

compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7.1 miles) west of Leakey, Texas. The reference coordinates for Channel 257A at Leakey are 29-44-41 North Latitude and 99-52-40 West Longitude. Although concurrence has been requested for Channel 257A at Leakey, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican Government, the construction permit will include the following condition: "Operation with the facilities specified for Leakey herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement."

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Accordingly, for the reasons set out in the preamble, 47 CFR Part 73 is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 261C at Dalhart; by adding Channel 229A at Kermit; and by adding Channel 257A at Leakey.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 03-15068 Filed 6-13-03; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[DA 03-1843; MB Docket No. 03-21, RM-10632, RM-10696]

##### Radio Broadcasting Services; Eastpoint and Port St. Joe, FL

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Moira L. Ritch, allots Channel 270C3 to Port St. Joe, FL, as the community's second local FM

transmission service. See 68 FR 7964, February 19, 2003. Channel 270C3 can be allotted to Port St. Joe in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) south to avoid short-spacing to the application site of Station WWAV, Channel 271C2, Santa Rosa, Florida and the license site of Station WBGE, Channel 270A, Bainbridge, Georgia. The reference coordinates for Channel 270C3 at Port St. Joe are 29-47-45 North Latitude and 85-17-27 West Longitude. In response to a counterproposal filed by Richard L. Plessinger, Sr., the Audio Division allots Channel 283A to Eastpoint, FL, as that community's first local aural transmission service. Channel 283A can be allotted to Eastpoint in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 283A at Eastpoint are 29-44-11 North Latitude and 84-52-42 West Longitude. Filing windows for Channel 270C3 at Port St. Joe, FL and Channel 283A at Eastpoint, FL, will not be opened at this time. Instead, the issue of opening a filing window for these channels will be addressed by the Commission in a subsequent order.

**DATES:** Effective July 14, 2003.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC. 20554.

**FOR FURTHER INFORMATION CONTACT:** Rolanda F. Smith, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 03-21, adopted May 28, 2003, and released May 30, 2003. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Accordingly, for the reasons set out in the preamble, 47 CFR Part 73 is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by adding Eastpoint, Channel 283A and by adding Channel 270C3 at Port St. Joe.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 03-15067 filed 6-13-03; 8:45 am]

**BILLING CODE 6712-01-P**

#### DEPARTMENT OF TRANSPORTATION

##### Office of the Secretary

##### 49 CFR Part 26

[Docket OST-2000-7639 & OST-2000-7640]

RIN 2105-AC89

##### Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the Department of Transportation's (DOT or Department) regulations for its Disadvantaged Business Enterprise (DBE) program. It makes several changes to the DBE program, concerning such subjects as uniform application and reporting forms; implementing a memorandum of understanding (MOU) with the Small Business Administration (SBA); substantive amendments to provisions concerning personal net worth, retainage, size standard, proof of ethnicity, confidentiality, proof of economic disadvantage, DBE credit for trucking firms, and eligibility of firms owned by Alaska Native Corporations (ANCs); and clarifications concerning multi-year project goals and the use of the new North American Industrial Classification System ("NAICS"). In addition, this document addresses comments received in response to both an interim final rule (IFR) issued in November 2000 and a notice of proposed rulemaking (NPRM) issued in May 2001 (RIN 2105-AC88).

**DATES:** This final rule is effective July 16, 2003.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant

General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), [bob.ashby@ost.dot.gov](mailto:bob.ashby@ost.dot.gov) (e-mail).

#### SUPPLEMENTARY INFORMATION:

**Electronic Access:** An electronic copy of this document may be downloaded by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Group Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>. You can also view and download this document by going to the web page of the Department's Docket Management System at: <http://dms.dot.gov/>. On that page, click on "search." On the next page, type in the four-digit docket number shown on the first page of this document. Then click on "search."

#### Background

On February 2, 1999, the Department published a final rule revising its Disadvantaged Business Enterprise (DBE) program. The new regulations (49 CFR part 26) replaced 49 CFR part 23, except for the airport concessions regulations. Airport concessions are being discussed in a separate rule. The NPRM on airport concessions was issued December 12, 2002 (67 FR 76327). Its final rule is pending. In drafting the 1999 final rule, the Department considered many sources, including the results of a government-wide review of affirmative action programs, requirements set forth in the Supreme Court's decision in *Adarand v. Peña* (515 U.S. 200 (1995)), extensive Congressional debate during the reauthorization of the DBE program, and over 900 comments. Because of the enormity of the 1999 revisions, there were several requirements, such as the establishment of a uniform certification form, that were reserved for a later date. Additionally, after administering the program since 1999 it is evident that clarification of some provisions and revisions to other provisions would be useful.

#### I. Interim Final Rule Regarding Threshold Requirements and Other Changes

The Department published an IFR in the **Federal Register** on November 15, 2000 (65 FR 68949). The IFR addressed threshold requirements for Federal Transit Administration recipients and

Federal Aviation Administration recipients to establish DBE programs and submit overall goals. In addition, the IFR corrected and clarified misleading language in 49 CFR part 26. The IFR also provided examples of ways to collect information required for bidders lists, and clarified that in order to verify whether a DBE firm actually performed the work they were committed to, both commitments and attainments must be tracked and reported. Finally, the IFR corrected potentially misleading language regarding evidence that must be considered when setting overall goals. The Department received only four comments on this IFR that are addressed below.

#### A. Substantive Changes

##### DBE Programs

Section 26.21(a)(2) of the rule states that Federal Transit Administration (FTA) recipients who receive \$250,000 or more in a fiscal year in various forms of FTA assistance must have a DBE program. Similarly, subsection (a)(3) requires Federal Aviation Administration (FAA) recipients who receive grants of \$250,000 or more in a fiscal year for airport planning and development to have a DBE program. The IFR changed the threshold to \$250,000 in contracting opportunities. The change requires FTA recipients who project awarding more than \$250,000 in prime contracts in a Federal fiscal year from FTA assistance to have a DBE program. Similarly, FAA recipients who project awarding more than \$250,000 in prime contracts in a fiscal year from grants for airport planning and development are required to submit a plan. Prime contracts include contracts for goods as well as contracts for services.

The Department made these changes to decrease the administrative burden on transit authorities and small airports. Many of these transit authorities and small airports receive more than \$250,000 in FTA or FAA funds, but have only a small amount of funding available for actual contracting opportunities. For example, FAA grants funding for land acquisition projects. While many of these grants exceed \$250,000, the value of contracting opportunities covered by the DBE program (e.g., real estate appraisal and survey) frequently is well below \$250,000. The major portion of grant funds is generally for the land purchase itself, which is not a "DOT-assisted contract" under the definition of § 26.5.

We only received two comments on this provision, both supporting the

change. It was suggested, however, that DOT monitor the number of recipients and Federal contracts affected by this change to ensure that the purpose of the DBE program is not compromised. We believe that this change will only affect a small number of our recipients and monitoring the way in which recipients carry out provisions of the rule is a normal function of FTA and FAA.

One commenter requested that we extend the \$250,000 threshold to transit vehicle manufacturers (TVMs). We do not believe that any TVMs would benefit from the \$250,000 threshold. The cost of just one vehicle would exceed \$250,000; therefore, any change would be meaningless.

Therefore, we are adopting the provisions of the IFR without change. FTA and FAA recipients who reasonably anticipate awarding \$250,000 or less in prime contracts in a fiscal year are not required to submit a DBE plan. This change affects new recipients or recipients who do not have a DBE program. The rule also reduces burdens on recipients who already have DBE programs. If such a recipient anticipates awarding \$250,000 or less in prime contracts it does not have to submit a DBE overall goal for that year.

##### Goal Setting

Section 26.45 requires recipients to submit new goals on August 1 of each year. The IFR revised this section to exempt FTA or FAA recipients with existing DBE programs from setting updated overall goals when they do not project awarding prime contracts exceeding \$250,000 (excluding vehicle transit purchases) in the year in which the updated goal would apply.

Under this provision, if a recipient is administering a DBE program, but is an FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts in a Federal fiscal year, the recipient is not required to develop overall goals for that fiscal year. The recipient's existing DBE program must remain in effect, however, even though they are not required to develop goals. For example, the recipient is still required to perform certification functions such as processing applications and obtaining no-change affidavits. If the recipient expects to award prime contracts exceeding \$250,000 in the following fiscal year, it must timely publish the proposed goal and submit the goal to the applicable DOT Operating Administration by August 1. Although not required, a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts may submit a goal for that fiscal year. If a recipient chooses to

submit a goal, however, it must meet all the requirements set forth in § 26.45. Of course, all recipients must still seek to meet the objectives of § 26.1 of this part.

There were no substantive comments on this section; therefore, we are not making any changes to this provision.

#### *B. Technical Changes*

##### **Clarification Concerning Bidders Lists**

Section 26.11(c) requires recipients to create and maintain a bidders list containing information about DBE and non-DBE contractors and subcontractors who seek work on a recipient's Federally-assisted contracts. The Department had received a number of questions regarding the appropriate method to collect the required information. Recipients had also expressed concern with collecting the annual gross receipts of firms, saying that firms sometimes have been reluctant to share this information.

In discussing this requirement in the DBE final rule, the Department recognized the difficulty in identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts. Consequently, the Department did not impose any procedural requirements for how the data are collected. The Department still believes that a recipient's data collection process should remain flexible. The IFR amended § 26.11(c) to emphasize the purpose of the bidders list and provide examples of ways in which recipients may choose to collect the required data.

The IFR amended § 26.11(c)(1) to state that the purpose of maintaining a bidders list is to provide the most accurate data possible about the universe of DBE and non-DBE contractors and subcontractors who seek to perform work under a recipient's Federally-assisted contracts for use in setting overall goals. The IFR also added language stating that a recipient may collect the required data from all bidders, before or after the bid due date. They may also choose to conduct a survey that will result in a statistically sound estimate of the universe comprised of DBE and non-DBE contractors and subcontractors who seek to perform work under the recipient's Federally-assisted contracts. Additionally, we clarified that the data need not come from the same source. For example, a recipient may collect name and address information from all bidders while conducting a survey with respect to age and gross receipts information. The Department continues to believe that the approach should remain flexible so that recipients can

choose the least burdensome and intrusive method.

With regard to a firm's annual gross receipts, the IFR amended the language in § 26.11(c) to clarify that recipients are not required to collect exact dollar figures from the bidders. Recipients may ask a firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$500,000; \$500,000–\$1 million; \$1–2 million; \$2–5 million; etc.) rather than requesting an exact figure from the firms. We note that this information on the financial size of a firm, as well as information collected about the firm's age, should be helpful to recipients in formulating narrowly tailored overall goals.

A few commenters stated that they do not use a firm's gross receipts or a firm's age in calculating their goals and therefore collecting this information should be optional. We believe that this information is a valuable way to measure the relative availability of ready, willing, and able DBEs, and we encourage recipients to utilize this in setting their goals. Use of this information will help recipients to ensure that their goal setting process is narrowly tailored. However, although this information is not required in setting goals, it is information that the Department is asked to provide periodically to Congress. Consequently, we will continue to require recipients to collect a firm's gross receipts and age for DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts. This portion of the IFR is also being retained without change.

##### **Clarification Concerning Monitoring and Counting DBE Participation**

Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs. The language in the final rule states that recipients must provide for a running tally of actual DBE attainments. The preamble to the rule states, "Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises." Verifying whether a DBE actually performed the work they were committed to necessarily requires the recipient to track both commitments and attainments.

The IFR reworded the language in § 26.37(b) to state that a recipient's DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. In addition, it added a new paragraph (c) to clarify that a recipient's mechanism

for providing a running tally of actual DBE attainments must include a means of comparing the attainments to commitments. It also clarified that both awards or commitments and attainments must be contained in a recipient's reports of DBE participation to the Department.

The few comments we received on this section questioned whether commitments and attainments could be reported together in a meaningful way without being misleading. We recognize that in many instances the awards and commitments reported will not correspond to the attainments reported on the same form. For example, if a contract is awarded to a DBE in August 2001, the award would be reflected in the report for that period, but the contract likely would not be completed for many years. Therefore, the actual achievements section in that report could not reflect the achievements on that contract. The Uniform Reporting Form in Section II of this document contains two separate sections in the form. The first section reflects contracts awarded or committed during the reporting period. The second section reflects actual payments on contracts completed during the reporting period. It is essentially a "snap-shot" of a recipient's progress towards the participation of DBEs in its DBE program, and is not a determinative factor as to whether or not DBE goals are being met.

One commenter requested that we provide guidance on how to track actual participation. The Department believes that a recipient's data collection process should remain flexible, and as such we are reluctant to tell recipients how to collect the information. As an example, many recipients track actual participation by obtaining certified statements from the prime contractor and then verifying the information with the DBEs.

The IFR also deleted and revised repetitive and misleading language. Section 26.37(b) requires the mechanism providing for a running tally of actual DBE attainments to include a provision ensuring that the DBE participation is credited toward overall or contract goals only when payments actually are made to DBE firms. Because this requirement was already stated in § 26.55(h), we have removed it from § 26.37(b). Furthermore, we believe that the wording of § 26.55(h) was confusing; therefore, we revised it. The point of the revised language is to emphasize that actual payment of committed funds to DBEs is a key element in determining whether a prime contractor has met its contract obligations.

### Clarification Concerning Goal Setting

In setting overall goals, step two requires that recipients examine all evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure. Section 26.45(d)(1) specifies information that must be considered when adjusting the base figure. Section 26.45(d)(2) lists additional information to consider, but uses the language "you may also consider." This permissive language may be misleading. A narrowly tailored program requires that all relevant information be considered. The IFR clarified that if the information is available, then it must be considered. Therefore, to avoid misleading language, we changed the wording in § 26.45(d)(2) to read, "If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete." There were no comments on this provision; therefore, we are not making any changes to this provision.

## II. Notice of Proposed Rulemaking Regarding Memorandum of Understanding With the Small Business Administration, Uniform Forms, and Other Provisions

There are three different matters addressed in this section. Part A addresses uniform forms. In the 1999 final rule, the Department stated that it would develop a uniform reporting form and a standard DOT application form for DBE eligibility. The Department did not want to delay the issuance of the 1999 final rule, so it reserved the date on which the uniform form requirements would go into effect. This document addresses both of these forms. Part B addresses the implementation of a Memorandum of Understanding (MOU) between the DOT and the Small Business Administration (SBA). The MOU streamlines certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs and DOT's DBE program. Part C addresses substantive changes to several provisions of part 26, including personal net worth, retainage, proof of ethnicity, confidentiality, proof of economic disadvantage, and DBE credit for trucking firms.

### A. Forms

#### Uniform Reporting Form

In the February 1999 rule, the Department adopted the suggestion of having a single, uniform, nationwide form that all recipients must use to report to the DOT its awards or commitments and payments. We published a proposed format in the

NPRM. We received over eighty comments concerning the format and content of the proposed uniform reporting form, all of which were considered and addressed in drafting the final form. Several versions of the form were generated to account for the various comments and suggestions provided, and the Department believes that the final form compiles the necessary information needed by the Department to safeguard the program's integrity and ensure the goals of the program are met. The Final Form and its instructions are in Appendix B of this document.

Many commenters made suggestions about the format and style of the reporting form. The basic formatting remains the same as in the NPRM because of its brevity and its capacity to capture the required information sought by the Department in a single page. One particular goal was to minimize the burden on recipients in compiling the information, as well as reducing the amount of paperwork required. Some terms and phrasing used in the form were changed to be consistent with that used in the current final rule.

The Instructions Sheet that accompanies the reporting form explains more fully what is required in each field on the form, and instructs recipients on how to derive specific numbers and percentages that are required to be provided. It is essential that recipients completing this form consult the Instructions Sheet.

One commenter questioned the distinction between race conscious and race neutral goals. These concepts are explained in some detail in part 26, and this rulemaking does not change any of the concepts in the 1999 final rule that established part 26. Another commenter requested clarification as to the category of "Other" in the ethnicity breakdown portion of the form. Firms may qualify as DBEs on a case-by-case, individual basis, even though their owners are not members of a group presumed to be disadvantaged (*e.g.*, a firm owned by a white male who makes an individual showing of disadvantage). The "Other" category would be used to report this type of scenario. We also added new category for "Non-Minority Women" to the final form to account for women-owned DBEs participating in the program, and to guard against the potential for double counting women-owned DBEs where the female owner is also a minority. As a result, the category "Caucasian" was removed from the final form.

Many commenters were concerned that the "Awards or Commitments this Reporting Period" section did not match

up with the later section on "Actual Payments on Contracts Completed This Reporting Period." All dollar amounts are to reflect only the Federal share of such contracts. The Department realizes that many awards or commitments last over an extended period of time, and therefore will be likely to extend over multiple reporting periods. The Departments intends that these sections would not match up and that the respective numbers would most likely be different.

The purpose of the Actual Payments section is to capture a "snap shot" of the present reporting period as concerns monies actually paid to DBEs, as opposed to monies that are only committed or awarded to DBEs but have not necessarily been paid yet. This data will provide a more accurate picture of the level of DBE participation that is completed at any given time. The new categories added to these sections will depict more fully the level of DBE participation. More importantly, it should be stressed that while several commenters noted that the tracking of such information is not currently done, it is crucial that recipients maintain records of committed DBE goals and actual payments by contract because this data allows recipients (and the Department) to determine the recipient's actual success in meeting contract and overall DBE goals. Failure to track such data would defeat the purpose of goal-setting and undermine the integrity of the program.

We received twenty-eight comments regarding the reporting frequency. The Department currently has authority to require quarterly reporting. While the FHWA and the FTA do require quarterly reporting, the FAA requires only annual reporting. Not surprisingly, most of the comments objecting to semi-annual reporting came from airport authorities, while many State DOTs favored semi-annual reporting. Although our goal is uniformity we also want to decrease our recipients' burdens. Therefore, all recipients are required to use the standard reporting form. Recipients of funds from the FHWA and FTA will be required to report semi-annually, but FAA recipients will continue to report annually.

Reports are due to a recipient's operating administration (OA) on June 1 and December 1 each year. The June 1 report should include information from October 1 through March 31. The December 1 report should include information from April 1 through September 30. We believe that these dates will assist recipients in setting goals, which are due by August 1 each year. A couple of commenters requested

alternative reporting deadlines for recipients that use local fiscal years or calendar years. This will be permitted on a case-by-case basis if approved by the concerned OA.

The form will be made available electronically in PDF format, but at this time recipients cannot submit the forms electronically. The reporting form must be submitted to the OA from which the recipient received Federal funds. For example, a recipient of Federal Highway funds must submit a report to the FHWA. If a recipient received funds from more than one OA, it must submit a report to each OA. TVMs will continue to report to the recipient and not DOT directly.

Finally, recipients are required to retain information relating to basic program data for three years.

#### Uniform Certification Application Form

In the February 1999 final rule the Department said that it planned to create a single, uniform, nationwide form that all recipients must use without modification for DBE eligibility. We published a proposed format in the NPRM. We received over eighty-eight comments concerning the format and content of the proposed uniform application, all of which were considered and addressed in drafting the final form. Several changes were made to the proposed form that the Department believes makes the form more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to make determinations as to applicants' qualifications for the DBE program. The Final Form is in Appendix F of this document.

Many commenters made suggestions about the format and style of the application. These suggestions were considered and incorporated into the final form to the extent possible. Much of the basic formatting remains the same because the goal was to keep the form manageable, easy to read, and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for the multitude of recipients required to accept the form. Our major concern was keeping the application within a reasonable limit, regarding both length and content, in order to prevent the form from becoming too unwieldy and burdensome.

Other commenters posed questions or sought clarification of certain terms used in the application or of the applicability of certain sections of the application to specific groups or types of contractors and businesses. These questions and queries are addressed in

both the form and in its accompanying Instructions Sheet. The form itself uses simplified language and the Instructions Sheet explains more fully the type of information or documents sought in each section of the application.

Although recipients must use the uniform application form without modification, we recognize that some recipients have additional statutory and/or regulatory requirements. Therefore, recipients, with the written consent of the cognizant OA, may (1) supplement the uniform application form with a one to two page attachment containing the additional information collection requirements, and (2) require applicants to submit additional supporting documents not already listed in or required by the uniform application. Additionally, with written consent of the OA, a recipient may translate the forms into a second language (e.g., Spanish or Chinese) to assist their applicants. We reiterate that the form should be streamlined, however, and that additional information should be sought during the on-site review process rather than during the application process.

#### B. Memorandum of Understanding

There has been some confusion as to the scope of the Memorandum of Understanding (MOU) between the Small Business Administration (SBA) and the DOT. While the intent of the MOU is to streamline the certification process for firms who apply for the SBA's 8(a) BD or SDB programs and the DOT's DBE program, absolute reciprocity is impossible. The programs share many common requirements, but there are some significant differences. Therefore, we are clarifying that the MOU does not alter any program requirements; applicant firms must meet the program requirements for which they are applying. For example, an SBA-certified firm applying for DBE certification must meet the DOT statutory gross receipts cap, currently set at \$17,420,000 (65 FR 52470 (August 29, 2000)). An SBA-certified firm must also undergo an on-site review before receiving DBE certification.

Because the SBA is not required to issue regulations prior to implementing the MOU, it has already established procedures to implement the agreement. If a DBE firm contacts the SBA requesting to be certified for SBA's Small and Disadvantaged Business program, the SBA would follow procedures similar to those set forth in this document.

Some commenters supported the MOU and the proposed regulations without change. Others did not object to

the MOU in its entirety, but rather focused on a few main issues. One of the primary issues was the degree of reciprocity. Under this rule, recipients must accept a firm's application package submitted to the SBA in lieu of requiring the applicant firm to fill out the recipient's own application. The certifying agency may ask the applicant firm for additional information and an on-site review will be required. If the SBA conducted an on-site review, the DOT recipient may rely on SBA's report in lieu of conducting its own on-site review. Several commenters mentioned the importance of conducting their own on-site review because the certifying agency can actually see the firm and can ask additional questions. We agree that the on-site review is important, and that is why the recipient may accept the SBA's report of the on-site review, but is not required to do so.

Under the 1999 final rule, a recipient receiving an application from an SBA-certified firm had three choices. It could (1) accept the SBA certification decision, subject to the recipient's own on-site review; (2) use the firm's SBA application package in lieu of requiring completion of the recipient's own application form (the recipient would still have to complete an on-site review), but make its own decision; or (3) disregard the SBA materials and require the recipient to undergo the recipient's full application process from scratch. The MOU, as implemented by this rule, removes the third option. Under today's final rule, recipients will have to choose one of the first two options when an SBA-certified firm files an application.

If the recipient chooses the second option, it should be aware of one important constraint on its discretion. If the SBA has looked at an application package and determined that a firm is a small business owned and controlled by socially and economically disadvantaged persons, it would not be appropriate for the DOT recipient to disagree with the SBA's conclusion in the absence of additional information that leads to a different conclusion. That is, the recipient could not make a different decision based solely on a judgment of the same exact information on which SBA based its decision. Doing so would be contrary to the language and intent of the MOU. However, if the DOT recipient (typically in the course of the on-site review) discovers additional information from which it could reasonably conclude that the SBA-certified firm is not an eligible DBE, it could decline to certify the firm.

In any case, § 26.83(k) requires a recipient to make a decision within ninety days of receiving all the required

information, including any additional information requested, whether it is from the applicant or the SBA.

This issue that appears to have caused the most concern is the requirement that recipients copy and transmit to the SBA a copy of the applicant firm's application package when a DOT-certified firm applies to the SBA for certification. A majority of the commenters argued that the copy requirement would place an administrative and financial burden on recipients. That is why we are allowing recipients to charge a reasonable fee (e.g., comparable to what would be charged for a Freedom of Information Act or open records law request) for the photocopying to defray some of the costs. A few commenters suggested that it would be more of a burden to collect the fees. Therefore, whether to impose copying and transmittal fees will be left entirely up to the recipient. We do not believe that there will be a large demand from DBE-certified firms requesting SBA certification, so we do not believe that this provision will have a significant economic effect. The Department will monitor the situation and will make future alterations as needed.

A few commenters questioned the definition of "application package." Two commenters stated that it would be easier to copy and transmit the entire file rather than the actual application. That way there would be no need for the SBA to request additional information from the recipient. We agree. By "application package" we mean the application and any information relied upon in making the certification decision.

Several commenters also addressed the time limits prescribed in the NPRM. Some claimed that the time limits were too short, while others said that they are too long. We believe that while an expedited process would be desirable, lack of resources will make shorter deadlines unworkable. We believe that the time frames set forth in the NPRM are reasonable. Therefore, recipients are required to forward the application package to the SBA within thirty days after the firm's request. If additional information is requested, it must be transmitted within forty-five days after receipt of the request. In implementing this provision, we intend to provide some flexibility during the first several months as recipients adjust to the requirement. Again, the Department will monitor the situation and make changes if warranted. There is some concern that some application packages are outdated and unreliable. We agree that transmitting irrelevant and outdated information would be wasteful;

however, if an applicant firm has a current, valid certification, and then all of the information relied upon for that certification may be relevant.

There were several comments regarding the notification requirement. If a recipient denies certification to a firm certified by the SBA, or if it decertifies a firm it knows to be certified by the SBA, it is required to notify the SBA in writing. The notification must include the reason for denial. Two commenters believe that the denial/decertification letter is sufficient notification to the SBA, and we agree. A recipient may simply send a copy of the denial or decertification letter to the SBA. One commenter asked how it would know whether the firm is SBA certified. Typically, an applicant will submit this information in an application package or decertification proceeding. A recipient could also query an on-line database of firms the SBA has certified at <http://pro-net.sba.gov>.

### C. Additional Changes

#### Personal Net Worth

Section 26.67 requires each individual whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth (PNW) with appropriate supporting documentation. The Department received a number of questions about what documentation is appropriate for recipients to require in ascertaining the PNW of owners of DBE firms. In the preamble to the final rule correction (64 FR 34569 (June 28, 1999)), the Department recommended using the SBA's form as a model. The SBA requires completion of a two-page form, supported by two years of personal and business tax returns. The Department wanted to remain flexible while encouraging recipients to use forms that are not unduly lengthy, burdensome, or intrusive. The Department did not require recipients to use the SBA form verbatim but encouraged them to use a form of similar length and content, including collecting and retaining two years of an individuals' personal and business tax returns. The Department has not found anything more appropriate than the SBA form, however. In the interest of uniformity, this final rule will mandate use of the SBA PNW form in conjunction with the new uniform application form. A copy is included in Appendix F.

The final rule explicitly requires that personal financial information be kept confidential. Nevertheless, the

Department has continued to receive comments concerning the intrusiveness of collecting personal tax returns. In the 2001 NPRM, the Department proposed an alternative option with regard to the necessary supporting documentation to prove PNW in order to address these concerns. The proposal still called for recipients to require individuals whose ownership and control are relied upon for DBE certification to certify that he or she has a PNW not exceeding \$750,000 by allowing applicants to submit a signed, notarized statement of PNW with appropriate documentation. In the alternative, the proposed option was to allow the applicant to submit a signed, notarized statement from a certified public accountant (CPA) attesting that the CPA had examined his or her PNW pursuant to § 26.67(a)(2)(iii) and determined that his or her PNW does not exceed \$750,000. This option was intended to eliminate the need for the applicant to provide personal income tax information to the DOT recipient as supporting documentation for purposes of proving PNW.

The Department received numerous comments concerning the proposed alternative documentation for establishing an applicant's PNW. Many commenters supported the proposed option of allowing applicants to submit a CPA's affidavit as to PNW instead of filing personal income tax information. A majority of the commenters in favor of the proposal highlighted the fact that such an option would be less intrusive and would protect the privacy and confidentiality interests of applicants in their personal economic and financial information. Furthermore, some commenters noted that this option would alleviate the burden of the application process on applicants and would reduce the amount of paperwork associated with the DBE program, thereby facilitating the entire process. One commenter also felt that CPAs are better situated to evaluate financial statements because of their academic and professional training.

A roughly equal number of commenters felt quite differently about the issue. An overwhelming majority of recipients opposed the proposal to allow the submission of a CPA's affidavit in lieu of an individual applicant's personal income tax return or other such documentation in order to prove PNW. Many commenters felt that it was very important for the recipients themselves to verify the PNW of each applicant, and that to allow a simple affidavit of a CPA would unduly inhibit their ability to do so, and would prevent the recipients from closely tracking the eligibility of applicants through their

own independent assessment. Moreover, a number of commenters strongly maintained that by requiring applicants to submit personal income tax information, rather than merely a CPA's affidavit, recipients could better safeguard the integrity of the DBE program because they would be able to certify applicants' eligibility to the Department with unqualified certainty, having done the eligibility determination as to PNW themselves. Of particular concern to those commenters opposed to the CPA affidavit was the fact that it could not be guaranteed that the various CPAs utilized by applicants would be familiar with the technical aspects of the DBE program, and that such CPAs would only, and could only, certify the PNW of applicants based on the information provided to them, which would not be available to the recipients if an affidavit were allowed to supplant the current requirement of actual documentation. This, they speculated, could lead to potential misinformation and, as a consequence, various forms of disclaimers and waivers by the CPAs in order to shield them from liability based on an applicant's supply of faulty or incomplete information. Accordingly, a majority of commenters opposed were concerned that this proposed alternative, while appearing more efficient, would open the door to, and increase the potential for, fraud and abuse by reducing the level of scrutiny with which a recipient could exercise over the applications submitted and in making the ultimate eligibility determinations.

The Department is clearly concerned with maintaining the integrity of the program. Central to the narrow tailoring of the DBE program is the PNW requirement, and as such there is a great need to ensure that every measure is taken to qualify applicants who are truly socially and economically disadvantaged within the meaning of the statutes governing the DBE program and as intended by Congress. Thus, a thorough eligibility determination process that is not overly burdensome is required. Having been persuaded by the recipients' comments opposing the CPA option on grounds of maintaining program integrity, the Department has decided not to adopt this proposal. Therefore, individual applicants are required to submit their personal income tax information to DOT recipients so that the recipients themselves can make unqualified and accurate determinations of applicants' eligibility under the DBE program.

It should be emphasized that the privacy and confidentiality concerns

raised by many of the commenters does not go unheeded. The final rule, as it has existed since 1999, explicitly requires that the personal financial information of applicants be kept strictly confidential. This confidentiality requirement is not taken lightly, and cannot and will not be compromised. We note that the regulation has been amended previously to prohibit the release by recipients of applicants' PNW-related personal financial information, even in the face of State freedom of information or open records laws.

We understand the justifiable privacy concerns associated with collecting personal tax returns; nevertheless, it is incumbent upon the Department to safeguard the integrity of the program. Providing the recipients with the necessary means and information to determine the eligibility of applicants to participate in the DBE program is critical to accomplishing this end, and such determinations must be unqualified and verified. This, we believe, is necessary to ensure that the DBE program is indeed narrowly tailored, so as to comply with *Adarand* and its progeny.

The 2001 NPRM went further in its proposed changes to § 26.67 as to the calculation of an applicant's PNW. The proposed change addressed vested pension plans, Individual Retirement Accounts, 401(k) accounts, and other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences. We proposed two options: (1) That PNW should include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time; and/or (2) to exclude such assets altogether from the PNW calculation.

As with the PNW proposal, the public comments received regarding retirement assets were sharply divided. Some commenters suggested that either method would be acceptable. One commenter offered a variation on these two proposed methods of calculating PNW—having applicants list their accounts and like assets, but not actually including them in the PNW calculation unless they are accessed. Another commenter suggested only counting such assets at the point they become vested.

A substantial number of other commenters opposed the inclusion of pension plans and other retirement assets in the PNW calculation, arguing that only liquid assets should be included, and because such assets are

not available without penalty they should not be counted. These commenters also voiced the concern that calculating the penalty (*i.e.*, present value minus taxes and interest penalties if withdrawn) would be too problematic and burdensome on small business owners and recipients. It would also be difficult to verify. Others suggested that retirement assets have no bearing on whether a particular DBE has the present ability to do the required work within the program, and therefore should be excluded from any PNW calculation. To include such assets in the PNW calculation, some commenters contended, would be to penalize DBEs for investing wisely.

A similarly substantial number of commenters, mostly recipients, strongly urged the inclusion of pension plans and other retirement assets in the PNW calculation. Many supporters of the inclusion of such assets stressed that to exclude them would go against generally accepted accounting practices. One commenter stated that the proposal of counting the assets and then taking into account the consequent liability is fairer than simply counting the asset in whole. Other commenters suggested that it is important to include these assets in the PNW calculation because it would prevent applicants from diverting funds to such accounts in order to meet the PNW requirement, and thereby preclude any possibility of fraud or abuse. One commenter stated that retirement assets are plainly assets, and therefore should be included in any accounting of PNW, taking appropriate account of penalties and present value.

Although retirement assets may not be readily available as sources of financing for business operations, they are part of a person's overall wealth. While we understand that it may be difficult to calculate the assets, we must maintain the integrity of the program and ensure that the calculation reflects the individual's true wealth. To exclude these assets would be misleading and could compromise the integrity of the program. Therefore, we are continuing to require that the present value of assets be counted. Recipients should count only the present value of the retirement savings or investment device toward the personal net worth calculation. That is, the recipient needs to determine how much the asset is actually worth today, not what its face value is or what the individual's return on it may be at some point in the future. In making this determination, the recipient would subtract the interest or tax penalties the individual would incur if he or she withdrew the assets today.



## Retainage

As the Department noted in the preamble to the February 1999 final rule, delays in payment have long been one of the most significant barriers to the competitiveness, and in some cases the viability, of small subcontractors. One of the delays in payment which subcontractors have been most concerned about is the payment of retainage. Subcontractors have told us they often finish their work on a contract months or years before the end of the project on which the prime contractor is working, but the prime contractor does not pay them fully until after the recipient has paid retainage to the prime contractor at the end of the entire project. To help surmount this barrier, the 1999 final rule requires prime contractors to pay retainage to subcontractors promptly after the subcontractors satisfactorily complete their work.

Many states and other recipients have responded creatively to this provision, taking such measures as making incremental payments to prime contractors or eliminating retainage altogether. Where recipients have not taken such measures, however, prime contractors have complained that the requirement to pay subcontractors fully before the recipient pays retainage to the prime contractor is a financial hardship on prime contractors.

In order to address the prime contractors' concerns without diminishing the benefit of the existing provision to subcontractors, the Department proposed three approaches: (1) A recipient could eliminate retainage entirely, neither retaining funds from prime contractors nor permitting prime contractors to hold retainage from subcontractors; (2) a recipient could decide not to retain funds from prime contractors, but give prime contractors discretion to hold retainage from subcontractors (the recipient would require prime contractors to pay subcontractors in full after satisfactory completion of the subcontractor's work); or (3) the recipient could hold retainage from prime contractors but make incremental inspections and approvals of the prime contractor's work at various stages of the project (the recipient would pay the prime contractor the portion of the retainage based on these approvals), and the prime contractor, in turn, would be required to promptly pay all retainage owed to the subcontractor for satisfactory completion of the approved work.

We received eighty-four comments on the issue of retainage. Several commenters favored the proposed

changes, with most agreeing that options (1) and (3) are best, so long as they would not conflict with state law. A majority of commenters favored the proposed changes with modifications. Several commenters noted the difficulty on prime contracts in implementing the three options when it may be difficult to evaluate the quality of each subcontractor's work in situations where the result of the subcontractor's work may not be known until other work is performed on top of it. In twenty-two letters submitted, option (3) was pointed out as the best because commenters said, of the need for prime contractors to have the flexibility to hold retainage until the state accepts the portion of the work performed by the subcontractor. Another commenter recommended a fourth option: all retainage amounts must be returned within fifteen business days of satisfactory completion of the work, regardless of whether the prime contractor was paid.

Several commenters requested a definition of "satisfactory completion." For purposes of this provision, we have defined satisfactory completion of a subcontractor's work as when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is considered satisfactorily completed.

Twenty-three commenters disagreed entirely with the proposed changes, including eleven State DOTs. Many of these commenters were concerned that one or more of the options could conflict with state laws, or force recipients into a "cookie cutter" solution. Others found option (3) unworkable, costly, or in need of a phase-in period for implementation. A few commenters recommended the complete elimination of retainage. They pointed to the root causes of difficulty in recouping retainage—such as inspector delays and inefficiency—that lead to the contractors being unduly penalized.

The Department wants recipients to have flexibility in their implementation of retainage. The Department believes that it is best to implement solutions that minimize difficulties for both subcontractors and prime contractors. Current § 26.29 addresses the difficulties caused by retainage for subcontractors, but does so in a way that prime contractors were concerned shifted too much of the burden to them. The purpose of the amendments to § 26.29 is to mitigate the problems

raised by prime contractors while retaining the benefits of the section to subcontractors. The Department also believes that recipients should have flexibility in their implementation of this section. For these reasons, we are adopting the proposed amendments and permitting recipients to choose which of the three options to use. Whichever option the recipient chooses, it must apply it uniformly to all contracts. We are defining "prompt" as no later than thirty days. Based on our experience in program review thirty days was the most common length of time suggested by recipients. The Department believes that this is a sensible amount of time for payment of retainage.

## Size Standard

One of the purposes of the DBE rule is to make it possible for small firms to grow. This includes the opportunity for subcontractors to become able to compete as prime contractors. To be able to perform prime contracts, companies often need to be larger and have more resources than they had as subcontractors. Frequently, firms attempting to grow will perform both prime contracts and subcontracts. This may create a dilemma for DBE firms in some instances. In order to work as prime contractors, firms may need to grow beyond the limits of the SBA size standards applicable to their subcontracting field. If they do, then recipients may decertify the companies because they no longer qualify as small businesses. A number of firms have expressed concern that this situation penalizes success and impedes achievement—an important objective of the DBE program.

We have issued guidance stating that recipients should not totally decertify a firm because it exceeds the size standard for one or more of its activities. Under § 26.65(a), if a firm meets the size standard for one type of work (e.g., as a general contractor), it should continue to be certified and receive DBE credit for that type of work, even if it has exceeded the size standard for another type of work (e.g., as a specialty subcontractor). When its specific section exceeds particular size standards, the firm will not remain eligible and receive DBE credit for this type of activity, but will retain its certification for its other areas that remain DBE eligible. It is important for recipients to make these distinctions, as it is not appropriate for a recipient to decline to certify a firm for all purposes when the firm meets SBA size standards with respect to some of its activities. However, recipients must be careful to award DBE credit to a firm



only in those areas in which it does meet size standards.

The Department sought comment on whether any modifications of the rule to address further the situations of firms that work as both prime contractors and subcontractors. There was no proposed language offered, but instead used recently issued guidance to shape the issue. Ten commenters favored changes with some modification or variation. One comment noted that the proposal raises concerns that DBEs who graduate from one type of work area are devising creative approaches to restructure their companies so they can remain in the DBE program. Another commenter favored change, but wanted to increase the certification gross receipts cap to \$25,000,000. The gross receipts cap is statutory, and the Department's discretion to raise it is limited to making adjustments for inflation.

Some commenters may have believed that the guidance language was a proposed change, but it was not. The major objections from those commenters opposed are that the change would be confusing and create tracking problems for the recipients. Several commenters noted questions that would be raised by the changes, including how often size standards should be checked, how it should be measured, and by whom. We recommend that size determinations be reviewed by the unified certification agency that conducted the most recent certification, and that the certifications be reviewed every three years. As such, we are not making any changes to the provision.

#### Evidence of Group Membership

Section 26.67 requires that recipients rebuttably presume that members of groups specified in the regulation are disadvantaged. Recipients are further required to obtain a signed, notarized statement of disadvantage from all persons whose membership in a disadvantaged group is relied upon for DBE certification. The current regulation also allows recipients to request additional proof of ethnicity. Several commenters indicated that a signed, notarized statement of ethnicity is sufficient. Other commenters felt that additional proof is necessary, however, and that they should be permitted to request additional proof rather than relying on a checked box on a form. We agree that recipients should continue to have the flexibility to require proof of ethnicity. We caution recipients, however, to apply these standards uniformly.

In particular, recipients should avoid making members of a particular ethnic group routinely meet a higher level of

proof than members of other groups. For example, many recipients accept a driver's license or a birth certificate as adequate proof of group membership. These forms of identification always indicate gender and sometimes may indicate the race of the holder. They often do not designate, however, whether an individual is Hispanic or Native American. In some instances, members of these groups have been required to provide several additional types of proof of ethnicity simply because their driver's license did not indicate their particular group membership.

The Department does not object to recipients' requirements that applicants document group membership. If a recipient chooses to require proof then it should do so uniformly, by requiring at least one piece of evidence from each applicant. A driver's license or a birth certificate may be adequate forms of proof of group membership. In cases where the required proof does not indicate specific races, however, such as Hispanic or Native American, the applicant only should be required to provide the same level of proof as members of other groups. For example, if a birth certificate is adequate for one group, then a single piece of evidence (but not multiple pieces of evidence) may be required from members of other groups. Such single pieces of evidence might include naturalization papers; Indian tribal roll cards; tribal voter registration certificate; a letter from a community group, educational institution, religious leader, or government agency stating that the individual is a member of the claimed group; or, a letter from the individual setting forth specific reasons for believing himself/herself to be a member of the designated group. If a recipient has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the recipient to collect additional information. In such a case, the recipient must inform the applicant, in writing, of the reasons for seeking additional documentary evidence. It is our expectation that requiring a written record justifying the need for additional information will help to reduce the number of unnecessary requests.

#### Confidentiality

In the NPRM we proposed amending the confidentiality section of the regulation to parallel the existing, tighter confidentiality provision of § 26.67 concerning personal net worth information. We received twenty-three comments on this section, all of which

at least in part supported the proposed change. Therefore, recipients may not release confidential business information under any circumstance without the submitter's written consent. This proposal has the effect of extending to all confidential business information the protection previously given to PNW-related personal financial information.

Two commenters asked about UCPs and the issue of several people having access to the applicant's confidential information. Section 26.101 requires that all recipients be bound by the regulations in part 26. So while it may be necessary for confidential information to be shared among several UCP participants in the certification process, no one may release the confidential information to an outside party without the submitter's consent. Part 26 specifically intends to preempt disclosure under state or local law, so a recipient may not release this information even under local and State FOIA laws. For information that is not considered or deemed confidential business information, the recipient must comply with State freedom of information or open records laws.

Recipients may continue to report data in formats that do not reveal the submitter's name. For example, § 26.11 requires that recipients keep and maintain information on DBE and non-DBE contractors' and subcontractors' annual gross receipts of the firm. There are a variety of methods by which recipients can keep and maintain confidential information private. For example, each applicant could be assigned a case number, and all confidential matters that might be needed by different resources could refer to the case number, with only a specific entity in possession of the master list for certification purposes.

#### Economic Disadvantage

The majority of commenters on this section supported removing paragraph (B)(2) under "Economic Disadvantage" in Appendix E to part 26, "Individual Determinations of Social and Economic Disadvantage." This paragraph requires that in the case of applications by individuals to be considered socially and economically disadvantaged on an individual basis, the applicant submit personal financial information about his or her spouse. Because it is inconsistent with the way the Department's personal net worth provisions under § 26.67 work in the case of applicants who are members of a group presumed to be economically and socially disadvantaged, we are deleting it.

The primary result of this change is that the Department no longer requires

spouses to complete PNW forms in addition to the applicant, even in cases of individual requests to be considered as disadvantaged (the Department never has permitted the routine collection of spousal information in other contexts). We are preserving, however, the ability for recipients to request relevant information from spouses on a case-by-case basis when the recipient has a specific reason to look into the spouse's finances. For example, when there has been a transfer of assets to the spouse within the previous two years, it is appropriate to collect certain information about the spouse, because assets transferred to the spouse are attributed to the applicant for purposes of calculating PNW. We also recognize that the recipients will want to be able to investigate a spouse's finances in situations where the recipient suspects the applicant is fraudulently transferring assets over to his/her spouse in order to qualify as a disadvantaged individual or when there is an affiliation relationship between the applicant's business and a spouse's business.

#### Credit for Trucking Firms

The issue of how to count DBE credit for trucking operations, which was debated vigorously among commenters to the 1999 final rule, has continued to be controversial. The SNPRM that led to the 1999 final rule proposed that to be performing a commercially useful function (CUF), a DBE trucking firm had to own fifty percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. The final rule provided that a DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease trucks owned by others, both DBEs and non-DBEs, including owner-operators. For work done with its own trucks and drivers, and for work done with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, because the services themselves are being performed by non-DBEs.

In the years since the publication of the final rule, the Department has received communications from a number of state DOTs, trucking

companies, and other parties saying that the portion of the rule limiting credit for trucks leased from non-DBE firms reduced opportunities for DBE trucking companies and did not take into account sufficiently the important role of leasing in the trucking industry. In response, the Department asked in the preamble to the May 2001 NPRM whether the rule should expand the credit available for DBE truck leasing (e.g., by counting credit for twice the number of trucks a DBE owned, so that a DBE that owned one truck used on a contract and leased another from a non-DBE firm would get credit for two trucks).

Commenters to the NPRM were divided on the issue. Eleven commenters preferred to leave the current rule in place, citing administrative simplicity and prevention of abuse as their major reasons. Five commenters endorsed the example suggested in the NPRM preamble of permitting credit for twice the number of trucks a DBE owns, and six others suggested variations on that example (e.g., authorizing credit for three times the number of trucks owned by the DBE). Some commenters emphasized the need for safeguards to ward off potential abuse of the provision. Twenty-three commenters favored permitting credit for all leased trucks used by a DBE on a contract, subject to certain safeguards (e.g., for trucks on long-term leases, the DBE firm is responsible for supervision and control of all trucks on the contract).

The principle that DBE participation should be counted only for work performed with a DBE firm's own forces is an important one that the Department's DBE program follows consistently. For example, when a DBE firm subcontracts part of its work to a non-DBE firm, the subcontracted portion does not count toward DBE goals, as per § 26.55(a)(3). The Department's existing counting provision for trucking services was explicitly designed to be consistent with this principle (64 FR 5116 (Feb. 2, 1999)). Allowing credit for unlimited use of non-DBE leased trucks could also lead to program abuses and reduce DBE contracting opportunities for DBEs in other types of work.

At the same time, the Department is aware that flexibility in administering the DBE program is important to recipients and contractors, and we are sensitive to the concerns of trucking companies that opportunities may have been reduced under the 1999 final rule. In light of these factors, the Department has granted program waivers to two states, Indiana and Wisconsin,

permitting credit for leased trucks for twice the number of trucks owned by DBE trucking firms on a contract. The Department believes that this approach reasonably accommodates many of the concerns commenters expressed with respect to reduced DBE trucking participation while not departing from the Department's principle of counting DBE credit only for work performed by DBE firms themselves.

Consequently, the Department, in this final rule, will adopt the following approach. Recipients may count for DBE credit the dollar volume attributable to no more than twice the number of trucks on a contract owned by a DBE firm or leased from another DBE firm, but is not required to do so. For example, if DBE Firm X owned two trucks, leased two others from another DBE firm, and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar volume of work attributable to eight trucks (four trucks owned by or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to the fees or commissions received by the DBE firm pertaining to those two trucks.

The final rule permits, but does not require, recipients to count credit in this manner. That is, a recipient could choose to continue the counting provisions its DBE program adopted to comply with the 1999 final rule. If a recipient chooses to modify its counting provisions to count the additional credit for non-DBE lessees permitted by today's amendment, it must do so via a change to its DBE program approved by the cognizant FHWA, FTA, or FAA office. The OA approval is necessary to ensure the appropriate safeguards are taken by the recipients to prevent fraud.

#### III. Alaska Native Corporations

In § 26.73(h) of the current DBE rule, the Department codified its interpretation of former 49 CFR part 23 that ANC-owned firms, as well as firms owned by Indian tribes and Native Hawaiian Organizations, must meet the DBE rule's eligibility standards concerning size and control. In the preamble to the February 1999 final rule (64 FR 5121 (Feb. 2, 1999)), the Department explained why it did not believe that 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act (ANCSA), mandated different treatment for ANC-owned firms in the DOT DBE program. The Department continues to believe that the legal and policy reasoning behind this provision was sound. However, an

amendment to Public Law 107–117 “making appropriations for the Department of Defense for the fiscal year ending September 30, 2002, and for other purposes,” has superseded the application of § 26.73(h) to ANC-owned firms.

Section 702 of Public Law 107–117 amended 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act, to say that:

Any entity (*i.e.*, a subsidiary, partnership, or joint venture of an ANC) that satisfies subsection (e)(2) of this section (which establishes ownership and control criteria for ANC-related entities) that has been certified under section 8 of Public Law 85–536 (*i.e.*, is certified by the Small Business Administration under the 8(a) or small disadvantaged business programs) is a Disadvantaged Business Enterprise for the purposes of Public Law 105–178 (*i.e.*, TEA–21).

Based on the above language, an entity meeting criteria to be an ANC-owned firm must be certified as a DBE, even if it does not meet size, ownership, and control criteria otherwise applicable to DBEs. For example, an ANC-related entity could exceed SBA small business size standards or have its daily business operations controlled by a non-disadvantaged individual and still be certified if it met the section 702 criteria.

Consequently, the Department is deleting references to ANC-related entities from § 26.73(h) and creating a new § 26.73(i). The new paragraph sets forth certification criteria for ANC-related entities consistent with 43 U.S.C. 1626(e). Because these certification criteria differ from those applicable to all other DBE applicants, recipients would not use the new DOT Uniform Application Form for ANC-related entities. Recipients instead would collect (and applicants would have to provide) sufficient documentation that an ANC-related entity meets the new criteria including information sufficient to allow the recipients to administer their DBE programs with respect to ANC-related entities. If an ANC-related entity did not meet all the requirements (*e.g.*, it had not been certified by SBA), then its certification would continue to be processed under § 26.73(h), in the same manner as Indian Tribal firms.

The statutory requirement to treat ANC-owned entities differently from all other applicants for certification in the DBE program, because of the reference in section 702 to TEA–21, on its face applies only to firms seeking work on FTA- and FHWA-assisted contracts. The statute does not apply to firms seeking work on FAA-assisted contracts. To

avoid confusion and unnecessary administrative complexity, however, in this rule the Department is applying the altered certification requirements for ANC-related entities to all parts of the DBE program, including FAA-assisted contracts and concessions.

#### IV. Clarification Regarding Multi-Year Projects and Other Revisions

##### Multi-Year Projects

A recipient of DOT funds—FAA, FTA, or FHWA—may set an overall project goal for a particular project. Typically, such a goal would be used for a large multi-year project. The recipient's overall project goal for the project would be separate from the recipient's annual overall goal for the rest of its DOT-assisted contracting activities. The recipient's submission of the overall project goal would have to meet the same requirements as for any other overall goal (§ 26.45(f)(3)), specifically including a breakout of the participation anticipated through race neutral and race conscious means. DOT would review the goal submission just as it does in other cases. This change to the regulation would apply to all such projects the option for a project goal currently available to design-build contracts.

With respect to its other DOT-assisted contracting activities, the recipient would also submit its regular annual overall goal for review. In doing so the recipient, in calculating the annual overall goal for a given fiscal year, would not consider funds or contracting opportunities attributable to the project covered by the separate project goal. For example, suppose a recipient will expend \$150 million on Project X in Years 1–3. The recipient will also expend \$40 million on other projects in each year during the same period. The recipient could submit a single project overall goal for Project X, based on the \$150 million to be expended over the life of the project. The recipient would also submit an overall goal each year for its other DOT-assisted contracting activities in Year 1, Year 2, and Year 3, based on the \$40 million the recipient was expending in each of those years.

An overall project goal can be used for a multi-modal project. For example, suppose FHWA Recipient W and FTA Recipient Z are cooperating on a project, which involves the total expenditure of \$500 million. Recipients W and Z can submit jointly a single overall project goal for the project. W and Z would also each submit regular annual overall goals for their other activities during the time that the project was under way.

Many large projects with which it could be useful to establish an overall project goal include design-build contracts. In such a case, the overall project goal would serve as the goal for the master contractor. The master contractor would then proceed to establish contract goals for the subcontracts it is letting at a level appropriate to meet the race conscious portion of the project overall goal.

Currently, part 26 explicitly authorizes the use of project goals in FAA and FTA projects. While nothing in the rule precludes the use of project goals in FHWA projects, the rule does not explicitly mention FHWA projects in this context. It is the Department's view, however, that recipients of funds from all three operating administrations can make use of project goals.

##### Clarification Concerning Primary Industry Classification

Section 26.5 of the DBE final rule defined primary industrial classification as the four-digit Standard Industrial Classification (SIC) code designation defined in 13 CFR part 121 by the Small Business Administration. In the final rule we further stated that as the North American Industrial Classification System (NAICS) replaces the SIC system, reference to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. We would like to take this opportunity to remind recipients that effective October 1, 2000, the Small Business Administration is no longer using the SIC system for its small business standards. The SBA published a final rule on May 15, 2000, adopting small business size standards based on the NAICS (65 FR 30840). The new table of small business size standards that accompanied the rule contained errors, so the SBA published a replacement table in the **Federal Register** on September 5, 2001 (65 Fed. Reg. 53533). Therefore, the term “Standard Industrial Classification” and the acronym “SIC” will be replaced with “North American Industrial Classification System” and the acronym “NAICS” throughout the text of the regulation. Although this change was not included in the Interim Final Rule, the change is editorial in nature and does not require notice and comment.

The SBA rule on NAICS standards can be obtained through the Internet at: <http://www.sba.gov/size/>. Further information about NAICS, including a table matching SIC codes to NAICS codes, is available on the U.S. Bureau of Census' Web page at: <http://census.gov/epcd/www/naics.html>. The *North American Industry Classification*

*Manual—United States, 1997* is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

### Regulatory Analyses and Notices

#### Executive Order 12866 and DOT Regulatory Policies and Provisions

This rule is not a significant regulation under either Executive Order 12866 or DOT Regulatory Policies and Provisions. The rule will not impose any new costs on recipients or contractors. It simply would make administrative adjustments concerning existing provisions and assist contractors by implementing the SBA-DOT MOU. It would also reduce burdens on contractors and recipients through the use of new uniform forms.

#### Regulatory Flexibility Act Analysis

The Department certifies that this rule will not have significant economic effects on a substantial number of small entities. While the rule affects small entities, it does not have a significant economic impact on anyone.

#### Paperwork Reduction Act

This rule contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (the PRA, 44 U.S.C. 3507(d)), the Department will submit these requirements to the Office of Information And Regulatory Affairs of the Office of Management and Budget for review.

As noted elsewhere in this preamble, the Department adopted the suggestion of having one standard reporting form in the February 2, 1999, DBE final rule. The Uniform Semi-Annual Report of DBE Awards or Commitments and Achievements form is contained in Appendix B. At the present time, the Department has an information collection item approved under the Paperwork Reduction Act. This is for a quarterly DBE data report from recipients to DOT (OMB No. 2105-0510). This approval expired July 31, 2001. Because the reporting requirement has been reduced to semi-annually, the burden has been reduced.

Firms applying for DBE certification must provide information to recipients to allow them to review the firm's continuing eligibility. The 1999 DBE final rule also called for a single, uniform, nationwide certification application form. Part 26 requires firms applying for DBE certification to provide information to recipients to allow them to make eligibility decisions.

Currently, an applicant firm may be required to fill out different applications for FAA, FHWA and FTA recipients. The Department believes that requiring one uniform application will reduce the paperwork burden. The Uniform Certification Application form is contained in Appendix F.

This rule provides forms for the Unified Certification Program for recipients. UCP certifying agencies are responsible for maintaining a directory of certified DBE firms. Instead of the hundreds that used to be required, now only 52 consolidated directories will exist. Additionally, recipients must submit DBE programs to be approved by the Department, including calculations of overall goals. As they complete this requirement, recipients may temporarily expend more hours than in the past on information-related tasks.

#### Federalism

The Department has determined that this final rule will not have Federalism impacts sufficient to warrant preparation of a Federalism assessment.

#### List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant-programs—transportation, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 4th day of June, 2003, at Washington, DC.

**Norman Y. Mineta,**

*Secretary of Transportation.*

■ For the reasons set forth in the preamble, the Department amends 49 CFR part 26 as follows:

### **PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

■ 1. The authority citation for 49 CFR part 26 continues to read as follows:

**Authority:** 23 U.S.C. 324; 41 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Pub. L. 105-178, Sec. 1101(b), 112 Stat. 107, 113.

■ 2. In 49 CFR part 26, the term “Standard Industrial Classification” is revised to read “North American Industrial Classification System” wherever it occurs. The acronym “SIC” is revised to read “NAICS” wherever it occurs.

■ 3. Amend § 26.5 by adding, in alphabetical order among the existing definitions, a definition of “DOT/SBA MOU Memorandum of Understanding or MOU” after “DOT-assisted contract and

a definition of “SBA certified firm” after “Small Business Administration”, and by revising the definition of “Primary industry classification”, to read as follows:

#### **§ 26.5 What do the terms in this part mean?**

\* \* \* \* \*

*DOT/SBA Memorandum of Understanding or MOU*, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and DOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

\* \* \* \* \*

*Primary industry classification* means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 1997* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

\* \* \* \* \*

*SBA certified firm* refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

\* \* \* \* \*

■ 4. Revise § 26.29 to read as follows:

#### **§ 26.29 What prompt payment mechanisms must recipients have?**

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime

contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

■ 5. In § 26.37, revise paragraph (b) to read as follows:

**§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?**

\* \* \* \* \*

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

\* \* \* \* \*

■ 6–7. In § 26.55, revise paragraphs (d)(5) and (h) to read as follows:

**§ 26.55 How is DBE participation counted toward goals?**

\* \* \* \* \*

(d) \* \* \*

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department Operating Administration.

*Example to this paragraph (d)(5):* DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

\* \* \* \* \*

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

■ 8. Revise § 26.61(c) to read as follows:

**§ 26.61 How are burdens of proof allocated in the certification process?**

\* \* \* \* \*

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in § 26.67(a). Applicants do have the obligation to provide you information

concerning their economic disadvantage (see § 26.67).

\* \* \* \* \*

■ 9. Revise § 26.63(a) to read as follows:

**§ 26.63 What rules govern group membership determinations?**

(a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see § 26.61(c)), you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.

(3) In implementing this section, you must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate § 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

\* \* \* \* \*

■ 10–11. Revise § 26.67(a)(2) and remove and reserve paragraph (c) as follows:

**§ 26.67 What rules determine social and economic disadvantage?**

(a) \* \* \*

(1) \* \* \*

(2) (i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$750,000.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided*, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

\* \* \* \* \*

■ 12. Amend § 26.73 by revising paragraph (h), and adding a new paragraph (i), to read as follows:

**§ 26.73 What are other rules affecting certification?**

\* \* \* \* \*

(h) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of

electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (*see* Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (*e.g.*, information that would appear in your DBE Directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

■ 13. Amend § 26.83 by revising paragraphs (c)(7) introductory text and (c)(7)(i) to read as follows:

**§ 26.83 What procedures do recipients follow in making certification decisions?**

\* \* \* \* \*

(c) \* \* \*

(7) Require potential DBEs to complete and submit an appropriate application form, unless the potential DBE is an SBA certified firm applying pursuant to the DOT/SBA MOU.

(i) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

\* \* \* \* \*

■ 14. Add a new § 26.84, to read as follows:

**§ 26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?**

(a) When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, you must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly, or may request that the SBA forward the package to you. Pursuant to the MOU,

the SBA will forward the package within thirty days.

(b) If necessary, you may request additional relevant information from the SBA. The SBA will provide this additional material within forty-five days of your written request.

(c) Before certifying a firm based on its 8(a) BD or SDB certification, you must conduct an on-site review of the firm (*see* § 26.83(c)(1)). If the SBA conducted an on-site review, you may rely on the SBA's report of the on-site review. In connection with this review, you may also request additional relevant information from the firm.

(d) Unless you determine, based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility requirements of Subpart D of this part, you must certify the firm.

(e) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the state(s) in which you operate unless there is a report of a "home state" on-site review on which you may rely.

(f) You are not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that you use in your DOT-assisted programs or airport concessions.

■ 15. Redesignate § 26.85 as § 26.86. Within the redesignated § 26.86, redesignate paragraphs (b) and (c) as paragraphs (c) and (d) and add a new paragraph (b) to read as follows:

**§ 26.86 What rules govern recipients' denials of initial requests for certification?**

\* \* \* \* \*

(b) When you deny DBE certification to a firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

\* \* \* \* \*

■ 16. Add a new § 26.85, to read as follows:

**§ 26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?**

(a) Upon receipt of a signed, written request from a DBE-certified firm, you must transfer to the SBA a copy of the firm's application package. You must transfer this information within thirty days of receipt of the request.

(b) If necessary, the SBA may make a written request to the recipient for additional materials (*e.g.*, the report of the on-site review). You must provide a copy of this material to the SBA within forty-five days of the additional request.

(c) You must provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation and status of applications.

■ 17. Amend § 26.87 by redesignating paragraphs (h) through (j) as paragraphs (i) through (k) and by adding a new paragraph (h) to read as follows:

**§ 26.87 What procedure does a recipient use to remove a DBE's eligibility?**

\* \* \* \* \*

(h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

\* \* \* \* \*

■ 18. Amend § 26.89 by revising paragraphs (a)(1) and (f)(7) to read as follows:

**§ 26.89 What is the process for certification appeals to the Department of Transportation?**

(a)(1) If you are a firm that is denied certification or whose eligibility is

removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

\* \* \* \* \*

(f) \* \* \*

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (*see* paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

\* \* \* \* \*

■ 19. In § 26.109, revise paragraph (a)(2) to read as follows:

**§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(a) \* \* \*

(1) \* \* \*

(2) Notwithstanding any provision of Federal or state law, you must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

■ 20. In Appendix B, revise the heading and add a form reading as follows:

**Appendix B to Part 26—Uniform Report of DBE Awards or Commitments and Payments Form**

BILLING CODE 4910-62-P



# INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If more than six, attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1 – September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1 – March 31. If this report is due December 1, data should cover April 1 – September 30. If this report is due to the FAA, data should cover the entire year.
6. Name of the recipient.
7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be submitted to and approved by the relevant OA. Your Overall Goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a Race Conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.
- 8-9. The amounts in items 8(A)-9(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.
- 8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.
- 8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.
- 8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded to DBEs through the use of Race Conscious methods. See the definition of Race Conscious Goal in item 7 and the explanation of project types in item 8 to include in your calculation.
- 8(F). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Conscious methods.
- 8(G). From the total dollar amount awarded in item 8(C), provide the dollar amount awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral Goal in item 7 and the explanation of project types in item 8 to include.
- 8(H). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Neutral methods.
- 8(I). Of all prime contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.
- 9(A)-9(I). Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.
- 10(A)-11(I). For all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C)-(D) and 9(C)-(D), break the data down further by total dollar amount as well as the number of all contracts going to each ethnic group as well as to non-minority women. The "Other" category includes those DBEs who are not members of the presumptively disadvantaged groups already listed, but who are determined eligible for the DBE program on an individual basis (e.g. a Caucasian male with a disability). The TOTALS value in 10(H) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(H) should equal the sum of 8(D) plus 9(D). Column I should only be filled out if this report is due on December 1, as indicated in item 5. The values for this column are derived by adding the values reported in column H in your first report with the values reported in this second report.
- 12(A). Provide the total number of prime contracts completed during this reporting period that had Race Conscious goals. Race Conscious contracts are those with contract goals or another Race Conscious measure.
- 12(B). Provide the total dollar value of prime contracts completed this reporting period that had Race Conscious goals.
- 12(C). Provide the total dollar amount of DBE participation on all Race Conscious prime contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious prime contracts.
- 12(D). Provide the actual total DBE participation in dollars on the race conscious prime contracts completed this reporting period.
- 12(E). Of all the prime contracts completed this reporting period, calculate the percentage of DBE participation. Divide the actual total dollar amount in 12(D) by the total dollar value provided in 12(B) to derive this percentage. Round to the nearest tenth.
- 13(A)-13(E). Items 13(A)-13(E) are derived in the same manner as items 12(A)-12(E), except these figures should be based on Race Neutral prime contracts (i.e. those with no race conscious measures).
- 14(A)-14(E). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.
15. Name of the Authorized Representative preparing this form.
16. Signature of the Authorized Representative.
17. Phone number of the Authorized Representative.
18. Fax number of the Authorized Representative.

**\*\*Submit your completed report to your Regional or Division Office.**

## UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

\*\*Please refer to the Instructions sheet for directions on filling out this form\*\*

1. Submitted to (check only one):		<input type="checkbox"/> FHWA		<input type="checkbox"/> FAA		<input type="checkbox"/> FTA--Vendor Number	
2. AIP Numbers (FAA Recipients Only):							
3. Federal fiscal year in which reporting period falls:		FY		4. Date This Report Submitted:			
5. Reporting Period		<input type="checkbox"/> Report due June 1 (for period Oct. 1-Mar. 31)		<input type="checkbox"/> Report due Dec. 1 (for period April 1-Sept. 30)			
6. Name of Recipient:							
7. Annual DBE Goal(s):		Race Conscious Goal		Race Neutral Goal		OVERALL Goal	
		%		%		%	
		A		B		C	
		Total Dollars		Total Number		Total to DBEs (dollars)	
		D		E		F	
		Total to DBEs (number)		Total to DBEs/Race Conscious (dollars)		Total to DBEs/Race Conscious (number)	
		G		H		I	
		Total to DBEs/Race Neutral (dollars)		Total to DBEs/Race Neutral (number)		Percentage of total dollars to DBEs	
AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (total contracts and subcontracts awarded or committed during this reporting period)							
8. Prime contracts awarded this period							
9. Subcontracts awarded/committed this period							
TOTAL							
DBE AWARDS/COMMITMENTS THIS REPORTING PERIOD-BREAKDOWN BY ETHNICITY & GENDER		A		B		C	
		Black American		Hispanic American		Native American	
		D		E		F	
		Subcont. Asian American		Asian-Pacific American		Non-Minority Women	
		G		H		I	
		Other (i.e., not of any other group listed here)		TOTALS (for this reporting period only)		Year-End TOTALS	
10. Total Number of Contracts (Prime and Sub)							
11. Total Dollar Value							
ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD		A		B		C	
		Number of Prime Contracts Completed		Total Dollar Value of Prime Contracts Completed		DBE Participation Needed to Meet Goal (Dollars)	
		D		E		F	
		Total DBE Participation (Dollars)		Percentage of Total DBE Participation			
12. Race Conscious							
13. Race Neutral							
14. Totals							
15. Submitted by (Print Name of Authorized Representative)				16. Signature of Authorized Representative			
17. Phone Number:				18. Fax Number:			

■ 21. In Appendix E, under Economic Disadvantage, remove and reserve section (B)(2).

■ 22. Add a new Appendix F to read as follows:

**Appendix F to Part 26—Uniform Certification Application Form**

# INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM UNIFORM CERTIFICATION APPLICATION

**NOTE:** If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

## Section 1: CERTIFICATION INFORMATION

### A. Prior/Other Certifications

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

**NOTE:** If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

### B. Prior/Other Applications and Privileges

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

## Section 2: GENERAL INFORMATION

### A. Contact Information

- (1) State the name and title of the person who will serve as your firm's primary contact under this application.
- (2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) State the primary phone number of your firm.
- (4) State a secondary phone number, if any.
- (5) State your firm's fax number, if any.
- (6) State your firm's or your contact person's email address.
- (7) State your firm's website address, if any.
- (8) State the street address of your firm (i.e., the physical location of its offices – not a post office box address).
- (9) State the mailing address of your firm, if it is different from your firm's street address.

### B. Business Profile

- (1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
- (2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
- (3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.

- (4) State the date on which you and/or each other owner took ownership of the firm.

- (5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.

- (6) Check the appropriate box that indicates whether your firm is "for profit."

**NOTE:** If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.

- (7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.

- (8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.

- (9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.

- (10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

### C. Relationships with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.

- (2) Check the appropriate box that indicates whether at present, or at any time in the past:

- (a) Your firm has been a subsidiary of any other firm;

- (b) Your firm consisted of a partnership in which one or more of the partners are other firms;

- (c) Your firm has owned any percentage of any other firm; and

- (d) Your firm has had any subsidiaries of its own.

- (3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

- (4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

**D. Immediate Family Member Businesses**

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

**Section 3: OWNERSHIP**

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each additional owner):

**A. Background Information**

- (1) Give the name of the owner.
- (2) State his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) State his/her home (street) address.
- (5) Check the appropriate box that indicates this owner's gender.
- (6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen.
- (8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

**B. Ownership Interest**

- (1) State the number of years during which this owner has been an owner of your firm.
- (2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment.
- (3) State the percentage of total ownership control of your firm that this owner possesses.
- (4) State the familial relationship of this owner to each other owner of your firm.
- (5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.

- (6) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function or title held in that business.

- (7) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

**C. Disadvantaged Status**

**NOTE:** You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)

- (1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
- (2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

**Section 4: CONTROL**

**A. Identify your firm's Officers and Board of Directors:**

- (1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer of your firm.
- (2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.
- (3) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
- (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the officer or director, and the nature of his/her business relationship with that other firm.

**B. Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:**

- (1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
  - (2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
  - (3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
  - (4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
  - (5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
  - (6) Office management;
  - (7) Marketing and sales;
  - (8) Purchasing of major equipment;
  - (9) Signing company checks (for any purpose); and
  - (10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
  - (11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
  - (12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.
- C. Indicate your firm's inventory in the following categories:**
- (1) **Equipment**  
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
  - (2) **Vehicles**  
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
  - (3) **Office Space**  
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
  - (4) **Storage Space**  
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.
- D. Does your firm rely on any other firm for management functions or employee payroll?**  
Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.
- E. Financial Information**
- (1) **Banking Information**
    - (a) State the name of your firm's bank.
    - (b) State the main phone number of your firm's bank branch.
    - (c) State the address of your firm's bank branch.
  - (2) **Bonding Information**
    - (a) State your firm's Binder Number.
    - (b) State the name of your firm's bond agent and/or broker.
    - (c) State your agent's/broker's phone number.
    - (d) State your agent's/broker's address.
    - (e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.
- F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**  
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.
- G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years:**  
Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.
- H. List current licenses/permits held by any owner or employee of your firm.**  
List the name of each person in your firm who holds a professional license or permit, the type of license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.
- I. List the three largest contracts completed by your firm in the past three years, if any.**  
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.
- J. List the three largest active jobs on which your firm is currently working.**  
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.
- AFFIDAVIT & SIGNATURE**  
Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**  
**49 C.F.R. PART 26**

***UNIFORM CERTIFICATION APPLICATION***

**ROADMAP FOR APPLICANTS**

① **Should I apply?**

- Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
- Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
- Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed \$17.42 million in gross annual receipts?
- Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.

② **Is there an easier way to apply?**

If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.

**NOTE: You must still meet the requirements for the DBE program, including undergoing an on-site review.**

③ **Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.**

④ **Where can I find more information?**

- U.S. DOT – <http://osdbuweb.dot.gov/business/dbe/index.html> (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
- SBA – <http://www.ntis.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/index/tableofsize.html> (provides a listing of NAICS codes)
- 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.



**Section 1: CERTIFICATION INFORMATION****A. Prior/Other Certifications**

Is your firm currently certified for any of the following programs? (If Yes, check appropriate box(es))	<input type="checkbox"/> DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit?
		<input type="checkbox"/> Yes, on ____ / ____ / ____ State: ____ <input type="checkbox"/> No
	<input type="checkbox"/> 8(a)	<b>⊗ STOP!</b> If you checked either the 8(a) or SDB box, you <u>may not</u> have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.
<input type="checkbox"/> SDB		

**B. Prior/Other Applications and Privileges**

Has your firm (under any name) or any of its owners, Board of Directors, officers or management personnel, ever withdrawn an application for any of the programs listed above, or ever been denied certification, decertified, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?
<input type="checkbox"/> Yes, on ____ / ____ / ____ <input type="checkbox"/> No
If Yes, identify State and name of state, local, or Federal agency and explain the nature of the action:

**Section 2: GENERAL INFORMATION****A. Contact Information**

(1) Contact person and Title:		(2) Legal name of firm:	
(3) Phone #:	(4) Other Phone #:	(5) Fax #:	
(6) E-mail:		(7) Website (if have one):	
(8) Street address of firm (No P.O. Box):	City:	County/Parish:	State: Zip:
(9) Mailing address of firm (if different):	City:	County/Parish:	State: Zip:

**B. Business Profile**

(1) Describe the primary activities of your firm:		(2) Federal Tax ID (if any):
(3) This firm was established on ____ / ____ / ____		(4) I/We have owned this firm since: ____ / ____ / ____
(5) Method of acquisition (check all that apply):		
<input type="checkbox"/> Started new business <input type="checkbox"/> Bought existing business <input type="checkbox"/> Inherited business <input type="checkbox"/> Secured concession <input type="checkbox"/> Merger or consolidation <input type="checkbox"/> Other (explain)		
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> No		<b>⊗ STOP!</b> If your firm is NOT for-profit, then you do NOT qualify for this program and do NOT need to fill out this application.

(7) Type of firm (check all that apply): <input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> Limited Liability Partnership <input type="checkbox"/> Limited Liability Corporation <input type="checkbox"/> Joint Venture <input type="checkbox"/> Other, Describe: _____								
(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain: _____								
(9) Number of employees: Full-time _____	Part-time _____	Total _____						
(10) Specify the gross receipts of the firm for the last 3 years: <table style="width: 100%; border: none;"> <tr> <td style="width: 60%;">Year _____</td> <td style="width: 40%;">Total receipts \$ _____</td> </tr> <tr> <td>Year _____</td> <td>Total receipts \$ _____</td> </tr> <tr> <td>Year _____</td> <td>Total receipts \$ _____</td> </tr> </table>			Year _____	Total receipts \$ _____	Year _____	Total receipts \$ _____	Year _____	Total receipts \$ _____
Year _____	Total receipts \$ _____							
Year _____	Total receipts \$ _____							
Year _____	Total receipts \$ _____							

### C. Relationships with Other Businesses

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office space, yard, warehouse, facilities, equipment, or office staff, with any other business, organization, or entity? <input type="checkbox"/> Yes <input type="checkbox"/> No  If Yes, identify: Other Firm's name: _____ Explain nature of shared facilities: _____													
(2) At present, or at any time in the past, has your firm:	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">(a) been a subsidiary of any other firm?</td> <td style="text-align: right; padding: 2px;"><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td style="padding: 2px;">(b) consisted of a partnership in which one or more of the partners are other firms?</td> <td style="text-align: right; padding: 2px;"><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td style="padding: 2px;">(c) owned any percentage of any other firm?</td> <td style="text-align: right; padding: 2px;"><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> <tr> <td style="padding: 2px;">(d) had any subsidiaries?</td> <td style="text-align: right; padding: 2px;"><input type="checkbox"/> Yes <input type="checkbox"/> No</td> </tr> </table>	(a) been a subsidiary of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No	(b) consisted of a partnership in which one or more of the partners are other firms?	<input type="checkbox"/> Yes <input type="checkbox"/> No	(c) owned any percentage of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No	(d) had any subsidiaries?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
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(3) Has any other firm had an ownership interest in your firm at present or at any time in the past? <input type="checkbox"/> Yes <input type="checkbox"/> No													
(4) If you answered "Yes" to any of the questions in (2)(a)-(d) and/or (3), identify the following for each (attach extra sheets, if needed): <table style="width: 100%; border: none; margin-top: 5px;"> <tr> <th style="text-align: left; width: 30%;"><u>Name</u></th> <th style="text-align: left; width: 30%;"><u>Address</u></th> <th style="text-align: left; width: 40%;"><u>Type of Business</u></th> </tr> <tr> <td>1. _____</td> <td>_____</td> <td>_____</td> </tr> <tr> <td>2. _____</td> <td>_____</td> <td>_____</td> </tr> <tr> <td>3. _____</td> <td>_____</td> <td>_____</td> </tr> </table>		<u>Name</u>	<u>Address</u>	<u>Type of Business</u>	1. _____	_____	_____	2. _____	_____	_____	3. _____	_____	_____
<u>Name</u>	<u>Address</u>	<u>Type of Business</u>											
1. _____	_____	_____											
2. _____	_____	_____											
3. _____	_____	_____											

### D. Immediate Family Member Businesses

Do any of your immediate family members own or manage another company? <input type="checkbox"/> Yes <input type="checkbox"/> No																			
If Yes, then list (attach extra sheets, if needed): <table style="width: 100%; border: none; margin-top: 5px;"> <tr> <th style="text-align: left; width: 15%;"><u>Name</u></th> <th style="text-align: left; width: 20%;"><u>Relationship</u></th> <th style="text-align: left; width: 20%;"><u>Company</u></th> <th style="text-align: left; width: 25%;"><u>Type of Business</u></th> <th style="text-align: left; width: 20%;"><u>Own or Manage?</u></th> </tr> <tr> <td>1. _____</td> <td>_____</td> <td>_____</td> <td>_____</td> <td>_____</td> </tr> <tr> <td>2. _____</td> <td>_____</td> <td>_____</td> <td>_____</td> <td>_____</td> </tr> </table>					<u>Name</u>	<u>Relationship</u>	<u>Company</u>	<u>Type of Business</u>	<u>Own or Manage?</u>	1. _____	_____	_____	_____	_____	2. _____	_____	_____	_____	_____
<u>Name</u>	<u>Relationship</u>	<u>Company</u>	<u>Type of Business</u>	<u>Own or Manage?</u>															
1. _____	_____	_____	_____	_____															
2. _____	_____	_____	_____	_____															

## Section 3: OWNERSHIP

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (If more than one owner, attach separate sheets for each additional owner):

## A. Background Information

(1) Name:	(2) Title:	(3) Home Phone #:
(4) Home Address (street and number):		City: State: Zip:
(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	(6) Ethnic group membership (Check all that apply):	
(7) U.S. Citizen: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Native American <input type="checkbox"/> Asian Pacific <input type="checkbox"/> Subcontinent Asian <input type="checkbox"/> Other (specify) _____	
(8) Lawfully Admitted Permanent Resident: <input type="checkbox"/> Yes <input type="checkbox"/> No		

## B. Ownership Interest

(1) Number of years as owner:	(2) Initial investment to acquire ownership interest in firm:	Type	Dollar Value
(3) Percentage owned:		Cash	\$
(4) Familial relationship to other owners:		Real Estate	\$
		Equipment	\$
		Other	\$
(5) Shares of Stock: <u>Number</u> <u>Percentage</u> <u>Class</u> <u>Date acquired</u> <u>Method Acquired</u>			
(6) Does this owner perform a management or supervisory function for any other business? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, identify: Name of Business: _____ Function/Title: _____			
(7) Does this owner own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, identify: Name of Business: _____ Function/Title: _____ Nature of Business Relationship: _____			

## C. Disadvantaged Status – NOTE: Complete this section only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged)

(1) What is the Personal Net Worth (PNW) of the owner(s) applying for DBE qualification? (Use and attach the Personal Net Worth calculator form at the end of this application; attach additional sheets if more than one owner is applying)
(2) Has any trust been created for the benefit of this disadvantaged owner(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain (attach additional sheets if needed):

**Section 4: CONTROL****A. Identify your firm's Officers & Board of Directors** (If additional space is required, attach a separate sheet):

	Name	Title	Date Appointed	Ethnicity	Gender
(1) Officers of the Company	(a)				
	(b)				
	(c)				
	(d)				
	(e)				
(2) Board of Directors	(a)				
	(b)				
	(c)				
	(d)				
	(e)				

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business? ☐ Yes ☐ No

If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
 Business: \_\_\_\_\_ Function: \_\_\_\_\_

(4) Do any of the persons listed (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? ☐ Yes ☐ No

If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
 Nature of Business Relationship: \_\_\_\_\_

**B. Identify your firm's management personnel who control your firm in the following areas** (If more than two persons, attach a separate sheet):

	Name	Title	Ethnicity	Gender
(1) Financial Decisions (responsibility for acquisition of lines of credit, surety bonding, supplies, etc.)	a.			
	b.			
(2) Estimating and bidding	a.			
	b.			
(3) Negotiating and Contract Execution	a.			
	b.			
(4) Hiring/firing of management personnel	a.			
	b.			
(5) Field/Production Operations Supervisor	a.			
	b.			
(6) Office management	a.			
	b.			
(7) Marketing/Sales	a.			
	b.			
(8) Purchasing of major equipment	a.			
	b.			
(9) Authorized to Sign Company Checks (for any purpose)	a.			
	b.			
(10) Authorized to make Financial Transactions	a.			
	b.			

(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business? ☐ Yes ☐ No

If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
Business: \_\_\_\_\_ Function: \_\_\_\_\_

(12) Do any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)?

☐ Yes ☐ No

If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
Nature of Business Relationship: \_\_\_\_\_

**C. Indicate your firm's inventory in the following categories (attach additional sheets if needed):**

**(1) Equipment**

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

**(2) Vehicles**

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

**(3) Office Space**

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

**(4) Storage Space**

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

**D. Does your firm rely on any other firm for management functions or employee payroll? ☐ Yes ☐ No**

If Yes, explain:

**E. Financial Information**

**(1) Banking Information:**

(a) Name of bank: \_\_\_\_\_ (b) Phone No: ( ) \_\_\_\_\_

(c) Address of bank: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(2) **Bonding Information:** If you have bonding capacity, identify: (a) Binder No: \_\_\_\_\_  
 (b) Name of agent/broker \_\_\_\_\_ (c) Phone No: ( ) \_\_\_\_\_  
 (d) Address of agent/broker: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
 (e) Bonding limit: Aggregate limit \$ \_\_\_\_\_ Project limit \$ \_\_\_\_\_

**F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:**

Name of Source	Address of Source	Name of Person Securing the Loan	Original Amount	Current Balance	Purpose of Loan
1.					
2.					
3.					

**G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years (attach additional sheets if needed):**

Contribution/Asset	Dollar Value	From Whom Transferred	To Whom Transferred	Relationship	Date of Transfer
1.					
2.					
3.					

**H. List current licenses/permits held by any owner and/or employee of your firm (e.g., contractor, engineer, architect, etc.) (attach additional sheets if needed):**

Name of License/Permit Holder	Type of License/Permit	Expiration Date	License Number and State
1.			
2.			
3.			

**I. List the three largest contracts completed by your firm in the past three years, if any:**

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract
1.			
2.			
3.			

**J. List the three largest active jobs on which your firm is currently working:**

<b>Name of Prime Contractor and Project Number</b>	<b>Location of Project</b>	<b>Type of Work</b>	<b>Project Start Date</b>	<b>Anticipated Completion Date</b>	<b>Dollar Value of Contract</b>
1.					
2.					
3.					



**DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST**

**In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.**

**All Applicants**

- ☐ Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- ☐ Personal Financial Statement (form available with this application)
- ☐ Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- ☐ Your firm's tax returns (gross receipts) and all related schedules for the past three years
- ☐ Documented proof of contributions used to acquire ownership for each owner (*e.g., both sides of cancelled checks*)
- ☐ Your firm's signed loan agreements, security agreements, and bonding forms
- ☐ Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- ☐ List of equipment leased and signed lease agreements
- ☐ List of construction equipment and/or vehicles owned and titles/proof of ownership
- ☐ Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- ☐ Year-end balance sheets and income statements for the past three years (*or life of firm, if less than three years*); a new business must provide a current balance sheet
- ☐ All relevant licenses, license renewal forms, permits, and haul authority forms
- ☐ DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- ☐ Bank authorization and signatory cards
- ☐ Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- ☐ Trust agreements held by any owner claiming disadvantaged status, if any

**Partnership or Joint Venture**

- ☐ Original and any amended Partnership or Joint Venture Agreements

**Corporation or LLC**

- ☐ Official Articles of Incorporation (*signed by the state official*)
- ☐ Both sides of all corporate stock certificates and your firm's stock transfer ledger
- ☐ Shareholders' Agreement
- ☐ Minutes of all stockholders and board of directors meetings
- ☐ Corporate by-laws and any amendments
- ☐ Corporate bank resolution and bank signature cards
- ☐ Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

**Trucking Company**

- ☐ Documented proof of ownership of the company
- ☐ Insurance agreements for each truck owned or operated by your firm
- ☐ Title(s) and registration certificate(s) for each truck owned or operated by your firm
- ☐ List of U.S. DOT numbers for each truck owned or operated by your firm

**Regular Dealer**

- ☐ Proof of warehouse ownership or lease
- ☐ List of product lines carried
- ☐ List of distribution equipment owned and/or leased

**NOTE:** The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.

**AFFIDAVIT OF CERTIFICATION**

*This form must be signed and notarized for each owner upon which disadvantaged status is relied.*

**A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.**

I \_\_\_\_\_ (full name printed), swear or affirm under penalty of law that I am \_\_\_\_\_ (title) of applicant firm \_\_\_\_\_ (firm name) and that I have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its place(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial of certification.

If awarded a contract or subcontract, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

I certify that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise (DBE). In support of my application, I certify that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s) (circle all that apply):

Female                      Black American Hispanic American  
Native American              Asian- Pacific American  
Subcontinent Asian American  
Other (specify) \_\_\_\_\_

I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further certify that my personal net worth does not exceed \$750,000, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

I declare under penalty of perjury that the information provided in this application and supporting documents is true and correct.

Executed on \_\_\_\_\_ (Date)

Signature \_\_\_\_\_  
(DBE Applicant)

**NOTARY CERTIFICATE**

[FR Doc. 03-14989 Filed 6-13-03; 8:45 am]

BILLING CODE 4910-62-C

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

#### 49 CFR Parts 192 and 195

#### Pipeline Safety: Alternative Mitigation Measures for Required Repairs Delayed by a Need To Obtain Permits

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Interpretation.

**SUMMARY:** Congress directed the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) to revise its pipeline safety regulations, if necessary, to allow operators to take alternative mitigation measures while they seek governmental permits required for repairs. As RSPA/OPS interprets the pipeline safety regulations, they already allow such measures. Revising the regulations is not necessary.

**DATES:** Effective June 16, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mike Israni by phone at (202) 366-4571, by fax at (202) 366-4566, or by e-mail at [mike.israni@rspa.dot.gov](mailto:mike.israni@rspa.dot.gov)

**SUPPLEMENTARY INFORMATION:** The Pipeline Safety Improvement Act of 2002 amended the Federal pipeline safety laws to require that the Secretary of Transportation revise pipeline safety regulations, as needed, to allow operators to implement alternative mitigation measures if repairs to pipelines cannot be completed within specified time frames. Specifically, 49 U.S.C. section 60133 provides, in part:

#### (d) INTERIM OPERATIONAL ALTERNATIVES.

(1) IN GENERAL \* \* \* subject to the limitations in paragraph (2), the Secretary of Transportation shall revise the regulations of the Department, to the extent necessary, to permit a pipeline operator subject to time periods for repair specified by rule by the Secretary to implement alternative mitigation measures until all applicable permits have been granted.

(2) LIMITATIONS. "The regulations issued by the Secretary pursuant to this subsection shall not allow an operator to implement alternative mitigation measures pursuant to paragraph (1) unless—

(A) Allowing the operator to implement such measures would be consistent with the protection of human health, public safety, and the environment;

(B) The operator, with respect to a particular repair project, has applied for and is pursuing diligently and in good faith all required Federal, State, and local permits to carry out the project; and

(C) The proposed alternative mitigation measures are not incompatible with pipeline safety.

RSPA/OPS has reviewed the existing pipeline safety regulations and determined that no changes to these regulations are necessary to implement this provision. As explained below, RSPA/OPS interprets existing pipeline repair requirements to allow for alternative mitigative measures while an operator has applied for and is waiting for a permit in order to effectuate a repair.

General pipeline facility repair requirements in 49 CFR 192.703 (for natural gas pipelines) and 49 CFR 195.401 (for hazardous liquid pipelines) require repair of conditions that are "unsafe" or "could adversely affect the safe operation of [the] pipeline system," but do not specify a time period in which the required repairs must be made. These provisions, instead, require an operator to take actions necessary to assure the pipeline is safe and to take these actions "within a reasonable time." Thus, for the non immediate hazard conditions, a reasonable repair time allows for an operator to obtain the Federal, state or local permits necessary to make a repair. RSPA/OPS expects an operator to exercise diligence in obtaining the necessary permits by being able to demonstrate that it has applied for the applicable permit and is taking all necessary steps for the permit to be processed and granted. In this interim period until the permit is granted, an operator is allowed to take alternative actions to mitigate the condition, as long as the actions are compatible with pipeline safety.

The reasonable time provision does not apply to an immediate hazard condition. If circumstances associated with a particular pipeline problem are such that safety is immediately in jeopardy, then immediate action is appropriate and delay would be inconsistent with the protection of human health, public safety, and the environment.

The only current regulation that specifies time periods for pipeline repairs is the recently promulgated integrity management rule for hazardous liquid pipelines, 49 CFR 195.452. The remediation requirements of this regulation require an operator to remediate defects meeting certain criteria immediately or within 60 or 180 days, depending on the defect's severity. This regulation further provides for an operator to take alternative mitigation measures if it cannot make the repair within the specified period for any reason, including being unable to obtain

required permits. Specifically, 49 CFR 195.452 (h)(3) provides in part:

(3) *Schedule for evaluation and remediation.* An operator must complete remediation of a condition according to a schedule that prioritizes the conditions for evaluation and remediation. If an operator cannot meet the schedule for any condition, the operator must justify the reasons why it cannot meet the schedule and that the changed schedule will not jeopardize public safety or environmental protection. An operator must notify OPS if the operator cannot meet the schedule and cannot provide safety through a temporary reduction in operating pressure.

Thus, if an operator must obtain a permit to carry out a repair for the operator's integrity management program, and cannot obtain the permit and make the repair within the 60- or 180-day period, an operator may either reduce operating pressure as an interim mitigative measure or, if it determines that pressure reduction is impracticable, submit a notification to RSPA/OPS explaining how it will ensure safety in the interim period, and then continue operation until the permit is granted and the repair made. An operator must complete the repairs in a time frame that does not jeopardize safety or environmental protection. Again, if the specified time period cannot be met because the operator is waiting for a permit to be granted, RSPA/OPS expects an operator to show it has applied for the permit and is taking all necessary steps for the permit to be processed and granted.

RSPA/OPS recently proposed integrity management remediation requirements for natural gas transmission pipelines (*see* 68 FR 4278; Jan. 28, 2003). Similar to the remediation requirements for hazardous liquid integrity programs, until a repair is made, the proposed regulation would allow continued operation with a reduction in operating pressure or notification to RSPA/OPS, if pressure reduction is impracticable. Under the proposal, an operator would be able to implement alternative mitigative measures while it has applied for and is waiting for the permit to be granted.

RSPA/OPS discussed the need for additional requirements including alternative mitigative measures with its advisory committees, the Technical Hazardous Liquid Pipeline Safety Standards Committee and the Technical Pipeline Safety Standards Committee, at a joint meeting held on March 26, 2003. The Committees agreed that the existing allowance for pressure reduction or case-by-case definition of alternative measures, via operator notification to RSPA/OPS, represents viable alternative