circumstances that would make compliance untenable. For smaller affected contracts (those not expected to exceed \$500,000, including options), the contracting agency should make impracticability determinations, for either an individual or class of contracts, weighing the reasons for believing that inclusion of the certification is impracticable for a particular solicitation against the compelling reasons for E.O. 12969. Where appropriate, agencies should consider modifications to the solicitation that would then make inclusion of the certification acceptable.

For larger contracts (those expected to exceed \$500,000, including options), E.O. 12969 imposes a consultation requirement on the contracting agency before a final impracticability determination can be made. Each Federal agency shall notify and consult with the Director of the Environmental Assistance Division within EPA's Office of Pollution Prevention and Toxic Substances (Mail Code 7408, 401 M St., SW., Washington, DC 20460) when the agency believes it is not practicable to include the certification requirement in the solicitation. This consultation should occur before the Agency's final determination on inclusion of the certification in the solicitation. EPA will continue to work with other agenices to reduce any burden associated with this consultative process.

A Federal agency's determination that including the certification requirement in a solicitation is impracticable does not in any manner waive the Federal contractor facility's responsibility to comply with the reporting provisions of EPCRA and the PPA.
Section 4-404. "Each Federal agency

shall require. . .''

For a discussion of the certification requirements, see the discussion for sections 3-301 through 3-303 above. It is important to note that on or before July 1 of each year is the deadline for submitting EPCRA and PPA data for the previous calendar year. For example, Form Rs submitted on or before July 1, 1996, cover the period January 1, 1995 through December 31, 1995. E.O. 12969 requires offerors to certify that their subject facilities will file the necessary Form Rs, including all information required under EPCRA and PPA, on or before the next July 1 after the date on which a contract is awarded.

Currently, contractor facilities affected by this E.O. are already

submitting reports because of their obligations under EPCRA section 313 and PPA section 6607. This may not always be the case. Therefore, EPA strongly encourages appropriate personnel at any facility owned or operated by a potential Federal contractor to maintain the information necessary to complete and submit Form Rs for the toxic chemicals reportable under E.O. 12969 for the previous calendar year. This will greatly ease compliance with section 4-404(b) of the E.O. should the contractor obtain a contract with the Federal Government. Section 4-405. "Information submitted to the EPA. . . .

Information submitted to EPA pursuant to E.O. 12969 is subject to the trade secret protections provided by EPCRA section 322, 42 U.S.C. 11042. EPCRA section 322 allows an owner or operator to withhold only "the specific chemical identity (including chemical name and other specific identification)"

from TRI reports.

Regulations implementing the trade secret provisions of EPCRA section 322 are codified at 40 CFR part 350. Under the provisions of 40 CFR part 350, EPA reviews the validity of a trade secret claim if the Agency receives a public request for disclosure of information claimed as chemical identity, or at any time if "EPA desires to determine whether chemical identity information claimed as trade secret is entitled to trade secret treatment, even though no request for release of the information has been received." In practice, EPA routinely reviews all trade secret claims relating to TRI reports.

Under the authority of E.O. 12969, EPA will review all claims for trade secret protection submitted by Federal contractors. If EPA determines that the contractor's claim of trade secrecy is invalid (following the review, appeals, and notification processes described in 40 CFR part 350), EPA will make the Form R available to the public and will include the information in the TRI data

Section 4-406. "When the Administrator determines. . . ."

If EPA determines that a Federal contractor (or first-tier subcontractor) has inaccurately, incompletely, or falsely certified as to its covered facility's compliance with the E.O. or that a Federal contractor's (or subcontractor's) covered facility has deliberately not filed the Form R or deliberately filed incomplete information, EPA may recommend to the head of the contracting agency a termination of the affected contract for the convenience of the Government or