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January 9, 1998

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 96–016–25]

RIN 0579–AA83

Karnal Bunt; Compensation for Wheat Seed and Straw in the 1995–1996 Crop Season

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Karnal bunt regulations by adding compensation provisions for growers and seed companies for the loss in value of wheat seed and straw in the 1995–1996 crop season. The payment of compensation is necessary in order to reduce the economic impact of the Karnal bunt regulations on affected wheat growers and other individuals.

EFFECTIVE DATE: December 23, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Stefan, Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236, (301) 734–8247, or e-mail: mstefan@aphis.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum* X *Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the smut fungus *Tilletia indica* (Mitra) Mundkur and is spread by spores, primarily through the movement of infected seed. In the absence of measures taken by the U.S. Department of Agriculture (USDA) to prevent its spread, the establishment of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets. The regulations regarding Karnal bunt are set forth in 7 CFR 301.89–1 through 301.89–14. Among other things, the regulations define areas regulated for Karnal bunt and restrict the movement of certain regulated articles, including wheat seed and grain, from the regulated areas.

On May 6, 1997, we published a document in the **Federal Register** (62 FR 24745–24753, Docket No. 96–016–17, effective April 30, 1997) making final an interim rule that amended the regulations to provide compensation for certain growers and handlers of wheat grain, owners of grain storage facilities, and flour millers in order to mitigate losses and expenses incurred in the 1995–1996 crop season because of actions taken by the Secretary to prevent the spread of Karnal bunt. The final rule also added compensation provisions for handlers of wheat grain that was tested and found negative for Karnal bunt and participants in the National Karnal Bunt Survey whose wheat grain tested positive for Karnal bunt in the 1995–1996 crop season. These compensation regulations are set forth at 7 CFR 301.89–14.

On July 30, 1997, we published in the **Federal Register** (62 FR 40756–40763, Docket No. 96–016–21) a proposal to amend the regulations by adding compensation provisions for wheat seed growers and seed companies for the loss in value of wheat seed in the 1995–1996 crop season. We also proposed to add compensation provisions for the loss in value of wheat straw in the 1995–1996 crop season.

We solicited comments concerning our proposal for 30 days ending August 29, 1997. We received six comments by that date. They were from wheat growers, plant breeders, seed companies, and seed industry associations. All the comments recommended additions or revisions to the compensation provisions. They are discussed below.

Comments Resulting in Changes to the Proposed Rule

Seed That Is Not Sold—Proposed § 301.89–14(e)

With one exception, our proposed compensation for seed companies addressed loss in value of wheat seed that was sold. As an exception, we also proposed that a seed company that did not sell its wheat seed could receive compensation at $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed. We explained that these amounts represent the seed margins of $4.50 for private variety seed and $2.40 for public variety seed plus the maximum $2.50 per bushel compensation for wheat grain provided in the regulations (see § 301.89–14(b) of the regulations). We stipulated that compensation would only be paid if the seed company has destroyed the wheat by burying it in a sanitary landfill or other site that has been approved by the Animal and Plant Health Inspection Service (APHIS).

We explained in the preamble to the proposal that this compensation would be necessary in a small number of cases where seed companies had their seed treated with a fungicide and bagged. Most seed companies did not treat their 1995–1996 crop season seed. Some seed companies, however, had seed from past crop seasons on hand that had already been treated in this manner. Treated seed cannot be used as grain, so if a seed company was unable or chose not to market treated seed for planting within the regulated areas, the only option for disposal of the treated seed was burial.

Two commenters said that the compensation offered in this circumstance should also include the cost of treating and bagging the seed, as well as the cost of cleaning it to separate out broken kernels and foreign matter prior to treating. These costs were incurred with the expectation of being able to sell the seed at a price that would allow the seed company to recover the costs. These costs are not accounted for in the seed margin that we factored into the proposed compensation amount.

In response to these comments, we are amending the compensation amounts for seed companies that buried their seed instead of selling it. We have determined that the average cost of cleaning, treating, and bagging seed is $2.40 per bushel (based on $1.20 per bushel for cleaning, $.60 per bushel for treating, and $.60 per bushel for bagging). We are adding this amount to the proposed compensation amounts, so that the compensation rates for seed companies that do not sell their seed will equal $9.40 per bushel for private

variety seed and $7.30 per bushel for public variety seed.

The preamble to the proposed rule explained that this compensation would apply to a small number of cases where seed companies had already cleaned, treated with a fungicide, and bagged their seed. However, the proposed rule did not limit the compensation to only those cases. Section 301.89–14(e) of the proposed rule stated that ''Seed companies are also eligible to receive compensation under the following circumstance: If a seed company is not able to or elects not to sell 1995–1996 crop season wheat grown for propagative purposes or propagative wheat inventories in their possession that were unsold as of March 1, 1996, the compensation rate will equal * * *.'' Because the compensation in this final rule has been increased to provide for the cleaning, treating, and bagging of seed, the final rule limits compensation to buried seed that has been cleaned, treated, and bagged.

We are not aware of any reason that a seed company would have been compelled or would have considered it more profitable to bury its seed rather than sell it in the 1995–1996 crop season, other than if the seed was previously cleaned, treated, and bagged. In fact, one of the comments on the proposed rule pointed out that a seed company trying to mitigate its losses would not dispose of untreated seed by burying it because the seed company would lose the salvage value. Therefore, § 301.89–14(e) of this final rule states that a seed company is eligible for compensation if the seed company has wheat that cannot be sold for use as grain or animal feed because it was previously cleaned, treated, and bagged.

The same two comments also requested that compensation for cleaned, treated, and bagged seed that was not sold include the cost of disposing of the wheat. We are not making any changes to the proposal in response to this request. Section 301.89–14(c) of the regulations provides compensation for 1995–1996 crop season wheat grain that was buried because it could not be sold, at the rate of $2.50 per bushel. This rate does not include the cost of disposal. It would be inconsistent to compensate seed companies for disposal costs for the burial of wheat seed when we did not compensate owners of grain that was buried for disposal.

Certified Seed

Several commenters said that we should specify that compensation will be paid only on ''certified'' seed. Certified seed is wheat that has been classified as ''certified'' by a State seed certification agency. The seed production and certification process can vary. We have attempted to provide a general description of the process below.

Certified seed is the final classification stage in the seed production process. The other classification stages are breeder, foundation, and registered seed. Breeder, foundation, and registered seed inventories are often produced by the seed company and are typically kept in relatively small quantities as stock for producing more seed. Certified seed is the progeny of breeder, foundation, or registered seed, and is the class of seed sold to farmers for growing wheat grain. Typically, seed companies contract with growers to produce certified seed. Before classifying seed as certified, the seed certification agency considers several factors, including the class of seed from which the seed to be certified will be grown and the condition of the field in which the seed to be certified is planted. The seed certification agency also analyzes the harvested seed for genetic and mechanical factors relating to specific seed standards.

Several commenters said that compensating growers and seed companies only for certified seed would ensure that wheat being compensated was actually grown for use as seed, and not as grain. This would help prevent false claims for compensation. The commenters said that seed certification is the only clear establishment of intent to produce wheat as a seed crop.

In the proposed rule, we specified that, to claim compensation for wheat seed, a copy of the contract under which the wheat was grown must be provided with each compensation claim. We believed that a contract would show that the wheat for which compensation is being claimed was intended to be sold as seed. Some commenters said, however, that seed production contracts could be easily forged, resulting in illegitimate claims.

We agree with commenters that requiring that seed be certified in order to be eligible for compensation is the most reliable establishment of intent to produce wheat as a seed crop. However, some seed companies did not complete the seed certification process because of the Karnal bunt quarantine. As explained above, the seed certification process consists of several steps. The final step is usually laboratory analysis of the harvested wheat for genetic and mechanical factors relating to specific seed standards. Prior to completion of this final step, the wheat is considered ''certifiable.'' However, seed that is grown with the intention of producing breeder, foundation, or registered seed is also classified as ''certifiable'' up to the point that it has completed the laboratory analysis step of the seed certification process. The intent of the proposed rule was to offer compensation only for seed in the final stage of seed production (that is, commercially available seed). We did not intend to offer compensation for seed still in non-final stages (that is, breeder, foundation, or registered seed).

With all this in mind, and in response to commenters concerns, we are amending the proposed rule to require that seed be either certified or grown with the intention of producing certified seed in order to be eligible for compensation. We will require this for both grower and seed company compensation. Throughout the rule, we will insert language indicating that compensation is for certified seed or seed grown with the intention of producing certified seed only. This language will replace proposed language referring to ''wheat grown for propagative purposes.'' In addition, in order to claim compensation, we will require that growers and seed companies submit documentation that provides evidence that the wheat being considered for compensation is classified as certified seed or is considered certifiable as certified seed by a State seed certification agency. Seed certification agencies usually require that applicants for seed certification keep records of the amount of certifiable seed harvested. This documentation may include one or more of the following types of documents: An application to the State seed certification agency for field inspection (to show that seed is eligible for certification); a bulk sale certificate; certification tags or labels issued by the State seed certification agency; or a document issued by the State seed certification agency verifying that the wheat is certified seed. Growers who do not have copies of such documentation can obtain it from the seed company or from their State's seed certification agency.

Private Variety Seed

The proposed rule provided different compensation rates to seed companies depending on whether their seed was private variety seed or public variety seed. Specifically, the seed margin used in the compensation calculations was set by the proposal at $4.50 for private variety seed and $2.40 for public variety seed. We explained in the preamble to the proposal that private variety seed is seed that has a plant variety protection

patent. The seed margin for private variety seed was set higher than the seed margin for public variety seed to reflect premiums paid by the seed company to the private firm that owns the plant variety protection patent.

Several of the commenters pointed out to us that not all private variety seed is patented. Usually, private varieties are protected by a patent. However, there are some private varieties that do not have patent protection. For example, some varieties are developed to be so specific to the needs of a particular customer that a patent is not deemed necessary. Another example is that a private individual (such as someone doing research at a university) may develop a variety that they do not wish to patent. The individual may sell the rights to this variety to a seed company. Such varieties may be recognized within the industry as being ''owned'' by a seed company, even though they are not protected by a patent. Commenters said that, among seed industry groups, private variety seed is defined simply as a variety owned by a private individual or company.

We agree with commenters that our description of private variety seed was incomplete. Public varieties of seed are usually developed by State or Federal government researchers, or by a university. Public variety seed is considered to be owned by the public and is available to anyone for planting and production. Because it is owned by the public, no private individual must be reimbursed for the development costs. In contrast, private varieties of seed are usually developed by a private individual or company. Seed margins for private variety seed are intended to reimburse the individual or company for the costs of developing the seed variety. In the case of patented varieties, the higher seed margin reflects premiums paid by the seed company to the developer who owns the patent. In other cases (as described above), the seed company may have purchased the rights to the variety from a developer. In such cases, the higher seed margin reflects the up front costs of the seed company for purchasing the seed variety.

Our explanation of private variety seed was in the preamble to the proposed rule. Because the actual rule did not define private variety seed, it is not necessary for us to make any changes to the rule in response to this comment. However, in implementing this final rule, we will consider any variety that is owned by a private individual or company to be a private variety. USDA's Farm Service Agency (FSA) will be processing compensation claims under this rule. The State FSA offices will make the determination as to what varieties are private and what varieties are public.

Seed Premium Not Specified in Contract

For compensation for growers, we proposed that ''the seed premium specified in the contract'' is to be used for certain compensation calculations. For example, compensation for growers under proposed § 301.89–14(d)(1)(i) would equal the contract price (CP) including the seed premium specified in the contract (SP)(contract) minus the higher of either the salvage value (SV) plus the actual seed premium received by the grower (SP)(actual), or the actual price received by the grower (AP) plus the actual seed premium received by the grower (SP)(actual). The equation for this compensation would be: Compensation rate = [CP + SP(contract)]—higher of [SV + SP(actual)] or [AP + SP(actual)].

One commenter said that this would be a problem because not all seed production contracts specify a seed premium separately. In these cases, the seed premium is included in the contract price. In response to the comment, we are making several changes to the proposed rule to accommodate these cases. Section 301.89–1 of the Karnal bunt regulations already defines ''contract price'' to mean the net price after adjustment for any premiums or discounts stated in the contract. Under this definition, seed premiums are considered part of the contract price. In the calculations, we will continue to mention the seed premium to make it clear that the seed premium must always be included in the contract price, even if it is specified in the contract separately. However, we are amending the proposed rule so that calculations will use only the contract price, with a phrase explaining that the contract price must include the seed premium if one is specified in the contract. Similarly, because the actual seed premium received by the grower may not always be specified on the receipt for the final sale of the wheat, we would make similar changes to the calculations that use ''actual price received.'' In addition, some calculations require use of either the seed premium specified in the contract or the actual seed premium received by the grower, separately from the contract price or the actual price received. In cases where there is no seed premium specified, we will use $.30 in the calculation. This represents the average seed premium received by growers in the regulated area.

For example, proposed § 301.89–14(d)(1)(i), cited above, will read as follows in this final rule: The compensation rate will equal the contract price (CP), including the seed premium if specified in the contract, minus the higher of either the salvage value (SV) plus the actual seed premium received by the grower (SP)(actual), or the actual price received by the grower (AP), including any seed premium specified on the receipt for the final sale of the wheat. If the actual seed premium received by the grower is not specified on the receipt for the final sale of the wheat, the seed premium will be set at $.30 for the compensation calculation. The equation for this compensation will be: Compensation rate = CP − higher of [SV + (SP(actual) or $.30)] or [AP].

In addition, we are making a change to the compensation provisions for seed companies. Under proposed § 301.89–14(d)(3)(i), a seed company would be eligible for compensation if the seed company honored the contract with the grower by paying the grower the full contract price, including the seed premium. For the same reasons discussed above, this final rule will state that a seed company is eligible for compensation if the seed company paid the grower the full contract price, ''including the seed premium if a seed premium is specified in the contract.''

Binned Seed Inventories

One commenter requested that we remove the requirement in proposed § 301.89–14(d)(7) that, to claim compensation, seed companies must provide a copy of the contract under which the wheat was grown. The commenter said that a common practice of seed companies is to ''bin'' bulk seed inventories, meaning that harvested seed from multiple growers (and contracts) is combined together in the same storage bin. This would make it impossible for seed companies to specifically associate a particular grower contract with a specific volume of seed. The commenter said that the requirement that seed companies must ''certify to FSA that the propagative wheat was in the seed company's possession as of March 1, 1996'' should be adequate.

We believe that the commenter is referring to seed inventories from past crop seasons that have been binned. Compensation provisions for seed companies for seed inventories from past crop seasons appear in proposed § 301.89–14(d)(3)(ii), (d)(4), (d)(5), and (e). To claim compensation for seed inventories, the proposed rule stated that seed companies must certify to FSA that the wheat was in the seed

company's possession as of March 1, 1996. The proposed rule also requires that the seed company provide a contract under which the wheat was grown. We understand that this may be difficult if seed inventories have been binned, because seed companies may not be able to tell which grower's seed was sold the previous year and which grower's seed was kept in inventory.

We have reviewed the proposed rule, and have determined that a copy of the contract under which the wheat was grown is not necessary to process compensation claims for seed inventories from past crop seasons. However, our review of the proposed rule also revealed an oversight in regard to compensation for seed companies for 1995–1996 crop season seed. Section 301.89–14(d)(3)(i) of the proposal stated that the seed company must have paid the grower the full contract price for the wheat. In this case, a copy of the contract is necessary to verify the full contract price. Proposed § 301.89–14(d)(4) (''Seed companies that sold propagative wheat for nonpropagative purposes and that have claimed compensation'') and (d)(5) (''Seed companies that sold propagative wheat for propagative purposes'') should have also contained the requirement that the seed company must have paid the grower the full contract price on the wheat seed in order to claim compensation. This requirement is necessary because if a seed company did not pay the grower the full contract price, the seed company would in effect have already been compensated for the loss in value of the wheat seed.

The failure to include this requirement in proposed § 301.89–14(d)(4) and (d)(5) was an oversight. This final rule, therefore, requires that, to claim compensation for 1995–1996 crop season wheat seed under § 301.89–14(d)(4) and (d)(5), the seed company must have paid the grower the full contract price, and must provide a copy of the contract under which the wheat was grown. For seed inventories from past crop seasons, seed companies would have already paid growers of the seed in the year it was harvested (prior to the discovery of Karnal bunt). Any variation in payment from the contract price on the inventories would not, therefore, have been related to Karnal bunt, making it unnecessary for FSA to verify the contract price. For this reason, we are removing the requirement that seed companies claiming compensation for seed inventories from past crop seasons provide a copy of the contract under which the wheat was grown.

Karnal Bunt Certificate

The proposed rule also required that claimants provide a copy of the Karnal bunt certificate issued by APHIS showing whether the wheat tested positive or negative for Karnal bunt. The salvage values used in the proposed compensation calculations vary depending on whether the wheat tested positive or negative for Karnal bunt. A Karnal bunt certificate is the most reliable documentation of the Karnal bunt test results.

One commenter said that binning (as described previously in this document) will make it difficult to associate Karnal bunt certificates with a particular volume of seed inventory. Further, the commenter said that seed inventories on hand as of March 1, 1996, were selectively sampled by APHIS for Karnal bunt testing. Therefore, not all inventories have a corresponding Karnal bunt certificate. The commenter also said this same requirement caused several weeks of delays in processing claims for 1995–1996 crop season wheat grain and that, ultimately, it will only prove what is already known, that only wheat that tested negative for Karnal bunt was allowed to be saved as seed.

This commenter addresses several issues. First, the commenter's assertion that only wheat that tested negative for Karnal bunt was allowed to be saved as seed is true. However, the proposed rule included compensation for wheat that was grown with the intention of producing certified seed, whether it tested positive or negative for Karnal bunt. If it tested positive for Karnal bunt, it was likely sold for use as animal feed, and would be compensated under proposed § 301.89–14(d)(2) for growers or § 301.89–14(d)(3) or (d)(4) for seed companies. Regardless, to determine the correct compensation amount, we would need to know whether the seed tested positive or negative for Karnal bunt.

Second, selective sampling of seed inventories was done by APHIS; however, a positive or negative status for Karnal bunt was determined for all seed inventories. For example, a lot of seed may have been composed of 2000 bags of seed. By March 1996, these bags of seed from a single lot could have potentially been held in inventory in several different locations. APHIS would have selectively sampled a number of bags of seed from the lot, in the same or in different locations. Based on the results of those samples, the entire lot would have been considered positive or negative for Karnal bunt.

Third, the commenter is correct that some delays were experienced when processing compensation for a small amount of 1995–1996 crop season wheat grain because a Karnal bunt certificate was never issued for this wheat. In the 1995–1996 crop season, a Karnal bunt certificate was issued only on wheat that was tested for movement outside of the regulated area. In a few cases in the 1995–1996 crop season, wheat grain that was considered negative based on a field test was sold within the regulated area, and so no Karnal bunt certificate was issued for it. Those cases were few, and we were able to handle them on a case-by-case basis to determine what other documentation was available to verify the Karnal bunt status of the wheat.

We agree with the commenter that a similar situation may occur when we process seed compensation claims. As described previously in regard to grain, any wheat that was intended for movement outside of the regulated area was tested for Karnal bunt and issued a Karnal bunt certificate at the time of movement. However, there are several circumstances under which wheat grown with the intention of producing certified seed would not have been issued a Karnal bunt certificate. First, because the Karnal bunt regulations prohibited the movement of wheat outside the regulated area if it was to be used as seed for planting, no Karnal bunt certificates were issued on wheat that was tested as seed. Most such seed that tested positive was sold within the regulated area for use as animal feed; the balance of positive testing seed was buried or kept in inventory. Some seed that tested negative for Karnal bunt was sold for planting within the regulated area; some was sold as grain for milling within the regulated area (if it could not be marketed as seed); some was kept in inventory. A Karnal bunt certificate would not have been issued on such seed.

We are adding several sentences to the regulations to accommodate claimants who do not have Karnal bunt certificates for their wheat. All wheat that tested positive for Karnal bunt in the 1995–1996 crop season was moved under a limited permit, even within the regulated area. The limited permits stated whether the wheat being moved was positive for Karnal bunt. We are adding a sentence to § 301.89–14(d)(7) (''To claim compensation'') to state that if the grower or seed company moved its wheat only within the regulated area, and therefore, does not have a corresponding Karnal bunt certificate for the wheat for which compensation is being claimed, a limited permit stating that the wheat was positive for Karnal bunt will be accepted in lieu of a Karnal

bunt certificate. Any wheat that was moved only within the regulated area and that was not moved under a limited permit will be considered negative for Karnal bunt.

Claims Deadline

In the proposed rule, we set the deadline for claiming compensation at on or before 60 days after the effective date of the final rule. We also said that the Administrator could extend the deadline, upon request in specific cases, when unusual or unforeseen circumstances occur which prevent or hinder a claimant from requesting compensation prior to that date.

Several commenters requested that we extend the deadline in the final rule to on or before 120 days after the effective date of the final rule. This would give growers and seed companies more time to collect the required paperwork and submit their claims to FSA. Based on our past experience in receiving compensation claims, we believe that extending the deadline would be helpful to affected growers and seed companies. It would also give the FSA offices more time to familiarize themselves with the compensation regulations for seed and straw following the effective date of the final rule. Therefore, we are extending the deadline for claiming compensation to on or before 120 calendar days after the effective date of the final rule. We will retain the option for the Administrator to extend the deadline, upon request in specific cases, when unusual or unforeseen circumstances occur which prevent or hinder a claimant from requesting compensation prior to that date.

Comments Not Resulting in Changes to the Proposed Rule

We received numerous comments requesting compensation for losses not addressed in the proposed rule, as well as requests for changes in the compensation amounts offered in the proposal. We recognize that the compensation we have offered for wheat seed and straw does not fully account for every loss or expense due to Karnal bunt in the 1995–1996 crop season. We regret that we cannot offer compensation for every loss experienced by growers and seed companies resulting from Karnal bunt. However, we believe the compensation provisions in this final rule do significantly mitigate losses due to the actions taken by USDA to control Karnal bunt. Before addressing each of the remaining comments specifically, we offer a general description of the rationale behind the Karnal bunt compensation program to date.

In the absence of measures taken by USDA to prevent the spread of Karnal bunt, the establishment of Karnal bunt in the United States would have significant consequences with regard to marketing wheat in the United States and with regard to the export of U.S. wheat to international markets. Approximately 50 percent of U.S. wheat exports are to countries that maintain restrictions against wheat imports from countries where Karnal bunt is known to occur. Upon discovering Karnal bunt in Arizona in March 1996, quarantine of affected areas and emergency actions were necessary to maintain the integrity of the wheat industry in the United States in order to preserve international markets, both for wheat within the regulated areas and for wheat produced in other parts of the country. The Karnal bunt regulations that were initially established were necessarily broad due to the lack of data available at the time as to the extent of the infestation. The discovery of Karnal bunt and subsequent quarantine and emergency actions occurred after production and marketing decisions had been made. Producers and other affected individuals had little time or ability to avoid the unexpected costs or pass those costs on to others in the marketing chain.

In previous Karnal bunt compensation rules, we have explained that compensation to mitigate certain losses has been offered to affected parties in the regulated areas in order to alleviate some of these hardships and to ensure full and effective compliance with the Karnal bunt regulatory program. The payment of compensation is in recognition of the fact that while benefits from regulation accrue to a large portion of the wheat industry outside the regulated areas, the regulatory burden falls predominantly on a small segment of the affected wheat industry within the regulated area.

APHIS identified three principles for deciding whether to provide compensation. First, compensation may be appropriate where quarantine and emergency actions cause losses over and above those that would result from the normal operation of market forces. Payment of compensation would reflect the incremental burdens of complying with regulatory requirements insofar as market forces would not otherwise impose similar or analogous costs. Second, compensation may be appropriate where parties undertake actions that confer significant benefits on others. Under this principle, payment of compensation would be intended to overcome the usual disincentives to produce such benefits. Third, compensation may be appropriate where a small number of parties necessarily bear a disproportionate share of the burden of providing such benefits. This principle rests on the widely shared belief that burden-sharing is a fundamental principle of equity.

Individual decisions regarding what specific losses to compensate and how much compensation to offer in each case were made in line with the above basic principles, which describe the goals of compensation. A top equity priority was compensation for wheat and other articles the Agency ordered destroyed or prohibited movement. Compensation amounts took into account the need to mitigate real losses caused by the regulations, so that regulated parties would not have a strong economic incentive to avoid compliance. At the same time, amounts were not set at a high enough rate to establish a ''bounty'' that would encourage fraudulent claims or behavior that would result in increases in contaminated wheat or other articles eligible for compensation.

Several comments on the proposed rule requested compensation for losses not addressed in the proposed rule, including demurrage charges on railcars, the cost of cleaning and sanitizing railcars prior to loading, declines in transporter operations due to delays caused by the Karnal bunt regulations, and extra storage costs due to the shipping delays. Commenters also requested compensation for losses incurred at various stages of seed production, including losses caused by interruption of seed increase programs, destruction and/or fumigation of research nurseries and resulting loss of germplasm, and loss of future royalties from destroyed seed varieties still in the development stages. Commenters further requested compensation for loss of the ability to ''conduct business as usual'' outside the regulated area. One commenter requested compensation for loss of export seed markets.

We have considered all of these comments very carefully, but we are not making any changes to the compensation regulations in response to these comments. Again, we recognize that the compensation we have offered does not fully account for every loss or expense due to Karnal bunt. However, we believe the compensation provisions in this final rule do significantly mitigate losses due to the actions taken by USDA to control Karnal bunt.

In regard to the request for compensation for demurrage charges on

railcars, cleaning of railcars, declines in transporter operations, and extra storage, we did not offer compensation for similar costs and losses related to wheat grain. In regard to requests for compensation for losses incurred at various stages of seed production, the loss in value of certified, market ready seed is the most quantifiable and direct loss associated with the actions taken by the Department to prevent the spread of Karnal bunt. For this reason, this rule provides compensation for loss in value of wheat seed that was intended to be sold in the 1995–1996 crop season. Many losses connected with seed in other stages of production are less quantifiable and may have been otherwise imposed by market forces, such as market demand and prices over the long term. Further, the eventual impact of these types of losses will likely be alleviated by reductions in the restrictions on the movement of seed from areas regulated for Karnal bunt.

One commenter said that the Regulatory Flexibility Analysis in the proposed rule did not include a discussion of numerous impacts on the wheat seed industry that resulted from Karnal bunt. Losses specifically referred to by the commenter are destruction of research nurseries, costs of additional required treatments, nursery seed losses of research and development companies, lost cleaning revenues of seed companies due to reduced seed sales, and carry costs paid to maintain seed inventories.

The Regulatory Flexibility Analysis that appeared in the proposed rule referenced a more detailed analysis that was published in the **Federal Register** on May 6, 1997 (62 FR 24753–24765, Docket No. 96–016–20). However, as the commenter says, neither of these analyses provides a detailed discussion of losses for which we did not intend to provide compensation. The intent of this rule is to compensate for the loss in market value of wheat seed and straw in the 1995–1996 crop season. The decision of intent was made in line with several criteria for compensation, which have been discussed earlier in this document. For this reason, the discussion of losses to the seed industry as a result of Karnal bunt were limited, both in the proposed rule and in the Regulatory Flexibility Analysis published on May 6, to losses in market value of 1995–1996 crop season wheat seed. We stated in the analysis published on May 6 that other economic losses were suffered by the seed industry due to Karnal bunt. These are mainly long-term losses, including costs to relocate wheat breeding operations outside the regulated areas and loss of breeding stock under development. The costs mentioned by the commenter would also be long term losses potentially suffered by the seed industry in the regulated area. As discussed previously in this document, the Karnal bunt compensation program for seed is intended to cover only for the loss in value of market-ready seed.

One commenter requested compensation for barley seed. The commenter said that types of planting seed other than wheat, most notably barley, were affected by the regulations for Karnal bunt; the commenter further stated that he has not been able to sell barley seed outside the regulated area since the original Karnal bunt quarantine was issued, and that his barley seed inventories had to be sold as grain.

Barley is not a regulated article under the Karnal bunt regulations. Therefore, the Karnal bunt regulations place no restrictions on the movement of barley from the regulated area. We are aware that, primarily early in the 1996 harvest, some countries (for example, Canada) prohibited the importation of anything from the regulated area that would fall under the category of small grains. Wheat, barley, and oats are small grains. These importing countries were fearful that Karnal bunt could infect or be spread by means of any small grain. However, the Karnal bunt fungus only affects wheat and wheat hybrids. Barley, oats, and other small grains are not affected by Karnal bunt. In general, importers from other countries recognized this, and growers and seed companies in the regulated area experienced little difficulty in exporting their barley and oat seed. Because the Karnal bunt regulations placed no restrictions on the movement of barley from the regulated area, we will not offer compensation for this loss.

Another commenter requested compensation for winter seed increases of wheat, barley, oats, and triticale that could not be shipped outside the regulated area. Winter seed increases are often grown in Arizona and other parts of the regulated area for seed companies in northern climates (such as Minnesota or Canada). These companies contract with growers in southern climates to grow seed during the winter months in order to increase their seed stock. Typically, winter seed increases are not certified, commercially available seed; winter seed increase programs are more likely used to increase foundation or registered seed stock.

After the 1996 harvest, some crops of winter seed increases could not be moved out of the regulated area. Because winter seed increases were not intended for sale as certified seed during the 1995–1996 crop season, we are not compensating for most of these situations. However, if the winter seed increase was for certified seed, the grower who was unable to move the seed out of the regulated area would be eligible for compensation. In regard to barley and oat seed increases, the Karnal bunt regulations did not place restrictions on the movement of such seed. For this reason, we are not offering compensation. In regard to triticale (which is a regulated article), we are not aware of any attempts to move triticale from the regulated area in the 1995–1996 crop season. Even so, winter seed increases of triticale were most likely not intended for sale as certified seed during the 1995–1996 crop season, and would therefore not be eligible for compensation.

One commenter requested that we consider compensation for losses caused by the delay in paying compensation until almost a year and a half after the losses were incurred.

Karnal bunt was first discovered in the United States in Arizona on March 8, 1996, and a quarantine and regulations were promulgated soon after. On July 5, 1996, we published an interim rule in the **Federal Register** (61 FR 35102–35107, Docket No. 96–016–7) that provided compensation to certain wheat grain growers and handlers, owners of grain storage facilities, and flour millers. Because the seed industry is complex, we needed more time to develop a compensation plan for seed growers and seed companies. Some growers and seed companies may have experienced certain kinds of losses due to uncertainty over what losses they would eventually be compensated for. We regret that such losses occurred as a result of the delay in compensation for 1995–1996 crop season seed. However, the intent of the Karnal bunt compensation program for seed is to compensate for the loss in value of seed that was intended for sale in the 1995–1996 crop season. We are not making any changes to the proposed rule based on this comment.

One commenter noted that the proposed rule estimated that the loss in seed value in the 1995–1996 crop season was between $5 and $6 million. The commenter said they have also heard USDA estimates of $10.8 million. The commenter said they would like us to clarify whether these levels are considered caps or estimates.

We stated in the preamble to the proposed rule that an estimated 1.5 million bushels of wheat seed grown in the regulated areas sustained a loss in value of between $5 and $6 million in

the 1995–1996 crop season. In the Regulatory Flexibility Act portion of the proposed rule, we said that $10.8 million has been apportioned for compensation to seed producers and companies for the loss in value of their seed. The $5 to $6 million figure is, therefore, an estimate. The $10.8 million figure is the maximum amount currently available to USDA for payments on seed compensation claims. Considering that we estimate the loss in value to be between $5 and $6 million, we anticipate that the $10.8 million apportionment will be adequate to fulfill all eligible claims for compensation.

One commenter said that growers and seed companies should not have to provide copies of Karnal bunt certificates, and also asked that we remove the requirement that growers and seed companies provide copies of Emergency Action Notifications (EANs) for wheat grown in an area that was not regulated for Karnal bunt but for which an EAN had been issued. The commenter's reason was that Karnal bunt certificates and EANs were issued by USDA, and so should not have to be provided back to USDA to claim compensation.

We are making no changes to the proposed rule based on this comment. Claims for 1995–1996 crop season wheat seed and straw will be processed by FSA. While FSA and APHIS are both a part of USDA, they do not share offices, computer systems, or recordkeeping systems. We understand that filing claims for compensation does require claimants to provide a number of documents, and collecting these requirements may seem cumbersome. However, affected entities were provided with copies of EANs and Karnal bunt certificates, and claimants should, therefore, not have difficulty in collecting these documents. At this time, the most efficient way for FSA to process compensation claims is for the claimant to provide the documents to FSA. As discussed previously in this document, this final rule will accommodate situations where a Karnal bunt certificate is not available.

One commenter said that our proposed seed margins and maximum compensation amounts are too low, and, further, that the proposed rule did not give enough information about how APHIS calculated these figures. Another commenter asked us to add a $.90 cleaning margin to the proposed seed margin amount.

We are not making any changes to the proposed rule in response to these comments. Seed margins were used in the proposed rule to calculate compensation for seed companies. We set seed margins at $4.50 for private variety seed and $2.40 for public variety seed because, according to our information, these were the average seed margins that seed companies in the regulated areas expected to receive in the 1995–1996 crop season. We set maximum compensation amounts for seed companies at $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed. We stated in the preamble to the proposed rule that these maximum compensation amounts represent the seed margins (described above) plus the maximum $2.50 compensation for nonpropagative wheat provided in the regulations. We believe that these amounts will provide reasonable compensation for losses sustained by seed companies.

Another commenter also said that the maximum compensation amount is too low. Some seed companies held on to their 1995–1996 crop season seed while awaiting publication of regulations on seed compensation. The commenter stated that, for this reason, these seed companies have been unable to sell their seed in 1997 at the market highs that existed during the summer of 1996. As a result, the commenter said that losses exceeded $7.00 per bushel (the proposed maximum compensation amount for private variety seed). The commenter recommends that the maximum compensation amounts should be revised to $14.00 per bushel for ''bagged treated seed'' and $8.00 per bushel for ''bulk non-treated seed.''

We are making no changes to the proposed rule based on this comment. As discussed previously in response to other comments, we based the proposed maximum compensation rates for seed companies on the seed margins plus the maximum $2.50 compensation for nonpropagative wheat provided in the regulations. The seed margins were determined in accordance with information we received from a variety of individuals operating in the regulated area. We believe the proposed maximum compensation amounts of $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed are appropriate for the losses that occurred in the 1995–1996 crop season, and will significantly mitigate the effects of those losses for seed companies.

One commenter cited the estimation in the proposal that 1.5 million bushels of wheat seed grown in the regulated areas sustained a loss in value of between $5 and 6 million dollars in the 1995–1996 crop season. The commenter stated that, calculated on a per bushel basis, the proposed maximum compensation of $2.50 per bushel is inadequate (i.e., 1.5 million multiplied by $2.50 only equals $3.75 million). The commenter says that to cover estimated losses, the maximum compensation amount should be raised to at least $3.00 per bushel.

This comment implies a misunderstanding of the proposed rule, and we are making no changes to the proposed rule based on this comment. The maximum compensation amount for wheat grain is $2.50 in the 1995–1996 crop season; this amount appears in the current regulations. The maximum compensation amounts we proposed for wheat seed in the 1995–1996 crop season are higher than for grain. For growers, the maximum compensation amount is $2.80 per bushel, which consists of $2.50 grain compensation plus an additional $.30 seed premium. For seed companies, the maximum compensation amounts are $7.00 per bushel for private variety seed and $4.90 per bushel of public variety seed. These amounts represent the $2.50 grain compensation plus seed margins of $4.50 per bushel for private variety seed and $2.40 per bushel for public variety seed.

We received one comment concerning the proposed compensation for loss in value of 1995–1996 straw. The commenter said that, though he normally bales and sells wheat straw, he did not bale straw after the 1996 harvest because of the Karnal bunt quarantine. The commenter requests compensation for this loss, even though in this case there are no bales of straw to weigh or count.

The proposed rule offered compensation to wheat straw producers at the rate of $1.00 per 80-pound bale or $1.25 per hundredweight. We proposed that producers would be eligible for compensation regardless of whether or not the straw is sold, but the straw must have been produced under contract. Thus, the criteria for compensation eligibility under the proposed rule requires that the straw must have been baled or weighed, and that there must be a contract for production. It would be impossible for us verify a grower's intent to produce straw if no straw was actually harvested and baled or weighed. Further, a significant portion of the proposed compensation amount for straw was intended to reimburse straw producers for the costs of harvesting and baling the straw, and moving the straw to the intended destination. If the straw was not actually harvested and baled or weighed, the grower incurred no production costs. For these reasons, we

are not making any changes to the proposed rule based on this comment.

Miscellaneous

Throughout the proposed rule, we specified maximum compensation amounts. For growers who sold wheat seed under contract, the maximum compensation amount that appears in § 301.89–14(d)(1) is $2.80 per bushel. We neglected to add the same maximum compensation amount to paragraph (d)(2) for growers who sold wheat seed for nonpropagative purposes. To correct this oversight, we are adding a sentence to paragraph (d)(2) to state that compensation will not exceed $2.80 per bushel under any circumstances.

Therefore, based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposal as a final rule with the changes discussed in this document.

Effective Date

Pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find good cause for making this rule effective less than 30 days after publication in the **Federal Register**. This rule provides compensation to individuals who experienced economic losses because of the quarantine for Karnal bunt. Immediate action is necessary to compensate these losses. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon signature.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be economically significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget (OMB).

The quarantine and regulations for Karnal bunt were established by a series of interim rules and a final rule published in the **Federal Register** on October 4, 1996. A final rule effective on April 30, 1997, and published in the **Federal Register** on May 6, 1997, amended the regulations to provide compensation for certain wheat grain growers and handlers, owners of grain storage facilities, flour millers, and participants in the National Karnal Bunt Survey in order to mitigate losses and expenses incurred in the 1995–1996 crop season because of actions taken by the Secretary of Agriculture to prevent the spread of Karnal bunt. The economic impact of the series of interim rules and the October 1996 final rule establishing the Karnal bunt quarantine and regulations, and the May 1997 final rule on compensation, was discussed in a regulatory flexibility analysis and regulatory impact analysis also published in the **Federal Register** on May 6, 1997 (62 FR 24753–24765, Docket No. 96–016–20). The analyses estimate that losses due to the discovery of Karnal bunt and the subsequent emergency regulatory actions amounted to $44 million (see table below). These losses were associated with the plowdown of fields in New Mexico and Texas that were known to be planted with Karnal bunt-infected seed, decontamination of grain storage facilities, the decline in market value of wheat grain testing either positive or negative for Karnal bunt, treatment of millfeed required by the regulations, the decline in market value of wheat seed and straw, and damages to combine harvesters due to required disinfection treatment.

In order to alleviate some of the economic hardships caused by the Karnal bunt regulations, and to ensure full and effective compliance with the regulatory program, compensation to mitigate certain losses was offered to affected parties in the regulated areas. A discussion of losses and the rationale for compensation can be found in the regulatory flexibility analysis and regulatory impact analysis cited above. Funding for compensation in the amount of $39 million has been made available through apportionment action (transfers from the Commodity Credit Corporation). Of the $39 million, $26.5 million has been allocated specifically for compensation for plowdown, decontaminating grain storage facilities, loss in value of grain, and millfeed treatment.

This final rule amends the Karnal bunt regulations by adding compensation provisions for wheat straw producers and wheat seed growers and seed companies for the loss in value of their straw and seed due to the regulations for Karnal bunt. As discussed in the regulatory impact analysis referred to above, losses to seed growers were estimated to be about $6 million; losses to straw producers were estimated at about $200,000. The compensation in this final rule for buried seed (see § 301.89–14(e)) has been increased from what was proposed, to provide an additional $2.40 per bushel for the cost of previously cleaning, treating, and bagging the seed. Based on our experience with compensating for buried grain in the 1995–1996 crop season, we expect the amount of compensation for buried seed in the 1995–1996 crop season to be less than $100,000. Given that the amount of buried seed for which compensation will be claimed is expected to be small, the inclusion of cleaning, treatment, and bagging costs in the compensation offered for buried seed does not affect the estimated loss in value of seed that appeared in the regulatory impact analysis referred to above. Other changes in this final rule primarily clarify the intent of the proposed rule, and, likewise, do not affect the estimated loss in value of seed or straw that appeared in the regulatory impact analysis.

The regulatory flexibility analysis referred to above discusses the impact of the Karnal bunt regulations on small entities. The majority of the affected entities in the regulated areas have been determined to be small entities. The table below is taken from the regulatory impact analysis, and shows estimated losses due to the Karnal bunt regulations in the 1995–1996 crop season.

ESTIMATED LOSS IN VALUE DUE TO KARNAL BUNT REGULATIONS, 1995–96 CROP YEAR

[In millions of dollars]

Action	Estimated loss in value
1. Plowdown of NM and TX fields planted with infected seed	$1.2
2. KB-positive grain diverted to animal feed market	4.2
3. KB-negative grain that experienced loss in value	[1] 28.0
4. Cost of sanitizing storage facilities	0.3
5. Millfeed treatment of KB-negative grain	1.6
6. Loss in value of seed	6.0
7. Loss in value of straw	0.2
8. Loss related to cleaning and disinfecting of combine harvesters	2.0
Total	44.0

[1] $28 million is the potential *maximum* amount of loss in value of uninfected wheat.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are

inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule have been approved by the Office of Management and Budget (OMB). The assigned OMB control numbers are 0579–0121 and 0579–0126. Some of the information collection requirements in this final rule differ from what was proposed in order to facilitate the submission of applications for compensation. However, these changes do not result in any changes in burden hours.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 7 CFR part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 147a, 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.22, 2.80, and 371.2(c).

2. In § 301.89–14, paragraph (f)(2), the reference to ''paragraph (d)'' is removed both times it appears and a reference to ''paragraph (f)'' is added in its place.

3. In § 301.89–14, paragraphs (d), (e), and (f) are redesignated as paragraphs (f), (g), and (h) respectively; and new paragraphs (d), (e), and (i) are added to read as set forth below.

§ 301.89–14 Compensation for the 1995–1996 crop season.

* * * * *

(d) *Growers and seed companies that sold wheat seed.* Growers of and seed companies with certified wheat seed or wheat grown with the intent of producing certified wheat seed are eligible for compensation for the loss in value of their seed, in accordance with this section, if the seed was grown in a State where the Secretary has declared an extraordinary emergency, and if the seed was grown in an area of that State that was regulated for Karnal bunt or under Emergency Action Notification (PPQ Form 523) for Karnal bunt during the 1995–1996 crop season.

(1) *Growers who sold wheat seed under contract.* Growers who sold 1995–1996 crop season certified wheat seed or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed are eligible to receive compensation as described in paragraphs (d)(1)(i) and (d)(1)(ii) of this section if they sold the wheat under contract to a seed company. However, compensation will not exceed $2.80 per bushel under any circumstances.

(i) If the wheat was grown under contract and a price was determined in the contract on or before March 1, 1996, and the contract price was not honored by the seed company, the compensation rate will equal the contract price (CP), including the seed premium if specified in the contract, minus the higher of either the salvage value (SV), as described in paragraph (d)(6) of this section, plus the actual seed premium received by the grower (SP)(actual), or the actual price received by the grower (AP), including any seed premium specified on the receipt for the final sale of the wheat. If the actual seed premium received by the grower is not specified on the receipt for the final sale of the wheat, the seed premium will be set at $.30 for the compensation calculation. In each case, the amount of the actual price or the salvage value of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. The equation for this compensation is: Compensation rate = CP—higher of [SV + (SP(actual) or $.30) or [AP].

(ii) If the wheat was grown under contract and a price was determined in the contract after March 1, 1996, the compensation rate will equal the estimated market price for grain (EMP) plus the seed premium if specified in the contract (SP)(contract) minus the higher of either the salvage value (SV), as described in paragraph (d)(6) of this section, plus the actual seed premium received by the grower (SP)(actual), or the actual price received by the grower (AP), including any seed premium specified on the receipt for the final sale of the wheat. If a seed premium is not specified in the contract or on the receipt for the final sale of the wheat, the seed premium that is added to the estimated market price (EMP) and the seed premium that is added to the salvage value (SV) will be set at $.30. In each case, the amount of the actual price or the salvage value of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. The equation for this compensation is: Compensation rate = [EMP + (SP(contract) or $.30)]—higher of [SV + (SP(actual) or $.30)] or [AP]. The estimated market price will be calculated by APHIS for each class of wheat, taking into account the prices offered by relevant terminal markets (animal feed, milling, or export) for the period between May 1 and June 30, 1996, with adjustments for transportation and other handling costs.

(2) *Growers who sold wheat seed for nonpropagative purposes.* Growers with 1995–1996 crop season certified wheat seed or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed are eligible to receive compensation in accordance with paragraphs (d)(2)(i) and (d)(2)(ii) of this section if they sold the wheat for nonpropagative purposes. However, compensation will not exceed $2.80 per bushel under any circumstances.

(i) If the grower has not claimed compensation under paragraph (b) of this section, the compensation rate will equal the estimated market price for grain (EMP) minus the actual price received by the grower (AP), plus the seed premium specified in the contract the grower had with a seed company (SP). If a seed premium is not specified in the contract, SP will equal $.30. In each case, the amount of the actual price of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. The equation for this compensation is: Compensation rate = (EMP − AP) + (SP or $.30). Growers who claim compensation under this paragraph may not claim compensation under paragraph (b) of this section.

(ii) If the grower has claimed compensation under paragraph (b) of this section, the compensation rate will equal the premium specified in the contract the grower had with a seed company. If no seed premium is specified in the contract, compensation will equal $.30 per bushel.

(3) *Seed companies that sold wheat seed for nonpropagative purposes and that have not claimed compensation.* Seed companies with 1995–1996 crop season certified wheat seed or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed, and seed companies with certified wheat seed inventories in their possession that were unsold as of March 1, 1996, are eligible to receive compensation as described in paragraphs (d)(3)(i) and (d)(3)(ii) of this section if the wheat seed was sold for nonpropagative purposes and if the seed company has not claimed compensation under paragraph (b) of this section. Seed companies that claim compensation under paragraph (d)(3)(i) or (d)(3)(ii) of

this section may not claim compensation under paragraph (b) of this section.

(i) If the wheat was grown in the 1995–1996 crop season, was under contract, and the seed company honored the contract by paying the grower the full contract price, including the seed premium if a seed premium is specified in the contract, the compensation rate will equal the estimated market price for grain (EMP) plus the seed margin (SM) minus the higher of either the actual price received by the seed company (AP) or the salvage value (SV), as described in paragraph (d)(6) of this section. The equation for this compensation is: Compensation rate = EMP + SM − higher of AP or SV. The seed margin is $4.50 per bushel for private variety seed and $2.40 per bushel for public variety seed. In each case, the amount of the actual price or the salvage value of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. However, compensation will not exceed $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed under any circumstances.

(ii) If a seed company had wheat inventories from past crop seasons that were unsold as of March 1, 1996, the compensation rate will equal the estimated market price for grain (EMP) plus the seed margin (SM) minus the higher of either the actual price received by the seed company (AP) or the salvage value (SV), as described in paragraph (d)(6) of this section. The equation for this compensation is: Compensation rate = EMP + SM − higher of AP or SV. The seed margin is $4.50 per bushel for private variety seed and $2.40 per bushel for public variety seed. In each case, the amount of the actual price or the salvage value of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. However, compensation will not exceed $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed under any circumstances.

(4) *Seed companies that sold wheat seed for nonpropagative purposes and that have claimed compensation.* Seed companies with 1995–1996 crop season certified wheat seed or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed, and seed companies with certified wheat seed inventories in their possession that were unsold as of March 1, 1996, are eligible to receive compensation as described in this paragraph if the wheat seed was sold for nonpropagative purposes and if the seed company has claimed compensation under paragraph (b) of this section. In addition, for claims on 1995–1996 crop season wheat, the wheat must have been grown under contract and the seed company must have honored the contract by paying the grower the full contract price, including the seed premium if a seed premium is specified in the contract. The compensation rate will equal the seed margin. The seed margin is $4.50 per bushel for private variety seed and $2.40 per bushel for public variety seed.

(5) *Seed companies that sold wheat seed for propagative purposes.* Seed companies with 1995–1996 crop season certified wheat seed or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed, and seed companies with certified wheat seed inventories in their possession that were unsold as of March 1, 1996, are eligible to receive compensation as described in this paragraph if the wheat seed was sold for propagative purposes. In addition, for claims on 1995–1996 crop season wheat, the wheat must have been grown under contract and the seed company must have honored the contract by paying the grower the full contract price, including the seed premium if a seed premium is specified in the contract. The compensation rate will equal the estimated market price for grain (EMP) plus the seed margin (SM) minus the higher of either the actual price received by the seed company (AP) or the salvage value (SV), as described in paragraph (d)(6) of this section. In each case, the amount of the actual price or the salvage value of the wheat seed will include the value of any proceeds accrued through insurance claims, judgments, or from any other source. The equation for this compensation is: Compensation rate = EMP + SM − higher of AP or SV. The seed margin is $4.50 per bushel for private variety seed and $2.40 per bushel for public variety seed. However, compensation will not exceed $7.00 per bushel for private variety seed and $4.90 per bushel for public variety seed under any circumstances.

(6) *Salvage value.* Salvage values will be determined as follows:

(i) If the wheat is positive for Karnal bunt and is sold for use as animal feed, salvage value equals $6.00 per hundredweight or $3.60 per bushel for all classes of wheat.

(ii) If the wheat is positive for Karnal bunt and is sold for a use other than animal feed, salvage value equals whichever is higher of the following: the average price paid in the region of the regulated areas where the wheat is sold for the relevant class of wheat (meaning type of wheat, such as durum or hard red winter) for the period between May 1 and June 30, 1996; or, $3.60 per bushel.

(iii) If the wheat is negative for Karnal bunt and is sold for any use, salvage value equals whichever is higher of the following: the average price paid in the region of the regulated areas where the wheat is sold for the relevant class of wheat (meaning type of wheat, such as durum or hard red winter) for the period between May 1 and June 30, 1996; or, $3.60 per bushel.

(7) *To claim compensation.* Compensation payments for claims made under paragraph (d) of this section will be issued by the Farm Service Agency (FSA). Claims for compensation must be received by FSA on or before April 22, 1998. The Administrator may extend this deadline, upon request in specific cases, when unusual and unforeseen circumstances occur which prevent or hinder a claimant from requesting compensation on or before that date. To claim compensation, a grower or seed company must submit to the local FSA county office all of the following that apply:

(i) The grower or seed company must submit a Karnal Bunt Compensation Claim form, provided by FSA;

(ii) The grower or seed company must submit a copy of the receipt for the final sale of the wheat, showing the intended use for which the wheat was sold, total bushels sold, and the total price received by the grower or seed company;

(iii) The grower or seed company must submit verification as to the actual (not estimated) weight of the wheat for which compensation is being claimed (such as a copy of a facility weigh ticket, or other verification);

(iv) The grower or seed company must submit documentation showing that the wheat is either certified seed or was grown with the intention of producing certified seed (this documentation may include one or more of the following types of documents: an application to the State seed certification agency for field inspection; a bulk sale certificate; certification tags or labels issued by the State seed certification agency; or a document issued by the State seed certification agency verifying that the wheat is certified seed);

(v) For claims on 1995–1996 crop season wheat, the grower or seed company must submit a copy of the contract under which the wheat was grown. Seed companies claiming compensation on seed inventories that were in their possession as of March 1, 1996, do not have to submit a copy of

the contract under which the wheat was grown;

(vi) A seed company that is claiming compensation for seed inventories must certify to FSA that the wheat seed was in the seed company's possession as of March 1, 1996;

(vii) The grower or seed company must submit a copy of the Karnal bunt certificate issued by APHIS that shows the Karnal bunt test results; *provided that,* if a grower or seed company moved its wheat only within the regulated area, and therefore, does not have a corresponding Karnal bunt certificate for the wheat for which compensation is being claimed, a limited permit stating that the wheat was positive for Karnal bunt will be accepted in lieu of a Karnal bunt certificate. Any wheat that was moved only within the regulated area and that was not moved under a limited permit will be considered negative for Karnal bunt;

(viii) If the wheat was grown in an area that is not a regulated area, but for which an Emergency Action Notification (PPQ Form 523) (EAN) for Karnal bunt has been issued, the grower or seed company must submit a copy of the EAN.

(e) *Other compensation for seed companies.* Seed companies are also eligible to receive compensation under the following circumstance: If a seed company has 1995–1996 crop season certified wheat seed, or 1995–1996 crop season wheat grown with the intent of producing certified wheat seed, that cannot be sold for use as grain or animal feed because it was previously cleaned, treated, and bagged, the compensation rate will equal $9.40 per bushel for private variety seed and $7.30 per bushel for public variety seed. Compensation will only be paid if the seed company has destroyed the wheat by burying it in a sanitary landfill or other site that has been approved by APHIS. The compensation will be issued by the Farm Service Agency (FSA). Claims for compensation must be received by FSA on or before April 22, 1998. The Administrator may extend this deadline, upon request in specific cases, when unusual and unforeseen circumstances occur which prevent or hinder a claimant from requesting compensation on or before that date. To claim compensation, a seed company must submit to the local FSA county office all of the following that apply:

(1) The seed company must submit a Karnal Bunt Compensation Claim form, provided by FSA;

(2) The seed company must submit verification of how much wheat was buried, in the form of a receipt from the sanitary landfill or verification signed by an APHIS inspector;

(3) The seed company must submit documentation showing that the wheat is either certified seed or was grown with the intention of producing certified seed (this documentation may include one or more of the following types of documents: an application to the State seed certification agency for field inspection; a bulk sale certificate; certification tags or labels issued by the State seed certification agency; or a document issued by the State seed certification agency verifying that the wheat is certified seed);

(4) For claims on 1995–1996 crop season wheat that was buried, the seed company must submit a copy of the contract under which the wheat was grown. Seed companies claiming compensation on buried seed inventories that were in their possession as of March 1, 1996, do not have to submit a copy of the contract under which the wheat was grown;

(5) A seed company that is claiming compensation for seed inventories that were buried must certify to FSA that the wheat seed was in the seed company's possession as of March 1, 1996;

(6) If the wheat was grown in an area that is not a regulated area, but for which an Emergency Action Notification (PPQ Form 523)(EAN) for Karnal bunt has been issued, the seed company must submit a copy of the EAN.

* * * * *

(i) *Wheat straw producers.* Producers of wheat straw (either growers who bale their own wheat straw or individuals contracted by growers to remove wheat straw from the growers' fields) made from wheat grown in the regulated areas in the 1995–1996 crop season are eligible to receive compensation on a one-time-only basis at the rate of $1.00 per 80-pound bale or $1.25 per hundredweight. Producers are eligible for compensation regardless of whether or not the straw is sold, but the straw must have been produced under contract. Compensation payments will be issued by the Farm Service Agency (FSA). To claim compensation, a wheat straw producer must submit a Karnal Bunt Compensation Claim form, provided by FSA, and a copy of the contract under which the wheat straw was produced to the local FSA county office. Claims for compensation must be received by FSA on or before April 22, 1998. The Administrator may extend this deadline, upon request in specific cases, when unusual and unforeseen circumstances occur which prevent or hinder a claimant from requesting compensation prior to that date.

Done in Washington, DC, this 23rd day of December 1997.

Craig A. Reed,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 98–550 Filed 1–8–98; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 212, 214, 235, and 274a

[INS No. 1611–93]

RIN 1115–AB72

Temporary Entry of Business Persons Under the North American Free Trade Agreement (NAFTA)

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule implements provisions of the North American Free Trade Agreement (NAFTA) by amending the Immigration and Naturalization Service (Service) regulations establishing procedures for the temporary entry of Canadian and Mexican citizen business persons into the United States. This rule will facilitate temporary entry on a reciprocal basis among the United States, Canada, and Mexico, while recognizing the continued need to ensure border security and to protect indigenous labor and permanent employment in all three countries.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Helen V. deThomas, Adjudications Officer, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514–5014.

SUPPLEMENTARY INFORMATION: On December 17, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103–182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA entered into force on January 1, 1994.

This final rule pertains to Canadian and Mexican citizen temporary visitors for business seeking classification under section 101(a)(15)(B) of the Immigration

and Nationality Act (Act), to Canadian and Mexican citizen treaty traders and treaty investors seeking classification under section 101(a)(15)(E) of the Act, to Canadian and Mexican citizen intracompany transferees seeking classification under section 101(a)(15)(L) of the Act, and to Canadian and Mexican citizens engaging in activities at a professional level seeking classification under section 214(e) of the Act, as amended by section 341(b) of the NAFTA Implementation Act.

This rule sets forth the procedures for the temporary entry of Canadian and Mexican citizen business persons as provided in Chapter 16 of the NAFTA and Subtitle D of Title III of the NAFTA Implementation Act. Chapter 16 of the NAFTA, Subtitle D of Title III of the NAFTA Implementation Act, and this rule reflect the special trading relationship now established among the United States, Canada, and Mexico, and recognize the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for such temporary entry. At the same time, full recognition is given to the continued need to ensure border security while protecting the domestic labor force and permanent employment in all three countries.

On December 30, 1993, the Service published an interim rule with request for comments in the **Federal Register** at 58 FR 69205, implementing the NAFTA. Interested persons were invited to submit comments to the Service on or before February 28, 1994.

Discussion of Comments

The Service received comments from three commenters relating to the interim rule. One of the commenters requested that additional medical occupations be added to the list of professions contained in Appendix 1603.D.1. Although the Service appreciates this comment, this final rule is not the proper forum in which to discuss whether an occupation should be added to the list of professions contained in Appendix 1603.D.1. The determination as to whether an occupation should be added to Appendix 1603.D.1 is made in a separate procedure apart from this final rule and involves consultations, on the domestic side, with other government agencies belonging to the NAFTA Temporary Entry Working Group. See Article 1605 of the NAFTA. In addition, the process involves consultation with representatives of the Canadian and Mexican governments and appropriate U.S. Congressional subcommittees. See NAFTA Implementation Act Statement of Administrative Action at page 183. If a decision is made to add occupations to the Appendix 1603.D.1, the Service will notify the public by publishing a notice of proposed rulemaking in the **Federal Register**.

The second commenter, the U.S. Coast Guard, recommended that a provision for the temporary entry of spill response specialists and laborers be added as a new class of business activity under 8 CFR 214.2(b)(4)(i). Such a provision, the Coast Guard stated, would allow pollution response workers lawful entry to the United States in conjunction with an actual response or response preparedness exercise under the Joint Marine Pollution Contingency Plans in effect among the NAFTA parties. The Service's regulations at 8 CFR 214.2(b)(4) provide for the entry in B–1 nonimmigrant classification of citizens of Mexico and Canada pursuant to Section A of Annex 1603 of the NAFTA. Although Appendix 1603.A.1 to Annex 1603 of the NAFTA provides a detailed list of specific types of activities in which a B–1 business visitor seeking entry under the NAFTA may engage, it is not intended to be exhaustive. As stated in the existing provision already available at 8 CFR 214.2(b)(4)(ii), nothing precludes a citizen of Mexico or Canada from seeking entry to engage in business activities which are not included within Appendix 1603.A.1, provided he or she meets all requirements for entry as a business visitor under section 101(a)(15)(B) of the Act. Whether a particular type of activity falls within this provision, however, will depend on the specific facts, and will require an analysis of the precise activities the alien intends to perform in this country. For this reason, the Service cannot determine in advance whether a Canadian or Mexican citizen wishing to engage in the activities described by the commenter would be consistent with section 101(a)(15)(B) of the Act. Accordingly, the Service will not adopt the commenter's suggestion because no special amendment is needed to 8 CFR 214.2(b)(4) for entry in B–1 nonimmigrant classification.

The third commenter was the American Immigration Lawyers' Association (AILA), a bar association representing over 3,600 lawyers and law professors practicing and teaching in the field of immigration and nationality law. The following discussion addresses the six issues raised by AILA in its comments and provides the Service's position on those issues. The discussion also indicates the revisions adopted in the final rule based on the comments.

Effect of a Strike on a Treaty Trader or Investor Admitted Under the Provisions of the NAFTA—8 CFR 214.2(e)(22)

AILA suggested that the Service adopt regulatory language which would provide E nonimmigrant aliens with the same safeguards which both the L–1 and TN nonimmigrant aliens enjoy regarding labor disputes or work stoppages. Specifically, AILA noted that the regulations relating to the L–1 and TN nonimmigrant classifications state that the alien's participation in a labor dispute or work stoppage is not violative of his or her nonimmigrant classification. The Service agrees with this suggestion and will amend the language at 8 CFR 214.2(e)(22) to reflect that E nonimmigrants admitted under the NAFTA are subject to the same labor dispute and work stoppage rules as TN and NAFTA L–1 nonimmigrants.

Engage in Business Activities at a Professional Level—8 CFR 214.6(b)

AILA suggested that the definition of the term ''engage in business activities at a professional level'' should be amended to allow self-employed individuals (that is, individuals who are self-employed in Canada or Mexico) to obtain TN classification even if the alien will be employed by a U.S. corporation which is wholly-owned by the alien, ''where such employment is not for self-subsistence and a true employment situation exists.'' AILA argued that the NAFTA does not preclude such a modification and that these aliens were admitted to the United States in the past under the United States-Canada Free-Trade Agreement (CFTA).

The Service cannot adopt this comment because its adoption would clearly conflict with the intent of the NAFTA Implementation Act. Annex 1603, section D, provides for the entry of a citizen of a Party country seeking to render professional-level services for an entity in another Party country. As stated in the NAFTA Implementation Act Statement of Administrative Action at page 178, ''Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed.'' It is the position of the Service that a professional may not avoid the bar to self-employment merely by adopting the corporate form. The test in all cases is whether the alien, in substance, is seeking admission for the purpose of establishing, or performing work for a business or practice that the alien has already established, in which he or she will be self-employed.

It should be noted that the bar on establishment of a business or practice in which the Canadian or Mexican citizen will be self-employed is in no way intended to limit a Canadian or Mexican citizen who is self-employed abroad from entering this country in, changing status to, or extending nonimmigrant stay in, TN classification pursuant to a pre-arranged agreement with a third party that is not substantively the same as, or de facto controlled by, the alien. On the other hand, a Canadian or Mexican citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner.

It should also be noted that, although the issue of self-employment was never specifically addressed under the regulations promulgated by the Service pursuant to the CFTA Implementation Act, the bar on establishment of a business or practice in which the professional will be self-employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar merely clarifies existing law.

Finally, the Service notes that, under Chapter 16 of the NAFTA, Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in this country may seek classification under section 101(a)(15)(E) of the Act. See NAFTA Implementation Act Statement of Administrative Action at page 178. In this regard, Annex 1603, section B, which deals with ''traders and investors,'' establishes the appropriate category of temporary entry for a citizen of a Party country seeking to develop and direct investment operations in another Party country.

Temporary Entry—8 CFR 214.6(b)

AILA suggested that the Service apply the concept of ''dual intent'' to the TN classification to accommodate business persons who may be adversely affected by the filing of a permanent residence petition or an application for a labor certification in their behalf. The concept of ''dual intent'' allows certain nonimmigrant aliens to retain nonimmigrant status even where the alien may have made application for permanent residence or where an employer has filed an application for a labor certification or employment-based petition in his or her behalf.

This suggestion cannot be adopted because it is clearly inconsistent with Article 1608 of the NAFTA. For purpose of Chapter 16 of the NAFTA, Article 1608 of the NAFTA defines ''temporary entry'' specifically as ''entry into the territory of a Party by a business person of another Party *without the intent to establish permanent residence.*'' (Emphasis added)

In order to further explain the temporary nature of a TN alien's entry into the United States, the definition of ''temporary entry'' has been clarified in the final rule providing that while there is no specific limit on the total period of time a citizen of Canada or Mexico may remain in TN status, the TN classification is nevertheless for persons seeking temporary entry without the intent to establish permanent residence. This clarified definition of ''temporary entry'' comports with that used by the Department of State and the intent of the Article 1608 of the NAFTA. See 22 CFR 41.59(c) (December 28, 1993).

Licensure for TN Classification—8 CFR 214.6(d)(2)(iv)

AILA stated that it appears from the language of the interim regulation that the licensure requirements at 8 CFR 214.6(d)(2)(iv) only apply to Mexican citizens and not to Canadian citizens since these requirements are listed under the heading ''Classification of citizens of Mexico as TN professionals under the NAFTA.'' AILA stated that in fairness, the Service should apply equal requirements to both Canadian and Mexican citizens, and that, therefore, the Service should amend the interim rule accordingly. The Service agrees with the AILA that the licensure requirements for Canadian and Mexican citizens for purposes of temporary entry under the NAFTA should be, and notes that the requirements are, in fact, the same. In both instances, the Canadian or Mexico prospective TN professional must be in possession of the appropriate license, if required by law, to perform the duties of the profession in the location where the alien will be employed. Compare 8 CFR 214.6(d)(2) with 214.6(e)(3)(ii). The Service's discussion of the licensure requirements for Mexican citizens in a separate regulatory provision than those for Canadian citizens should in no way be interpreted to imply that there exist different licensure requirements for these two groups of person. The Service discusses classification of Mexican citizens as TN professionals separately from that of their Canadian counterparts for clarity of presentation and to reflect the fact that, at this time, a petition is required for Mexican citizens seeking TN classification, while no such requirement exists for Canadian citizens. See NAFTA Annex 1603(D)(5)(b); NAFTA Appendix 1603.D.4. Accordingly, Mexican citizen professionals must present evidence of licensure, if necessary to perform the intended duties of the profession, at a different stage of the process than their Canadian counterparts. For these reasons, the Service will not adopt AILA's suggestion.

Extension of Stay—8 CFR 214.6(h)(1) and (2)

The regulation requires the extensions of stay for TN nonimmigrant aliens be filed on Form I–129 at the Nebraska Service Center. AILA suggested that this provision be amended to allow Ports-of-Entry to adjudicate extensions of stay. The Service will not adopt this suggestion because the Service has been moving towards the centralized adjudication of all petitions and applications at service centers in order to better serve the public. Such centralization will ensure consistency in the decision-making process, and will ensure that all applications and petitions are adjudicated in a timely fashion throughout the country. Although the Service realizes that some aliens may be required to travel and leave the country on short notice, proper planning by the alien's employer should minimize disruption of the alien's employment. In addition, the Service has established a procedure at the Nebraska Center to expedite the processing of applications and petitions in those situations where the petitioner establishes a bona fide need for such action. Ports-of-Entry, therefore, will remain responsible for processing applicants for TN admission to the United States, but not for processing applications for extensions of stay.

Representation and Appearance—8 CFR Part 292

AILA suggested that 8 CFR 214.6 should be amended to specify that the provisions of 8 CFR part 292, which pertain to the representation of aliens who are in Service proceedings, apply to foreign consultants who enter the United States under the NAFTA. AILA stated that such a change ''would enhance alien consumer protection from unscrupulous consultants who might seek to take advantage of aliens under the new TN program.'' The Service will not adopt this suggestion because 8 CFR part 292 clearly applies to all of Title 8 of the Code of Federal Regulations, including professionals admitted pursuant to 8 CFR 214.6, who may represent persons in proceedings before the Service. The Service believes that the provisions at 8 CFR part 292 are

fully adequate to protect aliens from the actions of any unscrupulous legal consultants without needing to restate them in 8 CFR 214.6.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that the rule will not have a significant economic impact on a substantial number of small entities. This certification is made in light of the fact that this regulation substantially retained the standards for the admission of Canadians formerly provided for under the CFTA and those set forth in the interim rule. Moreover, under this regulation, only 5,500 petitions may initially be approved annually in behalf of citizens of Mexico seeking classification as TN professionals. Additionally, based on the Service's experience to date, it is anticipated that only a limited number of citizens of Mexico will seek classification as treaty traders and investors pursuant to this regulation.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This final rule meets the applicable standards set forth in sections 3(a) and 3(b) of E.O. 12988.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and record keeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign Officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 8 CFR parts 103, 212, 214, 235, 274a, which was published at 58 FR 69205–69219 on December 30, 1993, is adopted as a final rule with the following changes:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (e) (22), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(e) * * *

(22) *Denial of treaty trader or treaty investor status to citizens of Canada or Mexico in the case of certain labor disputes.* (i) A citizen of Canada or Mexico may be denied E treaty trader or treaty investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:

(A) The Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers in the alien's occupational classification is in progress at the place where the alien is or intends to be employed; and

(B) Temporary entry of that alien may affect adversely either:

(*1*) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(*2*) The employment of any person who is involved in such dispute.

(ii) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other E nonimmigrants; and

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers.

(iii) Although participation by an E nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(iv) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (e)(22)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny entry to an applicant for E status.

* * * * *

3. Section 214.6 is amended by revising paragraph (b) to read as follows:

§ 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

* * * * *

(b) *Definitions.* As used in this section, the terms:

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.

Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.

Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.

* * * * *

Dated: August 13, 1997.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 98–601 Filed 1–8–98; 8:45 am]

BILLING CODE 4410–10–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AF73

Codes and Standards; IEEE National Consensus Standard, Withdrawal; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on December 23, 1997 (62 FR 66977). This action is necessary to correct an erroneous **Federal Register** citation.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Acting Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Washington, D.C. 20555–0001, telephone (301) 415–7163.

SUPPLEMENTARY INFORMATION: On page 66977, in the first column, in the last paragraph, in the second line, **Federal Register** citation ''(62 FR 53933)'' is corrected to read ''(62 FR 53932)''.

Dated at Rockville, Maryland, this 6th day of January 1998.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Acting Chief Rules and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 98–533 Filed 1–8–98; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–ANE–16; Amendment 39–10270; AD 98–01–06]

RIN 2120–AA64

Airworthiness Directives; Precision Airmotive Corporation Carburetors

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to Precision Airmotive Corporation carburetors, that currently requires the inspection of those carburetors equipped with a two-piece venturi at each annual inspection to determine if the primary venturi is loose or missing, and requires the replacement of a two-piece venturi with a one-piece venturi within 48 months after the effective date of the existing AD. This amendment eliminates the requirement to install a one-piece venturi, and allows the installation of a one-piece venturi on affected carburetors as an optional terminating action; or, requires repetitive inspections of a two-piece venturi on affected carburetors. This AD also adds an additional carburetor model, and requires the installation of a new fuel nozzle on certain carburetors when a one-piece venturi is installed. This amendment is prompted by service difficulty reports describing engines that fail to attain rated power, run rough, or experience power loss after installation of a one-piece venturi in accordance with the existing AD, and by incidents of forced landings of aircraft powered by engines modified to comply with the existing AD. The actions specified by this AD are intended to prevent disruption of fuel flow to the engine resulting in failure to attain rated power, power loss in flight, and forced landings.

DATES: Effective February 13, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 13, 1998.

ADDRESSES: The service information referenced in this AD may be obtained from Precision Airmotive Corporation, 3220 100th Street SW., Building E, Everett, WA 98204; telephone (206) 353–8181, fax (206) 348–3545. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA 01803–5299; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Richard Simonson, Aerospace Engineer, Seattle Aircraft Certification Office, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW, Renton, WA 98055–4056; telephone (425) 227–2597, fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding airworthiness directive (AD) 93–18–03, Amendment 39–8688

(58 FR 50843, September 29, 1993), which is applicable to Precision Airmotive Corporation (formerly Facet Aerospace Products Corporation and Marvel-Schebler Corporation) Model MA–3A, MA–3PA, MA–3SPA, and MA–4SPA carburetors equipped with two-piece venturis, was published in the **Federal Register** on August 1, 1997 (62 FR 41321). That action proposed to require repetitive inspections of two-piece venturis, and to allow installation of one-piece venturis as an optional terminating action for those repetitive inspections provided certain conditions are met.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One commenter (the manufacturer) states that the AD should not allow indefinite repetitive inspections, with no end date for accomplishment of the terminating action (i.e. installation of a one-piece venturi), since the terminating action is necessary and there has been no sound technical basis established for abandonment of the required date for compliance. The FAA does not concur. The FAA has determined that the terminating action should be optional, based upon the engines reported running rough with the one-piece venturi. Continued repetitive inspections of the two-piece venturi or replacement with a one-piece venturi will provide an acceptable level of safety.

The commenter also states that by allowing the reinstallation of two-piece venturis, non-serviceable parts might be used, particularly since the manufacture of these parts was discontinued in the late 1980s. If reinstallation of a two-piece venturi must be allowed, the commenter believes that this option should be viewed as an Alternative Method of Compliance (AMOC) and not as an option within the AD itself. The FAA does not concur. The FAA has determined that the risk of installing non-serviceable two-piece venturis is no greater than installing any other non-serviceable parts. Obviously, if there are no serviceable two-piece venturis available, the operator must continue operation of the one-piece venturi and install a new fuel nozzle in accordance with paragraphs (c), (d), or (e), as applicable, of this AD. Since the options of installing a two-piece venturi and maintaining continuing inspections, or installing a new fuel nozzle on carburetors with one-piece venturis when engines run rough or do not obtain rated power both result in equivalent levels of safety, the FAA has determined that both options should be presented in the AD instead of relegating the installation of a two-piece venturi to an AMOC.

Two commenters concur with the AD as proposed.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The FAA estimates that 30,000 carburetors installed on aircraft of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per engine to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $75 per carburetor. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $5,850,000.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–8688 (58 FR 50843, September 29, 1993) and by adding a new airworthiness directive, Amendment 39–10270, to read as follows:

98–01–06 Precision Airmotive Corporation: Amendment 39–10270. Supersedes airworthiness directive (AD) 93–18–03, Amendment 39–8688.

Applicability: Precision Airmotive Corporation (formerly Facet Aerospace Products Corporation and Marvel-Schebler Corporation) Model MA–3, MA–3A, MA–3PA, MA–3SPA, MA–4SPA carburetors installed on but not limited to Textron Lycoming O–235, O–290, and O–320 series engines, and Teledyne Continental Motors A–65, A–75, C–75, C–85, C–90, C–115, C–125, C–145, O–200, and O–300 series engines. These engines are installed on, but not limited to, normally aspirated reciprocating engine powered aircraft manufactured by Cessna, Piper, Raytheon, and Mooney.

Note 1: This AD applies to each carburetor identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For carburetors that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (f) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent disruption of fuel flow to the engine resulting in failure to attain rated power, power loss in flight, and forced landings, accomplish the following, accomplish the following:

(a) For Precision Airmotive Corporation Model MA–3A, A–3PA, MA–3SPA, and MA4–SPA carburetors:

(1) If not previously accomplished, prior to further flight, inspect the carburetor to determine if a two-piece venturi is installed. Carburetors that have the letter ''V'' stamped or etched on the lower portion of the data plate, or that have a black, yellow, or blue data plate showing the Precision Airmotive Corporation name and logo, or that have a black Facet Aerospace Products data plate with a serial number beginning with 750, are already equipped with a one-piece venturi and no further action is necessary provided the engine does not subsequently run rough or experience power loss.

(2) If a two-piece venturi is installed, inspect the carburetor at each annual, 100-hour, or progressive inspection, to determine if the primary venturi is loose or missing. If either of these conditions is found, prior to

further flight, repair the carburetor by installing a serviceable two-piece venturi or by installing a one-piece venturi in accordance with Precision Airmotive Service Bulletin (SB) No. MSA–2, Revision 1, dated November 11, 1991, Revision 2, dated December 28, 1993, or Revision 3, dated October 10, 1995. Installing a one-piece venturi constitutes terminating action for the repetitive inspection requirements of this paragraph.

(3) If a one-piece venturi is already installed, or installed in accordance with sub-paragraph (2) of this paragraph, and the engine subsequently runs rough or experiences power loss, accomplish either of the following:

(i) Modify the carburetor in accordance with paragraphs (c), (d) or (e) of this AD, as applicable; or

(ii) Install a carburetor containing a two-piece venturi and resume the repetitive inspections required by paragraph (a)(2) of this AD.

(b) For Precision Airmotive Corporation Model MA–3 series carburetors: at the next annual, 100-hour, or progressive inspection, whichever occurs first, after the effective date of this AD, inspect the carburetor to determine if the primary venturi is loose or missing. If either of these conditions are found, prior to further flight, repair the carburetor by installing a serviceable two-piece venturi, or replace the entire carburetor with a serviceable carburetor. Repeat this inspection at each annual, 100-hour, or progressive inspection.

(c) For Precision Airmotive Corporation Model MA–3SPA series carburetors with part numbers (P/N) 10–4894 or 10–4115–1, installed on Teledyne Continental Model O–200A series engines modified on or after the effective date of this AD by installing a one-piece venturi, install a new fuel nozzle in accordance with Precision Airmotive SB MSA–7, dated September 30, 1994, at the time of installation of the one-piece venturi.

(d) For Precision Airmotive Corporation Model MA–3SPA series carburetors with P/Ns 10–4895, 10–4439, or 10–3237, installed on Teledyne Continental Model O–300 or C–145 series engines modified on or after the effective date of this AD by installing a one-piece venturi, install a new fuel nozzle in accordance with Precision Airmotive SB No. MSA–8, dated July 10, 1995, at the time of installation of the one-piece venturi.

(e) For Precision Airmotive Corporation Model MA–3SPA series carburetors with P/Ns 10–4240, 10–4252, 10–4252–1, or 10–4457, installed on Teledyne Continental Model C–75, C–85, or C–90 series engines modified on or after the effective date of this AD by installing a one-piece venturi, install a new fuel nozzle in accordance with Precision Airmotive SB No. MSA–9, dated October 10, 1995, at the time of installation of the one-piece venturi.

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle Aircraft Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Seattle Aircraft Certification Office.

(g) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the inspection requirements of this AD can be accomplished.

(h) The actions required by this AD shall be done in accordance with the following Precision Airmotive Corporation SBs:

Document No.	Pages	Revision	Date
MSA–2 ..... Total Pages: 3.	1–3	1	November 11, 1991.
MSA–2 ..... Total Pages: 3.	1–3	2	December 28, 1993.
MSA–2 ..... Total Pages: 4.	1–4	3	October 10, 1995.
MSA–7 ..... Total Pages: 3.	1–3	Original	September 30, 1994.
MSA–8 ..... Total Pages: 3.	1–3	Original	July 10, 1995.
MSA–9 ..... Total Pages: 3.	1–3	Original	October 10, 1995.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Precision Airmotive Corporation, 3220 100th Street SW., Building E, Everett, WA 98204; telephone (206) 353–8181, fax (206) 348–3545. Copies may be inspected at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) This amendment becomes effective on February 13, 1998.

Issued in Burlington, Massachusetts, on December 23, 1997.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 98–70 Filed 1–8–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–CE–66–AD; Amendment 39–10273; AD 98–01–10]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A., Models EMB–110P1 and EMB–110P2 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 87–03–10, which currently requires repetitively inspecting the fillet area of both the left and right main landing gear (MLG) wheel axle/piston tube support junction area for cracks on Empresa Brasileira de Aeronautica S.A. (EMBRAER) Models EMB–110P1 and EMB–110P2 airplanes, and requires replacing any MLG wheel axle/piston tube assembly where a crack is found. AD 87–03–10 also provided the option of reworking this area when no cracks were found as terminating action for the repetitive inspections. The Federal Aviation Administration's policy on aging commuter-class aircraft is to eliminate or, in certain instances, reduce the number of certain repetitive short-interval inspections when improved parts or modifications are available. This AD requires the following on EMBRAER Models EMB 110–P1 and EMB 110–P2 airplanes that do not have an ''R'' stamped on both the left and right MLG wheel axle/piston tube assembly end-piece: inspecting (one-time) the fillet area of each MLG wheel axle/piston tube support junction area to assure that the area is free of cracks, replacing any MLG wheel axle/piston tube assembly if a crack is found, and reworking this area on both the left

and right MLG's, as terminating action for the repetitive inspections that are currently required by AD 87–03–10. The actions specified in this AD are intended to prevent failure of the MLG wheel axle/piston tube assembly caused by fatigue cracking, which could result in loss of control of the airplane during landing operations.

DATES: Effective February 9, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 9, 1998.

ADDRESSES: Service information that applies to this AD may be obtained from EMBRAER, Av. Brig Faira Lima 2170, 12227–901, Sao Jose dos Campos–SP, Brazil. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket 96–CE–66–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis Jackson, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, Campus Building, 1701 Columbia Avenue, suite 2–160, College Park, Georgia 30337–2748; telephone (404) 305–7358; facsimile (404) 305–7348.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to EMBRAER Models EMB–110P1 and EMB–110P2 airplanes that do not have an ''R'' stamped on both the left and right MLG wheel axle/piston tube assembly end-piece was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on March 12, 1997 (62 FR 11384). The NPRM proposed to supersede AD 87–03–10 with a new AD that would require inspecting (one-time) the fillet area of both the left and right MLG wheel axle/piston tube support junction area to assure that the area is free of cracks, replacing any MLG wheel axle/piston tube assembly if a crack is found, and reworking this area on both the left and right MLG's, as terminating action for the repetitive inspections that are currently required by AD 87–03–10. Airplanes that have an ''R'' stamped on both the left and right MLG wheel axle/piston tube assembly end-piece either (1) have a design configuration that is different from the unsafe condition specified in this document; or (2) the airplanes already have both the left and right MLG wheel axle/piston tube assembly reworked. Accomplishment of the proposed inspection as specified in the NPRM would be in accordance with EMBRAER Service Bulletin (SB) No. 110–032–0068, dated December 20, 1985. Accomplishment of the proposed rework as specified in the NPRM would be required in accordance with EMBRAER SB No. 110–032–0071, Change No. 01, dated June 21, 1988.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Cost Impact

The FAA estimates that 50 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 22 workhours (inspection: 8 workhours; rework: 14 workhours) per airplane to accomplish this AD, and that the average labor rate is approximately $60 an hour. There is no cost for parts to accomplish this AD. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $66,000.

The initial inspection cost of this AD is the same as that required by AD 87–03–10. The difference in the inspection costs of this AD and AD 87–03–10 is that this AD does not require the repetitive inspections and AD 87–03–10 currently requires repetitive inspections every 1,000 landings. The required rework eliminates the repetitive inspection requirement, and is optional in AD 87–03–10.

The FAA does not have any way of determining how many airplanes have an ''R'' stamped on both the left and right MLG wheel axle/piston tube support junction area end-piece and have these areas reworked, and, therefore already have the actions of this AD accomplished. The affected airplanes are no longer in production with few airplanes being operated in the United States. Since AD 87–03–10 provided the option of reworking the area on both the left and right MLG's as terminating action for the repetitive inspections, the FAA believes that most of the operators will have accomplished the rework and will not be affected by this AD.

The FAA's Aging Commuter Aircraft Policy

The actions required by this AD are consistent with the FAA's aging commuter aircraft policy, which briefly states that, when a modification exists that could eliminate or reduce the number of required critical inspections, the modification should be incorporated. This policy is based on the FAA's determination that reliance on critical repetitive inspections on airplanes utilized in commuter service carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections. In determining what inspections are critical, the FAA considers (1) the safety consequences of the airplane if the known problem is not detected by the inspection; (2) the reliability of the inspection such as the probability of not detecting the known problem; (3) whether the inspection area is difficult to access; and (4) the possibility of damage to an adjacent structure as a result of the problem.

The alternative to reworking the fillet area of the left and right MLG wheel axle/piston tube support junction area is to rely on the repetitive inspections currently required by AD 87–03–10 to detect cracks in this area.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is

contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Airworthiness Directive (AD) 87–03–10, Amendment 39-5524, and by adding a new AD to read as follows:

98–01–10 Empresa Brasileira De Aeronautica S.A: Amendment 39–10273; Docket 96–CE–66–AD. Supersedes AD 87–03–10, Amendment 39–5524.

Applicability: Models EMB–110P1 and EMB–110P2 airplanes, all serial numbers, certificated in any category, that do not have an ''R'' stamped on both the left and right main landing gear (MLG) wheel axle/piston tube assembly end-piece.

Note 1: Airplanes that have an ''R'' stamped on both the left and right MLG wheel axle/piston tube assembly end-piece either (1) have a design configuration that is different from the unsafe condition specified in this AD; or (2) already have both the left and right MLG wheel axle/piston tube support junction area reworked. EMBRAER Service Bulletin (SB) No. 110–032–0071, Change No. 01, dated June 21, 1988, includes procedures for this rework, including stamping an ''R'' on both the left and right MLG wheel axle/piston tube assembly end-piece.

Note 2: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required within the next 100 landings after the effective date of this AD, unless already accomplished.

Note 3: If the number of landings is unknown, hours time-in-service (TIS) may be used by multiplying the number of hours TIS by 0.50. If hours TIS are utilized to calculate the number of landings, this would make the AD effective ''within the next 200 hours TIS after the effective date of this AD.''

To prevent failure of a MLG wheel axle/piston tube assembly caused by fatigue cracking, which could result in loss of control of the airplane during landing operations, accomplish the following:

(a) Inspect, using either eddy current, dye penetrant, or magnetic particle methods, the fillet area in both the left and right MLG wheel axle/piston support junction area for cracks in accordance with the instructions contained in EMBRAER SB No. 110–032–0068, dated December 20, 1985. Included in this SB is ERAM SB No. 32–22, which includes procedures for accomplishing this inspection. If any cracks are found, prior to further flight, replace the MLG wheel axle/piston tube assembly with an uncracked assembly.

(b) Visually inspect the fillet radius in both the left and right MLG wheel axle/piston tube support junction area to determine whether the profile requires rework. Accomplish the inspection in accordance with the instructions in ERAM SB No. 32–25, which is part of EMBRAER SB No. 110–032–0071, Change No. 01, dated June 21, 1988.

(1) If the profile of the area of each MLG is like the one presented in image (A) Figure 1 of ERAM SB No. 32–25, which is part of EMBRAER SB No. 110–032–0071, Change No. 01, dated June 21, 1988, prior to further flight, polish the junction area using a fine grit abrasive cloth and stamp the letter ''R'' on the MLG wheel axle/piston tube assembly end-pipe.

(2) If the profile of the area of each MLG is like the one presented in image (B) Figure 1 of ERAM SB No. 32–25, which is part of EMBRAER SB No. 110–032–0071, Change No. 01, dated June 21, 1988, prior to further flight, accomplish the following in accordance with EMBRAER SB No. 110–032–0071, Change No. 01, dated June 21, 1988:

(i) Rework each MLG wheel axle/piston tube support junction area;

(ii) Polish each junction area using a fine grit abrasive cloth; and

(iii) Stamp the letter ''R'' on each MLG wheel axle/piston tube assembly end-pipe.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office (ACO), Campus Building, 1701 Columbia Avenue, suite 2–160, College Park, Georgia 30337–2748.

(1) The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

(2) Alternative methods of compliance approved in accordance with AD 87–03–10 (superseded by this action) are not considered approved as alternative methods of compliance with this AD.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta ACO.

(e) The inspection required by this AD shall be done in accordance with EMBRAER Service Bulletin No. 110–032–0068, dated December 20, 1985. The modification (rework, polishing, and stamping) required by this AD shall be done in accordance with EMBRAER Service Bulletin No. 110–032–0071, Change No. 01, dated June 21, 1988. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained EMBRAER, Av. Brig Faira Lima 2170, 12227–901, Sao Jose dos Campos-SP, Brazil. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment (39–10273) supersedes AD 87–03–10, Amendment 39–5524.

(g) This amendment (39–10273) becomes effective on February 9, 1998.

Issued in Kansas City, Missouri, on December 24, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–103 Filed 1–8–98; 8:45 am]

BILLING CODE 4910–13–U

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1610

Revision of Freedom of Information Act Regulations

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim final rule.

SUMMARY: The Equal Employment Opportunity Commission (EEOC) is revising its Freedom of Information Act (FOIA) regulations on Availability of Records to conform with the Electronic Freedom of Information Act Amendments of 1996. EEOC is also implementing a delegation of the Regional Attorney's FOIA responsibilities, updating office addresses, and correcting some typographical errors.

DATES: This interim final rule is effective on January 9, 1998. Comments must be submitted on or before March 10, 1998.

ADDRESSES: Written comments should be submitted to Frances M. Hart,

Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507.

As a convenience to commentators, the Executive Secretariat will accept comments transmitted by facsimile (''FAX'') machine. The telephone number of the FAX receiver is (202) 663–4114. (This is not a toll free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4078 (voice) or (202) 663–4077 (TDD). (These are not toll free numbers.) Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, N.W., Washington, D.C. 20507 between the hours of 9:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Thomas J. Schlageter, Assistant Legal Counsel, or Emily Kim, Staff Attorney, at (202) 663–4669. Copies of this interim final rule are available in the following alternate formats: Large print, braille, electronic file on computer disk, and audio-tape. Copies may be obtained from EEOC's Publication Center by calling 1–800–669-3362 (voice) or 1–800–669–6820 (TDD).

SUPPLEMENTARY INFORMATION: The Commission is revising its regulations under the Freedom of Information Act, 5 U.S.C. 552, to implement the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 105–231). The Electronic FOIA Amendments (''Amendments'') require several changes in the regulations. The Commission is also revising the regulation to reflect a delegation of FOIA responsibilities by the Regional Attorneys, updating field office addresses, and correcting some typographical errors.

A determination has been made by the Commission that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This rule is necessary for effective implementation of the Electronic Freedom of Information Act Amendments of 1996, which require that this Act take effect on March 31, 1997, except for sections 7 and 8, which take effect on October 2, 1997. Comments received in response to the publication of this interim final rule will be considered.

The Amendments now require that certain records be made available electronically. The Commission has created an Internet web site at which some of this information and much additional information about the Commission can be accessed. Accordingly, the Commission is revising § 1610.4(a) of the regulations to identify the web site through which the public may access information.

The Amendments increase the time limit for agency responses to FOIA requests to 20 days. Accordingly, in paragraph (a) of the revised § 1610.9, the Commission will now have 20 days to respond to FOIA requests, instead of 10.

The Amendments provide that FOIA requesters may, in circumstances of ''compelling need,'' be eligible for expedited processing of their information requests. The Commission, therefore, is adding a new paragraph (c) to § 1610.9 wherein requests for information may be considered for expedited processing if the requester can show ''compelling need'' through a certified statement. Under the new regulation, the Commission must notify the requester within 10 days whether she or he will receive information on an expedited basis. The requester can appeal the Commission's decision to deny a request for expedited processing.

To the extent practicable and consistent with the interest protected by the various exceptions, the Amendments require that agencies indicate the amount of withheld information. Thus, when withholding information, the revised § 1610.10(c) requires the Commission to indicate the estimated volume of information it is withholding, provided that doing so will not harm an interest protected by that statute. Also, when releasing only portions of documents, the Commission must indicate the volume of the deleted materials, and to the extent possible, the location of the deletion within the document.

Under the revised § 1610.21, the Legal Counsel will now submit the annual report to the Attorney General on a fiscal year basis, instead of to Congress on a calendar year basis.

Other changes not required by the Amendments include revisions in §§ 1610.8 through 1610.11 and 1610.14 reflecting that Regional Attorneys may delegate their responsibilities under these sections, and revisions to § 1610.4 reflecting field office changes of address.

Finally, some typographical errors have been corrected.

Regulatory Procedures

Regulatory Flexibility Act

The Commission, in accordance with the Regulatory Flexibility Act (5 U.S.C. 606(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

This regulation has been reviewed in accordance with Executive Order 12866. The Office of Management and Budget has determined that this rule is not a ''significant regulatory action'' as defined in E.O. 12866 because the revisions contained in this interim final rule incorporate only those changes required by the Electronic FOIA Amendments of 1996, a provision allowing Regional Attorneys to delegate their FOIA responsibilities, updated regional office addresses, and corrections of typographical errors.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 29 CFR Part 1610

Administrative practice and procedure, Freedom of Information, records.

For the reasons stated in the preamble, 29 CFR Part 1610 is amended as set forth below.

PART 1610—AVAILABILITY OF RECORDS

1. The authority citation for 29 CFR part 1610 is revised to read as follows:

Authority: 42 U.S.C. 2000e–12(a), 5 U.S.C. 552 as amended by Pub. L. 93–502, Pub. L. 99–570, and Pub. L. 105–231; for § 1610.15, nonsearch or copy portions are issued under 31 U.S.C. 9701.

2. Section 1610.4 is amended by adding a new sentence to paragraph (a) after the first sentence, removing the word ''it'' and adding in its place the word ''its'' in the fourth sentence, and revising paragraph (c) to read as follows:

§ 1610.4 Public reference facilities and current index.

(a) * * * Any such materials created on or after November 1, 1996 may also be accessed through the Internet at EEOC's World Wide Web site at http:www.eeoc.gov. * * *

* * * * *

(c) The Commission's field offices are:

Albuquerque Area Office (Phoenix District), 505 Marquette, NW, Suite 900, Albuquerque, NM 87102.

Atlanta District Office, 100 Alabama Street, SW, Suite 4R30, Atlanta, GA 30303.

Baltimore District Office, City Crescent Building, 10 South Howard Street, 3rd Floor, Baltimore, MD 21201.

Birmingham District Office, 1900 3rd Avenue, North, Suite 101, Birmingham, AL 35203–2397.

Boston Area Office (New York District), 1 Congress Street, 10th Floor, Room 1001, Boston, MA 02114.

Buffalo Local Office (New York District), 6 Fountain Plaza, Suite 350, Buffalo, NY 14202.

Charlotte District Office, 129 West Trade Street, Suite 400, Charlotte, NC 28202.

Chicago District Office, 500 West Madison Street, Suite 2800, Chicago, IL 60661.

Cincinnati Area Office (Cleveland District), 525 Vine Street, Suite 810, Cincinnati, OH 45202–3122.

Cleveland District Office, 1660 West Second Street, Suite 850, Cleveland, OH 44113–1454.

Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, TX 75202–4726.

Denver District Office, 303 E. 17th Avenue, Suite 510, Denver, CO 80203.

Detroit District Office, 477 Michigan Avenue, Room 865, Detroit, MI 48226–9704.

El Paso Area Office (San Antonio District), The Commons, Building C, Suite 100, 4171 N. Mesa Street, El Paso, TX 79902.

Fresno Local Office (San Francisco District), 1265 West Shaw Avenue, Suite 103, Fresno, CA 93711.

Greensboro Local Office (Charlotte District), 801 Summit Avenue, Greensboro, NC 27405–7813.

Greenville Local Office (Charlotte District), Wachovia Building, 15 South Main Street, Suite 530, Greenville, SC 29601.

Honolulu Local Office (San Francisco District), 300 Ala Moana Boulevard, Room 7123–A, PO Box 50082, Honolulu, HI 96850–0051.

Houston District Office, 1919 Smith Street, 7th Floor, Houston, TX 77002.

Indianapolis District Office, 101 West Ohio Street, Suite 1900, Indianapolis, IN 46204–4203.

Jackson Area Office (Birmingham District), 207 West Amite Street, Jackson, MS 39201.

Kansas City Area Office (St. Louis District), 400 State Avenue, Suite 905, Kansas City, KS 66101.

Little Rock Area Office (Memphis District), 425 West Capitol Avenue, Suite 625, Little Rock, AR 72201.

Los Angeles District Office, 255 E. Temple Street, 4th Floor, Los Angeles, CA 90012.

Louisville Area Office (Indianapolis District), 600 Dr. Martin Luther King Jr. Place, Suite 268, Louisville, KY 40202.

Memphis District Office, 1407 Union Avenue, Suite 621, Memphis, TN 38104.

Miami District Office, One Biscayne Tower, 2 South Biscayne Boulevard, Suite 2700, Miami, FL 33131.

Milwaukee District Office, 310 West Wisconsin Avenue, Suite 800, Milwaukee, WI 53203–2292.

Minneapolis Area Office (Milwaukee District), 330 South Second Avenue, Suite 430, Minneapolis, MN 55402–2224.

Nashville Area Office (Memphis District), 50 Vantage Way, Suite 202, Nashville, TN 37228-9940.

Newark Area Office (Philadelphia District), 1 Newark Center, 21st Floor, Newark, NJ 07102–5233.

New Orleans District Office, 701 Loyola Avenue, Suite 600, New Orleans, LA 70113–9936.

New York District Office, 7 World Trade Center, 18th Floor, New York, NY 10048–1102.

Norfolk Area Office (Baltimore District), World Trade Center, 101 South Main Street, Suite 4300, Norfolk, VA 23510.

Oakland Local Office (San Francisco District), 1301 Clay Street, Suite 1170–N, Oakland, CA 94612–5217.

Oklahoma Area Office (Dallas District), 210 Park Avenue, Suite 1350, Oklahoma City, OK 73102.

Philadelphia District Office, 21 South 5th Street, Suite 400, Philadelphia, PA 19106–2515.

Phoenix District Office, 3300 N. Central Avenue, Suite 690, Phoenix, AZ 85012–2504.

Pittsburgh Area Office (Philadelphia District), 1001 Liberty Avenue, Suite 300, Pittsburgh, PA 15222–4187.

Raleigh Area Office (Charlotte District), 1309 Annapolis Drive, Raleigh, NC 27608–2129.

Richmond Area Office (Baltimore District), 3600 West Broad Street, Room 229, Richmond, VA 23230.

San Antonio District Office, 5410 Fredericksburg Road, Suite 200, San Antonio, TX 78229–3555.

San Diego Area Office (Los Angeles District), 401 B Street, Suite 1550, San Diego, CA 92101.

San Francisco District Office, 901 Market Street, Suite 500, San Francisco, CA 94103.

San Jose Local Office (San Francisco District), 96 North 3rd Street, Suite 200, San Jose, CA 95112.

Savannah Local Office (Atlanta District), 410 Mall Boulevard, Suite G, Savannah, GA 31406–4821.

Seattle District Office, Federal Office Building, 909 First Avenue, Suite 400, Seattle, WA 98104–1061.

St. Louis District Office, Robert A. Young Building, 1222 Spruce Street, Room 8.100, St. Louis, MO 63103.

Tampa Area Office (Miami District), 501 East Polk Street, Room 1020, Tampa, FL 33602.

Washington Field Office (Baltimore District), 1400 L Street, NW, Suite 200, Washington, DC 20005.

§ 1610.5 [Amended]

3. Paragraph (c) of § 1610.5 is amended by replacing ''verify the scope of the request and;'' with ''verify the scope of the request and,'' at the end of paragraph (c).

4. Section 1610.8 is revised to read as follows:

§ 1610.8 Authority to determine.

The Legal Counsel's designee, the regional attorney, or the regional attorney's designee, when receiving a request pursuant to these regulations, shall grant or deny each such request. That decision shall be final, subject only to administrative review as provided in § 1610.11 of this subpart.

5. Section 1610.9 is amended by revising the heading, the introductory text of paragraph (a), and paragraph (b), and by adding a new paragraph (c) to read as follows:

§ 1610.9 Responses: timing.

(a) The Legal Counsel's designee, the regional attorney, or the regional attorney's designee shall either grant or deny a request for records within 20 working days after receipt of the request unless additional time is required for one of the following reasons:

* * * * *

(b) When additional time is required for one of the reasons stated in

paragraph (a) of this section the Legal Counsel's designee, the regional attorney, or the regional attorney's designee, shall acknowledge receipt of the request within the 20 day period and include a brief notation of the reason for the delay and an indication of the date on which it is expected that a determination as to disclosure will be forthcoming. If more than 10 working additional days are needed, the requester shall be notified and provided an opportunity to limit the scope of the request or to arrange for an alternate time frame for processing the request.

(c)(1) Requests for records may be eligible for expedited processing if the requester demonstrates a compelling need. For the purposes of this section, compelling need means:

(i) that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) that the requester is a person primarily engaged in disseminating information and there is an urgency to inform the public concerning actual or alleged Federal government activity.

(2) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. A determination on the request for expedited processing will be made and the requester notified within 10 working days. The Legal Counsel or designee shall promptly respond to any appeal of the denial for expedited processing.

6. Section 1610.10 is amended by adding a new sentence between the first and second sentences in paragraph (a), revising the introductory text of paragraph (b), redesignating paragraph (c) as paragraph (d), and adding a new paragraph (c) to read as follows:

§ 1610.10 Responses: form and content.

(a) * * * Records shall be made available in the form or format indicated by the requester, if the record is readily reproducible in that form or format. * * *

(b) A reply denying a written request for a record shall be in writing, signed by the Legal Counsel's designee, the regional attorney, or the regional attorney's designee, and shall include:

* * * * *

(c) When denying a request for records, the estimated volume of denied material shall be indicated, unless providing such estimate would harm an interest protected by the exemptions in 5 U.S.C. 522(b). When providing a reasonably segregable portion of a record, the amount of information deleted from the released portion, and to the extent technically feasible, the place in the record where such deletion was made shall be indicated.

7. Section 1610.11 is amended by revising the first and last sentences of paragraph (a), the last sentence of paragraph (b), paragraph (c) and the first sentence of paragraph (f) to read as follows:

§ 1610.11 Appeals to the Legal Counsel from initial denials.

(a) When the Legal Counsel's designee, the regional attorney, or the regional attorney's designee, has denied a request for records in whole or in part, the person making the request may appeal within 30 calendar days of its receipt. * * * Any appeal of a denial in whole or part by a regional attorney, or the regional attorney's designee, must include a copy of the regional attorney's, or the regional attorney's designee's determination.

(b) * * * The Legal Counsel or designee may extend the 20 day period in which to render a decision on an appeal for that period of time which could have been claimed and consumed by the Legal Counsel's designee, the regional attorney, or the regional attorney's designee, under § 1610.9 but which was either not claimed or consumed in making the original determination.

(c) The decision on appeal shall be in writing and signed by the Legal Counsel or designee. A denial in whole or in part of a request on appeal shall set forth the exemption relied on, a brief explanation of how the exemption applied to the records withheld and the reasons for asserting it, if different from that described by the Legal Counsel's designee, the regional attorney, or the regional attorney's designee under § 1610.10, and that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records reside, or in the District of Columbia.

* * * * *

(f) In the event that the Commission terminates its proceedings on a charge after the regional attorney or the regional attorney's designee denies a request for the charge file but during consideration of the requester's appeal from that denial, the request may be remanded for redetermination. * * *

§ 1610.14 [Amended]

8. Section 1610.14 is amended by adding ''or designees'' after ''and regional attorneys'' in the first sentence of paragraph (a).

§ 1610.15 [Amended]

9. Section 1610.15(f) is amended by replacing the word ''requrie'' with ''require.''

§ 1610.18 [Amended]

10. Section 1610.18(a) is amended by replacing the word ''perviously'' with ''previously.''

11. Section 1610.21 is revised to read as follows:

§ 1610.21 Annual report.

The Legal Counsel shall, on or before February 1, 1998, and annually thereafter, submit a Freedom of Information Act report covering the preceding fiscal year to the Attorney General of the United States. The report shall include those matters required by 5 U.S.C. 552(e), and shall be made available electronically.

§ 1610.34 [Amended]

12. Section 1610.34(a) is amended by replacing the word ''Council'' with ''Counsel.''

Dated: December 22, 1997.

Gilbert F. Casellas,

Chairman.

[FR Doc. 98–498 Filed 1–8–98; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 924

[SPATS No. MS–012–FOR]

Mississippi Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving, with exceptions and additional requirements, a proposed amendment to the Mississippi regulatory program (hereinafter referred to as the ''Mississippi program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Mississippi proposed revisions to the Mississippi Surface Coal Mining and Reclamation Law (MSCMRL) pertaining to definitions, reorganization, adoption of rules and regulations, small operator assistance program, permit applications, permit fees, reclamation plans, performance bonds, permit issuance,

permit reissuance, permit revision, public participation, public hearings, formal hearings, confidentiality claims, environmental protection performance standards, postmining land use, underground coal mining, mine entrance signs, violations, civil penalties, bond release, bond forfeiture, suspension and revocation of permits, designating lands unsuitable for surface coal mining, and creation of a ''Surface Coal Mining and Reclamation Fund.'' The amendment is intended to revise the Mississippi program to be consistent with SMCRA, clarify ambiguities, and improve operational efficiency by incorporating the administrative practices and laws used by other environmental agencies in the State.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Arthur W. Abbs, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209, Telephone: (205) 290–7282.

SUPPLEMENTARY INFORMATION:

I. Background on the Mississippi Program
II. Submission of the Proposed Amendment
III. Director's Findings
IV. Summary and Disposition of Comments
V. Director's Decision
VI. Procedural Determinations

I. Background on the Mississippi Program

On September 4, 1980, the Secretary of the Interior conditionally approved the Mississippi program. Background information on the Mississippi program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the September 4, 1980, **Federal Register** (45 FR 58520). Subsequent actions concerning the conditions of approval and program amendments can be found at 30 CFR 924.10, 924.15, 924.16, and 924.17.

II. Submission of the Proposed Amendment

By letter dated May 6, 1997 (Administrative Record No. MS–0338), Mississippi submitted a proposed amendment to its program pursuant to SMCRA. Mississippi submitted the proposed amendment in response to the required program amendment codified at 30 CFR 924.16 and at its own initiative. On March 10, 1997, the Governor of Mississippi signed Senate Bill No. 2725, which contains both substantive and nonsubstantive changes to the Mississippi Surface Coal Mining and Reclamation Law.

OSM announced receipt of the proposed amendment in the July 30, 1997, **Federal Register** (62 FR 40773), and in the same document opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment. The public comment period closed on August 29, 1997. Because no one requested a public hearing or meeting, none was held.

During its review of the amendment, OSM identified concerns relating to section 53–9–26, small operator assistance program; sections 53–9–37, 53–9–39, and 53–9–77 concerning public participation, public hearings, and formal hearings; section 53–9–45, environmental protection performance standards; and sections 53–9–55 and 53–9–69 concerning enforcement actions and civil penalties. OSM notified Mississippi of these concerns by letters dated October 23, 1997, and November 7, 1997 (Administrative Record Nos. MS–0343 and MS–0344, respectively).

By letter dated November 20, 1997 (Administrative Record No. MS–0346), Mississippi responded to OSM's concerns by submitting additional explanatory information. Because the additional information merely clarified certain provisions of Mississippi's proposed amendment, OSM did not reopen the public comment period.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment.

A. Nonsubstantive Changes Proposed for the Mississippi Surface Coal Mining and Reclamation Law

1. Nonsubstantive Revisions to Existing Statutes

Mississippi proposed revisions to the following previously-approved statutes that are nonsubstantive in nature and consist of minor wording and stylistic changes, minor revisions to reflect new designations of responsibility, and revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment (corresponding Federal statutes are listed in parentheses): section 53–9–3, legislative findings and declarations (section 101 of SMCRA); section 53–9–5, purpose (section 102 of SMCRA); section 53–9–19, financial interests of persons employed under this chapter (section 517g of SMCRA); section 53–9–21, surface coal mining and reclamation permit (section 506(a) through (c) of SMCRA) section 53–9–41, coal exploration permits (section 512 of SMCRA); section 53–9–47, surface effects of underground coal mining operations (section 516 of SMCRA); section 53–9–49, authorized departures from performance standards (section 711 of SMCRA); section 53–9–51, inspection and monitoring (section 517(b), (c), (e), and (f) of SMCRA); section 53–9–61, criminal penalties—resisting, preventing, impeding, or interfering with performance of duties (section 704 of SMCRA); section 53–9–63, nonexclusivity of penalty provisions (section 518(i) of SMCRA); section 53–9–73, cooperation with the Secretary of the Interior (section 523(c) of SMCRA); section 53–9–75, application of chapter to public corporations (section 524 of SMCRA); section 53–9–83, lease of state coal deposits (section 714(a), (c), (d), (e), and (g) of SMCRA); section 53–9–85, enforcement and protection of water rights (section 717 of SMCRA); and section 53–9–87, training, examination, and certification of persons responsible for blasting (section 719 of SMCRA).

Because Mississippi's proposed revisions to these previously-approved statutes are nonsubstantive in nature, the Director finds that the proposed revisions do not render the Mississippi program less stringent than SMCRA.

2. Deletion of Existing Statutes

Mississippi repealed section 53–9–13, creation of Surface Mining and Reclamation Operations Section; section 53–9–15, creation of Surface Mining Review Board; and section 53–9–17, Director of Bureau of Geology and Energy Resources. These sections designated to powers and duties of the agencies who would administer and enforce the Mississippi program. Mississippi replaced these sections with section 53–9–9, which designates the responsibilities of the new or renamed agencies who will administer and enforce the Mississippi program. Mississippi repealed section 53–9–59, criminal penalties—failure to make or making of false statement, representation or certification.

The substantive provisions of this section were added to section 53–9–57, Criminal penalties—violation of condition of permit or order. Mississippi repealed section 53–9–79, judicial review of decision. The substantive provisions of this section were added to section 53–9–77, right to formal hearing and appeal. Mississippi repealed section 53–9–91, fees. The substantive provisions of this section were added to new section 53–9–28, fees.

Because Mississippi added the substantive provisions of these previously-approved statutes to other sections of its program, the Director finds that the proposed deletions do not render the Mississippi program less stringent than SMCRA.

B. Revisions to the Mississippi Surface Coal Mining and Reclamation Law That Are Substantively Identical to the Corresponding Provisions of the Federal Statutes or Regulations

The proposed State statutes listed in the table contain language that is the same as or similar to the corresponding section of the Federal statutes or regulations. Differences between the proposed State statutes and the Federal statutes or regulations are nonsubstantive.

Topic	MSCMRL	Federal counterpart
Definition of approximate original contour	53–9–7(b)	701(2) of SMCRA
Definition of coal	53–9–7(d)	3 CFR 700.5
Definition of lignite	53–9–7(m)	701(30) of SMCRA
Definition of unwarranted failure to comply	53–9–7(aa)	701(29) of SMCRA
Compliance schedule	53–9–25(3)	510(c) of SMCRA
Transfer, assignment or sale of permit rights	53–9–33(4)	511(b) of SMCRA
Review of permits	53–9–33(5)	511(c) of SMCRA

Because the State statutes listed above are identical in meaning to the corresponding Federal statutes or regulations, the Director finds that Mississippi's proposed revisions are no less stringent than SMCRA and no less effective than the Federal regulations.

C. Other Revisions to the Mississippi Surface Coal Mining and Reclamation Law

Revisions to the following sections which are not specifically discussed below concern nonsubstantive wording changes or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

1. Section 53–9–7, Definitions

a. Mississippi proposes to delete the previously approved definitions for ''act,'' ''administrator,'' ''bureau,'' ''chief,'' ''director,'' ''division,'' ''Public Law 95–87,'' ''review board,'' and ''section'' at section 53–9–7(a), (b), (d), (e), (i), (j), (r), (t), and (u), respectively.

The term ''act,'' which was defined at section 53–9–7(a) as the Mississippi Surface Coal Mining and Reclamation Law, is not referenced in any of Mississippi's statutes, so the definition is not necessary to the meaning of the statutes. Therefore, the Director finds that the proposed deletion will not render the Mississippi program less stringent than SMCRA.

The term ''Pub. L. 95–87,'' which was defined at section 53–3–7(r) as the Surface Mining Control and Reclamation Act of 1977, was replaced by the term ''Federal act'' at new section 53–9–7(i), with no substantive change in the definition language. The Director finds that the proposed deletion is not inconsistent with any requirements of SMCRA or the Federal regulations.

The definitions of the terms ''administrator,'' ''bureau,'' ''chief,'' ''director,'' ''division,'' ''review board,'' and ''section,'' which identified those designated to administer and enforce and Mississippi program, were deleted because Mississippi redesignated the responsibilities for regulation of surface coal mining and reclamation operations in the State to reflect new or renamed agencies, and the terms are no longer applicable. The proposed deletions are consistent with the repeal of sections 53–9–13, 53–9–15, and 53–9–17 discussed above in finding A.2. Therefore, the Director finds that the removal of these definitions will not render the Mississippi program less stringent than SMCRA.

b. Mississippi proposed to add a definition for the term *appeal* at new section 53–9–7(a) to mean ''an appeal to an appropriate court of the state taken from a final decision of the permit board or commission made after a formal hearing before that body.'' Neither the Federal regulations nor SMCRA define the term ''appeal.'' However, the definition is not inconsistent with section 526(e) of SMCRA, which requires actions of a State regulatory authority pursuant to an approved State program be subject to judicial review by a court of competent jurisdiction in accordance with State law. Therefore, the Director finds that the State's definition is consistent with the generally accepted meaning of this term in the context of administrative law and is approving it.

c. At section 53–9–7(c), Mississippi defined the terminology ''as recorded in the minutes of the permit board'' to mean ''the date of the permit board meeting at which the action concerned is taken by the permit board.'' The permit board records all of its initial and final decisions or actions concerning permit applications, permit suspension or revocation, performance bond release, and the performance bond forfeiture in the minutes of the meetings held to consider them. Within specified times of these recordings, the applicants and interested parties may file written requests for formal hearings of the initial decisions before the permit board or appeal the final decisions before the chancery court. Although there is no Federal counterpart definition, the Director finds that the proposed definition is not inconsistent with the administrative review requirements of SMCRA.

d. Mississippi revised or added definitions for the following terms to reflect both changes in agency names and the reorganization of the State regulatory authority. At 53–9–7(e), the term ''commission'' was revised to mean ''the Mississippi Commission on Environmental Quality''; at section 53–9–7(f), the term ''department'' was revised to mean ''the Mississippi Department of Environmental Quality''; at section 53–9–7(g), the term ''executive director'' was defined as ''the executive director of the department''; at section 53–9–7(q), the term ''permit board'' was defined as ''the permit board created under Section 49–17–28'' (Environmental Quality Permit Board); and at section 53–9–7(x), the term ''state geologist'' was defined as ''the head of the office of geology and energy resources of the department or a successor office.'' Since the proposed definitions clarify terms used throughout Mississippi's statutes and are not inconsistent with any terms used in SMCRA, the Director is approving them.

e. At section 53–9–7(i), Mississippi defined the term ''Federal Act'' as ''the Surface Mining Control and Reclamation Act of 1977, as amended, which is codified as Section 1201 et seq. of Title 30 of the United States Code.'' The Director finds that Mississippi's proposed definition is consistent with the Federal definition of the term ''Act'' at 30 CFR 700.5, and is approving it.

f. At section 53–9–7(j), the term *formal hearing* was defined to mean ''a hearing on the record, as recorded and transcribed by a court reporter, before the commission or permit board where all parties to the hearing are allowed to present witnesses, cross-examine witnesses and present evidence for inclusion into the record, as appropriate under rules promulgated by the commission or permit board.'' There is no direct counterpart Federal definition. However, the Director finds that the proposed definition is not inconsistent with the Federal definition. However, the Director finds that the proposed definition is not inconsistent with the Federal requirements for administrative review at section 525 of SMCRA and 30 CFR Part 775 of the Federal regulations.

g. A definition for the term *interested party* was added at section 53–9–7(l) to mean ''any person claiming an interest relating to the surface coal mining operation and who is so situated that the person may be affected by that operation, or in the matter of regulations promulgated by the commission, any person who is so situated that the person may be affected by the action.'' There is no definition for the term ''interested party'' in SMCRA. However, the proposed definition is not inconsistent with the use of the terminology ''any person having an interest which is or may be adversely affected'' found in section 513(b) of SMCRA. Therefore, the Director is approving it.

h. Mississippi proposed to remove the reference to partnership or corporation from its definition of ''operator'' at section 53–9–7(n). The revised definition defines operator as any person engaged in coal mining who removes or intends to remove more than two hundred fifty (250) tons of coal from the earth by coal mining within twelve (12) consecutive calendar months in any one (1) location.'' Although the Federal definition of ''operator'' at section 701(13) contains the removed language, Mississippi's definition for ''person'' at section 53–9–7(r) includes partnerships and corporations. Therefore, the Director finds that Mississippi's definition of ''operator'' in conjunction with its definition of ''person'' is no less stringent than the Federal definition of ''operator.''

i. At section 53–9–7(p), the term ''permit area'' was revised by adding the requirement that the permit area be covered by the operator's performance bond. The Federal definition at section 701(17) also requires the permit area to be covered by the operator's bond. Therefore, the Director finds that Mississippi's revised definition is no less stringent than the Federal definition.

j. At section 53–9–7(r), the term *person* was revised by adding a joint venture, cooperative, and any agency, unit or instrumentality of federal, state or local government, including any publicly owned utility or publicly owned corporation to those who are considered a person. It is now defined as ''an individual, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit or instrumentality of federal, state or local government, including any publicly owned utility of publicly owned corporation.'' The Director finds that the revised definition at section 53–9–7(r) is substantively the same as the Federal definition of ''person'' at 30 CFR 700.5 and is no less stringent than sections 701(19) and 524 of SMCRA.

k. The terms *public hearing, informal hearing,* or *public meeting* were defined at section 53–9–7(t) to mean ''a public forum organized by the commission, department or permit board for the purpose of providing information to the public regarding a surface coal mining and reclamation operation or regulations proposed by the commission and at which members of the public are allowed to make comments or ask questions or both of the commission, department or the permit board.'' Section 53–9–37(2)(b) of the Mississippi Surface Coal Mining and Reclamation Law allows any interested party to request a public hearing and requires the permit board to hold a public hearing before issuance of a permit, whether or not one has been requested. Any member of the public, not just interested parties, may attend and participate in the hearings or meeting. There is no Federal counterpart definition. Although SMCRA does not provide for the type of open public process which allows participation by all members of the public, section 513(b) of SMCRA and 30 CFR 773.13 of the Federal regulations provide for an informal conference if requested by any person having an interest which is or may be adversely affected or the officer or head of any Federal, State, or local government agency or authority. The conference shall be conducted by a representative of the regulatory authority, who may accept oral or written statements and any other relevant information from any party to the conference. Therefore, the Director finds that Mississippi's proposed definition is no less stringent than the informal conference provisions of section 513 of SMCRA and no less effective than the public participation requirements of 30 CFR 773.13, and is approving the definition for these terms.

l. At section 53–9–7(v), the term *revision* was defined to mean ''any change to the permit or reclamation plan that does not significantly change the effect of the mining operation on either those persons impacted by the permitted operations or on the environment, including, but not limited to, incidental boundary changes to the permit area or a departure from or change within the permit area, incidental changes in the mining method or incidental changes in the reclamation plan.'' There is no Federal counterpart definition. However, the Director finds that the proposed definition is not inconsistent with the requirements of section 511 of SMCRA or 30 CFR 774.13 of the Federal regulations in relation to insignificant permit revisions and incidental boundary changes.

2. Section 53–9–9, General Responsibilities of the Department of Environmental Quality, the Commission on Environmental Quality, and the Environmental Quality Permit Board

This revised statute replaces previously approved sections 53–9–9, 53–9–13, 53–9–15, and 53–9–17. It designates the agencies which will administer and enforce the Mississippi program. The Department of Environmental Quality is designated as the agency to administer the Mississippi program. The Commission on Environmental Quality is designated as the body to enforce the Mississippi program, including the issuance of penalty orders, promulgation of regulations, and designation of lands unsuitable for surface coal mining. The Environmental Quality Permit Board is designated as the body to issue, modify, revoke, transfer, suspend, and reissue permits and to require, modify or release performance bonds. The Director, in accordance with section 503(a)(3), requires a State to provide authority to establish its regulatory authority and set forth its duties and responsibilities as in section 201 of SMCRA. The Director finds that section 53–9–9 meets this requirement, and is approving it.

3. Section 53–9–11, Promulgation of Rules and Regulations by Commission on Environmental Quality

Section 53–9–11(1) was revised to clarify the Commission on Environmental Quality's authority and responsibilities for rules and regulations. The Commission may

adopt, modify, repeal, and promulgate rules and regulations after notice and hearing and in accordance with the Mississippi Administrative Procedures Law. The Commission may also enforce rules and regulations and make exceptions to and grant exemptions and variances from them where not otherwise prohibited by Federal or State law. No exceptions, exemptions or variances shall be less stringent than rules and regulations promulgated under SMCRA. Section 53–9–11(1)(a)(iv) was revised to reflect changes in and add to the list of State agencies that are to receive notice of the public hearing that is required before the adoption of any rules and regulations. Section 53–9–11(1)(b) was revised by requiring the publication of the notice of the public hearing once a week for three consecutive weeks in one newspaper having general circulation in the state. Section 53–9–11(2) was revised by adding a provision specifying that failure of any person to submit comments within the time period established by the Commission would not preclude action by the Commission.

Although there is no direct Federal counterpart to the revised statute, the Director finds that section 53–9–11, as revised, is not inconsistent with section 503(a)(7) of SMCRA or the Federal regulations at 30 CFR 732.15(b)(10). Section 503(a)(7) requires States to promulgate rules and regulations consistent with the Federal regulations issued pursuant to SMCRA. The Federal regulation at 30 CFR 732.15(b)(10) requires States to provide for public participation in the development, revision, and enforcement of State regulations and the State program consistent with public participation requirements of SMCRA and 30 CFR chapter VII. Therefore, the Director is approving the above revisions.

4. Section 53–9–23, Permit Reissuance

Mississippi added a new provision at section 53–9–23(3) that allows an operator, if the application was timely filed, to continue surface coal mining operations until the permit board takes action on his reissuance application. Mississippi requires renewal applications to be filed at least 180 days before the expiration of the permit.

The Federal requirements for renewal of permits at section 506(d)(1) of SMCRA and 30 CFR 774.15(a) provide that a valid permit shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. Neither SMCRA nor the Federal regulations provide guidance on whether or not an operator may continue surface coal mining operations until action is taken on a renewal application that has been filed in a timely manner. However, the Director finds that the proposed provision is not unreasonable. If the operator files an application at least 180 days before his permit expires, Mississippi should have no problems completing its approval process, pursuant to its counterparts to section 506(d)(1) and 30 CFR 774.15(c), prior to expiration of the permit. Therefore, the Director finds that the proposed provision at section 53–9–23 will not render the Mississippi program less stringent than SMCRA or less effective than the Federal regulations.

5. Section 53–9–25, Contents of Permit Applications

Previously approved section 53–9–25(1), concerning permit fees, was moved to new section 53–9–28, and it is discussed below under finding C.8. Section 53–9–25(2) was designated as section 53–9–25(1)(a) and revised to require permit applications to contain information pertaining to the organization and business of the applicant including information regarding the ownership and names and addresses of directors, partners, officers, and resident agents; the previous experience and performance history of the applicant in surface coal mining; and a statement of whether the applicant, subsidiary, affiliate or persons controlled by or under common control with the applicant has held a mining permit which in the five-year period before the initial filing of the application had been suspended or revoked or under which the performance bond or deposit has been forfeited. It was also revised to require that permit applications contain any other information the permit board or commission by regulation may require consistent with the Federal Act. Existing section 53–9–25(3) (a) and (b) were designated as section 53–9–25 (1)(b) and (1)(c), respectively, with nonsubstantive language changes to clarify the existing provisions. Previously approved section 53–9–25(4), concerning Mississippi's small operator assistance program, was moved to section 53–9–26, and it is discussed below in finding C. 6.a. Previously approved section 53–9–25(5) was designated as section 53–9–25(2)(a) with nonsubstantive language changes to clarify the existing provisions. Existing section 53–9–25(6) was designated as section 53–9–25(2)(b) and revised to require that the insurance policy include compensation to persons damaged as a result of surface coal mining and reclamation operations, including use of explosives, and entitled to compensation under applicable State law. Previously approved section 53–9–25(7) was designated as section 53–9–25(2)(c) with nonsubstantive language changes to clarify the existing provisions. The Director finds that the revisions to section 53–9–25 are not inconsistent with and are no less stringent than the Federal requirements concerning contents of permit applications at section 507 of SMCRA.

6. Section 53–9–26, Small Operator Assistance Program (SOAP)

a. Mississippi proposes to revise its currently approved provision for a small operator assistance program codified at section 53–9–25(4) and to add the revised provision at section 53–9–26. This new section requires that if the permit board finds that the probable total annual production at all locations of a surface coal mining operation will not exceed 300,000 tons, the department is to assume the cost of conducting activities to obtain and provide the information required to be contained in the permit application as determined by the commission. The commission's determination is to be consistent with section 507(c) of SMCRA. This assumption of cost is subject to the availability of Federal or other special funds for that purpose and upon the written request of the operator. All work under this section is to be performed by a qualified public or private laboratory or other public or private qualified entity designated by the department.

With the exception of a typographical error, the Director finds that Mississippi's proposed provision at section 53–9–26 is no less stringent than section 507(c) of SMCRA. Section 507(c)(1) of SMCRA requires that if the regulatory authority finds that the probable total annual production at all locations of a coal surface mining operator will not exceed 300,000 tons, the cost of specified activities shall be assumed by the regulatory authority. Mississippi's use of the word ''operation'' in the phrase ''at all locations of a surface cost mining operation'' instead of ''operator'' changes the meaning of the provision at section 53–9–26 because an operator could have several permitted operations throughout the United States from which annual production must be considered. Therefore, the Director is approving the revision with the requirement that Mississippi correct this typographical error.

b. Section 507(h) of SMCRA and the implementing Federal regulation at 30 CFR 795.12(a)(2) require a coal operator that has received assistance under a small operator assistance program to

reimburse the regulatory authority for the cost of the services rendered if the program administrator finds that the operator's actual and attributed annual production of coal for all locations exceeds 300,000 tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit. There is no statutory counterpart to section 507(h) of SMCRA in the Mississippi Surface Coal Mining and Reclamation Law. The Mississippi program does contain a regulation at section 195.18(a) of the Mississippi Surface Coal Mining Regulations concerning reimbursement of costs, but it is not consistent with section 507(h) of SMCRA or 30 CFR 795.12(a)(2) of the Federal regulations since it requires reimbursement for the cost of laboratory services if the commission finds that the applicant's actual and attributed annual production of coal exceeds 100,000 tons. However, in accordance with the existing required program amendment at 30 CFR 924.16(a), Mississippi is in the process of revising its regulations to meet the requirements of SMCRA and the Federal regulations prior to allowing coal exploration or surface mining operations in the State. Therefore, the Director will ensure that Mississippi amends its regulation at section 195.18(a) to require reimbursement for the cost of services if the applicant's actual and attributed annual production of coal exceeds 300,000 tons, or otherwise amend its program to be no less stringent than the requirements of section 507(h) of SMCRA and no less effective than the requirements of 30 CFR 795.12(a)(2) of the Federal regulations prior to Mississippi's implementation of a small operator assistance program in the State.

7. Section 53–9–27, Filing of Application for Public Inspection

Mississippi proposed three revisions at section 53–9–27. (1) Mississippi is requiring an applicant to file a copy of the application for public inspection within ten days after filing the application with the permit board. (2) Mississippi is clarifying where applications are to be filed by requiring that a copy of the application be filed with the clerk of the chancery court of the county or judicial district where the mining is to occur and where real property contiguous to the surface coal mining and reclamation operation is located if that property is located in more than one county or judicial district. (3) Mississippi is clarifying the type of coal seam information that the applicant may omit from the copies of the application filed for public inspection by specifying that the applicant may omit information pertaining to the quality, depth or width of the coal seam or the location of the coal seam within the permit area if the information has been determined to be confidential by the commission under section 53–9–43.

Section 507(e) of SMCRA requires the applicant to file a copy of the application for public inspection with the recorder at the courthouse of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur, except for that information pertaining to the coal seam. Although there is no counterpart to Mississippi's ten-day time frame requirement in SMCRA, the Director finds that having a time frame within which an application must be filed for public inspection is not inconsistent with the requirements of section 507(e) of SMCRA. Mississippi's other proposed revisions to section 53–9–27 are consistent with and no less stringent than the Federal requirements at section 507(e) of SMCRA. Therefore, the Director is approving the three revisions proposed for section 53–9–27.

8. Section 53–9–28, Permit Fees

Mississippi proposes to remove its currently approved provision for permit fees codified at section 53–9–25(1) and to add a revised provision at section 53–9–28. Subsection (1) of this new section requires the commission to assess and collect a permit fee for reviewing the permit application and administering and enforcing a surface coal mining and reclamation permit. It also allows the commission to set permit fees for the transfer, modification or reissuance of a surface coal mining and reclamation permit. Subsection (2) allows the commission to establish a permit fee for the issuance, reissuance, transfer or modification of a coal exploration permit and a reasonable fee for a copy of a transcript of a formal hearing. Subsection (3) requires the commission to set by order the amount of any permit fee assessed. Such a permit fee may be less than, but shall not exceed the actual or anticipated direct and indirect costs of reviewing the permit application and administering and enforcing the permit. The commission may establish procedures to allow the assessment and collection of the permit fee over the term of the permit.

The Director finds that section 53–9–28(1) and (3) are consistent with and no less stringent than section 507(a) of SMCRA. Section 507(a) requires surface coal mining and reclamation permit applications to be accompanied by a fee as determined by the regulatory authority. It allows the fee to be less than, but requires the fee not to exceed, the actual or anticipated cost of reviewing, administering, and enforcing a permit. It also authorizes the regulatory authority to develop procedures which would enable the cost of the fee to be paid over the term of the permit. Although SMCRA contains no counterpart to section 53–9–28(2) concerning permit fees for coal exploration permits and copies of formal hearing transcripts, the Director finds that Mississippi's proposed fee payment provision for coal exploration permits is not inconsistent with SMCRA's provisions for surface coal mining and reclamation permit application fees and finds that Mississippi's proposed fee payment provision for formal hearing transcripts is not inconsistent with the provisions of 43 CFR 4.23 of the Federal regulations concerning fees for hearing transcripts. Therefore, the Director is approving the proposed statutory provisions at section 53–9–28.

9. Section 53–9–29, Reclamation Plan

Existing section 53–9–29(1) was revised by reorganizing its substantive requirements into an introductory statement and new subsections (1) through (5). The introductory language indicates that the reclamation plan shall include in the degree of detail as the commission may require by regulation the requirements of subsections (1) through (6). Subsection (1) requires an identification of lands subject to surface coal mining operations over the estimated life of those operations. Subsection (2) requires information about the condition and variety of uses of the land at the time of the application and the proposed uses of the land after reclamation. Subsection (3) requires a description of how reclamation is to be achieved, including a schedule of and timetable for significant reclamation activities. Subsection (4) requires an estimate of reclamation costs. Subsection (5) requires information on the steps that will be taken to comply with Mississippi's air and water quality standards, health and safety standards, and performance standards applicable to reclamation. New subsection (6) requires any other information consistent with the Federal Act as the permit board or commission may require to demonstrate that the reclamation required by this chapter can be accomplished. Existing subsection (2), concerning confidentiality of specified information, was removed.

Although the proposed provisions at section 53–9–29 do not contain all of the detailed requirements of section 508

of SMCRA, Mississippi is authorized to require by regulation other information consistent with the Federal Act. Therefore, the Director finds that section 53–9–29, as revised, is no less stringent than section 508 of SMCRA. It is noted that sections 180.18 through 180.37 of Mississippi's regulations contain the more detailed reclamation plan requirements of section 508 of SMCRA. It is further noted that section 186.15(a)(2) and (3) of Mississippi's regulations contain the substantive requirements for confidentiality of information required by section 508(a)(12) and (b) of SMCRA. Based on the above discussion, the Director is approving the revisions to section 53–9–29.

10. Section 53–9–31, Performance Bond

Section 53–9–31(1) was revised by clarifying the requirement that the performance bond be filed before the issuance of a permit and by requiring that the amount of the bond be determined by the permit board after consultation with the state geologist. Section 53–9–31(2) was revised by adding ''letters of credit'' to the types of bond allowed in lieu of a surety bond. The banks which issue the alternative types of bond must be insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or a similar federal banking or savings and loan insurance organization. Section 53–9–31(3) was revised by adding the requirement that the permit board's acceptance of the bond of the applicant without separate surety shall be in accordance with any conditions established by the commission in regulations promulgated under this chapter. Section 53–9–31(5) was revised by changing the terminology ''bond or deposit'' and ''bond'' to ''financial assurance.'' Other nonsubstantive wording and stylistic changes and minor revisions to reflect new designations of responsibility were made throughout this section.

The Director finds that the proposed provisions of section 53–9–31 are consistent with and no less stringent than the Federal requirements for performance bonds at section 509 of SMCRA.

11. Section 53–9–32, Application Summary

This new section requires the state geologist to prepare a plain language summary of a proposed surface coal mining and reclamation operation upon receipt of a complete application. The summary shall be made available to the public at the department and at each location where the applicant is required to place a copy of the application for public inspection.

Although there is no Federal counterpart requirement, the Director finds that the proposed provision will enhance the public participation requirements of Mississippi's program and will not render Mississippi's program less stringent than SMCRA or less effective than the Federal regulations.

12. Section 53–9–33, Requisites for Approval of Application for Permit

Existing section 53–9–39(1) was revised and added at new section 53–9–33(1). This revised provision authorizes the permit board to issue, deny, or modify a permit based upon a complete application for permit or a complete application for modification or reissuance of a permit within the time required under section 53–9–37. The permit board shall notify the applicant in writing of its action within the time required under section 53–9–39. The applicant for a permit or modification of a permit shall have the burden of establishing that its complete application is in compliance with the requirements of Mississippi's program. The action of the permit board shall be effective upon the initial decision by the permit board as recorded in the minutes of the permit board. The Director finds that the proposed provisions of section 53–9–33(1) are consistent with and no less stringent than the permit approval or denial provisions of section 510(a) of SMCRA.

Existing section 53–9–33(1) was designated as section 53–9–33(2). Subsection (2)(e) was revised by providing that any determination made by the permit board under paragraph (e) shall not be construed as a adjudication of property rights. The Director finds that the proposed revision is consistent with and no less stringent than the requirements of section 510(b)(6) of SMCRA.

13. Section 53–9–35, Permit Revisions

Existing subsection (1)(a) was designated as subsection (2) without any substantive changes. Existing subsection (1)(b) was designated as subsection (2) and it was revised by adding the requirement that a decision by the executive director to grant or deny a revision of a permit shall be subject to formal hearing and appeal under section 49–17–29 of the Mississippi Code of 1972. Section 49–17–29 contains general administrative practices and procedures used for formal hearings in connection with permits issued, denied, modified or revoked and for all appeals from decisions of the permit board. The Director finds that the proposed revisions are not inconsistent with and are no less stringent than the permit decision hearing and appeal requirements of section 514(c) and (f) of SMCRA.

Existing subsection (1)(c) was designated as subsection (3), and it was revised by adding the statement that ''[a] revision shall not be considered a modification.'' As discussed in finding C.1.m, Mississippi defined the term ''revision'' to mean any change to the permit or reclamation plan that does not significantly change the effect of the mining operation. Mississippi considers modifications as any change to the permit or reclamation plant that significantly changes the effect of the mining operation. All modifications are subject to permit application information requirements and procedures, including notice and hearings. The Director finds that the addition of the proposed statement is consistent with Mississippi's definition for the term ''revision'' and is not inconsistent with the revision requirements of section 511 of SMCRA. Existing subsections (2) and (3), which pertain to transfer, assignment or sale of permit rights and permit review, were removed and the substantive provisions added at section 53–9–33(4) and (5), respectively. Since the substantive provisions of these subsections were added to other portions of Mississippi's program, the Director finds that the proposed deletions do not render section 53–9–35 less stringent than section 511 of SMCRA. Based on the above discussion, the Director is approving the revisions to section 53–9–35.

14. Section 53–9–37(1), Public Notice and Written Comments

Mississippi proposed the following substantive revisions to its provisions at section 53–9–37(1).

a. Mississippi changed the word ''revision'' to ''modification,'' and changed its agency reference from ''administrator'' to ''permit board'' throughout subsection (1). Changing the word ''revision'' to ''modification'' is consistent with Mississippi's use of the term ''revision'' for non-significant changes to the permit or reclamation plan and its use of the term ''modification'' for significant changes to the permit or reclamation plan. Changing the term ''administrator'' to ''permit board'' is consistent with Mississippi's new designations of responsibility. The Director finds that these proposed changes are not

inconsistent with any provisions of SMCRA, and he is approving them.

b. *Submission of a complete application.* Mississippi added the word ''complete'' before the word ''application.'' This provision now requires that upon submission of a complete application for a permit or modification of an existing permit, under this chapter and the regulations promulgated under this chapter, the applicant shall submit to the permit board a copy of the applicant's advertisement of the ownership, precise location and boundaries of the land to be affected. The Director finds that Mississippi's use of the word ''complete'' to clarify that it expects the applicant to submit an application that contains all of the application requirements of its program is no less stringent than section 513(a) of SMCRA which requires submission of an application for a surface coal mining and reclamation permit, or revision of an existing permit, pursuant to the provisions of this Act or an approved State program, and is approving this revision.

c. *Newspaper advertisement.* Mississippi revised this provision by requiring the applicant to place an advertisement of the ownership, precise location, and boundaries of the land to be affected in a local and regional newspaper of general circulation in the county in which the proposed mine is to be located. If no local newspaper of general circulation in the county is published, notice shall be published in a regional newspaper and in a newspaper of general statewide circulation published in Jackson, Mississippi. The Mississippi program currently requires publication in only one newspaper. The Director finds that Mississippi's proposed revision enhances the public participation requirements of its program and is no less stringent than the requirement for public notice at section 513(a) of SMCRA.

d. *Notification to local governmental bodies, planning agencies, sewage and water treatment authorities.* Mississippi changed the term ''immediately'' to ''as soon as possible'' in its requirement to transmit the comments to the applicant, and made other minor wording changes to clarify existing requirements. The revised provision reads as follows:

> The permit board shall notify local governmental bodies, planning agencies, sewage and water treatment authorities, or water companies in the county in which the proposed surface coal mining will take place of the submission of the complete permit application. The permit board shall notify them of the operator's intention to surface mine coal on a particularly described tract of land, the number of the permit application and where a copy and summary of the proposed surface coal mining and reclamation plan may be inspected. These local bodies, agencies, authorities or companies may submit written comments within a reasonable period established by the commission on the effect of the proposed operation on the environment which is within their areas of responsibility. The comments shall be transmitted as soon as possible to the applicant by the permit board and shall be made available to the public at the same locations as the surface coal mining and reclamation permit application.

Section 513(a) of SMCRA requires that comments received from local bodies, agencies, authorities or companies shall immediately be transmitted to the applicant and made available to the public. Although Mississippi changed the term ''immediately'' to ''as soon as possible'' in its counterpart notification provision at section 53–9–37(1), its currently approved implementing regulation at section 186.12(c) does require that comments be immediately transmitted for filing and public inspection at the public office where the applicant filed a copy of the application and to the applicant. Therefore, since Mississippi interprets the phrase ''as soon as possible'' to mean ''immediately'' in its implementing regulations, the Director finds that this provision of section 53–9–37(1) in conjunction with section 186.12(c) is no less stringent than the counterpart Federal requirements at section 513(a) of SMCRA, and is approving the revision.

e. *Submittal of comments.* Mississippi added the following preclusion provision at section 53–9–37(1): ''The failure of any person to submit comments within the time established by the commission shall not preclude action by the commission.'' Although there is no direct Federal counterpart, the Director finds that this provision is not inconsistent with the provision in section 513(a) of SMCRA that allows the regulatory authority to establish a reasonable period of time for local bodies, agencies, authorities or companies to submit written comments with respect to the effect of the proposed operation on the environment or with the provision in section 513(b) of SMCRA that allows the filing of written objections within 30 days after the last publication of the newspaper notice, and is approving the proposed provision.

15. Section 53–9–37(2), Written Objections and Public Hearing

Mississippi proposed the following substantive revisions to the provisions at section 53–9–37(2).

a. *Written objections.* At section 53–9–37(2)(a), Mississippi changed the term ''immediately'' to ''as soon as possible'' in its requirement that written objections concerning a permit application be transmitted to the applicant and be made available to the public. Section 513(b) of SMCRA requires that objections shall immediately be transmitted to the applicant and made available to the public. Although Mississippi changed the term ''immediately'' to ''as soon as possible'' in its counterpart provision at section 53–9–37(2), its currently approved implementing regulation at section 186.13(b) does require that written objections be transmitted immediately upon receipt to the applicant and a copy filed for public inspection at the public office where the applicant filed a copy of the application. Therefore, since Mississippi interprets the term ''as soon as possible'' to mean ''immediately'' in its implementing regulations, the Director finds that this provision of section 53–9–37(2) in conjunction with section 186.13(b) is no less stringent than the counterpart Federal requirements at section 513(b) of SMCRA, and is approving the revision.

b. *Public hearing.* At section 53–9–37(2)(b), Mississippi added time frames for requesting a public hearing, publication of the notice of a public hearing, and holding a public hearing. Mississippi added a provision that requires the permit board to hold a public hearing before issuance of a permit. Mississippi also changed the term ''informal conference'' to ''public hearing'' and added a requirement concerning transcript costs. The revised provision reads as follows:

> Within 45 days after the last publication of the notice described in subsection (1) of this section, any interested party may request that the permit board conduct a public hearing concerning the complete application. If a public hearing is requested, the permit board shall hold a public hearing in the county of the proposed surface coal mining and reclamation operations within ninety (90) days after receipt of the first request for a public hearing. Before issuance of a permit, the permit board shall hold a public hearing at a suitable location in the county of the proposed surface coal mining and reclamation operation. The date, time and location of any public hearing shall be advertised by the permit board in the same manner as provided for the publication of notice for advertisement of land ownership under subsection (1) of this section. The last

public hearing notice shall be published at least thirty (30) days before the scheduled public hearing date. An electronic or stenographic record shall be made of the public hearing proceeding. Any person requesting transcription of the record shall bear the costs of the transcription. That record shall be maintained and shall be accessible to the public until final release of the applicant's performance bond or other collateral. If all persons requesting the public hearing stipulate agreement before the requested public hearing and withdraw their request, the public hearing may be canceled at the discretion of the permit board.

Mississippi uses its public hearing provisions as a counterpart to the informal conference provisions of section 513(b) of SMCRA. As discussed in Finding C.1.1, Mississippi's public hearing is more of an open public process than the informal conference allowed by SMCRA since Mississippi allows any member of the public, not just interested parties, to attend and participate in the hearing. Mississippi's proposed language which requires the permit board to hold a public hearing before issuance of a permit is in accordance with the Mississippi law regarding administrative practices and procedures at section 49–17–29(4)(a) of the Mississippi Code of 1972. This law requires the permit board to conduct a public hearing or meeting to obtain comments from the public on a proposed permit prior to its issuance even if a public hearing is not requested. Section 513(b) of SMCRA provides for written objections and requests for an informal conference to be filed within 30 days after the last publication of the newspaper notice required by section 513(a) of SMCRA, the informal conference is to be held within a reasonable time of the receipt of the request, and the date, time and location of the informal conference shall be advertised by the regulatory authority at least two weeks prior to the scheduled conference. The Director finds that allowing interested parties 45 days to request a public hearing enhances Mississippi's public participation provisions and holding a public hearing within 90 days after receipt of the first request is reasonable considering the 45-day comment period and the revised notice of hearing provisions. The Director finds that Mississippi's requirement that the notice of hearing be published at least once a week for four consecutive weeks and that the last notice be published at least 30 days before the scheduled hearing date is no less stringent than the Federal requirement that a notice be published at least two weeks prior to a scheduled conference. The Director finds that requiring a person to bear the cost of a requested transcript is consistent with and no less effective than the Federal requirements for a transcript of hearings at 43 CFR 4.23. Based upon the above discussion, the Director is approving the proposed revisions at section 53–9–37(2)(b).

16. Section 53–9–37(3), Access to the Proposed Mining Area

Mississippi revised its existing provision regarding access to the proposed mining area and added the revised provision at subsection (3). The revised provision requires the permit board to arrange with the applicant reasonable access to the area of the proposed operation for the purpose of gathering information relevant to the proceeding before the public hearing upon request by any interested party requesting a public hearing. An exception clause was added to the provision that allows access to be provided before the public hearing if requested in less than one week of the hearing. Section 513(b) of SMCRA allows the regulatory authority the discretion of determining whether to conduct visits to areas of proposed mines for the purpose of gathering information relevant to the proceeding. Since SMCRA does not specifically require the regulatory authority to arrange access, the Director finds that section 53–9–37(3), including the exception clause, is no less stringent than section 513(b) of SMCRA.

17. Section 53–9–37(4), Permit Decision

Mississippi revised its existing provisions at section 53–9–39(2) and (3) concerning the time frames for making permit decisions, and moved them to section 53–9–37(4). Section 53–9–37(4) requires the permit board to act upon a complete permit application within 60 days after the date of the public hearing. If no public hearing is requested or required, the permit board shall act within 60 days after the last publication of the applicant's newspaper notice described in subsection (1). An exception clause was added that provides that the time frames may be extended if agreed in writing by the department and the applicant.

The Director finds that requiring a decision on a permit application within 60 days after an administrative proceeding is consistent with and no less stringent than the requirements of section 514(a) of SMCRA and requiring a decision on a permit application within 60 days after publication of the last public notice if no public hearing is requested or required is no less stringent than the requirements of section 514(b) of SMCRA. The Director also finds that the proposed time-frame extension language is not inconsistent with the requirements of section 514(b) of SMCRA, which allows the regulatory authority to notify the applicant for a permit of its decision within a time frame established by the regulatory authority if no informal conference is held.

On October 23, 1997, OSM notified Mississippi of a concern regarding Mississippi's time-frame extension provision as it relates to its public hearing provision (Administrative Record No. MS–0343). The time-frame extension provision did not appear to take into consideration the agreement of interested parties who requested the public hearing. In its letter dated November 20, 1997 (Administrative Record No. MS–0346), Mississippi explained that the reason it anticipates the possible need for an extension to the time frame is because a public hearing is mandatory prior to the issuance of a permit and its public hearing process allows any member of the public to attend and participate, not just interested parties who request a hearing. Because anyone can participate in public hearings, similar hearings in other Mississippi pollution control programs have resulted in voluminous public comment which required more than 60 days for the permit board and the department to digest, review, and incorporate into the permit as appropriate.

The Director agrees that if voluminous public comments are received at a public hearing, it may take more than 60 days to make a final decision on whether to grant or deny the permit. However, the Director finds that the proposed time-frame extension language is not consistent with the requirements of section 514(a) of SMCRA since it does not provide for agreement to the extension by interested parties who requested the public hearing. Section 514(a) of SMCRA requires that persons who are parties to administrative proceedings also be furnished with the written findings of the regulatory authority, and section 53–9–39(1)(d) of the Mississippi Surface Coal Mining and Reclamation Law requires that persons who requested the public hearing be notified of the permit decision. Therefore, interested parties who requested the public hearing, not only the applicant, must agree to an extension of the permit decision time frame. As discussed in finding C.1.h, Mississippi defines the term ''interested party'' to mean any person claiming an interest relating to the surface coal mining operation and who is so situated that the person may be affected by that

operation. If a mandatory hearing is held because no interested party requested a public hearing, then agreement by the applicant only would not be inconsistent with section 514(a) of SMCRA.

Based upon the above discussion, the Director is approving the revisions to section 53–9–37(4) with the requirement that Mississippi propose revisions to section 186.23(b)(2) of the Mississippi Surface Coal Mining Regulations, or otherwise amend its program, to require agreement to an extension of the 60-day time frame for acting upon a complete permit application by the applicant and interested parties who requested the public hearing, if a public hearing is requested and held.

18. Section 53–9–39, Notification of Permit Decision, Formal Hearings, and Appeals

Mississippi proposed several revisions regarding notification of the action taken by the permit board on a permit application, administrative review of the action, and appeal of the final action. The Director finds that with the exception of the provisions discussed below, the revised provisions at section 53–9–39 are substantively the same as the Federal counterpart provisions of SMCRA.

a. *Section 53–9–39(1), notification.* Mississippi's provisions at section 53–9–39(1) require that within 14 days after issuing or denying a permit or granting or denying a motification to an existing permit, the permit board shall notify by mail the applicant, the mayor of each municipality and the president of the board of supervisors of each county in which the permit area is located, persons who submitted written comments if those persons provided a complete address, and persons who requested the public hearing if those persons provided a complete address. The notification to the local governmental officials shall include a description of the permit area and a summary of the mining and reclamation plan.

(1) Section 510(a) of SMCRA requires that within 10 days after the granting of a permit, the regulatory authority shall notify the local governmental officials in the local political subdivision in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land. Although Mississippi's revised provisions at section 53–9–39(1)(b) requires notification to local governmental officials within 14 days instead of 10 days after issuing or denying a permit, the Director finds that the proposed revision is no less stringent than section 510(a) of SMCRA because Mississippi allows local governmental officials 45 days to request a formal hearing at section 53–9–39(3), instead of the 30 days provided by section 514(c) of SMCRA.

(2) Section 514(a) of SMCRA requires that if an informal conference has been held, the regulatory authority shall issue and furnish the applicant for a permit and persons who are parties to the administrative proceedings with the written finding of the regulatory authority within 60 days of said hearings. Mississippi's revised provisions at section 53–9–37(4) require the permit board to act upon a complete permit application within 60 days after the date of the public hearing and section 53–9–39(1)(a) and (d) require notification to the applicant and persons who requested the public hearing within 14 days after issuing a decision on a permit or modification to an existing permit. Although Mississippi's revised provisions allow the permit board to furnish its permit decision within 74 days of a hearing instead of 60 days, the Director finds that Mississippi's revised time-frame for notification at section 53–9–39(1) (a) and (d) is no less stringent than the requirements of section 514(a) of SMCRA because Mississippi allows additional time to the applicant and interested persons to request a formal hearing. Mississippi's statute at section 53–9–39(3) allows the applicant or any other interested party to request a formal hearing within 45 days after its initial decision to issue or deny a permit, while section 514(c) of SMCRA allows the applicant or any person with an interest which is or may be adversely affected to request a hearing within 30 days after the applicant is notified of the final decision.

Based upon the above discussions, the Director is approving Mississippi's proposed revisions at section 53–9–39(1) of the Mississippi Surface Coal Mining and Reclamation Law.

b. *Section 53–9–39(3), formal hearings.* At section 53–9–39(3), Mississippi allows the applicant and any other interested party to request a formal hearing within 45 days after the permit board makes its decision to issue or deny a permit application and requires hearings to be conducted within sixty (60) days after receipt of the first request for a formal hearing. Mississippi removed its previously approved provision from section 53–9–39(7) that allowed judicial appeal if the regulatory authority failed to act within the time limits specified in its statutes and added a new provision at section 53–9–39(3) that allows any interested party to request a formal hearing if the permit board fails to take action within the time allowed under section 53–9–37, which specified the time periods for holding a public hearing and for issuing or denying a permit. Mississippi is also requiring that at the conclusion of the formal hearing or within 30 days after the formal hearing, the permit board shall enter in its minutes a final decision affirming, modifying or reversing its prior decision to issue or deny the permit. The permit board shall mail within seven days after its final decision a notice of that decision to the applicant and all persons who participated as a party in the formal hearing.

(1) Section 514(c) of SMCRA allows the applicant or any person with an interest which is or may be adversely affected to request a hearing within 30 days after the applicant is notified of the final decision and requires that administrative hearings on final permit decisions be held within 30 days of a request for hearing. The Director finds that allowing the applicant and interested persons 45 days to request a formal hearing will not render Mississippi's administrative review process less stringent than the Federal requirements. However, in its October 23, 1997, letter, OSM expressed concern that Mississippi's requirement for a 60-day rather than a 30-day time frame for holding a hearing may not be consistent with the Federal requirements. In its letter dated November 20, 1997, Mississippi explained that the 60-day period stemmed from the permit board's procedures for holding a formal hearing. The formal hearing procedures require that direct testimony be submitted in writing, usually in affidavit form, with attached exhibits, prior to the hearing. All parties are given 30 days to submit initial testimony, and then are given 7 days to submit rebuttal testimony. The hearing normally is scheduled for 7 days after the filing of rebuttal testimony. At the hearing, cross-examination is allowed. This allows members of the public and community or environmental groups to participate in formal hearings, because the individuals or groups are given time to put their complaints and concerns in writing, rather than having to depend on the presentation of evidence through oral testimony. Taking into consideration the additional time that Mississippi allows the applicant and other interested persons to request a hearing and the formal hearing process explained above, the Director finds that Mississippi's time frame for holding a formal hearing is no less stringent than

the counterpart Federal provision at section 514(c) of SMCRA.

(2) Section 514(f) of SMCRA requires that any applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector shall have the right to judicial appeal if the regulatory authority fails to act within the time limits specified in this Act. In its October 23, 1997, letter, OSM expressed concern that Mississippi had removed its counterpart provision from section 53–9–39(7). In its November 20, 1997, letter Mississippi explained that it had divided the right to review the permit board's failure to act within specified time periods into separate administrative and judicial forums by allowing affected parties to request a formal hearing under section 53–9–39(3). The party then may request judicial appeal at section 53–9–39(6) in accordance with the requirements of section 53–9–77(1) and section 49–17–29(5) of the Mississippi Code of 1972 if the party is aggrieved by the formal hearing decision. If the affected party wishes to seek direct judicial review of the failure of the permit board to abide by any time frame in the Mississippi statutes, the party may file suit pursuant to section 53–9–67(1)(b), which provides judicial review for the failure of the agency to perform any nondiscretionary duty under the Act. SMCRA does not provide for a formal hearing on a regulatory authority's failure to act within the time limits specified in SMCRA. However, the Director finds that Mississippi's provision at section 53–9–39(3) when combined with the judicial review requirements of sections 53–9–77(1) and 49–17–29(5) and the civil action requirements of 53–9–67(1)(b) is no less stringent that the Federal requirements at section 514(f) of SMCRA.

(3) In its letter dated October 23, 1997, OSM expressed its concern that Mississippi's proposed language at section 53–9–39(3) that allows the permit board a total of 30 days within which to issue a decision on a permit and an additional seven days within which to furnish its written decision to the proper parties after a formal hearing may be less stringent than the Federal requirements. Section 514(c) of SMCRA requires that the written decision be issued and furnished within 30 days after a formal hearing. In its letter dated November 20, 1997, Mississippi explained that the seven days in which the permit board would be allowed to mail the notice of the decision is a reasonable effort to accommodate the combined effect of Mississippi case law and the Mississippi Open Meetings Law on the method the permit board uses to make and record its permit actions. The permit board's decision documents must include an explanation of the specific reasons for an agency's decision, if the reasons are not otherwise evident from the administrative record (*McGowan* v. *State Oil & Gas Board*, 604 So. 2d 312 (1992)). Since a decision document cannot be prepared until the decision is made, it would be very difficult for the permit board to issue an order on the same day it is made. Permit actions are taken by a vote of the seven-member board and the decision is then entered into the meeting minutes. Under Mississippi law, the permit board can take action on a permit only at an open meeting, Mississippi Annotated Code section 25–41–5 (Rev. 1990), normally scheduled twice monthly. The Director finds that since the final permit decision is made at the conclusion of the formal hearing or within 30 days after the formal hearing at a meeting which is open to the public, including the applicant and all persons who participated as a party in the formal hearing, Mississippi's provision at section 53–9–39(3) which allows the permit board to mail its written decision within seven days after its final decision is recorded in the minutes of the permit board is no less stringent than the requirements of section 514(c) of SMCRA.

c. *Section 53–9–39(5), transcript of hearings.* Section 514(e) of SMCRA requires that a verbatim record of each hearing shall be made and a transcript made available on the motion of any party or by order of the regulatory authority. Mississippi's requirement for a transcript was removed from existing section 53–9–39(6) and was not added to the revised provision concerning the requirement for a verbatim record at section 53–9–39(5). However, Mississippi's currently approved regulations at section 187.11(b)(3)(ii), concerning administrative review of permit decisions, includes this requirement. Therefore, the Director finds that section 53–9–39(5) in conjunction with Mississippi's approved regulation at section 187.11(b)(3)(ii) of the Mississippi Surface Coal Mining Regulations is no less stringent than the Federal requirements for a verbatim record and transcript of a hearing at section 514(e) of SMCRA.

19. Section 53–9–43, Confidentiality of Information

This section was modified by removing the existing provisions regarding issued permits meeting all applicable performance standards and by adding the existing language from section 53–9–41(2) on the confidentiality of information. Mississippi also proposed additional requirements. Section 53–9–43 now authorizes the commission to determine confidentiality claims and to provide penalties for unauthorized disclosure of confidential information. Information submitted concerning trade secrets or privileged commercial or financial information relating to the competitive rights of an applicant and which is specifically identified as confidential shall not be available for public examination if the applicant submits a written confidentiality claim to the commission before the submission of the information and the commission determines the confidentiality claim is valid. The confidentiality claim shall include a generic description of the nature of the information included in the submission. The commission shall promulgate rules and regulations consistent with the Mississippi Public Records Act regarding access to confidential information. Any information for which a confidentiality claim is asserted shall not be disclosed pending the outcome of any formal hearing and all appeals. Any person knowingly and willfully making unauthorized disclosures of any information determined to be confidential shall be liable for civil damages. A person convicted of making unauthorized disclosures shall be fined $1,000 and dismissed from public office or employment.

Section 512(b) of SMCRA and 30 CFR 772.15(b) of the Federal regulations require that information concerning coal exploration that is submitted to the regulatory authority as confidential concerning trade secrets or privileged commercial or financial information which relates to the competitive rights shall not be available for public examination. The Federal regulation at 30 CFR 772.15(c) provides that information requested to be held as confidential shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information. The Director finds that the requirements of section 53–9–43 are non inconsistent with the requirements of SMCRA or the Federal regulations concerning confidentially of information, and is approving the proposed revisions to section 53–9–43.

20. Section 53–9–45, Performance Standards Relating to Surface Mining

This section was modified by adding the existing language from section 53–9–43 concerning content of permits for surface coal mining and reclamation operations at subsection (1). Mississippi revised the existing language by adding a requirement that any permit issued to conduct coal exploration operations, as well as surface coal mining and reclamation operations, require such operations to meet all applicable environmental protection performance standards of this chapter and such other requirements as the commission shall promulgate. This section was also amended to make various clarifying language revisions to the existing provisions concerning the general environmental protection performance standards that the commission shall promulgate by regulations, including the following: At section 53–9–45(2)(c), the regulations shall assure restoration of the approximate original contour of the land with all highwalls, spoil piles and depressions eliminated, unless an exception is provided under section 53–9–45. At section 53–9–45(2)(g), the operator may elect to impound water to provide lakes or ponds for wildlife, recreational or water supply purposes if it is a part of the approved mining and reclamation plan and if those impoundments are constructed in accordance with applicable Federal and state laws and regulations. At section 53–9–45(2)(h), the regulations shall govern the proper conduct of augering operations or prohibit those operations under certain circumstances. At section 53–9–45(4)(b)(i) and (ii), additional criteria were added for a variance from the requirement to restore to approximate original contour and to reclaim the land to an industrial, commercial, residential or public use. Notification must be made to appropriate Federal, state, and local governmental agencies providing an opportunity to comment on the proposed use; the proposed postmining land use must be compatible with adjacent land uses and state and local land use planning; and the proposed postmining land use must be economically practical.

Section 515 of SMCRA provides the general performance standards that are applicable to all surface coal mining operations. In its letter dated October 23, 1997, OSM expressed concern that Mississippi's reference at section 53–9–45(4)(b) to subsection (2) in the phrase ''a variance from other requirement to restore to approximate original contour set forth in subsections (2) or (3) of this section'' could be interpreted as an expansion of the variance to non-steep slope disturbed areas since subsection (2) contains the general protection performance standards that are applicable to all surface coal mining and reclamation operations. Section 515(e)(2) of SMCRA grants a variance from the requirement to restore disturbed areas to approximate original contour only for steepslope surface coal mining and reclamation operations. In its letter dated November 20, 1997, Mississippi explained that the discrepancy stems from a typographical error which is the result of renumbering the provisions. Therefore, the Director finds that with the exception of this typographical error, Mississippi's proposed revisions at section 53–9–45 are no less stringent than the provisions of section 515 of SMCRA, and is requiring Mississippi to remove its reference to subsection (2) from section 53–9–45(4)(b).

21. Section 53–9–53, Mine Entrance Signs

This section was revised by adding new information requirements for mine entrance signs. The signs must also state that questions and complaints regarding the operation may be directed to the department, and they must show the department's telephone number.

There is no direct Federal counterpart to Mississippi's proposed provision. However, the Director finds that requiring permittees to maintain additional information on their mine entrance signs is not inconsistent with section 517(d) of SMCRA or 30 CFR 816.11(c)(2) of the Federal regulations pertaining to requirements for mine entrance signs.

22. Section 53–9–55, Complaints, Formal Hearing, Service of Notices, and Civil Penalties

This section was amended to add new provisions and make various clarifying language revisions to the existing provisions concerning violations and assessment of civil penalties.

a. *Section 53–9–55(1), written complaint, formal hearing, and service of notices.* Existing section 53–9–55 was revised by adding new subsection (1), which allows service of a written complaint at paragraph (a), affords an opportunity for a formal hearing to alleged violators at paragraph (b), and provides for service of notices at paragraph (c). These new paragraphs read as follows:

(a) When the commission or an authorized representative of the department has reason to believe that a violation of this chapter or any regulation or order of the commission or permit board or any condition of a permit has occurred, the commission may cause a written complaint to be served upon the alleged violator. The complaint shall specify the section, regulation, order or permit alleged to be violated and the facts alleged to constitute the violation and shall require the alleged violator to appear before the commission at a time and place specified in the order to answer the complaint. The time of appearance before the commission shall be not less than twenty (20) days from the date of the mailing or service of the complaint, whichever is earlier.

(b) The commission shall afford an opportunity for a formal hearing to the alleged violator at the time and place specified in the complaint or at another time or place agreed to in writing by both the department and the alleged violator, and approved by the commission. On the basis of the evidence produced at the formal hearing, the commission shall enter an order which in its opinion will best further the purposes of this chapter and shall give written notice of that order to the alleged violator and to any other persons who participated as parties at the formal hearing or who made written request for notice of the order. The commission may assess penalties as provided in this section.

(c) Except as otherwise expressly provided, any notice or other instrument issued by or under authority of the commission may be served on any affected person personally or by publication, and proof of that service may be made in the same manner as in case of service of a summons in a civil action. The proof of service shall be filed in the office of the commission. Service may also be made by mailing a copy of the notice, order, or other instrument by certified mail, directed to the person affected at the person's last known post-office address as shown by the files or records of the commission. Proof of service may be made by the affidavit of the person who did the mailing and shall be filed in the office of the commission.

In its letter of October 23, 1997, OSM expressed a concern that Mississippi's provisions at section 53–9–55(1)(a) may conflict with the enforcement provisions of section 521(a) of SMCRA and Mississippi's counterpart enforcement provisions at section 53–9–69(1). Section 521(a) requires the Secretary or his authorized representative to issue orders of cessation and notices of violation when on the basis of an inspection it is determined that a violation exists. Section 53–9–55(1)(a) authorizes the commission to cause a written complaint to be served when the commission or an authorized representative of the department has reason to believe that a violation has occurred, without mention of an inspection. Section 53–9–55(1)(b) provides the alleged violator an opportunity for a formal hearing regarding the written complaint. In its letter of November 20, 1997, Mississippi

explained that section 53–9–55(1) grants optional enforcement authority to the commission that is in addition to the mandatory enforcement requirements in section 53–9–69(1), which requires the issuance of an appropriate cessation order or notice of violation upon discovering a violation during an inspection. Section 521(d) of SMCRA provides that section 521 of SMCRA shall not be construed so as to eliminate any additional enforcement rights or procedures which are available under State law to a State regulatory authority.

Based upon the above discussion, the Director finds that the proposed enforcement and hearing provisions at section 53–9–55(1) (a) and (b) as such as supplemental to Mississippi's enforcement and hearing provisions at section 53–9–69 and are not inconsistent with the provisions of section 521 of SMCRA. The Director further finds that Mississippi's proposed provision at paragraph (c) is not inconsistent with the Federal requirements for service of notices of violation, cessation orders, and show cause orders at 30 CFR 843.14 of the Federal regulations, which allows service on the person to whom the notice or order is directed or by certified mail. Therefore, the Director is approving section 53–9–55(1).

b. *Section 53–9–55(2), assessment of a civil penalty*. Existing section 53–9–55(1) was revised and redesignated as section 53–9–55(2). Existing section 53–9–55(2), concerning a civil penalty for failure to correct a violation for which a citation had been issued, was removed. Mississippi proposed minor clarifying language changes to the existing requirements and revised the amount of the civil penalty that may be assessed for each violation. Section 53–9–55(2) now authorizes the commission, after notice and opportunity for a formal hearing, to assess a civil penalty not to exceed $25,000 per violation, Mississippi's existing provision and section 518(a) of SMCRA authorize the assessment of $5,000 for each violation. However, in *In Re: Permanent Surface Mining Regulation Litigation*, U.S.D.C., District of Columbia, Civil Action No. 79–1144 (February 26, 1980), the Court ruled that penalty amounts need not be equivalent to those of the Federal regulations at 30 CFR Part 845. The Court determined that a State must consider the four criteria listed in section 518(a) of SMCRA for determining the amount of the penalty and the penalties imposed must be no less stringent than those in SMCRA. Mississippi's revised statutory language continues to consider the four criteria specified in section 518(a) in determining the amount of the penalty. Therefore, in accordance with section 518(i) of SMCRA, the Director finds that Mississippi's program provisions at section 53–9–55(2) incorporates civil penalties no less stringent than those set forth in section 518(a) of SMCRA and contains the same or similar procedural requirements relating to them.

c. *Section 53–9–55(3), payment of penalty*.

(1) Mississippi removed its existing statutory language at section 53–9–55(3) regarding a public hearing and added the substantive provisions from section 53–9–55(4) concerning payment of a penalty. The opportunity for a formal hearing regarding a civil penalty was added at section 53–9–55(2). Section 53–9–55(3) was revised by removing the language that specified the amount of interest that must be paid to a person cited with a violation on penalties placed in escrow if it is determined through administrative or judicial review of the proposed penalty that no violation occurred or that the amount of the penalty should be reduced. Section 518(c) of SMCRA provides that the person cited with a violation can receive 6 percent interest, or interest at the prevailing Department of the Treasury rate. Mississippi's revision provides for the return of the escrowed amount with ''any interest earned.'' However, Mississippi's regulation at section 245.20(c) of the Mississippi Surface Coal Mining Regulations requires refund with interest from the date of payment into escrow to the date of the refund at the rate of 6 percent or at the prevailing Department of the Treasury rate, whichever, is greater. Therefore, the Director finds that Mississippi's revision at section 53–9–55(3) in conjunction with its regulation at section 245.20(c) is no less stringent that section 518(c) of SMCRA.

(2) Section 53–9–55(3) was also revised by adding a new provision that allows the commission to promulgate regulations regarding a waiver from the requirement to post a penalty payment bond upon a showing by the operator of an inability to post the bond in order to contest the amount of the proposed penalty or fact of the violation.

In its November 7, 1997, letter to Mississippi, OSM expressed concern regarding this requirement because section 518(c) of SMCRA specifies that a person who wishes to contest either the amount of the penalty or the fact of violation shall prepay the proposed penalty to the Secretary, who shall then place it into an escrow account. The Federal regulations at 30 CFR 845.19(a) similarly provide that a person charged with a violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty to the Department of the Interior's Office of Hearings and Appeals. In its November 20, 1997, letter, Mississippi explained that a 1996 decision of the United States Supreme Court arising from *Mississippi, M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996) had cast doubt on a Mississippi agency's authority to require indigent parties to prepay a penalty or the cost of appeal as a prerequisite to conducting the appeal and prompted the department to add the provision regarding the possible waiver of the prepayment provision. The Director understands Mississippi's concern, but recognizes that one of the principal factors leading to the adoption of SMCRA's prepayment requirement was Congressional concern about the historically low collection rate of similar penalties assessed by other governmental agencies. Because of this concern, neither SMCRA nor the Federal regulations provide for a waiver of the prepayment requirement. Therefore, the Director finds that Mississippi's proposal at section 53–9–55(3) for a prepayment waiver is inconsistent with SMCRA and the Federal regulations, and is not approving it.

d. *Section 53–9–55(4), penalty for willfully and knowingly authorizing, ordering or carrying out a violation*. The existing statutory language at section 53–9–55(5) was moved to section 53–9–55(4) and revised to read as follows:

> When a permittee violates this chapter or any regulation or written order of the commission promulgated or issued under this chapter or any condition of a permit issued, any director, officer, general partner, joint venturer in or authorized agent of the permittee who willfully and knowingly authorized, ordered or carried out that violation shall be subject to separate civil penalties in the same amount as penalties that may be imposed upon a person under subsection (2) of this section.

The Director finds that the revised statutory requirements at section 53–9–55(4) are no less stringent than the requirements of section 518(f) of SMCRA relating to civil penalties for directors, officers, or agents of corporate permittees.

e. *Section 53–9–55(5), recovery of penalties in a civil action*. The substantive provisions of existing section 53–9–55(6) were moved to section 53–9–55(5) and revised to allow civil penalties to be recovered in a civil action in the chancery or circuit court of the First Judicial District of Hinds County or in the chancery or circuit court of any county in which the surface

coal mining and reclamation operation exists or in which the defendant may be found. The Director finds that section 53–9–55(5) is no less stringent than section 518(d), which allows civil penalties to be recovered in a civil action.

f. New section 53–9–55(6) specifies that ''provisions of this section and chapter regarding liability for the costs of clean-up, removal, remediation or abatement of any pollution, hazardous waste or solid waste shall be limited as provided in section 49–17–42 and rules promulgated under that section.'' Section 49–17–42 of the Mississippi Code of 1972 specifies that ''any lender or holder who maintains indicia of ownership primarily to protect an interest in a property, facility, or other person, and who does not participate in the management of the property, facility, or other persons, shall not be considered an owner or operator of that property, facility, or other person, nor liable under any pollution control or other environmental protection law, or any rule or regulation or written order of the commission in pursuance thereof, for the prevention, clean-up, removal, remediation or abatement of any pollution, hazardous waste or solid waste placed, released or dumped on, in, about or near property, facility or other person or caused by any operator on or of the property, facility or other person.''

Although there is no direct Federal counterpart to this provision, the Director finds that section 53–9–55(6) is not inconsistent with section 518(f) of SMCRA that limits liability for violations of corporate permittees to the permittee and the director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out such violation.

23. Section 53–9–57, Criminal Penalties

Mississippi revised this section by incorporating additional statutory language from existing section 53–9–59 concerning criminal penalties for making false statements, representations, and certifications. The revised provision reads as follows:

> Any person who willfully and knowingly violates this chapter or any regulation or written order of the commission promulgated or issued under this chapter or any condition of a permit, or makes any false statement, representation or certification or knowingly fails to make any statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under a regulation or written order of the commission promulgated or issued under this chapter, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars ($10,000.00) or by imprisonment for not more than one (1) year, or both.

The Director finds that Mississippi's revised provision for criminal penalties is consistent with and no less stringent than the counterpart requirements in section 518(e) and (g) of SMCRA, and is approving the revisions to section 53–9–37.

24. Section 53–9–65, Bond Release and Bond Forfeiture

Section 53–9–65 was revised to authorize the permit board to release performance bonds, to clarify the existing public hearing provisions, to provide for administrative review and appeal of decisions of the permit board, and to establish a procedure for bond forfeiture.

a. *Section 53–9–65(1) and (2), application and schedule for bond release.* Previously approved subsection (1) provides for filing of an application for the release of performance bond, public notice of the application, and inspection and evaluation of the reclamation work involved. Previously approved subsection (2) provides the criteria and schedule for release of performance bond. Mississippi revised these sections by proposing minor wording and stylistic changes and revisions to reflect new designations of responsibility. The Director finds that the proposed revisions at section 53–9–65(1) and (2) will not render these previously approved statutory provisions less stringent than the Federal counterpart provisions at section 519(a) through (d) of SMCRA.

b. *Section 53–9–65(3), public hearing.* Mississippi added new provisions for a public hearing at subsection (3), removed its provision concerning an informal conference at existing subsection (4), and removed its provisions concerning the public hearing at existing subsection (5). The revised provisions at subsection (3) read as follows:

> Any interested party or the responsible officer or head of any federal, state or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to the operations, may submit written comments on the proposed release from bond or other collateral, and request a public hearing concerning the bond release application under Section 49–17–29. The failure of any person to submit comments within the time required shall not preclude action by the permit board. Any request for a public hearing concerning the bond release application shall be made in writing within thirty (30) days after the last publication of the notice described in subsection (1) of this section. The permit board may on its own motion hold a public hearing concerning the bond release application. If requested, the permit board shall hold a public hearing to obtain comments from the public on the application for bond release. The date, time and location of the public hearings shall be advertised by the permit board in the same manner as provided for the publication of notice for advertisement of land ownership under Section 53–9–37. The last public hearing notice shall be published at least seven (7), but not more than fourteen (14) days before the scheduled public hearing date. If all persons requesting the public hearing stipulate agreement before the requested public hearing, the public hearing may be cancelled at the discretion of the permit board.

Mississippi's requirements concerning public hearings throughout its statutory provisions, including those for the release of performance bonds, are used as a counterpart to SMCRA's provisions for an informal conference at section 513(b). Section 519(g) of SMCRA allows the regulatory authority to establish an informal conference as provided in section 513(b) to resolve written objections concerning a performance bond release request. Mississippi's proposed statutory provisions at section 53–9–65(3) do not contain the substantive requirements of section 513(b) of SMCRA that the regulatory authority hold an informal conference within a reasonable time of the receipt of a request or for an electronic or stenographic record of the conference proceedings. However, Mississippi's regulation at section 207.11(e) that provides for an informal conference on proposed bond releases contains these substantive requirements. Section 207.11(e)(2) requires that the informal conference be held within 30 days from the date of the notice; section 207.11(e)(3) requires an electronic or stenographic record be made of the conference and the record maintained for access by the parties, until final release of the bond, unless recording is waived by all of the parties to the conference; and section 207.11(f)(3) provides that if an informal conference has been held, the notification of the decision shall be made to the permittee and all interested parties within 30 days after conclusion of the conference. Therefore, the Director finds that Mississippi's proposed revisions for a public hearing at subsection (3) in conjunction with its regulations at section 207.11(e) and (f) are no less stringent than the Federal provisions for an informal conference at sections 519(g) and 513(b) of SMCRA.

c. *Section 53–9–65(4), formal hearing and appeal.* Mississippi is adding the

following provision at new subsection (4) that provides for a formal hearing on the permit board's initial decision to grant or deny the bond release and judicial appeal of its final decision.

Within thirty (30) days after the permit board takes action on the bond release application as recorded in the minutes of the permit board, any person who filed a written comment or requested or participated in the public hearing under this subsection may request a formal hearing before the permit board regarding its initial decision to grant or deny the bond release. The formal hearing shall be conducted as provided by Section 49–17–29. Upon conclusion of the formal hearing, the permit board shall enter into its minutes its final decision affirming, modifying or reversing its prior action on the bond release application. Any appeal from that decision may be taken by any person who participated as a party in the formal hearing in the manner provided in Section 49–17–29.

The Director finds that the provision for a formal hearing at section 53–9–65(4) is no less stringent than section 519(d) of SMCRA, which provides for a public hearing if the application for release of the bond is disapproved, or section 519(f) and (g) of SMCRA, which provide for a public hearing on proposed bond releases. The Director also finds that the provision for appeal at section 53–9–65(4) is no less stringent than section 526(e) of SMCRA, which requires that actions of a State regulatory authority shall be subject to judicial review by a court of competent jurisdiction in accordance with State law.

d. *Section 53–9–65(5), bond forfeiture.* Mississippi added the following provisions concerning bond forfeiture to new subsection (5).

(a) If a surface coal mining and reclamation operation is not proceeding in accordance with this chapter or the permit, the operation represents an imminent threat to the public health, welfare and the environment, and the operator has failed, within thirty (30) days after written notice to the operator and opportunity for a formal hearing, to take appropriate corrective action, a forfeiture proceeding may be commenced against the operator for any performance bond or other collateral posted by the operator.

(b) A forfeiture proceeding against any performance bond or other collateral shall be commenced and conducted according to Sections 49–17–31 through 49–17–41.

(c) If the commission orders forfeiture of any performance bond or other collateral, the entire sum of the performance bond or other collateral shall be forfeited to the department. The funds from the forfeited performance bond or other collateral shall be used to pay for reclamation of the permit area and remediation of any offsite damages resulting from the operation. Any surplus performance bond or other collateral funds shall be refunded to the operator or corporate surety.

(d) Forfeiture proceedings shall be before the commission and an order of the commission under this subsection shall be a final order. If the commission determines that forfeiture of the performance bond or other collateral should be ordered, the department shall have the immediate right to all funds of any performance bond or other collateral, subject only to review and appeals allowed under Section 49–17–41.

(e) If the operator cannot be located for purposes of notice, the department shall send notice of the forfeiture proceeding, certified mail, return receipt requested, to the operator's last known address. The department shall also publish notice of the forfeiture proceeding in the same manner as provided for the publication of notice for the advertisement of land ownership under Section 53–9–37. Any formal hearing on the bond forfeiture shall be set at least thirty (30) days after the last notice publication.

(f) If the performance bond or other collateral is insufficient to cover the costs of reclamation of the permit area or remediation of any offsite damages, the commission may initiate a civil action to recover the deficiency amount in the county in which the surface coal mining operation is located.

(g) If the commission initiates a civil action under this section, the commission shall be entitled to any sums necessary to complete reclamation of the permit area and remediate any offsite damages resulting from that operation and attorney's fees.

SMCRA does not address bond forfeiture proceedings. However, the Director finds that Mississippi's proposed provisions for bond forfeiture proceedings are no less effective than the counterpart Federal regulations at 30 CFR 800.50.

25. Section 53–9–67, Civil Action

a. Mississippi revised previously approved subsections (1) through (5) by proposing minor wording and stylistic changes and revisions to reflect new designations of responsibility. The Director finds that the proposed revisions at section 53–9–67(1) through (5) will not render these previously approved statutory provisions less stringent than the Federal counterpart provisions at sections 520(a) through (e) of SMCRA.

b. Mississippi removed its existing provision at section 53–9–67(6), which provided that a person who is injured in his person or property through a violation by an operator may bring an action for damages, including reasonable attorney and expert witness fees, only in the judicial district in which the surface coal mining operation complained of is located. The removal of this limiting provision means that a person so injured may initiate a civil action in any judicial district. Therefore, the Director finds that the removal of this provision will not render Mississippi's provisions at section 53–9–67 less stringent than section 520 of SMCRA.

c. New section 53–9–67(6) specifies that ''provisions of this section and chapter regarding liability for the costs of clean-up, removal, remediation or abatement of any pollution, hazardous waste or solid waste shall be limited as provided in section 49–17–42 and rules promulgated under that section.'' Although there is no direct Federal counterpart to this provision, the Director finds, based on the discussion in finding C.22.f, that the proposed provision is not inconsistent with the requirements of section 518(f) of SMCRA that limit liability for violations of corporate permittees to the permittee and the director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out such violation.

26. Section 53–9–69, Inspection—Cessation Order—Suspension or Revocation of Permit—Hearing

a. Mississippi revised section 53–9–69(1) (a) and (b) by changing the authority for ordering inspection of a surface coal mining operation at which an alleged violation is occurring and for ordering a cessation of a surface coal mining and reclamation operation when a condition, practice or violation creates an imminent danger to the health and safety of the public, or is causing or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources from the ''administrator'' to the ''executive director or state geologist as the executive director's designee.'' These revisions are consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program, which is discussed in finding C.2. Therefore, the Director finds that the proposed revisions will not render section 53–9–69(1) (a) and (b) less stringent than section 521(a) (1) and (2) of SMCRA.

b. Mississippi revised section 53–9–69(1)(c), which concerns (1) issuance of an enforcement order for a violation that does not create an imminent danger to the health and safety of the public or cannot be reasonably expected to cause significant imminent environmental harm to land, air or water resources and ordering immediate cessation of the activities violating or resulting in the violation, and (2) issuance of an order of cessation for a violation that was not abated within the period of time originally fixed or subsequently extended.

Mississipi proposed to change the authority for issuing an order of

violation and an order of cessation for failure to abate the violation from the ''administrator'' to the ''commission, executive director or the executive director's authorized representative.'' The Director finds that this revision is consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program, which is discussed in finding C.2.

Mississipi revised section 53–9–69(1)(c)(i) to allow, rather than require, the issuance of an order of violation. The Director finds that allowing issuance rather than requiring issuance of an order of violation for the specified type of violation is less stringent than the Federal requirements at section 521(a)(3) of SMCRA, which provides that a notice of violation shall be issued to the permittee if he is in violation, but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources. There is no Federal counterpart to Mississippi's proposed language which allows ordering cessation of the activities that are causing this type of violation.

However, the Director finds that the proposed provision will not render the Mississippi program less stringent than SMCRA since the ordering of cessation of the activities creating the violation is in addition to issuance of the order of violation. Based upon the above discussion, the Director is approving the proposed revisions with the requirement that Mississippi amend section 53–9–69(1)(c)(i) to require the issuance of a violation order for the specified type of violation by changing the word ''may'' to ''shall'' in the phrase ''the commission, executive director or the executive director's authorized representative may issue an order to the permittee or agent of the permittee.''

c. Mississippi revised section 53–9–69(1)(d), which concerns permit suspension or revocation, to read as follows:

> When, on the basis of an inspection, the executive director has reason to believe that a pattern of violations of this chapter, any regulation promulgated under this chapter or any condition of a permit exists or has existed, and if the executive director also finds that the violations are caused by the unwarranted failure of the permittee to comply with this chapter, any regulation promulgated under this chapter or any condition of a permit, or that the violations are willfully caused by the permittee, the executive director shall issue an order to the permittee to show cause as to why the permit should not be suspended or revoked by the permit board. Upon the permittee's failure to show cause to the satisfaction of the executive director or the executive director's authorized representative as to why the permit should not be suspended or revoked, the executive director or the executive director's authorized representative shall present this information to the permit board and request that the permit board suspend or revoke the permit. The permit board shall decide the executive director's request under the procedures of Section 49–17–29(4) and (5). Any request by an interested party for a formal hearing regarding the permit board's initial decision on suspension or revocation of the permit or any appeal of the final decision following the formal hearing by any person who participated as a party in the formal hearing may be taken as provided under Section 49–17–29(4) and (5).

Mississippi's revisions include changing the authority from the ''administrator or his authorized representative'' to the ''executive director or the executive director's authorized representative'' and the ''permit board'' for enforcing the requirements of this statute, and changing the procedural requirements involved in the determination as to whether a permit should be suspended or revoked. The Director finds that the change of authority is consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program and that the revised procedural requirements are no less stringent than those of section 521(a)(4) of SMCRA.

Section 49–17–29, which is referenced in the revised provisions of section 53–9–69(1)(d), is a statutory provision codified in the Mississippi Code of 1972 that provides general administrative practices and procedures regarding hearings and appeals of decisions of the permit board. Section 49–17–29(4) provides for an informal public hearing or meeting to obtain comments from the public on the proposed action and a formal hearing if requested within 30 days after the permit board takes action upon a permit revocation request. If a formal hearing is held, section 49–17–29(5) provides for an appeal from any decision or action of the permit board in a chancery court of the county where the surface coal mining and reclamation operation is located. The Director finds that Mississippi's revised provisions for public notice, hearing, and appeal are no less stringent than the requirement for notice and hearing at section 521(a)(4) of SMCRA.

d. Mississippi removed its existing provision at section 53–9–69(1)(e) which was a counterpart to section 521(a)(5) of SMCRA and added a new provision at section 53–9–69(1)(e) that allows the permittee or other interested party to request a formal hearing concerning an order of cessation or violation as provided under section 49–17–41. Section 49–17–41 is a statutory provision codified in the Mississippi Code of 1972 that provides general administrative practices and procedures relating to hearing and appeal of decisions of the commission or executive director. Any person or interested party aggrieved by any order of the commission or the executive director shall have a right to file a petition under section 49–17–41 for review within 30 days after the order is issued. Section 49–17–41 also provides for appeal to the chancery court of the final order of determination of the commission following the formal hearing. The Director finds that Mississippi's new provision at section 53–9–69(e), which provides for formal hearing and appeal, is consistent with and no less effective than the requirements of the Federal regulations at 30 CFR 843.16 concerning formal review of citations.

Section 52(a)(5) of SMCRA provides specific requirements for notices of violation and cessation orders including content, service, and subsequent actions that may be taken. It also specifies that any notice or order which requires cessation of mining by the operator shall expire within 30 days of actual notice to the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing. This public hearing may be informal in nature and is required unless the condition, practice, or violation in question has been abated or the hearing has been waived within the 30-day time frame. Although Mississippi removed its counterpart to section 521(a)(5) of SMCRA concerning specific requirements for orders of violation and cessation including content, service, and subsequent actions that may be taken, its currently approved regulations at sections 243.11, 243.12, 243.15 of the Mississippi Surface Coal Mining Regulations contain these substantive requirements. They provide specific requirements for orders and the required public hearing. Therefore, the Director finds that the removal of existing section 53–9–69(1)(e) will not render the Mississippi program less stringent than SMCRA.

e. At section 53–9–69(2), which provides the procedural requirements relating to initiating a civil action for relief, Mississippi removed all references to the ''administrator'' and added references to the ''commission,'' ''permit board,'' and/or ''executive

director.'' The Director finds that this revision is consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program.

At section 53–9–69(2)(a), Mississippi added the First Judicial District of Hinds County to the list of chancery courts in which a civil action for relief could be initiated. The Mississippi program now allows a civil action for relief, including a permanent or temporary injunction or any other appropriate order, to be initiated in the chancery court of the county or judicial district in which the surface coal mining and reclamation operation is located, in which the permittee has its principal office, or in the First Judicial District of Hinds County. Section 521(c) of SMCRA provides that a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order may be initiated in the district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which the permittee has his principal office. Section 521(d) of SMCRA provides that nothing in section 521 ''shall be construed so as to eliminate any additional enforcement rights or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.'' Therefore, the Director finds that Mississippi's proposed revision will not render the enforcement provisions of section 53–9–69(2)(a) less stringent than those of section 521(c) of SMCRA.

At section 53–9–69(2)(b), Mississippi added the following provision to the existing requirements concerning the court providing injunctive relief.

> The commission may obtain mandatory or prohibitory injunctive relief, either temporary or permanent, and in cases of imminent and substantial hazard or endangerment to the environment or public health, it is not necessary that the commission plead or prove: (i) That irreparable damage would result if the injunction did not issue; (ii) that there is no adequate remedy by law; or (iii) that a written complaint or commission order has first been issued for the alleged violation.

There is no counterpart provision in SMCRA or the Federal regulations. However, the proposed revision is not inconsistent with any Federal provisions and in accordance with section 521(d) of SMCRA, the Director finds that the addition of this new provision will not render the enforcement provisions of section 53–9–69(2)(b) less stringent than those of section 521(c) of SMCRA.

27. Section 53–9–71, Designation of Lands as Unsuitable for Surface Coal Mining Operations

Section 53–9–71 was amended to modify the procedures for petitioning to designate lands unsuitable for surface coal mining and reclamation and to revise the provisions for public hearings and formal hearings.

a. At section 53–9–71(1)(a), Mississippi added the provision that surface coal mining and reclamation permits may be issued before completion of the planning process that is to be established for designating lands as unsuitable for surface coal mining operations.

There is no Federal counterpart to this provision. However, on September 4, 1980, the Secretary of the Interior found pursuant to section 503(a)(5) of SMCRA that Mississippi had established a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 of SMCRA (45 FR 58520). Therefore, the Director finds that the addition of the proposed provision will not render the Mississippi program less stringent than section 522(a)(1) of SMCRA.

b. Mississippi revised section 53–9–71(1)(b) by changing the authority for designating an area as unsuitable for all or certain types of surface coal mining operations from the ''administrator'' to the ''commission.'' The Director finds that this change of authority is consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program.

c. Mississippi revised section 53–9–71(1)(d) by changing the authority for the surface coal mining lands review from the ''administrator'' to the ''state geologist.'' The Director finds that this change of authority is consistent with Mississippi's redesignation of the responsibilities for administering and enforcing the Mississippi program.

d. At section 53–9–71(2)(a), Mississippi changed the time frame for holding a public hearing from ten months to six months after receipt of a petition. Section 522(c) of SMCRA requires that a public hearing be held within ten months after receipt of a petition. The Director finds that Mississippi's requirement for a six-month time frame is within the time requirements of SMCRA, and is approving this provision.

Mississippi also added a provision that allows any interested party aggrieved by a decision of the commission to request a formal hearing under section 49–17–41 and any person who participated as a party in the formal hearing to appeal the final decision under section 49–17–41. There is no counterpart provision in section 522 of SMCRA, but section 526(e) of SMCRA does require that actions of the State regulatory authority be subject to judicial review. Therefore, the Director finds that Mississippi's proposed provision at section 53–9–71(2)(a) is no less stringent than the requirements of section 522(c) concerning a public hearing and the requirements of section 526(e) of SMCRA concerning judicial review.

e. At section 53–9–71(2)(b), Mississippi added a new provision that requires the commission to promulgate regulations that are no less stringent than the Federal regulations concerning procedures for designating lands unsuitable for surface coal mining, including procedures for the content and submission of petitions and notice and public hearing requirements. Although there is no direct counterpart in section 522 of SMCRA, section 503(a)(7) of SMCRA requires a State program to have rules and regulations consistent with the Federal regulations. Therefore, the Director finds that the proposed provision is not inconsistent with the requirements of SMCRA, and is approving it.

28. Section 53–9–77, Formal Hearings

This section was amended to provide for administrative review and appeal of decisions of the permit board and commission and to provide for the powers of the permit board and the commission in conducting hearings. With the following exceptions, the Director finds that the revised provisions of section 53–9–77 in conjunction with the administrative and judicial review requirements at section 49–17–29 and 49–17–41 of the Mississippi Code of 1972 are no less stringent than the requirements of sections 525 and 526 of SMCRA.

a. Mississippi removed its counterpart to section 525(a)(2) of SMCRA at previously approved section 53–9–77(1)(b). Section 525(a)(2) requires that the permittee and other interested persons be given written notice of the time and place of an enforcement hearing at least five days prior to such hearing. Although Mississippi's statute at section 53–9–69(1)(e) provides for a hearing under section 49–17–41 of the Mississippi Code of 1972 for enforcement actions and section 49–17–41 requires the commission to fix the time and place of such hearing and to notify those who requested the hearing, neither of these sections contain a time frame for notification. However, in accordance with the required program

amendment at 30 CFR 924.16(a), Mississippi is in the process of revising its regulations to meet the requirements of SMCRA and the Federal regulations prior to allowing coal exploration or surface mining operations in the State. The Director will ensure that Mississippi amends its regulations to provide the permittee and other interested persons written notice of the time and place of an enforcement hearing at least five days prior to such hearing, or otherwise amend its program, to be no less stringent than section 525(a)(2) of SMCRA and no less effective than the requirements of 30 CFR 843.16 and 43 CFR Part 4 of the Federal regulations.

b. Mississippi removed its counterpart to section 525(b) of SMCRA at previously approved section 53–9–77(2). Section 525(b) of SMCRA requires that where an application for review concerns an order of cessation of surface coal mining and reclamation operations, findings of fact shall be made and a written decision shall be issued vacating, affirming, modifying, or terminating an order of cessation within 30 days of receipt of the application, unless temporary relief has been granted. A counterpart to this provision is not included under section 49–17–41, the section which is required to be followed for a formal hearing on cessation orders, or in Mississippi's currently approved regulations. However, in accordance with the required program amendment at 30 CFR 924.16(a), Mississippi is in the process of revising its regulations to meet the requirements of SMCRA and the Federal regulations prior to allowing coal exploration or surface mining operations in the State. The Director will ensure that Mississippi amends its regulations to require issuance of a written decision within 30 days of receipt of an application for review where it concerns an order for cessation of surface coal mining and reclamation operations, unless temporary relief has been granted, or otherwise amend its program, to be no less stringent than the requirements of section 525(b) of SMCRA and no less effective than the requirements of 30 CFR 843.16 and 43 CFR Part 4 of the Federal regulations.

c. Section 525(c) of SMCRA requires that in order for temporary relief to be granted, three conditions must be met: (1) a hearing, (2) a showing by the applicant that there is substantial likelihood that the findings of the Secretary will be favorable to him, and (3) a finding that such relief will not adversely affect the health or safety of the public or cause significant imminent environmental harm. These and other Federal requirements concerning temporary relief were included in section 53–9–77(3) before Mississippi revised its statute. Under Mississippi's proposed statutory scheme at section 53–9–77(4)(b), the hearing officer may grant temporary relief ''upon the basis of evidence presented at the hearing.'' The Director is approving this provision with the requirement that Mississippi amend the Mississippi Surface Coal Mining Regulations to include conditions for granting temporary relief that are no less stringent than those contained in section 525(c) of SMCRA and no less effective than those contained in 30 CFR 843.16 and 43 CFR Part 4 of the Federal regulations. In accordance with the required program amendment at 30 CFR 924.16(a), Mississippi is in the process of revising its regulations to meet the requirements of SMCRA and the Federal regulations prior to allowing coal exploration or surface mining operations in the State. The Director will ensure that Mississippi's amended regulations include the required conditions for granting temporary relief.

d. Mississippi removed its provision at section 53–9–77(4) which was a counterpart to section 525(d) of SMCRA, which provides hearing requirements concerning show cause orders and suspension or revocation of a permit. However, Mississippi does provide equivalent provisions for issuance of show cause orders and suspension or revocation of permits at section 53–9–69(d) of its statutes and at section 243.13(e) of its regulations. Therefore, the Director is approving the removal of section 53–9–77(4).

e. Section 525(e) of SMCRA provides that at the request of any person, costs and expenses, including attorney fees, resulting from administrative or judicial review may be assessed against either party. Mississippi removed its counterpart provision at section 53–9–77(6). Therefore, the Director is requiring Mississippi to amend section 53–9–77 to include requirements for court costs and attorney fees that are no less stringent than section 525(e) of SMCRA.

f. Mississippi's requirements for judicial review at section 53–9–77 do not include a counterpart to the provision in section 526(e) of SMCRA that requires the availability of judicial review shall not be construed to limit the operation of the rights for civil action established in section 520 of SMCRA. Currently approved section 53–9–79, which included this requirement, was repealed. Therefore, the Director is requiring Mississippi to amend its provisions concerning judicial review at section 53–9–77 by adding a proviso that the availability of judicial review shall not be construed to limit the operation of the rights established for civil actions in section 53–9–67 except as provided therein.

29. Section 53–9–81, Exceptions

The existing provision at section 53–9–81(c) which excluded the extraction of coal incidental to the extraction of other materials where coal does not exceed 16⅔ percent of the tonnage of materials removed for purposes of commercial use or sale from the requirements of the Mississippi Surface Coal Mining and Reclamation Law was removed. OSM interprets the deletion of this provision to mean that Mississippi intends to regulate this type of coal extraction. Although section 701(28)(A) of SMCRA excludes this type of coal extraction from the requirements of SMCRA, section 505 of SMCRA provides that any provision of any State law or regulation which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operations than do the provisions of SMCRA or the Federal regulations shall not be construed to be inconsistent with SMCRA. Therefore, the Director finds that the removal of section 53–9–81(c) will not render the Mississippi program less stringent than SMCRA.

30. Section 53–9–89, Deposit of Funds

Section 53–9–89 was amended to create the ''Surface Coal Mining and Reclamation Fund,'' which includes the ''Surface Coal Mining Program Operations Account'' and the ''Surface Coal Mining Reclamation Account''; to provide for use of the accounts; and to require certain funds to be deposited into the fund. Monies in the ''Surface Coal Mining Program Operations Account'' are to be used to pay the reasonable direct and indirect costs of administering and enforcing the Mississippi program. Monies in the ''Surface Coal Mining Reclamation Account'' are to be used to pay for the reclamation of lands for which bonds or other collateral were forfeited. The ''Surface Coal Mining Program Operations Account'' may receive monies from any available public or private source, with the exception of fines, penalties and the proceeds from the forfeiture of bonds or other collateral. The ''Surface Coal Mining Reclamation Account'' may receive monies from fines, penalties, the proceeds from the forfeiture of bonds or other collateral and interest.

Section 503(a)(3) of SMCRA requires that a State regulatory authority have

sufficient funding to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA. The Director finds that creation of the ''Surface Coal Mining and Reclamation Fund'' will help Mississippi to maintain the funding necessary to administer and enforce its program, and is approving the provisions of section 53–9–89.

IV. Summary and Disposition of Comments

Public Comments

OSM solicited public comments on the proposed amendment, but none were received.

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Mississippi program. On August 14, 1997 (Administrative Record No. MS–0341), the Fish and Wildlife Service (FWS) responded with comments, questions, and concerns regarding the proposed amendment.

(1) The FWS supported Mississippi's assumption of authority to regulate surface coal mining provided there is adequate protection of wetlands and fish and wildlife resources, and recommended that the Office of Surface Mining retain oversight authority.

Mississippi's statute at section 53–9–45(2)(u) requires all surface coal mining and reclamation operations to assure the minimization of disturbances and adverse impacts on fish, wildlife and related environmental values using the best technology currently available. This is consistent with the requirements of section 515(b)(24) of SMCRA concerning environmental protection performance standards for fish, wildlife and related environmental values. The Office of Surface Mining, in accordance with section 201 of SMCRA, retains the authority to administer the programs for controlling surface coal mining and reclamation operations pursuant to the requirements of SMCRA and to conduct oversight activities, including investigations and inspections necessary in ensure compliance with SMCRA.

(2) The FWS requested that the role of the state commission and permit board be clarified and asked how coordination with other State agencies would be handled.

As discussed in finding No. C.2, the Mississippi Legislature at section 53–9–9 of the Mississippi Surface Coal Mining and Reclamation Law, designated the Commission on Environmental Quality (commission) as the body to enforce the Mississippi program, including the issuance of enforcement and penalty orders, promulgation of regulations, and designation of lands unsuitable for surface coal mining. The Mississippi Environmental Quality Permit Board (permit board) was designated as the body to issue, modify, revoke, transfer, suspend, and reissue permits and to require, modify or release performance bonds. As discussed below, representatives from other State agencies are members of the permit board. Therefore, coordination would be assured in the review and decision processes for all permitting actions.

The commission was created by the Mississippi Legislature at section 49–2–5 of the Mississippi Code of 1972. It is composed of seven persons appointed by the Governor, with the advice and consent of the Senate, for a term of seven years. One person is appointed from each congressional district as constituted January 1, 1978, and two members are appointed from the State at large. The commission is composed of persons with extensive knowledge of or practical experience in at least one of the matters of jurisdiction of the commission. The permit board was created by the Mississippi Legislature at section 49–17–28 of the Mississippi Code of 1972. The membership of the permit board is composed, by law, of the chief of the Bureau of Environmental Health of the State Board of Health, or his designee; the Executive Director of the Department of Wildlife, Fisheries and Parks, or his designee; the Director of the Bureau of Land and Water Resources of the Department of Environmental Quality, or his designee; the Supervisor of the State Oil and Gas Board, or his designee; the Executive Director of the Department of Marine Resources, or his designee; the Director of the Bureau of Geology and Energy Resources of the Department of Environmental Quality, or his designee; the Commissioner of Agriculture and Commerce, or his designee; a retired professional engineer knowledgeable in the engineering of water wells and water supply systems, to be appointed by the Governor; and a retired water well contractor, to be appointed by the Governor.

(3) The FWS asked whether state or federal agencies may appeal decisions of the commission and permit board.

Mississippi allows any person claiming an interest relating to the surface coal mining operation who is so situated that the person may be affected by that operation to submit objections and request a public hearing or formal hearing under section 49–17–29 of the Mississippi Code of 1972 concerning decisions of the permit board and to submit objections and request a formal hearing under section 49–17–41 of the Mississippi Code of 1972 concerning decisions of the commission. Both sections 49–17–29 and 49–17–41 provide for judicial appeal of final orders. Mississiippi's statute at section 53–9–7(r) defines the term ''person'' to include any agency, unit or instrumentality of federal, state or local government.

(4) With reference to section 53–9–45(4), the FWS commented that exemptions or variances should not be granted that result in substantial land use changes, especially if such land use changes result in significant adverse impacts to fish and wildlife resources and expressed concerns regarding the permit board having the authority to change postmining land use to a substantially different land use compared with premining land use.

Mississippi's provision at section 53–9–45(4) is consistent with the requirements of section 515(e) of SMCRA, which provides authority to States to approve land use changes under specified circumstances.

(5) With reference to section 53–9–71(4)(b), the FWS commented that mining on State lands should not be permitted since such actions could result in significant adverse impacts to fish and wildlife resources.

Mississippi's provision at section 53–9–71(4)(b) was previously approved by the Secretary of the Interior, and no substantive revisions were proposed in this amendment. In acting on State program amendments, the Director only addresses those sections of a State's law and regulations where substantive revisions are proposed. Section 522(e) of SMCRA does not specifically prohibit mining on State lands. In accordance with Section 503 of SMCRA, States may, subject to approval of the Secretary of the Interior, assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands. This would include State lands.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that Mississippi proposed to make in this amendment pertain to air or water quality standards.

Therefore, OSM did not request the EPA's concurrence.

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from The EPA (Administrative Record No. MS–0340). The EPA did not respond to OSM's request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM is required to solicit comments on proposed amendments which may have an effect on historic properties from the SHPO and ACHP. OSM solicited comments on the proposed amendment from the SHPO and ACHP (Administrative Record No. MS–0340). Neither the SHPO nor ACHP responded to OSM's request.

V. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, the proposed amendment as submitted by Mississippi on May 6, 1997.

The Director does not approve, as discussed in finding No. C.22.c.(2), the provision in section 53–9–55(3) that allows the commission to promulgate regulations concerning a waiver from the requirement to post a penalty payment bond in order to contest the proposed penalty or the fact of the violation.

With the requirement that Mississippi further revise its statutes, the Director approves, as discussed in finding No. C.6.a, section 53–9–26, concerning Mississippi's small operator assistance program; finding No. C.20, section 53–9–45(4)(b), concerning variances from approximate original contour; finding No. C.26.b, section 53–9–69(1)(c)(i), concerning issuance of an enforcement order; finding No. C.28.e. and f, section 53–9–77, concerning administrative and judicial review.

With the requirement that Mississippi further revise its regulations, the Director approves, as discussed in finding No. C.6.b, section 53–9–26, concerning Mississippi's small operator assistance program; finding No. C.17, section 53–9–37(4), concerning time frames for permit decision; finding No. C.28.a., b., and c., section 53–9–77, concerning administrative and judicial review.

The Federal regulations at 30 CFR Part 924, codifying decisions concerning the Mississippi program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In the oversight of the Mississippi program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Mississippi of only such provisions.

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 924

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 22, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 924 is amended as set forth below:

PART 924—MISSISSIPPI

1. The authority citation for part 924 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 924.15 is added to read as follows:

§ 924.15 Approval of Mississippi regulatory program amendments.

The following is a list of the dates amendments were submitted to OSM, the dates when the Director's decision approving all, or portions of these

amendments, were published in the **Federal Register** and the State citations or a brief description of each amendment. The amendments in this table are listed in order of the date of final publication in the **Federal Register.**

Original amendment submission date	Date of final publication	Citation/description
May 6, 1997	January 9, 1998	MSCMRL 53–9–3; 5; 7; 9; 11; 13; 15; 17; 19; 21; 23; 25; 26; 27; 28; 29; 31; 32; 33; 35; 37; 39; 41; 43; 45; 47; 49; 51; 53; 55; 57; 59; 61; 63; 65; 67; 69; 71; 73; 75; 77; 79; 81; 83; 85; 87; 89; 91.

3. Section 924.16 is revised to read as follows:

§ 924.16 Required program amendments.

Pursuant to 30 CFR 732.17(f)(1), Mississippi is required to submit to OSM by the specified date the following written, proposed program amendments, or a description of the amendments to be proposed, that meet the requirements of SMCRA and 30 CFR chapter VII and a timetable for enactment that is consistent with Mississippi's established administrative or legislative procedures.

(a) Mississippi prior to allowing coal exploration or surface mining operations shall submit and have approved by OSM amendments to the Mississippi Surface Coal Mining Regulations that are no less effective than the Federal regulations at 30 CFR chapter VII in existence at the time.

(b) By March 10, 1998. Mississippi shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption of proposed revisions to the Mississippi Surface Coal Mining and Reclamation Law to correct the following typographical errors that would have a substantive impact on implementation of the Mississippi program:

(1) At section 53–9–26 change the word ''operation'' in the phrase ''at all locations of a surface coal mining operation'' to ''operator.''

(2) At section 53–9–45(4)(b) remove the reference to subsection (2) in the phrase ''a variance from the requirement to restore to approximate original contour set forth in subsection (2) or (3) of this section.''

(c) By March 10, 1998. Mississippi shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption of proposed revisions to section 53–9–69(1)(c)(i) of the Mississippi Surface Coal Mining and Reclamation Law to change the word ''may'' to ''shall'' in the phrase ''the commission, executive director or the executive director's authorized representative may issue an order to the permittee or agent of the permittee.''

(d) By March 10, 1998.

(1) Mississippi shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption of proposed revisions to section 53–9–77 of the Mississippi Surface Coal Mining and Reclamation Law to provide requirements for assessing court costs and attorney fees that are no less stringent than those provided in section 525(e) of SMCRA.

(2) Mississippi shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption of proposed revisions to section 53–9–77 of the Mississippi Surface Coal Mining and Reclamation Law, consistent with section 526(e) of SMCRA, to provide that the availability of judicial review shall not be construed to limit the operation of the rights established for civil actions in section 53–9–67 except as provided therein.

(e) By March 10, 1998. Mississippi shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption of proposed revisions to section 186.23(b)(2) of the Mississippi Surface Coal Mining Regulations, or otherwise amend its program, to require agreement to an extension of the 60-day time frame for acting upon a complete permit application by the applicant and interested parties who requested the public hearing, if a public hearing is requested and held.

4. Section 924.17 is added to read as follows:

§ 924.17 State regulatory program provisions and amendments disapproved.

The proposed language in section 53–9–55(3), as submitted by Mississippi on May 6, 1997, that allows the commission to promulgate regulations regarding a waiver from the requirement to post a penalty payment bond upon a showing by the operator of an inability to post the bond is disapproved.

[FR Doc. 98–532 Filed 1–8–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[FRL–5945–8]

RIN 2060-AH61

Minor Amendments to Inspection Maintenance Program Evaluation Requirements; Amendment to the Final Rule

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's action revises the Motor Vehicle Inspection/Maintenance (I/M) requirements by replacing the I/M rule requirement that the tailpipe portion of the mandatory program evaluation be performed using only an IM240 or equivalent mass-emission transient test with a requirement that states use a sound evaluation methodology capable of providing accurate information about the overall effectiveness of an I/M program. The goal of this action is to allow states additional flexibility to use not only IM240 but other approved alternative methodologies for their program evaluation. Today's action also clarifies that such program evaluation testing shall begin no later than November 30, 1998, and is not required to be coincident with program start up (though the first report is still due two years after program start up). This action also clarifies that ''initial test'' simply means that the test is conducted before repairs for each test cycle, and does not therefore preclude states from using alternative sampling methodologies such as roadside pullover to sample the fleet. Today's action also amends the conditions relating to the program evaluation testing requirements that were part of the conditional interim approval actions taken on the I/M State Implementation Plans (SIPs) for the Commonwealths of Pennsylvania and Virginia and the State of Delaware. States wishing to take advantage of the flexibility provided by today's action should review their implementation plans for any language that conflicts

with today's amendments. Such language will need to be amended and the amendment submitted as a SIP revision by November 30, 1998.

EFFECTIVE DATE: This rule will take effect on February 9, 1998.

ADDRESSES: Materials relevant to this rulemaking are contained in the Public Docket No. A–97–46. The docket is located at the Air Docket, room M–1500 (6102), Waterside Mall SW., Washington, DC 20460. The docket may be inspected between 8:30 a.m. and 12 noon and between 1:30 p.m. until 3:30 p.m. on weekdays. A reasonable fee may be charged for copying docket material. Electronic copies of the preamble and the regulatory text of this rulemaking are available on the Office of Mobile Sources' World Wide Web site, http://www.epa.gov/OMSWWW/.

FOR FURTHER INFORMATION CONTACT: Tracey Bradish, Office of Mobile Sources, National Vehicle and Fuel Emissions Laboratory, 2565 Plymouth Road, Ann Arbor, Michigan,48105. Telephone (313) 668–4239. E-mail bradish.tracey@epamail.epa.gov.

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II. Summary of Rule

Under the Clean Air Act as amended in 1990 (the Act), 42 U.S.C. 7401 *et seq.*, the U.S. Environmental Protection Agency (EPA) published in the **Federal Register** on November 5, 1992, (40 CFR part 51, subpart S) a rule related to state air quality implementation plans for Motor Vehicle Inspection and Maintenance (I/M) programs (hereafter referred to as the I/M rule; see 57 FR 52950). With today's action, EPA is amending this rule to provide greater flexibility to states in conducting program evaluation. This action: 1) amends the I/M program evaluation requirements at 40 CFR 51.353(c) to remove the current requirement that the tailpipe portion of the program evaluation can only be performed by conducting mass emission transient testing (METT), 2) creates a new evaluation requirement at 40 CFR 51.353(c) that instead requires states to conduct program evaluation testing using a sound evaluation methodology capable of providing accurate information about I/M program effectiveness, such evaluation to begin no later than November 30, 1998, 3) amends the requirement that the program evaluation test be conducted ''at the time the initial test is due'' to clarify that states are not barred from using alternative sample gathering methods like roadside pullovers by defining ''the time of initial test'' as any time prior to repairs during the inspection cycle under consideration, 4) deletes the current conditions on Pennsylvania's and Virginia's conditional interim I/M approvals and Delaware's conditional approval (40 CFR part 52, subpart NN, § 52.2026(a)(2), 40 CFR part 52, subpart V, § 52.2450(b)(2), and 40 CFR part 52, subpart I, § 52.424(b), respectively) that require submission of program evaluation regulations under the existing I/M rule, and 5) imposes a new condition on Pennsylvania's, Virginia's, and Delaware's I/M approvals that will require them to submit I/M SIP revisions which include a requirement to perform a program evaluation using a sound evaluation methodology meeting the amended requirements of 40 CFR 51.353(c) by November 30, 1998.

Prior to today's action, the I/M rule required states to test at least 0.1 percent of the vehicles subject to inspection in a given year using a state administered or monitored IM240 or an EPA-approved equivalent METT evaluation methodology. Today's action revises this requirement to allow states the option of using an approved, alternative, sound methodology for their program evaluation. This action also clarifies that states are to start vehicle testing for their program evaluation no later than November 30, 1998, and are not required to do so coincident with program start up. EPA notes that existing requirements for program start up as soon as possible remain in place and are not effected in any way by today's program evaluation amendments.

Today's action is in response to the many changes that have occurred in the field of I/M since the original rule was promulgated in November 1992. Program designs and test types not originally envisioned in 1992 are now becoming the options of choice among many states required to implement enhanced I/M programs. For example, non-METTs like the Acceleration Simulation Mode (ASM) test have been adopted by several enhanced I/M states that were originally expected to choose the METT-based IM240. These states have subsequently voiced the concern that requiring a METT like the IM240 for the purpose of evaluating a program using a non-METT as its day-to-day test poses certain practical implementation difficulties not experienced in programs that have opted to use a METT as the day-to-day test. While these problems are not insurmountable, EPA acknowledges the potential, practical benefits of adopting a sound evaluation methodology that does not rely on METT. Today's action, therefore, introduces the flexibility needed to allow states who choose to do so to make the case for alternative evaluation methodologies, including those centered on non-METT-based testing. In addition to considering state proposals, EPA will also be conducting formal reviews of several alternative evaluation methodologies presented to it during a stakeholder's meeting held in Ann Arbor, Michigan on August 11, 1997, details of which are discussed in the ''Public Participation'' section of this document. Today's action will also better accommodate new advances in analytical methodologies, given the speed at which new technology in this field has been shown to evolve and mature.

To ensure that all states have an equal opportunity to take advantage of the flexibilities created by today's action, it is necessary that EPA also amend certain I/M SIP approval actions previously published in the **Federal Register** in response to the National Highway System Designation Act of 1995 (NHSDA) as well as those published in response to EPA's own I/M flexibility amendments of September 18, 1995 and July 25, 1996. The NHSDA and I/M amendments introduced additional flexibility with regard to I/M program design, and states that opted to take advantage of this flexibility were required to submit new SIPs. In review of these revised I/M SIPs, EPA found that many failed to fully address one aspect or another of the I/M rule, leading the Agency to propose either conditional interim approvals (in the case of NHSDA-triggered revisions) or conditional approvals in the remaining cases. For example, the Commonwealths of Pennsylvania and Virginia failed to fully address the I/M rule's program

evaluation requirements for conducting the IM240 or an equivalent, approved METT on 0.1 percent of their in-use fleet. In response to this omission, EPA originally placed conditions on the Virginia and Pennsylvania interim approval actions, based on commitments made by the commonwealths, requiring them to adopt the regulations needed to meet the METT-based program evaluation requirement. Since today's action broadens the program evaluation requirement to include other sound evaluation methodologies, it is also appropriate to withdraw these METT-based program evaluation conditions on the interim approval notices for Virginia and Pennsylvania. In place of these original conditions, today's action imposes new conditions that will require the commonwealths instead to submit SIP revisions that meet the more flexible requirements of the amended 40 CFR 51.353(c). These new conditions are based on new commitments submitted by the states to meet the new evaluation requirements. In the case of Delaware, while the program evaluation condition did not explicitly require METT-based program evaluation, the deadline for meeting that condition falls sooner than it would based upon today's amendments. To allow the State to take advantage of this deadline extension, it is necessary for EPA to also amend the **Federal Register** document conditionally approving the Delaware I/M SIP based upon a new state commitment to meet the new program evaluation requirements. All three—Delaware, Virginia, and Pennsylvania—must submit revised SIPs meeting the amended evaluation methodology requirements by November 30, 1998 in order to meet the new conditions imposed by today's action under section 110(k)(4) of the Act.

Of the three above SIP approval notices, only Virginia's originally required the Commonwealth to meet its METT-based program evaluation condition before EPA could complete today's action. The original published deadline for Virginia to meet its program evaluation condition was September 15, 1997, which did not reflect the full twelve month period available under the statute for meeting such conditions. Therefore, in conjunction with the publication of the notice proposing today's action, and based upon a commitment by the Commonwealth, EPA took an interim final action to extend the deadline for Virginia's existing program evaluation condition to May 15, 1998, which represented the latest date available prior to finalization of today's action. Today's action creates a new deadline of November 30, 1998, in keeping with the time extension provided to other states by today's action for compliance with the new evaluation requirements promulgated today and consistent with Virginia's new commitment to meet the new requirements by that date.

Lastly, it may similarly be necessary for some states to amend their currently approved I/M SIPs to take advantage of flexibilities provided by today's action. EPA therefore suggests that such states review their enhanced I/M SIPs for any language that may conflict with today's amendments. Such language will need to be amended and the amendment submitted as a SIP revision no later than November 30, 1998, in order to take advantage of today's flexibility.

III. Authority

Authority for the rule change proposed in this document is granted to EPA by section 182 of the Clean Air Act as amended (42 U.S.C. 7401, *et seq.*). Authority to conditionally approve a SIP based on a state's commitment to revise the SIP by a date certain within one year is provided by section 110(k)(4) of the Act.

IV. Public Participation

Written comments on the September 19, 1997 proposal were received from seven sources prior to the close of public comment period on October 20, 1997: The Georgia, Missouri, and Wisconsin Departments of Natural Resources; the Maryland Department of the Environment; Pennsylvania's Department of Transportation and Department of Environmental Protection (jointly); the Service Station Dealers of America and Allied Trades; and the International Tire and Rubber Association. The Missouri and Wisconsin Departments of Natural Resources and the Maryland Department of the Environment opposed the amendments, while the remainder of the commenters supported the proposed amendments, in whole or in part.

In addition, the Texas Natural Resource Conservation Commision (TNRCC) submitted comments one month after the close of public comment period, in a letter dated November 20, 1997. While we will not be addressing each of TNRCC's comments separately and specifically in this rulemaking due to time constraints, EPA does acknowledge their receipt and has included them in the docket for this rulemaking. In general, TNRCC supported the proposed amendments and reiterated and/or reinforced comments made by the other, above commmenters.

The main issues raised by the commenters are summarized and addressed below.

A. Increased Flexibility

All the commenters supporting changes to the program evaluation requirement as well as the other proposed amendments cited the greater flexibility provided to states as the primary reason for their support. Among these supporters, one stands out: Pennsylvania. Unlike the other supporters, Pennsylvania augmented its support of the amendments with numerous additional comments suggesting that even greater flexibility is still needed. These additional comments will be addressed as appropriate, below.

B. METT vs. ''Sound'' Evaluation Method

1. Summary of Proposal

The proposal removed the I/M rule's requirement that the program evaluation testing be performed using either an IM240 or ''any other transient, mass emission test procedure approved as equivalent,'' and replaced it with the more flexible requirement that such testing be conducted using an EPA-approved, ''sound evaluation methodology * * * capable of providing accurate information about the overall effectiveness of an I/M program.''

2. Summary of Comments

Commenters opposed to the proposed amendments focused on the test type to be used for the program evaluation. These commenters generally favored leaving the original requirement for IM240 or an equivalent METT unchanged. Most of the opposing commenters cited EPA's original reasons for choosing the IM240—its accuracy, its ability to reflect real world driving conditions, its correlation to the Federal Test Procedure (FTP), and its ability to measure actual mass emissions, as opposed to percent concentrations—in support of retaining the requirement. The opposing commenters also suggested that METT testing was the only way to provide an objective and consistent criterion for comparing the effectiveness of state programs, particularly given the number and variety of untested program designs being implemented by the states, post-NHSDA. One such commenter was also concerned that allowing program evaluations based upon potentially less rigorous criteria could unfairly penalize those states that opt for METT-based

program evaluations, by artificially overestimating the benefit of decentralized, non-METT-based programs (and therefore underestimating those areas' contribution to regional ozone transport problems).

3. Response to Comments

While EPA agrees that IM240 and equivalent METTs are a cost effective, accurate, objective, and consistent method for evaluating the program effectiveness of both METT and non-METT-based I/M programs, suggesting that only a METT evaluation will suffice is premature. While we can assure states that have opted to use IM240 as their day-to-day inspection that the IM240 itself will continue as an approved program evaluation test method (because it represents a sound evaluation technique capable of providing accurate data on the effectiveness of I/M programs), we cannot now rule out the possibility of acceptable METT and non-METT alternatives to the IM240. EPA is in the process of reviewing several alternative, non-IM240-based program evaluation methodologies that were presented at a stakeholder's meeting held in Ann Arbor on August 11, 1997 and at the 13th Annual Mobile Sources/Clean Air Conference held September 16–19, 1997 in Steamboat Springs, Colorado. While many of these methods are cheaper, easier-to-implement variations on the METT concept that could be conducted with minimal equipment retrofitting in an otherwise decentralized, non-METT setting, at least one would allow states to use their existing, non-METT I/M program data in the determination of program effectiveness. Furthermore, while EPA's resources necessarily limit us in the number of alternative methodologies we can evaluate, we remain open to reviewing evaluations of additional methodologies conducted by the states or other interested parties and submitted to EPA, including non-METT alternatives. Lastly, while it is still too early to tell which of these methods will be deemed approved alternatives, EPA is sensitive to the need for both equity and accuracy in whatever candidate methodologies are selected for approval. EPA will take special care to insure that the benefits of non-METT programs are not overestimated as a result of the selected evaluation methodologies.

C. ''Sound'' vs. non-METT Evaluation Method

1. Summary of Proposal

While the proposed amendment language discussed above removes the explicit requirement that the program evaluation test be METT-based—thereby opening the door to the possibility of non-METT-based alternatives—the amendment does not jump to the conclusion that such non-METT alternatives actually exist.

2. Summary of Comments

While Pennsylvania supported the spirit of the proposed amendments, the Commonwealth argued that EPA fell short by failing to specify that a non-METT program evaluation methodology would, in fact, be found and adopted. The Commonwealth argued that the program evaluation test should be the same test used for day-to-day testing (i.e., in the case of Pennsylvania, the non-METT-based idle and ASM tests). To support this claim, Pennsylvania cited the CAA's requirement that the biennial program evaluation be ''based on data collected *during* the inspection and repair of vehicles'' (emphasis added). Pennsylvania also quoted Conference Report 105–297 accompanying H.R. 2158, in support of its claim that Congress intended to bar EPA from mandating the use of IM240 for any purpose, including program evaluation. Furthermore, citing the same conference report, Pennsylvania indicated its belief that EPA was specifically directed by Congress to develop (not merely consider) a non-METT program evaluation test. In particular, Pennsylvania objected to the proposal's claim that it introduced ''the flexibility needed to allow states who choose to do so to make the case for alternative evaluation methodologies, including those centered on non-METT based testing.'' Specifically, Pennsylvania claimed that it is ''EPA's statutory obligation to develop a non-METT evaluation method; it is not the states' obligation to 'make the case' for one.''

3. Response to Comments

As indicated in the previous response, EPA is still in the process of evaluating several alternative program evaluation methods, at least one of which would be consistent with Pennsylvania's request to use routine test data as the basis for program evaluation. Also, the intention of the ''make the case'' statement quoted by Pennsylvania was not to shift the obligation for test review and evaluation to the states. Rather, as previously stated, EPA's resources necessarily limit us in the number of alternative methodologies we can evaluate, and while a non-METT-based alternative *is* being considered by EPA, we remain open to reviewing evaluations of additional methodologies conducted by the states or other interested parties. Further, EPA does not view comments in legislative history on unrelated legislation to impose any new requirements on EPA with respect to I/M program evaluations. The CAA gives EPA the flexibility to establish appropriate program evaluation methodologies and EPA is properly exercising that discretion. Under these amended requirements, EPA is no longer requiring use of IM240 and has specifically opened the door so that non-METT-based alternatives may be considered. Finally, EPA does not believe that the CAA requirement to base program evaluation on data collected during inspection places any limitation on the test type to be used to conduct such evaluations. Whatever test is to be used, EPA agrees it will be conducted at the time of initial testing as defined in today's action.

D. FTP Correlation

1. Summary of Proposal

The proposal did not address the criteria by which candidate alternative program evaluation methodologies would be judged, other than specifying that the method would be ''sound'' and ''capable of providing accurate information about the overall effectiveness of an I/M program.''

2. Summary of Comments

Though correlation to the FTP was not stipulated as a criterion for evaluating alternative program evaluation methodologies in the proposal submitted for public comment, several commenters raised FTP correlation as an issue. Those commenters opposed to the proposed amendments argued for the retention of IM240 because of the high degree to which that test correlates with the test used to certify new vehicles to the applicable emission standards (i.e., the FTP). One of the opposing commenters—Maryland—while not ruling out the possibility of valid alternatives, specifically requested that any approved alternative methods be ''no less rigorous or reliable than the IM240 METT.'' Pennsylvania, on the other hand, objected to using correlation to the FTP as a criterion for determining the approvability of alternative program evaluation methods. The Commonwealth also suggested that, should EPA choose correlation to the FTP as the primary criterion for establishing an alternative method's approvability, then it is EPA's responsibility to make non-METTs like the ASM and idle test correlate better to the FTP. This last comment was in

response to the Commonwealth's reference to previous EPA statements regarding the very poor correlation to the FTP exhibited by non-METTs like the ASM and idle tests.

3. Response to Comments

While EPA believes that a high degree of correlation to the FTP is a reliable indicator of a test's ability to accurately measure real world in-use vehicle emissions, we are not prepared to rule out the possibility that other, surrogate measurements could provide equally valid indicators of program effectiveness. EPA will explore other potential measures in conjunction with development and analysis of alternative evaluation techniques. Nevertheless, EPA disagrees with the suggestion that should FTP correlation be found to be the only reliable indicator of an evaluation method's acceptability that EPA therefore is obligated to somehow improve the degree to which non-METTs correlate to the FTP. While it is possible to increase correlation to the FTP by starting with the same basic equipment used to perform a non-METT like the ASM and either changing the test procedure and/or retrofitting the equipment to gather variables like exhaust volume, the resultant test is no longer an ASM by definition, but likely something approximating a METT. Trying to change the correlation of a given test without fundamentally changing the underlying nature of the test itself is a logical impossibility. Furthermore, strategies such as tightening cutpoints—which states have used historically to increase emission reductions by increasing the failure rate for a chosen test—do not improve a test's correlation to the FTP, which is based on actual emission measurements and not relative failure rate.

E. SIP Submission Deadlines

1. Summary of Proposal

The proposal revised the conditional approvals for Pennsylvania, Virginia, and Delaware to require the submission of SIP revisions addressing the revised program evaluation requirements by November 30, 1998. The proposal also set the date by which program evaluation testing is to begin for all enhanced I/M programs at no later than November 30, 1998. The proposal did not address which alternative program evaluation tests would be reviewed nor when guidance on approved alternatives would be issued.

2. Summary of Comments

Both Maryland and Pennsylvania raised concerns regarding whether or not EPA would be able to complete its review of alternative program evaluation methodologies in time for states to meet the November 30, 1998 deadline. While Pennsylvania commented that it ''agrees that states need to start vehicle testing for their program evaluation no later than November 30, 1998,'' it also requested that states be given until November 30, 2000 to submit revised SIPs. Pennsylvania also requested that the requirement that the revised SIP include an ''approved'' program evaluation methodology be deleted, suggesting that such a requirement would either circumvent the public notice-and-comment rulemaking process SIP approvals are usually subjected to, or require states to submit SIP revisions substantially earlier than November 30, 1998 to allow EPA time to process and approve the submission by the November 30, 1998 deadline.

3. Response to Comments

EPA has currently identified four alternative program evaluation methodologies which will be the subject of further investigation in the coming months. The methods to be reviewed are: 1) The V-MAS method, a low cost method for measuring exhaust flow for the purpose of converting concentration measurements into mass emissions measurements; 2) The California Analytical Bench method, a low cost analyzer bench that uses the same type of analyzers as the IM240; 3) The Sierra Research method, a method that relies on state I/M program data, modeling data, and correlation to a base I/M program with a known effectiveness level; and 4) The RSD method, which relies on remote sensing (RSD) data. EPA projects the following schedule for its program evaluation methodology review, including milestones already completed:

August 11, 1997—EPA hosted a stakeholder's meeting for states, contractors, vendors, and all interested parties for the purpose of seeking input regarding which alternative methods to investigate. This milestone has been completed.

September 15, 1997—EPA selected the candidate methodologies for further investigation. This milestone has also been completed.

May 31, 1998—The testing of candidate methodologies will be completed.

October 15, 1998—EPA's analysis of the testing results will be completed.

October 31, 1998—EPA will release a policy memo and guidance on approved program evaluation methodologies.

While a review of the above schedule initially suggests that states hoping to meet a November 30, 1998 deadline will have only one month in which to prepare and submit their SIP revisions, such a conclusion assumes that states can take no relevant action prior to the release of official EPA guidance on alternative methods. In fact, many elements of the necessary SIP revision are not test-dependent and can be addressed well prior to finalization of EPA guidance. Furthermore, while final guidance may not be released until October 31, 1998, the direction of the investigation should be clear well before that deadline, and EPA will keep all interested parties informed of our progress as the review process moves forward. Also, it should be pointed out again that today's action does not bind any state to change whatever course it may have been on prior to the introduction of this additional flexibility. States that choose to make use of this additional flexibility must determine for themselves the feasibility of such a decision within the context of their local needs and competing resource demands. EPA does not see any reason to extend compliance beyond November 1998.

Concerning Pennsylvania's request that EPA delete the requirement that the evaluation method included in the SIP revision be ''approved,'' EPA declines this request. Contrary to the Commonwealth's expressed concern, ''approved'' as it is used in this context does not mean that the SIP revision itself has to be somehow pre-approved prior to submission (or prior to November 30, 1998). Rather, ''approved'' simply refers to the program evaluation test methodology included in the submission. The approval of alternative program evaluation methodologies is the goal of the investigation discussed earlier in this response. The guidance scheduled for release no later than October 31, 1998 will indicate which methods are ''approved'' in this sense. EPA wishes to retain the ''approved'' language in the rule merely to indicate that states may not do I/M program evaluations with methodologies that EPA has not found to be acceptable. EPA will still complete notice-and-comment rulemaking on any SIP submission containing program evaluation methodology revisions once it is submitted.

F. Need for New State Regulations

1. Summary of Proposal

The proposal revised the program evaluation conditions on the Pennsylvania and Virginia conditional interim I/M SIP approvals to require the submission of revised state I/M program

evaluation regulations by November 30, 1998, based upon commitments from the commonwealths.

2. Summary of Comments

Pennsylvania commented that its existing state I/M program evaluation regulations are sufficiently broad as to meet the new general program evaluation requirements without further revision. The Commonwealth also suggested that the specific details necessary as part of a SIP revision to address implementation of the revised program evaluation requirements would be provided by EPA guidance, implying that perhaps no SIP revision would be required to implement them (though this conclusion was not stated explicitly).

3. Response to Comments

EPA agrees that the Commonwealth's standing regulation, previously approved into the Pennsylvania I/M SIP, is broad enough to meet the revised general program evaluation requirements and has revised that portion of today's action to reflect this. This said, EPA cautions against jumping to the conclusion that the detail provided in future EPA guidance will satisfy the detailed program description requirements necessary for an approvable SIP revision addressing these requirements. EPA guidance, by necessity, must be general and applicable to a wide range of program possibilities. It will likely include options that states will need to select from and tailor to their local needs. EPA guidance will not be so limited and prescriptive as to obviate the need for separate SIP submissions from the states to implement alternative program evaluation methodologies. Thus, although Pennsylvania will likely not need new regulations, EPA believes that it will need a new SIP revision to address today's amended program evaluation requirements.

G. State Monitoring

1. Summary of Proposal

The proposal requires that the sample of vehicles selected for program evaluation testing receive a program evaluation test that is either ''administered or monitored'' by the state. This requirement was not introduced or revised as part of the proposed amendment, and has been a part of I/M requirements since publication of the 1992 rule.

2. Summary of Comments

Pennsylvania objected to the requirement that the program evaluation test be administered or monitored by the state, indicating that it ''is not in the 'business' of emissions testing.'' In particular, the Commonwealth objected to the notion of having to invest in the purchase of any testing equipment whatsoever for the purpose of evaluating program effectiveness. Instead, Pennsylvania indicated its preference to ''monitor the program through computer programming and software,'' with the possibility of random station visits at its discretion. The Commonwealth concluded by suggesting that it would not object to this requirement if it is subsequently determined that states can, in fact, use their day-to-day I/M tests as the program evaluation test.

3. Response to Comments

As explained elsewhere, EPA is still in the process of evaluating possible program evaluation methodologies, at least one of which would allow states to use their day-to-day I/M test as the program evaluation test. Regardless of the conclusions of the program evaluation investigation, however, EPA does not believe that removing the requirement for state administration or monitoring of the program evaluation test is justified. The requirement is intended to ensure quality assurance and quality control of the subset of vehicle testing data devoted to program evaluation. Given the small size of the sample required (i.e., 0.1%) it is essential that the objectivity and quality of the data under consideration not be questioned. EPA believes this can only be accomplished by state operated or contracted program evaluations. Thus, EPA believes the requirement that program evaluation tests be administered or monitored by the state should remain no matter what test type is selected.

V. Economic Costs and Benefits

Today's action provides states additional flexibility that lessens rather than increases the potential economic burden on states. Furthermore, states are under no obligation, legal or otherwise, to modify existing plans meeting the previously applicable requirements as a result of today's action.

VI. Administrative Requirements

A. Administrative Designation

It has been determined that this amendment to the I/M rule is not a significant regulatory action under the terms of Executive Order 12866 and are therefore not subject to OMB review. Any impacts associated with these revisions do not constitute additional burdens when compared to the existing I/M requirements published in the **Federal Register** on November 5, 1992 (57 FR 52950) as amended. Nor do the amendments create an annual effect on the economy of $100 million or more or otherwise adversely affect the economy or the environment. It is not inconsistent with nor does it interfere with actions by other agencies. It does not alter budgetary impacts of entitlements or other programs, and it does not raise any new or unusual legal or policy issues.

B. Reporting and Recordkeeping Requirement

There are no information requirements in this action which require the approval of the Office of Management and Budget under the Paperwork Reduction Act 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that this action will not have a significant economic impact on a substantial number of small entities and, therefore, is not subject to the requirement of a Regulatory Impact Analysis. A small entity may include a small government entity or jurisdiction. This certification is based on the fact that the I/M areas impacted by this rulemaking do not meet the definition of a small government jurisdiction, that is, ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' The enhanced I/M requirements only apply to urbanized areas with population in excess of either 100,000 or 200,000 depending on location. Furthermore, the impact created by this action does not increase the pre-existing burden of the existing rule which this action amends.

D. Unfunded Mandates Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule where the estimated costs to State, local, or tribal governments, or to the private sector, will be $100 million or more. Under § 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule. To the extent that the rules being

finalized by this action would impose any mandate at all as defined in § 101 of the Unfunded Mandates Act upon the state, local, or tribal governments, or the private sector, as explained above, this action is not estimated to impose costs in excess of $100 million. Therefore, EPA has not prepared a statement with respect to budgetary impacts. As noted above, this rule offers opportunities to states that would enable them to lower economic burdens from those resulting from the I/M rule which this action amends.

E. Small Business Regulatory Enforcement Fairness Act

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. The rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

F. Petition for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 10, 1998.

Filing a petition for reconsideration by the Administrator of this final rule to amend the program evaluation requirements of the I/M rule does not affect the finality of this rule for the purpose of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Clean Air Act).

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Transportation.

40 CFR Part 52

Air pollution control, Carbon monoxide.

Dated: December 29, 1997.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, parts 51 and 52 of title 40, chapter I of the Code of Federal Regulations is amended to read as follows:

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 51.353 is amended by revising paragraph (c)(3) and (c)(4) to read as follows:

§ 51.353 Network type and program evaluation.

* * * * *

(c) * * *

(3) The evaluation program shall consist, at a minimum, of those items described in paragraph (b)(1) of this section and program evaluation data using a sound evaluation methodology, as approved by EPA, and evaporative system checks, specified in § 51.357(a)(9) and (10) of this subpart, for model years subject to those evaporative system test procedures. The test data shall be obtained from a representative, random sample, taken at the time of initial inspection (before repair) on a minimum of 0.1 percent of the vehicles subject to inspection in a given year. Such vehicles shall receive a state administered or monitored test, as specified in this paragraph (c)(3), prior to the performance of I/M-triggered repairs during the inspection cycle under consideration.

(4) The program evaluation test data shall be submitted to EPA and shall be capable of providing accurate information about the overall effectiveness of an I/M program, such evaluation to begin no later than November 30, 1998.

* * * * *

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority:42 U.S.C. 7401 *et seq.*

2. Section 52.2026 is amended by revising paragraph (a)(2) to read as follows:

§ 52.2026 Conditional approval.

* * * * *

(a) * * *

(2) The Commonwealth must submit to EPA as a SIP amendment, by November 30, 1998, the final Pennsylvania I/M program evaluation plan requiring an approved alternative sound evaluation methodology to be performed on a minimum of 0.1 percent of the subject fleet each year as per 40 CFR 51.353(c)(3) and which meets the program evaluation elements as specified in 40 CFR 51.353(c).

* * * * *

3. Section 52.2450 is amended by revising paragraph (b)(2) to read as follows:

§ 52.2450 Conditional approval.

* * * * *

(b) * * *

(2) The Commonwealth must submit to EPA as a SIP amendment, by November 30, 1998, the final Virginia I/M program evaluation regulation requiring an approved alternative sound evaluation methodology to be performed on a minimum of 0.1 percent of the subject fleet each year as per 40 CFR 51.353(c)(3) and which meets the program evaluation elements as specified in 40 CFR 51.353(c).

* * * *

4. Section 52.424 is amended by revising paragraph (b) introductory text to read as follows:

§ 52.424 Conditional approval.

* * * * *

(b) The State of Delaware's February 17, 1995 submittal for an enhanced motor vehicle inspection and maintenance (I/M) program, and the November 30, 1995 submittal of the performance standard evaluation of the low enhanced program, is conditionally approved based on certain contingencies.The following conditions must be addressed in a revised SIP submission. Along with the conditions listed is a separate detailed I/M checklist explaining what is required to fully remedy the deficiencies found in the proposed notice of conditional approval. This checklist is found in the Technical Support Document (TSD), located in the docket of this rulemaking, that was prepared in support of the proposed conditional I/M rulemaking for Delaware. This checklist and Technical Support Document are available at the Air, Radiation, and Toxics Division, 841 Chestnut Bldg., Philadelphia, PA 19107, telephone (215) 566–2183. By no later than one year from June 18, 1997, Delaware must submit a revised SIP that meets the following conditions for approvability, with the exception of condition item in paragraph (b)(3) of this section which addresses I/M program evaluation requirements. Condition in paragraph (b)(3) of this section must be met by November 30, 1998, in keeping with the amended requirements of 40 CFR 51.353.

* * * * *

[FR Doc. 98–551 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OH104–4; FRL–5948–6]

Approval and Promulgation of Implementation Plans; Ohio Ozone Maintenance Plan

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Direct final rule; Withdrawal.

SUMMARY: On May 14, 1997 USEPA published a direct final rule (62 FR 26396) approving, and an accompanying proposed rule (62 FR 26463) proposing to approve a revision submitted on July 9, 1996 and January 31, 1997, to the ozone maintenance plans for the Dayton-Springfield Area (Miami, Montgomery, Clark and Greene Counties), Toledo Area (Lucas and Wood Counties), Canton Area (Stark County), Ohio portion of the Youngstown-Warren-Sharon Area (Mahoning and Trumbell Counties), Columbus Area (Franklin, Delaware, and Licking Counties), Cleveland-Akron-Lorain Area (Ashtabula, Cuyahoga, Lake, Lorain, Medina, Summit, Portage, and Geauga Counties), Preble County, Jefferson County, Columbiana and Clinton Counties. The revision was based on a request from the State of Ohio to revise the federally approved maintenance plan for these areas to provide the State and the affected areas with greater flexibility in choosing the appropriate ozone contingency measures for each area in the event such a measure is needed. On June 13, 1997 (62 FR 32204) the USEPA delayed the effective date of this rule for 60 days to allow for a 60-day extension of the public comment period. In the proposed rules section of the June 13, 1997 **Federal Register** (62 FR 32257), USEPA announced a 60-day extension of the public comment period on these maintenance plans, until August 12, 1997. On August 12, 1997 (62 FR 43109), USEPA further delayed the effective date of the approval of these maintenance plans for an additional 120 days until January 9, 1998. In the proposed rules section of the August 12, 1997 **Federal Register** (62 FR 43140), USEPA extended the public comment period until December 10, 1997. The USEPA is withdrawing this final rule due to the adverse comments received on these actions. In a subsequent final rule, USEPA will summarize and respond to the comments received and take final rulemaking action on this requested Ohio SIP revision.

DATES: The direct final rule published at 62 FR 26396 is withdrawn January 9, 1998.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following location:

U.S. Environmental Protection Agency, Region 5, Regulation Development Branch, 7 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: John Paskevicz, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. Telephone: (312) 886–6084.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Volatile organic compounds.

Dated: December 31, 1997.

Michelle D. Jordan,

Acting Regional Administrator, Region V.

Accordingly, under the authority of 42 U.S.C. 7401–7671q, the direct final rule published on May 14, 1997 (62 FR 26396), the effective date of which was delayed on June 13, 1997 (62 FR 32204) and on August 12, 1997 (62 FR 43109), is withdrawn.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300597; FRL–5764–1]

RIN 2070–AB78

Fenoxaprop-ethyl; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for the combined residues of fenoxaprop-ethyl [(±)-ethyl 2-[4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoic acid and 6-chloro-2,3-dihydrobenzoxazol-2-one in or on the following raw agricultural commodities (RACs): cattle, fat, meat by-products (mbyp) and meat at 0.05 part per million (ppm); goats, fat, mbyp and meat at 0.05 ppm; hogs, fat, mbyp and meat at 0.05 ppm; horses, fat, mbyp and meat at 0.05 ppm; milk at 0.02 ppm; sheep, fat, mbyp and meat at 0.05ppm; wheat, grain at 0.05, and wheat straw at 0.50 ppm. It also removes time-limited tolerances for residues of fenoxaprop-ethyl on the same commodities that expired on November 1, 1997. AgrEvo USA Company requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170).

DATES: This regulation is effective January 9, 1998. Objections and requests for hearings must be received by EPA on or before March 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300597], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300597], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300597]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne I. Miller, Product Manager (PM) 23, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-6224, e-mail: miller.joanne@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 17, 1997 (62 FR 48837) (FRL–5741–1), EPA issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) announcing the filing of a pesticide petition (PP) for tolerance by AgrEvo USA Company, Little Falls One, 2711 Centerville Road, Wilmington, DE 19808. This notice included a summary of the petition prepared by AgrEvo USA Company, the registrant. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR 180.430 (b) be amended by establishing tolerances for the combined residues of the herbicide fenoxaprop-ethyl [(±)-ethyl 2-[4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoic acid and 6-chloro-2,3-dihydrobenzoxazol-2-one, in or on the following raw agricultural commodities: cattle, fat, mbyp and meat at 0.05 part per million (ppm); goats, fat, mbyp and meat at 0.05 ppm; hogs, fat, mbyp and meat at 0.05ppm; horses, fat, mbyp and meat at 0.05 ppm; milk at 0.02 ppm; sheep, fat, mbyp and meat at 0.05 ppm; wheat, grain at 0.05 ppm; and wheat straw at 0.50 ppm.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute,'' ''short-term,'' ''intermediate term,'' and ''chronic'' risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and

presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from Federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup was not regionally based.

II. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of fenoxaprop-ethyl and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for the combined residues of fenoxaprop-ethyl [(±)-ethyl 2-[4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoic acid and 6-chloro-2,3-dihydrobenzoxazol-2-one in or on the following raw agricultural commodities: cattle, fat, meat and meat by-products (mbyp) at 0.05 part per million (ppm); goats, fat, meat and mbyp at 0.05 ppm; hogs, fat, meat and mbyp at 0.05ppm; horses, fat, meat and mbyp at 0.05 ppm; milk at 0.02 ppm; sheep, fat, meat and mbyp at 0.05 ppm; wheat, grain at 0.05 ppm; and wheat straw at 0.50 ppm. EPA's assessment of the dietary exposures and risks associated with establishing these tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by fenoxaprop-ethyl are discussed below.

1. *Acute toxicity*. A battery of acute toxicity studies is available, places technical fenoxaprop-ethyl in Toxicity Category III for acute oral (rat) (LD_{50} = 2,357 milligram/kilogram (mg/kg) (M) and 2,500 mg/kg (F)), and acute inhalation LC_{50} = >0.511 mg/L; in Toxicity Category IV for acute dermal (rat) = >2,000 mg/kg and rabbit =>1,000 mg/kg and skin irritation (slight irritant) and in Toxicity Category I for eye irritation with non-reversible corneal opacity at day 21. Fenoxaprop-ethyl was determined to be a non-sensitizer in a dermal sensitization study.

2. *Genotoxicity* . A battery of genotoxicity studies, none of which indicated any genotoxic potential. The studies submitted included: *in vitro* human lymphocyte chromosomal aberration, mouse micronucleus, *in vitro* unscheduled DNA synthesis, Ames *Salmonella* bacterial point mutation and yeast DNA repair assays.

3. *Subchronic feeding study*— i. *Rats*. In a subchronic feeding study with rats (30/sex/dose), fenoxaprop-ethyl was administered at doses of 0, 1, 4 or 16 milligram/kilograms/day (mg/kg/day) for 90 days. The NOEL was 1 mg/kg/day and the lowest observed effect level (LOEL) was 4 mg/kg/day) based on relative organ weight changes. After the 4-week recovery period, significantly decreased liver weights were observed in males at the 1 mg/kg/day dose and in females at 4 mg/kg/day.

ii. *Dogs*. In a subchronic feeding study in dogs (6 dogs/sex/dose), fenoxaprop-ethyl was administered at doses of 0, 0.4, 2, or 10 mg/kg/day were fed for 90 days. The NOEL was 0.4 mg/kg/day) and the LOEL was 2 mg/kg/day based on histological changes of the kidneys. Inflammatory changes of the kidneys (interstitial pyelonephritis) were detected in the 2 mg/kg/day and in the 10 mg/kg/day dosed dogs.

4. *Dermal toxicity study— Rats*. In a 21-day dermal toxicity study, Wistar rats (10/sex/dose) received repeated dermal applications of fenoxaprop-ethyl (96.5%, moistened with sesame oil) at doses of 0, 5, 10, or 20 mg/kg, 6 hours/day, 5 days/week, for 21 total exposures. The LOEL was >5 mg/kg based on decreased liver weights. A NOEL was not established.

In a second 21-day dermal toxicity study, Wistar rats (10/sex/dose) received repeated dermal applications of fenoxaprop-ethyl (96.5%, vehicle not specified) at doses of 0, 5, or 20 mg/kg, 6 hours/day, 5 days/week, for 21 total exposures. The study author concluded that the NOEL was >20 mg/kg; a LOEL was not established.

5. *Subchronic inhalation study— Rats*. In a subchronic inhalation toxicity

study, Wistar rats (10-15/sex/concentration) were exposed by nose-only inhalation to fenoxaprop-ethyl (96.5%) at target concentrations of 0, 0.075, 0.250, or 0.750 mg/L (analytically-determined concentrations of 0, 0.073, 0.248, or 0.727 mg/L, respectively) for 6 hours/day, 5 days/week, for 6 weeks (28-29 total exposures). An unequivocal NOEL was not established in this study. A second study using the same protocol with target concentrations of 0 or 0.015 mg/L (analytically determined to be 0 or 0.0143 mg/L, respectively) was conducted. The exposure period was followed by a 4-week recovery period for animals in all but the 0.750 mg/L group. A NOEL for the repeated dose inhalation was 0.015 mg/L.

6. *Chronic toxicity study*. In a chronic toxicity study in beagle dogs (6/sex/dose) dogs were fed fenoxaprop-ethyl (94%) at doses of 0, 0.075, 0.375 or 1.875 mg/kg/day for 2 years. The NOEL was 0.375 mg/kg/day and the LOEL was 1.875 mg/kg/day based on decreases in body weight gain.

7. *Carcinogenicity study*. In a carcinogenicity study with groups of 50 male and 50 female NMRKF (SPF71) mice, fenoxaprop-ethyl (94%) was administered at dose levels of 0, 0.375, 1.5, or 6 mg/kg/day for 24 months. The NOEL was >6 mg/kg/day highest dose tested (HDT). A LOEL was not established.

In a second carcinogenicity study, fenoxaprop-ethyl (96.8%) was administered to groups of 50 male and 50 female NMRI mice at doses of 0, 5.7, 16.6 or 44.6 mg/kg/day in males and 0, 6.8, 19.4 or 53.7 mg/kg/day in females for 24 months. For chronic toxicity the NOEL was 5.7 mg/kg/day and the LOEL was 16.6 mg/kg/day based on histopathological findings in the liver. There was evidence of carcinogenicity at the highest dose tested. Statistically ($p=0.05$) significant increases were seen in liver and adrenal gland tumors. In males at the high dose, the incidence of hepatocellular adenomas (30%) and carcinomas (8%) were increased when compared to controls (2%, adenomas and 0%, carcinomas). Also at this dose in males, the incidence of subcapsular adenomas of the adrenal glands was 43% compared to 22% in controls. In addition, microscopic pathology indicated the hepatocellular hypertrophy was observed in the majority of all treated animals (both sexes). Dosing was considered adequate to assess the carcinogenic potential of fenoxaprop-ethyl based on clinical signs, increased liver weight, and histopathology.

8. *Chronic/oncogencity study*. In a combined chronic/oncogenicity study, Wistar rats (116/sex/dose) were dosed with fenoxaprop-ethyl (95.8%) at 0. 0.25, 1.5 or 9 mg/kg/day for 28 months. For chronic toxicity, the NOEL was 1.5 mg/kg/day) and the LOEL was 9 mg/kg/day based on decreased serum lipids and cholesterol in the males. Under the conditions of this study, there was no evidence of carcinogenic potential.

9. *Oral developmental toxicity study*— i. *Rats*. In an oral developmental toxicity study, pregnant Wistar rats (20/dose) received fenoxaprop-ethyl (93% a.i.) in sesame oil at doses of 0, 10, 32, or 100 mg/kg/day from days 7 through 16 of gestation. For maternal toxicity, the NOEL was 32 mg/kg/day and the LOEL was 100 mg/kg/day, based on slight initial reduction in body weight and food consumption. There were no treatment-related effects or clinical signs, body weight gain, food consumption, or development of the conceptuses in the uterus at dose levels of less than 32 mg/kg/day. Developmental toxicity was demonstrated at 100 mg/kg/day as slightly impaired growth of the fetuses (reduced body weights and placental weights and reduced skeletal ossification). For developmental toxicity, the NOEL was 32 mg/kg/day and the LOEL was 100 mg/kg/day, based on reduced fetal body weights, reduced placental weights, retarded skeletal ossification of the cranium, sternebrae and 5th metacarpals.

In a second oral developmental toxicity study, pregnant Cr1:COBS CD (SD) BR rats were dosed with fenoxaprop-ethyl (96.2%) in corn oil at doses of 0, 10, 32, or 100 mg/kg/day from days 6 through 15 of gestation. For maternal toxicity, the NOEL was 32 mg/kg/day and the LOEL was 100 mg/kg/day, based on decreased body weight gain and increased liver weights. For developmental toxicity, the NOEL was 32 mg/kg/day and the LOEL was 100 mg/kg/day base on increase malformations, significant fetal weight reduction and increase total visceral and skeletal anomalies.

ii. *Rabbits*. In an oral developmental toxicity study with groups of Himalayan [Hoe:HIMK(SPFWiga)] rabbits were dosed at doses of fenoxaprop-ethyl (93%) in sesame oil at 0, 0.5, 12.5, 50.0 or 200 mg/kg/day from days 7 through 19 of gestation. For maternal toxicity, the NOEL was 12.5 mg/kg/day and the LOEL was 50.0 mg/kg/day, based on decreased food consumption and body weight gain. For developmental toxicity, the NOEL was 50 mg/kg/day and the LOEL was 200 mg/kg/day based on reduced fetal weights, placental weights, crown-rump lengths, and fetal survival, and increased litter and fetal incidence of rib anomalies and diaphragmatic hernias. No developmental toxicity was observed at doses of less than 50.0 mg/kg/day.

10. *Dermal developmental toxicity study*— i. *Rats*. In a dermal developmental toxicity study, pregnant KFM-Han Wistar rats (25/dose) received repeated dermal applications of fenoxaprop-ethyl (96.5%) in sesame oil at doses of 0, 100, 300, or 1,000 mg/kg/day for 6 hours/day on days 6-15 of gestation. For maternal toxicity, the NOEL was >1,000 mg/kg/day (HDT); a LOEL was not observed. For developmental toxicity, the NOEL was 1,000 mg/kg/day; a LOEL was not observed. There were no treatment-related malformations or variations noted upon external, visceral, and skeletal examination of the fetuses.

ii. *Rabbits*. In a dermal developmental toxicity study, fenoxaprop-ethyl (96.5%) in sesame oil was administered dermally to 16 Chinchilla rabbits (SPF quality) at dose levels of 0, 100, 300, or 1,000 mg/kg/day for 6 hours/day on days 6-18 of gestation. For maternal toxicity, the NOEL was 1,000 mg/kg/day (HDT); a LOEL was not observed. There was no developmental toxicity demonstrated at any dose level. For developmental toxicity, the NOEL was 1,000 mg/kg/day; a LOEL was not observed.

11. *Reproductive toxicity study*. In a 2-generation reproductive toxicity study, fenoxaprop-ethyl (97.2%) was administered to 30 WISTAR/HAN rats/sex/dose in their diet at doses of 0, 0.25, 1.5, or 9.0 mg/kg/day. Exposure to animals began at 7 weeks of age and lasted for 80 days prior to mating to produce F1a and F1b pups. At 21 days of age, F1b pups were selected to become the parents of the F2a and F2b litters. There were no treatment-related effects on mortality, clinical signs of toxicity, body weight, food consumption or reproductive parameters at any dose level. For parental/systemic toxicity, the NOEL was 0.25 mg/kg/day and the LOEL was 1.5 mg/kg/day based on decreased blood lipids. The NOEL for systemic toxicity was 0.25 mg/kg/day. For reproductive toxicity, the NOEL was 0.25 mg/kg/day and the LOEL was 1.5 mg/kg/day based on reduced pup body weights (F1a).

12. *Developmental neurotoxicity data*. No developmental neurotoxicity data are required for fenoxaprop-ethyl. No effects on histopathology of the brain were observed in any of the studies in which these parameters were measured. There no evidence of developmental anomalies of the fetal nervous system in

the prenatal developmental toxicity studies with rats or rabbits or in the two-generation reproduction study in rats.

13. *Studies on metabolism*. In a rat metabolism study fenoxaprop-ethyl($U^{-14}C$-chlorophenyl; 98% radiochemical purity) was administered to male and female Wistar HOE: Wiskf (SPF 71) strain of rats (10-15 animals/dose/sex) by gavage as a single dose at levels of 2 or 10 mg/kg, or at a single dose at 2 mg/kg following a 4-day pretreatment with unlabeled fenoxaprop-ethyl at 2 mg/kg/day. Within 6 hours of dosing 83-109% of the administered radioactivity was recovered in the urine and feces, with a majority of the dose (51-65%) being recovered within 24 hours of dosing. Within 24 hours of dosing, urinary excretion accounted for 39-48% of the dose for females and 22-311% of the dose for males. The primary metabolite in urine of both sexes in each dose group was 6-chlorobenzoxazole-2-mercapturic acid, accounting for 22-50% of the total radioactivity in the urine (15-26% of the dose) The urine of female rats dosed either once at 10 mg/kg or repeatedly at 2 mg/kg also contained high levels (23-28% of dose) of 2-(4-(6-chloro-2-benzoxazolyloxy)-phenoxy)-propionic acid (the free acid of fenoxaprop-ethyl). At the 10 mg/kg dose, unchanged parent accounted for 24% of the fecal radioactivity (15% of dose) for male rats and 6% for female rats (1.7% of dose).

In a second rat metabolism study, fenoxaprop-ethyl ($1^{-14}C$-dioxyphenyl; 96% radiochemical purity) was administered by gavage as a single dose to male and female SPF Wistar strain rats (10 animals /sex) at 10 mg/kg body weight and to 15 females at 2 mg/kg body weight. Within 96 hours of dosing, 101.3% and 87.4% of the 10 gm/kg dose was recovered from male and female rats, respectively, and 108.8% of the 2 mg/kg dose was recovered from female rats. There were sex- and dose-related differences in excretion. In the 0- to 24-hour urine of male rats dosed at 10 mg/kg, 99% of the radioactivity was identified as 2-(4-hydroxyphenoxy)-propionic acid (HPP-acid), accounting for 47.5% of the administered dose. In female rats dosed at 10 mg/kg, the primary urinary metabolites were identified as HPP acid (27.5% of dose) and 2-(4-6-chloro-2-benzoxazolyloxy)-phenoxy)-propionic acid (the free acid of fenoxaprop-ethyl; 27% of dose). In feces of the 10 mg/kg dose groups, fenoxaprop-ethyl and its free acid accounted for 20.1 and 16.6% of the dose for males and 9.0 and 11.3% of the dose for females.

B. Toxicological Endpoints

1. *Acute toxicity*. EPA has selected for acute dietary risk assessment the NOEL of 32 mg/kg/day from the rat developmental toxicity study. The effects were increased incidence of fetuses with malformations (including skeletal defects, eye defects, absent innominate artery, diaphragmatic hernia and umbilical hernia at 100 mg/kg/day LOEL. Population subgroup of concern is females 13+ years old.

An acute dietary risk assessment for the general population, including infants and children, (excluding the subgroup, females 13+ years old) is not required because no treatment-related effects attributable to a single exposure (dose) were seen in oral studies conducted with fenoxaprop-ethyl. A MOE of 100 is adequate to ensure protection for females 13+ years old.

2. *Short- and intermediate- term toxicity.* No dermal or systemic toxicity was seen in a dermal developmental toxicity study in rats and rabbits following repeated dermal applications of fenoxaprop-ethyl at 1,000 mg/kg/day (Limit-Dose). Also, no dermal or systemic toxicity was seen at the highest dose tested (20 mg/kg/day) in a 21-day dermal toxicity study in rats.

All Time Periods, Inhalation: A 6-Week Rat Inhalation Toxicity Study demonstrated a NOEL = 0.015 mg/L based on decreases in total lipids, increased triglycerides, increased alkaline phosphatase, increased liver and kidney weights, and liver hypertrophy at 0.075 mg/L LOEL.

3. *Chronic toxicity*. EPA has established the RfD for fenoxaprop-ethyl at 0.0025 mg/kg/day. This RfD is based on reduced pup weights observed in a 2-generation rat reproductive toxicity study with a NOEL of 0.25 mg/kg/day. An uncertainity factor of 100 was used in calculating the RfD to account for both inter- and intra-species variations.

4. *Carcinogenicity*. Referred to EPA Health Effects Division's Cancer Peer Review Committee. For the interim, a worst case and protective risk assessment was carried out by use of a linear low dose extrapolation method (Q1*) based on the increases in adrenal tumors in male mice. The Q1* for the adrenal tumors is 9.1×10^{-2}.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.430 (a)) for the combined residues of fenoxaprop-ethyl [(±)-ethyl 2-4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoic acid, and 6-chloro-2,3-dihydrobenzoxazol-2-one in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures and risks from fenoxaprop-ethyl as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1 day or single exposure. The NOEL for the acute dietary exposure was 32 mg/kg/day from a rat study. The Agency has determined that the uncertainty factor of 10 to account for enhanced sensitivity of infants and children should be removed for fenoxaprop-ethyl, and that the MOE of 100 to account for inter (10) and intra (10) species variation is adequate to insure protection for this population from exposure to fenoxaprop-ethyl, because in the rat developmental toxicity study, the fetal effects (malformations) were seen at maternally toxic doses (i.e., the LOEL was the same for both adults and fetuses).

From the acute dietary (food only) risk assessment a high-end exposure estimate of 0.001 mg/kg/day was calculated. This exposure yields a dietary (food only) MOE of 32,000 for females 13+ years, the population subgroup of concern. This risk estimate was highly conservative because it assume that 100% of wheat and all other commodities having tolerances for residues of fenoxaprop-ethyl will contain residues at tolerance levels. Therefore, this is an overestimation of human dietary exposure. Use of anticipated residue values and percent crop-treated data will result in a lower acute dietary exposure estimate if estimated by Monte Carlo analysis.

ii. *Chronic exposure and risk.* The anticipated residues for existing fenoxaprop-ethyl uses (including a proposed Section 18 use on barley) result in Anticipated Residue Contribution that varies between 0.000009 and 0.000023 mg/kg/day for the population subgroups (the U.S. Population, Nursing Infants (<1 year old), Non-Nursing Infants (> year old), Children (1-6 years old) , Children (7-12 years old) and Non-Hispanic Others); and occupied between 0.4% and 0.9% of the RfD.

Section 408(b)(2)(E) authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided five years after the tolerance is established, modified, or

left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. Section 408(b)(2)(F) states that the Agency may use data on the actual percent of crop treated for assessing chronic dietary risk only if the Agency can make the following findings:

(1) That the data used are reliable and provide a valid a basis for showing the percentage of food derived from a crop that is likely to contain residues.

(2) That the exposure estimate does not underestimate the exposure for any significant subpopulation.

(3) Where data on regional pesticide use and food consumption are available, that the exposure estimate does not understate exposure for any regional population.

In addition the Agency must provide for periodic evaluation of any estimates used.

The percent of crop treated estimates for fenoxaprop-ethyl were derived from federal and market survey data. EPA considers these data reliable. A range of estimates are supplied by this data and the upper end of this range was used for the exposure assessment. By using this upper end estimate of percent crop treated, the Agency is reasonably certain that exposure is not underestimated for any significant subpopulation. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Review of this regional data allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. To provide for the periodic evaluation of these estimates of percent crop treated as required by the section 408(b)(2)(F), EPA may require fenoxaprop-ethyl registrants to submit data on percent crop treated. As required by section 408(b)(2)(E), EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than five years from the date of issuance of this tolerance.

In the absence of an Agency Cancer Assessment Review, the Health Effects Division of the Office of Pesticide Programs recommended a worst case and protective risk assessment using a linear low dose extrapolation method (Q1*) based on the increases in adrenal tumors in mice. The Q1* for the adrenal tumors was determined to be 9.1 x 10^{-2}. Based on the US population chronic dietary exposure of 0.00001 mg/kg/day, this results in a cancer risk estimate of 9.1 x 10^{-7}.

2. *From drinking water.* Based on the acute and chronic dietary (food) exposure and using default body weights and water consumption figures, acute and chronic drinking water levels of concern (DWLOC) for drinking water were calculated. To calculate the DWLOC, the acute or chronic dietary food exposure (from the DRES analysis) was subtracted from the acute toxicity NOEL or RfD, as appropriate. DWLOCs were then calculated using the default bodyweights and drinking water consumption figures.

For acute drinking water exposure for both adults and children, the level of concern was 960 ppm. For chronic exposure in drinking water the level of concern was 80 ppm. For adults, the estimate was based on a body weight of 70 kg and consumption of 2 liters of water per day; for children, a body weight of 10 kg and a consumption of 1 liter of water per day. Agency estimates for contamination of drinking water from the registered uses of fenoxaprop-ethyl is less than 1 ppb. This level is not greater than levels of EPA concern.

3. *From non-dietary exposure.* Fenoxaprop-ethyl is currently registered for use on turfgrass including sod farms, commercial and residential turf and ornamentals. Applications to residential turf are done by professional applicators. There are no homeowner uses.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether fenoxaprop-ethyl has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, fenoxaprop-ethyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that fenoxaprop-ethyl has a common mechanism of toxicity with other substances.

D. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk.* From the acute dietary (food use) risk assessment a high-end exposure estimate of 0.001 mg/kg/day was determined for females 13+ years, the population subgroup of concern for acute toxicity. This exposure yields a dietary MOE of 32,000. The potential contribution to acute exposure from residues in drinking water is minimal (1,000-fold less than EPA's level of concern) and would not result in an aggregate acute exposure that exceeds EPA's level of concern.

2. *Chronic risk.* Using the ARC exposure assumptions described above, EPA has concluded that aggregate

exposure to fenoxaprop-ethyl from food will utilize less than 0.4% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is non-nursing infants less than one year old. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to fenoxaprop-ethyl in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to fenoxaprop-ethyl residues.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure.

Fenoxaprop-ethyl is currently registered for use on turfgrass including sod production, commercial and residential turf and landscape ornamentals. No short- or intermediate-term dermal toxicity endpoints have been identified for fenoxaprop-ethyl. An inhalation endpoint has been identified, however, as the uses are outdoors, exposure from inhalation route should be considerable less than that determined for worker mixer/loaders, who have an MOE of 2,800. Additionally, based on the low level of chronic dietary exposure, the Agency concludes that aggregate short- and intermediate-term exposure is at a level below EPA's level of concern.

E. Aggregate Cancer Risk for U.S. Population

Based on a upper bound potency factor (Q1*) of 9.1 x 10^{-2} $(mg/kg/day)^{-1}$, the aggregate upper bound lifetime cancer risk from the use of fenoxaprop-ethyl in the culture of wheat from worst case estimates of residues in food is 9.1 x 10^{-7}. In the present analysis a worst case risk assessment was used. The analysis used a linear low dose extrapolation method (Q1*) based on the increases in adrenal tumors in mice. EPA concludes that fenoxaprop-ethyl poses no greater than a negligible cancer risk.

F. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children*— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of fenoxaprop-ethyl, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard uncertainty factor (usually 100 for combined inter- and intra-species variability)) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In an oral developmental toxicity study with Wistar rats, the maternal NOEL was 32 mg/kg/day, based on reduction in body weight and food consumption. The developmental NOEL was 32 mg/kg/day, based on reduced fetal body weights, reduced placental weights and retarded skeletal ossification of the cranium, sternebrae and 5th metacarpals.

In a second oral developmental toxicity study with Crl:COBS CD (SD) BR rats, the maternal NOEL was 32 mg/kg/day, based on decreased body weight gain and increased liver weights. The developmental NOEL was 32 mg/kg/day, based on increase malformations, significant fetal weight reduction and increase total visceral and skeletal anomalies.

In an oral developmental toxicity study with Himalayan rabbits, the maternal NOEL was 12.5 mg/kg/day, based on decreased food consumption and body weight gain. The developmental NOEL was 50 mg/kg/day, based on reduced fetal weights, placental weights, crown-rump lengths, fetal survival and increased litter and fetal incidence of rib anomalies and diaphragmatic hernias.

iii. *Reproductive toxicity study.* In a rat reproduction study, the parental (systemic) NOEL was 0.25 mg/kg/day, based on decreased blood lipids. The reproductive (pup) NOEL was 0.25 mg/kg/day, based on reduced pup body weights.

iv. *Pre- and post-natal sensitivity.* The pre-natal developmental toxicity data demonstrated no indication of increased sensitivity of rats or rabbits to *in utero* exposure or repeated dermal applications of fenoxaprop-ethyl. The rat reproduction study did not identify any increased sensitivity of rats to *in utero* or post-natal exposure. Maternal and parental NOELs were equivalent to developmental or offspring NOELs.

2. *Acute risk.* The acute dietary (food only) MOE for females 13+ years old (accounts for both maternal and fetal exposure) was determined to be 32,000. This MOE was based on the developmental NOEL in rats of 32 mg/kg/day. This risk assessment assumed 100% crop-treated and tolerance level residues on all treated crops consumed, resulting in a significant over-estimate of dietary exposure. Despite the potential for exposure to fenoxaprop-ethyl in drinking water, EPA does not expect the acute aggregate exposure to exceed level of concern. The large acute dietary MOE determined for females 13+ years old provides assurance that there is a reasonable certainty of no harm from both females 13+ years and the pre-natal development of infants.

3. *Chronic risk.* Using the exposure assumptions described in this rule, the percentage of the RfD that will be utilized by chronic dietary (food only) exposure to residues of fenoxaprop-ethyl ranges from 0.4% for nursing infants less than one year old, up to 0.9% for non-nursing infants less than 1 year old. Despite the potential for exposure to fenoxaprop-ethyl in drinking water, EPA does not expect the chronic aggregate exposure to exceed 100% of the RfD. Based on the nature of the residential uses, no chronic residential exposure is anticipated. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from chronic aggregate exposure to fenoxaprop-ethyl regulable residues.

III. Other Considerations

A. Metabolism In Plants and Animals

The metabolism of fenoxaprop-ethyl in plants and animals is adequately understood for purposes of these tolerances.

B. Analytical Enforcement Methodology

An adequate analytical method for determining the magnitude of residues in the raw agricultural commodities listed in this Final Rule has been evaluated by EPA and is published in the Pesticide Analytical Manual (PAM II). The method may be requested from: Calvin Furlow, PRRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 119FF, CM#2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703–305–5229).

C. Magnitude of Residues

The nature of the residue in plants is adequately understood for the purposes of these tolerances.

D. International Residue Limits

No CODEX Maximum Residue Levels (MRLs) have been established for fenoxaprop-ethyl. Canadian MRLs for combined residues of fenoxaprop-ethyl, its free acid metabolite [2-[4-[(6-chloro-2-benzoxazolyl)oxy]propanoic acid] and 6-chloro-2,3-dihydrobenzoxazol-2-one have been established at 0.02 ppm for milk. This tolerance expression and level for milk is in harmony with subject tolerances of the final rule.

IV. Conclusion

Therefore, the tolerances are established for the combined residues of fenoxaprop-ethyl [(±)-ethyl 2-[4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoic acid and 6-chloro-2,3-dihydrobenzoxazol-2-one, in or on the following raw agricultural commodities: cattle, fat, mbyp and meat at 0.05 ppm; goats, fat, mbyp and meat at 0.05 ppm; hogs, fat, mbyp and meat at 0.05ppm; horses, fat, mbyp and meat at 0.05 ppm; milk at 0.02 ppm; sheep, fat, mbyp and meat at 0.05 ppm; wheat, grain at 0.05 ppm; and wheat straw at 0.50 ppm.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by March 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VI. Public Docket

EPA has established a record for this rulemaking under docket control number [OPP–300597] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Electronic comments may be sent directly to EPA at:
opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

VII. Regulatory Assessment Requirements

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since these tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of

a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the Agency has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 29, 1997.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. Section 180.430 is revised to read as follows:

§ 180.430 Fenoxaprop-ethyl; tolerances for residues.

(a) *General.* Tolerances are established for the combined residues of the herbicide fenoxaprop-ethyl [(±)-ethyl 2-[4-[(6-chloro-2-benzoxazolyl)oxy]phenoxy]propanoate] and its metabolites [2-[4-](6-chloro-2-benzoxazoly)oxy]phenoxy]propanoic acid and 6-chloro- 2,3-dihydrobenzoxazol-2-one], each expressed as fenoxaprop-ethyl, in or on the following raw agricultural commodities:

Commodity	Parts per million
Cattle, fat	0.05
Cattle, mbyp	0.05
Cattle, meat	0.05
Cottonseed	0.05
Goats, fat	0.05
Goats, mbyp	0.05
Goats, meat	0.05
Hogs, fat	0.05
Hogs, mbyp	0.05
Hogs, meat	0.05
Horses, fat	0.05
Horses, mbyp	0.05
Horses, meat	0.05
Milk	0.02
Peanut hulls	0.05
Peanuts	0.05
Rice grain	0.05
Sheep, fat	0.05
Sheep, mbyp	0.05
Sheep, meat	0.05
Soybeans	0.05
Wheat, grain	0.05
Wheat, straw	0.50

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 98–556 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300600; FRL–5764–6]
RIN 2070–AB78

Bifenthrin; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extends a time-limited tolerance for residues of the insecticide bifenthrin in or on broccoli and cauliflower at 0.1 and 0.05 parts per million (ppm), respectively, for an additional 1-year period, to January 31, 1999. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on September 19, 1997, under the crisis provisions. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA.

DATES: This regulation becomes effective January 9, 1998. Objections and requests for hearings must be received by EPA, on or before March 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300600], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300600], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Follow the instructions in Unit II. of this preamble. No Confidential Business Information (CBI) should be submitted through e-mail.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 267, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)-308-9356; e-mail: beard.andrea@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA issued a final rule, published in the **Federal Register** of February 12, 1997 (62 FR 6486) (FRL–5585–1), which announced that on its own initiative and under section 408(e) of the FFDCA, 21 U.S.C. 346a(e) and (l)(6), it established a time-limited tolerance for the residues of bifenthrin in or on broccoli and cauliflower at 0.1 and 0.05 ppm, respectively, with an expiration date of January 31, 1998. EPA established the tolerance because section 408(l)(6) of the FFDCA requires

EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

EPA received a request to extend the use of bifenthrin on broccoli and cauliflower for this year's growing season due to the circumstances of there being no effective material available for late season control of the silverleaf whitefly, a relatively newly established pest, which has caused serious damage to vegetable crops in recent years. After having reviewed the submission, EPA concurs that emergency conditions exist for this state. EPA has authorized under FIFRA section 18 the use of bifenthrin on broccoli and cauliflower for control of whiteflies in California.

EPA assessed the potential risks presented by residues of bifenthrin in or on cauliflower and broccoli. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of February 12, 1997 (62 FR 6486). Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional 1-year period. Although this tolerance will expire and is revoked on January 31, 1999, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on broccoli and cauliflower after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

I. Objections and Hearing Requests

The new section 408(g) of the FFDCA provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) of the FFDCA as was provided in the old section 408 and in section 409 of the FFDCA. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by March 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

II. Public Record and Electronic Submissions

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

Electronic comments may be sent directly to EPA at:
opp-docket@epamail.epa.gov.

Electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300600]. No CBI should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

III. Regulatory Assessment Requirements

This final rule extends a time-limited tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

Since this extension of an existing time-limited tolerance does not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the

Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

IV. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 23, 1997.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

§ 180.442 [Amended]

2. In § 180.442, by amending paragraph (b) in the table, for the commodities ''broccoli'' and ''cauliflower'' by removing ''1/31/98''and by adding in its place ''1/31/99''.

[FR Doc. 98–561 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180 and 186

[OPP–300541A; FRL–5761–9]

RIN 2070–AB78

Thiodicarb; Pesticide Tolerance; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: EPA issued in the **Federal Register** of August 22, 1997, a document establishing tolerances for the combined residues of thiodicarb and its metabolite, methomyl, in or on broccoli, cabbage, cauliflower, and leafy vegetables (except *Brassica* vegetables). This document corrects an error published in Table 1 of the preamble.

DATES: This correction is effective January 9, 1998.

FOR FURTHER INFORMATION CONTACT: By mail: Thomas C. Harris, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall 2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5404, e-mail: harris.thomas@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In FR Doc. 97–22397 in the **Federal Register** of August 22, 1997 (62 FR 44582) (FRL–5739–7), make the following correction:

On page 44589, in the second column, in Table 1, under column four, the margin of exposure (MOE) for U.S. Population now reading ''218'' should read ''725''.

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the Agency has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this rule in today's **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 180 and 186

Environmental protection, Administrative practice and procedure, Agricultural commodities, Animal feeds, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 10, 1997.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 98–420 Filed 1-8-98; 8:45 a.m.]

BILLING CODE 6560–50–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 413

[HCFA–1004–FC]

RIN 0938–AI34

Medicare Program; Limit on the Valuation of a Depreciable Asset Recognized as an Allowance for Depreciation and Interest on Capital Indebtedness After a Change of Ownership

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period revises the Medicare provider reimbursement regulations relative to allowable costs and sets a limit on the valuation of a depreciable asset that may be recognized in establishing an appropriate allowance for depreciation and for interest on capital indebtedness after a change of ownership that occurs on or after December 1, 1997. These provisions apply to providers that are reimbursed on the basis of reasonable costs. This change implements the mandate in section 4404 of the Balanced Budget Act of 1997 (Pub. L. 105–33).

DATES: *Effective Date:* This final rule is effective January 9, 1998.

Applicability: Pursuant to 5 U.S.C. 808(2), as well as section 1861(v)(1)(O) of the Social Security Act (as amended by section 4404 of Pub. L. 105–33), this rule applies to changes of ownership that occur on or after December 1, 1997.

Comment Period: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 p.m. on March 10, 1998.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Department of Health and Human Services, Health Care Financing Administration, Attention: HCFA–1004–FC, P.O. Box 7517, Baltimore, Maryland 21207–0517.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201, or
Room C5–11–17, Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Comments may also be submitted electronically to the following e-mail address: HCFA–1004–FC@hcfa.gov. E-mail comments must include the full name and address of the sender and must be submitted to the referenced address in order to be considered. All comments must be incorporated in the e-mail message because we may not be able to access attachments. Electronically submitted comments will also be available for public inspection at the Independence Avenue address below.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1004–FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW, Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (Phone: (202) 690–7890).

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 37194, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $8. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Deposit Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

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FOR FURTHER INFORMATION CONTACT: Ann Pash, (410) 786–4516

SUPPLEMENTARY INFORMATION:

I. Background

Under Medicare's reasonable cost reimbursement system, appropriate allowance for depreciation and for interest on capital indebtedness on buildings and equipment used in the provision of patient care is based in part on the historical cost of the asset. Prior to the enactment of the Balanced Budget Act of 1997 (Pub. L. 105–33), when a Medicare certified provider's capital asset is disposed of through sale, scrapping, trade-in, exchange, demolition, abandonment, condemnation, fire, theft, or other casualty, Medicare recognized a gain or a loss from the transaction. Currently, under regulations at § 413.134, if the facility is purchased as an ongoing operation, the cost basis for the assets of the facility is limited, based on when the transaction occurred and by the type of provider involved.

Section 1861(v)(1) of the Social Security Act (the Act) provides the general statutory authority for reimbursement on the basis of reasonable costs. Section 1861(v)(1)(O) of the Act addresses specifically the appropriate allowance for depreciation and interest for a capital asset of a hospital or a skilled nursing facility that has undergone a change of ownership. The regulations governing the allowance for depreciation based on asset costs are set forth in § 413.134. They are applicable to all providers reimbursed on the basis of reasonable costs.

Under § 413.134(f), if the disposal of a depreciable asset results in a gain or a loss, an adjustment is necessary in the provider's allowable costs. The treatment of the gain or loss depends upon the manner of disposition of the asset and its net book value as determined under the regulations. Generally when a provider sells its depreciable assets at more than the net book value, Medicare shares in the gain. If the provider sells its depreciable assets at less than the net book value, Medicare shares in the loss. The amount of a gain is limited to the amount of depreciation previously included in Medicare allowable costs. The amount of a loss is limited to the undepreciated basis of the asset permitted under the program.

Recent increases in the number of hospital sales have raised concerns about Medicare's liability for depreciation adjustments. In fact, the Office of the Inspector General (OIG) of the Department of Health and Human Services, conducted a study and issued a report in June 1997, Medicare Losses on Hospital Sales (OEI–03–96–00170), that quantifies the financial impact of hospital sales on the Medicare program. The scope of its study was acute care hospital changes of ownership (except bankruptcies) that met Medicare requirements for a depreciation adjustment during fiscal Years 1990 through 1996. The OIG found that for 229 hospitals sold between 1990 and 1996, there were $453 million in losses and $56 million in gains, for a net loss of $397 million. The OIG also noted that during the period of the study, another $174 million net loss had been reported by hospitals but not yet settled by Medicare. Also, another 88 hospital sales had occurred but financial data were not available.

Additionally, the study also showed that net losses reported to the program increased 322 percent from $29 million in 1990 to $122 million in 1996. While Medicare shared in the loss for 161 hospitals, it shared in the gain for only 33 hospitals. The OIG report recommended that the depreciation adjustments on hospital sales be discontinued in that it is an unnecessary holdover from the cost-based reimbursement system. The provisions of section 4404 of Public Law 105–33 address the concerns raised by the OIG report.

II. Provisions of the Final Regulation With Comment Period

This final rule with comment period revises § 413.134 to implement the provisions of section 4404 of Public Law 105–33. Section 4404 sets a limit on the valuation of a depreciable asset that may be recognized in establishing an allowance for depreciation and for interest on capital indebtedness after a change of ownership that occurs on or after December 1, 1997. The statute specifies that these provisions apply to ''changes of ownership that occur after the third month beginning after the date of enactment of this section.'' This language is ambiguous because it is unclear whether the reference to ''month'' means a calendar month or a period of approximately 30 days. Thus, the language could be interpreted to mean that the effective date is either December 1, 1997 or November 5, 1997. Because there has been some confusion

in the provider community on this issue, we have decided to adopt the less restrictive reading, that is, an effective date of December 1, 1997. The provisions of this section apply to providers paid on a reasonable cost basis.

Under these provisions, when a depreciable asset of a provider undergoes a change of ownership, the valuation of the asset, for purposes of establishing a Medicare allowance for depreciation and interest, will be the historical cost of the asset to the owner of record, less depreciation allowed. Thus, when a depreciable asset is sold, the value of the asset to the seller will be the historical cost (as recognized under Medicare) to the owner of record as of August 5, 1997, less depreciation allowed. In this case, there will be no adjustment for gain or loss on the sale. For the buyer, the value of the asset will also be the historical cost (as recognized under Medicare) to the owner of record as of August 5, 1997, less depreciation allowed. Accordingly, the new owner's allowance for depreciation and interest will be based on this value. Stated simply, the asset moves from the hands of the seller to the hands of the buyer at the asset's net book value defined in § 413.134(b)(9). In light of section 4404 of Public Law 105–33, we are making conforming changes to § 413.134(b)(1)(i) to add an expanded description of the historical cost of a depreciable asset acquired on or after December 1, 1997.

III. Other Required Information

A. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking to provide a period for public comment on substantive changes to our regulations. However, section 1871(b) of the Social Security Act provides that publication of a notice of proposed rulemaking is not required before a rule takes effect where ''a statute establishes a specific deadline for the implementation of the provision and the deadline is less than 150 days after the date of the enactment of the statute in which the deadline is contained.'' In addition, we may waive a notice of proposed rulemaking if we find, for good cause that prior notice and comment are impracticable, unnecessary, or contrary to the public interest. The changes in this final rule conform the regulations to section 1861(v)(1)(O) of the Act, as amended by section 4404 of Public Law 105–33. For good cause, we find that prior notice is unnecessary, and also impracticable because of the limited time frame between the enactment of section 4404 and the effective date of section 4404 of Public Law 105–33. However, we are furnishing a subsequent public comment period for public response to this final rule with comment period.

B. Effect of the Contract With America Advancement Act, Public Law 104–121

Normally, under 5 U.S.C. 801, as added by section 251 of Public Law 104–121, the effective date of a major rule is delayed 60 days for Congressional review. This has been determined to be a major rule under title 5, United States Code, section 804(2). However, as indicated in section III.A. of the preamble to this final rule with comment period, for good cause, we find that prior notice and comment procedures are unnecessary and impracticable. Pursuant to 5 U.S.C. 808(2), a rule shall take effect at such time as the Federal agency promulgating the rule determines if it finds, for good cause, that prior notice and comment procedures are unnecessary or impracticable. Accordingly, under the exemption provided in 5 U.S.C. 808(2), this final rule with comment period is effective for changes of ownership that occur on or after December 1, 1997.

IV. Regulatory Impact Statement

We have examined the impact of this final rule with comment period as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of the RFA, most hospitals, and most other providers, physicians, and health care suppliers are small entities, either by nonprofit status or by having revenues of $5 million or less annually.

Also, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule with comment period revises the Medicare regulations that are affected by section 4404 of Public Law 105–33 that was enacted on August 5, 1997. This rule describes the new limitation on the valuation of assets that undergo a change of ownership on or after December 1, 1997. These statutory changes will affect providers with depreciable assets that are paid on a reasonable cost basis and that undergo a change of ownership.

Background

Since the beginning of the Medicare program, providers increasingly have been involved in acquisitions through purchase, merger, and/or consolidation. These transactions have involved both chain provider organizations and independent providers. Under current payment rules for providers other than hospitals and skilled nursing facilities, acquisitions frequently result in increased levels of Medicare payments. This occurs because the acquiring entity usually pays more for the acquired assets than the amount at which they are carried on the records of the prior owner. Generally, the amount at which the asset is acquired is the basis upon which Medicare payments are determined. For hospitals and skilled nursing facilities, this upward revaluation was limited for transactions occurring on or after July 18, 1984 by section 2314 of Public Law 98–369. However, for all providers, if the disposal of a depreciable asset results in a gain or loss, an adjustment is made in the provider's allowable costs. There is justified concern with the financial impact of this adjustment on the Medicare program.

Impact on Providers

Under section 4404 of Public Law 105–33, Congress eliminated Medicare's participation in the gains and losses that result from a change of ownership. Yet, we do not believe that this rule will have an impact on the current level of acquisitions. There are a number of factors other than gain or loss on a capital asset that affect a provider's decision regarding acquisitions. These factors include excess bed capacity, new technologies, changes in the service area, increased buying power, market entry initiatives, and other economic factors. These factors will not be affected by this final rule with comment period.

However, as a result of the enactment of section 4404 of Public Law 105–33, there will be a financial impact on those providers that undergo a change of ownership. For providers other than hospitals and skilled nursing facilities, Medicare payment will be reduced for capital expenses. For all providers, Medicare will no longer share in the

loss, or gain, that results from a change of ownership. We are not able to estimate with certainty the effect this provision will have on Medicare payments because we do not know how many changes of ownership will occur nor, of the changes that do occur, how many will result in a gain and how many will result in a loss.

As a step in the overall pricing of Public Law 105–33, HCFA actuaries estimated the impact of the provisions of section 4404 as a 5-year savings of $300 million. The preliminary estimate was released through the FY 1998 Mid-Session Review of the President's Budget. The following table shows the preliminary annual savings estimates:

FY	Savings (million)
1998	$50
1999	60
2000	60
2001	60
2002	70

In a subsequent evaluation based on additional data HCFA actuaries revised estimates of the savings to the program for the 5-year period 1998 through 2002. The revised 5-year estimate of $409 million assumes a lag of one year between the sale of a facility and the Medicare payment. Under this assumption, there are no savings calculated for FY 1998. The following table shows the revised annual savings estimates:

FY	Savings (million)
1998	
1999	91
2000	98
2001	106
2002	114

While this estimate represents a significant impact on providers, this effect arises directly from the provisions of section 4404 of Public Law 105–33. The relevant changes to the regulations merely conform the regulations text to the statute. The statute mandates that we implement this limitation.

In accordance with the provisions of Executive Order 12866, this final rule with comment period was reviewed by the Office of Management and Budget.

V. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

List of Subjects in 42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 413 is amended as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; OPTIONAL PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1861(v)(1)(A), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395x(v)(1)(A), and 1395hh).

2. In § 413.134 the introductory text of paragraph (b)(1) is republished and paragraphs (b)(1)(i), (b)(1)(ii)(A), (f)(1), and (f)(2) paragraph heading are revised, new introductory text is added to paragraph (f)(2), the heading of paragraph (g) is republished, paragraph (g)(4) is redesignated as paragraph (g)(5), and a new paragraph (g)(4) is added to read as follows:

§ 413.134 Depreciation: Allowance for depreciation based on asset costs.

* * * * *

(b) *General rules—(1) Historical cost.* Historical cost is the cost incurred by the present owner in acquiring the asset.

(i) *All providers*—(A) *Depreciable assets acquired after July 31, 1970 and before December 1, 1997.* For depreciable assets acquired after July 31, 1970 and before December 1, 1997, and for a hospital or an SNF, acquired before July 18, 1984, the historical cost may not exceed the lower of current reproduction cost adjusted for straight-line depreciation over the life of the asset to the time of the purchase or the fair market value of the asset at the time of its purchase.

(B) *Depreciable assets acquired on or after December 1, 1997.* For depreciable assets acquired on or after December 1, 1997, the historical cost of the asset that will be recognized under this program must not exceed the historical cost less depreciation allowed to the owner of record as of August 5, 1997 (or if an asset did not exist as of August 5, 1997, the first owner of record after August 5, 1997). For this paragraph (b)(1)(i)(B), the following apply:

(*1*) An asset that was not in existence as of August 5, 1997 includes an asset that physically existed but was not owned by a provider participating in the Medicare program as of that date.

(*2*) The acquisition cost to the owner of record is subject to the limitation on historical costs described in paragraphs (g) (1), (2), and (3) of this section, and is reduced by any depreciation taken by the owner of record. The limitation on historical cost is also applied to the purchase of land, which is a capital asset that is neither depreciable nor amortizable under any circumstances. (See §§ 413.153(d) and 413.157(b) for application of the limitation to the cost of land for purposes of determining the allowable interest expense.)

(*3*) Acquisition cost to the owner of record includes the costs of betterment or improvements that extend the estimated useful life of an asset at least 2 years beyond its original estimated useful life or that increase the productivity of an asset significantly over its original productivity.

(*4*) For assets acquired prior to a provider's entrance into the Medicare program, the acquisition cost to the owner of record is the historical cost when acquired, rather than when the provider entered the program.

(*5*) For assets subject to the optional depreciation allowance as described in § 413.139, the acquisition cost to the owner of record is the historical cost established for those assets when the provider changed to actual depreciation as described in § 413.139(e). If the provider did not change to actual depreciation, as described in § 413.139(e), for optional allowance assets, the acquisition cost to the owner of record is based on the provider's recorded historical cost of the asset when acquired. If the provider has no historical cost records for optional allowance assets, the acquisition cost to the owner of record is established by appraisal.

(*6*) The historical cost of an asset acquired on or after July 18, 1984 may not include costs attributable to the negotiation or settlement of the sale or purchase (by acquisition, merger, or consolidation) of any capital asset for which any payment was previously made under the Medicare program. The costs to be excluded include, but are not limited to, appraisal costs (except those incurred at the request of the intermediary under paragraph (f)(2)(iv) of this section), legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies.

(ii) *Hospitals and SNFs only.* (A) For assets acquired on or after July 18, 1984 and before December 1, 1997 and not

subject to an enforceable agreement entered into before July 18, 1984, historical cost may not exceed the lowest of the following:

* * * * *

(f) *Gains and losses on disposal of assets*—(1) *General.* Depreciable assets may be disposed of through sale, scrapping, trade-in, exchange, demolition, abandonment, condemnation, fire, theft, or other casualty. If disposal of a depreciable asset, including the sale or scrapping of an asset before December 1, 1997, results in a gain or loss, an adjustment is necessary in the provider's allowable cost. (No gain or loss is recognized on either the sale or the scrapping of an asset that occurs on or after December 1, 1997.) The amount of a gain included in the determination of allowable cost is limited to the amount of depreciation previously included in Medicare allowable costs. The amount of a loss to be included is limited to the undepreciated basis of the asset permitted under the program. The treatment of the gain or loss depends upon the manner of disposition of the asset, as specified in paragraphs (f)(2) through (6) of this section. The gain or loss on the disposition of depreciable assets has no retroactive effect on a proprietary provider's equity capital for years prior to the year of disposition.

(2) *Bona fide sale or scrapping before December 1, 1997.* For the bona fide sale or scrapping of depreciable assets before December 1, 1997, the following apply:

* * * * *

(g) *Establishment of cost basis on purchase of facility as an ongoing operation.*

* * * * *

(4) *Assets acquired by all providers on or after December 1, 1997.* Subject to the provisions of paragraph (b)(1)(i)(A) of this section, the historical cost may not exceed the historical cost of the asset, as recognized under the Medicare program, less depreciation allowed, to the owner of record as of August 5, 1997 (or for an asset not in existence as of August 5, 1997, the first owner of record after August 5, 1997).

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 9, 1997.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Approved: December 31, 1997.

Donna E. Shalala,

Secretary.

[FR Doc. 98–268 Filed 1–8–98; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 393

[FHWA Docket No. MC–97–5; FHWA–97–2364]

RIN 2125–AD40

Parts and Accessories Necessary for Safe Operation; Glazing in Specified Openings

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising its requirements concerning glazing materials, windshield condition, coloring and tinting of windshields and windows, and obstructions to the driver's field of view for commercial motor vehicles operated in interstate commerce. The revision is intended to remove obsolete regulatory language, establish requirements that are more performance-based than the previous requirements, and respond to requests for waivers to allow the use of windshield-mounted transponders. On April 14, 1997, the FHWA published a notice of proposed rulemaking (NPRM) in which the agency proposed general amendments to part 393 of the Federal Motor Carrier Safety Regulations (FMCSRs), Parts and Accessories Necessary for Safe Operation. The proposed amendments covered a wide range of topics, including the subjects of this rule. Upon review of the docket comments and recent requests for waivers, the agency has decided to issue a final rule on glazing materials, windshields and windows and to publish, at a later date, a final rule on the remaining issues covered in the April 14, 1997, NPRM. As a result of this rulemaking, motor carriers operating under the terms of the March 6, 1995, waiver granted for the ADVANTAGE I–75 and Heavy Vehicle Electronic License Plate, Inc. programs are no longer required to comply with the conditions prescribed by the waiver.

EFFECTIVE DATE: February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Larry W. Minor, Office of Motor Carrier Research and Standards, HCS–10, (202) 366–4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, HCC–20, (202) 366–1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On December 7, 1988, the FHWA published a final rule on parts and accessories necessary for safe operation (53 FR 49380). The final rule included amendments to the requirements of 49 CFR part 393 for lamps and reflective devices, brake systems, fuel systems, frames and frame assemblies, suspension systems, steering systems, and axle assemblies. This action was taken to implement sections 206 and 210 of the Motor Carrier Safety Act of 1984 (the Act), 49 U.S.C. 31136 and 31142, and to ensure that commercial motor vehicles are equipped with all parts and accessories considered necessary for safe operation. Since the publication of the final rule, the FHWA has received numerous petitions for rulemaking and requests for interpretation of the requirements of part 393 which have raised the need for additional amendments to clarify several provisions of the 1988 final rule. In addition, the National Highway Traffic Safety Administration (NHTSA), the Federal agency responsible for establishing safety standards for the manufacture of motor vehicles and certain motor vehicle equipment, has made several amendments to its Federal Motor Vehicle Safety Standards (FMVSSs) that necessitate amendments to the FMCSRs in order to eliminate inconsistencies between part 393 and the FMVSSs.

On April 14, 1997, the FHWA published a notice of proposed rulemaking (NPRM) to amend part 393 of the FMCSRs (62 FR 18170). The proposed amendments were intended to remove obsolete and redundant regulations; respond to several petitions for rulemaking; provide improved definitions of vehicle types, systems, and components; resolve inconsistencies between part 393 and the NHTSA's FMVSSs (49 CFR 571); and codify certain FHWA regulatory guidance concerning the requirements of part 393. The comment period was extended to July 28, 1997, at 62 FR 32066 on June 12, 1997.

As part of the NPRM, the FHWA proposed revising § 393.60, Glazing in specified openings. The agency proposed requiring that glazing material used in windshields, windows and doors of commercial motor vehicles manufactured on or after December 25, 1968, meet the requirements of FMVSS No. 205 in effect on the date of manufacture of the vehicle. The agency also proposed including a requirement that each bus, truck, and truck-tractor be equipped with a windshield.

With regard to coloring or tinting of windshields and side windows, the FHWA proposed revising the requirements to codify regulatory guidance on this topic. Coloring or tinting of windshields and the windows to the immediate right and left of the driver would be allowed provided the parallel luminous transmittance through the colored or tinted glazing is not less than 70 percent of the light at normal incidence in those portions of the windshield or windows which are marked as having a luminous transmittance of at least 70 percent.

The FHWA proposed revising § 393.60(c) concerning restrictions on the use of vision-reducing matter on windshields. The proposed revision was intended to eliminate the need for motor carriers to petition the FHWA for waivers to allow the use of windshield-mounted transponders and similar devices. The preamble to the NPRM stated:

> On March 6, 1995, the FHWA granted a petition from the Commonwealth of Kentucky, and Heavy Vehicle Electronic License Plate, Inc. (HELP) requesting a waiver from the requirements of § 393.60(c) to allow mounting of an automatic vehicle identification transponder at the upper border of the windshields of commercial motor vehicles (60 FR 12146). The waiver was necessary because § 393.60(c) prohibits the operation of a commercial motor vehicle with vision-reducing matter covering any portion of the windshield with certain exceptions for decals required by law and affixed to the bottom of the windshield.
>
> In evaluating the requests for waivers to § 393.60(c), the FHWA reviewed automotive engineering recommended practices, the NHTSA's FMVSSs, and recent research concerning driver's field of view. The agency also examined current commercial motor vehicle cab designs related to placement of interior mirrors and sun visors which occupy approximately the same space proposed for the transponder. Based upon the information obtained from this review, the FHWA concluded that a transponder mounted at the approximate center of the top of the windshield would be extremely unlikely to create a situation inconsistent with the safe operation of a commercial motor vehicle. This location is well outside the area recommended for windshield wiper sweep under the SAE recommended practice J198, *Windshield Wiper Systems—Trucks, Buses, and Multipurpose Vehicles,* and the area recommended for windshield defrosting under J342, *Windshield Defrosting Systems Performance Guidelines—Trucks, Buses, and Multipurpose Vehicles.* The findings of recent research reports on the subject also suggested that the location of an object, such as a transponder device, near the upper margin of a windshield is unlikely to have any effect on a driver's ability to observe nearby objects, such as pedestrians.

The NPRM indicated the agency would allow the installation of antennas, transponders, and similar devices in the upper margin of windshields for the reasons presented in the notice granting the waiver. These devices could not be placed lower than 152 mm (6 inches) from the upper edge of the windshield, must be outside the area swept by the windshield wipers, and must be outside the driver's sight lines to the road and highway signs or signals. The proposed amendment would codify the March 6, 1995, waiver and help to promote the use of advanced technologies to improve the efficiency and safety of operation of commercial motor vehicles.

On the subject of limitations on the placement of decals and stickers at the bottom of the windshield, the FHWA proposed adopting a performance-based requirement that decals required by law must not obstruct the driver's view of the road or traffic signs.

Discussion of Comments to the NPRM

The FHWA received 35 comments in response to the NPRM. The commenters were: Air Ride Control, Inc.; Amerex Corporation; the American Trucking Associations (ATA) (two submissions to the docket); Burns Consulting Associates; Colorado Department of Public Safety; Commercial Vehicle Safety Alliance (CVSA) (two submissions to the docket); Robert J. Crail, a transportation engineering consultant; W. E. Currie, a consulting engineer; Dana Corporation, Boston Weatherhead Division; Electronic Controls Company; Elf Atochem North America, Inc.; Grote Industries, Inc.; Hüls America, Inc.; Lufkin Trailers; Mark IV Industrial—Dayco Eastman; The Commonwealth of Massachusetts, Department of Public Utilities; National Association of State Fire Marshals; National Association of Trailer Manufacturers; National Automobile Dealers Association; National Automobile Transporters Association; National Propane Gas Association; Oklahoma Highway Patrol; Parker Hannifin Corporation (two submissions to the docket); Rockwell International Corporation (the automotive division of Rockwell is now Meritor Automotive); Star Headlight and Lantern Company, Inc.; Transportation Safety Equipment Institute; Truck Manufacturers Association; Truck Trailer Manufacturers Association; UBE Industries (America), Inc.; Donald H. Verhoff; and, Wells Cargo, Inc.

The ATA and the CVSA were the only commenters to discuss the proposed revision of § 393.60. The CVSA supported the proposal to allow the use of windshield-mounted transponders and recommended that the revision be expedited.

The ATA opposed the proposed reference to FMVSS No. 205, concerning manufacturing standards for glazing material, and the proposed requirement that all commercial motor vehicles be equipped with windshields. The ATA also expressed concern about the proposed regulatory language concerning prohibitions on obstructions to the drivers field of view. The ATA stated:

> [M]otor carriers can not test to assure that a component or system meets the FMVSS. By referencing the American National Standards Institute (ANSI) standard ANS Z26, the FMVSS requires that glazing be tested for, among many other things, chemical resistance. Performing this test requires, as one testing agent, gasoline of a certain Isooctane type and content. It is completely unreasonable to believe that any carrier is ever going to understand what such a fluid is, let alone purchase it for testing glazing.
>
> Carriers can, however, assure that glazing material is marked in accordance with FMVSS 205.S6. This is the type of indication which the manufacturers make to show compliance with the FMVSS. We believe such marking is necessary for all components which the agency believes motor carriers must show were constructed in compliance with the FMVSS.

The ATA also expressed concern about the proposed requirement for windshields.

> The ATA believes an exemption is needed for the transportation of vehicles such as ''chassis cowls'' between truck manufacturers and final stage manufacturers. The incomplete vehicles often have no windshield, windshield wipers or washers, heater-defroster, or speedometer. The ATA indicated the movement of this equipment is typically across town to a ''body builders'' facility.

With regard to the proposed language concerning prohibitions on obstructions to the driver's field of view, the ATA believes the wording about decals is ''too liberal.'' The ATA stated:

> It will once again allow state and federally required material to be affixed to the top, bottom, and sides of a windshield. We recognize that new technology has created the need for transponders and similar equipment. We also understand that CVSA

decals should be affixed to windshields but are not required by law and so need an exemption for such placement. And we can not forget how bad this can get without stringent control.

Many windshields have curved sides which are not swept by the wipers. Under FHWA/OMC's new wording this will become fertile glass for the planting of new stickers. To control the desire to use the windshield as a billboard, we suggest the following:

(2) *Decals and stickers mounted on the windshield.* Commercial Vehicle Safety Alliance (CVSA) inspection decals, and stickers and/or decals required under federal or state laws may be placed at the bottom or sides of the windshield provided such decals or stickers do not extend upward more than 4½ inches (11.5 cm) from the bottom of the windshield and are located outside the area swept by the windshield wipers, and outside the driver's sight lines to the road and highway signs or signals.

FHWA Response to Comments

The FHWA agrees with the CVSA's recommendation that the revision concerning windshield-mounted transponders and similar devices should be expedited. The agency acknowledges the ATA's concerns about Federal- and State-required decals being applied to inappropriate areas of the windshields of commercial motor vehicles, and has modified the regulatory language accordingly. However, for the reasons discussed below, the FHWA disagrees with the ATA's argument that motor carriers are not able to comply with the requirement to ensure that their commercial motor vehicles are equipped with windshields which meet the requirements of FMVSS No. 205. The agency also disagrees with the ATA's argument about the need for a driveaway exemption for the operation of incomplete motor vehicles.

The Use of Windshield-Mounted Transponders on Commercial Motor Vehicles

The FHWA is aware of two Intelligent Transportation Systems (ITS) programs that need regulatory relief from § 393.60(c) to allow the use of windshield-mounted transponders: the International Borders Clearance Program (the Borders Clearance Program), and the Oregon Green Light Electronic Clearance Operational Test Project (Green Light Project). The revised regulation will allow motor carriers participating in the Borders Clearance Program and Green Light Project, as well as carriers participating in future programs intended to improve efficiency and highway safety, to mount automatic vehicle identification (AVI) transponders at the top of the windshield (near the centerline or middle) of their commercial motor vehicles (CMVs).

The Borders Clearance Program is an element of the FHWA's ITS program that is designed to develop and demonstrate the integration of ITS technology (i.e., electronic pre-clearance, AVI transponders on vehicles, and AVI readers and other state-of-the-art communications and information systems) into an international border clearance system for CMVs operating between the United States, Canada, and Mexico. The Borders Clearance Program will allow the CMVs that meet safety and operational requirements to pass through border crossings with minimal delays. Currently, field operational tests (FOTs) to demonstrate the use of ITS technology are being planned for international border clearance sites on the Northern border (Buffalo, New York, and Detroit, Michigan) and on the Southern border (Otay Mesa, California, and Nogales, Arizona). Also FOTs are being developed for international border crossing sites in El Paso and Laredo, Texas; Blaine, Washington; and Sweetgrass, Montana.

The FOTs are intended to demonstrate an approach for standardizing data/information exchange systems between various U.S. Federal agencies (the Customs Service, the Immigration and Naturalization Service, and the Department of Transportation) with regulatory/enforcement responsibilities in border areas. This program will result in improved efficiency and effectiveness of activities at the border crossings and streamline the processes for ensuring safe CMV operations and verifying the credentials of motor carriers. Other important aspects of these initiatives include: the incorporation of the U.S. Treasury Department's North American Trade Automation Prototype (NATAP) project; examination of methods to make electronic information secure; and on-board processing of CMV safety information.

The FOTs are scheduled for completion by the end of 1999. The next step in the Borders Clearance Program would be to move toward the model deployment phase, focusing on deploying international border crossing systems at high priority sites.

Like the ADVANTAGE I–75 and HELP programs discussed earlier in this document, the Borders Clearance Program is dependent on the use of AVI transponders transmitting and receiving information to and from inspection stations. The transponders that will be used for the Borders Clearance Program are the same size as those used for the other programs and would be placed at the top of the windshield, near the centerline or middle of the CMV. The reasons for choosing this location are the same as those presented by ADVANTAGE I–75 and HELP programs.

The Green Light Project is part of the State of Oregon's ITS Commercial Vehicle Operations' Program. The project involves the testing of mainline pre-clearance systems featuring state-of-the-art weigh-in-motion and AVI devices compatible with systems in other jurisdictions. In addition, certain sites will be equipped with data collection systems for use in enforcing safety and weight regulations. Other sites will be equipped with safety enhancement technologies, including highway warning systems for weather-related hazards and downhill truck speed information systems.

The Green Light Project is dependent on the use of AVI transponders transmitting and receiving information to and from inspection stations. The transponders that will be used for the Green Light Project are the same size as those used for the programs previously mentioned and would be placed at the top of the windshield, near the centerline or middle of the CMV. The reasons for choosing this location are the same as those presented by the programs previously mentioned.

The FHWA has reviewed the operational needs of the Borders Clearance Program and Green Light Project and the comments received in response to the April 14, 1997, NPRM and has determined that revising § 393.60 to allow the use of windshield-mounted transponders and similar devices will help to promote increased efficiency and safety of motor carrier operations. The agency has reviewed accident reports concerning the transponder-equipped CMVs operating under the terms of the 1995 waiver and has determined that there have been no accidents (as defined in § 390.5) that could be attributed to the mounting of the transponders in the uppermost area of the center of the windshields of those CMVs. Therefore, the real-world experience of the motor carriers operating approximately 10,000 transponder-equipped CMVs indicates that allowing other CMVs to be similarly equipped is consistent with the public interest and the safe operation of CMVs.

Cross-Reference to FMVSS No. 205

The FHWA does not believe the ATA's concerns about cross-referencing FMVSS No. 205 are warranted. The regulatory language proposed did not include a requirement for motor carriers to conduct certification testing of

glazing materials in order to verify that windshields meet the manufacturing standard.

Motor vehicle manufacturers must certify that the vehicles they manufacture for sale and use in the United States meet all applicable Federal Motor Vehicle Safety Standards issued by the NHTSA. In certain cases, the vehicle safety standards require motor vehicle equipment to be marked by the equipment manufacturer to certify that the product meets the applicable safety standard (e.g., retroreflective sheeting for use on trailers manufactured on or after December 1, 1993, are marked with DOT–C2, DOT–C3, or DOT–C4, depending on the width of the tape).

Through cross-references to the FMVSSs, the FHWA places upon motor carriers the responsibility for being knowledgeable about the Federal manufacturing standards that are applicable to heavy trucks, buses, and trailers. Motor carriers have the responsibility of purchasing vehicles and components from manufacturers that are capable of certifying the products they are selling meet the applicable Federal manufacturing standards. If the commercial motor vehicle is damaged during its service life, or components wear out and require replacement, motor carriers are required to have the vehicle properly repaired by knowledgeable and capable maintenance personnel. Maintenance personnel should recognize that there are Federal safety standards and be capable of determining whether the repairs being performed will restore the vehicle to its previous condition.

Looking specifically at the cross-reference to FMVSS No. 205, vehicle manufacturers are responsible for ensuring that original windshields and windows installed in new motor vehicles meet the applicable requirements. With certain exceptions, the glazing material is required to be marked by the glazing manufacturer. Therefore motor carriers need only look for the certification label or tag (required by 49 CFR 567) for the new vehicle, and the certification marking (required by 49 CFR 571.205) on the glazing (i.e., windshields and windows) to determine whether the manufacturers have certified that the vehicle and glazing meet the applicable Federal requirements. If the windshield has to be replaced at a later date, the motor carrier need only ensure the repair facility or supplier of the replacement windshield is knowledgeable about the Federal standards applicable to glazing materials. The FHWA is not aware of any evidence of fraudulent certification and marking of windshields.

The argument by the ATA that motor carriers would be required to understand, in whole or in part, the test procedures that manufacturers are required to follow, or conduct testing in order to ensure compliance with the cross-referenced standard, is without basis. The FMCSRs have for more than 25 years included cross-references to the FMVSSs (e.g., FMVSS No. 105, concerning hydraulic brake systems, and No. 121 concerning air brake systems) with an apparently clear understanding by the vast majority of the regulated industry that motor carriers are not required to conduct certification testing. Although motor carriers and vehicle manufacturers have requested interpretations on numerous aspects of part 393 of the FMCSRs, the cross-references to the FMVSSs do not appear to have raised a discernible level of confusion or concern. Therefore, the FHWA has retained the cross-reference to FMVSS No. 205.

Requirement for Vehicles To Be Equipped With Windshields

The FHWA does not believe it is necessary to include in the final rule requiring windshields an exemption for driveaway operations. The scenario the ATA described would be considered the operation of a commercial motor vehicle in intrastate commerce. As such it would not be subject to the requirements of part 393 of the FMCSRs.

The FHWA notes that as a condition under the Motor Carrier Safety Assistance Program (MCSAP) States are required to adopt motor carrier safety and hazardous materials transportation rules and regulations identical in nearly all respects to those set forth in Federal laws and regulations. The States are required to apply those rules and regulations to both interstate and intrastate operations. However, the FHWA has provided, in appendix C to 49 CFR part 350, tolerance guidelines for State rules and regulations where Federal regulations do not apply. The tolerance guidelines provide a mechanism for individual States to assess the intrastate movement of incomplete motor vehicles, and determine whether an exemption to the requirement for windshields is appropriate. If State officials believe that an exemption is necessary for the movement of incomplete vehicles, the State may submit the information required by appendix C to the FHWA for consideration.

Discussion of Final Rule

The final rule requires glazing materials used for windshields, windows, and doors on a commercial motor vehicle manufactured on or after December 25, 1968, (the effective date of the NHTSA requirements for glazing) meet the requirements of FMVSS No. 205 in effect on the date of manufacture of the vehicle. Windshields and windows may be replaced with glazing materials that meet the requirements in effect on the date of manufacture, or with glazing materials that meet newer standards, adopted by amendments or revisions of FMVSS No. 205.

Each bus, truck and truck-tractor is required to have a windshield. The windshield must be mounted using the full periphery of the glazing material and be free of discoloration or damage in certain areas. Minor damage, such as cracks that are not intersected by other cracks, would not be considered violations.

The final rule allows tinting of windshields as long as the percentage of light transmitted through the tinted windshield is at least 70 percent of the light at normal incidence in those portions of the windshield or windows which are marked as having a luminous transmittance of at least 70 percent.

Motor carriers are allowed to attach antennas, transponders, and similar devices to windshields provided the devices are not mounted more than 152 mm (6 inches) from the upper edge of the windshield and are located outside the area swept by the windshield wipers. The devices also must be located outside the driver's sight lines to the road and highway signs and signals. As a result of the revision to § 393.60, motor carriers operating under the terms of the waiver granted for the ADVANTAGE I–75 and HELP programs are no longer required to comply with the conditions prescribed by the waiver. The waiver is terminated effective February 9, 1998.

Inspection decals and stickers and/or decals required under Federal or State laws may be placed at the bottom or sides of the windshield. However, the stickers or decals may not extend more than 115 mm (4½ inches) from the bottom of the windshield and must be located outside the area swept by the windshield wipers. The stickers or decals also must be located outside the driver's sight lines to the road and highway signs and signals. The FHWA recognizes that compliance with this provision requires cooperation of the Federal and State agencies that have requirements for stickers/decals to be attached to windshields. However, since

the previous requirements under § 393.60 have identical restrictions on the placement of stickers/decals, the FHWA does not believe that retaining the restrictions will conflict with the current requirements of other Federal or State agencies.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has considered the impacts of this document and has determined that it is neither a significant rulemaking action within the meaning of Executive Order 12866 nor a significant rulemaking under the regulatory policies and procedures of the Department of Transportation. The rulemaking would revise § 393.60 of the FMCSRs to remove obsolete regulatory language and eliminate the need for processing requests for waivers. The rulemaking also will codify regulatory guidance concerning the requirements of § 393.60. It is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. The rulemaking would revise § 393.60 of the FMCSRs to remove obsolete regulatory language and eliminate the need for processing requests for waivers. The rulemaking also will codify regulatory guidance concerning the requirements of § 393.60. The revised regulation is not likely to change the operating practices or equipment needs of motor carriers in general, or small motor carriers (private and for-hire) in particular. It is anticipated that the economic impact of this rulemaking will be minimal since it would not require modifications to equipment. Based on this evaluation, the FHWA certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This document does not contain information collection requirements for the purposes of the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq*].

National Environmental Policy Act

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 393

Highways and roads, Incorporation by reference, Motor carriers, Motor vehicle equipment, Motor vehicle safety.

Issued on: December 22, 1997.

Kenneth R. Wykle,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends title 49, Code of Federal Regulations, subchapter B, chapter III, as follows:

PART 393—[AMENDED]

1. The authority citation for part 393 continues to read as follows:

Authority: Section 1041(b) of Pub. L. 102–240, 105 Stat. 1914, 1993 (1991); 49 U.S.C. 31136 and 31502; 49 CFR 1.48.

2. Section 393.60 is revised to read as follows:

§ 393.60 Glazing in specified openings.

(a) *Glazing material.* Glazing material used in windshields, windows, and doors on a motor vehicle manufactured on or after December 25, 1968, shall at a minimum meet the requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 205 in effect on the date of manufacture of the motor vehicle. The glazing material shall be marked in accordance with FMVSS No. 205 (49 CFR 571.205, S6).

(b) *Windshields required.* Each bus, truck and truck-tractor shall be equipped with a windshield. Each windshield or portion of a multi-piece windshield shall be mounted using the full periphery of the glazing material.

(c) *Windshield condition.* With the exception of the conditions listed in paragraphs (c)(1), (c)(2), and (c)(3) of this section, each windshield shall be free of discoloration or damage in the area extending upward from the height of the top of the steering wheel (excluding a 51 mm (2 inch) border at the top of the windshield) and extending from a 25 mm (1 inch) border at each side of the windshield or windshield panel. *Exceptions:*

(1) Coloring or tinting which meets the requirements of paragraph (d) of this section;

(2) Any crack that is not intersected by any other cracks;

(3) Any damaged area which can be covered by a disc 19 mm (¾ inch) in diameter if not closer than 76 mm (3 inches) to any other similarly damaged area.

(d) *Coloring or tinting of windshields and windows.* Coloring or tinting of windshields and the windows to the immediate right and left of the driver is allowed, provided the parallel luminous transmittance through the colored or tinted glazing is not less than 70 percent of the light at normal incidence in those portions of the windshield or windows which are marked as having a parallel luminous transmittance of not less than 70 percent. The transmittance restriction does not apply to other windows on the commercial motor vehicle.

(e) *Prohibition on obstructions to the driver's field of view*—(1) *Devices mounted at the top of the windshield.* Antennas, transponders, and similar devices must not be mounted more than 152 mm (6 inches) below the upper edge of the windshield. These devices must be located outside the area swept by the windshield wipers, and outside the driver's sight lines to the road and highway signs and signals.

(2) *Decals and stickers mounted on the windshield.* Commercial Vehicle Safety Alliance (CVSA) inspection decals, and stickers and/or decals required under Federal or State laws may be placed at the bottom or sides of the windshield provided such decals or stickers do not extend more than 115 mm (4½ inches) from the bottom of the windshield and are located outside the area swept by the windshield wipers,

and outside the driver's sight lines to the road and highway signs or signals.

[FR Doc. 98–567 Filed 1–8–98; 8:45 am]
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 970715175–7292–02; I.D. No. 042997B]

RIN 0648–AG58

Designated Critical Habitat; Umpqua River Cutthroat Trout

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: NMFS is designating critical habitat for the Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*). Designated critical habitat includes all river reaches of the Umpqua River accessible to cutthroat trout, including all Umpqua River estuarine areas and tributaries upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters. Critical habitat includes all waterways below longstanding, naturally impassable barriers (i.e., natural water falls in existence for over several hundred years). Such areas represent the current freshwater and estuarine range of the listed species. The economic and other impacts resulting from this critical habitat designation are expected to be minimal.

NMFS is excluding areas above Soda Springs dam on the North Umpqua River from critical habitat. Available information indicates that habitat above Soda Springs dam is not currently essential for the conservation of this species. NMFS may revise this determination in the future should new information indicate habitat above Soda Springs dam is essential for the conservation of the species.

DATES: This rule is effective February 9, 1998. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Jim Lynch, NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR, 97232–2737, telephone (503/230–5422), internet (jim.lynch@noaa.gov).

SUPPLEMENTARY INFORMATION:

Background

On August 9, 1996, NMFS published its determination to list Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*) as endangered under the Endangered Species Act (ESA) (61 FR 41514). In its final listing determination, NMFS concluded that all cutthroat trout life history forms (i.e., anadromous, potamodromous, and resident) should be included in the listed Umpqua River cutthroat trout Evolutionarily Significant Unit. This conclusion was based on studies conducted by Oregon Department of Fish and Wildlife (ODFW) and others that indicate these life history forms are not completely reproductively isolated and, therefore, should be considered a single ''distinct population segment,'' under the ESA and NMFS' ESA species policy (61 FR 41516).

Historically, anadromous, potamodromous, and resident cutthroat trout likely existed throughout the Umpqua River basin. The current freshwater distribution of anadromous and potamodromous life forms is thought to be limited primarily to the mainstem, Smith, and North Umpqua Rivers. Resident cutthroat trout appear to remain broadly distributed throughout the Umpqua River basin, including areas of the South Umpqua River thought to support insignificant numbers of anadromous cutthroat trout populations.

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. On July 19, 1993, NMFS published a **Federal Register** notice soliciting information and data regarding the present and historic status of the Umpqua River cutthroat trout, as well as information on areas that may qualify as critical habitat (58 FR 38544). At the time of final listing, critical habitat was not determinable, since information necessary to perform the required analyses was not available.

On July 30, 1997, NMFS published a proposed rule designating critical habitat for the listed species (62 FR 40786). In that proposed rule, NMFS solicited public comments and announced public hearings on the proposed action. This final rule considers new information and comments received in response to the proposed rule.

Use of the term ''essential habitat'' within this final rule refers to critical habitat as defined by the ESA and should not be confused with the requirement to describe and identify Essential Fish Habitat (EFH) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the ESA as ''(i) the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species * * * upon a determination by the Secretary [of Commerce] that such areas are essential for the conservation of the species.'' (See 16 U.S.C. 1532(5)(A).) The term ''conservation,'' as defined in section 3(3) of the ESA, means, ''* * * to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' (See 16 U.S.C. 1532(3).)

In designating critical habitat, NMFS considers the following requirements of the species, space for individual and population growth, and for normal behavior, food, water, air, light, minerals, or other nutritional or physiological requirements, cover or shelter, sites for breeding, reproduction, or rearing of offspring; and, generally, habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of this species (See 50 CFR § 424.12(b)). In addition to these factors, NMFS also focuses on the known physical and biological features (primary constituent elements) within the designated area that are necessary to the conservation of the species and may require special management considerations or protection. These essential features may include, but are not limited to, spawning sites, food resources, water quality and quantity, and riparian vegetation (See 50 CFR § 424.12(b).)

Benefits of Critical Habitat Designation

A designation of critical habitat provides a clear indication to Federal

agencies as to when section 7 consultation is required, particularly in cases where the proposed action would not result in direct mortality, injury, or harm to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7 (i.e., activities outside critical habitat that may affect essential features of the designated area).

A critical habitat designation will also assist Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. With a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of a critical habitat designation is that it helps focus Federal, state, and private conservation and management efforts in such areas. Management efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of the proposed regulations and, therefore, are not considered in the critical habitat designation process. Other Federal, state, and local authorities, such as zoning or wetlands and riparian lands protection, may also provide special protection for critical habitat areas.

Summary of Comments

Two public hearings were held on the proposed action—one in Roseburg, Oregon, on August 16, 1997, and one in Reedsport, Oregon, on August 17, 1997. Twenty-four individuals provided oral testimony at the two public hearings. Ten written comments were submitted in response to the proposed rule. The majority of the oral and written comments opposed designation of critical habitat. New information and comments received in response to the proposed rule are summarized here.

Economic Considerations

Comment: Several commenters stated that NMFS improperly minimized the economic impacts by separating the designation of critical habitat from the listing process (i.e., considering only the incremental economic effects of designating critical habitat beyond the effects associated with listing the species as threatened or endangered). These commenters are concerned that by separating the costs associated with the various administrative actions (e.g., listing, critical habitat designation, section 7 consultations), NMFS underestimated the real economic consequences of protecting listed Umpqua River cutthroat trout as required by the ESA. Several commenters objected to NMFS' interpretation that the impact of critical habitat designation only duplicates the protection provided under section 7 of the ESA. Also, several commenters believe that using an incremental approach for critical habitat designation renders sections of the ESA meaningless and circumvents the intent of Congress.

Response: NMFS disagrees with the assertion that it has improperly minimized the economic impacts by separating the designation of critical habitat from the listing process, or that this incremental approach for critical habitat designation renders sections of the ESA meaningless. Rather, the ESA is unambiguous in how it addresses economic impacts; it prohibits the consideration of economic impacts in the listing process, but requires analysis of economic impacts when designating critical habitat. These separate requirements for each determination lead to an incremental analysis in which only the economic impacts resulting from the designation of the critical habitat are considered.

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements or economic effects beyond those which may accrue from section 7 of the ESA. Section 7 requires Federal agencies to insure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat which is determined to be critical. The consultation requirements of section 7 are nondiscretionary and are effective at the time of species listing. Therefore, Federal agencies must consult with NMFS and ensure their action does not jeopardize a listed species regardless of whether critical habitat is designated.

The designation of critical habitat remains important notwithstanding its lack of economic impact because it identifies habitat that is essential for the continued existence of a species and that may require special management attention. This facilitates and enhances Federal agencies' ability to comply with section 7 by ensuring that they are aware of their activities on listed species and habitats essential to support them. In addition to aiding Federal agencies in determining when consultations are required pursuant to section 7(a)(2), critical habitat can aid an agency in fulfilling its broader obligation under section 7(a)(1) to use its authority to carry out programs for the conservation of listed species.

Comment: Several commenters asserted that the incremental approach fails to take into account the substantial effect on non-Federal interests that will be harmed by critical habitat designation to the extent they must receive Federal approvals or funds to conduct their activities.

Response: Most of the effect on non-Federal interests will result from the taking prohibition of section 9, or the no-jeopardy requirement of section 7, both of which are a function of the listing of the species, not of the designation of critical habitat. Whether or not critical habitat is designated, non-Federal interests must conduct their actions consistent with the requirements of the ESA. When a species is listed, non-Federal interests must comply with the prohibitions on takings under section 9 of the ESA or associated regulations. If the activity is funded, permitted, or authorized by a Federal agency, that agency must comply with the non-jeopardy mandate of section 7 of the ESA, which is also a result of the listing of a species, not of the designation of critical habitat. Once critical habitat is designated, the agency must avoid actions that destroy or adversely modify that critical habitat. However, pursuant to NMFS' ESA implementing regulations, any action that destroys or adversely modifies critical habitat is also likely to jeopardize the continued existence of the species (See 50 CFR § 402.02). Therefore, NMFS does not anticipate that the designation will result in significant additional requirements for non-Federal interests.

Scope and Extent of Critical Habitat

Comment: Several commenters questioned NMFS' delineation of critical habitat as including all areas currently accessible to the species. One commenter stated that NMFS should only designate areas as critical habitat that have been proven to contain the species. Several commenters questioned why NMFS had not designated critical habitat in marine areas while one commenter agreed that omitting such areas was appropriate at this stage.

Response: Critical habitat is defined in section 3(5)(A) of the ESA as the specific areas within the geographic area occupied by the species on which are

found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Based on commenters' concerns and on new information received during the public comment period, NMFS has refined its designation of critical habitat for Umpqua River cutthroat trout. The following sections address these commenters' concerns and clarify NMFS' designation of critical habitat for this species.

Estuarine and Marine Habitats

NMFS recognizes that the Umpqua River estuary is an essential rearing area and migration corridor for listed Umpqua River cutthroat trout, and has maintained the designation of the estuary as critical habitat in this final rule. Although they are also important, NMFS believes that marine habitats (i.e., oceanic or nearshore areas seaward of the mouth of the Umpqua River) used by listed Umpqua River cutthroat trout do not presently warrant designation and do not appear to be in need of special management consideration or protection. Degradation of this portion of the species' habitat does not appear to have been a significant factor in the decline of the species. Specifically, existing laws appear adequate to protect these areas, and special management of this habitat is not considered necessary at this time. If additional evidence supports the inclusion of marine areas, NMFS may revise designated critical habitat in accordance with 50 CFR § 424.16. NMFS will, of course, continue to consult under section 7 of the ESA to address Federal actions that may affect the species or result in takings in the ocean, such as Federal management of ocean fishing.

Freshwater Habitats

NMFS has determined that it is possible to determine most river reaches and lakes critical to the conservation of listed Umpqua River cutthroat trout. However, Umpqua River cutthroat trout inhabit a wide range of habitats, from the mainstem Umpqua River to small perennial and intermittent streams. This use of diverse habitats coupled with the inadequacy of existing species distribution maps makes it extremely difficult to identify all specific river reaches required by this species. Furthermore, designating each specific river reach would not necessarily aid current conservation efforts for this species since there is the potential of excluding small, yet important, tributaries from the critical habitat designation. Therefore, it is presently not feasible to designate each particular river reach that could be considered as critical habitat for Umpqua River cutthroat trout. Accordingly, NMFS has determined that it is prudent to designate specific hydrologic units (i.e., federally-designated river basin boundaries) that include or contain river reaches presently or historically accessible to this species (except reaches upstream of impassable natural falls, and Soda Springs dam). These reaches are known to contain physical and biological features vital to the conservation of Umpqua River cutthroat trout (see Table 4 in the regulatory text). Figure 9 identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Umpqua River cutthroat trout. Note that Figure 9 does not constitute the definition of critical habitat, but instead is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Umpqua River cutthroat trout. The complete text delineating critical habitat for this species can be found in the final regulation below. Table 4 to this part provides a list of affected counties.

NMFS acknowledges that many of the river reaches within the hydrologic units designated as critical habitat may not presently be inhabited by the listed species. Salmonids and cutthroat trout in particular, are highly migratory and utilize numerous types of habitat throughout their life cycles. This species' life history is not fully understood. However, three separate life forms have been identified and are included in the listed ESU: anadromous fish (ocean-migrating), potamodromous fish (in-river migrating), and resident fish (freshwater dwelling). Given the complexity of cutthroat trout's life history and the diversity of its habitat needs, NMFS believes that all areas that are currently accessible to the listed species may be critical to its recovery and survival. Furthermore, the vast majority of streams in the Umpqua River basin contribute essential elements such as food, gravel, large woody debris, and water quality to this species' habitat. Hence, their inclusion as part of the critical habitat is in keeping with the ESA's purpose ''* * * to provide a means whereby the ecosystems upon which endangered species or threatened species depend may be conserved * * *'' (16 U.S.C. 1532(b)). Until information is developed that allows more definitive and detailed characterization of stream reaches as critical or noncritical, NMFS chooses to adopt a more inclusive critical habitat designation incorporating river reaches in hydrologic units presently or historically accessible (except reaches upstream of impassable natural falls, and Soda Springs dam) to cutthroat trout.

Experience gained by NMFS through section 7 consultations clearly demonstrates the importance of assessing potential impacts of actions within entire watersheds. It is well documented that human activities in areas outside the immediate stream channel can have a demonstrable effect on physical and biological features essential to the conservation of listed Umpqua River cutthroat trout. For example, road building and timber harvest operations in upland areas can result in adverse modifications to cutthroat trout spawning and rearing areas via landslides, sedimentation, fuel spills, and loss of riparian vegetation that provides shade, cover, and other habitat functions.

Comment: Several commenters questioned why NMFS designated riparian areas 300 ft. (91.4 m) on each side of the stream channel high water line as critical habitat. Several commenters also questioned if the 300-ft. (91.4 m) riparian buffer applied to nonfish-bearing streams.

Response: Riparian habitats provide several essential elements for cutthroat trout. The reduction in riparian tree shade canopy can produce significant increases in water temperatures (Bottom et al., 1985; California Department of Fish and Game, 1994; Forest Ecosystem Management Assessment Team (FEMAT), 1993). Riparian vegetation protects stream banks from erosion through soil binding by root masses and the presence of ground litter and dense overstory canopy, which impedes the rate of surface runoff (FEMAT, 1993). Riparian vegetation provides important substrates for aquatic invertebrates, cover for predator avoidance, and resting habitat for many fish species. Riparian vegetation that is carried from upland areas and deposited in estuaries is a major source of food and habitat for obligatory, wood-boring marine invertebrates which break down and pass usable carbon into the water's current where it enters the detrital-based marine food web (Sedell and Maser, 1994). As much as 99 percent of the annual energy input, the food base for all aquatic communities, comes from riparian vegetation (Reynolds *et al.*, 1993). Removal of streamside vegetation simplifies channel banks and destroys shelter for rearing fish species, simplifies channel shape so there are fewer pools and riffles, and eventually

leads to a widening of channels that are more prone to warming by sunlight (Botkin *et al.*, 1995; California Advisory Committee on Salmon and Steelhead Trout, 1988; California Department of Fish and Game, 1994).

Biophysical characteristics and processes that create riparian zones vary considerably throughout the range of listed Umpqua River cutthroat trout. However, riparian zones along the Umpqua River are considered essential for the conservation of the listed species because they provide important space, cover, and shelter, and increase river productivity. Furthermore, healthy riparian zones help ensure that water quality parameters support physiological and behavioral requirements of the listed species.

In the Umpqua River basin, critical habitat includes the water, waterway bottom, and the adjacent riparian zone. A 1992 report by the U.S. Fish and Wildlife Service (FWS) states that riparian streambanks are composed of natural, eroding substrates supporting vegetation that either overhangs or protrudes into the water and, consequently, provides shade and escape cover for salmonids and other wildlife. Furthermore, according to a 1993 report by FEMAT, riparian zones consist of ''areas where the vegetation complex and microclimate conditions are products of the combined presence and influence of perennial and/or intermittent water, associated high water tables, and soils that exhibit some wetness characteristics.'' The FEMAT report contains a comprehensive review of riparian ecosystem components, and specifies that riparian zones for fishbearing streams should consist of ''* * * the area on either side of the stream extending from the edges of the active stream channel to the top of the inner gorge, or to the outer edges of the 100-year floodplain, or to the outer edges of riparian vegetation, or to a distance equal to the height of two site-potential trees, or 300 ft. (91.4m) slope distance (600 ft. (182.8 m), including both sides of the stream channel), whichever is greatest.''

Since adverse modification of riparian zones may impede the recovery of the endangered Umpqua River cutthroat trout, the adjacent riparian zone is included in the critical habitat designation. It is important to note that this critical habitat designation includes all river reaches of the Umpqua River currently accessible to endangered Umpqua River cutthroat trout. In most cases, this critical habitat designation will encompass fishbearing streams only.

NMFS recognizes that the influences of riparian vegetation progressively decrease away from the water source (e.g., river), making it difficult to identify discrete boundaries for the riparian zones. As a reasonable benchmark, NMFS defines the ''adjacent riparian zone'' as those areas within a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel or from the shoreline of a standing body of water. NMFS points out that this definition is adopted solely as a means by which agencies can evaluate the potential risk of proposed actions on designated critical habitat. The actual delineation of riparian zones at the site of a proposed action can be more accurately identified through section 7 consultations.

Comment: One commenter stated that NMFS should exclude areas above Soda Springs dam on the North Umpqua River from a critical habitat designation since: (1) cutthroat trout do not currently inhabit the area above Soda Springs dam, and (2) available habitat above Soda Springs dam is not essential for the conservation of the species.

Response: Since the proposed listing, several new sources of information indicate that cutthroat trout do not occur in the North Umpqua River above Soda Springs dam. Surveys conducted by PacifiCorp in the North Umpqua River and tributaries above Soda Springs dam indicate that these areas are dominated by rainbow trout, brown trout, and brook trout and do not contain cutthroat trout (PacifiCorp, 1997).

PacifiCorp's analysis appears to be supported by recent survey work conducted by the U.S. Forest Service (USFS) in this area. In a recent survey conducted by USFS biologists in Fish Creek, a tributary to the North Umpqua River just above Soda Springs dam, USFS personnel collected samples of fish thought to be cutthroat trout, or cutthroat trout-rainbow trout hybrids (USFS, 1997). These samples were sent to NMFS for genetic analysis. Initial lab results indicate that all the fish submitted are rainbow trout, not cutthroat trout (NMFS, 1997).

Aside from new information submitted by PacifiCorp and USFS, the Oregon Department of Fish and Wildlife (ODFW) has previously stated its belief that no cutthroat trout occur above Soda Springs dam (ODFW, 1996).

Regardless whether cutthroat trout currently occur above Soda Springs dam, NMFS may designate areas as critical habitat outside the current species range if it finds that designation of the present range would be inadequate to ensure conservation of the species (50 CFR § 424.12(e)). In the present case, areas above Soda Springs dam appear to be inhabited by species that could outcompete or hybridize with introduced cutthroat trout, reducing the species' viability in this area (PacifiCorp, 1997).

Based on new information submitted by PacifiCorp and USFS and on previous comments from ODFW, NMFS concludes that habitat areas above Soda Springs dam are not currently essential for the conservation of listed Umpqua River cutthroat trout. Therefore, NMFS is revising the proposed critical habitat designation to exclude areas above Soda Springs dam on the North Umpqua River from Umpqua River cutthroat trout critical habitat. NMFS may, in the future, revise this designation should new information come to light indicating that such habitat areas are essential for conservation purposes.

Even though NMFS is not designating areas above Soda Springs dam as critical habitat for Umpqua River cutthroat trout, this in no way affects NMFS' listing of resident or potamodromous cutthroat trout should they be found in the future to exist above Soda Springs dam. If cutthroat trout are found to occur above the dam in the future, parties will have the duty to avoid ''take'' under section 9 of the ESA.

Adequacy of Existing Management Plans

Comment: Several commenters stated that existing management plans and conservation initiatives were sufficient to protect Umpqua River cutthroat trout and its habitat, and, therefore, the proposed critical habitat designation is not warranted.

Response: NMFS considered existing regulatory mechanisms and conservation plans applicable to Umpqua River cutthroat trout and its habitat in the August 9, 1996, final listing determination (61 FR 41514). In that **Federal Register** notice, a variety of Federal and state laws and programs were found to have affected the abundance and survival of anadromous fish populations in the Umpqua River Basin (61 FR 41520). NMFS concluded that available regulatory mechanisms were inadequate and continued to represent a potential threat to the species' existence (61 FR 41520).

Since the final listing determination, the State of Oregon completed a significant conservation initiative entitled the *Oregon Coastal Salmon Restoration Initiative* (OCSRI). The OCSRI currently focuses on factors that have led to the decline of coastal coho salmon. In addressing these factors, the State has implemented measures to

improve habitat quality and lessen impacts from hatchery and harvest practices.

NMFS believes that habitat measures contained in the OCSRI will likely provide benefits for Umpqua River cutthroat trout over the long term. However, the OCSRI relies exclusively on Federal measures to protect salmon habitat on Federal lands. The majority of lands within the range of Umpqua River cutthroat trout are in Federal ownership. Therefore, under the OCSRI, it is imperative that existing Federal protections under the Northwest Forest Plan and related Federal measures that are described in the OSCRI protect the species to the greatest extent. On private lands, the OCSRI relies heavily upon voluntary measures to protect and enhance aquatic habitat. NMFS believes that these voluntary measures may benefit Umpqua River cutthroat trout. However, given the present status of the species (endangered), NMFS concludes that it would be imprudent to rely on voluntary measures on private lands to conserve this species and its habitat. Critical habitat designation will assure careful scrutiny of and priority attention to Federal actions that may impact Umpqua River cutthroat trout habitats, resulting in strengthened protection for this endangered species.

Changes From the Proposed Rule

Section 226.22 incorrectly amended references to the hydrologic unit maps in the proposed rule. These maps have been correctly referenced in this final rule.

Critical Habitat of Umpqua River Cutthroat Trout

Available biological information for listed Umpqua River cutthroat trout can be found in the species' status review (Johnson *et al.,* 1994) and in **Federal Register** notices of proposed and final listing determinations (see 59 FR 35089, July 8, 1994); 61 FR 41514, August 9, 1996). Critical habitat consists of five components, spawning and juvenile rearing areas, juvenile migration corridors, areas for growth and development to adulthood, adult migration corridors, and over-wintering habitat. The Pacific Ocean areas used by listed cutthroat trout for growth and development to adulthood are not well understood, and essential areas and features have not been identified.

The current geographic range of Umpqua River cutthroat trout includes nearshore ocean areas, the mainstem Umpqua River and its tributaries, and the North and South Umpqua Rivers and their tributaries. NMFS has determined that the current freshwater and estuarine range (referred to as the in-river range) of the species is adequate to ensure the species' conservation. The species' current in-river range encompasses all critical habitat features (e.g., riverine conditions, estuaries, headwater areas) in sufficient quantity to ensure conservation of the species. Therefore, designation of habitat areas outside the species' current in-river range is not necessary.

NMFS recognizes the Umpqua River estuary is an essential migration corridor for listed Umpqua River cutthroat trout and, accordingly, has included estuary areas as critical habitat in this designation. However, the importance of marine habitats (i.e., oceanic or near shore areas seaward of the mouth of the Umpqua River) is not well understood (Pauley, 1989; Behnke, 1992). In addition to a lack of biological information concerning the marine life history phase of cutthroat trout, a need for special management consideration or protection of this habitat is not apparent. Based on present information, degradation of this portion of the species' habitat does not appear to have been a significant factor in the decline of the species.

Essential features of the designated in-river areas include adequate substrate, water quality, water quantity, water temperature, food, riparian vegetation, and access. Juvenile migration corridors include the North and South Umpqua Rivers and the mainstem Umpqua River to the Pacific Ocean. Essential features of the juvenile migration corridors include adequate: (1) Substrate; (2) water quality; (3) water quantity; (4) water temperature; (5) water velocity; (6) cover/shelter; (7) food; (8) riparian vegetation; (9) space; and (10) safe passage conditions. Adult migration corridors and their essential features are the same as those identified for juvenile migration corridors.

Critical Habitat: Geographic Extent

Critical habitat includes all river reaches accessible to listed Umpqua River cutthroat trout from a straight line connecting the west end of the South jetty and the west end of the North jetty and including all Umpqua River estuarine areas (including the Smith River) and tributaries proceeding upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters (including Cow Creek, tributary to the South Umpqua River). Critical habitat includes all waterways below longstanding, naturally impassable barriers (i.e., natural water falls in existence for over several hundred years). Critical habitat includes the bottom and water of the waterways and adjacent riparian zone. The riparian zone includes those areas within 300 ft. (91.4 m) of the normal line of the high water mark of the stream channel or from the shoreline of a standing body of water.

Expected Economic Impacts of Designating Critical Habitat

The economic impacts to be considered in a critical habitat designation are the incremental effects of critical habitat designation above the economic impacts attributable to listing or attributable to authorities other than the ESA (see Consideration of Economic, Environmental and Other Factors section of this preamble). Incremental impacts result from special management activities in areas outside the present distribution of the listed species that have been determined to be essential to the conservation of the species. However, NMFS has determined that the species' present in-river range contains sufficient habitat for conservation of the species. Therefore, NMFS finds that there are no incremental impacts associated with this critical habitat designation.

Activities That May Affect Critical Habitat

A wide range of activities may affect the essential habitat requirements of listed Umpqua River cutthroat trout. These activities include water and land management actions of Federal agencies (i.e., U.S. Forest Service, U.S. Bureau of Land Management, U.S. Bureau of Reclamation, the Federal Highway Administration, and the Federal Energy Regulatory Commission) and related or similar actions of other federally-regulated projects and lands, including livestock grazing allocations in the Umpqua River Basin by the U.S. Forest Service and U.S. Bureau of Land Management; hydropower operators (i.e., PacifiCorp) in the Umpqua River system licensed by the Federal Energy Regulatory Commission; timber sales in the Umpqua River Basin conducted by the U.S. Forest Service and U.S. Bureau of Land Management; road building activities authorized by the Federal Highway Administration, U.S. Forest Service, and U.S. Bureau of Land Management; and mining and road building activities authorized by the State of Oregon. Other actions of concern include dredge and fill, mining,

and bank stabilization activities authorized and/or conducted by the U.S. Army Corps of Engineers throughout the Umpqua River Basin.

Federal agencies that will most likely be affected by this critical habitat designation include the U.S. Forest Service, U.S. Bureau of Land Management, U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, the Federal Highway Administration, and the Federal Energy Regulatory Commission. This designation will provide clear notification to these agencies, private entities, and the public of critical habitat designated for listed Umpqua River cutthroat trout and the protection provided for that habitat by the ESA section 7 consultation process. This designation will also assist these agencies and others in evaluating the potential effects of their activities on listed Umpqua River cutthroat trout and their critical habitat and in determining when consultation with NMFS would be appropriate.

Need for Special Management Considerations or Protection

To ensure that the essential areas and features are maintained or restored, special management may be needed. Activities that may require special management considerations for listed Umpqua River cutthroat trout spawning and juvenile rearing areas include, but are not limited to: (1) Land management; (2) timber harvest; (3) water pollution; (4) livestock grazing; (5) habitat restoration; (6) irrigation water withdrawal; (7) mining; (8) road construction; and (9) dam operation and maintenance. For juvenile and adult migration corridors, special management considerations also include dredge and fill activities, and dam operations. Not all of these activities are necessarily of current concern; however, they indicate the potential types of activities that will require consultation in the future. No special management considerations have been identified for listed Umpqua River cutthroat trout residing in the ocean environment.

National Environmental Policy Act

NMFS has determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared for this critical habitat designation. See *Douglas County* v. *Babbitt*, 48 F.3D 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is not significant for purposes of E.O. 12866.

NMFS is designating only the current range of this species as critical habitat. The current range encompasses a wide range of habitat, including small tributary reaches, as well as mainstem, off-channel and estuarine areas. Areas excluded from this final designation include nearshore habitats in the Pacific Ocean, historically occupied areas above Soda Springs dam, and headwater areas above impassable natural barriers (e.g., long-standing, natural waterfalls). NMFS has concluded that currently inhabited areas within the range of Umpqua River cutthroat trout are the minimum habitat necessary to ensure conservation and recovery of the listed species.

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements or economic effects upon small entities, beyond those which may accrue from section 7 of the ESA. Section 7 requires Federal agencies to ensure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (16 U.S.C. § 1536(a)(2)). The consultation requirements of section 7 are nondiscretionary and are effective at the time of species' listing. Therefore, Federal agencies must consult with NMFS and ensure their actions do not jeopardize a listed species, regardless of whether critical habitat is designated.

In the future, if NMFS determines that designation of habitat areas outside the species' current range is necessary for conservation and recovery, NMFS will analyze the incremental costs of that action and assess its potential impacts on small entities, as required by the Regulatory Flexibility Act. Until that time, a more detailed analysis would be premature and would not reflect the true economic impacts of the proposed action on local businesses, organizations, and governments.

Accordingly, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact of a substantial number of small entities, as described in the Regulatory Flexibility Act.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The AA has determined that the proposed designation is consistent, to the maximum extent practicable, with the approved Coastal Zone Management Program of the State of Oregon. This determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

References

The complete citations for the references used in this document can be obtained by contacting Jim Lynch, NMFS (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species, Incorporation by reference.

Dated: December 18, 1997.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 226 is to be amended as follows:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. Section 226.22, introductory paragraph, is amended by revising the sixth sentence to read as follows:

§ 226.22 Snake River Sockeye Salmon (Oncorhynchus nerka), Snake River Spring/Summer Chinook Salmon (Oncorhynchus tshawytscha), Snake River Fall Chinook Salmon (Oncorhynchus tshawytscha).

* * * Hydrologic units (table 3) are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps, United States Geological Survey Water Supply Paper 2294, 1987'', and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon, 1974; State of Washington, 1974; State of Idaho, 1974, which are incorporated by reference. * * *

3. Section 226.23 is added to subpart C to read as follows:

§ 226.23 Umpqua River cutthroat trout (Oncorhynchus clarki clarki).

(a) The following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently accessible to listed Umpqua River cutthroat trout. Adjacent riparian zones are defined as those areas within

a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel (600 ft. or 182.8 m, when both sides of the stream channel are included) or from the shoreline of a standing body of water. Figure 9 to this part identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Umpqua River cutthroat trout. Note that Figure 9 does not constitute the definition of critical habitat but, instead, is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Umpqua River cutthroat trout. The complete text delineating the critical habitat for the species follows. Hydrologic units are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps, Water Supply Paper 2294, 1986, and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon (1974) which is incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected during normal business hours at NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232–2737, or NMFS, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) *Geographic boundaries.* All river reaches accessible to listed Umpqua River cutthroat trout in the Umpqua River from a straight line connecting the west end of the South jetty and the west end of the North jetty and including all Umpqua River estuarine areas (including the Smith River) and tributaries proceeding upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters (including Cow Creek, tributary to the South Umpqua River). Critical habitat includes all river reaches below longstanding, naturally impassable barriers (i.e., waterfalls in existence for several hundred years) in the following hydrologic units: North Umpqua, South Umpqua, and Umpqua. Critical habitat borders on or passes through the following counties in Oregon: Douglas, Lane, Coos, Jackson, and Klamath counties. Perennial rivers and creeks within the defined areas are also included in the critical habitat designation (but are not specifically named), unless otherwise noted. Critical habitat maps are available upon request from NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232–2737, telephone (503/230–5422).

4. Table 4 is added to part 226 to read as follows:

Table 4.—Hydrologic Units [1] Containing Critical Habitat for Endangered Umpqua River Cutthroat Trout and Counties Contained in Each Hydrologic Unit.

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit
North Umpqua	17100301	Douglas, Lane, Klamath.
South Umpqua	17100302	Douglas, Jackson, Coos.
Umpqua	17100303	Douglas, Lane, Coos.

[1] 1 Hydrologic units and names taken from DOI, USGS 1:500,000 scale State of Oregon (1974) hydrologic unit map (available from USGS).

6. Figure 9 to part 226 is added to read as follows:

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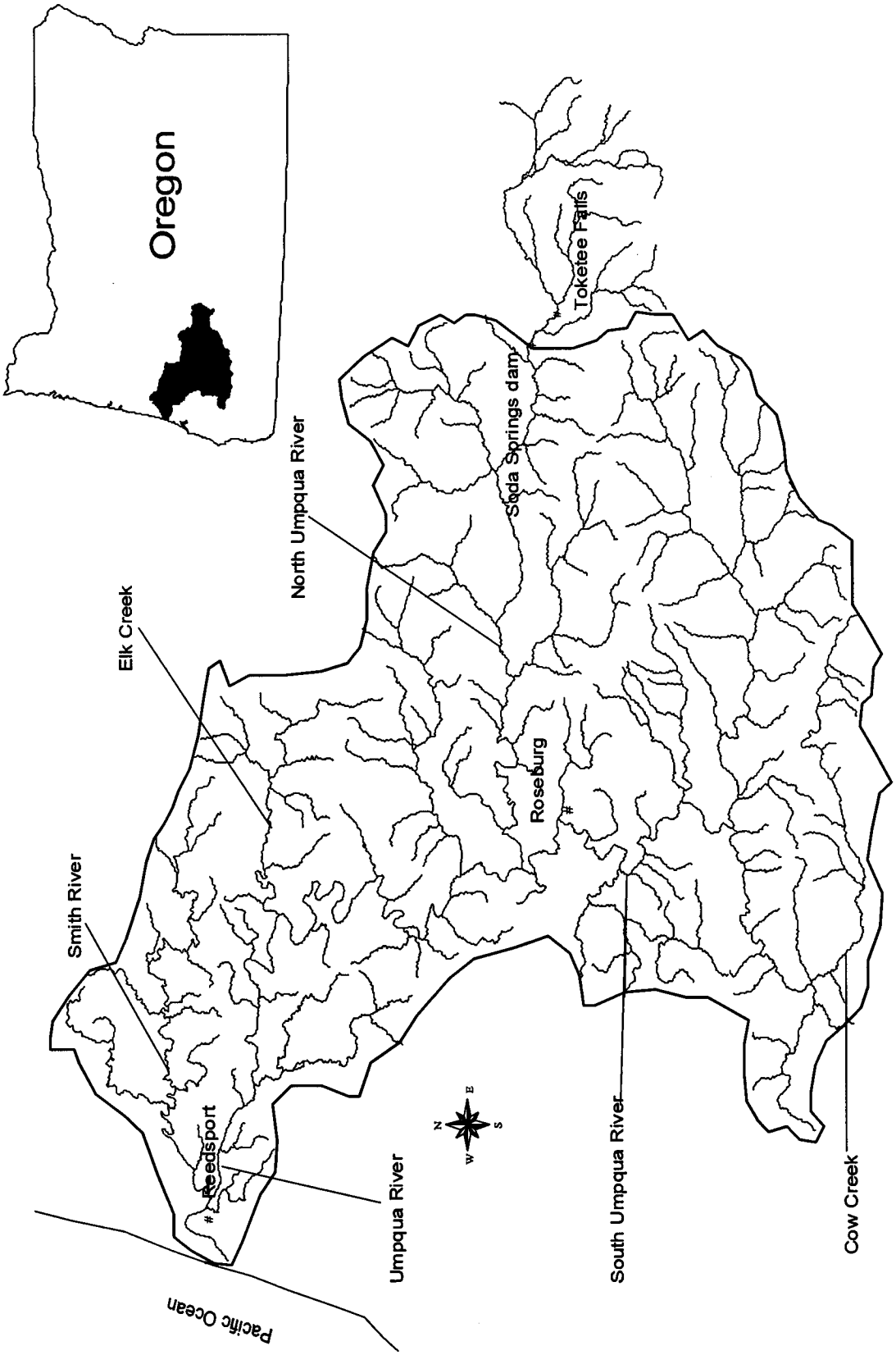

Figure 9. Umpqua River Cutthroat Trout Critical Habitat

[FR Doc. 98–545 Filed 1–8–98; 8:45 am]

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Proposed Rules

Federal Register
Vol. 63, No. 6
Friday, January 9, 1998

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Part 1301

Notice of Meeting

AGENCY: Northeast Dairy Compact Commission.

ACTION: Notice of meeting.

SUMMARY: The Compact Commission will hold its monthly meeting to consider whether to adopt as a Final Rule the Proposed Rule to exempt from the compact over-order price regulation fluid milk utilized for child nutrition programs and distributed by handlers during the 1998–1999 contract year. The Commission will also deliberate and make a final ruling on a handler petition for exemption from the price regulation. Certain matters relating to administration will also be considered and acted upon.

DATES: The meeting is scheduled for January 16, 1998 commencing at 10:00 a.m. to adjournment.

ADDRESSES: The meeting will be held at the Holiday Inn, Capitol Room, 172 North Main Street, Concord, NH (exit 14 off Interstate 93).

FOR FURTHER INFORMATION CONTACT: Daniel Smith, Executive Director, Northeast Dairy Compact Commission, 43 State Street, PO Box 1058, Montpelier, VT 05601. Telephone (802) 229–1941.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Northeast Dairy Compact Commission will hold its regularly scheduled monthly meeting. The Compact Commission will deliberate and act upon whether to adopt as a Final Rule the Proposed Rule to exempt from the regulation fluid milk distributed by handlers during the 1998–1999 contract year under competitive bid contracts with School Food Authorities in New England for Child Nutrition Programs qualified for reimbursement under the National School Lunch Act of 1946 and the Child Nutrition Act. See 62 FR 65226 (December 11, 1997). The Commission will also deliberate and make a final ruling on Horizon Organic Dairy's petition for exemption from the price regulation. Docket #HEP–97–009. Certain matters relating to administration, including final approval of the contract with participating universities to conduct the market impact study required by the price regulation, will also be considered and acted upon.

(Authority: (a) Article V, Section 11 of the Northeast Interstate Dairy Compact, and all other applicable Articles and Sections, as approved by Section 147, of the Federal Agriculture Improvement and Reform Act (FAIR ACT), Pub. L. 104–127, and as thereby set forth in S.J. Res. 28(1)(b) of the 104th Congress; Finding of Compelling Public Interest by United States Department of Agriculture Secretary Dan Glickman, August 8, 1996 and March 20, 1997. (b) Bylaws of the Northeast Dairy Compact Commission, adopted November 21, 1996)

Daniel Smith,

Executive Director.

[FR Doc. 98–588 Filed 1–8–98; 8:45 am]

BILLING CODE 1650–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 904

[SPATS No. AR–031–FOR]

Arkansas Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing receipt of a proposed amendment to the Arkansas regulatory program (hereinafter the ''Arkansas program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of revisions to and additions of regulations pertaining to revegetation success standards and selective husbandry practices that would not extend the period of responsibility for revegetative success and bond liability. The amendment is intended to revise the Arkansas program to be consistent with the corresponding Federal regulations and improve operational efficiency.

This document sets forth the times and locations that the Arkansas program and proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received by 4:00 p.m., c.s.t. on February 9, 1998. If requested, a public hearing on the proposed amendment will be held on February 3, 1998. Requests to speak at the hearing must be received by 4:00 p.m., c.s.t. on January 26, 1998.

ADDRESSES: Written comments and requests to speak at the hearing should be mailed or hand delivered to Michael C. Wolfrom, Director, Tulsa Field Office, at the address listed below.

Copies of the Arkansas program, the proposed amendment, a listing of any scheduled public hearings, and all written comments received in response to this document will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSM's Tulsa Field Office.

Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430.

Arkansas Department of Pollution Control and Ecology, Surface Mining and Reclamation Division, 8001 National Drive, Little Rock, Arkansas 72219–8913. Telephone (501) 682–0744.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Telephone: (918) 581–6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Arkansas Program

On November 21, 1980, the Secretary of the Interior conditionally approved the Arkansas program. Background information on the Arkansas program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in

the November 21, 1980, **Federal Register** (45 FR 77003). Arkansas amended its program by submitting provisions that satisfied all of the conditions of the Secretary's approval of November 21, 1980. Effective January 22, 1982, OSM removed the conditions of the approval of the Arkansas permanent regulatory program. Information on the removal of the conditions can be found in January 22, 1982, **Federal Register** (47 FR 3108). Subsequent actions concerning the conditions of approval and program amendments can be found at 30 CFR 904.12, 904.15, and 904.16.

II. Description of the Proposed Amendment

By letter dated November 24, 1997 (Administrative Record No. AR–560), Arkansas submitted a proposed amendment to its program pursuant to SMCRA. Arkansas submitted the proposed amendment at its own initiative. Arkansas proposes to amend the Arkansas Surface Coal Mining and Reclamation Code to include revegetation success standards at section 816.116. Arkansas also submitted copies of the parts of the United States Department of Agriculture, Natural Resources Conservation Service (NCRS) Arkansas Field Office Technical Guide to which the proposed amendment refers. The full text of the proposed program amendment and the parts of the Technical Guide submitted by Arkansas are available for public inspection at the locations listed above under **ADDRESSES.** A brief discussion of the proposed amendment is presented below.

1. ASCMRC Subsection 816.116(a) General Revegetation Success Standards

Arkansas proposes to delete existing paragraph (1) and redesignate existing paragraph (2) as (1). Arkansas also proposes to revise the second sentence of redesignated paragraph (1) to read, ''Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 percent of the success standards in paragraphs (b)(1), and (2) of this section.''

2. ASCMRC Subsection 816.116(b)(1) Revegetation Success Standards for Areas Developed for Use as Grazing and Pasture Land

Arkansas proposes to delete the existing language at subsection 816.116(b)(1) and replace it with the following language:

(1) Areas developed for use as a grazing land or pasture land shall be maintained using proper management practice as set forth in the United States Department of Agriculture, Natural Resources Conservation Service (NRCS) Arkansas Field Office Technical Guide Section IV, Codes 342, 510, and 512) and this subsection until the end of the responsibility period. Production for proof of productivity purposes shall be initiated within five years after completion of backfilling and final grading; and (i) The ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area, except for erosion control devices and other structure (i.e., levees, ditches, waterways, impounding structures, etc.). The productivity and ground cover figures shall have a 90-percent statistical confidence (i.e., one-sided test with a 0.10 alpha error) derived from any two years of the five year responsibility period prior to release of the performance bond, except for the first year; or (ii) When no reference area is employed, productivity success [tons of grass, animal unit months (A.U.M.), and/or legumes per acre, etc.], except for erosion control devices and other structures (i.e., levees, ditches, waterways, impounding structures, etc.), shall be considered successful if it is 90 percent of the predicted yields under improved management established by the NRCS's respective county District Conservationist, County Soil Manual, and/or Soil Survey Database for the vegetation type(s) planted on the soil series present before the area was disturbed. Ground cover shall be considered successful if it is 90 percent. The productivity and ground cover figures shall have a 90-percent statistical confidence (i.e., one-sided test with a 0.10 alpha error) derived from any two years of the five responsibility period prior to release of the performance bond, except for the first.

3. ASCMRC Subsection 816.116(b)(2) Proof of Productivity Standards for Area Developed for Use as Cropland

Arkansas proposes to delete the existing language at subsection 816.116(b)(2) and replace it with the following language:

(2) For those areas developed for use as cropland, production for proof of productivity purposes shall be initiated within ten years after completion of backfilling and final grading, and (i) Production on the revegetated areas shall be at least equal to that of a reference area, except for erosion control devices and other structures (i.e., levees, ditches, waterways, impounding structures, etc.) With a 90-percent statistical confidence (i.e., one-sided test with a 0.10 alpha error) for a minimum of any two crop years of ten year responsibility period prior to release of the performance bond, except the first year of the five year responsibility period; or (ii) When no reference area is employed, 90 percent of that crop production established in NRCS's respective county District Conservationist, County Soil Survey Manual, and/or the Soil Survey Database for the soil series present prior to disturbance with a 90-percent statistical confidence (i.e., one-sided test with a 0.10 alpha error) for a minimum of any two crop years of a ten year responsibility period prior to release of the performance bond, except the first year of the five year responsibility period. (iii) During the extended five year responsibility period, erosion from cropland must be minimized using equivalent or better management practices than surrounding unmined cropland. The five responsibility period shall begin after the last year of augmented seeding, fertilizing, or soil treatment and at the time of the planting of the crop(s) to be grown for the productivity showing or crops grown in rotation.

4. ASCMRC Subsection 816.116(b)(3) Revegetation Success Standards for Areas to be Developed for Fish and Wildlife Habitat

At existing subsection 816.116(b)(3), Arkansas proposed to delete the language, ''success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:''

Arkansas proposes to redesignate existing paragraphs 816.116(b)(3)(i), (ii), and (iii), as 816.116(b)(3)(i)(A), (B), and (C), respectively, and to add the following language at proposed new paragraph 816.116(b)(3), ''Success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover using proper management practices set forth in the NRCS's Arkansas Field Office Technical Guide (Section IV, Codes 612, and 645) and such parameters described as follows:''

5. ASCMRC Subsection 816.116(b)(4) Revegetation Success Standards for Areas to be Developed for Industrial, Commercial, or Residential Use

Arkansas proposes to revise subsection 816.116(b)(4) by adding the phase, ''and shall not be less than 70 percent.''

6. ASCMRC Subsection 816,116(b)(5) Revegetation Success for Areas Previously Disturbed by Mining

Arkansas proposes to revise subsection 816.116(b)(5) to require that vegetative ground cover shall not be less than the greater 70 percent or the percentage of the ground cover existing before redisturbance, and shall be adequate to control erosion during the last year of responsibility.

7. ASCMRC Subsection 816.116(b)(6) Revegetation Success for Non-contiguous Areas

Arkansas proposes to add a new subsection at 816.116(b)(6) as follows:

Non-contiguous areas less than or equal to four acres which we disturbed from activities such as, but no limited to, signs, boreholes, power poles, stockpiles and substations shall

be considered successfully revegetated if the operator can demonstrate the soil disturbance was minor, i.e., the majority of the subsoil remains in place, the soil has been returned to its original capability and the area is supporting its approved postmining use at the end of the responsibility period.

8. ASCMRC Subsection 816.116(c) Vegetative Ground Cover Measurement Technique

Arkansas proposes to redesignate existing (c) as (d), and replace it with new subsection (c) as follows:

(c) Vegetative ground cover shall be measured by the following technique: (1) Ten (10) random points shall be identified in the area to be tested. (2) A twenty (20) foot engineer's tape shall be extended directly south of each point. If the tape extends beyond the boundary of the area to be tested or extends into an area where herbaceous ground cover has been controlled with herbicides to minimize competition with woody plants, the tape shall be rotated in ninety (90) degree increments until the entire twenty (20) foot length is within the boundary of the area to be tested or area not treated with herbicides. (3) A measurement shall be taken at each two: tenths (0.2) foot increment directly above or below the tape. A Ground cover shall be determined to be present if any vegetation identified in the NRCS's Arkansas Field Office Technical Guide (Section IV, Codes 342, 510, and 512) and the approved reclamation plan, including ten percent (10%) site-produced litter and/or other desirable annual species described in (Section IV, Code 342, Table 2) is measured at the increment. (5) A percentage of ground cover shall be established for the area tested by taking the total number of measurements where ground cover was determined to be present.

9. ASCMRC Subsection 816.116(d) Period of Extended Responsibility for Revegetation Success

Arkansas proposes to revise redesignated subsection 816.116(d) by deleting (d)(3) and by making non-substantive language changes and paragraph notation changes to reflect the revisions made by this amendment.

10. ASCMRC Subsection 816.116(e) Selective Husbandry Practices

Arkansas proposes to add new subsection (e) as follows:

(e) Selective husbandry practices which will not extend the period of responsibility for revegetative success and bond liability, if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires sill not reduce the probability of permanent revegetative success, include: (1) Augmented seeding, fertilization, liming, mulching, mowing, or irrigation; (2) Temporary erosion control structures such as silt fencing, straw, or hay bale dikes; (3) Practices such as disease, pest, and vermin control; and any pruning, reseeding and/or transplanting specifically necessitated by such action; (4) Land smoothing and reseeding, provided the cumulative acreage is no greater than ten percent (10%) of the disturbed area of the permit; (5) Rip-rap repair and maintenance; (6) Terrace repair and maintenance; (7) Rill and gully repair on noncropland-capable or cropland-capable reclaimed land will be considered a husbandry practice if an operator has an approved erosion control plan in place in the field, and shortly after the first rainfall event after the repair, the Department makes the following determination: (i) The area is a minor erosional feature; (ii) The area is small; (iii) The erosion is not expected to recur; and (iv) The area is stable. The Department shall notify the permittee in writing whether on not a repair is an augmentation. Such written notice shall be in the form of an inspection report or other document issued by the Department.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Arkansas program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Tulsa Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to speak at the public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., c.s.t. on January 26, 1998. The location and time of the hearing will be arranged with those persons requesting the hearing. Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under **FOR FURTHER INFORMATION CONTACT**. If no one requests an opportunity to speak at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions. The public hearing will continue on the specified date until all persons scheduled to speak have been heard. Persons in the audience who have not been scheduled to speak, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to speak and persons present in the audience who wish to speak have been heard.

Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **ADDRESSES**. A written summary of each meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National

Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 904

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 31, 1997

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 98–530 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[SPATS No. OK–017–FOR]

Oklahoma Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; withdrawal of proposed amendment.

SUMMARY: OSM is announcing the withdrawal of a proposed amendment to the Oklahoma regulatory program (hereinafter the ''Oklahoma program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment concerned protected activities. Oklahoma is withdrawing the amendment at its own initiative.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Telephone: (918) 581–6430.

SUPPLEMENTARY INFORMATION: By letter dated February 21, 1996 (Administrative Record No. OK–973), Oklahoma submitted a proposed amendment to its program to SMCRA. Oklahoma submitted the proposed amendment at its own initiative. The provisions of the Oklahoma regulations that Oklahoma proposed to amend were at Oklahoma Administrative Code (OAC) 460:20–15–7 concerning permit conditions. Specifically, Oklahoma proposed to revise OAC 460:20–15–7 by adding a new permit condition at subsection (5) concerning protected activities.

OSM announced receipt of the proposed amendment in the March 5, 1996, **Federal Register** (61 FR 8536) and invited public comment on its adequacy. The public comment period ended April 4, 1996.

During its review of the amendment, OSM identified concerns relating to Oklahoma's proposed addition at OAC 460:20–15–7(5). OSM was specifically concerned that the existing state enforcement and citizens complaint regulations did not contain the procedures necessary to implement the requirements of the Federal regulations dealing with protected activities at 30 CFR Part 865. OSM notified Oklahoma of the concerns by letter dated June 25, 1996 (Administrative Record No. OK–973.06). Oklahoma responded in a letter dated August 28, 1996 (Administrative Record No. OK–973.08), by submitting a revised amendment. Oklahoma proposed the addition of a new subchapter at OAC 460:20–16, concerning protection of employees, to replace the changes originally proposed for OAC 460:20–15–7.

Based upon the proposed revision to the program amendment submitted by Oklahoma, OSM reopened the public comment period in the September 19, 1996, **Federal Register** (61 FR 49282). The public comment period closed on October 4, 1996.

On December 12, 1997 (Administrative Record No. OK–973.14), Oklahoma requested that the proposed amendment be withdrawn. Oklahoma has decided not to add the provisions contained in OAC 460:20–16 concerning protection of employees to its approved program at this time. Therefore, the proposed amendment announced in the March 5, and September 19, 1996, **Federal Register** is withdrawn.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 31, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 98–531 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF JUSTICE

48 CFR Chapter 28

Justice Acquisition Regulations; Rewrite of the Justice Acquisition Regulation (JAR). Regarding: Implementation of the Federal Acquisition Streamlining Act and the National Performance Review Recommendations

AGENCY: Justice Management Division, Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: The Department of Justice is proposing to rewrite 48 CFR Chapter 28, the Justice Acquisition Regulations, in its entirety in order to implement regulatory changes resulting from the Federal Acquisition Streamlining Act and to further implement recommendations of the National Performance Review. This effort will create a new JAR that is simpler and less burdensome. This 1998 version of the JAR supersedes the 1985 version and all amendments (Justice Acquisition Circulars 85–1 through 97–1) issued prior to the date of publication of a final rule.

DATES: Comments must be submitted on or before March 10, 1998.

ADDRESSES: Send written comments to Procurement Executive, 1331 Pennsylvania Avenue, NW., National Place Bldg., Room 1400, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Janis Sposato, Procurement Executive, Justice Management Division (202) 514–3103.

SUPPLEMENTARY INFORMATION: The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted agency procurement regulations from review

under Executive Order 12291, except for selected areas. The exception applies to this rule. In addition, the Department of Justice certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601–612) because the amendment sets forth, wholly, internal departmental procedures. All information collection requirements which require approval by OMB under the Paperwork Reduction Act of 1980 (Pub. L. 96–511) have been submitted to OMB. In those cases where an OMB control number has been assigned, the control number is included in the regulation.

List of Subjects in 48 CFR Parts 2801 Through 2852

Government procurement.

Stephen R. Colgate,

Assistant Attorney General For Administration.

For the reasons set out in the preamble, Chapter 28 of Title 48 of the Code of Federal Regulations is proposed to be revised as set forth below.

CHAPTER 28—DEPARTMENT OF JUSTICE

SUBCHAPTER A—GENERAL

Part 2801—Department of Justice Acquisition Regulations System
Part 2802—Definitions of Words and Terms
Part 2803—Improper Business Practices and Personal Conflicts of Interest
Part 2804—Administrative Matters

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

Part 2805—Publicizing Contract Actions
Part 2806—Competition Requirements
Part 2807—Acquisition Planning
Part 2808—Required Sources of Supplies and Services
Part 2809—Contractor Qualifications
Part 2811—Describing Agency Needs
Part 2812—Acquisition of Commercial Items

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

Part 2813—Simplified Acquisition Procedures
Part 2814—Sealed Bidding
Part 2815—Contracting By Negotiation
Part 2816—Types of Contracts
Part 2817—Special Contracting Methods

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

Part 2819—Small Business Programs
Part 2822—Application of Labor Laws to Government Acquisitions
Part 2823—Environment, Conservation, Occupational Safety, and Drug-Free Workplace
Part 2824—Protection of Privacy and Freedom of Information
Part 2825—Foreign Acquisition

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

Part 2828—Bonds and Insurance
Part 2829—Taxes
Part 2830—Cost Accounting Standards Administration
Part 2831—Contract Cost Principles and Procedures
Part 2832—Contract Financing
Part 2833—Protests, Disputes, and Appeals

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

Part 2834—Major System Acquisition

SUBCHAPTER G—CONTRACT MANAGEMENT

Part 2842—Contract Administration
Part 2845—Government Property
Part 2846—Quality Assurance

SUBCHAPTER H—CLAUSES AND FORMS

Part 2852—Solicitation Provisions and Contract Clauses

SUBCHAPTER A—GENERAL

PART 2801—DEPARTMENT OF JUSTICE ACQUISITION REGULATIONS SYSTEM

Subpart 2801.1—Purpose, Authority, Issuance

2801.101 Purpose.

Subpart 2801.2—Administration

2801.270–1 Revisions.

Subpart 2801.3—Agency Acquisition Regulations

2801.304 Agency control and compliance procedures.

Subpart 2801.4—Deviations From The FAR and JAR

2801.403 Individual deviations.
2801.404 Class deviations.
2801.470 Requests for class deviations.

Subpart 2801.6—Career Development, Contracting Authority, and Responsibilities

2801.601 General.
2801.602 Contracting Officers.
2801602–3 Ratification of unauthorized commitments.
2801.603 Selection, appointment and termination of appointment.
2801.603–1 Department of Justice Acquisition Career Management Program.
2801.603–3 Appointment.

Subpart 2801.70—Contracting Officer's Technical Representative

2801.7001–701 General.
2801.7001–702 Selection, appointment, and limitation of authority.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2801.1—Purpose, Authority, Issuance

2801.101 Purpose.

(a) The Justice Acquisition Regulations (JAR) in this chapter are established to provide procurement regulations that supplement the Federal Acquisition Regulation (FAR), 48 Code of Federal Regulations (CFR), Chapter 1. As such, the regulations contained in the JAR will include coverage of only those areas where agency implementation is required by the FAR, or where Department of Justice (DOJ) policies and procedures exist that supplement FAR coverage and directly affect the contractual relationship between the Department and potential or existing contractors. The JAR will not repeat FAR coverage.

(b) The FAR contains many references to agency procedures. If the JAR does not include supplemental guidance under the corresponding part or subpart, it is because the FAR language is considered to be sufficient. In those instances where the JAR states ''in accordance with bureau procedures'', it does not mean that the bureau must have a procedure. It is intended that the bureau procedures are to be followed if they exist; however, it does not mean that the bureau must have a formal written procedure. Where both the JAR and bureau procedures do not address a FAR subject, the FAR guidance is to be followed.

(c) The JAR is not a complete system of regulations and must be used in conjunction with the FAR.

Subpart 2801.2—Administration

2801.270–1 Revisions.

In addition to changes published in the **Federal Register**, the JAR will be amended by issuance of Justice Acquisition Circulars (JACs) containing loose-leaf replacement pages which revise parts, subparts, sections, subsections, paragraphs or subparagraphs. A vertical bar (edit bar) at the beginning or end of a line indicates that a change has been made within that line.

Subpart 2801.3—Agency Acquisition Regulations

2801.304 Agency control and compliance procedures.

Pursuant to FAR 1.304, the Procurement Executive (PE) is responsible for ensuring that bureau acquisition regulations and directives do not restrain the flexibilities found in the FAR. For this reason, bureau acquisition regulations shall be forwarded to the PE upon issuance. The PE reserves the right to revoke the regulations and directives in this chapter if they are determined to be restrictive.

Subpart 2801.4—Deviations from the FAR and JAR

§ 2801.403 Individual deviations.

Individual deviations from the FAR or the JAR shall be approved by the head of the contracting activity (HCA). A copy of the deviation shall be included in the contract file. Copies of all deviations will be provided to the PE.

§ 2801.404 Class deviations.

Requests for class deviations from the FAR or the JAR shall be submitted to the PE. The PE will consult with the chairperson of the Civilian Agency Acquisition Council, as appropriate, and send his/her recommendations to the AAG/A. The AAG/A will grant or deny requests for such deviations. For the purposes of this chapter, requests for deviations involving basic ordering agreements, master type contracts, or situations where multiple awards are made from one solicitation, are considered to involve more than one contract and therefore considered to be class deviation requests.

§ 2801.470 Requests for class deviations.

Requests for approval of class deviations from the FAR or the JAR shall be forwarded to the PE. Such requests will be signed by the Bureau Procurement Chief (BPC). Requests for class deviations shall be submitted as far in advance as the exigencies of the situation permit and shall contain sufficient written justification to evaluate the request.

Subpart 2801.6—Career Development, Contracting Authority, and Responsibilities

§ 2801.601 General.

(a) In accordance with Attorney General Order 1687–93, the authority vested in the Attorney General with respect to contractual actions, for goods and services, is delegated to the following officials:

(1) Assistant Attorney General for Administration (for the offices, boards, and divisions (OBDs);

(2) Director, Federal Bureau of Investigation;

(3) Director, Bureau of Prisons;

(4) Commissioner, Federal Prison Industries;

(5) Commissioner, Immigration and Naturalization Service;

(6) Administrator, Drug Enforcement Administration;

(7) Assistant Attorney General, Office of Justice Programs;

(8) Director, U.S. Marshals Service;

(9) Director, National Institute of Corrections; and

(10) Inspector General, Office of the Inspector General.

(b) The acquisition authority delegated to the officials in 2801.601(a) may be redelegated to subordinate officials as necessary for the efficient and proper administration of the Department's acquisition operations. Such redelegated authority shall expressly state whether it carriers the power of redelegation of authority.

(c) The redelegation of contracting authority directly to specific persons without regard for intermediate organizational levels only establishes authority to represent the Government in its commercial business dealings. It is not intended to affect the organizational relationship between the contracting officers and higher administrative and supervisory levels in the performance of their duties.

§ 2801.602 Contracting officers.

§ 2801.602–3 Ratification of unauthorized commitments.

The HCA may delegate the authority to ratify unauthorized commitments to the chief of the contracting office, except for those actions effected by his or her office. Dollar thresholds for delegations made under this section will be determined by the HCA. Copies of all ratifications are to be provided to the PE.

§ 2801.603 Selection, appointment and termination of appointment.

§ 2801.603–1 Department of Justice Acquisition Career Management Program.

(a) Each Bureau Procurement Chief shall develop and manage an acquisition career management program for contracting personnel in his or her component, consistent and uniform with this section and the Department of Justice Acquisition Procurement Career Management Program.

(b) The program shall cover all contracting personnel in the following categories:

(1) General Schedule (GS–1102) Contracting Series;

(2) Contracting officers, regardless of General Schedule Series, with contracting authority above the simplified acquisition threshold;

(3) Purchasing Series (GS–1105), other individuals performing purchasing duties and individuals with contracting authority between the micro purchase and simplified acquisition thresholds.

(4) All Contracting Officer Representatives/Contracting Officer Technical Representatives, or equivalent positions.

(c) The program shall include:

(1) *Management information system.* Standardized information on the acquisition workforce will be collected and maintained. To the maximum extent practicable, such data requirements shall conform to the standards established by the Office of Personnel Management for the Central Personnel Data File and shall be compatible with the Department of Justice acquisition workforce management information system.

(2) *Individual assessments and development plans for personnel in the GS–1102 Contracting Series.*

(i) An individual assessment by a supervisor of each covered employee's state of competence to perform the full range of potential duties of his or her job; and

(ii) An individual development plan to schedule classroom, on-the-job training, or other training to develop the employee's skill level to an appropriate level in each area of competence necessary to perform his or her job.

(iii) Individual assessments and development plans should be designed to fit the needs of the component, but they should be built upon the units of competence and instruction prepared by the Federal Acquisition Institute whenever feasible. Individual development plans should attempt to bring the employee to an appropriate level of skill in all necessary competencies in the field of procurement. In general, a proficiency skill level of 3, as defined in Attachment 1 to OFPP Policy Letter 92–3, shall be obtained for any contracting duty that is actually required to be performed on the job. Individual assessments and development plans should be reviewed annually and revised as appropriate, until the employee reaches the full competency level of his or her job.

(iv) Employees who perform only purchasing duties, regardless of occupational series, shall be required to obtain the requisite level of skill only in competencies involving simplified acquisitions. If the employee's duties are expanded to include contracting duties, then skill procurement competencies must be assessed and developed.

(v) Individual assessments of covered employee skills shall be completed within 90 days of the employee's entry on duty.

(3) *Mandatory training.* Training shall be provided for the identified categories of contracting personnel to meet the minimum standards identified in OFPP Policy Letter 97–01.

(4) *Skills currency.* Contract Specialists (GS–1102) and contracting officers with authority to obligate funds above the micropurchase threshold that have satisfied the mandatory training

requirements, shall be provided the equivalent of at least 40 hours of continuing procurement and acquisition related education and training every two years for the purpose of maintaining the currency of acquisition knowledge and skills.

(5) *Program funding.* Bureau Procurement Chiefs are responsible for assessing the funding needs to provide for the education and training of their acquisition workforce and requesting such funding in the annual budget process.

2801.603–3 Appointment.

Contracting officers whose authority will be limited to micro-purchases shall be appointed in writing and include any limitations to that authority.

Subpart 2801.70—Contracting Officer's Technical Representative

2801.7001–701 General.

Contracting officers may appoint individuals selected by program offices to act as authorized representatives in the monitoring and administration of a contract. Such officials shall be designated as Contracting Officers' Technical Representatives (COTRs).

2801.7001–702 Selection, appointment, and limitation of authority.

(a) *COTR Standards Program.* This subpart sets forth policies and procedures for establishing standards for COTRs in DOJ. The program sets forth minimum standards for individuals to be eligible for an appointment as a COTR.

(b) *Applicability.* the eligibility requirements of this subpart apply to all individuals who are designated by the contracting officer as COTRs.

(c) *Eligibility standards.* To be determined eligible for an appointment as a DOJ COTR, the following standards must be met:

(1) The candidate must attend and successfully complete a minimum of a 16-hour basic COTR course; and

(2) The candidate must attend a minimum of 1 hour training specifically in procurement ethics, either through courses offered periodically by the Department, the bureaus, or a Government or commercial vendor.

(d) *Limitations.* Each COTR appointment made by the contracting officer shall clearly state that the representative is not an authorized contracting officer and does not have the authority under any circumstances to:

(1) Award, agree to award, or execute any contract, contract modification, notice of intent, or other form of binding agreement;

(2) Obligate, in any manner, the payment of money by the Government;

(3) Make a final decision on any contract matter which is subject to the clause at FAR 52.233–1, Disputes; or

(4) Terminate, suspend, or otherwise interfere with the contractor's right to proceed, or direct any changes in the contractor's performance that are inconsistent with or materially change the contract specifications.

(e) *Termination.* Termination of the COTR's appointment shall be made in writing by the contracting officer and shall give the effective date of the termination. The contracting officer shall promptly modify the contract once a COTR termination notice has been issued. A termination notice is not required when the COTR's appointment terminates upon expiration of the contract.

(f) *Waivers.* No individual may serve as a COTR on any contract without the requisite training and signed COTR certificate for the file. In the rare event that there is an urgent requirement for a specific individual to serve as a COTR and the individual has not successfully completed the required training, the BPC may waive the training requirements and authorize the individual to perform the COTR duties, for a period of time not to exceed 120 days. The waiver will be granted in accordance with bureau procedures.

PART 2802—DEFINITIONS OF WORDS AND TERMS

Subpart 2.1—Definitions

2802.101 Definitions.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2.1—Definitions

2802.101 Definitions.

Throughout this chapter, the following words and terms are used as defined in this subpart unless the context in which they appear clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part.

(a) *Bureaus* means contracting activities. (See *contracting activity* in this subpart.)

(b) *Bureau procurement chief* means that supervisory official who is directly responsible for supervising, managing and directing all contracting offices of the bureau.

(c) *Chief of the contracting office* means that supervisory official who is directly responsible for supervising, managing and directing a contracting office.

(d) *Contracting activity* means a component within the Department which has been delegated procurement authority to manage contracting functions associated with its mission. See 2801.601(a).

(e) *DOJ* means the Department of Justice.

(f) *Head of the contracting activity* means those officials identified in 2801.601(a) having responsibility for supervising, managing, and directing the operations of the contracting activities.

(g) *JAR* means the Department of Justice Acquisition Regulations.

(h) *JMD* means the Justice Management Division.

(i) *OBD* means the offices, boards, and divisions within the Justice Department.

(j) *PE* means the Procurement Executive for the Department of Justice.

PART 2803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 2803.1—Safeguards

2803.101–3 Agency regulations.
2803.104 Procurement integrity.
2803.104–10 Violations or possible violations.
2803.104–70 Ethics program training requirements.

Subpart 2803.2—Contractor Gratuities to Government Personnel

2803.203 Reporting suspected violations of the Gratuities clause.
2803.204 Treatment of violators.

Subpart 2803.3—Reports of Suspected Antitrust Violations

2803.301 General.

Subpart 2803.9—Whistleblower Protections for Contractor Employees

2803.905 Procedures for investigating complaints.
2803.906 Remedies.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2803.1—Safeguards

2803.101–3 Agency regulations.

The DOJ regulations governing Standards of Conduct are contained in 5 CFR part 2635.

2803.104 Procurement integrity.

2803.104–10 Violations or possible violations.

(a) Upon receipt of information of a violation or possible violation of section 27 of the Act, the contracting officer must do the following:

(1) Refer the matter to the office of the Inspector General or other office designated in Attorney General Order 1931–94; and,

(2) Make the determination required by FAR 3.104–10(a) and followed the procedures prescribed therein.

(b) The individual referenced in FAR 3.104–10(a)(1) is the Bureau Procurement Chief.

(c) The HCA must follow the criteria contained in FAR 3.104–10(g) when designating authority under this subpart.

(d) The HCA, or designee, shall refer information regarding actual or possible violations of section 27 of the Act to the Office of the Inspector General or other office designated in Attorney General Order 1931–94 for guidance before taking action.

(e) If the HCA, or designee, receiving the information of a violation, or possible violation, determines that award is justified by urgent and compelling circumstances, or is otherwise in the interest of the Government, then the contracting officer may be authorized to award the contract after notification to the Office of the Inspector General or other office designated in Attorney General Order 1931–94.

(f) The contracting officer will be advised, or directed by the HCA, or designee, as to the action to be taken. The types of actions that would normally be taken when a violation has occurred that affected the outcome of a procurement are listed in FAR 3.104–11(d).

(g) The PE shall be advised of all instances where violations have been determined to have occurred. Information must describe the violation as well as actions taken.

2803.104–70 Ethics program training requirements.

It is the responsibility of the bureaus to provide training for ''procurement officials'' concerning the requirements of FAR 3.104. The bureau procurement training efforts should be coordinated with the Department's Ethics Official, who is responsible for developing agency ethics training plans, to include briefings on ethics and standards of conduct for employees who are contracting officers and procurement officials. The Ethics Official should be contacted directly to schedule training.

Subpart 2803.2—Contractor Gratuities to Government Personnel

2803.203 Reporting suspected violations of the Gratuities clause.

DOJ personnel shall report suspected violations of the Gratuities clause to the contracting officer or chief of the contracting office in writing. The report shall clearly state the circumstances surrounding the incident, including the nature of the gratuity, the behavior or action the gratuity was to influence, and the persons involved. The contracting officer, after review, shall forward the report along with his or her recommendations regarding the treatment of the violation in accordance with FAR 3.204(c) to the HCA or designee.

2803.204 Treatment of violations.

(a) The HCA or designee shall determine whether adverse action against the contractor in accordance with FAR 3.204(c) should be taken. In reaching a decision, the HCA or designee shall consult with the contracting activity's legal advisor and the Office of the Inspector General or other office designated in Attorney General Order 1931–94.

(b) Prior to taking any action against the contractor the HCA or designee shall allow the contractor the opportunity to present opposing arguments in accordance with FAR 3.204(b).

(c) The PE shall be advised of all instances where violations have been determined to have occurred. Information must describe the violation as well as actions taken.

Subpart 2803.3—Reports of Suspected Antitrust Violations

2803.301 General.

Reports of suspected antitrust violations shall be referred to the AG and PE in accordance with bureau procedures.

Supart 2803.9—Whistleblower Protections for Contractor Employees

2803.905 Procedures for investigating complaints.

(a) The Inspector General shall conduct an investigation and provide a written report of findings to the HCA.

(b) The HCA will ensure that the Inspector General provides the report of finding as specified in FAR 3.905(c).

(c) the complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the HCA. Extensions of time to file a written response may be granted by the HCA.

(d) The HCA may at any time request additional investigative work be done on the complaint.

2803.906 Remedies.

(a) Upon determination that a contractor has subjected one of its employees to a reprisal for providing information, the HCA may take one or more actions specified in FAR 3.906(a).

(b) Whenever a contractor fails to comply with an order, the HCA shall request an action be filed for enforcement of such order in the United States district court.

PART 2804—ADMINISTRATIVE MATTERS

Subpart 2804.4—Safeguarding Classified Information Within Industry

2804.402 General.
2804.403 Responsibilities of contracting officers.
2804.470 Contractor Personnel Security Program.
2804.470–1 Policy.
2804.470–2 Responsibilties.

Subpart 2804.5—Electronic Commerce in Contracting

2804.506 Exemptions.

Subpart 2804.6—Contract Reporting

2804.602 Federal Procurement Data System.

Subpart 2804.8—Government Contract Files

2804.805 Storage, handling, and disposal of contract files.

Subpart 2804.9—Information Reporting to the Internal Revenue Service

2804.901 Definitions.
2804.902 Contract information.
2804.970 Special reporting exceptions.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2804.4—Safeguarding Classified Information Within Industry

2804.402 General.

Classified acquisitions or contracts which require access to classified material, as defined in FAR 4.401, for their performance shall be subject to the policies, procedures, and instructions contained in departmental regulations in this chapter and shall be processed in a manner consistent with those regulations.

2804.403 Responsibilities of contracting officers.

For proposed solicitations and contracts which may require access to classified material or where guard services are assigned to safeguard departmental activities in possession of classified information, the contracting officer will consult with the COTR and the Director, Security and Emergency Planning Staff, JMD, to determine the appropriate security measures to safeguard such material and information.

2804.470 Contractor Personnel Security Program.

2804.470–1 Policy.

It is the policy of the Department of Justice that all acquisitions which allow

unescorted contractor access to Government facilities or sensitive information contain, as appropriate, requirements for appropriate personnel security screening by the contractor. To the maximum extent practicable, contractors shall be made responsible for the performance of personnel security screening. The personnel security screening may vary from one acquisition to another, depending upon the type, context, duration and location of the work to be performed. Classified contracts are exempted from the requirements of this section because they are governed by he requirements of Executive Order 12829 (January 6, 1993).

2804.470–2 Responsibilities.

(a) The primary acquiring component, together with its Security Program Manager, is responsible for providing the contracting officer with the appropriate contractor personnel security screening requirements (including waiver requirements, if appropriate) to be included in the statement of work.

(b) The contracting officer is responsible for including in the contract file for all such acquisitions, a certification made by the responsible Security Program Manager that the Personnel security requirements of the contract are adequate to ensure the security of Departmental operations, information and personnel.

(c) The Security Program Manager for the acquiring component is responsible for monitoring and ensuring that the contractor personnel security requirements of the contract are accomplished.

(d) For purposes of this section, the term Contracting Officer includes anyone empowered to place orders under Blanket Purchase Agreements (BPA) or any other existing contract vehicle and/or through the use of the government-wide commercial purchase card.

Subpart 2804.5—Electronic Commerce in Contracting

2804.506 Exemptions.

Pursuant to FAR 4.506(b), all determinations that FACNET processing is not cost-effective or practicable for the contracting office, or portions thereof, shall be initiated by the HCA and submitted to the PE for processing to the Attorney General for signature.

Subpart 2804.6—Conract Reporting

2804.602 Federal Procurement Data System.

(a) Federal Procurement Data System (FPDS) reports shall be submitted to the Procurement Policy and Review Group (PPRG) within 21 days of the close of each of the first three quarters of the fiscal year and within 30 days after the close of the fourth quarter. Specific preparation procedures are contained in the FPDS Reporting Manual and the Product and Service Code Manual.

(b) Bureaus shall submit their annual summary subcontract reports, together with copies of their Standard Form 295 to PPRG, and enter their summary subcontract data on-line to GSA, not later than February 15th of the following year.

(c) BPCs shall provide to the PE, the name, office, mailing address, and telephone number of the individual who will provide day-to-day operational contact within the bureau for the implementation of the FPDS. Changes and updates shall be forwarded to PPRG within 10 days after they occur. It is the responsibility of the bureau contacts to ensure that all actions are reported and submitted to PPRG in a timely manner and that all statistics and reports are accurate, current, and complete. BPCs shall be responsible for validating the data.

Subpart 2804.8—Government Contract Files

2804.805 Storage, handling, and disposal of contract files.

In accordance with FAR 4.805, each bureau shall prescribe procedures for the handling, storage, and disposing of contract files.

Subpart 2804.9—Information Reporting to the Internal Revenue Service

2804.901 Definitions.

Classified contract, as used in this subpart, means a contract such that the fact of its existence or its subject matter has been designated and clearly marked or clearly represented, pursuant to the provisions of Federal law or an Executive Order, as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

Confidential contract, as used in this subpart, means a contract, the reporting of which to the Internal Revenue Service (IRS) as required under 26 U.S.C. 6050M, would interfere with the effective conduct of a confidential law enforcement activity, such as contracts for sites for undercover operations or contracts with informants, or foreign counterintelligence activity.

2804.902 Contract information.

(a) Pursuant to FAR 4.902, the HCA, or delegate, shall certify to the PE, in the format specified in this section, under penalty of perjury, that such official has examined the information submitted by that bureau as its FPDS data, that the data has been prepared pursuant to the requirements of 26 U.S.C. 6050M, and that, to the best of such official's knowledge and belief it is compiled from bureau records maintained in the normal course of business for the purpose of making a true, correct and complete return as required by 26 U.S.C. 6050M.

(b) The following certification will be signed and dated by the HCA, or delegate, and submitted with each bureau quarterly FPDS report (as specified by 2804.602).

Certification

I, _____ (Name), _____ (Title) under the penalties of perjury have examined the information to be submitted by _____ (Bureau) to the Procurement Executive, for making information returns on behalf of the Department of Justice to the Internal Revenue Service, and certify that this information has been prepared pursuant to the requirements of 26 U.S.C. 6050M and that it is to the best of my knowledge and belief, a compilation of bureau records maintained in the normal course of business for the purpose of providing true, correct and complete returns as required by 26 U.S.C. 6050M.

_____

Signature

_____

Date

(c) The PE will certify the consolidated FPDS data for the Department, transmit the data to the Federal Procurement Data Center (FPDC) and authorize the FPDC to make returns to the IRS on behalf of the agency.

2804.970 Special reporting exceptions.

(a) The Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100–647) amended 26 U.S.C. 6959M to allow exceptions to the reporting requirements for certain classified or confidential contracts.

(b) The head of the agency has determined that the filing of information returns, as required by 26 U.S.C. 6050M, on confidential contracts, which involve law enforcement or foreign counterintelligence activities, would interfere with the effective conduct of those confidential law enforcement or foreign counterintelligence activities, and that the special reporting exceptions added to 26 U.S.C. 6050M by The Technical and Miscellaneous

Revenue Act of 1988 apply to these types of contracts.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 2805—PUBLICIZING CONTRACT ACTIONS

Subpart 2805.2—Synopses of Proposed Contract Actions

2805.201–70 Departmental notification.

Subpart 2805.3—Synopses of Contract Awards

2805.302–70 Departmental notification.

Subpart 2805.5—Paid Advertisements

2805.502 Authority.
2805.503–70 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2805–2—Synopses of Proposed Contract Actions

2805.201–70 Departmental notification.

(a) A copy of each synopsis of a proposed contract action sent to the Department of Commerce, shall be furnished to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU), Justice Management Division (JMD).

(b) Contracting officers shall document, in the contract file, that a copy of the notice has been forwarded to the OSDBU. A ''cc'' to the OSDBU on the file copy of the Commerce Business Daily (CBD) notice shall be considered adequate documentation.

Subpart 2805.3—Synopses of Contract Awards

2805.302–70 Departmental notification.

(a) The contracting officer shall forward a copy of the synopsis of contract award, as prepared under FAR 5.302, to the Director, OSDBU, JMD.

(b) Contracting officers shall document in the contract file that a copy of the notice has been forwarded to the OSDBU. A ''cc'' to the OSDBU on the file copy of the CBD notice shall be considered adequate documentation.

Subpart 2805.5—Paid Advertisements

This subpart provides policies and procedures for the procurement of paid advertising as covered by 5 U.S.C. 302, 44 U.S.C. 3701, 3702, and 3703, and Title 7, Chapter 5–25.2, General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

2805.502 Authority.

(a) Authorization for paid advertising is required for newspapers only. Pursuant to 28 CFR 0.14, the authority to approve publication of paid advertisements in newspapers has been delegated to the officials listed in 2801.601(a). This authority may be redelegated as appropriate.

(b) Authority to purchase paid advertising must be granted in writing by an official delegated such authority. No advertisement, notice, or proposal will be published prior to receipt of advance written authority for such publication. No voucher for any such advertisement or publication will be paid unless there is presented, with the voucher, a copy of such written authority. Authority shall not be granted retroactively.

2805.503–70 Procedures.

(a) Agency Officials exercising the authority delegated by 2805.502 (a) and (b) shall do so in accordance with the procedures set forth in FAR 5.503 and those set forth in this subsection.

(b) Requests for procurements of advertising shall be accompanied by written authority to advertise or publish which sets forth justification and includes the names of newspapers or journals concerned, frequency and dates of proposed advertisements, estimated cost, and other pertinent information.

(c) Paid advertisements shall be limited to publication of essential details of invitations for bids and requests for proposals including those for the sale of personal property and for the recruitment of employees.

(d) Procedures for payment of vouchers are contained in Title 7, Chapter 5–25.2, General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

PART 2806—COMPETITION REQUIREMENTS

Subpart 2806.3—Other Than Full and Open Competition

2806.302 Circumstances permitting other than full and open competition.
2806.302–7 Public interest.
2806.302–70 Determination and findings.
2806.303 Justifications.
2806.303–1 Requirements.
2806.303–2 Content.
2806.304 Approval of the justification.

Subpart 2806.5—Competition Advocates

2806.501 Requirement.
2806.502 Duties and responsibilities.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2806.3—Other than Full and Open Competition

2806.302 Circumstances permitting other than full and open competition.

2806.302–7 Public interest.

2806.302–70 Determination and findings.

(a) *Procedure.* The determination and findings (D&F) required by FAR 6.302–7(c)(1) shall be prepared in the format provided in paragraph (b) of this subsection. The original D&F and documentation supporting the use of this exception to the requirement for full and open competition shall be submitted to PPRG, JMD, for concurrence and coordination to the Attorney General for signature.

(b) *Format.* The following format shall be used for the D&F:

Department of Justice, Washington, DC 20530, Determination and Findings

Authority To Use Other Than Full and Open Competition:

Upon the basis of the following findings and determination, which I hereby make pursuant to the authority of 41 U.S.C. 253(c)(7), as implemented by FAR 6.302–7, it is in the public interest to provide for other than full and open competition in the contract action described below.

Findings:

1. The (1) purposes to enter into a contract for the acquisition of (2).

2. Use of the authority cited above is necessary and in the public interest for the following reasons: (3)

Determination

For the reasons described above, it is necessary and in the public interest to use other than full and open competition in the proposed acquisition.

_____

Signature

_____

Date

Notes:

(1) Name of contracting activity.
(2) Brief description of supplies or services.
(3) Explain the need for use of the authority.

2806.303 Justification.

2806.302–1 Requirements.

Pursuant to FAR 6.303–1(d), a copy of the justification shall be forwarded through the Department's Competition Advocate to the Department's point of contact with the Office of the United States Trade Representative.

2806.303–2 Content.

In addition to the information required by FAR 6.303–2, justifications requiring the approval of the PE shall contain the following documents:

(a) A written Acquisition Plan as required by FAR 7.102, and part 2807 of

this chapter. If a plan was not prepared, explain why planning was not feasible or accomplished.

(b) A copy of the CBD announcement or proposed announcement in accordance with the requirements of FAR 5.203.

(c) As part of the description of the supplies or services required in FAR 6.303–2, the justification shall include the statement of need as submitted by the requiring activity and any subsequent changes or revisions to the specifications.

(d) Any additional documentation that may be unique to the proposed procurement and is relevant to the justification.

2806.304 Approval of the justification.

(a) All justifications for contract actions over the contracting officer's approval dollar threshold shall be submitted to the BPC for concurrence before being forwarded to the contracting activity competition advocate for approval. Justifications requiring approval by the PE shall be further submitted for the concurrence of the contracting activity competition advocate and the HCA, or designee, before being forwarded to the PE for approval.

(b) After approval by the PE, the signed original will be returned to the contracting activity and one copy will be retained by the PPRG, JMD.

(c) Pursuant to FAR 6.304(c), a class justification for other than full and open competition shall be approved in accordance with bureau procedures.

Subpart 2806.5—Competition advocates

2806.501 Requirement.

In accordance with FAR 6.501:

(a) The Assistant Director, Procurement Policy and Review Group, Management and Planning Staff, Justice Management Division, has been designated as the Competition Advocate for the Department of Justice.

(b) The agency head will appoint, in each bureau, an official to be the contracting activity competition advocate. The contracting activity competition advocates shall be vested with the overall responsibility for competition activities within their contracting activity. No individual in the contracting office at or below the level of chief of the contracting office may serve as the contracting activity competition advocate. An individual at any level above the BPC may serve as contracting activity competition advocate.

2806.502 Duties and responsibilities.

In addition to the duties and responsibilities set forth in FAR 6.502(b) and elsewhere in this chapter, contracting activity competition advocates shall:

(a) Actively enforce the Department's Competition Advocacy Program within the contracting activity and ensure that systems are established for the effective internal control of contracting activity functions and activities which implement the Department's Competition Advocacy Program.

(b) Implement specific goals and objectives to enhance competition and the acquisition of commercial items.

(c) Prepare and submit to the DOJ Competition Advocate, by November 30 of each year, an annual report of competition advocacy activities conducted during the prior fiscal year.

PART 2807—Acquisition Planning

Subpart 2807.1—Acquistion Plans

2807.102 Policy.
2807.102–70 Applicability.
2807.103 Agency-head responsibilities.
2807.103–70 Other officials' responsibilities.
2807.105 Contents of written acquisition plans.

Subpart 2807.5—Inherently Governmental Functions

2807.503 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2807.1—Acquisition Plans

2807.102 Policy.

(a)(1) In accordance with FAR 7.1, DOJ contracting activities shall perform acquisition planning and conduct market research for all acquisitions in order to promote and provide for:

(i) Full and open competition (see FAR part 6);

(ii) Maximum practicable competition for those acquisitions where full and open competition is not required by FAR part 6; and

(iii) The acquisition of commercial items or, when commercial items are not available, nondevelopmental items to the maximum extent practicable.

(2) The degree of planning and market research may vary, depending on such factors as the acquisition's size, scope and complexity.

(b) Acquisition planning shall be the joint responsibility of both the contracting and program offices. All acquisition plans shall be prepared sufficiently in advance of solicitation release dates to ensure that requirements are presented in a way that promotes full and open competition and provides sufficient time for the identification and resolution of impediments that could delay the acquisition or lead to increased cost or technical risk.

2807.102–70 Applicability.

(a) Planning commensurate with the complexity and dollar value of the individual requirement shall be performed for all acquisitions, except for those acquisitions listed in paragraph (c) of this subsection which may be exempt from the planning process. Heads of contracting activities may authorize the use of oral plans for simple and/or small dollar acquisitions. When oral plans are used, the file should be documented with the name of the individual who approved the plan.

(b) Written acquisition plans shall be prepared for all major systems acquisitions as defined in 2834.002.

(c) The following types of acquisitions may be exempt from the acquisition planning program:

(1) Architect-engineering services;

(2) Unsolicited proposals (when deemed innovative and unique in accordance with FAR 15.5);

(3) Regulated utility services where services are available from only one source;

(4) Acquisitions made from or through other Government agencies; and

(5) Contract modifications which exercise an option or add funds to an incrementally funded contract (provided there is an approved acquisition planning document for the original action and there is no significant deviation from that plan).

2807.103 Agency-head responsibilities.

The AAG/A may establish acquisition planning criteria and thresholds for those bureaus who:

(a) Fail to allow ample time for conducting competitive acquisitions;

(b) Develop a pattern of awarding urgent requirements that generally restrict competition; and

(c) Fail to identify identical or like requirements that can be combined under one solicitation and miss opportunities to obtain lower costs through volume purchasing, reduce administrative costs in processing one contract action versus multiple actions, and standardize goods and services.

2807.103–70 Other officials' responsibilities.

(a) In accordance with FAR 7.1, the HCA shall develop an acquisition planning program for all acquisitions to ensure that its needs are met in the most effective, economical, and timely manner.

(b) Heads of contracting activities have the flexibility to develop programs that are best suited to their individual needs. Criteria and thresholds shall be established at which increasingly greater detail and formality in the planning process is required. DOJ components are encouraged to keep paperwork to a minimum and to put a premium on simplicity.

(c) HCAs shall ensure that, during the acquisition planning phase, requirements personnel consider the use of:

(1) The metric system of measurement consistent with 15 U.S.C. 2205(b); and

(2) Environmentally preferable and energy-efficient products and services.

2807.105 Contents of written acquisition plans.

(a) HCAs shall prescribe format and content of acquisition planning documents that are commensurate with the complexity and dollar value of the individual acquisition (sample acquisition planning documents for both simple and complex acquisitions will be made available by PPRG, JMD, and may be used or modified as appropriate).

(b) HCAs shall include, at a minimum, the content elements at FAR 7.105 and 106 for all major systems acquisitions as defined in 2834.002.

Subpart 2807.5—Inherently Governmental Functions

2807.503 Policy.

The requirements official shall provide the contracting officer, concurrent with the transmittal of the statement of work (or modification thereof), a written determination that none of the functions to be performed are inherently governmental. Any disputes concerning this determination shall be resolved by the contracting officer, after consultation with the requirements official. The contracting officer's determination shall be final.

PART 2808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 2808.8—Acquisition of Printing and Related Supplies

2808.802 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2808.8—Acquisition of Printing and Related Supplies

2808.802 Policy.

The Director, Facilities and Administrative Services Staff, has been designated to serve as the central printing authority for the Department.

PART 2809—CONTRACTOR QUALIFICATIONS

Subpart 2809.4—Debarment, Suspension, and Ineligibility

2809.402 Policy.
2809.404 List of parties excluded from Federal procurement and nonprocurement programs.
2809.405 Effect of listing.
2809.405–1 Continuation of current contracts.

Subpart 2809.5—Organizational and Consultant Conflict of Interest

2809.503 Waiver.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2809.4—Debarment, Suspension, and Ineligibility

2809.402 Policy.

Contracting activities shall:

(a) Consider debarment or suspension of a contractor when cause is shown as listed under FAR 9.406–2 and FAR 9.407–2. Contracting staffs should consult with their appropriate legal counsel prior to making a decision to initiate debarment or suspension proceedings. If a determination is made that available facts do not justify beginning debarment or suspension proceedings, the file should be documented accordingly. This determination should be subject to reconsideration if new information or additional fact-finding so justifies.

(b) If the decision is made to initiate debarment and/or suspension of a contractor, immediately prepare a notice in accordance with FAR 9.046–3(c) or FAR 9.407–3(c). The draft notice, along with the administrative file containing all relevant facts and analysis shall be forwarded to the PE, as the debarring and suspending official, following review by the activity's legal counsel and BPC.

(c) The PE shall:

(1) Review the notice and administrative file for sufficiency and provide for review by other DOJ officials as considered appropriate;

(2) If it is determined that action is warranted, give the contractor prompt notice of the proposed debarment or suspension, in accordance with FAR 9.406–3(c) or FAR 9.407–3(c);

(3) Direct additional fact-finding as necessary when material facts are in dispute.

(4) Notify the contractor of the final decision to debar or suspend, including a decision not to debar or suspend, in accordance with FAR 9.406–3(c) and FAR 9.407–3(c).

2809.404 List of parties excluded from federal procurement and nonprocurement programs.

(a) The PE shall:

(1) Provide GSA notification of the information set forth in FAR 9.404(b) within five working days after debarring or suspending a contractor or modifying or rescinding such an action.

(2) Maintain agency-wide records of debarred or suspended contractors in accordance with FAR 9.404.

(b) Contracting activities shall provide an effective system to ensure that contracting staff consult the ''List of Parties Excluded from Federal Procurement and Nonprocurement Programs'' prior to soliciting offers from, awarding or extending contracts to, or consenting to subcontracts with contractors on the list.

2809.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and bureaus shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the HCA determines that there is a compelling reason for such action and the PE approves such determinations.

(b) Bids received from any listed contractor in response to an invitation for bids shall be entered on the abstract of bids, and rejected unless the HCA determines in writing that there is a compelling reason to consider the bid and the PE approves such action.

(c) Proposals, quotations, or offers received from any listed contractor shall not be evaluated for award or included in the competitive range, nor shall discussions be conducted with a listed offeror during a period of ineligibility, unless the HCA determines in writing that there is a compelling reason to do so and the PE approves such action.

2809.405–1 Continuation of current contracts.

(a) In accordance with FAR 9.405–1, contracting activities may continue contracts or subcontracts in existence at the time a contractor is suspended or debarred unless it is determined that termination of the contract is in the best interest of the Government. In making this determination, contracting activities shall consider the seriousness of the act or omission leading to the debarment or suspension, the effect of debarment or suspension on the contractor's ability to continue operations, and the Department's ability to safeguard its interests and receive satisfactory performance.

(b) Contracting activities shall not renew or otherwise extend the duration

of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the HCA states, in writing, the compelling reasons for renewal or extension and the PE approves such action.

Subpart 2809.5—Organizational and Consultant Conflicts of Interest

2809.503 Waiver.

The HCA may waive any general rule or procedure of FAR 9.5 by determining that its application in a particular situation would not be in the Government's interest.

PART 2811—DESCRIBING AGENCY NEEDS

2811.001 Definitions.
2811.002 Policy.

Subpart 2811.1—Selecting and Developing Requirements Documents

2811.103 Market acceptance.
2811.104–70 Brand-name or equal description.

Subpart 2811.6—Priorities and Allocations

2811.603 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

2811.001 Definitions.

Dual systems means the use of both inch-pound and metric systems. For example, an item is designed, produced and described in inch-pound values with soft metric values also shown for information or comparison purposes.

Hybrid systems means the use of both inch-pound and standard metric values in specifications, standards, supplies, and services; e.g., an engine with internal parts in metric dimensions and external fittings or attachments in inch-pound dimensions.

Metric system means the International System of Units established by the General Conference of Weights and Measures in 1960.

Soft metric means the result of mathematical conversion of inch-pound measurements to metric equivalents in specifications, standards, supplies, and services. The physical dimensions are not changed.

2811.002 Policy.

Consistent with the policy expressed in FAR 11.002(b), solicitations must include specifications and purchase descriptions stated in metric units of measurement whenever metric is the accepted industry system. Whenever possible, commercially developed metric specifications and internationally, or domestically developed voluntary standards, using metric measurements, must be adopted. While an industry is in transition to metric specifications, solicitations must include requirements documents stated in soft metric, hybrid, or dual systems, except when impractical or inefficient.

Subpart 2811.1—Selecting and Developing Requirements Documents

2811.103 Market acceptance.

Pursuant to FAR 11.103, the HCA or designee at a level not lower than the BPC has the authority to require offerors to demonstrate that the items offered meet the criteria set forth in FAR 11.103(a).

2811.104–70 Brand-name or equal description.

When a brand-name or equal description is used, the clause set forth in 2852.211–70, Brand-Name or Equal, shall be inserted into the solicitation.

Subpart 2811.6—Priorities and Allocations

2811.603 Procedures.

The PE is the agency official delegated authority to exercise priority authority on behalf of the Department. Any request for a priority rating on a contract or order must be submitted to PPRG, JMD, in accordance with the procedures in this subpart.

(a) The requesting activity shall submit, to the PE, a description of the supplies or services requiring a priority rating and a complete justification for the necessity of a rated order including the method and type of contract and the anticipated award date. The justification must also state the level of priority rating requested and comply with the requirements of the Defense Priorities and Allocations System.

(b) Upon receipt, the PPRG shall review the request for completeness and establish appropriate liaison with the Department of Commerce (DOC), the administering agency. Depending on the nature of the requirement, the PPRG may schedule a meeting with DOC officials to present the proposal. In such cases, a representative from the requiring activity may be requested to attend.

(c) DOJ activities requesting rated orders that concern classified material shall call PPRG before submitting their request to ensure appropriate transmission and handling between the requesting activity and PPRG.

PART 2812—ACQUISITION OF COMMERCIAL ITEMS

Subpart 2812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

2812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

2812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Pursuant to FAR 12.302(c), the HCA or designee at a level not lower than the BPC is authorized to approve clauses or additional terms or conditions for inclusion in solicitations or contracts for commercial items that are inconsistent with customary commercial practices.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 2813—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 2813.1—General

2813.103 Policy—Purchases at or below the micro-purchase threshold.

Subpart 2813.4—Imprest Fund

2813.401 General.

Subpart 2813.5—Purchase Orders

2813.505 Purchase order and related forms.

Subpart 2813.70—Certified Invoice Procedure

2813.7001 Policy.
2813.7002 Procedure.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2813.1—General

2813.103 Policy—Purchases at or below the micro-purchase threshold.

To the maximum extent practicable, the Government Purchase Card shall be used as the primary method for transacting micro-purchases.

Subpart 2813.4—Imprest Fund

2813.401 General.

Regulations governing the operation and procedures of the imprest fund shall be contained in internal bureau regulations. Individuals delegated the authority to withdraw from the imprest fund are further subject to the limitations contained in their delegation memorandum.

Subpart 2813.5—Purchase Orders

2813.505 Purchase order and related forms.

(a) In accordance with FAR 13.505, for other than commercial items, bureaus may use order forms other than Standard Form (SF) 1449, OF 347 and 348 and may print on those forms, clauses considered to be suitable for purchases.

(b)(1) Contracting activities using the SF 44 will be responsible for instructing authorized users as to the limitations and procedures for use of the form as outlined in FAR 13.505.

(2) Since the SF 44 is an accountable form, a record shall be maintained of: serial numbers of the forms; to whom issued; and, the date issued. SF 44s shall be kept securely under lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of the SF 44.

Subpart 2813.70—Certified Invoice Procedure

2813.7001 Policy.

Under limited circumstances as described in this subpart, supplies or services directly related to mission accomplishment, may be acquired on the open market from local suppliers at the site of the work or use point, using vendor's invoices under the certified invoice procedure, instead of issuing purchase orders. Certified invoice procedures may not be used to place orders under established contracts.

2813.7002 Procedure.

(a) Purchases utilizing the certified invoice procedure shall be effected only in accordance with FAR part 13 and this part 2813, subject to the following:

(1) The amount of any one purchase does not exceed the micro-purchase threshold;

(2) A purchase order is not required by either the supplier or the Government;

(3) Appropriate invoices can be obtained from the supplier; and,

(4) The items to be purchased shall be domestic source end products, except as provided in FAR subpart 25.1.

(b) Use of the certified invoice procedures does not eliminate the requirements in FAR part 13 or this part 2813 that are applicable to purchases of this dollar threshold.

(c) The chief of the contracting office, as defined in 2802.101(c), shall delegate the authority to use the certified invoice procedure. Each delegation must specify any limitations placed on the individual's use of these procedures, such as limits on the amount of each purchase, or limits on the commodities, or services which can be procured.

(d) Each individual using this purchasing technique shall require the supplier to immediately submit properly prepared invoices which itemized property or services furnished. Upon receiving the invoice, the individual making the purchase shall annotate the invoice with the date of receipt, verify the arithmetic accuracy of the invoiced amount and verify on the invoice that the supplies and/or services have been received and accepted. If the invoice is correct, the individual making the purchase shall sign the invoice indicating acceptance and immediately forward it to the appropriate administrative office. The invoice shall be approved by the appropriate administrative office and forwarded to the Finance Office for payment within 5 workdays after receipt of the invoice, or acceptance of supplies or services, whichever is later. Before forwarding the invoice to Finance, the administrative office shall place the following statement on the invoice, along with the accounting and appropriation data:

I certify that these goods and/or services were received on _____ (date) and accepted on _____ (date). Oral purchase was authorized and no confirming order has been issued.

_____

_____

Signature

_____

Date

_____

Printed or Typed Name and Title

PART 2814—SEALED BIDDING

Subpart 2814.4—Opening of bids and award of contract

2814.407 Mistakes in bids.
2814.407–3 Other mistakes disclosed before award.
2814.407–4 Mistakes after awards.
2814.409 Information to bidders.
2814.409–2 Award of classified contracts.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2814.4—Opening of bids and award of contract

2814.407 Mistakes in bids.

2814.407–3 Other mistakes disclosed before award.

(a) The authority to make determinations under paragraphs (a), (b), (c), and (d) of FAR 14.407–3 is delegated to the HCA or designee at a level not lower than the BPC.

(b) The following procedures shall be followed when submitting doubtful cases of mistakes in bids to the Comptroller General for an advance decision.

(1) Requests for advance decisions submitted to the Comptroller General in cases of mistakes in bids shall be made by the HCA.

(2) Requests for advance decisions shall be in writing, dated, signed by the requestor, addressed to the Comptroller General of the United States, General Accounting Office, Washington, D.C. 20548, and contain the following:

(i) The name and address of the party requesting the decision;

(ii) A statement of the question to be decided, a presentation of all relevant facts, and a statement of the requesting party's position with respect to the question; and,

(iii) Copies of all pertinent and supporting documentation.

2814.407–4 Mistakes after award.

Proposed determinations under FAR 14.407 shall be coordinated with legal counsel in accordance with bureau procedures.

2814.409 Information to bidders.

2814.409–2 Award of classified contracts.

In accordance with FAR 14.409–2, the contracting officer shall advise the unsuccessful bidders, including any who did not bid, to take disposition action in accordance with bureau procedures.

PART 2815—CONTRACTING BY NEGOTIATION

Subpart 2815.4—Solicitation and Receipt of Proposals and Quotations

2815.405 Solicitations for information or planning purposes.
2815.405–1 General.
2815.408 Issuing solicitations.
2815.411 Receipt of proposals and quotations.

Subpart 2815.5—Unsolicited Proposals

2815.506 Agency procedures.

Subpart 2815.8—Price Negotiation

2815.803 General.
2815.805 Proposal analysis.
2815.805–5 Field pricing support.
2815.810 Should-cost review.
2815.810–2 Program should-cost review.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2815.4—Solicitation and Receipt of Proposals and Quotations

2815.405 Solicitations for information or planning purposes.

2815.405–1 General.

When a solicitation for informational or planning purposes is to be issued, the contracting officer shall make a written

determination that such solicitation is justified. This determination shall be approved at a level above the contracting officer.

2815.408 Issuing solicitations.

Solicitations involving classified information shall be handled in accordance with the policies and procedures contained in Departmental regulations and other offices, boards, divisions, and bureaus (OBDB) prescribed policies and regulations that supplement Departmental regulations.

2815.411 Receipt of proposals and quotations.

Classified proposals and quotations shall be handled in accordance with the current DOJ Order agency regulations and any supplemental directives or orders implemented by the OBDB. Such supplemental regulations must have the prior approval of the AAG/A before implementation in accordance with the Departmental regulations.

Subpart 2815.5—Unsolicited Proposals

2815.506 Agency procedures.

(a) Each contracting activity shall designate a point of contact for the receipt and handling of unsolicited proposals. Generally, the official designated shall be the BPC or immediate subordinate.

(b) The designated point of contact for each contracting activity shall provide for and coordinate receipt, review, evaluation, and final disposition of unsolicited proposals in accordance with FAR 15.506 through 15.509.

Subpart 2815.8—Price Negotiation

2815.803 General.

If a contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable and the contracting officer has taken all authorized actions to negotiate a reasonable price or profit or fee without success, the contracting officer shall then refer the contract action to the HCA or designee.

2815.805 Proposal analysis.

2815.805–5 Field pricing support.

All requests for field pricing support shall be made by the contracting officer directly to the cognizant audit agency. A copy of the request for such services shall be sent to the Department of Justice Office of the Inspector General (OIG) at the address shown in this subsection at the time it is mailed to the cognizant audit agency. A copy of each report received shall also be sent to the OIG. Requests for other audit assistance may be made to the Assistant Inspector General for Audits, Suite 5000, 1425 New York Avenue, N.W., Washington, D.C. 20530.

2815.810 Should-cost review.

2815.810–2 Program should-cost review.

In acquisitions for which a program should-cost review is conducted, the required should-cost review team report shall be prepared in accordance with bureau procedures.

PART 2816—TYPES OF CONTRACTS

Subpart 2816.5—Indefinite-Delivery Contracts

2816.505 Ordering.

Subpart 2816.6—Time and Materials, Labor-Hour, and Letter Contracts

2816.601 Time-and-material contracts.
2816.602 Labor-hour contracts.
2816.603 Letter contracts.
2816.603–2 Application.
2816.603–3 Limitations.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2816.5—Indefinite-Delivery Contracts

2816.505 Ordering.

(a) In accordance with FAR 16.505(b)(4), the Department of Justice Task Order and Delivery Order Ombudsman is the DOJ Competition Advocate.

(b) Heads of contracting activities shall designate a contracting activity Task Order and Delivery Order Ombudsman. This person may be the contracting activity competition advocate and must meet the qualification requirements of 2806.501(b).

(c) Contracting activity ombudsmen shall review and resolve complaints from contractors concerning task or delivery orders placed by the contracting activity.

(d) Contractors not satisfied with the resolution of a complaint by a contracting activity ombudsman may request the Departmental Ombudsman to review the complaint.

Subpart 2816.6—Time-and-Materials, Labor-Hour, and Letter Contracts

2816.601 Time-and-material contracts.

In addition to the limitations listed in FAR 16.601(c), a time-and-materials contract may be used only after the contracting officer receives written approval from the chief of the contracting office. When the contracting officer is also the chief of the contracting office, the approval to use a time-and-materials type contract will be made at a level above the contracting officer.

2816.602 Labor-hour contracts.

The limitations set forth in 2816.601 for time-and-material contracts also apply to labor-hour contracts.

2816.603 Letter contracts.

2816.603–2 Application.

In cases where the contracting officer and the contractor cannot negotiate the definitization of a letter contract within 180 days after the date of the letter contract, or before completion of 40 percent of the work to be performed, the contracting officer may, with the written approval of the PE, revise and extend the definitization schedule. However, in no event shall the extension of the definitization schedule extend beyond the lesser of an additional 180 day period or the completion of 80 percent of the work to be performed. If at the end of the extension, the contracting officer and the contractor cannot negotiate a definitive contract because of failure to reach an agreement on price or fee, the procedures set forth in FAR 52.216–25, 16.603–2, 15.8, and part 31 shall be followed, as applicable.

2816.603–3 Limitations.

A letter contract may be used only after the express written approval of the Procurement Executive. Requests for approval shall contain the rationale explaining why no other contract is suitable and shall include the approval of the HCA or designee. Under circumstances of compelling urgency which do not permit the time needed for written approval, oral approval must be obtained; however, written documentation to support the award and confirm the oral approval must be submitted as soon as practicable after award.

PART 2817—SPECIAL CONTRACTING METHODS

Subpart 2817.1—Multiyear Contracting

2817.108 Congressional notification.

Subpart 2817.6—Management and Operating Contracts

2817.605 Award, renewal, and extension.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j); and 28 CFR 0.76(j).

Subpart 2817.1—Multiyear Contracting

2817.108 Congressional notification.

Pursuant to FAR 17.198(a), the original congressional notification shall be submitted to PPRG, JMD, for concurrence, coordination to the Attorney General, and subsequent transmission to the appropriate congressional committees.

Subpart 2817.6—Management and Operating Contracts

2817.605 Award, renewal, and extension.

In accordance with FAR 17.605(b), the contracting officer, following bureau procedures, shall review each management and operating contract, at appropriate intervals and at least once every 5 years.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 2819—SMALL BUSINESS PROGRAMS

Subpart 2819.2—Policies

2819.201 General policy.

Subpart 2819.5—Set-Asides for Small Business

2819.506 Withdrawing or modifying set-asides.

Subpart 2819.6—Certificates of Competency and Determinations of Eligibility

2819.602 Procedures.
2819.602–1 Referral.

Subpart 2819.70—Forecasts of Expected Contract Opportunities

2819.7001 General.
2819.7002 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2819.2—Policies

2819.201 General policy.

(a) The Office of Small and Disadvantaged Business Utilization (OSDBU) is organizationally attached to the Office of the Deputy Attorney General in accordance with 28 CFR 0.18a, but is located in JMD for administrative purposes.

(b) The Director, OSDBU is responsible for the administration of the DOJ small and disadvantaged business programs in accordance with the duties described in 28 CFR 0.18a.

Subpart 2819.5—Set-Asides for Small Business

2819.506 Withdrawing or modifying set-asides.

(a) Before a contracting officer may withdraw or modify a small business set-aside, the contracting officer shall seek the concurrence of the Director, OSDBU.

(b) If the contracting officer and the Director, OSDBU, are unable to agree on the proposed withdrawal or modification, the Director, OSDBU shall:

(1) Forward the matter to the SBA procurement center representative assigned to the Department of Justice for resolution; or,

(2) Forward the matter to the PE for resolution if an SBA procurement center representative is not assigned to the Department of Justice.

Subpart 2819.6—Certificates of Competency and Determinations of Eligibility

2819.602 Procedures.

2819.602–1 Referral.

In accordance with FAR 19.602–1(a)(2), the matter shall be submitted to the Director, OSDBU, for subsequent referral to the cognizant SBA Regional Officer.

Subpart 2819.70—Forecasts of Expected Contract Opportunities

2819.7001 General.

Section 501 of Public Law 100–656, the Business Opportunity Development Reform Act of 1988, requires executive agencies having contract actions in excess of $50 million in Fiscal Year 1988 or later to prepare an annual forecast of expected contract opportunities, or classes of contract opportunities that small business concerns, including those owned and controlled by socially and economically disadvantaged individuals, are capable of performing.

2819.7002 Procedures.

The content and format of bureau annual forecasts of contract opportunities, as well as the updates to their contracting forecasts shall be as specified by the Director, OSDBU.

PART 2822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 2822.1—Basic Labor Policies

2822.101 Labor relations.
2822.101–1 General.
2822.101–3 Reporting labor disputes.
2822.103 Overtime.
2822.103–4 Approvals.

Subpart 2822.4—Labor Stardards for Contracts Involving Construction

2822.406 Administration and enforcement.
2822.406–8 Investigations.

Subpart 2822.13—Special Disabled and Vietnam Era Veterans

2822.1303 Waivers.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2822.1—Basic Labor Policies

2822.101 Labor relations.

2822.101–1 General.

All matters regarding labor relations shall be handled in accordance with bureau procedures.

2822.101–3 Reporting labor disputes.

The office administering the contract shall report, directly to the contracting officer, any potential or actual labor disputes that may interfere with performing any contracts under its cognizance.

2822.103 Overtime.

2822.103–4 Approvals.

The inclusion of a dollar amount greater than zero in paragraph (a) of the FAR clause 52.222–2, Payment For Overtime Premiums, must be approved at a level above the contracting officer. Such approval shall be reflected by the signature of the approving official on the contracting officer's written determination made in accordance with FAR 22.103–4.

Subpart 2822.4—Labor Standards for Contracts Involving Construction

2822.406 Administration and enforcement.

2822.406–8 Investigations.

Pursuant to FAR 22.406–8(d), the contracting officer shall prepare and forward the report of violations to the HCA or designee at a level not lower than the BPC. That official shall be responsible for processing the report in accordance with FAR 22.406–8(d)(2).

Subpart 2822.13—Special Disabled and Vietnam Era Veterans

2822.1303 Waivers.

In accordance with FAR 22.1303, all requests for waivers shall be forwarded from the HCA to PPRG, JMD, for processing to the Attorney General.

PART 2823—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 2823.1—Pollution Control and Clean Air and Water

2823.107 Compliance responsibilities.

Subpart 2823.3—Hazardous Material Identification and Material Safety Data

2823.303–70 Departmental contract clause.

Subpart 2823.4—Use of Recovered Materials

2823.403 Policy.
2823.404 Procedures.
2823.404–70 Affirmative Procurement Program for Recycled Materials.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2823.1—Pollution Control and Clean Air and Water

2823.107 Compliance responsibilities.

If a contracting officer becomes aware of noncompliance with clean air, water

or other affected media standards in facilities used in performing nonexempt contracts, that contracting officer shall notify the Department of Justice Environmental Executive (DOJEE).

Subpart 2823.3—Hazardous Material Identification and Material Safety Data

2823.303–70 Departmental contract clause.

The contracting officer shall insert the clause at 2852.223–70, Unsafe Conditions Due to the Presence of Hazardous Material, in all solicitations and contracts, as appropriate, if the contract will require the performance of services on Government-owned or Government-leased facilities.

Subpart 2823.4—Use of Recovered Materials

2823.403 Policy.

It is the policy of DOJ that its contracting activities and contractors that procedure on behalf of DOJ, acquire EPA designated items in accordance with EPA's Comprehensive Procurement Guideline For Products Containing Recovered Materials (CPG) (40 CFR part 247). The recommended minimum recovered materials content of EPA designated items is set forth in EPA's Recovered Materials Advisory Notices (RMANs) and in E.O. 12873 as amended. These publications are available from the DOJEE.

2823.404 Procedures.

(a) The program office initiating the acquisition is responsible for determining if recovered materials should be included in the specification. Procurement offices are responsible for informing program offices of the requirement for writing specifications for designated items that include minimum content standards specified in the RMANs.

(b) If the program office chooses to procure designated items containing less than the minimum content standards, the program office must justify that decision in writing and include a copy of the signed justification with the procurement request package. FAR 23.404(b)(3) sets forth the only accepted justifications for acquiring EPA designated items which do not meet the minimum content standard. The contracting officer is the approving official for justifications made pursuant to FAR 23.404(b)(3). Contracting officers are responsible for including a signed copy of the justification in the acquisition file and submitting a copy of the approved justification to the DOJEE.

2823.404–70 Affirmative Procurement Program for Recycled Materials.

(a) *Recovered materials preference program.* Preference will be given to procuring and using products containing recovered materials rather than products made with virgin materials when adequate competition exists, and when price, performance and availability are equal.

(b) *Promotion program.* The DOJEE has primary responsibility for actively promoting the acquisition of products containing recycled materials throughout DOJ. Technical and procurement personnel will cooperate with the DOJEE to actively promote DOJ's Affirmative Procurement Program (APP).

(c) *Procedures for vendor estimation, verification and certification.* (1) *Estimation.* The contractor shall provide estimates of the total percentage(s) of recovered materials for EPA designated items to be used in products or services provided.

(2) *Certification.* Contracting officers shall provide copies of all vendor and subcontractor certifications required by FAR 23.405(c) to the DOJEE.

(3) *Verification.* The DOJEE is responsible for periodically reviewing vendor certification documents and waivers as part of the annual review and monitoring process to determine if DOJ is in compliance with the E.O. 12873 and subsequent amendments.

PART 2824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 2824.2—Freedom of Information Act

2824.202 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2824.2—Freedom of Information Act

2824.202 Policy.

Procedures for processing Freedom of Information Act requests are set forth in Departmental regulations and 28 CFR part 16.

PART 2825—FOREIGN ACQUISITION

Subpart 2825.2—Buy American Act—Construction Materials

2825.203 Evaluating offers.

Subpart 2825.3—Balance of Payments Program

2825.302 Policy.

Subpart 2825.9—Additional Foreign Acquisition Clauses

2825.901 Omission of audit clause.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2825.2—Buy American Act—Construction Materials

2825.203 Evaluating offers.

The HCA, or designee at a level not lower than the BPC, is the agency official authorized to make the determination that using a particular domestic construction material would unreasonably increase the cost of the acquisition or would be impracticable.

Subpart 2825.3—Balance of Payments Program

2825.302 Policy.

The HCA, or designee at a level not lower than the BPC, is the agency official authorized to make determinations under FAR 25.302(b)(3), as well as authorize the use of a differential greater than 50 percent, as specified in FAR 25.302(c), for the evaluation of domestic and foreign offers under the Balance of Payments Program. All determinations made under this section shall be in writing and shall set forth the facts and circumstances supporting the determination. Determinations shall be reviewed and concurred in by the contracting activity's legal counsel.

Subpart 2825.9—Additional Foreign Acquisition Clauses

2825.901 Omission of audit clause.

The HCA, or designee at a level not lower than the BPC, is the agency official authorized to make determinations under FAR 25.901(c). All determinations made under this authority shall be reviewed and concurred in by the contracting activity's legal counsel prior to being approved by the authorized agency official.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 2828—BONDS AND INSURANCE

Subpart 2828.1—Bonds

2828.106 Administration.
2828.106–6 Furnishing information.

Subpart 2828.2—Sureties

2828.204 Alternatives in lieu of corporate or individual sureties.

Subpart 2828.3—Insurance

2828.307–1 Group insurance plans.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2828.1—Bonds

2828.106 Administration.

2828.106–6 Furnishing information.

In accordance with FAR 28.106–6(c), the HCA, or designee at a level not lower than the BPC, is the agency official authorized to furnish the certified copy of the bond and the contract.

Subpart 2828.2—Sureties

2828.204 Alternatives in lieu of corporate or individual sureties.

When contractors submit any of the types of security described in FAR 28.204–1 through 28.204–3 in lieu of furnishing sureties, the contracting officer shall enter into an agreement with the contractor covering a bank account, and suitable covenants protecting the Government's interest, in which the securities will be deposited to protect against their loss during the period of the bond obligation.

Subpart 2828.3—Insurance

2828.307–1 Group insurance plans.

Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor shall submit the plan to the contracting officer for review and approval. During review, the contracting office should utilize all sources of information available such as audit, industry practices, etc., to determine that acceptance of the group insurance plan, as submitted, is in the Government's best interest.

PART 2829—TAXES

Subpart 2829.3—State and Local Taxes

2829.302 Applications of State and local taxes to the Government.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2829.3—State and Local Taxes

2829.302 Application of State and local taxes to the Government.

(a) It is DOJ policy that DOJ contracts shall not contain clauses expressly designating prime contractors as agents of the Government for the purpose of avoiding State and local taxes.

(b) Although circumstances may exist under which a contractor is an agent of the Government, even in the absence of a contract clause expressly designating a contractor as such, these circumstances should be extremely rare. Before any DOJ contracting activity may contend that any of its contractors are agents of the Government for the purpose of claiming immunity from State and local sales and use taxes, the matter will be referred to the AAG/A for review, and approval to ensure that DOJ policy is complied with and that the contracting activity's contention is fully in accordance with the pertinent legal principles and precedents. Each case forwarded will be reviewed by the HCA before referral to the AAG/A. The referral will include all pertinent data on which the contracting activity's contention is based, together with a thorough analysis of all relevant legal precedents.

(c) Whenever clauses, procedures, and business practices are cited by DOJ contracting activities to support the contention that a contractor is an agent of the Government for the purpose of immunity from a State or local sales or use tax, contracting activities should whenever possible, devise alternative clauses, procedures, and practices for future use which will accomplish their intended purpose without providing the basis for contention that the contractor is an agent of the Government for the purpose of immunity from State and local sales or use taxes. Any referral to the AAG/A for approval under this subpart shall include comments on the extent to which alternative clauses, procedures, or practices may be utilized to accomplish the intended purpose without providing the basis for the contention that the contractor is an agent of the Government for the purpose of immunity from State and local sales or use taxes.

PART 2830—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 2830.2—CAS Program Requirements

2830.201–5 Waiver.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2830.2—CAS Program Requirements

2830.201–5 Waiver.

A request for a waiver of the Cost Accounting Standards requirements shall be forwarded to the HCA after the contracting officer has made the determination required by FAR 30.201–5.

PART 2831—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 2831.1—Applicability

2831.101 Objectives.
2831.109 Advance agreements.

Subpart 2831.2—Contracts With Commercial Organizations

2831.205 Selected costs.
2831.205–32 Precontract costs.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2831.1—Applicability

2831.101 Objectives.

(a) The PE is the official authorized to grant individual deviations from the cost principles of FAR part 31. All requests for individual deviations must cite the facts and circumstances surrounding the request as well as attempts to negotiate contractor compliance.

(b) Requests for class deviation from the cost principles set forth in FAR part 31 will be forwarded through the PE prior to submission to the Civilian Agency Acquisition Counsel. Requests must contain the information required in paragraph (a) of this section.

2831.109 Advance agreements.

(a) The DOJ and bureau contracting officers are encouraged to negotiate advance agreements concerning the treatment of special or unusual costs to avoid possible subsequent disputes or disallowance of costs based upon unreasonableness or nonallowability. All such agreements shall be negotiated in accordance with FAR 31.109 prior to the contractor incurring such costs. Contracting officers are not authorized to agree to a treatment of costs which would be inconsistent with FAR part 31.

(b) Prior to negotiating an advance agreement, contracting officers shall make a written determination setting forth the reasons and rationale for entering into such agreements. In addition, the determination will set forth the nature, the duration, and which contract or contracts are covered by the proposed agreement. All determinations required by this subpart will be reviewed and approved at a level above the contracting officer prior to negotiation of the proposed agreement. The approved determination will be placed in the contract file.

(c) All advance agreements shall be in writing and shall set forth the nature, duration, and contract or contracts covered by the agreements. Advance agreements will be signed by both the contractor and the contracting officer, and made a part of the contract file. Copies of executed advance agreements will be distributed to the cognizant audit office when applicable.

(d) All advance agreements will be incorporated in full in the subsequent contract(s) to which they pertain, prior to award.

Subpart 2831.2—Contracts With Commercial Organizations

2831.205 Selected costs.

2831.205–32 Precontract costs.

(a) Precontract cost authorizations shall be used only on cost reimbursement contracts, contain no provisions for payment of fees, and be treated as advance agreements in accordance with the provisions of FAR 31.109 and 2831.109.

(b) The following limitations apply to the execution of precontract cost authorizations.

(1) Contracts which are estimated to be greater than the simplified acquisition threshold may contain a precontract cost authorization providing the authorization is for a period of 60 days or less and the dollar amount does not exceed the lesser of the simplified acquisition threshold or one-third of the total estimated costs (including fee if any) of the contract.

(2) The limitation expressed under paragraph (b) of this section may be increased in unusual circumstances as appropriate, with the written approval of the HCA, but in no event shall they exceed one-third of the total estimated costs (including fee if any) of the contract or be for periods of time which exceed 90 days.

PART 2832—CONTRACT FINANCING

Subpart 2832.1—Non-Commercial Item Purchase Financing

2832.114 Unusual contract financing.

Subpart 2832.4—Advance Payments for Non-Commercial Items

2831.402 General.
2831.407 Interest.

Subpart 2832.9—Prompt Payment

2831.903 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2832.1—Non-Commercial Item Purchase Financing

2832.114 Unusual contract financing.

The HCA, or designee at a level not lower than the BPC, is the official authorized to approve unusual contract financing as set forth in FAR 31.114.

Subpart 2832.4—Advance Payments for Non-Commercial Items

2832.402 General.

(a) The authority to sign written determinations and findings with respect to making advance payments is vested in the HCA.

(b) Prior to awarding a contract which contains provisions for making advanced payments, the contract terms and conditions concerning advance payments must be approved at a level above the contracting officer, with advice and consent of the bureau's legal counsel.

(c) The contracting officer shall coordinate with the activity that is to provide contract financing for advance payments, the bureau's disbursing or finance office, or the Treasury Department, as appropriate, to ensure that all FAR and departmental requirements are met.

2832.407 Interest.

In cases where advance payments may be made on an interest free basis (FAR 32.407(d)), the intent to make such interest free advance payments, and the circumstance permitting interest free advance payments, shall be set forth in the original determination and findings and be approved in accordance with 2832.402.

Subpart 2832.9—Prompt Payment

2832.903 Policy.

The HCA is responsible for promulgating policies and procedures to implement FAR 32.9 and to ensure that, when specifying due dates, full consideration will be given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract.

PART 2833—PROTESTS, DISPUTES, AND APPEALS

Subpart 2833.1—Protests

2833.101 Definitions.
2833.102 General.
2833.103 Protests to the Agency.

Subpart 2833.2—Disputes and Appeals

2833.209 Suspected fraudulent claims.
2833.211 Contracting officer's decision.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2833.1—Protests

2833.101 Definitions.

(a) *Agency Protest Official* means the official, other than the contracting officer, designated to review and decide procurement protests filed with a contracting activity of the Department of Justice.

(1) This person will be at a level above that of the Contracting Officer, will be knowledgeable about the acquisition process in general and will have no programmatic interest in the procurement.

(2) This official shall be an individual designated by the head of the contracting activity and may be the Competition Advocate.

(b) *Deciding Official* means the person chosen by the protestor to decide the agency protest; it may be either the Contracting Officer or the Agency Protest Official.

(c) *Interested Party* means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

22833.102 General.

(a) This part prescribes policies and procedures for processing protests to the Department of Justice in accordance with Executive Order 12979, Agency Procurement Protests, dated October 25, 1995 and FAR 33.103. They are intended to be flexible and to provide for fair, quick, and inexpensive resolution of agency protests.

(b) Interested parties have the option of protesting to the Contracting Officer or to the Agency Protest Official.

(c) Contracting officers and potential protestors are encouraged to use their best efforts to resolve concerns through frank and open discussion, as required by FAR 33.103(b). In resolving concerns and/or protests, consideration should be given to the use of alternative dispute resolution techniques where appropriate.

(d) Responsibilities. (1) *Contracting Officers:*

(i) Include the provision at 2852.233–70 in all solicitations that are expected to exceed the simplified acquisition threshold.

(ii) If the protestor requests that the Contracting Officer decide the protest, or if the protest is silent on this issue, the Contracting Officer decides the protest using the procedures in this subpart and FAR 33.103.

(iii) If the protestor requests that the Agency Protest Official decide the protest, the Contracting Officer must ensure that the Agency Protest Official receives a copy of the materials served on the Contracting Officer within one business day after the filing date.

(2) *Agency Protest Official:* If the protestor requests that the Agency Protest Official decide the protest, the Official must use the procedures in this subpart and FAR 33.103 to provide an independent review of the issues raised in the protest.

2833.103 Protests to the Agency.

(a) The filing time frames in FAR 33.103(e) apply. An agency protest is filed when the protest complaint is received at the location the solicitation designates for serving protests.

(b) An interested party filing an agency protest has the choice of requesting either that the contracting

Officer or the Agency Protest Official decide the protest.

(c) In addition to the information required by FAR 33.103(d)(2), the protest must:

(1) Indicate that it is a protest to the agency.

(2) Be filed with the Contracting Officer.

(3) State whether the protestor chooses to have the Contracting Officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the Contracting Officer will decide the protest.

(4) Indicate whether the protestor prefers to make an oral or written presentation of arguments in support of the protest to the deciding official.

(d) The decision by the Agency Protest Official is an alternative to a decision by the Contracting Officer on a protest. The Agency Protest Official will not consider appeals from a Contracting Officer's decision on an agency protest.

(e) The deciding official must conduct a scheduling conference with the protestor within five (5) days after the protest is filed. The scheduling conference will establish deadlines for oral or written arguments in support of the agency protest and for agency officials to present information in response to the protest issues. The deciding official may hear oral arguments in support of the agency protest at the same time as the scheduling conference, depending on availability of the necessary parties.

(f) Oral conferences may take place either by telephone or in person. Other parties may attend at the discretion of the deciding official.

(g) The protestor has only one opportunity to support or explain the substance of its protest. Department of Justice procedures do not provide for any discovery. The deciding official has discretion to request additional information from either the agency or the protestor. However, the deciding official will normally decide protests on the basis of information provided by the protestor and the agency.

(h) The preferred practice is to resolve protests through informal oral discussion.

(i) An interested party may represent itself or be represented by legal counsel. The Department of Justice will not reimburse the protestor for any legal fees related to the agency protest.

(j) If an agency protest is received before contract award, the Contracting Officer must not make award unless the Head of the Contracting Activity makes a determination to proceed under FAR 33.103(f)(1). Similarly, if an agency protest is filed within ten (10) days after award, the Contracting Officer must stay performance unless the Head of the Contracting Activity makes a determination to proceed under FAR 33.103(f)(3). Any stay of award or suspension of performance remains in effect until the protest is decided, dismissed, or withdrawn.

(k) The deciding official must make a best effort to issue a decision on the protest within twenty (20) days after the filing date. The decision may be oral or written. If oral, the deciding official must send a confirming letter within three (3) days after the decision using a means that provides receipt. The confirming letter must include the following information:

(1) State whether the protest was denied, sustained or dismissed.

(2) Indicate the date the decision was provided.

(l) If the deciding official sustains the protest, relief may consist of any of the following:

(1) Recommendation that the contract be terminated for convenience or cause.

(2) Recompeting the requirement.

(3) Amending the solicitation.

(4) Refraining from exercising contract options.

(5) Awarding a contract consistent with statute, regulation, and the terms of the solicitation.

(6) Other action that the deciding official determines is appropriate.

(m) If the Agency Protest Official sustains a protest, then within 30 days after receiving the Official's recommendations for relief, the Contracting Officer must either:

(1) Fully implement the recommended relief; or

(2) Notify the Agency Protest Official in writing if any recommendations have not been implemented and explain why.

(n) Proceedings on an agency protest may be dismissed or stayed if a protest on the same or similar basis is filed with a protest forum outside of the Department of Justice.

Subpart 2833.2—Disputes and Appeals

2833.209 Suspected fraudulent claims.

Contracting officers shall report suspected fraudulent claims to the Office of the Inspector General.

2833.211 Contracting officer's decision.

(a) The Agency Board of Contract Appeals (BCA), which will hear appeals from the decisions of bureau contracting officers, is the Department of Transportation BCA. The procedures set forth in 48 CFR chapter 63 shall apply.

(b) Pursuant to 28 CFR 0.45(i), the contact for all appeals of decisions of DOJ contracting officers which will be forwarded to the BCA under paragraph (a) of this section, is the Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 2834—MAJOR SYSTEM ACQUISITION

Subpart 2834.0—General

2834.002 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2834.0—General

2834.002 Policy.

In accordance with Pub. L. 98–577, the Small Business and Federal Procurement Competition Enhancement Act of 1984, an executive agency may establish a dollar threshold for the designation of a major system. Accordingly, dollar thresholds for a major system under Office of Management and Budget Circular A–109 are designated in this section.

(a) *Major Automated Information System.* Within the Department of Justice, a major automated information system is one whose life-cycle cost is in excess of $100 million.

(b) *Major Real Property System.* (1) By purchase, when the assessed value of the property exceeds $60 million.

(2) By lease, when the annual rental charges, including basic services (e.g., cleaning, guards, maintenance), exceed $1.8 million.

(3) By transfer from another agency at no cost when the assessed value of the property exceeds $12 million.

(c) *Research and Development (R&D) System.* Any R&D activity expected to exceed $0.5 million, for the R&D phase is subject to OMB Circular A–109, unless exempted by the HCA.

(d) *Any other system or activity.* The HCA responsible for the system may designate any system or activity as a Major System under OMB Circular A–109 as a result of Departmental review, e.g., selected systems designed to support more than one principal organizational unit.

(e) *Exemption.* The AAG/A, upon recommendation by the HCA responsible for the system, may determine that because of the routine nature of the acquisition, the system (e.g., an information system utilizing only off-the-shelf hardware or software) will be exempt from the OMB Circular A–109 process, although by virtue of the life cycle costs, it would otherwise be identified as ''major'' in response to OMB Circular A–109.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 2842—CONTRACT ADMINISTRATION

Subpart 2842.15—Contractor Performance Information

2842.1502 Policy.
2842.1503 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2842.15—Contractor Performance Information

2842.1502 Policy.

The head of each contracting activity shall be responsible for establishing past performance evaluation procedures and systems as required by FAR 42.1502 and 42.1503.

2842.1503 Procedures.

Past performance evaluation procedures and systems shall include, to the greatest practical extent, the evaluation and performance rating factors set forth in the Office of Federal Procurement Policy best practices guide for past performance.

PART 2845—GOVERNMENT PROPERTY

Subpart 2845.1—General

2845.105 Records of Government property.

Subpart 2845.5—Management of Government Property in the Possession of Contractors

2845.505–14 Reports of Government Property.

Subpart 2845.6—Reporting, Redistribution, and Disposal of Contractor Inventory

2845.603 Disposal methods.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2845.1—General

2845.105 Records of Government property.

If departmental elements maintain the Government's official property management records, the contract records may be kept as a separate account in the bureau's internal property management system, in which case the contracting officer or formally designated property administrator shall serve as custodian of the account.

Subpart 2845.5—Management of Government Property in the Possession of Contractors

2845.505–14 Report of Government Property.

(a) In compliance with FAR 45.505–14, by January 31 of each year, DOJ contractors shall furnish the cognizant contracting officer an annual report of the DOJ property for which they are accountable as of the end of the calendar year.

(b) By March 1 of each year, bureaus shall submit a summary report of Departmental property furnished under each contract, as of the end of the calendar year, to the Facilities and Administrative Services Staff, Justice Management Division. The report shall be categorized in accordance with FAR 45.505 and shall include contracts for which the bureau maintains the official government records.

Subpart 2845.6—Reporting, Redistribution, and Disposal of Contractor Inventory

2845.603 Disposal methods.

Policies pertaining to reutilization and disposal of DOJ property, including requirements for internal screening, waivers, and disposal reporting, are prescribed in the Justice Property Management Regulations Subpart 128–43. Unless otherwise specified, the ''plant clearance officer'' shall be a designated utilization and disposal representative of a bureau's property management office.

PART 2846—QUALITY ASSURANCE

Subpart 2846.6—Material Inspection and Receiving Reports

Subpart 2846.7—Warranties

2845.704 Authority for use of warranties.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2846.6—Material Inspection and Receiving Reports

Bureaus shall prescribe procedures and instructions for the use, preparation, and distribution of material inspection and receiving reports and commercial shipping document/packing lists to evidence Government inspection.

Subpart 2846.7—Warranties

2846.704 Authority for use of warranties.

The use of a warranty in an acquisition shall be approved at a level above the contracting officer.

Subchapter H—Clauses and Forms

PART 2852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 2852.1—Instructions for Using Provisions and Clauses

2852.102 Incorporating provisions and clauses.
2852.102–270 Incorporation in full text.

Subpart 2852.2—Text of Provisions and Clauses

2852.201–70 Contracting Officer's Technical Representative (COTR).
2852.211–70 Brand-name or Equal.
2852.223–70 Unsafe Conditions Due to the Presence of Hazardous Material.
2852.233–70 Protests Filed Directly with the Department of Justice.

Authority: 28 U.S.C. 510; 49 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

Subpart 2852.1—Instructions for Using Provisions and Clauses

2852.102 Incorporating provisions and clauses.

2852.102–270 Incorporation in full text.

JAR provisions or clauses shall be incorporated in solicitations and contracts in full text.

Subpart 2852.2—Text of Provisions and Clauses

2852.201–70 Contracting Officer's Technical Representative (COTR).

As prescribed in subpart 2801.70, insert the following clauses:

Contracting Officer's Technical Representative (COTR) (JAN 1985)

(a) Mr./Ms. (Name) of (Organization) (Room No.), (Building), (Address), (Area Code & Telephone No.), is hereby designated to act as Contracting Officer's Technical Representative (COTR) under this contract.

(b) The COTR is responsible, as applicable, for: receiving all deliverables, inspecting and accepting the supplies or services provided hereunder in accordance with the terms and conditions of this contract; providing direction to the contractor which clarifies the contract effort, fills in details or otherwise serves to accomplish the contractual Scope of Work; evaluating performance; and certifying all invoices/vouchers for acceptance of the supplies or services furnished for payment.

(c) The COTR does not have the authority to alter the contractor's obligations under the contract, and/or modify any of the expressed terms, conditions, specifications, or cost of the agreement. If as a result of technical discussions it is desirable to alter/change contractual obligations or the Scope of Work, the Contracting Officer shall issue such changes.

(End of Clause)

2852.211–70 Brand-name or Equal.

As prescribed in 2811.104–70, insert the following clause:

BRAND-NAME OR EQUAL (JAN 1985)

(a) The terms ''bid'' and ''bidder'', as used in this clause, include the terms ''proposal'' and ''offerors''. The terms ''invitation for bids'' and ''invitation'', as used in this clause include the terms ''request for proposal'' and ''request''.

(b) If items called for by this invitation for bids have been identified in the schedule by a ''brand name or equal'' description, such identification is intended to be descriptive

but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering ''equal'' products (including products of a brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics and requirements listed in the invitation.

(c) Unless the bidder clearly indicates in his/her bid that he/she is offering an ''equal'' product, his/her bid shall be considered as offering the brand name product referenced in the invitation for bids.

(d)(1) If the bidder proposes to furnish an ''equal'' products, brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determinations to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his/her bid as well as other information reasonably available to the purchasing activity. To ensure that sufficient information is available, the bidder must furnish as a part of his/her bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to: (i) determine whether the product offered meets the salient characteristics requirements of the invitation for bids, and (ii) establish exactly what the bidder proposed to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the invitation for bids, he/she shall: (i) include in his/her bid a clear description of such proposed modifications, and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after the bid opening to make a product conform to a brand name product referenced in the invitation for bids will not be considered.

(End of Clause)

2852.223–70 Unsafe Conditions Due to the Presence of Hazardous Material

As prescribed in 2823.303–70, insert the following clause:

UNSAFE CONDITIONS DUE TO THE PRESENCE OF HAZARDOUS MATERIAL (JUNE 1996)

(a) ''Unsafe condition'' as used in this clause means the actual or potential exposure of contractor or Government employees to a hazardous material as defined in Federal Standard No. 313, and any revisions thereto during the term of this contract, or any other material or working condition designated by the Contracting Officer's Technical Representative (COTR) as potentially hazardous and requiring safety controls.

(b) The Occupational Safety and Health Administration (OSHA) is responsible for issuing and administering regulations that require contractors to apprise its employees of all hazards to which they may be exposed in the course of their employment; proper conditions and precautions for safe use and exposure; and related symptoms and emergency treatment in the event of exposure.

(c) Prior to commencement of work, contractors are required to inspect for and report to the contracting officer or designee the presence of, or suspected presence of, any unsafe condition including asbestos or other hazardous materials or working conditions in areas in which they will be working.

(d) If during the performance of the work under this contract, the contractor or any of its employees, or subcontractor employees, discovers the existence of an unsafe condition, the contractor shall immediately notify the contracting officer, or designee (with written notice provided not later than three (3) working days thereafter), of the existence of an unsafe condition. Such notice shall include the contractor's recommendations for the protection and the safety of Government, contractor and subcontractor personnel and property that may be exposed to the unsafe condition.

(e) When the Government receives notice of an unsafe condition from the contractor, the parties will agree on a course of action to mitigate the effects of that condition and, if necessary, the contract will be amended. Failure to agree on a course of action will constitute a dispute under the Disputes clause of this contract.

(f) Nothing contained in this clause shall relieve the contractor or subcontractors from complying with applicable Federal, State, and local laws, codes, ordinances and regulations (including the obtaining of licenses and permits) in connection with hazardous material including but not limited to the use, disturbance, or disposal of such material.

(End of Clause)

2852.233–70 Protests Filed Directly With the Department of Justice.

As prescribed in 2833.102(d), insert a clause substantially as follows:

PROTESTS FILED DIRECTLY WITH THE DEPARTMENT OF JUSTICE (JAN 1998)

(a) The following definitions apply in this provision:

(1) ''Agency Protest Official'' means the official, other than the contracting officer, designated to review and decide procurement protests filed with a contracting activity of the Department of Justice.

(2) ''Deciding Official'' means the person chosen by the protestor to decide the agency protest; it may be either the Contracting Officer or the Agency Protest Official.

(3) ''Interested Party'' means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(b) A protest filed directly with the Department of Justice must:

(1) Indicate that it is a protest to the agency.

(2) Be filed with the Contracting Officer.

(3) State whether the protestor chooses to have the Contracting Officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the Contracting Officer will decide the protest.

(4) Indicate whether the protestor prefers to make an oral or written presentation of arguments in support of the protest to the deciding official.

(5) Include the information required by FAR 33.103(d)(2):

(i) Name, address, fax number and telephone number of the protestor.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protestor is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(c) An interest party filing a protest with the Department of Justice has the choice of requesting either that the Contracting Officer of the Agency Protest Official decide the protest.

(d) The decision by the Agency Protest Official is an alternative to a decision by the Contracting Officer. The Agency Protest Official will not consider appeals from the Contracting Officer's decision on an agency protest.

(e) The deciding official must conduct a scheduling conference with the protestor within five (5) days after the protest is filed. The scheduling conference will establish deadlines for oral or written arguments in support of the agency protest and for agency officials to present information in response to the protest issues. The deciding official may hear oral arguments in support of the agency protest at the same time as the scheduling conference, depending on availability of the necessary parties.

(f) Oral conferences may take place either by telephone or in person. Other parties may attend at the discretion of the deciding official.

(g) The protestor has only one opportunity to support or explain the substance of its protest. Department of Justice procedures do not provide for any discovery. The deciding official may request additional information from either the agency or the protestor. The deciding official will resolve the protest through informal presentations or meetings to the maximum extent practicable.

(h) An interested party may represent itself or be represented by legal counsel. The Department of Justice will not reimburse the protester for any legal fees related to the agency protest.

(i) The Department of Justice will stay award or suspend contract performance in accordance with FAR 33.103(f). The stay or suspension, unless over-ridden, remains in effect until the protest is decided, dismissed, or withdrawn.

(j) The deciding official will make a best effort to issue a decision on the protest within twenty (20) days after the filing date. The decision may be oral or written.

(k) The Department of Justice may dismiss or stay proceeding on an agency protest if a protest on the same or similar basis is filed with a protest forum outside the Department of Justice.

(End of Clause)

[FR Doc. 98–380 Filed 1–8–98; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 232

[FRA Docket No. PB–9, Notice No. 9]

[RIN 2130–AB22]

Two-Way End-of-Train Telemetry Devices and Certain Passenger Train Operations

AGENCY: Federal Railroad Administration (FRA).

ACTION: Notice of withdrawal of previously issued and published notice of proposed rulemaking.

SUMMARY: FRA is withdrawing the notice of proposed rulemaking (NPRM) regarding two-way end-of-train telemetry devices and certain passenger train operations issued on December 29, 1997 and published in the **Federal Register** on January 5, 1998. *See* 63 FR 195. FRA inadvertently issued and published the NPRM prior to the completion of executive branch review of the document and is consequently withdrawing the proposal at this time. FRA intends to reissue an NPRM on two-way end-of-train telemetry devices and certain passenger train operations upon the completion of the review process.

FOR FURTHER INFORMATION CONTACT: James Wilson, Motive Power and Equipment Division, Office of Safety, RRS–14, FRA, 400 Seventh Street, S.W., Stop 25, Washington, D.C. 20590 (telephone 202–632–3367), or Thomas Herrmann, Trial Attorney, Office of the Chief Counsel, RCC–12, FRA, 400 Seventh Street, S.W., Stop 10, Washington, D.C. 20590 (telephone 202–632–3178).

Issued in Washington, DC, on January 6, 1998.

Jolene M. Molitoris,

Administrator.

[FR Doc. 98–693 Filed 1–8–98; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Notice of Reclassification of a Candidate Taxon: Clematis Hirsutissima var. Arizonica (Arizona Leatherflower)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of candidate taxon reclassification.

SUMMARY: In this document, the U.S. Fish and Wildlife Service (Service) provides the explanation for a change in the status of *Clematis hirsutissima* var. *arizonica* (Arizona leatherflower), a plant taxon that is under review for possible addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act of 1973, as amended (Act). Because it no longer meets the Act's definition of ''species,'' this taxon is being removed from candidate status at this time.

ADDRESSES: Questions concerning this notice should be submitted to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Mail Stop 452 ARLSQ, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species (see **ADDRESSES** section) (telephone: 703/358–2171).

SUPPLEMENTARY INFORMATION:

Background

Candidate taxa are those taxa for which the Service has on file sufficient information to support issuance of a proposed rule to list under the Act. In addition to its annual review of all candidate taxa, the Service has an on-going review process, particularly to update taxa whose status may have changed markedly. The results of this review indicate that the plant taxon *Clematis hirsutissima* var. *arizonica* (A. Heller) R.O. Erickson (Arizona leatherflower) should be removed from candidate status. This notice provides the specific explanation for the reclassification of this taxon.

It is important to note that candidate assessment is an ongoing function and changes in status should be expected. Taxa that are removed from the candidate list may be restored to candidate status if additional information supporting such a change becomes available to the Service. Requests for such information were issued by the Service most recently in the plant and animal candidate notice of review published in the **Federal Register** on September 19, 1997 (62 FR 49398).

The Service has included *Clematis hirsutissima* var. *arizonica* in the last five candidate notices of review for plants published in the **Federal Register**. The taxon was included as a category 2 candidate in the September 27, 1985 (50 FR 39526), notice of review. Prior to 1996, category 2 taxa were defined as under consideration for possible addition to the Federal Lists of Endangered and Threatened Wildlife and Plants, but for which conclusive data on biological vulnerability and threats were not currently available to support a proposed rule. *Clematis hirsutissima* var. *arizonica* was included as a category 1 candidate in the February 21, 1990 (55 FR 6184), and September 30, 1993 (58 FR 51144), notices of review. Category 1 candidates were defined as those taxa for which the Service had on file sufficient information on biological vulnerability and threats to support the preparation of listing proposals, but issuance of the proposed rule was precluded by other pending listing proposals of higher priority. On February 28, 1996, the Service published a notice of review (61 FR 7596) that discontinued the designation of category 2 candidates. *Clematis hirsutissima* var. *arizonica* was listed as a candidate in that notice of review, as well as in the September 19, 1997 (62 FR 49398), notice of review.

Finding

Clematis hirsutissima var. *arizonica* (Arizona leatherflower) was considered to be restricted to certain limestone soils in northern Arizona and possibly New Mexico. However, the results of a recently completed floristic review of the genus *Clematis* in North America (Pringle 1997) show no clear differences between *C. hirsutissima* var. *arizonica* and *C.h.* var. *hirsutissima* with respect to such features as the width of the leaflet lobes and the degree of spreading of the leaves, both of which had been considered distinguishing characteristics of *C.h.* var. *arizonica.* Pringle's review indicates that *C.h.* var. *arizonica* should be placed in synonymy under *C.h.* var. *hirsutissima.* The Service is now removing *Clematis hirsutissima* var. *arizonica* from candidate status, because it no longer meets the Act's definition of ''species.''

Clematis hirsutissima var. *hirsutissima* is a widespread taxon, known from nine western states (Pringle 1997), and is not in danger of extinction within the foreseeable future. The taxon

is not subject to a degree of threats sufficient to warrant candidate status.

Based on the above information, acceptance of either *Clematis hirsutissima* var. *arizonica* or *C.h.* var. *hirsutissima* as a candidate taxon is not warranted. Should additional study of the systematics of the species result in a peer-reviewed treatment that resurrects *C.h.* var. *arizonica,* the Service will reconsider according candidate status to that entity.

References Cited

Pringle, J.S. 1997. *Clematis,* pp. 160–176 in Flora of North America, Volume 3. Oxford University Press, New York.

Author: This notice was compiled from materials supplied by staff biologists located in the Service's southwestern regional and field offices. The materials were compiled by Joan E. Canfield, Division of Endangered Species (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Dated: December 30, 1997.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 98–549 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 63, No. 6

Friday, January 9, 1998

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 97–073N]

Nominations for Membership on the National Advisory Committee on Microbiological Criteria for Foods

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Department of Agriculture (USDA) is soliciting nominations for membership on the National Advisory Committee on Microbiological Criteria for Foods (NACMCF). Nominees are sought who have scientific expertise in the fields of Microbiology, Epidemiology, Food Technology, Food Production, Risk Assessment, and Animal and Public Health. Persons from the government, industry, academia, and consumer advocacy groups are invited to submit nominations.

DATES: The nominee's typed resume or curriculum vitae should be sent to the Office of the Administrator, Food Safety and Inspection Service (FSIS), 6913 Franklin Court, 1400 Independence Avenue, SW, Washington, DC 20250–3700, no later than 30 days from the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Ellis at the above address or by telephone at (202) 501–7625.

SUPPLEMENTARY INFORMATION:

NACMCF was established in April 1988 as a result of a recommendation by the National Academy of Sciences (NAS) Committee on Food Protection, Subcommittee on Microbiological Criteria, in a 1985 report entitled ''An Evaluation of the Role of Microbiological Criteria for Foods.'' NACMCF provides advice and recommendations to the Secretaries of Agriculture and Health and Human Services concerning microbiological and epidemiological aspects of food safety and foodborne diseases and provides specific information to the Departments of Defense and Commerce.

Appointment(s) to the Committee will be made by the Secretary of Agriculture after consultation with the Secretary of Health and Human Services. Advice on membership appointments will be requested from the Department of Commerce's National Marine Fisheries Service and the Department of Defense's U.S. Army, Veterinary Services Activity, because of their interest in microbial criteria for foods. Appointments to NACMCF are based primarily on expertise in food science, microbiology, and other relevant disciplines. To ensure that recommendations of the Committee take into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. Because of the complexity of the issues to be addressed, it is anticipated that the full Committee will meet three times annually, and the subcommittees will meet as often as necessary.

There are three vacancies on the advisory Committee. There is a minimum 2-year commitment, and appointments are limited to a maximum of 6 years. Participation may require 2 work outside of scheduled Committee and subcommittee meetings and include the preparation of written documents.

Done at Washington, DC, on December 29, 1997.

Thomas J. Billy,

Administrator.

[FR Doc. 98–571 Filed 1–8–98; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket 97–071N]

National Advisory Committee on Meat and Poultry Inspection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice

SUMMARY: The Food Safety and Inspection Service (FSIS) published a document in the **Federal Register** of December 12, 1997, concerning a public meeting by the National Advisory Committee on Meat and Poultry Inspection on January 13 and 14, 1998, to continue discussion of key policy issues. The document did not include the Schedule of Events.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Micchelli at (202) 720–6269 or FAX to (202) 690–1030.

SUPPLEMENTARY INFORMATION:

In the December 12, 1997, **Federal Register** (62 FR 65409), FSIS announced that the National Advisory Committee on Meat and Poultry Inspection will meet on January 13 and 14, 1998, to continue consideration of three policy issues: (1) Interstate shipment of state inspected product; (2) HACCP Inspection Models; and (3) inspection resource management in a HACCP environment. The Schedule of Events is an outline of the times for discussion of particular topics. The Schedule of Events for the meeting is available on the FSIS Homepage at http://www.usda.gov/agency/fsis/homepage.htm. The Schedule of Events also is available by FAST FAX, FSIS' automated retrieval system, at (800) 238–8281 or (202) 690–3754 or by contacting the individual named above. The reference number for the FAST FAX system is 4012.

Done at Washington, DC on: December 30, 1997.

Thomas J. Billy,

Administrator.

[FR Doc. 98–572 Filed 1–8–98; 8:45 am]

BILLING CODE 3410–DM–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: February 9, 1998.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202–4302.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION:

On June 6, 13, November 14 and 21, 1997, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (62 F.R. 31065, 32288, 61081 and 62284) of proposed additions to the Procurement List.

The Following Comments Pertain to Cap, Cold Weather

Comments were received from the current contractor as a result of a Committee request for sales data and through a Member of Congress. The contractor claimed that addition of the cap to the Procurement List would have a severe adverse impact on the company. One reason for this severe impact is the cumulative impact of earlier additions to the Procurement List of headwear items made by the contractor.

The Committee originally proposed the addition of the entire Government requirement for the cap to the Procurement List, for production by two nonprofit agencies employing people with severe disabilities. Because of the concerns expressed by the contractor, the Committee decided to reduce the addition proposal to 50 percent of the Government requirement, to be produced by only one nonprofit agency. This change will reduce the impact on the contractor below the level which the Committee normally considers severe adverse impact. In addition, the contractor will be allowed to finish its current contract, as the Committee's mandate applies only to contracts formed after the effective date of a Procurement List addition.

As for the cumulative impact issues the contractor raised, the contractor's use of its 1991 sales year as the high point from which a subsequent sales decline is measured is misleading, as 1991 was a good year for all military cap manufacturers because of the high number of orders then to support Operation Desert Shield/Storm. The contractor's sales in 1989 and 1993 are more reflective of a typical sales year, and those are not substantially different from the contractor's current annual sales. Moreover, while the contractor may not have completely recovered from the impacts of the Committee's previous actions, the primary reason its sales have not increased is military downsizing in recent years. Troop reductions, and not the effects of the Committee's program, have reduced the sales of most military cap manufacturers, including those involved in the Committee's program and the current contractor.

Of the three caps the contractor identified as previous impacts, one was added to the Procurement List in 1989 and the other in 1993. The contractor was not the current contractor for the third cap (Cap, Combat Camouflage) when it was added to the Procurement List. Only 50 percent of the Government requirement for the 1989 addition, a Marine Corps utility cap, was taken out of competitive procurement, so the contractor continued to be eligible to compete for Government contracts for the other half of the Government requirement for this cap.

The Following Comments Pertain to Tray, MM, Fiberboard

The Committee initially proposed to add the total Government requirement for fiberboard MM trays and sleeves to the Procurement List. Comments were received from two companies which were current contractors for these items at the time the Committee wrote to them to request sales data. One company indicated that the items made up a substantial portion of its sales, and losing them would also cause layoffs of some workers. The other company described the production process and questioned whether the designated nonprofit agency would be capable of acquiring the machinery needed to perform it to Government specifications.

Before the Committee took any action, a new contract was awarded for the sleeves, and neither company received the award. Consequently, when the Committee added the sleeves to the Procurement List, both companies had already lost the business and only lost the opportunity to compete for subsequent procurements of these items. The Committee does not consider this type of loss to be a severe impact on the companies, because all they are losing is the possibility of a contract, not acutal work on which they have come to rely.

This addition involves only the fiberboard MM trays. The quantity of the Government's tray requirement which the Committee is adding to the Procurement List is 45 percent of the total Government requirement (not to exceed 20 million trays annually), leaving more than half the requirement available for production by either of the two contractors or others under the competitive bidding system. The portion of the requirement being added to the Procurement List represents a percentage of the contractors' sales which is below the level the Committee considers to be severe adverse impact.

The designated nonprofit agency has experience in producing corrugated items for the Government and other customers. The Committee's industrial engineer has reviewed the capability assessments which have been done by the contracting activity and the central nonprofit agency, and has concluded that the nonprofit agency will be capable of producing the trays to Government specifications at the time of contract performance.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities and services and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities and services proposed for addition to the Procurement List.

Accordingly, the following commodities and services are hereby added to the Procurement List:

Commodities

Office and Miscellaneous Supplies

(Requirements for the Naval Station, Ingleside, Texas)

Sponge, Cellulose
7920–01–444–3650

Cap, Cold Weather
8415–01–099–7843 thru –7848
(50% of the Government's requirement)

Tray, MM, Fiberboard

P.S. 3916
(45% of annual requirements up to 20 million)
Extra Life & Shipper
M.R. 858
M.R. 859

Services

Janitorial/Custodial
Naval Air Reserve
Moffett Field, California
Janitorial/Custodial
Robert N.C. Nix, Sr. Federal Center
9th & Market Street
Philadelphia, Pennsylvania
Switchboard Operation
Veterans Affairs Medical Center
2250 Leestown Road
Lexington, Kentucky

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 98–577 Filed 1–8–98; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Addition to and Deletions from Procurement List.

SUMMARY: The Committee has received proposals to add to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete services previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: February 9, 1998.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202–4302.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Addition

If the Committee approves the proposed addition, all entities of the Federal Government (except as otherwise indicated) will be required to procure the service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the service.

3. The action will result in authorizing small entities to furnish the service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46—48c) in connection with the service proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following service has been proposed for addition to Procurement List for production by the nonprofit agency listed:

Janitorial/Custodial
Defense Finance and Accounting Service (DFAS)
Rome, New York
NPA: The Arc, Onieda-Lewis Chapter, NYSARC, Utica, New York

Deletions

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action does not appear to have a severe economic impact on future contractors for the services.

3. The action will result in authorizing small entities to furnish the services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for deletion from the Procurement List.

The following services have been proposed for deletion from the Procurement List:

Disposal Support Services
Defense Reutilization and Marketing Office (DRMO)
Alameda, California
Janitorial/Custodial
Building 243 ''A-G'' Bay
McClellan AFB, California
Janitorial/Custodial
Border Station
Chateaugay, New York
Microfilming of EEG Records
Department of Veterans Affairs Medical Center
Buffalo, New York

Beverly L. Milkman,

Executive Director.

[FR Doc. 98–578 Filed 1–8–98; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Proposed Additions to the Procurement List; Correction

In the document appearing on page 63314, FR Doc. 97–31380, in the issue of November 28, 1997, in the first column, the service listed as Janitorial/Grounds Maintenance, West Los Angeles Federal Building and U.S. Post Office, 11000 Wilshire Boulevard, Los Angeles, California should read: Janitorial/Grounds Maintenance for the following locations in Los Angeles, California: West Los Angeles Federal Building & U.S. Post Office, 11000 Wilshire Boulevard and the FBI Garage, 1260 Sepulveda Boulevard.

Beverly L. Milkman,

Executive Director.

[FR Doc. 98–579 Filed 1–8–98; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket No. 970408082–7273–02]

Block Group Program for Census 2000—Final Criteria

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of final program.

SUMMARY: Block groups are geographic statistical divisions of census tracts, each of which consists of from one to nine block groups. A block group comprises a reasonably compact and contiguous cluster of census blocks. The

primary goal of the block group program is to provide data users with a geographic subunit of census tracts for which decennial census sample and 100 percent data are tabulated and disseminated.

The Census Bureau first used block groups in its data presentations from the 1970 census. It did this in lieu of providing data summaries for enumeration districts in areas that had census block numbers. As census blocks and block groups became increasingly popular with data users, the Census Bureau established them in many new areas. By 1990, there was complete census block and block group coverage for all of the United States, Puerto Rico, and the Island Areas (American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands of the United States).

Through the 1990 census, block groups were subunits either of census tracts or of statistically equivalent entities known as block numbering areas (BNAs). For areas where census tracts did not exist, the Census Bureau had established BNAs to control the numbering of census blocks within block groups. A county or statistically equivalent entity [1] could, therefore, have either census tracts or BNAs. For Census 2000, the Census Bureau will combine the similar programs into a single census tract program.

To determine boundaries and identification numbers for block groups, the Census Bureau offers a program to local participants, such as locally identified agencies and American Indian tribal officials and Alaska Native officials, whereby they can review and update the boundaries of the block groups delineated for the 1990 census and suggest revisions according to the criteria developed and promulgated by the Census Bureau. The Census Bureau will then review the resulting block groups for conformance to these criteria. The Census Bureau does not take into account or attempt to anticipate any nonstatistical uses that may be made of block groups, nor will the Census Bureau modify the definition of block groups to meet the requirements of any nonstatistical program.

The Census Bureau is now publishing final criteria for the delineation of block groups for Census 2000. These criteria will apply to the 50 states, American Indian and Alaska Native areas, Puerto Rico, and the Island Areas. The Census Bureau may modify and, if necessary, reject proposals for block groups that do not meet the criteria established following this notice.

In addition to these final criteria, this notice includes a description of the changes from the criteria used for the 1990 census and a list of definitions of key terms used in the criteria.

DATES: The Block Group criteria for Census 2000 become effective February 9, 1998.

ADDRESSES: Director, Bureau of the Census, Washington, DC 20233–0001.

FOR FURTHER INFORMATION CONTACT: Dr. Joel Morrison, Chief, Geography Division, Bureau of the Census, Washington, DC 20233–7400, telephone (301) 457–1132, or e-mail (j.morrison@geo.census.gov).

SUPPLEMENTARY INFORMATION: The block group delineation criteria have evolved in response to decennial census practices and the preferences of program participants and data users. After each decennial census, the Census Bureau, in consultation with participants and data users, reviews and revises these criteria. Then, before the next decennial census, the Census Bureau offers state, tribal, and local officials an opportunity to correct, update, and otherwise improve the block group delineations.

In July and August 1995, the Census Bureau issued invitations to local and tribal groups and agencies to participate in the delineation of statistical geographic areas for Census 2000. These groups and agencies included regional planning agencies, councils of governments, county planning agencies, officials of federally recognized American Indian tribes, and officials of the 12 nonprofit Alaska Native Regional Corporations.

By early 1998, the Census Bureau will provide maps and detailed guidelines to program participants for the review and delineation of block groups for Census 2000.

Response to Comments

The Census Bureau issued a Notice of Proposed Program Revisions and Request for Comments in the **Federal Register** (62 FR 24077) on Friday, May 2, 1997. That notice solicited comments on the proposed criteria for delineating block groups for Census 2000. The Census Bureau received only one comment—from a county planning department requesting the continued use of housing unit estimates rather than population estimates as a basis for proposing block groups. In response, the Census Bureau expressed its willingness to accept block group proposals based on housing unit estimates. The Census Bureau is maintaining its population-based criteria and will apply a standard figure (2.5 persons per household) to convert housing units to population estimates.

Executive Order 12866

This notice does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Assistant General Counsel for Legislation and Regulation, Department of Commerce, certified to the Chief Counsel, Small Business Administration, that this notice will not have a significant economic impact on a substantial number of small entities. This notice sets forth the criteria for the delineation of block groups for Census 2000. The criteria will be used to provide geographic subunits of census tracts for the tabulation of census data. Thus, because the Census Bureau uses block groups to tabulate and disseminate statistical data from the decennial census, the delineation of block groups is solely for statistical purposes. It will not have a significant economic impact on a substantial number of small entities.

Final Program Requirements

A. Criteria for Delineating Block Groups for Census 2000

The Census Bureau announces the following final criteria for use in delineating Census 2000 block groups:

1. General Characteristics

- A block group must meet the population and boundary feature criteria and comprise a compact piece of territory.
- A census tract boundary always must be a block group boundary.
- Each census tract must contain a minimum of one block group and may have a maximum of nine block groups.
- Block groups must cover the entire land and inland water area of a census tract.
- A block group entirely within an American Indian reservation may extend across a state or county boundary for tabulations in the American Indian geographic hierarchy. For standard data tabulations, the portion of the block group in each state and county is treated as a separate block group.

[1] Includes parishes in Louisiana; boroughs and census areas in Alaska; independent cities in Maryland, Missouri, Nevada, and Virginia; that portion of Yellowstone National Park in Montana; districts/islands in American Samoa and the main islands of the Virgin Islands of the United States; municipalities in the Northern Mariana Islands; municipios in Puerto Rico; the entire area constituting the District of Columbia; and the entire area constituting Guam. This notice will refer to all these entities collectively as ''counties.''

2. Identification

- A block group consists of all blocks within a census tract that have the same first digit and is identified using that same first digit. For example in 1990, block group 3 included all census blocks numbered in the 300s. For Census 2000, the Census Bureau will introduce a four-digit block numbering system, and block group 3 will include all census blocks numbered in the 3000s within a census tract.
- The range of acceptable block group numbers is 1 through 9. Block group numbers must always be unique within a census tract; that is, the same number cannot be repeated.
- The Census Bureau will assign a single ''zero'' block group to census tracts numbered ''0000.'' (In counties that have coastal water, territorial sea, or Great Lakes waters, the Census Bureau recommends establishing a ''0000'' census tract to provide complete area coverage.)

3. Boundary Features

The Census Bureau recommends that block group boundaries follow visible and identifiable features; that is, visible, perennial natural and cultural features, such as roads; rivers; canals; railroads; above-ground, high-tension power lines; and so forth. This provision makes the location of boundaries less ambiguous and easier for data users to locate.

State and county boundaries are always block group boundaries. The Census Bureau also permits the use of other types of legal boundaries in some states and situations where the boundaries of these governmental units tend to remain unchanged between censuses. The following features are acceptable as block group boundaries:

- American Indian reservation and trust land boundaries.
- All minor civil division (MCD) boundaries (generally towns or townships) in Connecticut, Indiana, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.
- Those MCD boundaries not conjoint with the boundaries of incorporated places that themselves are MCDs (being either coextensive with or independent of MCDs) in Illinois (townships only, not election precincts), Iowa, Kansas, Michigan, Minnesota, Missouri (governmental townships only), Nebraska (townships only, not election precincts), North Dakota, Ohio, South Dakota, and Wisconsin.
- Barrio, barrio-pueblo, and subbarrio boundaries in Puerto Rico, census subdistrict boundaries in the Virgin Islands of the United States, MCD-county and island boundaries in American Samoa, municipal district boundaries in the Northern Mariana Islands, and election district boundaries in Guam.
- All incorporated place boundaries in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.
- Conjoint incorporated place boundaries in other states; that is, the boundary separating two different incorporated places.
- Alaska Native village statistical area and Alaska Native Regional Corporation boundaries, at the discretion of the Census Bureau, insofar as such boundaries are unambiguous for allocating living quarters as part of Census 2000 activities.

When the above types of features are not available for selection, the Census Bureau may, at its discretion, approve other nonstandard visible features, such as ridge lines, pipelines, intermittent streams, fence lines, and so forth. The Census Bureau also may accept, on a case-by-case basis, the boundaries of selected nonstandard and potentially nonvisible features, such as the boundaries of national parks and national forests, cemeteries, or other special land-use properties; the straight-line extensions of visible features; and other lines of sight.

4. Population Thresholds

The Census Bureau has established standard size criteria for most block groups in the United States, Puerto Rico, and the Island Areas (American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands of the United States). (See Table 1.) Smaller optimum and minimum sizes are permissible for block groups located on American Indian reservations or comprising special places. (Special places are correctional institutions, military installations, college campuses, workers' dormitories, hospitals, nursing homes, and group homes.)

TABLE 1.—POPULATION THRESHOLDS FOR CENSUS 2000 BLOCK GROUPS

Area(s)	Optimum	Minimum	Maximum
United States, Puerto Rico, and the Island Areas	1,500	600	3,000
American Indian reservations	1,000	300	3,000
Special place block group	None	300	None.

If a block group located on an American Indian reservation crosses a county boundary or a state boundary, the minimum population size criterion applies to the entire area of the block group, not to the individual portions that are in separate counties or states.

5. Final Approval of Block Groups

The Census Bureau reserves the right to approve all block group proposals for Census 2000. The Census Bureau will make an effort to reach agreement with local and tribal participants in the block group program, but cannot approve the use of block groups as submitted if they do not meet Census 2000 criteria. If necessary, the Census Bureau will revise block group boundaries where they do not meet the boundary and population size requirements.

B. Changes to the Criteria for Census 2000

Most provisions of the block group criteria remain unchanged from those used in conjunction with the 1990 census, with the few exceptions summarized below:

1. For 1990 and previous decennial censuses, the Census Bureau delineated the block groups in BNAs on the basis of the number of housing units rather than population. For Census 2000, the Census Bureau is merging the census tract and BNA programs to create a single census tract program, and the size criteria for all block groups will be on the basis of population rather than the number of housing units.

2. For Census 2000, the Census Bureau is increasing the number of governmental units that have boundaries acceptable to use as block group boundaries. The added areas are: all MCDs in Indiana and selected MCDs in Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin; the MCD-county and island areas of American Samoa; and villages in New York.

3. The Census Bureau now allows officials of federally recognized

American Indian reservations to establish block groups that cross state or county boundaries. While the Census Bureau will publish data for each state-county-census tract-block group part, it also plans to provide summed data for all block groups that are located within a federally recognized American Indian reservation and that cross state or county boundaries.

Definitions of Key Terms

Alaska Native Regional Corporation (ANRC)—A corporate entity established under the Alaska Native Claims Settlement Act of 1972, Public Law 92–203, as amended by Public Law 92–204, to conduct both the business and nonprofit affairs of Alaska Natives. Twelve ANRCs cover the entire State of Alaska except for the Annette Islands Reserve.

Alaska Native village statistical area (ANVSA)—A statistical entity containing the densely settled extent of an Alaska Native village that constitutes an association, band, clan, community, group, tribe, or village recognized pursuant to the Alaska Native Claims Settlement Act of 1972, Public Law 92–203, as amended by Public Law 92–204.

American Indian reservation (AIR)—A federally recognized American Indian entity with boundaries established by treaty, statute, and/or executive or court order and over which American Indians have governmental jurisdiction. Along with reservation, designations such as colonies, communities, pueblos, rancherias, and reserves apply to AIRs.

Block numbering area (BNA)—A small-area, statistical geographic division of a county or statistically equivalent area delineated in 1990 instead of and generally geographically equivalent to a census tract. For Census 2000, the Census Bureau is merging the BNA program with the census tract program and converting all BNAs to census tracts.

Census block—The smallest geographic entity for which the Census Bureau collects and tabulates decennial census information, bounded on all sides by visible and nonvisible features identified by the Census Bureau in computer files and on maps.

Census tract—A small, relatively permanent statistical geographic subdivision of a county or statistically equivalent area defined for the tabulation of data. For Census 2000, the Census Bureau is replacing BNAs with census tracts.

Coastal water—Water bodies between territorial seas and inland water, the encompassing headlands being greater than 1 mile apart and less than 24 miles apart.

Conjoint—A description of a boundary shared by two adjacent geographic areas.

Contiguous—A description of geographic areas that are adjacent to one another, sharing either a common boundary or point.

Great Lakes waters—Water area beyond one-mile-wide headland embayments located in any of the five Great Lakes: Erie, Huron, Michigan, Ontario, or Superior.

Incorporated place—A type of governmental unit, sanctioned by state law as a city, town (except in New England, New York, and Wisconsin), village, or borough (except in Alaska and New York), having legally prescribed limits, powers, and functions.

Inland water—Water bodies entirely surrounded by land or at the point where their opening to coastal waters, territorial seas, or the Great Lakes is less than one mile across.

Minor civil division (MCD)—The primary governmental or administrative division of a county in 28 states, Puerto Rico, and the Island Areas having legal boundaries, names, and descriptions. MCDs represent many different types of legal entities with a wide variety of characteristics, powers, and functions depending on the state and type of MCD. In some states, some or all of the incorporated places also constitute MCDs.

Nonvisible feature—A map feature that is not visible on the ground, such as a city or county boundary through space, a property line, a short line-of-sight extension of a road, or a point-to-point line of sight.

Special place—A specific location requiring special enumeration procedures because the location includes people not in households, or the area includes special land use. Special places include facilities with resident population, such as correctional institutions, military installations, college campuses, workers' dormitories, hospitals, nursing homes, and group homes; and land-use areas such as national parks. A special place includes the entire facility, including nonresidential areas and staff housing units, as well as all group quarters population.

Territorial seas—Water bodies not included under the rules for inland water, coastal water, or Great Lakes waters (see above).

Visible feature—A map feature that one can see on the ground, such as a road, railroad track, above-ground transmission line, stream, shoreline, fence, sharply defined mountain ridge, or cliff. A nonstandard visible feature is a feature that may not be clearly defined on the ground (such as a ridge), may be seasonal (such as an intermittent stream), or may be relatively impermanent (such as a fence). The Census Bureau generally requests verification that nonstandard features pose no problem in their location during field work.

Dated: November 25, 1997.

Martha Farnsworth Riche,

Director, Bureau of the Census.

[FR Doc. 98–544 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket No. 970501104–7271–02]

Census County Division (CCD) Program for Census 2000—Final Criteria

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of final program.

SUMMARY: Census county divisions (CCDs) are geographic statistical entities established cooperatively by the Census Bureau and officials of state and local governments in 21 states where minor civil divisions (MCDs) either do not exist or are unsatisfactory for reporting decennial census data. The primary goal of the CCD program is to establish and maintain a set of subcounty units that have stable boundaries and recognizable names. A CCD usually represents one or more communities, trading centers, or, in some instances, major land uses. It usually consists of a single geographic piece that is relatively compact in shape. The geographic ''building blocks'' of CCDs are census tracts, and many CCDs are groupings of several contiguous census tracts.

Since the 1950s, the Census Bureau has worked with state and local officials to create subcounty areas for the collection, presentation, and analysis of census statistics in states where MCDs do not exist, are not well-known locally, or are subject to frequent change. By 1990, 21 states had shifted to CCDs: Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Montana, Nevada, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Washington, and Wyoming. Once a state has replaced its MCDs with CCDs, it usually keeps them throughout subsequent decennial censuses. For Census 2000, all of the above 21 states will retain their CCDs.

To maintain and update the boundaries and names of CCDs for Census 2000, the Census Bureau offers a program for state and local officials to review and update their 1990 CCDs according to criteria developed and promulgated by the Census Bureau. The Census Bureau then reviews their CCD plans for conformance to these criteria.

The Census Bureau is now publishing the final CCD criteria proposed for Census 2000. These criteria will apply only to states with CCDs. The Census Bureau may modify and, if necessary, reject proposals for any CCD changes that do not meet its criteria.

In addition to these final criteria, this notice includes a description of the changes from the criteria used for the 1990 census and a list of definitions of key terms used in the criteria.

DATES: The CCD criteria for Census 2000 become effective on February 9, 1998.

ADDRESSES: Director, Bureau of the Census, Washington, DC 20233–0001.

FOR FURTHER INFORMATION CONTACT: Dr. Joel Morrison, Chief, Geography Division, Bureau of the Census, Washington, DC 20233–7400, telephone (301) 457–1132, or e-mail (j.morrison@geo.census.gov).

SUPPLEMENTARY INFORMATION: The CCD criteria have evolved in response to decennial census practices and the preferences of state and local participants and data users. After each decennial census, the Census Bureau, in consultation with program participants and data users, reviews and revises these criteria. Then, before the next decennial census, the Census Bureau offers participants and data users an opportunity to correct, update, and otherwise improve their CCDs.

In July and August 1995, the Census Bureau issued invitations to state and local groups and agencies to participate in the delineation of statistical geographic areas for Census 2000. These included state and regional planning agencies, councils of governments, and county planning agencies.

By early 1998, the Census Bureau will provide maps and detailed guidelines to program participants for the review and delineation of CCDs for Census 2000.

Response to Comments

The Census Bureau issued a Notice of Proposed Program Revisions and Request for Comments in the **Federal Register** (62 FR 27217) on Monday, May 19, 1997. That notice solicited comments on the proposed criteria changes for delineating CCDs for Census 2000. The Census Bureau received comments from a State Data Center proposing major modifications to CCDs on the basis of population size. In counties of 500,000 people or more, the proposal was to subdivide some CCDs with very large populations. In smaller counties, the CCDs would be consolidated into units with minimum populations from 20,000–30,000 people. In response, the Census Bureau indicated its willingness to consider proposals to subdivide some of the most populous CCDs, provided that such modifications did not violate the delineation criteria. However, the Census Bureau could not agree to the minimum population threshold of 20,000 people for a CCD, because such a major consolidation would cause an unacceptable disruption of historical comparability and a loss of name identification for many distinct geographic regions within counties.

Executive Order 12866

This notice does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Assistant General Counsel for Legislation and Regulation, Department of Commerce, certified to the Chief Counsel, Small Business Administration, that this notice will not have a significant economic impact on a substantial number of small entities. This notice sets forth the criteria for the delineation of CCDs for Census 2000. These criteria will be used to establish and maintain a set of subcounty areas for the collection, presentation, and analysis of census statistics in states that have CCDs. Because CCDs are used solely for statistical purposes, their delineation will not have a significant economic impact on a substantial number of entities.

Final Program Requirements

A. Criteria for Delineating CCDs for Census 2000

The Census Bureau requires that CCDs—(1) have community orientation, (2) have visible, stable boundaries, (3) conform to groupings of census tracts, and (4) have recognizable names.

1. Community Orientation

Each CCD should focus on one or more communities or places and take in the additional surrounding territory that is served by these in some fashion. The definition of community should take into account factors such as production, marketing, consumption, and the integrating factor of local institutions.

The community on which a CCD is centered usually is an incorporated place or a census designated place. In some cases, the CCD may be centered on a major area of significantly different land use or ownership, such as a large military base or American Indian reservation. In other situations, a CCD can represent an area that is physiographically different from the rest of the county. A CCD should always consist of a single geographic piece that is relatively compact in shape.

2. Visible, Stable Boundaries

A CCD should have easily locatable boundaries that seldom change. These should be readily discernible in the field and easy to depict on maps. This provision makes the location of boundaries less ambiguous and easier for data users to locate. The following features are acceptable:

- County boundaries (always a CCD boundary).
- Census tract boundaries, which usually follow visible, perennial natural and cultural features, such as roads; rivers; canals; railroads; above-ground, high-tension power lines; and so forth.
- American Indian reservation boundaries.
- Conjoint city limits (in certain situations).

When the above types of features are not available for selection, the Census Bureau may, at its discretion, approve nonstandard visible features, such as ridge lines, pipelines, intermittent streams, fence lines, and so forth. The Census Bureau also may accept, on a case-by-case basis, the boundaries of selected nonstandard and potentially nonvisible features, such as the boundaries of national parks and national forests, cemeteries or other special land-use properties; the straight-line extensions of visible features; and other lines of sight.

3. Groupings of Census Tracts, CCD Population Size

A CCD should almost always consist of one census tract or a combination of contiguous census tracts. Therefore, CCD boundaries should conform to census tract boundaries. In counties that had block numbering areas (BNAs) in 1990, program participants will be converting the BNAs to census tracts. For these counties, the Census Bureau strongly recommends adjusting the CCDs to conform to groupings of census tracts. As an alternative, program participants may use the CCD framework as a basis for establishing some or all of their census tracts. It is permissible to use both approaches.

In a few exceptional situations, some CCD boundaries may not need to follow census tract boundaries, and there may

be two or more 1990 CCDs within one census tract. Usually, such situations are limited to very sparsely populated counties with a large land area.

Population size is not as important a consideration with CCDs as it is with census tracts. Historically, CCDs have ranged from a few hundred people (in selected situations) to more than one million. However, insofar as possible, CCDs that are new for Census 2000 should have a population of at least 1,500 people, the recommended minimum for a census tract.

4. Name Identification

A CCD usually should be named after the largest population center or place within it (Los Angeles). Sometimes a CCD name may represent the two largest centers; for example, Bayard-Santa Rita. In some situations, a CCD may be named after a prominent physical feature (Castle Rock, Lake Mono, Pikes Peak) or a distinctive region within the county (Death Valley, Everglades, Lower Keys, Tellico Plains). In other cases, a CCD name may consist of the county name and a compass direction to indicate the portion of the county in the CCD, or a place name and a compass direction to give the CCD location relative to the place. The directional indicator usually precedes a county name, as in Northwest Union. If a place name is used, the directional indicator follows it; for example, Smithville North. In all cases, the objective is to identify clearly the extent of the CCD by means of an area name; CCD names always should be meaningful to data users.

5. Revisions to Existing CCDs

Some 1990 CCD boundaries have errors. Most of these involve small areas where the CCD boundaries and census tract boundaries were supposed to be conjoint but were not. The Census Bureau will bring these specific situations to the attention of local participants and request that they submit corrections.

The Census Bureau does not encourage state and local officials to make major revisions to their CCDs, since the goal of the program is to maintain a set of stable subcounty entities that allows data comparability from census to census. However, updates and revisions may be necessary in some instances, such as where there have been county boundary changes, revisions to census tract boundaries, or as part of the initial delineation of census tracts. Additionally, revisions to CCD names may be necessary due to population changes within CCDs.

6. Final Approval of CCDs

The Census Bureau reserves the right to approve all CCD proposals for Census 2000. The Census Bureau will make an effort to reach agreement with local participants, but cannot approve the CCDs submitted if the changes are unwarranted or do not meet Census 2000 criteria. If necessary, the Census Bureau will revise CCDs that do not meet its requirements.

B. Changes to the Criteria for Census 2000

Most provisions of the CCD criteria remain unchanged from those used in conjunction with the 1990 census. The only major change is the shift to census tracts in all counties that had BNAs and the need to adjust the CCDs in those counties to the boundaries of census tracts.

Definitions of Key Terms

American Indian reservation (AIR)—A federally recognized American Indian entity with boundaries established by treaty, statute, and/or executive or court order and over which American Indians have governmental jurisdiction. Along with reservation, designations such as colonies, communities, pueblos, rancherias, and reserves apply to AIRs.

Block numbering area (BNA)—A small-area, statistical geographic division of a county or statistically equivalent area delineated in 1990 instead of and generally geographically equivalent to a census tract. For Census 2000, the Census Bureau is merging the BNA program with the census tract program and converting all BNAs to census tracts.

Census block—The smallest geographic entity for which the Census Bureau collects and tabulates decennial census information, bounded on all sides by visible and nonvisible features identified by the Census Bureau in computer files and on maps.

Census designated place (CDP)—A locally recognized, closely settled population center identified by name. The Census Bureau uses CDPs to present data for localities that otherwise would not be identified as places in its data products.

Census tract—A small, relatively permanent statistical geographic subdivision of a county or statistically equivalent area defined for the tabulation of data. For Census 2000, the Census Bureau is replacing BNAs with census tracts.

Conjoint—A description of a boundary shared by two adjacent geographic areas.

Contiguous—A description of geographic areas that are adjacent to one another, sharing either a common boundary or point.

Incorporated place—A type of governmental unit, sanctioned by state law as a city, town (except in New England, New York, and Wisconsin), village, or borough (except in Alaska and New York) having legally prescribed limits, powers, and functions.

Minor civil division (MCD)—The primary governmental or administrative division of a county in 28 states, Puerto Rico, and the Island Areas having legal boundaries, names, and descriptions. MCDs represent many different types of legal entities with a wide variety of characteristics, powers, and functions depending on the state and type of MCD. In some states, some or all of the incorporated places also constitute MCDs.

Nonvisible feature—A map feature that is not visible on the ground, such as a city or county boundary through space, a property line, a short line-of-sight extension of a road, or a point-to-point line of sight.

Special place—A specific location requiring special enumeration because the location includes people not in households or the area includes special land use. Special places include facilities with resident population, such as correctional institutions, military installations, college campuses, workers' dormitories, hospitals, nursing homes, and group homes, and land-use areas such as national parks. A special place includes the entire facility, including nonresidential areas and staff housing units, as well as all group quarters population.

Visible feature—A map feature that one can see on the ground, such as a road, railroad track, above-ground transmission line, stream, shoreline, fence, sharply defined mountain ridge, or cliff. A nonstandard visible feature is a feature that may not be clearly defined on the ground (such as a ridge), may be seasonal (such as an intermittent stream), or may be relatively impermanent (such as a fence). The Census Bureau generally requests verification that nonstandard features are easily locatable.

Dated: November 19, 1997.

Bradford R. Huther,

Deputy Director and Chief Operating Officer, Bureau of the Census.

[FR Doc. 98–543 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–601]

Certain Fresh Cut Flowers From Mexico; Notice of Preliminary Results of Antidumping Duty Administrative Review, and Intent To Revoke the Order in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain fresh cut flowers from Mexico in response to a request from Rancho del Pacifico (Pacifico), respondent. Additionally, the Department preliminarily intends to revoke the order in part with respect to Pacifico. This review covers one producer/exporter and entries of the subject merchandise into the United States during the period April 1, 1996 through March 31, 1997.

We preliminarily determine that sales have not been made below normal value (NV). If these preliminary results are adopted in our final results, we will instruct U.S. Customs to liquidate entries without regard to antidumping duties.

Interested parties are invited to comment on these preliminary results. Parties who submit argument are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Tamara Underwood or Maureen Flannery, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone: (202) 482–4733.

Applicable Statute: Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations as codified at 19 CFR Part 353 (1996).

SUPPLEMENTARY INFORMATION:

Background

On April 23, 1987, the Department published in the **Federal Register** (52 FR 13491) the antidumping duty order on certain fresh cut flowers from Mexico. On April 28, 1997, in accordance with 19 CFR 353.22(a), Pacifico requested that the Department conduct an administrative review. In accordance with 19 CFR 353.25(b) (1) and (2), Pacifico also requested a partial revocation of the antidumping duty order as it pertains to it upon completion of this review. We published a notice of initiation of review on May 21, 1997 (62 FR 27720). The Department is conducting this administrative review in accordance with section 751 of the Act.

Scope of the Review

The products covered by this review are certain fresh cut flowers, defined as standard carnations, standard chrysanthemums, and pompon chrysanthemums (pompons). During the period of review (POR), such merchandise was classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) items 0603.10.7010 (pompons), 0603.10.7020 (standard chrysanthemums), and 0603.10.7030 (standard carnations). The HTSUS item numbers are provided for convenience and Customs purposes only. The written description remains dispositive as to the scope of the order.

This review covers sales of subject merchandise entered into the United States during the period April 1, 1996 through March 31, 1997.

Verification

As provided in section 776(b) of the Act, we conducted a verification of the questionnaire responses submitted by Pacifico. We used standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant accounting, sales, and other financial records, and the selection of original documentation containing relevant information. Our verification results are outlined in the public version of the verification report.

Intent To Revoke

On April 28, 1997, Pacifico submitted a request, in accordance with 19 CFR 353.25(b), that the Department revoke the order covering certain fresh cut flowers from Mexico with respect to its sales of this merchandise.

In accordance with 19 CFR 353.25(a)(2)(iii), this request was accompanied by a certification from Pacifico that it had not sold the subject merchandise at less than NV for a three-year period, including this review period, and would not do so in the future. Pacifico also agreed to its immediate reinstatement in the relevant antidumping order, as long as any firm is subject to this order, if the Department concludes under 19 CFR 353.22(f) that, subsequent to revocation, it sold the subject merchandise at less than NV.

In the two prior reviews of this order, we determined that Pacifico sold fresh cut flowers from Mexico at not less than NV. The Department conducted a verification of Pacifico's response for this period of review. We preliminarily determine that Pacifico sold fresh cut flowers at not less than NV during this review period. Based on Pacifico's three consecutive years of zero or *de minimis* margins and the absence of evidence to the contrary, we preliminarily determine that it is not likely that Pacifico will in the future sell subject merchandise at less than NV. Therefore, if these preliminary findings are affirmed in our final results, we intend to revoke the order on fresh cut flowers from Mexico with respect to Pacifico.

United States Price

In calculating United States Price (USP), we used constructed export price (CEP), in accordance with section 772 (b), (c), and (d) of the Act, because Pacifico's sales to the first unaffiliated purchaser occurred after importation into the United States. We based CEP on the packed F.O.B. prices to the first unaffiliated purchaser after importation into the United States. As in the original less-than-fair-value (LTFV) investigation and in all prior administrative reviews, all prices to the United States were weight-averaged on a monthly basis to account for the perishability of the product. In accordance with the methodology established in the 1992–1993 review, we also calculated USP by flower type, without regard to specific grades. (*See Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico,* 56 FR 29621 (June 28, 1991).)

Where appropriate, we made deductions from CEP for foreign and U.S. inland freight, U.S. and Mexican brokerage and handling charges, and for credit expenses incurred on sales in the United States. No other adjustments were claimed or allowed.

Normal Value

In calculating NV, we used home market prices to unaffiliated purchasers, as defined in section 773 of the Act. In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared Pacifico's volume of home market sales of the subject merchandise to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of

the Act. Because Pacifico's volume of home market sales of the subject merchandise was greater than five percent of its volume of U.S. sales of the subject merchandise, we determined that the home market provides a viable basis for calculating NV for Pacifico.

Home market price was based on F.O.B. farm gate unit price of subject merchandise sold to unaffiliated purchasers in the home market. No adjustments were claimed or allowed.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the export price (EP) or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value, that of the sales from which we derive selling, general and administrative expenses and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa,* 62 FR 61731, 61732 (November 19, 1997).

Pacifico did not claim a LOT adjustment; however, we requested information concerning Pacifico's distribution system, including classes of customers, selling functions, and selling expenses to determine whether such an adjustment was necessary. Pacifico reported that all sales during the POR, in both the comparison market, the home market in this instant case, and the United States, were to wholesalers. We examined information provided by Pacifico concerning these sales and determined that there was no difference in either selling functions or selling expenses between sales in the home market and sales in the United States. Therefore, we preliminarily determine that sales in the home market and sales in the United States are at the same LOT and that no adjustment is warranted.

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margin exists:

Manufacturer/exporter	Time period	Margin (percent)
Rancho del Pacifico	04/01/96–03/31/97	0.00

Parties to the proceeding may request disclosure within 5 days of the date of publication of this notice in accordance with 19 CFR 353.28. Any interested party may request a hearing within 10 days of publication in accordance with 19 CFR 353.38(b). Any hearing, if requested, will be held 44 days after the publication of this notice, or the first workday thereafter. Interested parties may submit case briefs within 30 days of the date of publication of this notice in accordance with 19 CFR 353.38(c). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 37 days after the date of publication. The Department will publish a notice of final results of this administrative review, which will include the results of its analysis of issues raised in any such comments.

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. Upon completion of this review, the Department will issue appraisement instructions directly to the U.S. Customs Service.

Furthermore, the following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of fresh cut flowers from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(c) of the Act: (1) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (2) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) for all other producers and/or exporters of this merchandise, the cash deposit rate shall be the rate established in the investigation of sales at less than fair value, which is 18.20 percent. *See* 52 FR 6361 (March 3, 1987).

If our intent to revoke is finalized, the revocation will apply to all entries of the subject merchandise from Pacifico entered, or withdrawn from warehouse, for consumption on or after April 1, 1997. The Department will then order the suspension of liquidation ended for all such entries and will instruct the Customs Service to release any cash deposit or bonds. The Department will further instruct Customs to refund with interest any cash deposits on post-March 31, 1997 entries. If we do not revoke, the cash deposit rate for Pacifico will be the rate established in the final results of this review (except that no deposit will be required if the margin is zero or *de minimis, i.e.,* less than 0.5 percent).

These deposit rates, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.25(b) to file certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 29, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–487 Filed 1–8–98; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–504]

Porcelain-on-Steel Cookware From Mexico: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request by the petitioner, General Housewares Corporation, the Department of Commerce is conducting an administrative review of the antidumping duty order on porcelain-on-steel cookware from Mexico. This review covers Cinsa, S.A. de C.V. and Esmaltaciones de Norte America, S.A. de C.V., manufacturers/exporters of the subject merchandise to the United States. The period of review is December 1, 1995, through November 30, 1996.

We preliminarily determine that sales have been made below normal value. If these preliminary results are adopted in our final results of administrative review, we will instruct the Customs Service to assess antidumping duties on all appropriate entries.

Interested parties are invited to comment on these preliminary results. Parties who submit arguments in this proceeding should also submit with the argument: (1) a statement of the issue, and (2) a brief summary of the argument.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Kate Johnson/Dorlores Peck or Mary Jenkins, Office 5, AD/CVD Enforcement Group II, Import Administration—Room B099, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4929 or 482–1756, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930, as amended (the Act), by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to the provisions codified at 19 CFR part 353 (April 1997). Where we cite to the Department's new regulations (19 CFR part 351, 62 FR 27926 (May 19, 1997) (New Regulations)) as an indication of current Department practice, we have so stated.

Background

On October 10, 1986, the Department published in the **Federal Register** (51 FR 36435) the final affirmative antidumping duty determination on certain porcelain-on-steel cookware from Mexico. We published an antidumping duty order on December 2, 1986 (51 FR 43415).

On December 3, 1996, the Department published in the **Federal Register** a notice advising of the opportunity to request an administrative review of this order for the period December 1, 1995, through November 30, 1996 (the POR) (61 FR 64050). The Department received a request for an administrative review of Cinsa, S.A. de C.V. (Cinsa) and Esmaltaciones de Norte America, S.A. de C.V. (ENASA) from General Housewares Corporation, the petitioner. We published a notice of initiation of the review on January 17, 1997 (62 FR 2647). On June 10, 1997, the petitioner made an allegation that Cinsa and ENASA were reimbursing the affiliated U.S. importer, Cinsa International Corporation (CIC), for antidumping deposits and assessment liabilities during the POR.

During the period June 23 through June 27, 1997, we conducted verifications of Cinsa and ENASA, as well as CIC.

On August 19, 1997, the Department extended the time limit for the preliminary results in this case until December 31, 1997. *See Extension of Time Limit for Antidumping Duty Administrative Review,* 62 FR 44108, August 17, 1997.

The Department is conducting this review in accordance with section 751(a) of the Act.

Scope of the Review

The products covered by this review are porcelain-on-steel cookware, including tea kettles, which do not have self-contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. This merchandise is currently classifiable under *Harmonized Tariff Schedule of the United States* (HTSUS) subheading 7323.94.00. Kitchenware currently classifiable under HTSUS subheading 7323.94.00.30 is not subject to the order. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Verification

As provided in Section 782(i) of the Act, we conducted verifications of Cinsa, ENASA and CIC from June 23 through June 27, 1997. We conducted the verifications using standard verification procedures including on-site inspection of the manufacturers' facilities, the examination of relevant accounting, sales, and other financial records, and selection of original documentation containing relevant information. Our verification results are outlined in the public version of the verification report which is on file in the Central Records Unit (CRU) in room B–099 of the Main Commerce Building.

Based on verification, we made certain changes to data in the sales listing submitted by Cinsa and ENASA used to calculate the preliminary margins (*See* Memorandum to the File dated December 30, 1997).

Affiliated Parties

Cinsa and ENASA are both wholly-owned subsidiaries of ISLO S.A. de C.V., which in turn is wholly-owned by the Grupo Saltillo, S.A. de C.V. Because Cinsa and ENASA are controlled by the same parent, they are affiliated within the meaning of section 771(3)(F) of the Act.

Since Cinsa and ENASA are affiliated producers of subject merchandise, we analyzed whether the two producers should be treated as a single entity for the purpose of assigning an antidumping margin using the Department's standard ''collapsing'' test. *See* reference to 19 CFR 351.401(f) on page two. During the course of this review, we verified that the manufacturing facilities of ENASA are separate from those of Cinsa, and that the machinery Cinsa used to produce ''ranch style'' cookware cannot be used to make the ENASA ''euro-style'' cookware, and vice versa, without fundamental and expensive retooling. Accordingly, because we have determined that the production facilities of Cinsa and ENASA would require substantial retooling in order to produce similar or identical products, as in prior reviews, we are not treating these firms

as a single entity for the purposes of assigning and antidumping margin.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by Cinsa and ENASA covered by the description in the ''Scope of the Review'' section, above, and sold in the home market during the POR to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the most similar foreign like product. In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order: quality, gauge, cookware category, model, shape, wall shape, diameter, width, capacity, weight, interior coating, exterior coating, grade of frit (a material component of enamel), color, decoration, and cover, if any. With regard to sets, where there were no sales of identical merchandise in the home market to compare to U.S. sales of subject merchandise sold in sets, we compared U.S. sales of sets to the constructed value (CV) of the set.

Cinsa did not report all of the required physical characteristic data for one U.S. product. Accordingly, we were unable to identify the most similar home market sales to that product. As facts available, we compare U.S. sales of this product to CV.

In addition, Cinsa and ENASA did not report cost information for all sales made during the POR. Accordingly, we must apply facts available to these sales. However, given the level of cooperation of the two respondents, we have no basis to apply adverse facts available in this instance. Therefore, we have used the average of all positive margins for those sales without reported costs.

As in our final results of review for the period December 1, 1994, through November 30, 1995, (*Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review,* 62 FR 42496, August 7, 1997 (POS9 Final)), we have rejected Cinsa's argument that heavy gauge (HG) and medium gauge (MG) euro-style cookware manufactured by ENASA and light gauge (LG) ranch-style cookware manufactured by Cinsa constitute distinct ''classes or kinds'' of merchandise and, therefore, require the Department to calculate one margin for HG and MG cookware and a separate margin for LG cookware. The scope of the order constitutes a single class or kind of merchandise, *i.e.* the ''subject merchandise.''

Consistent with our practice (*see, e.g., Final Results of Antidumping Duty Administrative Review: Cold-rolled Carbon Steel Flat Products from the Netherlands,* 61 FR 48465, (September 13, 1996)), we compared prime quality models sold in the United States to identical prime quality models sold in the home market. Where no home market sales of identical prime quality models existed, we compared the U.S. sales of prime quality models to the most similar home market prime quality model. There were no U.S. sales of second quality models.

Allegation of Reimbursement

The Department examined at verification the issue of whether, as the petitioner alleged, CIC was reimbursed for antidumping duties. With respect to capital contributions made by GISSA Holding USA to CIC during the POR, we found that since its inception in early January of 1995, the affiliated importer, CIC, has received two cash transfers in the form of capital contributions. The first transfer constituted start-up funds and was not tied to antidumping duty deposits or assessments. In a public submission on the record of the tenth review (1995–1996), the respondents Cinsa and ENASA specifically stated that a second capital contribution made in April 1997 by CIC's affiliate, GISSA Holding USA, was provided to ensure that CIC would have enough funds to cover anticipated antidumping duties and assessment liability subsequent to the liquidation of fifth (1990–1991) and seventh (1992–1993) POR entries during the tenth (1995–1996) POR. Because GISSA Holding, USA is not a producer or exporter of the subject merchandise, we cannot, *ipso facto,* conclude that a producer or exporter paid for, or reimbursed to, the importer antidumping duties. Thus, we preliminary do not find reimbursement within the meaning of 19 CFR 353.26(a). However, we will continue to examine this issue in light of comments by the parties and may, if warranted, seek additional information.

Comparisons

To determine whether sales of porcelain-on-steel cookware by Cinsa and ENASA to the United States were made at less than normal value (NV), we compared export price (EP) or constructed export price (CEP) to the NV, as described in the ''Export Price and Constructed Export Price'' and ''Normal Value'' sections of this notice.

Mexico experienced significant inflation during the POR, as measured by the producer price index issued by the Bank of Mexico. Accordingly, to avoid the distortions caused by the effects of this level of inflation on prices, we limited our comparisons to sales in the same month and did not apply the Department's 90/60 rule, whereby the Department may use as NV comparison market prices from the three months prior to and the two months after the month in which the U.S. sale was made. *See e.g., Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review,* 62 FR 42496 (August 7, 1997).

Export Price and Constructed Export Price

For certain sales made by Cinsa and ENASA, we calculated EP in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation and because CEP methodology was not otherwise indicated. We based EP on packed prices to unaffiliated purchasers in the United States. We made deductions from the starting price, where appropriate, for U.S. and foreign inland freight, U.S. and Mexican brokerage and handling expenses, U.S. duty and rebates.

For the remaining sales made by Cinsa and ENASA during the POR, we calculated CEP in accordance with section 772(b) of the Act, because the subject merchandise was sold by CIC after having been imported into the United States. We based CEP on packed prices to unaffiliated purchasers in the United States. We made deductions from the starting price, where appropriate, for U.S. and foreign inland freight, U.S. and Mexican brokerage and handling expenses, U.S. duty and rebates.

We made further deductions, where appropriate, for credit, commissions, and indirect selling expenses that were associated with economic activities occurring in the United States. Finally, we made an adjustment for profit in accordance with section 772(d)(3) of the Act.

Normal Value

Based on a comparison of the aggregate quantity of home market and U.S. sales, we determined that the quantity of the foreign like product sold in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a) of the Act. Therefore, we based NV on either (1) the price (exclusive of value-added tax) at which the foreign like

product was first sold for consumption in the home market, in accordance with section 773(a)(1)(B)(i) of the Act or (2) CV, in accordance with section 773(a)(4) of the Act, as noted in the ''Price to Price Comparisons'' and ''Price to CV Comparisons'' sections of this notice.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value (''CV''), that of the sales from which we derive selling, general and administrative (''SG&A'') expenses and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer. To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731 (November 19, 1997).

In this review, Cinsa and ENASA reported three channels of distribution in the home market: (1) direct sales to customers from the Saltillo plant, (2) sales shipped from their Mexico city warehouse, and (3) sales shipped from their Guadalajara warehouse. In analyzing the data in the home market sales listing by distribution channel and sales function, we found that the three home market channels did not differ significantly with respect to selling activities. Similar services, such as freight and delivery services and inventory maintenance, were offered to all or some portion of customers in each channel. Based on this analysis, we find that the three home market channels of distribution comprise a single level of trade.

Cinsa and ENASA reported both EP and CEP sales in the U.S. market. The EP sales were made by the exporter to the unaffiliated customer, who received the merchandise at the border between Mexico and the United States (FOB Laredo, Texas). We noted that EP sales involved basically the same selling functions associated with the home market level of trade described above. Therefore, based upon this information, we have determined that the level of trade for all EP sales is the same as that in the home market.

The CEP sales were based on sales made by the exporter to CIC, the U.S. affiliated reseller, who then sold the merchandise directly to unaffiliated purchasers in the United States from its San Antonio warehouse. Based on our analysis, after the section 772(d) deductions, there are two selling activities associated with Cinsa's and ENASA's sales to CIC reflected in the CEP: (1) freight and other movement expenses from the plant to the affiliated reseller's San Antonio warehouse, and (2) freight and delivery services (excluding actual freight charges), and inventory maintenance, and other support services (such as sales personnel, order processing personnel, and billing personnel), which are the same functions found in the home market. Therefore, we determine that Cinsa's and ENASA's CEP sales and their home market sales are made at the same level of trade. Accordingly, because we find the U.S. sales and home market sales to be at the same level of trade, no level of trade adjustments under section 773(a)(7)(A) of the Act are warranted.

CEP Offset

Section 773(a)(7)(B) of the Act provides for an adjustment to NV when NV is based on a level of trade different from that of the CEP if the NV level is more remote from the factory than the CEP and if we are unable to determine whether the difference in levels of trade between CEP and NV affects the comparability of their prices. This latter situation can occur where there is no home market level of trade equivalent to the U.S. sales level or where there is a different home market level of trade but the data are insufficient to support a conclusion on price effect. This adjustment, the CEP offset, is identified in section 773(a)(7)(B) and is the lesser of the following:

The indirect selling expenses on the home market sale, or

The indirect selling expenses from the starting price in calculating CEP.

The CEP offset is not automatic each time we use CEP.

In their questionnaire responses, Cinsa and ENASA claimed that the sales support activities (such as freight and delivery services, excluding actual freight charges, and inventory maintenance), and other support services (such as sales personnel, order processing personnel, and billing personnel) provided to home market and to U.S. customers are generally the same. The respondents nevertheless requested an adjustment to NV when NV is compared to U.S. CEP sales because they claim that home market sales are made at a more advanced level of trade than CEP sales because the NV sales price includes indirect selling expenses attributable to sales support activities and other support services noted above, while the CEP sales price is exclusive of all indirect selling expenses and the selling functions attributable thereto.

However, as discussed above, we find that the selling functions performed at the CEP level are essentially the same as those performed in the home market. Accordingly, we consider the home market and CEP levels of trade comparable. We disagree with respondents' assertion that differences in indirect selling expenses reflect a difference in level of trade. Because we find the CEP and home market levels of trade are the same, an adjustment to NV is not warranted.

Cost of Production Analysis

The Department disregarded certain sales made by Cinsa for the period December 1, 1994, through November 30, 1995, (the most recently completed review of Cinsa) pursuant to a finding in that review that sales were made below cost. Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that the respondent Cinsa made sales in the home market at prices below the cost of producing the merchandise in the current review period. As a result, the Department initiated an investigation to determine whether the respondent made home market sales during the POR at prices below its cost of production (COP) within the meaning of section 773(b) of the Act.

The petitioner alleged that there are reasonable grounds to believe or suspect that ENASA made home market sales during the POR at prices that were less than its COP. On May 15, 1997, the Department initiated a sales below cost investigation to determine whether ENASA made home market sales during

the POR at prices below its COP within the meaning of section 773(b) of the Act.

A. Calculation of COP

We calculated the COP based on the sum of Cinsa's and ENASA's cost of materials and fabrication costs for the foreign like product, plus amounts for home market SG&A and packing costs in accordance with section 773(b)(3) of the Act.

As noted above in the ''Product Comparisons'' section, the Mexican economy experienced significant inflation during the POR. Therefore, in order to avoid the distortive effect of inflation on our comparisons of costs and prices, we requested that the respondents submit monthly, model-specific production costs for each month of the POR. We calculated a model-specific total and variable cost of manufacturing (COM) during the POR. Using the producer price index for Mexico maintained by the Bank of Mexico, we indexed the total and variable POR model-specific costs to a common point, *i.e.*, November 1996, the month of the POR. We then divided the sum of the total POR model-specific costs by the total model-specific production quantity to obtain a model-specific POR weighted-average cost corresponding to the November 1996 reference point. The weighted-average COM was then restated based on the currency value in each respective month and used to calculate a month COP for each product.

We relied on COP information submitted by Cinsa and ENASA, except in the following instances where it was not appropriately quantified or valued: (1) frit prices from an affiliated supplier did not approximate fair market value prices; therefore, we increased direct materials by the percentage required to adjust the reported cost of frit to reflect fair market prices; (2) we added profit sharing expenses to the variable cost of manufacture because they relate to the compensation of direct labor; and (3) we revised Cinsa's submitted interest costs to exclude the calculation of negative interest expense.

B. Test of Home Market Prices

We compared the monthly weight-averaged per unit COP figures, indexed to account for the effects of inflation as noted above, to home market sales of the foreign like product as required under section 773(b) of the Act, in order to determine whether these sales were made at prices below the COP. In determining whether to disregard home market sales made at prices below the COP, we examined whether: (1) within an extended period of time, such sales were made in substantial quantities; and (2) such sales were made a prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to the home market prices, less any applicable movement charges, rebates, discounts, and direct and indirect selling expenses.

C. Results of COP Test

Pursuant to section 773(b)(2)(C), where less than 20 percent of the respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we disregarded the below-cost sales were such sales were found to be made at prices which would not permit the recovery of all costs within a reasonable period of time (in accordance with section 773(b)(2)(D) of the Act). Where all comparison sales of a specific product were disregarded based on the COP test, we calculated NV based on CV, in accordance with section 773(b)(1) of the act.

D. Calculation of CV

In accordance with section 773(e)(1) of the Act, we calculated a CV based on the sum of the respondents' cost of materials, fabrication, SG&A, and U.S. Packing costs as reported in the U.S. sales listing. We calculated CV based on the methodology described in the calculation of COP above.

In accordance with section 773(e)(2)A), we based SG&A and profit on the actual amounts incurred and realized by Cinsa and ENASA in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. For selling expenses, we used the weighted-average home market selling expense. Where we compared EP to CV, we deducted from CV the weighted-average home market direct selling expenses and added the U.S. direct selling expenses, in accordance with section 773(a)(8) of the Act and section 353.56(a)(2) of the Department's regulations.

E. Price to Price Comparisons

For those comparison products for which there were sales at prices above the COP, we based the respondents' NV on home market prices. For both of the respondents, we calculated NV based on the VA-exclusive gross unit price and deducted, where appropriate, inland freight, rebates, and early payment discounts.

For comparisons in Cinsa and ENASA's EP sales, we made a circumstance-of-sale adjustment, where appropriate, for differences in credit expenses. For comparisons to Cinsa's and ENASA's CEP sales, we also deducted credit expenses and commissions from NV (no commissions were incurred on EP sales). We made adjustments for differences in packing expenses for both Cinsa and ENASA. We also made adjustments to NV, where appropriate, for differences in costs attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act.

In order to make appropriate adjustment for physical differences between the products compared, and to account for the effects of inflation, all costs were expressed in currency values corresponding to November 1996, the last month of the POR. Using these November-based costs, we then calculated a per-unit model-specific weighted-average variable and total COM. These weighted-average costs were then indexed to the currency value of the month of the comparison U.S. sale. The adjusted monthly variable costs of manufacturing for U.S. and home market products were then compared to arrive at the difference in merchandise adjustment.

F. Price to CV

Where we compared EP or CEP to CV, we made circumstance-of-sale adjustments by deducting from CV the weighted-average home market direct selling expenses and adding the United States direct selling expenses.

Currency Conversion

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. Section 773A(a) of the Act directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a ''fluctuation.'' In accordance with the Department's practice, we have determined as a general matter that a fluctuation exists when the daily exchange rate differs from a benchmark by 2.25 percent. The benchmark is defined as the rolling average of rates for the past 40 business days. When we determine a fluctuation existed, we substitute the benchmark for the daily rate.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margins exist:

Manufacturer/ exporter	Period	Margin
Cinsa	12/1/95–11/30/96	15.94
ENASA	12/1/95–11/30/96	63.76

Parties to the proceeding may request disclosure within five days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication or the first business day thereafter.

Issues raised in hearings will be limited to those raised in the respective case briefs and rebuttal briefs. Case briefs from interested parties and rebuttal briefs, limited to the issues raised in the respective case briefs, may be submitted not later than 30 days and 37 days, respectively, from the date of publication of these preliminary results. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

The Department will subsequently issue the final results of this administrative review, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice.

The Department shall determine and the Customs Service shall assess antidumping duties on all appropriate entries. The Department will issue appropriate appraisement instructions directly to the Customs Service upon completion of this review.

Furthermore, the following deposit requirements will be effective upon publication of the final results of this antidumping duty review for all shipments of porcelain-on-steel cookware from Mexico, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a) of the Tariff Act: (1) the cash deposit rates for the reviewed companies will be those established in the final results of review; (2) for exporters not covered in this review, but covered in the LTFV investigation or prior reviews, the cash deposit rate will continue to be the company-specific rate from the LTFV investigation or the prior review; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash deposit rate for all other manufactures or exporters will continue to be 29.52 percent, the ''All Others'' rate made effective by the LTFV investigation. These requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are published in accordance with section 751(a)(1) of the Act and 19 CFR 353.22.

Dated: December 31, 1997.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–485 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–506]

Porcelain-on-Steel Cooking Ware From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request by an importer of the subject merchandise, the Department of Commerce is conducting an administrative review of the antidumping duty order on porcelain-on-steel cooking ware from the People's Republic of China. The review covers one manufacturer/exporter of the subject merchandise and its affiliated third-country reseller in Hong Kong and the period December 1, 1995, through November 30, 1996.

We preliminarily determine that sales have been made below normal value. If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Lorenza Olivas or Suzanne King, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions as of January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930, as amended, (the Act), by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR Part 353 (April 1997).

Background

On December 2, 1986, the Department published in the **Federal Register** the antidumping duty order on Porcelain-on-Steel (POS) cooking ware from the People's Republic of China (PRC) (51 FR 43414). On December 3, 1996, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this antidumping duty order (61 FR 64051). On December 20 and 26, 1996, in accordance with 19 CFR 353.22(a), an importer of the subject merchandise to the United States, CGS International, requested that the Department conduct an administrative review of Clover Enamelware Enterprise, Ltd. of China (Clover), a manufacturer/exporter, and its third-country reseller Lucky Enamelware Factory Ltd. of Hong Kong (Lucky). We published the notice of initiation of this review covering the period December 1, 1995, through November 30, 1996, on January 17, 1996 (62 FR 2647). The Department is conducting this administrative review in accordance with section 751(a) of the Act.

Scope of the Review

Imports covered by this review are shipments of POS cooking ware, including tea kettles, which do not have self-contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. The merchandise is

currently classifiable under the Harmonized Tariff Schedule (HTS) item 7323.94.00. HTS item numbers are provided for convenience and Customs purposes. The written description of the scope remains dispositive.

Verification

We verified the questionnaire responses submitted by Clover and Lucky, using standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and selection of original documentation containing relevant information, as provided in section 782(i) of the Act. Our verification results are outlined in the public versions of the verification reports, which are on file in the Central Records Unit (Room B–099 of the Main Commerce Building).

Affiliated Parties

Clover is two-thirds owned by Lucky and, therefore, Lucky holds controlling interest in Clover. Due to Lucky's ownership interest in Clover, and the fact that the same individual is the general manager at both companies, we consider Clover and Lucky to be affiliated parties pursuant to section 771(33) of the Act. As such, and consistent with prior reviews of this order, we are assigning Clover and Lucky (hereinafter Clover/Lucky) a single dumping margin. *See Porcelain-on-Steel Cooking Ware from the People's Republic of China: Final Results of Antidumping Administrative Review;* 62 FR 32758 (June 17, 1997). No new information or evidence of changed circumstances has been submitted in this proceeding to warrant reconsideration of this finding.

Separate Rates Analysis

Lucky is located outside the PRC and there is no PRC ownership of the company. Therefore, we determine that no separate rates analysis is required for this third-country reseller because it is beyond the jurisdiction of the PRC government. *See Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters from the People's Republic of China* (60 FR 22359, 22361; May 5, 1995). Clover is partially owned by a PRC government company and, therefore, a separate rates analysis is necessary to determine whether this manufacturer/exporter is independent from government control.

To establish whether a company is sufficiently independent to be entitled to a separate rate, the Department analyzes each exporting entity under the test established in the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) (*Sparklers*), as amplified in *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994) (*Silicon Carbide*). Under this policy, exporters in non-market-economy (NME) countries are entitled to separate, company-specific margins when they can demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports.

1. Absence of De Jure Control

Evidence supporting, though not requiring, a finding of *de jure* absence of government control includes: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. Clover's submissions pertaining to legislative enactments and the terms of its Enterprise Legal Person Operation License demonstrate the absence of *de jure* control. (See Memorandum from Kelly Parkhill to Barbara E. Tillman, dated December 9, 1997. ''Separate Rate Analysis for Assignment of Separate Rate for Clover/Lucky in the 1995–1996 Administrative Reviews of POS Cooking Ware from the People's Republic of China'' (*Separate Rate Memorandum*), which is a public document on file in the Central Records Unit.

2. Absence of De Facto Control

De facto absence of government control with respect to exports is based on four criteria: (1) Whether the export prices are set by or subject to the approval of a government authority; (2) whether each exporter retains the proceeds from its sales and makes independent decisions regarding the disposition of profits and financing of losses; (3) whether each exporter has autonomy in making decisions regarding the selection of management; and (4) whether each exporter has the authority to negotiate and sign contracts. See *Silicon Carbide* at 22587.

With respect to *de facto* absence of government control, the information submitted by Clover in the questionnaire response indicates the following: (1) No government entity exercises control over its export prices; (2) it negotiates contracts without guidance from any governmental entities or organizations; (3) it makes its own personnel decisions; and (4) it retains the proceeds of its export sales, utilizing profits to provide dividends to shareholders. In addition, it has the authority to seek out loans at market interest rates. This information supports the finding that there is *de facto* absence of governmental control of export functions. Consequently, we preliminarily determine that Clover has met the criteria for the application of separate rates according to the criteria identified in *Sparklers* and *Silicon Carbide*. For a further discussion of this issue, see *Separate Rate Memorandum*.

Export Price

The Department used export price (EP) for sales made by Clover/Lucky, in accordance with section 772(a) of the Act, because the subject merchandise was sold to unaffiliated purchasers in the United States, or Hong Kong (in cases where Clover/Lucky knew the ultimate destination was the United States), prior to importation into the United States and constructed export price is not otherwise indicated.

We calculated EP based on Lucky's price charged to unaffiliated purchasers in the United States because Lucky is Clover's sole sales agent with respect to all subject merchandise manufactured by Clover and, as discussed above, Lucky and Clover are affiliated pursuant to section 771(33) of the Act. We deducted amounts, where appropriate, for discounts, brokerage and handling, foreign inland freight, ocean freight, and marine insurance, which were provided by market economy carriers and paid for in market economy currencies.

Normal Value

For merchandise produced in NME countries, section 773(c)(1) of the Act provides that the Department shall determine normal value (NV) using a factors of production methodology if: (1) The subject merchandise is exported from an NME country; and (2) available information does not permit the calculation of NV using home market prices or third country prices, in accordance with section 773(a) of the Act.

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. Pursuant to section 771 (18)(c)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. None of the parties to this proceeding has contested such treatment in this review. Accordingly, we are treating the PRC as an NME country for purposes of this review.

We calculated NV by valuing factors of production as set forth in 773(c)(3) of

the Act, except for the factors of steel, percolators and certain customer-specific packing materials. For these factors, which were purchased from market economy suppliers and paid for in market economy currencies, we used the actual prices paid for the factors to calculate the factor-based NV in accordance with our practice. See *Lasko Metal Products* vs. *United States,* 437 F. 3d 1442, 1443 (Fed. Cir. 1994).

For the remaining factors, we have selected a comparable market economy country which is a significant producer of comparable merchandise. Pursuant to section 773(c)(4) of the Act and section 353.52(c) of the Department's regulations, we determined that Indonesia is comparable to the PRC in terms of per capita gross national product (GNP), the growth rate in per capita GNP, and the national distribution of labor, and that Indonesia is a significant producer of comparable merchandise. Therefore, for this review, we have used publicly available information regarding Indonesia to value all of the remaining factors of production which were not purchased from market economy suppliers. (See Memorandum to Barbara Tillman, Director, Office of CVD/AD Enforcement VI from Jeff May, Director, Office of Policy, dated August 11, 1997, ''Porcelain-on-Steel Cooking Ware from the People's Republic of China, Non-Market Economy Status and Surrogate Country Selection'' and the Memorandum to the File from Case Analysts, dated August 18, 1997, ''Porcelain-on Steel Cooking Ware from the People's Republic of China—Surrogate Country Selection,'' which are public documents on file in the Central Records Unit.)

For purposes of calculating NV, we valued PRC factors of production as follows, in accordance with section 773(c)(1) of the Act:

- For surrogate values of materials used in the production of POS cooking ware, including soda ash, sulphuric acid, degreasing agents, borax, barium molybdate, magnesium sulphate, potassium carbonate, urea, quartz powder, clay, color oxides, and enamel frits, we used per kilogram values obtained from the *Foreign Trade Statistical Bulletin-Imports,* November 1995, from Indonesia (Indonesian Import Statistics). We used an average exchange rate for the POR to convert surrogate values to U.S. dollars.
- We calculated a cost for freight incurred between the supplier and Clover by using the freight rates reported in a September 1991 cable from the U.S. Embassy in Jakarta, Indonesia and the actual kilometers reported in the questionnaire response. The cable was received for the less than fair value (LTFV) investigation of *Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China.* We adjusted these freight rates to reflect yearly inflation through the period of review (POR) using wholesale price indices (WPI), excluding petroleum, obtained from the *International Financial Statistics* published by the International Monetary Fund (IMF). We used an average exchange rate for the POR to convert surrogate values to U.S. dollars.
- For labor amounts, we were unable to find a publicly available source for skilled and unskilled labor rates for the POS cooking ware industry, or a similar industry, in Indonesia. We therefore used information obtained from a September 1991 cable from the U.S. Embassy in Jakarta, Indonesia. This cable was received for the LTFV investigation of *Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* and provides unskilled and skilled labor rates. We adjusted these labor rates to reflect yearly inflation through the POR using consumer price indices (CPI) obtained from the *International Financial Statistics* published by the IMF. We used an average exchange rate for the POR to convert surrogate values to U.S. dollars.
- For factory overhead, we were unable to locate any publicly available data for the POS cooking ware industry, or a similar industry, in Indonesia. Therefore, we used information reported in a December 1994, U.S. State Department cable from the U.S. Embassy in Jakarta, Indonesia. These data were received for the LTFV investigation of *Furfuryl Alcohol from the People's Republic of China,* and provide an estimated range of factory overhead costs in Indonesia. The information was also used in the LTFV investigation of *Disposable Pocket Lighters from the People's Republic of China.* From this information, we were able to determine factory overhead as a percentage of materials and labor. The surrogate overhead rate included energy and indirect labor; therefore, we did not include Clover/Lucky's reported energy and indirect labor factors.
- For selling, general and administrative (SG&A) expenses, we were unable to find publicly available data for POS cooking ware, or a similar industry, in Indonesia. Therefore, we used information obtained from a September 1991 cable from the U.S. Embassy in Jakarta, Indonesia. This cable was received for the LTFV investigation of *Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* and provides an estimated range of SG&A percentages.
- For profit, we could not find publicly available data for the POS cooking ware industry, or another similar industry, in Indonesia. Therefore, to calculate a profit rate, we used information obtained from a September 1991 cable from the U.S. Embassy in Jakarta, Indonesia. This cable was received for the LTFV investigation of *Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* and provides a range of profit margin percentages.

For a complete analysis of surrogate values, *see* ''Factor Values Used for the Preliminary Results of the 1995–1996 Administrative Review of POS Cooking Ware from the PRC'' (Public Version) dated December 10, 1997, on file in the Central Records Unit.

Currency Conversion

For purposes of the preliminary results, we made currency conversions based on the official exchange rates published by the Federal Reserve. Section 773A(a) of the Act directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a ''fluctuation.'' In accordance with the Department's practice, we have determined as a general matter that a fluctuation exists when the daily exchange rate differs from a benchmark by 2.25 percent. The benchmark is defined as the rolling average of rates for the past 40 business days. When we determine that a fluctuation exists, we substitute the benchmark for the daily rate. However, for the preliminary results in this review we have determined that a fluctuation did not exist during the POR, and we have not substituted the benchmark for the daily rate.

Preliminary Results of the Review

As a result of our review, we preliminarily determine that the following dumping margins exist for the period December 1, 1995 through November 30, 1996:

Manufacturer/exporter	Margin (percent)
Clover Enamelware Enterprise/ Lucky Enamelware Factory	0.81
PRC-Wide Rate	66.65

The PRC-wide rate applies to all entries of subject merchandise except for entries from manufacturers and exporters that are individually identified above. The Department

implements a policy in NME cases whereby all exporters or producers are presumed to comprise a single entity, the ''NME entity.'' The U.S. Court of International Trade has upheld our NME policy in previous cases. See e.g., *UCF America, Inc.* v. *United States,* 870 F. Supp. 1120, 1126 (CIT 1994); *Sigma Corp.* v. *United States,* 841 F. Supp. 1255, 1266–67 (CIT 1993), and; *Tianjin Machinery Import & Export Corp.* v. *United States,* 806 F. Supp. 1008, 1013–15 (CIT 1992). Thus, we assign the NME rate to the NME entity just as we assign an individual rate to a single exporter or producer operating in a market economy. As a result, all exporters and producers that are part of the NME entity are assigned the ''NME-wide'' rate. Because the ''NME-wide'' rate is the equivalent of a company-specific rate, it changes only when we review the NME entity (i.e., all NME producers and exporters that have not qualified for a separate rate). To qualify for a separate rate, as discussed under the *Separate Rates* section of this notice, an NME exporter or producer must provide evidence showing both *de jure* and *de facto* absence of government control over export activities. Until such evidence is presented, a company is presumed to be part of the NME entity and receives the ''NME-wide'' rate. All exporters or producers will either qualify for a separate, company-specific rate, or be part of the NME enterprise, and receive the ''NME-wide'' rate. Thus, there can be no exporters or producers who have never been investigated or reviewed. In this review, Clover/Lucky qualifies for a separate rate, as discussed under the *Separate Rates Analysis* section of this notice. The PRC-wide rate has not changed from the last administrative review because no companies representing the single entity were reviewed.

Parties to the proceeding may request disclosure within 5 days of the date of publication of this notice in accordance with 19 CFR 353.22(c)(6). Any interested party may request a hearing within 10 days of publication in accordance with 19 CFR 353.38(b). Any hearing, if requested, will be held 44 days after the publication of this notice, or the first workday thereafter. Interested parties may submit case briefs within 30 days of the date of publication of this notice in accordance with 19 CFR 353.38(c). In accordance with 19 CFR 353.38(d), rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 37 days after the date of publication. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) a statement of the issue; and (2) a brief summary of the argument. The Department will publish a notice of final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, not later than 120 days after the date of the publication of this notice.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. We will calculate, wherever possible, an exporter/importer-specific assessment rate. With respect these preliminary results, we divided the total dumping margins for each importer (calculated as the difference between NV and EP), by the total quantity of sales to that importer during the POR. We will instruct Customs to assess the resulting per-piece (a set to be treated as a single piece) amount against each piece in each of the importer's entries during the POR. Although this will result in assessing different percentage margins for individual entries, the total antidumping duties collected for each importer for the review period will approximately equal the total dumping margins. The Department will issue appraisement instructions directly to the U.S. Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of POS cooking ware from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For Clover/Lucky, which has a separate rate, the cash deposit rate will be the company-specific rate established in the final results of this administrative review; (2) for all other PRC exporters, the cash deposit rate will be the PRC-wide rate; and (3) the cash deposit rates for non-PRC exporters of subject merchandise from the PRC will be the rates applicable to the PRC supplier of that exporter. We preliminarily determine that the margin of 66.65 percent continues to be the PRC-wide rate because no companies representing the single entity were reviewed. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification of Interested Parties

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 3 53.26 of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1 677f (i)) and 19 CFR 353.22 of the Department's regulations.

Dated December 31, 1997.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–488 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–DS–P–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–815]

Certain Welded Stainless Steel Pipe From Taiwan; Preliminary Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of administrative review.

SUMMARY: In response to requests by petitioners [1] and respondent Ta Chen Stainless Pipe Co., Ltd. (Ta Chen), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain welded stainless steel pipe from Taiwan (A–583–815). This review covers one manufacturer/exporter of the subject merchandise to the United States during the period December 1, 1995 through November 30, 1996.

We preliminarily determine that a *de minimis* dumping margin exists for Ta Chen's sales of welded stainless steel pipe (WSSP) in the United States. If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service to assess antidumping duties on entries of Ta Chen merchandise during the period of review, in accordance with the Department's regulations (19 CFR 353.6). Interested parties are invited to

[1] Avesta Sheffield, Inc., Damascus Tube Division, Damascus-Bishop Tube Co., Trent Tube Division, Crucible Materials Corporation, and the United Steelworkers of America (AFL–CIO/CLC).

comment on these preliminary results. Parties who submit comments are requested to submit with the argument (1) a statement of the issues and (2) a brief summary of the argument.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Robert James at (202) 482–5222 or John Kugelman at (202) 482–0649, Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

APPLICABLE STATUTE AND REGULATIONS: Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act), are to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR Part 353 (April 1, 1997).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1992, the Department published in the **Federal Register** the antidumping duty order on WSSP from Taiwan (57 FR 62300). On December 3, 1996, the Department published the notice of ''Opportunity to Request Administrative Review'' for the period December 1, 1995 through November 30, 1996 (61 FR 64051). In accordance with 19 CFR 353.22(a)(1) (1995), petitioners and Ta Chen requested that we conduct a review of Ta Chen's sales. On January 17, 1997, we published in the **Federal Register** a notice of initiation of this antidumping duty administrative review covering the period December 1, 1995 through November 30, 1996 (62 FR 2647).

Because it was not practicable to complete this review within the normal time frame, on July 24, 1997, we published in the **Federal Register** our notice of extension of time limits for this review (62 FR 39824). As a result, we extended the deadline for these preliminary results to December 31, 1997. The deadline for the final results of this review will continue to be 120 days after publication of these preliminary results.

Scope of the Review

The merchandise subject to this administrative review is certain welded austenitic stainless steel pipe (WSSP) that meets the standards and specifications set forth by the American Society for Testing and Materials (ASTM) for the welded form of chromium-nickel pipe designated ASTM A–312. The merchandise covered by the scope of the order also includes austenitic welded stainless steel pipes made according to the standards of other nations which are comparable to ASTM A–312.

WSSP is produced by forming stainless steel flat-rolled products into a tubular configuration and welding along the seam. WSSP is a commodity product generally used as a conduit to transmit liquids or gases. Major applications for WSSP include, but are not limited to, digester lines, blow lines, pharmaceutical lines, petrochemical stock lines, brewery process and transport lines, general food processing lines, automotive paint lines, and paper process machines.

Imports of WSSP are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTS) subheadings: 7306.40.5005, 7306.04.5015, 7306.40.5040, 7306.40.5065, and 7306.40.5085. Although these subheadings include both pipes and tubes, the scope of this review is limited to welded austenitic stainless steel pipes. Although the HTS subheadings are provided for convenience and Customs purposes, our written description of the scope of this order is dispositive.

The period for this review is December 1, 1995 through November 30, 1996. This review covers one manufacturer/exporter, Ta Chen.

Export Price

Ta Chen reported in its initial and supplemental questionnaire responses that all of its U.S. sales were first sold to unaffiliated purchasers prior to importation into the United States. Each of these sales was made through Ta Chen's wholly-owned U.S. subsidiary, TCI. Ta Chen claims that it ''sold'' the merchandise to TCI, which immediately transferred the WSSP to the first unaffiliated U.S. customer. For each of these sales, Ta Chen claims that TCI acted merely as a ''facilitator,'' handling sales- and Customs-related paper work; Ta Chen states that at no time did TCI take physical possession of the merchandise or enter it into TCI's warehouse. In each instance, according to Ta Chen, the price and quantity of the U.S. sale to the unaffiliated customer were determined prior to importation into the United States. Therefore, in calculating U.S. price we used export price (EP), as defined in section 772(a) of the Tariff Act, for all of Ta Chen's sales. We calculated EP as the packed, delivered or ex-U.S. port price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Tariff Act, we reduced this price by Taiwanese pre-sale inland freight, international ocean freight, marine insurance, Taiwanese brokerage and handling, U.S. brokerage and handling, U.S. duty, and U.S. inland freight. Where appropriate, we also reduced the EP by Taiwanese and U.S. bank charges.

Normal Value

A. Viability

Based upon (i) our comparison of the aggregate quantity of home market and U.S. sales, (ii) the absence of any information that a particular market situation in Taiwan does not permit a proper comparison, and (iii) the fact that Ta Chen's quantity of sales in the home market exceeded five percent of its sales to the U.S. market, we determined that the quantity of foreign like product Ta Chen sold in Taiwan was sufficient to permit a proper comparison with the sales of subject merchandise to the United States pursuant to section 773(a) of the Tariff Act. Therefore, in accordance with section 773(a)(1)(B)(i) of the Tariff Act, we based NV on the prices at which the foreign like products were first sold for consumption in the exporting market, i.e., Taiwan.

B. Cost-of-Production Analysis

Because we disregarded sales below the cost of production in the less-than-fair-value (LTFV) investigation (at the time of our initiation of this administrative review, the most-recently completed segment of these proceedings), we have reasonable grounds to believe or suspect that sales of the foreign like product under consideration for determining NV in this review may have been at prices below the cost of production (COP), as provided in section 773(b)(2)(A)(ii) of the Tariff Act (see Final Determination of Sales at Less Than Fair Value; Certain Welded Stainless Steel Pipe from Taiwan, 57 FR 53705 (November 12, 1992)). Therefore, pursuant to section 773(b)(1) of the Tariff Act, we initiated a COP investigation of sales by Ta Chen (see Memorandum to the File, dated February 11, 1997, available in Room B–099 of the Main Commerce Building).

In accordance with section 773(b)(3) of the Tariff Act, we calculated COP based on the sum of materials and fabrication employed in producing the foreign like product, plus selling, general, and administrative expenses (SG&A) and the cost of all expenses incidental to placing the foreign like product in condition packed ready for

shipment. We relied on the home market sales and COP information Ta Chen provided in its questionnaire responses.

After calculating COP, we tested whether home market sales of subject WSSP were made at prices below COP within an extended period of time in substantial quantities, and whether such prices permitted the recovery of all costs within a reasonable period of time. We compared model-specific COPs to the reported home market prices less any applicable movement charges and post-sale price adjustments (reported as discounts).

Pursuant to section 773(b)(2)(C) of the Tariff Act, where less than twenty percent of Ta Chen's home market sales for a model were at prices less than the COP, we did not disregard any below-cost sales of that model because we determined that the below-cost sales were not made within an extended period of time in ''substantial quantities.'' Where twenty percent or more of Ta Chen's home market sales were at prices less than the COP, we determined that such sales were made within an extended period of time in substantial quantities in accordance with section 773(b)(2) (B) and (C) of the Tariff Act. To determine whether such sales were at prices which would not permit the full recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Tariff Act, we compared home market prices to the weighted-average COPs for the POR.

The results of our cost test for Ta Chen indicated that for certain home market models less than twenty percent of the sales of the model were at prices below COP. We therefore retained all sales of these models in our analysis and used them as the basis for determining NV. Our cost test for Ta Chen also indicated that for certain other home market models more than twenty percent of the home market sales within an extended period of time were at prices below COP and would not permit the full recovery of all costs within a reasonable period of time. In accordance with section 773(b)(1) of the Tariff Act, we therefore excluded the below-cost sales of these models from our analysis and used the remaining above-cost sales as the basis for determining NV.

C. Product Comparisons

We compared Ta Chen's U.S. sales with contemporaneous sales of the foreign like product in the home market. We considered pipe identical based on product nomenclature and considered specifications/alloy, nominal pipe size, and wall thickness in determining the most similar types of pipe. We used a twenty percent cap in reported differences in merchandise as the maximum difference in cost allowable for similar merchandise. For purposes of these preliminary results, we have used the difference-in-merchandise information Ta Chen submitted with its supplemental questionnaire response of October 30, 1997.

D. Level of Trade

As set forth in section 773(a)(1)(B)(i) of the Tariff Act, to the extent practicable, the Department will calculate NV based on sales in the comparison market at the same level of trade (LOT) as the EP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value, that of the sales from which we derive SG&A expenses and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. In cases involving constructed export price (CEP) sales, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and the comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Tariff Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV pursuant to section 773(a)(7)(B) of the Tariff Act (the CEP offset provision). See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731 (November 19, 1997).

In its questionnaire responses Ta Chen stated that there were few differences in its selling activities by customer categories within each market. In order to confirm independently the absence of separate levels of trade within or between the U.S. and home markets, we examined Ta Chen's questionnaire responses for indications that Ta Chen's functions as a seller differed qualitatively or quantitatively among customer categories. Where possible, we further examined whether each selling function was performed on a substantial portion of sales.

Ta Chen sold to distributors in the U.S. market. In the home market, Ta Chen sold to local distributors and end users. With respect to the home market, Ta Chen claimed that its two customer categories constituted a single level of trade. Base upon our examination of information supplied by Ta Chen in its original and supplemental questionnaire responses, we agree that only one level of trade existed for Ta Chen in the home market. According to Ta Chen, it provided no strategic or economic planning services, market research, business-development services, personnel training, engineering, advertising, procurement services, inventory maintenance, or post-sale warehousing for customers in either category. Customers in both categories received the same degree of packing, after-sales services, and freight and delivery arrangements. End-user customers did receive slightly higher levels of research and development and technical assistance than did distributors; however this one difference is not sufficient to establish discrete levels of trade.

For its U.S. sales, Ta Chen reported a single customer category, i.e., distributors. In determining whether, in fact, a single stage of marketing existed, we examined the selling functions as reflected in the starting price to the unaffiliated U.S. customer. TCI processed paperwork and provided certain selling functions for all of Ta Chen's U.S. sales which, in every instance, were to pipe distributors in the United States. We find preliminarily that TCI provided very limited selling functions for these sales and, therefore, find that no significant differences in the selling functions between sales to different customers. As a result, we preliminarily agree with Ta Chen that Ta Chen's EP sales constitute a single level of trade.

When we compared Ta Chen's sales at its EP level of trade to its home market level of trade, we found that Ta Chen provided little or no strategic or economic planning, market research, engineering services, advertising, after-sales services, or post-sale warehousing at either the EP or home market level of trade. Ta Chen reported that it provided moderate-to-low technical assistance at its home market level of trade, while providing none at the EP level. All packing expenses at either level of trade were borne by Ta Chen; freight and delivery arrangements varied between the two markets in that U.S. movement

expenses on certain U.S. sales were incurred by TCI, while other sales were made on ''FOB U.S. port'' terms. Our analysis of the selling functions performed by Ta Chen in both markets leads us to conclude that sales within or between each market are not made at different levels of trade. Accordingly, we preliminarily find that all sales in the home market and the U.S. market were made at the same level of trade. We have not, therefore, made a level-of-trade adjustment because all price comparisons are at the same level of trade and an adjustment pursuant to section 773(a)(7)(A) of the Tariff Act is not appropriate.

E. Home Market Price

While we found below-cost home market sales for Ta Chen in this review, Ta Chen's remaining home market sales at or above cost were sufficient to serve as the basis for NV.

We based home market prices on the packed, ex-factory or delivered prices to unaffiliated purchasers in the home market. We made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Tariff Act. In addition, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Tariff Act, and for differences in circumstances of sale (COS) in accordance with section 773(a)(6)(C)(iii) of the Tariff Act and 19 CFR 353.56. We made COS adjustments by deducting home market direct selling expenses and adding U.S. direct selling expenses. Finally, where the comparison EP sale involved a commission, we increased home market price by the amount of this commission and subtracted home market indirect selling expenses up to the amount of the U.S. commission, as provided at 19 CFR 353.56(b).

In accordance with section 773(a)(4) of the Tariff Act, we based NV on constructed value (CV) if (i) a sale of a U.S. model matched to a home market model for which no sales were above cost, or (ii) we were unable to find a contemporaneous home market match for the U.S. sale. We calculated CV based on the costs of materials and fabrication employed in producing the subject merchandise, SG&A, and profit. In accordance with section 773(e)(2)(A) of the Tariff Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in Taiwan. For selling expenses, we used the weighted-average home market selling expenses. Where appropriate, we made adjustments to CV in accordance with section 773(a)(8) of the Tariff Act and 19 CFR 353.56 for COS adjustments. For comparisons to EP, we made COS adjustments by deducting home market direct selling expenses and adding U.S. direct selling expenses. We also made adjustments, where applicable, for home market indirect selling expenses to offset U.S. commissions.

Fair-Value Comparisons

To determine whether Ta Chen made sales of subject WSSP in the United States at prices that were less than fair value, we compared the EP to NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Tariff Act, we calculated monthly weighted-average prices for NV and compared these monthly averages to individual U.S. sales transactions.

Preliminary Results of Review

As a result of our review, we preliminarily determine the weighted-average margin for Ta Chen for the period December 1, 1995 through November 30, 1996 is 0.07 percent.

Parties to these proceedings may request disclosure within five days of the date of publication of this notice and may request a hearing within ten days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first business day thereafter. Case briefs and/or written comments from interested parties may be submitted no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be submitted no later than 37 days after the date of publication of this notice. Parties who submit arguments in these proceedings are requested to submit with the argument (1) a statement of the issues and (2) a brief summary of the argument. The Department will issue final results of this administrative review, including the results of our analysis of the issues in any such written comments or at a hearing, within 120 days of publication of these preliminary results.

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between U.S. price and NV may vary from the percentage stated above. The Department will issue appraisement instructions directly to Customs. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise during this period of review, and for future deposits of estimated duties.

Furthermore, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of WSSP from Taiwan entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided in section 751(a)(1) of the Tariff Act:

(1) The cash deposit rate for Ta Chen will be zero percent, in light of its *de minimis* weighted-average margin;

(2) For previously reviewed or investigated companies other than Ta Chen, the cash deposit rate will continue to be the company-specific rate published for the most recent period;

(3) If the exporter is not a firm covered in this review, a prior review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and

(4) If neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 19.84 percent. *See Amended Final Determination and Antidumping Duty Order; Certain Welded Stainless Steel Pipe From Taiwan,* 57 FR 62300 (December 30, 1992).

This notice serves as preliminary reminder to importers of their responsibility to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and this notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 30, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–489 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–508–605]

Certain Industrial Phosphoric Acid From Israel; Extension of Time Limit for Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Extension of time limit for countervailing duty administrative review.

SUMMARY: The Department of Commerce is extending the time limit for the final results of the third administrative review of the countervailing duty order on certain industrial phosphoric acid from Israel, covering the period January 1, 1995 through December 31, 1995. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Christopher Cassel or Lorenza Olivas, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

Postponement.

Under the Act, the Department of Commerce (the Department) may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. The Department finds that it is not practicable to complete the calendar year 1995 administrative review of industrial phosphoric acid from Israel within this time limit.

In accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act, the Department will extend the time for completion of the final results of this review from January 8, 1998 to no later than March 9, 1998.

Dated: December 19, 1997.

Richard W. Moreland,

Acting Deputy Assistant Secretary for AD/CVD Enforcement, Group II.

[FR Doc. 98–486 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 980105002–8002–01]

RIN 0625–ZA06

[CFDA No.: 11.115]

Cooperative Agreement Program for an American Business Center® in Russia

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: The International Trade Administration (ITA) is soliciting competitive applications to establish and operate an American Business Center® (ABC®)in Samara, Russia for a three (3) year multi-year award period. ABC® Samara will encourage the export of U.S. goods and services and stimulate trade and investment in Russia. Funds to support the new ABC® award are not currently available. Any award resulting from this announcement is contingent upon the availability of appropriated funds.

ABC® Samara will provide, on a user fee basis, a broad range of business development and facilitation services to United States companies in Russia. Services provided by ABC® Samara will be designed to encourage more U.S. firms to explore opportunities for trade and investment in Russia and to help them conduct business there more effectively. The core services to be provided by the ABC® include: International telephone, fax, and data transmission; temporary office space; space for meetings, small seminars, and small product exhibitions or demonstrations; secretarial support (e.g., word processing, typing, message taking); translator/interpreters; photocopying; market research; counseling on local business conditions; and arranging appointments with Russian business contacts. The Center also will work closely with Russian businesses to help them become more attractive trading partners; identify and report obstacles to trade and investment; and serve as a link between financial institutions, U.S. companies, and Russian enterprises.

In addition to these core services, the ABC® will support U.S. Government activities under the Regional Investment Initiative (RII). This will include providing, at cost, support for the activities of the RII coordinator. Such support may include office space, computers, telecommunications equipment and secretarial and translation services.

DATES: ITA will accept only those applications which are received at the U.S. Department of Commerce, Room 1235, HCHB, no later than 3:00 pm E.S.T. February 9, 1998. Late applications will not be accepted and will not be considered. On January 9, 1998 competitive application kits are available from the Department of Commerce.

ADDRESSES: To obtain a copy of the application kit, please send a written request with a self-addressed mail label to: Russia-NIS Program Office, U.S. & Foreign Commercial Service, Room 1235, HCHB, U.S. Department of Commerce, Washington, D.C. 20230. Requests for application kits also may be faxed to 202–482–2456. Only one application kit will be provided to each organization requesting it, but the kit may be reproduced by the requester. All forms necessary to submit an application will be included in the application kit.
Completed applications should be returned to the same address. Applicants must submit a signed original and two copies of the application and supporting materials. It is anticipated that it will take ten weeks after the deadline for receipt of applications to process applications and make an award.

FOR FURTHER INFORMATION CONTACT: Applicants wishing further information should contact Ms. E. Vivian Spathopoulos, Deputy Director, Russia-NIS Program Office, U.S. & Foreign Commercial Service, U.S. Department of Commerce, room 1235, HCHB, Washington, D.C. 20230, telephone: (202) 482–2902, or Fax: (202) 482–2456.

SUPPLEMENTARY INFORMATION:

Program Authority

The American Business Center® program is authorized by Title III of the ''Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992'' or the ''FREEDOM Support Act'', Public Law 102–511. Funding for the program is provided by the Agency for International Development under Section 632(a) of the Foreign Assistance Act of 1961, as amended.

Eligible Applicants

United States for-profit firms, non-profit organizations, non-Federal government agencies, industry and trade associations, and educational institutions are eligible to apply. An enterprise which includes or intends to include participation of host country citizens or entities will be considered an eligible applicant only so long as the

applicant is and will remain, throughout the award period, controlled and managed by citizens and/or entities of the United States in all matters.

Funding Guidelines

Since it is anticipated that ITA will be involved in the implementation of the project for which an award is made, the funding instrument for the program will be a cooperative agreement. Examples of ITA involvement include but are not limited to the following: supplemental marketing to promote the ABC®, guidance on eligibility of ABC® clients, and coordination with other U.S. government assistance programs.

ITA anticipates $800,000 will be available for a three (3)-year cooperative agreement award during FY 1998. Funds for the cooperative agreement will be dispersed incrementally over the period of time required to complete the scope of work, but not to exceed three years from the date of the award. Applicants will be requested to submit a work-plan and budget which covers a three (3)-year period for a total amount of not more than $800,000 in Federal funds. Applicants must supply at least twenty-percent (20%) of total project costs, with the Federal portion of total project costs to be no more than eighty-percent (80%). A minimum of one-half (½) of the support supplied by the applicant must be in the form of cash. The remaining portion of the applicant's support may consist of cash or in-kind contributions (goods and services contributed by a third-party). Publication of this notice does not constitute an obligation by the Department of Commerce to enter into a cooperative agreement with any responding applicant.

Evaluation Criteria

Consideration for financial assistance under the program will be based on the following evaluation criteria:

(1) *Quality of Work Plan:* core commercial activities, marketing strategy, management/staffing, cooperation with ITA and outreach programs to Russian firms;

(2) *Qualifications of Applicant:* financial history, personnel's experience in region and in delivering commercial products/services;

(3) *Market Knowledge of Locations:* applicant's demonstrated familiarity with the market conditions in the proposed city and/or region;

(4) *Project Timetable:* ability of applicant to complete major stages in the scope of work quickly, particularly bringing an ABC'' into the fully-operational stage;

(5) *U.S. Small Business Utility:* accessibility of services to small firms and reasonableness of fees;

(6) *Cost-Effectiveness:* reasonableness, allowability and allocability of costs.

For purpose of evaluation of the applications, the above criteria will be weighted as follows: Criterion (1) will be worth a maximum of 30 (thirty) percent; criterion (2) will be worth a maximum of 30 (thirty) percent; criterion (3) will be worth a maximum of 20 (twenty) percent; criterion (4) will be worth a maximum of 10 (ten) percent; criterion (5) and (6) will be worth a maximum of 5 (five) percent each.

Selection Procedure

Each application will be evaluated by a panel of at least three independent reviewers qualified to evaluate applications submitted under the program. Applications will be evaluated on a competitive basis in accordance with the evaluation criteria set forth above. This announcement is for applicants to establish and operate an ABC in Samara. An award will be based on highest total accumulated score.

Notifications

All applicants are advised of the following:

(1) Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

(2) If applicants incur any cost prior to an award being made, they do so solely at their own risk of not being reimbursed by the Federal Government. Not withstanding any verbal assurance that they may receive, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

(3) If an application is selected for funding, the Department of Commerce has no obligation to provide any additional future funding in connection with the award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of the Department of Commerce.

(4) No award of Federal funds shall be made to an applicant who has an outstanding debt until either:

a. The delinquent account is paid in full;

b. A negotiated repayment schedule is established and at least one payment is received; or

c. Other arrangements satisfactory to the Department of Commerce are made.

(5) All primary applicants must submit a completed Form CD–511, ''Certification Regarding Debarment, Suspension and other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying''. Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR part 26, ''Nonprocurement Debarment and Suspension'' and the related section of the certification form prescribed above applies. Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F ''Government wide Requirement for Drug-Free Workplace (Grants)'' and the related section of the certification form prescribed above applies. Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, ''Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions;'' and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000 and loans and loan guarantees for more that $150,000 or the single family maximum mortgage limit for affected programs, whichever is greater''. Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, ''Disclosure of Lobbying Activities,'' as required under 15 CFR part 28. Appendix B.

(6) Recipients shall require applicants/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, ''Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction and Lobbying'' and disclosure form, SF–LLL,'Disclosure of Lobbying Activities.'' Form CD–512 is intended for the use of recipients and should not be submitted by any tier recipient or sub-recipient should be submitted to the Department of Commerce in accordance with instructions contained in the award document.

(7) A false statement on an application is grounds for denial or termination of funds and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001 and denial or termination of Federal funding.

(8) All recipients and sub-recipients are subject to all applicable Federal laws and Federal Department of Commerce policies, regulations, and procedures applicable to Federal assistance awards. For-profit organizations shall be subject to OMB Circular A–110 and 15 CFR 29a.

(9) All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals

associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's management honesty or financial integrity.

(10) Recipients are subject to the Fly America Act (49 USC sec. 1517 as implemented by 41 CFR sec. 301–3.6).

(11) Executive Order 12372 ''Intergovernmental Review of Federal Programs'' does not apply to this program.

(12) Paperwork Reduction Act does apply to this program. This document involves collections of information subject to the Paperwork Reduction Act, which have been approved by the Office of Management and Budget under OMB Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number.

(13) The total dollar amount of the indirect costs proposed in an application under this program must not exceed the indirect cost rate negotiated and approved by a cognizant Federal agency prior to the proposed effective date of the award or 100 percent of the total proposed direct costs dollar amount in the application, whichever is less.

Dated: January 6, 1998.

E. Vivian Spathopoulos,

Deputy Director, US&FCS/Russia-NIS Program Office.

[FR Doc. 98–589 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–FP–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Environmental Protection Agency

Coastal Nonpoint Pollution Control Program: Proposed Findings Document, Environmental Assessment, and Finding of No Significant Impact

AGENCY: National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Environmental Protection Agency.

ACTION: Notice of availability of Proposed Findings Document, Environmental Assessment, and Finding of No Significant Impact on Approval of Coastal Nonprofit Pollution Control Programs for California.

SUMMARY: Notice is hereby given of the availability of the Proposed Findings Document, Environmental Assessment (EA), and Finding of No Significant Impact for California. Coastal states and territories were required to submit their coastal nonprofit programs to the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) for approval in July 1995. The Findings document was prepared by NOAA and EPA to provide the rationale for the agencies' decision to approve the state coastal nonprofit pollution control program. Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA), 16 U.S.C. 1455b, requires states and territories with coastal zone management programs that have received approval under section 306 of the Coastal Zone Management Act to develop and implement coastal nonpoint pollution control programs. The EA was prepared by NOAA, pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, to assess the environmental impacts associated with the approval of the coastal nonpoint pollution control program submitted to NOAA and EPA by California.

NOAA and EPA have proposed to approve, with conditions, the coastal nonpoint pollution control program submitted by California. The requirements of 40 CFR Parts 1500–1508 (Council on Environmental Quality (CEQ) regulations to implement the National Environmental Policy Act) apply to the preparation of the Environmental Assessment. Specifically, 40 CFR section 1506.6 requires agencies to provide public notice of the availability of environmental documents. This notice is part of NOAA's action to comply with this requirement.

Introduction

Nonpoint source pollution, pollution caused by a wide range of activities including agriculture, mining, urban development and forestry, is a major cause of water quality impairment nationally and in California. To address these problems, the State of California, along with various federal and local agencies, private non-profit groups and landowners are involved in many efforts to reduce and prevent nonpoint source pollution. California's CZARA submittal, an important part of these efforts, is a good start to describing a program to address the challenging and critical problems associated with nonpoint source pollution. However, the proposed findings for the California submittal conclude that the program as currently submitted to EPA and NOAA is not adequate to protect California's water quality. In particular, EPA and NOAA are asking the State Water Resources Control Board (SWRCB) and the California Coastal Commission (CCC) to more fully identify the activities that will be undertaken to ensure widespread implementation of management measures for the major nonpoint sources in the State, while providing for evaluation, feedback, public review and program adjustments as necessary. California has agreed to expand upon the California submittal documents prepared to date to more adequately address the requirements of CZARA and advance the success of the nonpoint source program.

Background: Description of California's Nonpoint Source Program

The SWRCB and the nine Regional Water Quality Control Boards (RWQCBs) have primary responsibility in California for the protection of water quality. As such, in 1988 the SWRCB adopted the California Nonpoint Source (NPS) Management Plan that outlined a 3-tiered approach for addressing polluted runoff: (1) Voluntary implementation of Best Management Practices (BMPs), (2) regulatory-based encouragement of BMPs, and (3) effluent limitations. In addition to the SWRCB and the RWQCBs, California's program recognizes that other federal, state, local and private entities have key responsibilities for addressing the problems caused by nonpoint sources, such as the Board of Forestry, Department of Pesticides, California Department of Transportation, Natural Resource Conservation Service, and local governments. Preparation of the State's NPS Management Plan was in response to Clean Water Act Section 319, enacted by Congress in 1987. CWA Section 319 required states to develop an assessment report detailing the extent of nonpoint source pollution and a management program specifying nonpoint source controls, in order to be eligible for federal funding. As a result, California received an annual federal funding allocation in 1997 of $5.3 million to carry out its nonpoint source program.

California's Response to Section 6217 of CZARA

CZARA requirements resulted in the expansion of the partnership for addressing nonpoint source pollution to include the California Coastal

Commission (CCC), in order to strengthen the links between Federal and State coastal zone management and water quality programs. Therefore, the SWRCB, the RWQCBs and CCC undertook a joint effort to improve the statewide nonpoint source program and comply with CZARA requirements. In February 1994, the State initiated a comprehensive review process to consider the requirements of Section 6217 and update its existing statewide nonpoint source management program rather than create a separate program dealing exclusively with coastal waters. The State anticipated that a statewide approach would reduce resource expenditures and eliminate the potential for regulatory inequities which might occur if a separate nonpoint source pollution control program was instituted for coastal areas.

Technical advisory committees (TACs), composed of representatives from industry, academia, environmental groups, and state and federal agencies, were convened to provide critical input to the program review. For one year the TAC's reviewed current nonpoint source programs and developed consensus-based recommendations for improving implementation, including innovative approaches for using existing programs more efficiently, and allowing limited staff and fiscal resources to be focused on the most pressing water quality problems. The 10 separate technical advisory committee (TAC) reports identified a wide range of activities aimed at implementing the CZARA management measures, improving the State's nonpoint source program, and reducing the water quality impacts associated with nonpoint source pollution. In addition these reports contained several common themes, such as: voluntary cooperation is preferred over prescriptive measures; improve outreach and technical assistance to individuals and local groups; support local stewardship and specific, problem-responsive measures devised through comprehensive watershed management plans; better coordinate activities of the various resource management agencies; and where voluntary efforts have not succeeded and significant water quality problems persist, utilize appropriate authorities to achieve environmental improvements.

The SWRCB and the CCC then prepared the State of California's response to CZARA and submitted the documents in September 1995 to EPA and NOAA, as required by the statute. The State's submittal package included two principal documents:

- ''California's Coastal Nonpoint Pollution Control Submittal,'' which is an account of the State's existing programs related to the management of nonpoint pollution, and
- ''Initiatives in Nonpoint Source Management,'' which describes several Initiatives adopted by the SWRCB to improve the nonpoint source program, along with the associated TAC reports.

EPA and NOAA's Review of California's 6217 Submittal

The proposed findings document now available for public review concludes that California's nonpoint source program is encouraging because of its broad scope in terms of the State's authorities and programs to address nonpoint source pollution, its statewide applicability and the watershed approach being proposed. However, the State's submittal is not sufficient to conform with the requirements of CZARA because (in summary):

- The submittal does not describe how the management measures are incorporated into the State's program and how they will be implemented;
- The submittal does not describe how existing ''back-up'' authorities will be used to ensure implementation of the management measures, if voluntary efforts fail;
- The submittal does not adequately address key gaps and recommendations identified by the Technical Advisory Committees;
- The submittal does not incorporate the activities, roles and responsibilities of the CCC;
- The submittal does not adequately address common program elements related to administrative coordination, technical assistance, critical coastal areas, additional management measures and monitoring.

EPA and NOAA have reached agreement with the CCC and the SWRCB on an ''action plan'' for improving California's Nonpoint Source Program that will also assist the State in meeting the requirements of Section 6217 of CZARA. The ''action plan'' outlines a framework and key activities that the CCC and the SWRCB along with the RWQCBs will undertake to prepare an implementation strategy to improve efforts to reduce nonpoint source pollution. EPA and NOAA anticipate that the completion of the activities in the ''action plan'' will address the submittal's current shortcomings in a manner that will provide California with a more effective nonpoint source program and help meet the conditions for programs approval identified in the proposed findings. EPA and NOAA are encouraging the State to base this strategy, to the fullest extent possible, on the CZARA materials submitted to date and to continue to involve a wide range of stakeholders in preparing and implementing a nonpoint source program that more fully protects California's water quality and complies with CZARA.

Copies of the Proposed Findings Document, Environmental Assessment, and Finding of No Significant Impact may be obtained upon request from: Joseph P. Flanagan, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, tel. (301) 713–3121, x201.

DATES: Individuals or organizations wishing to submit comments on the proposed Findings or Environmental Assessment should do so by February 9, 1998.

ADDRESSES: Comments should be made to: Joseph A. Uravitch, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA 1305 East-West Highway, Silver Spring, Maryland, 20910, tel. (301) 713–3155, x195. (Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration)

Dated: January 6, 1998.

Captain Evelyn J. Fields,

Acting Deputy Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

Robert H. Wayland III,

Director, Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency.

[FR Doc. 98–542 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–12–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Weather Service Modernization and Associated Restructuring

AGENCY: National Weather Service (NWS), NOAA, Commerce.

ACTION: Notice and opportunity for public comment.

SUMMARY: The NWS is publishing proposed certifications for the automation and closure of the following Weather Service offices at the indicated FAA Weather Observation Service Level:

(1) Astoria, Oregon Weather Service Office (WSO) which will be automated at FAA Weather Observation Service

Level D and with services being provided by the future Portland, Oregon Weather Forecast Office (WFO); and

(2) Lexington, Kentucky WSO which will be automated at FAA Weather Observation Service Level C and with services being provided by the future Louisville, Kentucky and Cincinnati, Ohio WFOs.

In accordance with Pub. L. 102–567, the public will have 60-days in which to comment on these proposed automation and closure certifications.

DATES: Comments are requested by March 10, 1998.

ADDRESSES: Requests for copies of the proposed automation and closure packages should be sent to Tom Beaver, Room 11426, 1325 East-West Highway, Silver Spring, MD 20910, telephone 301–713–0300. All comments should be sent to Tom Beaver at the above address.

FOR FURTHER INFORMATION CONTACT: Tom Beaver at 301–713–0300.

SUPPLEMENTARY INFORMATION: In accordance with section 706 of Pub. L. 102–567, the Secretary of Commerce must certify that these automations and closures will not result in any degradation of service to the affected areas of responsibility and must publish the proposed automation and closure certifications in the FR. The documentation supporting each proposed certification includes the following:

(1) a draft memorandum by the meteorologist(s)-in-charge recommending the certification, the final of which will be endorsed by the Regional Director and the Assistant Administrator of the NWS if appropriate, after consideration of public comments and completion of consultation with the Modernization Transition Committee (the Committee);

(2) a description of local weather characteristics and weather-related concerns which affect the weather services provided within the service area;

(3) a comparison of the services provided within the service area and the services to be provided after such action;

(4) a description of any recent or expected modernization of NWS operation which will enhance services in the service area;

(5) an identification of any area within the affected service area which would not receive coverage (at an elevation of 10,000 feet) by the next generation weather radar network;

(6) evidence, based upon operational demonstration of modernized NWS operations, which was considered in reaching the conclusion that no degradation in service will result from such action including the ASOS Commissioning Report; series of three letters between NWS and FAA confirming that weather services will continue in full compliance with applicable flight aviation rules after ASOS commissioning; Surface Aviation Observation Transition Checklist documenting transfer of augmentation and backup responsibility from NWS to FAA; successful resolution of ASOS user confirmation of services complaints; and an in-place supplementary data program at the responsible WFO(s);

(7) warning and forecast verification statistics for pre-modernized and modernized services which were utilized in determining that services have not been degraded;

(8) an Air Safety Appraisal for offices which are located on an airport; and

(9) a letter appointing the liaison officer.

These proposed certifications do not include any report of the Committee which could be submitted in accordance with sections 706(b)(6) and 707(c) of Pub. L. 102–567. In December 1995 the Committee decided that, in general, they would forego the optional consultation on proposed certifications. Instead, the Committee would just review certifications after the public comment period had closed so their consultation would be with the benefit of public comments that had been submitted.

This notice does not include the complete certification packages because they are too voluminous to publish. Copies of the certification packages and supporting documentation can be obtained through the contact listed above.

Once all public comments have been received and considered, the NWS will complete consultation with the Committee and determine whether to proceed with the final certification. At the June 25, 1997 MTC meeting, the Committee stated that its endorsement of certifications is ''subject to the following qualifications:

(1) The number of trained staff in each modernized field office meets staffing requirements as established by the modernization criteria and documented in the National Implementation Plan and the Human Resources Plan (WBS 1100). Delays in training or failure to fill required positions will increase the risk of degradation of service;

(2) The availability of operational systems in each modernized field office meets requirements as established by the modernization criteria and documented in the System Commissioning and Support Function Demonstration Plans; and

(3) The operational and administrative infrastructures and technical development needed to support the modernized field offices be maintained as required by the modernization plan.'' These qualifications have been met for the above proposed certifications. If a decision to certify is made, the Secretary of Commerce must publish the final certifications in the FR and transmit the certifications to the appropriate Congressional committees prior to automating and closing these offices.

Dated: January 5, 1998.

Robert S. Winokur,

Acting Assistant Administrator for Weather Services.

[FR Doc. 98–499 Filed 1–8–98; 8:45 am]

BILLING CODE 3510–12–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120297A]

Marine Mammals; Permit No. 873 (P772#63)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of amendment.

SUMMARY: Notice is hereby given that on December 18, 1997, permit No. 873 issued to the Southwest Fisheries Science Center, NMFS, P.O. Box 271, La Jolla, CA 92038–0271, was amended.

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS,

1315 East-West Highway, Suite 13130, Silver Spring, MD 20910 (301/713–2289); and

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802, (562/980–4016).

SUPPLEMENTARY INFORMATION: The amendment has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the provisions of § 216.39 of the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the provisions of § 222.25 of the

regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR 222.23).

Permit no. 873 authorizes the permit holder to biopsy several species of cetaceans off the Pacific, Southern, and Indian Oceans, as well as U.S. territorial waters of the Pacific and Southern Oceans and the Gulf of Mexico; and to import biopsy tissues collected outside of U.S. waters. The permit has been amended to extend the expiration date from December 31, 1997 to February 28, 1998. This is a time extension only and involves no increase in the number of animals authorized to be taken under the permit.

Issuance of this permit as required by the ESA was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which is the subject of this permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 19, 1997.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 98–492 Filed 1-8-98; 8:45 am]

BILLING CODE 3510–22–F

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, January 14, 1998, 10:00 a.m.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

MATTER TO BE CONSIDERED:

Bunk Beds

The Commission will consider options for Commission action to address entrapment hazards associated with bunk beds.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207 (301) 504–0800.

Dated: January 6, 1998.

Sadye E. Dunn,

Secretary.

[FR Doc. 98–695 Filed 1–7–98; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability for the Environmental Impact Statement (EIS) on the Disposal and Reuse of the Former Fitzsimons Army Medical Center, Now U.S. Army Garrison-Fitzsimons (USAG–F), Aurora, Colorado

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The proposed action evaluated by this EIS is the disposal of USAG–F, Aurora, Colorado, in accordance with the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510. The EIS addresses the environmental consequences of the disposal and subsequent reuse of the 577-acre installation except for a 21.8 acre enclave for the McWhethy Army Reserve Center.

The EIS analyzes three disposal alternatives: (1) the no action alternative, which entails maintaining the property in caretaker status after closure; (2) the encumbered disposal alternative, which entails transferring the property to future owners with Army-imposed limitations, or encumbrances, on the future use of the property; and (3) the unencumbered disposal alternative, which entails transferring the property to future owners with few or no Army-imposed limitations, or encumbrances, on the future use of the property. The impacts of reuse are evaluated in terms of land use intensities. The Fitzsimons Redevelopment Authority developed the reuse alternatives based on their Reuse Plan. The resource areas evaluated for potential impacts by the proposed action (disposal) and the secondary action (reuse) include: land use; climate; air quality; noise; geology, soils, and topography; water resources; infrastructure; regulated substances; biological resources and ecosystems; cultural resources; sociological environment; quality of life; installation agreements, and permits and regulatory authorizations.

COPIES: Copies of the EIS will be available for review at the Aurora Central Public Library, Aurora, CO and USAG–F, Aurora, CO.

DATES: A final decision on the FEIS will be made after a 30-day waiting period, which commences with the publication of the Environmental Protection Agency's NOA in the **Federal Register.** The action will be documented with a Record of Decision.

ADDRESSES: Copies of the EIS can be obtained by writing to the U.S. Army Corps of Engineers, Omaha District Office, ATTN: Mr. Gene Sturm, 215 North 17th Street, Omaha, NE 68102–4978, or by facsimile at (402) 221–4886. Written comments and suggestions should also be sent to this address.

Dated: December 19, 1997.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, Environment, Safety and Occupational Health) OASA (I,L&E).

[FR Doc. 98–083 Filed 1–8–98; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Committee Meeting Notice

AGENCY: School of the Americas, Training and Doctrine Command.

ACTION: Notice of meeting.

SUMMARY: In accordance with Section 10 (a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following committee meeting:

Name of Committee: School of the Americas (SOA) Subcommittee of the Army Education Advisory Committee.

Dates of Meeting: 27 and 28 January 1998.

Place: School of the Americas, Building 35, Fort Benning, Georgia.

Time: 0900–1700 on 27 January, 0900–1600 on 28 January 1998.

FOR FURTHER INFORMATION CONTACT: School of the Americas, Attention: TMD, MAJ Clemente, Room 333, Building 35, Fort Benning, GA 31905.

SUPPLEMENTARY INFORMATION:

Proposed Agenda: Presentation by the Commanding General, Training and Doctrine Command on the Subcommittee's report of the previous meeting and issues requested from that meeting.

1. Purpose of Meeting: This is the fourth SOA Subcommittee meeting. The subcommittee will receive a report from the Commander Training and Doctrine Command, and briefings they requested as a result of the third subcommittee meeting.

2. Meeting of Advisory Committee is open to the public. Due to space limitations, attendance may be limited to those persons who have notified the Committee Management Office in writing at least 5 days prior to the meeting date of their intent to attend.

3. Any member of the public may file a written statement with the committee

before, during or after the meeting. To the extent that time permits, the subcommittee chairman may allow public presentations of oral statements at the meeting.

4. All communications regarding this subcommittee should be addressed to Lieutenant Colonel Nunez-Rosa, Designated Federal Official, U.S. Army School of the Americas, ATTN: ATZB–SAZ–CS, Fort Benning, GA 31905–6245.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 98–682 Filed 1–8–98; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP96–213–007]

Columbia Gas Transmission Corporation; Notice of Amendment of Application

January 5, 1998.

Take notice that on December 24, 1997, Columbia Gas Transmission Corporation (Columbia), a Delaware corporation, having its principal place of business at 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314–1599, filed on application to amend, pursuant to Section 7(c) of the Natural Gas Act, its certificate previously issued by the Commission in an ''Order Denying Rehearing And Issuing Certificates'' on May 14, 1997 in Docket Nos. CP96–213–000, *et. al.*, Columbia's Market Expansion Project (MEP).

By this amendment Columbia now proposes to refine certain of its 1998 facility construction proposals. The facility modifications are the result of further detailed design analysis of the proposed projects by Columbia's engineering staff. These modifications to Columbia's existing certificate are:

Pipeline Projects

4.6RR Line VM–105 Loop/VM–106

This project, was originally designated VM–140 (Project Item 4.6); Columbia now proposes a variation of the original VM–140 Project which will provide the operational efficiency and control of a single delivery point. This revised project consists of 0.3 mile of 20-inch loop (VM–105 Loop) on the suction of Boswells Tavern Compressor Station, measurement upgrade at Bosewells Tavern, and 0.6 mile of 24-inch pipeline (VM–106) replacing an existing 12-inch pipeline on the discharge of Boswell Compressor Station.

4.18 Line VM–109 (Louisa Loop)

Columbia proposes to install 6.0 miles of 24-inch pipeline loop, from its Mainline Valve 3 to its Louisa Compressor Station, all in Louisa County, Virginia. The proposes pipeline loop will loop out the section of line between mainline Valve 3 and Louisa and provide the necessary capacity to serve Market Expansion service increases. This loop would replace the previously proposed and approved horsepower additions at Louisa (Project No. 5.17) and Petersburg Compressor Station (Project No. 5.18). This additional pipeline loop is estimated to cost $5,966,700 and is the least cost option to achieve the required Market Expansion service.

Compressor Projects

5.17 Louisa Compressor Station

The installation of 1,350 HP would be canceled.

5.18 Peterburg Compressor Station

The installation of 1,100 HP would be canceled.

5.20R/5.21R Hamlin Compressor Station

The installation of this new station consisting of 3,175 HP would be canceled. Columbia has now determined that it no longer requires the authorized Hamlin Compressor Station since additional long term gas supply is available at its existing Grant Compressor Station and on the Line KA System. Certain piping modifications will be required at the Grant Compressor Station at a cost of $1,885,000 in order to flow gas south from Line SM–80 via SM–116 into the suction of Grant's high stage cylinders for delivery into the KA System.

Abandonment Projects

7.15 Dugannon Compressor Station

The relocation of a 825 HP Unit to Hamlin Compressor Station would be canceled.

7.20 Peterburg Compressor Station

The relocation of a 1,140 HP Unit to Louisa Compressor Station would be canceled.

7.26 Line VM–106

The existing 12-inch pipeline is to be abandoned in conjunction with 24-inch replacement in Project No. 4.6RR.

Also, Columbia proposes to reduce reacquisition of the TEMCO capacity due to the revisions to customer elected services. Columbia states that, due to certain service level changes requested by two of its customers, Reynolds Metals Company (Reynolds) and Roanoke Gas Company (Roanoke), it is able to reduce the reacquisition of Transco Energy Marketing Company's (TEMCO) capacity from 53,800 to 50,375 Mdth/d and its associated costs. Specifically, Reynolds has notified Columbia that it no longer desires 3,425 Dth/d of FTS service originally scheduled to commence in 1998. Roanoke has requested and entered into a fifteen year contract for an additional 3,425 Dth/d of FTS service beginning in 1999. Columbia states that the level of the TEMCO capacity reacquisition can be reduced because of the location of the Roanoke delivery.

Columbia states that the revised construction results in a savings in Gross Investment of $3,280,700 reducing the 1995 Gross Investment estimate for the Market Expansion Project from $259,348,100 to $256,067,400.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 22, 1998, file with the Federal Energy Regulation Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Any person wishing to become a party to a proceeding or to participate as party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be

unnecessary for Columbia to appear or be represented at the hearing.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–506 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM98–4–23–000]

Eastern Shore Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

January 5, 1998.

Take notice that Eastern Shore Natural Gas Company (ESNG) tendered for filing on December 18, 1997 certain revised tariff sheets in the above captioned docket as part of its FERC Gas Tariff, First Revised Volume No. 1, with a proposed effective date of December 1, 1997.

The purpose of the instant filing is to track rate changes attributable to storage service purchased from Transcontinental Gas Pipe Line Corporation (Transco) under its Rate Schedules GSS and LSS the costs of which are included in the rates and charges payable under ESNG's Rates Schedules GSS and LSS. This tracking filing is being made pursuant to Section 3 of ESNG's Rate Schedule GSS and Section 3 of ESNG's Rate Schedule LSS.

ESNG states that copies of the filing have been served upon its jurisdictional customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed as provided in Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–520 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–20–013]

El Paso Natural Gas Company; Notice of Compliance Filing

January 5, 1998.

Take notice that on December 29, 1997, El Paso Natural Gas Company (''El Paso'') tendered for filing and acceptance the following revised tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1–A, to become effective February 1, 1998:

Substitute Fourth Revised Sheet No. 210
Sub Second Revised Sheet No. 210.01
Substitue Second Revised Sheet No. 211
Sub 1st Revised Original Sheet No. 211A
Substitute Fourth Revised Sheet No. 215
Substitute Third Revised Sheet No. 217

El Paso states that the tariff sheets are being filed here to revise El Paso's pooling and intra-day scheduling provisions to comply with the Commission's order issued December 19, 1997 in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests should be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–511 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–287–010]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

January 5, 1998.

Take notice that on December 24, 1997, El Paso Natural Gas Company (''El Paso'') tendered for filing and acceptance by the Federal Energy Regulatory Commission (''Commission'') the following tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1–A, to become effective January 1, 1998:

Eleventh Revised Sheet No. 30
Sixth Revised Sheet No. 31

El Paso states that the above tariff sheets are being filed to implement negotiated rate contracts pursuant to the Commission's statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines issued January 31, 1996 at Docket Nos. RM95–6–000 and RM96–7–000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–512 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–287–011]

El Paso Natural Gas Company; Notice of Compliance Filing

January 5, 1998.

Take notice that on December 29, 1997, El Paso Natural Gas Company (''El Paso'') tendered for filing and acceptance the following revised tariff sheet to its FERC Gas Tariff, Second Revised Volume No. 1–A, to become effective December 1, 1997:

Substitute Tenth Revised Sheet No. 30

El Paso states that the tariff sheet is being filed to revise certain reported

volume commitments on its Statement of Negotiated Rates sheet in compliance with the Commission's letter order issued on December 18, 1997 in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–513 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–96–000]

Great Lakes Gas Transmission Limited Partnership; Notice of Filing

January 5 1998.

Take notice that on December 23, 1997, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets proposed to be effective February 1, 1998:

Fourth Revised Sheet No. 1
Fifth Revised Sheet No. 4A
Fourth Revised Sheet No. 8
Fifth Revised Sheet No. 9
Third Revised Sheet No. 10
Second Revised Sheet No. 10A
Fourth Revised Sheet No. 13
Second Revised Sheet No. 16
Original Sheet No. 16A
Third Revised Sheet No. 22
Second Revised Sheet No. 23
First Revised Sheet No. 24
Second Revised Sheet No. 25
Second Revised Sheet No. 26
Second Revised Sheet No. 27
First Revised Sheet No. 27A
Second Revised Sheet No. 40A
Second Revised Sheet No. 40B
Fourth Revised Sheet No. 41
Third Revised Sheet No. 42
First Revised Sheet No. 42B
Third Revised Sheet No. 45
Original Sheet No. 45A
Second Revised Sheet No. 57
Third Revised Sheet No. 63
Third Revised Sheet No. 64
Fourth Revised Sheet No. 65
Second Revised Sheet No. 84

Great Lakes also tendered for filing as part of its FERC Gas Tariff, Original Volume No. 2, the following tariff sheets proposed to become effective February 1, 1997:

Fourth Revised Sheet No. 100
Third Revised Sheet NO. 169
Third Revised Sheet NO. 220
Second Revised Sheet NO. 221
Fifth Revised Sheet NO. 224
Third Revised Sheet NO. 225
Third Revised Sheet NO. 243
Seventh Revised Sheet NO. 246
Third Revised Sheet NO. 265
Third Revised Sheet NO. 266
Second Revised Sheet NO. 271
Sixth Revised Sheet NO. 291
Third Revised Sheet NO. 292
Second Revised Sheet NO. 296
Fourth Revised Sheet NO. 601
Third Revised Sheet NO. 602
Third Revised Sheet NO. 671

Great Lakes states that most of the above-referenced tariff sheets are being filed to implement procedural and operational changes deemed necessary to effectively compete in the increasingly complex gas industry, partially due to the standards promulgated by the Gas Industry Standards Board. The remaining changes proposed are either being made to clarify Great Lakes' tariff or are simply administrative in nature. None of the proposed changes will affect any of Great Lakes' currently effective rates and charges.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.214 and Section 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Commission's Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–517 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–164–000]

Koch Gateway Pipeline Company; Notice of Request Under Blanket Authorization

January 5, 1998.

Take notice that on December 29, 1997, Koch Gateway Pipeline Company (KGPC), P.O. Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP98–164–000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for approval to modify an existing receipt point meter station into a bi-directional point serving Riveria Utilities, Inc. (Riveria), a local distribution company, under KGPC's blanket certificate issued in Docket No. CP82–430–000, pursuant to Section 7(c) of the Natural Gas Act (NGA), all as more fully set forth in the request which is on file with the commission and open to public inspection.

KGPC states that it proposes to reverse one meter tube at an existing dual four-inch meter station on KGPC's lateral line, designated as Index 301–8 in Baldwin County, Alabama. KGPC asserts that the volumes of natural gas proposed to be delivered to Riveria will remain within its current certificated entitlement. KGPC further asserts that the activities proposed herein will have no effect on KGPC's ability to serve its other existing customers.

Any person or the Commission's Staff may, within 45 days of the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214), a motion to intervene and pursuant to Section 157.205 of the regulations under the Natural Gas Act (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefor, the proposed activities shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–507 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–320–019]

Koch Gateway Pipeline Company; Notice of Negotiated Rate Filing

January 5, 1998.

Take notice that on December 23, 1997, Koch Gateway Pipeline Company (''Koch'') hereby submits to the Federal Energy Regulatory Commission (''Commission'') a contract for disclosure of a recently negotiated rate transaction. As shown on the contract, Koch requests an effective date of December 23, 1997.

Special Negotiated Rate Under Interruptible Transportation Service Agreement Between Koch and Texaco Natural Gas.

Koch states that copies of the filing are being made available for public inspection during regular business hours in Koch's offices in Houston, Texas. In addition, Koch states that it has served copies of this filing upon all parties on the official service list created by the Secretary in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–510 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–373–006]

Koch Gateway Pipeline Company; Notice of Filing

January 5, 1998.

Take notice that on December 23, 1997, Koch Gateway Pipeline Company (''Koch'') tendered for filing as part of its FERC Gas Tariff, Volume No. 1, the following tariff sheets, to become effective January 1, 1998:

Fifth Revised Volume No. 1

Twenty-second Revised Sheet No. 20
Nineteenth Revised Sheet No. 21
Twentieth Revised Sheet No. 22
Twenty-second Revised Sheet No. 24

Koch states that the above referenced tariff sheets are being filed to reflect the removal of the GRI surcharge from its currently effective rates.

Koch also states that it has served copies of the instant filing upon each affected customer, interested state commissions, and other parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–514 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–373–007]

Koch Gateway Pipeline Company; Notice of Compliance Filing

January 5, 1998.

Take notice that on December 23, 1997, Koch Gateway Pipeline Company (''Koch'') tendered for filing as part of its FERC Gas Tariff, Volume No. 1, the following tariff sheet, to become effective December 1, 1997:

Fifth Revised Volume No. 1

2nd Sub First Revised Sheet No. 719

Koch states that the above referenced tariff sheet is being filed to comply with the Commission's December 17, 1997, ''Order on Rehearing and Clarification'', issued in the above captioned docket.

Koch also states that it has served copies of the instant filing upon each person designated on the official service list, each affected customer, interested state commissions, and other parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make Protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–515 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–98–000]

Pacific Gas Transmission Co.; Notice of Cancellation of FERC Gas Tariff

January 5, 1998.

Take notice that on December 24, 1997, Pacific Gas transmission Company (''PGT'') tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet: Sixth Revised Sheet No. 1. PGT requests this tariff sheet becomes effective January 24, 1998.

PGT states that the tariff sheet which it is submitting reflects cancellation of its firm transportation service Rate Schedule T–3 pursuant to Section 7(c) of the Natural Gas Act. PGT states that all shippers previously utilizing this rate schedule have executed contracts

converting their transportation service to PGT's Rage Schedule FTS–1 pursuant to the provisions of PGT's FERC Gas Tariff, First Revised Volume No. 1–A. PGT further states that cancellation of Rate Schedule T–3 leaves no remaining rate schedules or shippers to which Second Revised Volume No. 1 applies. Accordingly, PGT is issuing notice of cancellation of its FERC Gas Tariff, Second Revised Volume No. 1.

PGT further states it has served a copy of this filing upon all interested state regulatory agencies and PGT's jurisdictional customers.

Any persons desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Davis P. Boergers,

Acting Secretary.

[FR Doc. 98–519 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–97–000]

Sea Robin Pipeline Company; Notice of Flowthrough Crediting Report

January 5, 1998.

Take notice that on December 23, 1997, Sea Robin Pipeline Company (Sea Robin) tendered for filing a report setting forth amounts due shippers through its Annual Flowthrough Crediting Mechanism. This report is filed pursuant to Section 27 of the General Terms and Conditions of Sea Robin's FERC Gas Tariff which requires the crediting of certain amounts received as a result of resolving monthly imbalances between its gas and liquefiables shippers and under its operational balancing agreements, and imposing scheduling penalties during the 12 month period ending October 31, 1997.

Copies of Sea Robin's filing will be served upon all of Sea Robin's shippers, interested commissions and interested parties.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's rules and regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–518 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–58–001]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

January 5, 1998.

Take notice that on December 23, 1997 Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing certain revised tariff sheets to its FERC Gas Tariff, Third Revised Volume No. 1 which tariff sheets are enumerated in Appendix A attached to the filing. The referenced tariff sheets are proposed to be effective December 21, 1997.

On November 21, 1997 Transco submitted a filing in Docket No. RP98–58–000 primarily for the purpose of cleaning up various spelling, punctuation, wording and reference errors. The tariff sheets were proposed to be effective December 21, 1997. On December 17, 1997, the Federal Energy Regulatory Commission (Commission) issued an order accepting such tariff sheets (December 17 Order). However, the Commission directed Transco, within 10 days of the order, to refile Second Revised Sheet Nos. 184 and 185 to change the designation of the superseded tariff sheets to be First Revised Sheet Nos. 184 and 185. Additionally, the Commission directed Transco to refile First Revised Sheet No. 215 to supersede Substitute Original Sheet No. 215. Accordingly, in compliance with the Commission's December 17 Order, Transco hereby tenders the sheets enumerated in Appendix A with the revised pagination.

Transco is serving a copy of the filing to parties to Docket No. RP98–58–000 and interested State Commissions. In accordance with the provisions of Section 154.16 of the Commission's Regulations, copies of this filing are available for public inspection, during regular business hours, in a convenient form and place at Transco's main office at 2800 Post Oak Boulevard in Houston, Texas.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–516 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

East Tennessee Natural Gas Company; Notice of Intent to Prepare an Environmental Assessment for the Proposed Virginia Expansion Project and Request for Comments on Environmental Issues

January 5, 1998.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the construction and operation of the facilities proposed in the Virginia Expansion Project.[1] This EA will be

[1] East Tennessee Natural Gas Company's application was filed with the Commission under

Continued

used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

Summary of the Proposed Project

East Tennessee Natural Gas Company (East Tennessee) proposes to expand the capacity of its facilities in Tennessee and Virginia to transport an additional 10,300 dekatherms (Dth) per day of natural gas to Roanoke Gas Company. Specifically, East Tennessee seeks authority to:

- Construct about 9.95 miles of 12-inch-diameter pipeline in Washington, Smyth and Wythe Counties, Virginia;
- Hydrostatically test piping at three compressor stations in Robertson, Trousdale, and Putnam Counties, Tennessee, 10.88 miles of 22-inch-diameter pipeline in Smith and Overton Counties, Tennessee, and 20.95 miles of 8-inch diameter pipeline in Washington County, Virginia; and
- Construct 20 feet of 22-inch-diameter pipeline at six manifold locations for tie-ins in Smith and Overton Counties, Tennessee, and Washington County, Virginia.

The general location of the project facilities is shown in appendix 1.[2] If you are interested in obtaining detailed maps of a specific portion of the project, or procedural information, please write to the Secretary of the Commission.

Land Requirements for Construction

Construction of the proposed facilities would require about 153.3 acres of land. Following construction, about 60.3 acres would be maintained as new permanent right-of-way. The remaining 93.0 acres of land would be restored and allowed to revert to its former use.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impact that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. We call this ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission requests public comments on the scope of the issues it will address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituent of this proposed action and encourage them to comment on their areas of concern.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- geology and soils
- water resources, fisheries, and wetlands
- endangered and threatened species
- vegetation and wildlife
- land use
- cultural resources
- air quality and noise
- public safety

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, state, and local agencies, public interest groups, interested individuals affected landowners, newspapers, libraries, and the Commissions' official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

Currently Identified Environmental Issues

We have already identified one issue that we think deserves attention based on a preliminary review of the proposed facilities and the environmental information provided by East Tennessee. This preliminary list of issues may be changed based on your comments and our analysis.

- Four residences are located within 50 feet of the proposed construction right-of-way

Public Participation

You can make a difference by sending a letter addressing your specific comments or concerns about the project. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send two copies of your letter to: Secretary, Federal Energy Regulatory Commission, 888 First St., N.E., Room 1A, Washington, DC 20426;
- Label one copy of the comments for the attention of the Environmental Review and Compliance Branch, PR–11.1
- Reference Docket No. CP98–40–000; and
- Mail your comments so that they will be received in Washington, DC on or before February 11, 1998.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding or become an ''intervenor.'' Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide copies of its filings to all other parties. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).

The date for filing timely motions to intervene in this proceeding has passed. Therefore, parties now seeking to file late interventions must show good cause, as required by section 385.214(b)(3), why this time limitation should be waived. Environmental issues have been viewed as good cause for late intervention.

You do not need intervenor status to have your comments considered.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–521 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

section 7 of the Natural Gas Act and part 157 of the Commission's regulations.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available from the Commision's Public Reference and Files Maintenance Branch, 888 First Street, N.E., Washington, D.C. 20426, or call (202) 208–1371. Copies of the appendices were sent to all those receiving this notice in the mail.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Surrender of Exemption

January 5, 1998.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender of Exemption.

b. *Project No.:* 8732–004.

c. *Date Filed:* December 22, 1997.

d. *Applicant:* City of Manassas, Virginia, Department of Public Works.

e. *Name of Project:* Broad Run Hydroelectric Project.

f. *Location:* On Broad Run at Lake Manassas, in Prince William County, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Contact:* Mr. Allen P. Todd, Director of Utilities, City of Manassas, 8500 Public Works Drive, Manassas, VA 22110, (703) 257–8226.

i. *FERC Contact:* Mr. Lynn R. Miles, (202) 219–2671.

j. *Comment Date:* February 20, 1998.

k. Description of the Proposed Action: The exemptee requests to surrender the exemption for its existing project.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–509 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT98–11–000]

Williston Basin Interstate Pipeline Company; Notice of Filing

January 5, 1998.

Take notice that on December 24, 1997, Williston Basin Interstate Pipeline Company (Williston Basin), 200 North Third Street, Suite 300, Bismarck, North Dakota 58501, tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective December 24, 1997:

Second Revised Volume No. 1
Ninth Revised Sheet No. 776
Twentieth Revised Sheet No. 831

Williston Basin states that the revised tariff sheets are being filed simply to update its Master Receipt/Delivery Point List.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided by Section 154.210 of the Commission's rules and regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–508 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Public Outreach Meeting; Birmingham, Alabama

January 5, 1998.

The Office of Hydropower Licensing will hold a public Outreach Meeting in Birmingham, Alabama, on Thursday, January 29, 1998. The Outreach Meeting is scheduled to start at 9:00 am and finish at 5:00 pm.

The purpose of the Outreach program is to familiarize federal, state, and other government agencies, Indian tribes, nongovernmental organizations, licensees, and other interested parties with the Commission's hydropower licensing program. The topics for the Outreach Meeting are pre-licensing, licensing, and post-licensing procedures for hydroelectric projects in Alabama and Georgia whose licenses expire between calendar years 2000 and 2010.

Staff from the Commission's Office of Hydropower Licensing will preside over the meetings.

The location of the Outreach Meeting is: Holiday Inn-Redmont, 2105 5th Avenue North, Birmingham, AL 35203, (205) 324–2101.

If you plan to attend, notify Ron McKitrick or Theresa Gibson, Eastern Outreach Coordinators, fax: 202–219–2152; telephone: 202–219–2783 or 202–219–2793.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–505 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL98–3–000]

Process for Assuring Non-discriminatory Transmission Services as New Reliability Rules are Developed for Using the Transmission System; Notice of Conference

January 5, 1998.

I

The Federal Energy Regulatory Commission (Commission) hereby announces its intention to convene a public conference to discuss what procedures it should follow, in the absence of federal legislation on reliability issues, to address the effect of new reliability standards on jurisdictional electric transmission

service. Specifically, the Commission wishes to examine how it should go about ensuring non-discriminatory open access service under Order No. 888 as the power industry adopts new methods of protecting system reliability. This conference, described below, is for the limited purpose of discussing the procedures necessary for the Commission to meet this goal.

II

The Commission requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to provide non-discriminatory transmission service to eligible customers and to take transmission service for their own uses under the same rates, terms and conditions applied to others.

Increased competition in wholesale electricity markets has resulted in many new market participants who do not own, control or operate transmission facilities, and has fostered a great increase in the number and variety of wholesale transmission and power sale arrangements, including ancillary services needed to accomplish transmission service. In addition, control over transmission facilities is shifting in some instances from traditional utility owners and operators to a regime of control that includes independent transmission system operators whose primary purpose is to ensure nondiscriminatory operation of transmission facilities.

In light of the changes taking place in the electric industry, the North American Electric Reliability Council (NERC) and its regional reliability councils are implementing changes in their rules to maintain transmission system security. These rules apply both to transmission-owning utilities and to the transmission customers of those utilities. Historically, the Commission has followed a ''rule of reason'' approach and not required each contract or practice that affects a jurisdictional service to be on file, even though section 205 of the Federal Power Act may lead to that result. If the new reliability rules become terms and conditions with which customers of Commission-jurisdictional utilities must comply as a predicate to obtaining transmission service, the Commission may need to reassess how it is applying the ''rule of reason.'' If jurisdictional services can be denied or compromised under the new reliability rules, then section 205 appears to require that such rules be included in the transmission tariffs on file with the Commission.

The Commission is not proposing in this notice to judge the technical adequacy or appropriateness of any reliability standard. Nor is it proposing in this notice to approve the structure of NERC or the appropriateness of any organization that establishes reliability standards under existing laws and circumstances. Indeed, the Commission's authority to act on such matters is at best unclear. As described in a recent position paper of the task force that is charged with advising the Secretary of Energy on electric system reliability:

> It is not clear whether the FERC has sufficient statutory authority to enforce NERC rules. The FERC has issued several orders requiring parties to abide by the NERC standards and parties have assented to the requirements. However, the use of FERC's conditioning authority to enforce NERC standards has not yet been challenged. Others question whether the FERC *should* enforce these rules in light of concerns over NERC's governance and decision-making procedures.[1]

III

The Commission is committed to ensuring that competitive developments in the industry take place in a manner that safeguards the reliability of the nation's electric transmission system. The Commission is equally committed to ensuring that the rules and practices for reliable operation of the grid are compatible with open, non-discriminatory use of transmission systems.

The Commission believes that it would be beneficial at this juncture to further explore this matter with interested parties in an informal setting. To that end, we are announcing today our intention to convene a round-table discussion on developing an appropriate procedure or procedures for the Commission to address potentially service-affecting reliability practices in the context of non-discriminatory transmission access. We emphasize that the purpose of the round-table is to discuss procedures and not to discuss the merits of any particular reliability rule, practice or organization. The round-table will take place on February 20, 1998, in Washington, DC.

The Commission has identified certain possible procedures and expects that participants will be prepared to discuss these procedures as well as to identify others. One approach might be to prohibit any public utility from imposing new terms or conditions related to reliability on any customer unless and until that utility had first incorporated those terms and conditions into its transmission tariff under an appropriately noticed section 205 filing. An alternative might be to have the appropriate reliability organization (NERC or one of the regional reliability councils) file a request for a declaratory order setting forth proposed changes to its existing reliability rules, so that appropriate notice and opportunity for comment could be given. Once the Commission issued a declaratory order, utilities could then incorporate the results of the declaratory order proceeding in their tariffs through what would amount to a compliance filing. This process could apply to those changes in reliability rules that determine whether a transmission customer obtains or loses transmission service, or it could apply to a larger group of reliability rule changes.

Staff will contact industry representatives to develop a broadly representative panel. We expect the panel to have no more than fifteen participants. Persons wishing to be considered for inclusion on the panel should contact: David N. Cook, Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, 202–208–0955.

Persons wishing to file written comments on possible procedural approaches to these issues should do so by January 30, 1998. The Commission will issue a notice identifying the panel members and giving further details on the round-table discussion in the near future.

By direction of the Commission.

David P. Boergers,

Acting Secretary.

[FR Doc. 98–529 Filed 1–8–98; 8:45 am]

BILLING CODE 6717–01–M

[1] ''Maintaining Bull-Power Reliability Through Use of a Self-Regulating Organization: Position Paper.'' Secretary of Energy Advisory Board, Task Force on Electric-System Reliability (November 6, 1997).

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–5487–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 OR (202) 564–7153.

Weekly receipt of Environmental Impact Statements Filed December 29, 1997 Through January 2, 1998 Pursuant to 40 CFR 1506.9.

EIS No. 970498, Draft Supplement, COE, OR, WA, Columbia and Lower Willamette River Federal Navigation

Channel, Intregrated Dredged Material Management Study, OR and WA, *Due:* February 23, 1998, *Contact:* Steven J. Stevens (503) 808–4768.

EIS No. 970499, Final EIS, USA, CO, United States Army Garrison, Fitzsimons (Formerly Fitzsimons Army Medical Center) Disposal and Reuse for BRAC–95, Implementation, City of Aurora, Denver County, CO, *Due:* February 9, 1998, *Contact:* Gene Sturm (402) 221–4886.

EIS No. 970500, Draft Supplement, AFS, MT, Asarco Rock Creek Copper and Silver Mining Construction and Operation Project, Additional Information, Plan of Operations Approval, Special Use Permit(s), Road Use Permit, Mineral Material Permit, Timber Sale Contract and COE Section 404 Permit Issuance, Kootenai National Forest, Sanders County, MT, *Due:* March 11, 1998, *Contact:* Peter Kaiser (406) 293–6211.

EIS No. 970501, Final EIS, AFS, CO, Arapaho and Roosevelt National Forests and Pawnee National Grassland, Implementation, Land and Resource Management Plan, Boulder, Clear Creek, Gilpin, Grand, Larimer and Weld Counties, CO, *Due:* February 9, 1998, *Contact:* Peter L. Clark (970) 498–1100.

Amended Notices

EIS No. 970213, Draft EIS, AFS, ID, North Lochsa Face Landscape and Watershed Assessment Project, Implementation, Clearwater National Forest, Lochsa Ranger District, Idaho County, ID, *Due:* March 2, 1998, *Contact:* George Harbaugh (208) 926–4275. Published FR 06–13–97—Review Period Reopened.

EIS No. 970416, Draft EIS, FHW, HI, Saddle Road (HI–200) Improvements between Mamalahoa Highway (HI–190) to Milepost 6 near Hilo, Funding, NPDES and COE Section 404 Permit, Hawaii County, HI, *Due:* January 16, 1998, *Contact:* Bert McCauley (303) 969–5924. Published FR 11–07–97—Review Period extended.

Dated: January 6, 1998.

William D. Dickerson,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 98–587 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30446; FRL–5764–8]

Allersearch Laboratories; Applications to Register Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing a new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments must be submitted by February 9, 1998.

ADDRESSES: By mail, submit written comments identified by the document control number [OPP–30446] and the file symbols to: Public Information and Records Integrity Branch (7502C), Information Resources and Services Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Environmental Protection Agency, Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. The public docket is available for public inspection in Rm. 1132 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Marion Johnson, Product Manager (PM-10), Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 250, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703) 305–6788; e-mail: johnson.marion@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA received applications as follows to register pesticide products containing an active ingredient not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Products Containing a New Active Ingredient Not Previously Registered

1. File Symbol: 67648–E. Applicant: Allersearch Laboratories, Division of Alkaline Corporation, P.O. Box 306, Oakhurst, NJ 07755–0306. Product Name: Benzyl Alcohol NF Technical. Active ingredient: Benzyl alcohol at 99 percent. Proposed classification/Use: General. For formulation into end-use products intended for indoor nonfood uses only.

2. File Symbol: 67648–R. Applicant: Allersearch Laboratories, Div., of Alkaline Corporation. Product Name: Allersearch DMS. Active ingredient: Benzyl alcohol at 10 percent. Proposed classification/Use: General. For use to control house dust mites on carpet and upholstery.

Notice of approval or denial of an application to register a pesticide product will be announced in the **Federal Register**. The procedure for requesting data will be given in the **Federal Register** if an application is approved.

Comments received within the specified time period will be considered before a final decision is made; comments received after the time specified will be considered only to the extent possible without delaying processing of the application.

The official record for this notice, as well as the public version, has been established for this notice under docket number [OPP–30446] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form

of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number [OPP–30446]. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pest, Product registration.

Dated: December 29, 1997.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 98–554 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30409A; FRL–5763–5]

DowElanco; Approval of Pesticide Product Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications submitted by DowElanco, to conditionally register the pesticide products FirstRate Herbicide and Cloransulam-methyl Technical containing a new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: By mail: James Tompkins, Product Manager (PM) 25, Registration Division (7505C), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 239, CM #2, Environmental Protection Agency, 1921 Jefferson Davis Hwy, Arlington, VA 22202, 703–305–5697; e-mail: tompkins.james@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document and the Fact Sheet are available from the EPA home page at the Environmental Sub-Set entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

EPA issued a notice, published in the **Federal Register** of May 1, 1996 (61 FR 19279; FRL–5365–5), which announced that DowElanco, 9330 Zionsville Road, Indianapolis, IN 46268–1054, had submitted applications to register the pesticide products FirstRate Herbicide and Cloransulam-methyl Technical (EPA File Symbols 62719–ETL and 62719–ETU), containing the active ingredient cloransulam-methyl: *N*-(2-carbomethoxy-6-chlorophenyl)-5-ethoxy-7-fluoro (1,2,4) triazolo-[1,5-c]pyrimidine-2-sulfonamide at 84 and 97.5 percent respectively, an active ingredient not included in any previously registered products.

The applications were approved on October 29, 1997, for one end-use and one technical product listed below:

1. FirstRate Herbicide for broadleaf weed control in soybeans (EPA Registration Number 62719–275).

2. Cloransulam-methyl Technical for manufacturing use only (EPA Registration Number 62719–274).

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest.

The Agency has considered the available data on the risks associated with the proposed use of cloransulam-methyl: *N*-(2-carbomethoxy-6-chlorophenyl)-5-ethoxy-7-fluoro (1,2,4) triazolo-[1,5-c]pyrimidine-2-sulfonamide, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of cloransulam-methyl: *N*-(2-carbomethoxy-6-chlorophenyl)-5-ethoxy-7-fluoro (1,2,4) triazolo-[1,5-c]pyrimidine-2-sulfonamide during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

These products are conditionally registered in accordance with FIFRA section 3(c)(7)(C). If the conditions are not complied with the registrations will be subject to cancellation in accordance with FIFRA section 6(e).

Consistent with section 3(c)(7)(C), the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

More detailed information on these conditional registrations is contained in an EPA Pesticide Fact Sheet on cloransulam-methyl: *N*-(2-carbomethoxy-6-chlorophenyl)-5-ethoxy-7-fluoro (1,2,4) triazolo-[1,5-c]pyrimidine-2-sulfonamide.

A copy of the fact sheet, which provides a summary description of the chemical, use patterns and formulations, science findings, and the Agency's regulatory position and rationale, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Intregrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 1132, CM #2, Arlington, VA 22202 (703–305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A-101), 401 M St., SW., Washington, D.C. 20460. Such requests should: (1) Identify the product name and registration number and (2) specify the data or information desired.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Product registration.

Dated: December 18, 1997.

James Jones,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 98–555 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–786; FRL–5762–6]

Notice of Filing of Pesticide Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of certain pesticide chemicals in or on various food commodities.

DATES: Comments, identified by the docket control number PF–786, must be received on or before February 9, 1998.

ADDRESSES: By mail submit written comments to: Public Information and Records Integrity Branch (7502C), Information Resources and Services Division, Office of Pesticides Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as ''Confidential Business Information'' (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: The product manager listed in the table below:

Product Manager	Office location/telephone number	Address
Joanne Miller (PM 23) ...	Rm. 237, CM #2, 703–305–6224, e-mail: miller.joanne@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA
Marion Johnson (PM 10)	Rm. 217, CM #2, 703–305–6788, e-mail: johnson.marion@epamail.epa.gov.	Do.
Cynthia Giles-Parker (PM 22).	Rm. 229, CM #2, 703–305–7740, e-mail: giles-parker.cynthia@epamail.epa.gov.	Do.

SUPPLEMENTARY INFORMATION: EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

The official record for this notice of filing, as well as the public version, has been established for this notice of filing under docket control number [PF–786] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number [PF–786] and appropriate petition number. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection, Agricultural commodities, Food additives, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 17, 1997.

James Jones,

Acting Director, Registration Division, Office of Pesticide Programs.

Summaries of Petitions

Petitioner summaries of the pesticide petitions are printed below as required by section 408(d)(3) of the FFDCA. The summaries of the petitions were prepared by the petitioners and represent the views of the petitioners. EPA is publishing the petition summaries verbatim without editing them in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

1. BASF Corporation

PP 7F4881

EPA has received a pesticide petition (PP 7F4881) from BASF Corporation, Agricultural Products, P.O. Box 13528, Research Triangle Park, NC 27709, proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of Pridaben, [2 tert-butyl-5(4-tert-butylbenzylthio)-4-chloropyridazin-3(2*H*)-one] in or on the raw agricultural commodity. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism*. BASF Corporation notes that metabolism in plants is understood.

2. *Analytical method*. The proposed analytical method involves extraction, partition, clean-up and detection of residues by gc/ecd.

3. *Magnitude of residues*. Eleven peach residue trials to determine residues in peaches and nectarines were conducted in eight states. Residues of pyridaben were measured by gc/ecd. The method of detection had a limit of detection of 0.05 parts per million (ppm). Residues ranged from <0.05 to 2.36.

Eight plum residue trials to determine residues in plums and prunes were conducted in four states. Residues of pyridaben were measured by gc/ecd. The method of detection had a limit of detection of 0.05 ppm. Residues ranged from <0.05 to 0.683 ppm.

No residues trials were conducted to determine residues in cherries and apricots. Only postharvest applications are requested. No residues will occur since pyridaben is not systemic and does not translocate. The limit of detection of 0.05 ppm is proposed as the tolerance.

Fifteen grape residue trials were conducted in six states. Residues of pyridaben were measured by gc/ecd. The method of detection had a limit of detection of 0.05 ppm. Residues ranged from 0.168 to 1.38 ppm.

Six pecan residue trials were conducted in four states to complete requirements for a group tolerance for nut crops. BASF Corporation was granted a tolerance of 0.05 ppm for use on almonds. Residues of pyridaben were measured by gc/ecd. The method of detection had a limit of detection of 0.05ppm. There were no residues above 0.05 ppm.

B. Toxicological Profile

1. *Acute toxicity—Acute toxicity testing.* i. Acute Oral Toxicity (rat): LD_{50} = 1,100 mg/kg in males; 570 mg/kg in females. Tox Category: III.

ii. Acute Oral Toxicity (mouse): LD_{50} = 424 mg/kg in males; 383 mg/kg in females. Tox Category: II.

iii. Acute Dermal Toxicity (rat): LD_{50} = >2000 mg/kg in males and females. Tox Category: III.

iv. Acute Inhalation Toxicity (rat): LC_{50} = 0.66 mg/l in males; 0.62 mg/l in females. Tox Category: III.

v. Primary Eye Irritation (rabbit): Pyridaben is a slight ocular irritant. Tox Category: III.

vi. Primary Dermal irritation (rabbit): Pyridaben is not a dermal irritant. Tox Category: IV.

vii. Dermal Sensitization (guinea pig): Pyridaben is not a dermal sensitizer.

viii. Acute Neurotoxicity (rat): Rats were dosed once with 0, 50, 100 and 200 milligram/kilogram (mg/kg). The No Observed Effect Level (NOEL) for systemic toxicity was determined to be 50 mg/kg for both males and females. The Lowest Observed Effect Level (LOEL) for systemic effects was determined to be 100 mg/kg in both sexes based on decreased food consumption, decreased body weight gain and increased clinical signs. The LOEL for neurobehavioral effects was determined to be 200 mg/kg in males and >200 mg/kg in females.

2. Mutagenicity testing—Ames testing: Negative *In vitro* cytogenicity (Chinese hamster lung cells): Negative *In vivo* micronucleus assay (mouse): Negative DNA damage/repair (*E. coli*): Negative.

3. *Reproductive and developmental toxicity—* i. *Developmental toxicity testing (rat).* Sprague Dawley rats were dosed with 0, 2.5, 5.7, 13 and 30 mg/kg/day pyridaben in the diet from days 6 through 15 of gestation. The Maternal NOEL was determined to be 4.7 mg/kg/day and the maternal LOEL was determined to be 13 mg/kg/day based on decreased body weight gain, and decreased food consumption during the dosing period. The developmental NOEL was determined to be 13 mg/kg/day and the developmental LOEL was determined to be 30 mg/kg/day based on decreased fetal body weight and an increase in incomplete ossification in selected bones.

ii. *Developmental toxicity (rabbit).* New Zealand white rabbits were dosed with 0, 1.5, 5, and 15 mg/kg/day pyridaben in the diet from days 6 through 19 of gestation. The Maternal NOEL was determined to be 5 mg/kg/day and the maternal LOEL was determined to be 15 mg/kg/day based on decreased body weight gain, and decreased food consumption during the dosing period. The developmental NOEL was determined to be >15 mg/kg/day and the developmental LOEL was determined to be >15 mg/kg/day.

iii. *Developmental toxicity (rabbit).* Himalayan rabbits were dosed, by dermal application, with 0, 70, 170 and 450 mg/kg/day pyridaben from days 6 through 19 of gestation. The Maternal systemic NOEL was determined to be 70 mg/kg/day and the maternal LOEL was determined to be 170 mg/kg/day based on decreased body weight gain, and decreased food consumption during the dosing period. The developmental NOEL was determined to be 170 mg/kg/day and the LOEL determined to be 450 mg/kg/day based on decreased ossification of the skull.

iv. *Reproductive toxicity testing, multigeneration reproduction (rat).* CD rats were dosed with 0, 10, 28 and 80 ppm pyridaben in the diet. The Parental/Systemic NOEL was determined to be 28 ppm in both sexes (equivalent to 2.20 mg/kg/day in males and 2.41 mg/kg/day in females). The Parental/Systemic LOEL was determined to be 80 ppm (equivalent to 6.31 mg/kg/day in males and 7.82 mg/kg/day in females) based on decreased body weight, decreased body weight gain and decreased food efficiency. The reproductive NOEL and LOEL were both determined to be >80 ppm in males and females.

4. *Subchronic toxicity—* i. *A 21-day dermal (rat).* Rats were repeatedly dosed with pyridaben at 0, 30. 100, 300 and 1,000 mg/kg/day for 21 days. The NOEL was determined to be 100 mg/kg/day and the LOEL 300 mg/kg/day based on decreased body weight gain in females.

ii. *A 90-day rodent (rat).* CD rats were dosed with pyridaben at 0, 30, 65, 155 and 350 ppm in the diet for 13 weeks. The NOEL was determined to be 65 ppm (4.94 mg/kg/day) for males and 30 ppm (2.64 mg/kg/day) in females. The LOEL for males was determined to be 155 ppm (11.55 mg/kg/day) based on reduced body weight gain, reduced food consumption, reduced food efficiency, and altered clinical pathology parameters. The LOEL for females was determined to be 65 ppm (5.53 mg/kg/day) based on reduced body weight gain and reduced food efficiency.

iii. *A 90-day non-rodent (dog).* Beagle dogs were dosed with pyridaben at 0, 0.5, 1,4, and 16 mg/kg/day in the diet for 13 weeks. The NOEL was determined to be 1 mg/kg/day and the LOEL determined to be 4 mg/kg/day based on reduced body weight gain and an increase in clinical signs in both sexes.

iv. *A 90-day neurotoxicity (rat).* Rats were dosed with pyridaben at 0, 30, 100, and 350 ppm in the diet for 13 weeks. The systemic NOEL was determined to be 100 ppm (equivalent to 8.5 mg/kg/day in males and 9.3 mg/kg/day in females). The systemic LOEL was determined to be 350 ppm (equivalent to 28.8 mg/kg/day in males and 31.1 mg/kg/day in females) based on decreased body weight gain, decreased food consumption and decreased food efficiency. No neuropathological effects were noted in the study.

5. *Chronic toxicity—* i. *A 1-year non-rodent (dog).* Two studies were run. In the first, beagle dogs were dosed with pyridaben at 0, 1, 4, 16 and 32 mg/kg/day in the diet for 1-year. In the second, beagle dogs were dosed with pyridaben at 0 and 0.5 mg/kg/day in the diet for 1-year. The NOEL was determined to be <0.5 ppm and LOEL determined to be 0.5 mg/kg/day based on increased clinical signs and decreased body weight gain in both sexes.

ii. *Combined rodent chronic toxicity/carcinogenicity (rat).* Wistar rats were fed 0, 4, 10, 28 and 80 ppm pyridaben in the diet to assess carcinogenicity and 0, 4, 10, 28 and 120 ppm in the diet to assess chronic toxicity for 104 weeks. The NOEL was determined to be 28 ppm in both sexes (equivalent to 1.13 mg/kg/day in males and 1.46 mg/kg/day in females). The LOEL was determined

to be 120 ppm in both sexes (equivalent to 5.0 mg/kg/day in males and 6.52 mg/kg/day in females) based on decreased body weight gain in both sexes and decreased ALT levels in males. Pyridaben was not carcinogenic under the conditions of the test.

iii. *Carcinogenicity in the rodent (mouse).* CD-1 mice were fed 0, 2.5, 8.0, 25 and 80 ppm pyridaben in the diet for 78 weeks. The NOEL was determined to be 25 ppm in both sexes (equivalent to 2.78 mg/kg/day in both sexes). The LOEL was determined to be 80 ppm in both sexes (equivalent to 8.88 mg/kg/day in males and 9.74 mg/kg/day in females) based on decreased body weight gain, decreased food efficiency and changes in organ weights and histopathology. Pyridaben was not carcinogenic under the conditions of the test.

6. *Animal metabolism*. BASF Corporation notes that metabolism in animals is understood.

7. *Threshold effects.* Based on the available chronic toxicity data, EPA has established the Reference Dose (RfD) for pyridaben at 0.005 mg/kg/day. The RfD for pyridaben is based on a 1-year feeding study in dogs with a threshold Lowest-Observed Effect Level (LOEL) of 0.5 mg/kg/day based on increased clinical signs and decreased body weight gain in both sexes and an uncertainty factor of 100.

8. *Non-threshold effects.* Using its Guidelines for Carcinogenic Risk Assessment, EPA has classified pyridaben as Group ''E'' for carcinogenicity (no evidence of carcinogenicity) based on the results of carcinogenicity studies in two species. There was no evidence of carcinogenicity in an 18-month feeding study in mice and a 2-year feeding study in rats at the dosage levels tested. The doses tested were adequate for identifying a cancer risk. Thus, a cancer risk assessment is not necessary.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food*. Since Pyridaben is regulated based upon non-carcinogenic chronic toxicity, BASF conducted a DRES analysis based on anticipated residue levels determined by the tolerance support branch of HED. The anticipated residue levels were derived from the average residue levels from field trials conducted at the maximum proposed use rate and minimum pre-harvest interval, and a correction factor of 2.3 to account for all organosoluble residues as determined by EPA HED. This analysis demonstrates that the exposure to non-nursing infants <1 year, the most sensitive sub-population is approximately 128.6% of the RfD and to the general population exposure is approximately 18.6%. Assuming a conservative pyridaben market share of 65% of all crop uses, then the most sensitive sub-population is approximately 83.8% of the RfD and to the general population exposure is approximately 12.1%.

ii. *Drinking water.* Other potential sources of exposure of the general population to residues of pesticides are residues in drinking water and exposure from non-occupational sources. Based on the studies submitted to EPA for assessment of environmental risk, BASF does not anticipate exposure to residues of pyridaben in drinking water. There is no established Maximum Concentration Level for residues of pyridaben in drinking water under the Safe Drinking Water Act. BASF has not estimated non-occupational exposure for pyridaben since the current registration for pyridaben is limited to commercial greenhouse use for non-food ornamental plants and the only other use will be for commercial apple/pear and citrus production The potential for non-occupational exposure to the general population is considered to be insignificant.

D. Cumulative Effects

BASF also considered the potential for cumulative effects of pyridaben and other substances that have a common mechanism of toxicity. BASF has concluded that consideration of a common mechanism of toxicity is not appropriate at this time since there is no reliable information to indicate that toxic effects produced by pyridaben would be cumulative with those of any other chemical compounds.

E. Safety Determination

1. *U.S. population*. Reference Dose (RfD), using the exposure assumptions described in section III, above, BASF concludes that aggregate exposure to pyridaben will utilize approximately 12.1% the RfD for the U.S. population. EPA generally has no concern for exposures below 100% of the RfD. Therefore, based on the completeness and reliability of the toxicity data and the conservative exposure assessment, BASF concludes that there is a reasonable certainty that no harm will result from aggregate exposure to residues of pyridaben, including all anticipated dietary exposure and all other non-occupational exposures.

2. *Infants and children*. Developmental toxicity (delayed ossification) was observed in developmental toxicity studies using rats and rabbits. The No-Observed Effect Level's (NOEL's) for developmental effects were established at 13 mg/kg/day in the rat study and 15 mg/kg/day in the rabbit study. The developmental effect observed in these studies is believed to be a secondary effect resulting from maternal stress (decreased body weight gain and food consumption).

In a 2-generation reproduction study in rats, pups from the high dose group, which were fed diets containing 80 ppm (equivalent to 6.31 and 7.82 mg/kg/day in male and females, respectively) gained less weight beginning on lactation day 14. Parental systemic toxicity including decreased body weights, body weight gains and food efficiency in males, and slightly decreased body weights and body weight gains in females during lactation was also observed in the high dose group. The results of this study indicate that the loss in weight gain in pups from the high dose group was affected by nursing.

No clear scientific consensus yet exists to define the most appropriate endpoints for assessing risk in children. However, in consideration of the data that show both developmental and reproductive toxicity were effects secondary to parental toxicity, BASF believes that the established Reference Dose (RfD) of 0.005 mg/kg/day is the most conservative approach for assessing risk in children. Using the exposure assumptions described in section 5, above, BASF has concluded that the percent of the RfD, when adjusted for a conservative market share of 65%, that will be utilized by aggregate exposure to residues of pyridaben from the proposed use in citrus, apples, pears, almonds, peaches, plums, and grapes is approximately 83.8% for non-nursing infants (< 1 year), the most sensitive sub-population. Based on the completeness and reliability of the toxicity data and the conservative exposure assessment, BASF concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the residues of pyridaben, including all anticipated dietary exposure and all other non-occupational exposures.

F. Other Considerations

The qualitative nature of the residues in plants and animals is adequately understood. Residues of the parent molecule, pyridaben are the only residues of concern. Residues of pyridaben do not concentrate in the processed commodities apple and citrus juice. There is a practical analytical method for detecting and measuring levels of pyridaben in or on food with

a limit of detection that allows monitoring of food with residues at or above the levels set in these tolerances. Endocrine effects. No specific tests have been conducted with pyridaben to determine whether the chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects. However, there were no significant findings in other relevant toxicity studies, i.e., teratology and multi-generation reproductive studies, which would suggest that pyridaben produces endocrine related effects.

G. International Tolerances

A maximum residue level has not been established for pyridaben by the Codex Alimentarius Commission. (PM 10)

2. GMJA Specialties

PP 7G4891

EPA has received a pesticide petition (PP 7G4891) from GMJA Specialties, 1001 13th Avenue East, Bradenton, FL 34208, proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of PT807-HCl in or on the raw agricultural commodity oranges at 0.01 ppm. The proposed analytical method is extracting PT807-HCl from whole oranges, juice, and dried pulp using organic solvents has been validated. Extracted PT807-HCl residues are analyzed using high performance liquid chromatography (HPLC) with a UV detector. The limit of quantitation (LOQ) of the method is 0.01 part per million (ppm). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

Plant metabolism. The metabolism of PT807-HCl in plants and animals is understood. In plants (oranges), unchanged parent is the only residue identified in fruit. Valencia orange trees were treated with ^{14}C PT807-HCl at a nominal rate of 1,000 ppm (approximately 60x the maximum recommended application rate). Fruit from the previous season's crop present on the tree at the time of application was harvested 50 days after treatment (DAT) and mature fruit (not present on the tree at application) was harvested 370 DAT. Total radioactive residue (TRR) levels were 0.538 ppm in 50 DAT orange samples and were 0.051 ppm in 370 DAT orange samples. Most of the radioactivity was present on the peel (88.63% TRR or 0.475 ppm in the 50 DAT fruit, and 64.19% TRR or 0.033 ppm in the 370 DAT fruit). Unchanged parent PT807-HCl was detected in 50 DAT mature fruit using organic solvents has been validated. Extracted PT807-HCl residues are analyzed using HPLC with a UV detector. The LOQ of the method is 0.01 ppm.

B. Toxicological Profile

1. *Acute toxicity*. A battery of acute toxicity studies has been conducted and the results indicate that PT807-HCl exhibits low acute oral, dermal, and inhalation toxicity. PT807-HCl also has low potential as a skin or eye irritant and is not a skin sensitizer.

2. *Genotoxicity*. The genotoxic potential of PT807-HCl has been assessed in an Ames *Salmonella* assay, a CHO HGPRT gene mutation assay, a mouse micronucleus assay, and an *in vitro* CHO assay for chromosomal aberrations. The *in vitro* chromosomal aberration assay was positive with and without metabolic activation; however, all of the remaining assays were negative, indicating very low genotoxic potential of PT807 weakened by the negative finding in an *in vivo* study (mouse micronucleus) measuring a similar endpoint.

3. *Reproductive and developmental toxicity*. A 2-generation reproductive toxicity study of PT807-HCl is ongoing.

4. *Analytical method*. An analytical method capable of extracting PT807-HCl from whole oranges, juice, and dried pulp using organic solvents has been validated. Extracted PT807-HCl residues are analyzed using high performance liquid chromatography (HPLC) with a UV detector. The limit of quantitation (LOQ) of the method is 0.01 ppm.

5. *Magnitude of residues*. Seventeen field trials were conducted using various varieties of oranges in California (4 trials), Florida (12 trials), and Texas (1 trial). Two of the trials (1 in California and 1 in Florida) were decline studies with sampling intervals of 0, 7, 14, 30, and 60 days after application. For all other trials, oranges were harvested at the earliest possible time for normal commercial harvest after a single application with PT807-HCl at the maximum recommended application rate (6 g a.i./A). At some of the test sites (depending on the variety of oranges), the previous season's crops was present on the tree at application for these trials, oranges were collected 0 to 68 days after treatment (DAT). In all other trials, fruit were not present on the trees at applications and mature oranges were collected at normal harvest (197 to 359 DAT). Samples were analyzed for residues of PT807-HCl by HPLC with UV detection. Residues of PT807-HCl were nondetectable (<0.01 ppm) in all treated and control samples.

A processing study was conducted using oranges treated at 5x the maximum application rate in California. The harvested oranges were from the previous season's crop and were on the tree at the time of application. Therefore the application represents the maximum possible residues. No detectable residues were measured in whole oranges, juice, or oil. Residues of PT807-HCl were detectable in dried pulp at 0.015 and 0.017 ppm (average 0.016 ppm). Correcting the measured residues for the exaggerated application rate, no detectable residues are likely in any processed product of oranges.

Residues of PT807-HCl were determined to be stable in whole orange fruit, oil, juice, and dried pulp stored frozen up to 113 days.

6. *Subchronic toxicity*. Subchronic toxicity studies have been conducted with PT807-HCl in mice, rats, and dogs. In dietary studies in rats and dogs, the most notable findings include decreased food consumption and a consequent decrease in bodyweight gain.(resulting primarily from poor palatability of the test material). Dogs also showed a trend toward anemia, and males showed arrested or delayed sexual maturation at the high dose (equivalent to approximately 222 mg/kg/day). Marked weight loss and decreased weight gain was observed at this dose and this dose level is considered to have exceeded a MTD. Rats dosed by gavage showed signs of neurotoxic effects (tremors, incoordination, changes in activity) at doses 3-- mg/kg/day. In mice treatment-related decreased food consumption and body weight gain were seen in males at 7,000 (HDT). No treatment-related toxicity was evident at dietary doses up to 3,500 ppm (479 and 635 mg/kg/day for males and females, respectively).

7. *Chronic toxicity*. Chronic toxicity studies of PT807-HCl in rats and doges are currently ongoing.

8. *Animal metabolism*. ^{14}CPT807-HCl was extensively metabolized and readily eliminated in the urine and feces following oral administration to a lactating goat. The efficient elimination processes resulted in negligible to modest retention of radioactive residues in milk and tissues (<0.2 % of the administered dose). No residues of unchanged parent were identified in tissues or milk. The rapid elimination of the PT807-HCl and its metabolites

coupled with the highly exaggerated dose (approximately 3,600x the dietary burden) clearly indicates that no detectable residues of PT807-HCl will accumulate in milk and tissues.

9. *Metabolite toxicology*. The metabolism of PT807-HCl in oranges has been determined. The only significant metabolite is unchanged parent. No detectable residues of PT807-HCl are anticipated in oranges treated at the recommended application rate.

C. Aggregate Exposure

1. *Dietary exposure*. There are no anticipated dietary exposures to PT807-HCl outside of those requested in this temporary tolerance petition. The chronic dietary exposure from the consumption of oranges and its processed products treated with PT807-HCl is very low. The exposure is only 5.0 % of the RfD (0.00063 mg/kg/day) for the most highly exposed sub-population, children 1 to 6 years old. The dietary exposure is only 1.7% of the RfD (0.00021 mg/kg/day) for the U.S. population.

2. *Food*. The proposed temporary tolerance of 0.01 ppm was used for the residue level to calculate the dietary exposure from residues of PT807-HCl in or on oranges. Based on the processing study, there is no anticipated concentration of residues of PT807-HCl in processed products of oranges, therefore, the proposed temporary tolerance level for whole oranges was also used for the processed commodities. For the purpose of calculating a worst-case estimate, it was assumed that 100% of the oranges and their processed products were treated with PT807-HCl.

3. *Drinking water*. Based on the results of the GENEEC model, the 56-day chronic EEC (calculated from the lowest K_{oc} value measured for PT807-HCl) is 0.315 µg/L. Using the standard drinking water consumption scenarios of 2 liters per day for a 70-kg adult and 1 liter per day for a 10 kg child, the calculated consumption of PT807-HCl in drinking is 0.009 µg/kg/day for an adult and 0.032 µg/kg/day for a child. These consumption values correspond to 0.7% of the RfD for adults and 2.6% of the RfD for children. As discussed above, drinking water concentrations calculated by the GENEEC procedure represent very conservative screening level assessments of drinking water exposure. Finally, the above drinking water calculations use the water concentration calculated from the lowest K_{oc} value measured for PT807-HCl. Three of four soils tested gave K_{oc} values that are more than 10-fold higher, leading to correspondingly lower calculated water concentrations.

4. *Non-dietary exposure*. There are currently no registered uses for PT807-HCl, and therefore, there is no anticipated non-occupational exposure to the chemical.

D. Cumulative Effects

GMJA Specialities is not aware of any currently registered products that are structurally similar to PT-807-HCl or that would be likely to share a common mechanism of action. Therefore, no cumulative exposures are considered in the PT807-HCl dietary risk assessment.

E. Safety Determination

1. *U.S. population*. The chronic dietary exposure from the consumption of oranges and its processed products treated with PT807-HCl is very low. The exposure is only 5.0 % of the RfD (0.00063 mg/kg/day) for the most highly exposed sub-population, children 1 to 6 years old. The dietary exposure is only 1.7% of the RfD (0.00021 mg/kg/day) for the U.S. population.

2. *Infants and children*. The reference dose is conservatively calculated using a very high (10,000-fold) safety factor for children. Based on currently available data, PT807-HCl does not present a unique hazard to infants or children and there is no evidence that children are likely to be more sensitive to the toxic effects of PT807-HCl. A 2-generation reproductive toxicity study with PT807-HCl in rats is currently ongoing. PT807-HCl showed evidence of developmental effects in rats only at a severely maternally toxic dose level. No evidence of developmental toxicity was seen in rabbits.

F. International Tolerances

There are no Codex Alimentarius Commission (Codex Maximum Residue Levels (MRLs) for PT807-HCl. (PM 22)

3. Rohm & Haas Company

PP 3F4229

EPA has received a pesticide petition (PP 3F4229) from Rohm & Haas Company, Philadelphia, PA, proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of oxyfluorfen in or on the raw agricultural commodities peanut meat, meal, vine, hay, crude oil, soap stock, and refined oil at 0.05 ppm and peanut hulls at 0.10 ppm. The proposed analytical method involves extraction from the raw agricultural commodity with methanol or acetonitrite. Extracts are refluxed in presence of NaOH and Al to reduce and or hydrolyze residues to 4-(2-chloro-4-(trifluoromethyl)-phenoxy)-2-ethoxybenzenenamine. The derivatives are partitioned into hexane and heptafluorobutyryl derivatives prepared. Following Florisel cleanup, residues are determined by electron capture GLC. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant and animal metabolism*. The chemical identities of potential plant residues resulting from the use of oxyfluorfen have been elucidated. The principal residue in plants is parent oxyflurofen.

The chemical identities of potential animal residues resulting from consumption of oxyfluorfen-treated crops have been elucidated. Parent oxyfluorfen is the principal residue in animal tissues. Oxyfluorfen residues do not transfer to milk (concentration <0.01 ppm at 10x dose). Residues also do not appreciably transfer to cow muscle, liver and kidney (highest level 0.011 ppm at 10x dose). Residues are present in cow fat at low levels (less than 0.01 at 1x dose). Residues in eggs and hen liver are 0.02 ppm or less on average at a 1x dose, and less than 0.01 ppm in muscle at the 1x dose. Residues approach 0.2 ppm in hen fat at the 1x dose.

2. *Analytical method*. There is a practical analytical method for detecting and measuring levels of oxyfluorfen in or on food with a limit of detection that allows monitoring of food with residues at or above the levels in these proposed tolerances. EPA has provided information on this method to FDA. The method is available to anyone who is interested in pesticide residue enforcement from: By mail, Calvin Furlow, Public Response and Program Resources Branch, Field Operations Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Crystal Mall #2, Rm. 1132, 1921 Jefferson Davis Highway, Arlington, Virginia, 703-305-5805.

3. *Magnitude of the residues*. Residue studies have been conducted in accordance with the geographic distribution mandated by the EPA for peanuts. Oxyfluorfen residues were not detectable in nutmeat [NDR <LOQ = 0.01 mg/kg] or peanut hay [NDR<LOQ = 0.03 mg/kg]. Tolerances of 0.05 ppm in

nutmeat and hay are proposed based on these data. Residues were not measured in processed fractions of peanuts and tolerances are not proposed because residues are not likely to exceed the proposed 0.05 ppm tolerance level for nutmeat since the maximum theoretical concentration factor for process fractions is 2x.

B. Toxicological Profile

1. *Acute toxicity.* Oxyfluorfen is practically nontoxic by the oral, dermal, and respiratory routes of exposure, is nonirritating to the skin and moderately irritating to the eye.

2. *Genotoxicity. In vitro* tests in *salmonella* and mouse lymphoma cells have indicated the potential for genotoxicity. *In vivo* tests do not show a potential for adverse chromosal effects.

3. *Reproductive and developmental toxicity.* Maternal and developmental toxicity were noted at an oxyfluorfen dose of 183 mg/kg/day (NOEL of 18 mg/kg/day) in rats and at a dose of 30 mg/kg/day (NOEL of 10 mg/kg/day) in rabbits. Reductions in body weight of offspring and histopathologic alteration of the kidneys of parents were observed with a dose of oxyfluorfen of ~80 mg/kg/day (NOEL ~20 mg/kg/ day) in a rat 2-generation reproduction study.

4. *Subchronic and chronic toxicity.* Adverse effects on the liver marked the LOEL in all three chronic toxicity studies with NOELs of 2.5, 2.0, and 0.3 mg/kg/day seen in the dog, rat, and mouse studies respectively. A statistically significant positive dose-related trend for liver adenomas and carcinomas was observed in the chronic mouse study and oxyfluorfen is classified as a Group C chemical by EPA. A reference dose of 0.003 mg/kg/day and a $Q1^*$ of 0.128 $(mg/kg/day)^{-1}$ has been set by the Agency.

5. *Animal metabolism.* Animal metabolism studies have been conducted on farm animals using laying hens and lactating goats and in a laboratory animal (rat). These studies were reviewed and accepted by the Agency. EPA has concluded that the metabolism of oxyfluorfen in animals is adequately understood.

C. Aggregate Exposure

1. *Food.* To determine chronic (using the RfD) and cancer (using the $Q1^*$ approach) risks, refined dietary exposure estimates using percent of crop treated and anticipated residues were utilized for registered uses of oxyfluorfen with established tolerances on the following food and/or animal feed items: dates, figs, guava, loquats, olives, papaya, persimmon, pomegranate, plantains, kiwi, cocoa butter, coffee, artichokes, taro-roots and greens, garlic, shallots, cauliflower, bok-choy, and other Chinese variety cole crops, dry beans, crabapples, quince, blackberry, raspberry, Brazil nut, cashew, chestnuts, hazelnuts, hickory nuts, macadamias, pecans, horseradish, peppermint, spearmint, pistachio nuts, cotton, cherries, nectarines, plums, prunes, almonds, walnuts, bananas, broccoli, cabbage, apricots, nutmeat, milk, onions, soybeans, apples, pears, peaches, grapes, and corn. Actual residues are expected to be quite low because the majority of the use patterns direct sprays onto weeds or soil and away from the crop. There are long preharvest intervals for sprays which are directly applied to crops.

Acute dietary exposure (food only) was calculated using the TMRC (worst case) assumptions.

2. *Drinking water.* The Agency has reviewed environmental fate data which indicate that oxyfluorfen is persistent but nonmobile. There is no established Maximum Concentration Level (MCL) for residues of oxyfluorfen in drinking water. No health advisory levels for oxyfluorfen in drinking water have been established. As noted in ''Pesticides in Groundwater Database'' EPA 734-12-92-001, September 1992, 188 wells were monitored in Texas in 1987 and 1988. No detectable residues of oxyfluorfen were found in any of the samples.

While EPA has not yet pinpointed the appropriate bounding figure for consumption of contaminated water, the ranges the Agency is continuing to examine are all below the level that would cause oxyfluorfen to exceed the RfD if the tolerance being considered in this document were granted. In addition, chronic exposure to oxyfluorfen residues resulting from potential water exposure would not increase the total cancer risk so that it exceeds the Agency's level of concern. The potential exposures associated with oxyfluorfen in water, even at the higher levels the Agency is considering as a conservative upper bound for RfD exposure considerations, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerance is granted.

Despite the potential for acute exposure to oxyfluorfen in drinking water, it is not expected that the aggregate acute exposure will exceed the Agency's level of concern if the tolerance being considered in this document were granted. The potential acute term exposures associated with oxyfluorfen in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerance is granted.

3. *Non-dietary exposure.* Oxyfluorfen is registered for outdoor residential use. Acceptable, reliable data are not currently available with which to assess acute risk. However, based on the available residential exposure data and the best professional judgment of scientists who have worked with the available occupational exposure data, 5% of the risk for outdoor residential uses is a reasonable, protective default assumption for this pesticide. Chronic exposure to oxyfluorfen residues resulting from potential outdoor residential exposure would not increase the total chronic or cancer risks so that they exceed the Agency's level of concern.

Theoretically, it is also possible that a residential, or other non-dietary, exposure could be combined with the acute total dietary exposure from food and water. However, the Agency does not believe that aggregating multiple exposure to large amounts of pesticide residues in the residential environment via multiple products and routes for a one-day exposure is a reasonably probable event. It is highly unlikely that, in one day, an individual would have multiple high-end exposures to the same pesticide by treating their lawn and garden, treating their house via crack and crevice application, swimming in a pool, and be maximally exposed in the food and water consumed.

D. Cumulative Effects

EPA does not have, at this time, available data to determine whether oxyfluorfen has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, oxyfluorfen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that oxyfluorfen has a common mechanism of toxicity with other substances.

E. Endocrine Effects

The toxicity studies required by EPA for the registration of pesticides measure numerous endpoints with sufficient sensitivity to detect potential endocrine-modulating activity. No effects have been identified in subchronic, chronic, reproductive, or developmental toxicity studies to indicate any endocrine-modulating activity by oxyfluorfen.

More importantly, the multi-generation reproduction study in rodents is a complex study design which measures a broad range of endpoints in the reproductive system and in developing offspring that are sensitive to alterations by chemical agents. Oxyfluorfen has been tested in two separate multi-generation studies and each time the results demonstrated that oxyfluorfen is not a reproductive toxin.

F. Safety Determination

1. *U.S. population*— i. *Chronic RfD and cancer risk.* Using the refined dietary exposure assumptions described above and taking into account the completeness and reliability of the toxicity data, it is concluded that aggregate dietary exposure (food only) to oxyfluorfen will utilize 0.04% of the RfD for the general United States population. EPA has no concern generally for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to oxyfluorfen in drinking water and from the 5% default-level contribution from non-dietary, nonoccupational exposure, it is not expected the aggregate exposure will exceed 100% of the RfD. As noted above, oxyfluorfen has been classified as a Group C chemical by the Agency based on liver adenomas and carcinomas in the 20-month mouse feeding study. The Agency recommends using the $Q1^*$ approach to assess cancer risk. A value of 0.067 $(mg/kg/day)^{-1}$ is recommended.

The refined dietary assumptions for existing oxyfluorfen tolerances plus those proposed for peanuts result in an Anticipated Residue Contribution (ARC) that is equivalent to a risk of 8.0×10^{-8} (food only). Actual residues are expected to be quite low because the majority of the use patterns direct sprays onto weeds and away from the crop and there are long preharvest intervals for sprays which are directly applied to crops. Environmental fate data indicate that oxyfluorfen strongly adheres to soil, does not leach into groundwater and has not been detected in sampled groundwater. Based on this information, occurrence of oxyfluorfen in drinking water is unlikely. Outdoor residential uses of oxyfluorfen are limited and exposure is expected to be low. Oxyfluorfen is toxic to lawn grasses and certain ornamental plants, and use is generally limited to spot treatments for nonselective weed control. Chronic exposure to oxyfluorfen residues resulting from potential residential and/or water exposure would not increase the total cancer risk so that it exceeds the Agency's level of concern. There is a reasonable certainty that no harm will result from chronic aggregate exposure to oxyfluorfen residues.

ii. *Acute risk.* The acute dietary exposure endpoint of concern for oxyfluorfen is fused sternebrae in developing pups which was observed in the rabbit developmental study. The population subgroup of concern is females 13+ years old (women of childbearing age). For this subgroup, the calculated MOE at the high end exposure is greater than 5,000. The Agency considers dietary (food) MOEs of greater than 100 to be acceptable for oxyfluorfen. Acute dietary exposure (food only) was calculated using the TMRC (worst case) assumptions.

In the absence of data for drinking water exposure, the ranges of exposure being considered by the Agency for consumption of contaminated water will be reserved for drinking water. The aggregate MOE level of concern for dietary plus the addition of upperbound estimates for drinking water is not likely to raise the MOE level of concern above 150. Despite the potential for acute exposure to oxyfluorfen in drinking water, it is not expected that the aggregate exposure will exceed the Agency's level of concern if the tolerance being considered in this document were granted. It is therefore concluded that the potential acute exposure associated with oxyfluorfen in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerance is granted.

2. *Infants and Children*. The toxicology database is complete for oxyfluorfen relative to prenatal and postnatal toxicity. In the developmental toxicity study in rabbits, at the maternally toxic dose of 30 mg/kg/day, there were developmental anomalies (fused sternebrae) in the fetuses which demonstrated that prenatal toxicity should be evaluated by an acute dietary risk estimate. The acute dietary MOE for pregnant women 13+ years old is greater than 5,000 based on a developmental NOEL of 10 mg/kg/day. This MOE is much higher than the minimal acceptable MOE (100 for dietary-food only) and suggests that prenatal developmental risks to infants and children from exposure to oxyfluorfen dietary residues is not a concern. Additionally, the rabbit developmental NOEL of 10 mg/kg/day is 33 times greater than the NOEL of 0.3 mg/kg/day used to calculate the RfD. In the developmental toxicity study in rats, both the developmental and maternal NOEL and LOEL of 18 and 183 mg/kg/day, respectively, occurred at the same dose levels and demonstrates that there is no special sensitivity in infants and children exposed to oxyfluorfen. Although the developmental findings in the rat were severe effects, the developmental NOEL of 18 mg/kg/day is greater than the rabbit developmental NOEL of 10 mg/kg/day used to calculate acute dietary MOEs. Therefore, the acute dietary risk estimates calculated from the rabbit developmental NOEL are lower than acute dietary MOEs which could be calculated for the more severe effects occurring in rats above the NOEL of 18 mg/kg/day. By basing the acute dietary MOEs on the NOEL in the most sensitive species (rabbit), pregnant women are protected against both types of prenatal toxicity effects as seen in the rat and rabbit developmental toxicity studies. Therefore, there are no significant prenatal toxicity concerns for infants and children due to the high MOE for pregnant women 13+ years old. In the 2-generation reproductive toxicity study in rats used to assess the postnatal toxicity potential of infants and children, the NOEL and LOEL of 20 mg/kg/day and 80 mg/kg/day, respectively, for developmental/reproductive and systemic toxicity demonstrated that there are no pup toxicity effects in the absence of parental toxicity (NOEL and LOEL are the same for pups and parental animals). Therefore, there are no special postnatal sensitivities in infants and children which can be attributed to the findings of the 2-generation reproductive toxicity study in rats. Additionally, the developmental/reproductive NOEL of 20/mg/kg/day [which is the NOEL for decreased litter size at birth as well as decreased pup body weight] and the parental systemic NOEL of 20 mg/kg/day is 66 times greater than the NOEL of 0.3 mg/kg/day used to calculate the RfD.

Based on the above, EPA concludes that reliable data support use of the standard hundredfold margin of exposure/uncertainty factor and that an additional margin/factor is not needed to protect the safety of infants and children.

i. *Chronic risk.* Using the refined exposure assumptions described above and taking into account the completeness and reliability of the toxicity data, it is concluded that aggregate dietary exposure to oxyfluorfen will utilize 0.05% of the RfD for infants and 0.08% of the RfD for children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at

or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to oxyfluorfen in drinking water and from non-dietary, nonoccupational exposure, the chronic aggregate exposure is not expected to exceed 100% of the RfD. There is a reasonable certainty that no harm will result to infants and children from chronic aggregate exposure to oxyfluorfen residues.

ii. *Acute risk.* As mentioned above, the acute dietary exposure endpoint of concern for oxyfluorfen is fused sternebrae in developing pups which was observed in the rabbit developmental study. The population subgroup of concern is females 13+ years old (women of childbearing age). For this subgroup, the calculated MOE at the high end exposure is greater than 5,000. The Agency considers dietary (food) MOEs of greater than 100 to be acceptable for oxyfluorfen. Acute dietary exposure (food only) was calculated using the TMRC (worst case) assumptions.

In the absence of data for drinking water exposure, the ranges of exposure being considered by the Agency for consumption of contaminated water will be reserved for drinking water. Based on the ranges under consideration, the aggregate MOE level of concern for dietary plus the addition of drinking water is not likely to raise the MOE above the Agency's level of concern. The large MOE calculated for this use of oxyfluorfen provides assurance that there is a reasonable certainty of no harm for infants and children.

G. International Tolerances

There are no Codex Alimentarius Commission (CODEX) maximum residue levels (MRL's) established for residue of oxyfluorfen in or on raw agricultural commodities. (PM 23)

[FR Doc. 98–557 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–44645; FRL–5763–9]

TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of test data on n-amyl acetate (CAS No. 628–63–7), and alkyl glycidyl ether (CAS No. 120547–52–6). These data were submitted pursuant to enforceable testing consent agreements/orders issued by EPA under section 4 of the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–543B, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551; e-mail: TSCA-Hotline@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: Under 40 CFR 790.60, all TSCA section 4 enforceable consent agreements/orders must contain a statement that results of testing conducted pursuant to testing enforceable consent agreements/orders will be announced to the public in accordance with procedures specified in section 4(d) of TSCA.

I. Test Data Submissions

Test data for n-amyl acetate were submitted by RegNet Environmental Services on behalf of Union Carbide Corporation pursuant to a TSCA section 4 enforceable testing consent agreement/order at 40 CFR 799.5000. EPA received the data on October 29, 1997. The submission includes a final report entitled ''A 13-Week Inhalation Neurotoxicity Study By Whole-Body Exposure of n-Amyl Acetate Vapor in the Albino Rat.'' This chemical is primarily used as a solvent for nitrocellulose lacquers and paints. Other large uses are as extraction solvents in penicillin manufacture and electrostatic spray coatings for automobiles. Miscellaneous uses include a solvent in photographic film, leather polishes, dry cleaning preparations, and as a flavoring agent.

Test data for alkyl glycidyl ether were submitted by The Society of the Plastics Industry, Inc. Epoxy Resin Systems Alkyl Glycidyl Ether Task Force. The following companies comprise the Task Force: Air Products and Chemicals Inc.; Callaway Chemical Company; Ciba-Geigy Corporation; CVC Specialty Chemicals; and Shell Chemical Company. The submission includes three final reports entitled (1) ''Alkyl Glycidyl Ether: 2-Week Range Finding and 13-Week Repeated Dose Dermal Toxicity Study in Fischer 344 Rats, (2) ''A Dermal Developmental Toxicity Screening Study of Alkyl Glycidyl Ethers in Rats,'' and (3) ''Bacterial Reverse Mutation Assay with an Independent Repeat Assay.'' These reports were submitted in accordance with a TSCA section 4 enforceable testing consent agreement/order at 40 CFR 799.5000. The first two reports were received by EPA on November 12, 1977 and the third report was received by EPA on November 18, 1997. This chemical is used as an epoxy resin additive and as a modifier for other epoxides in flooring and adhesives.

EPA has initiated its review and evaluation process for this data submission. At this time, the Agency is unable to provide any determination as to the completeness of the submission.

II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPPTS–44645). This record includes copies of all studies reported in this notice. The record is available for inspection from 12 noon to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Nonconfidential Information Center (also known as the TSCA Public Docket Office), Rm. B–607 Northeast Mall, 401 M St., SW., Washington, DC 20460. Requests for documents should be sent in writing to: Environmental Protection Agency, TSCA Nonconfidential Information Center (7407), 401 M St., SW., Washington, DC 20460 or fax: (202) 260–5069 or e-mail: oppt.ncic@epamail.epa.gov.

Authority: 15 U.S.C. 2603.

List of Subjects

Environmental protection, Test data.

Dated: December 22, 1997.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 98–560 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–42199B; FRL–5765–1]

Enforceable Consent Agreement Development for Maleic Anhydride; Solicitation of Interested Parties and Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is soliciting interested parties who want to monitor or participate in negotiations on an enforceable consent agreement (ECA) concerning the use of pharmacokinetics (PK) studies and mechanistic data to help meet testing requirements for maleic anhydride in the proposed hazardous air pollutants (HAPs) test

rule. In addition, EPA invites all interested parties to attend a public meeting to initiate negotiations on the ECA for maleic anhydride.

DATES: EPA must receive written notification requesting designation as an interested party for maleic anhydride on or before January 30, 1998. Those persons who identify themselves as interested parties for maleic anhydride may submit written comments to EPA on the PK proposal for this chemical, on EPA's preliminary technical analysis, and on other materials in the docket for the proposed HAPs test rule, that relate to the ECA process for this chemical by January 30, 1998.

The public meeting is scheduled from 9 a.m. to 1 p.m. on February 6, 1998.

ADDRESSES: Each comment must bear the docket control number, OPPTS–42199B. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

EPA will address these comments at the public meeting.

Comments and data may also be submitted electronically to: oppt.ncic@epamail.epa.gov following the instructions under Unit VI. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this document. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will make the information available to the public without further notice to the submitter.

The public meeting will be held at EPA Headquarters, 401 M St., SW., Washington, DC in the EPA Conference Center, North Conference Area in Room 1.

FOR FURTHER INFORMATION CONTACT: *For additional information*: Susan B. Hazen, Director, Environmental Assistance Division (7408), Rm. E–543B, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail address: TSCA-Hotline@epamail.epa.gov.

For technical information: Richard W. Leukroth, Jr., Project Manager, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 260–0321; fax: (202) 260–8850; e-mail address: leukroth.rich@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

Internet: Electronic copies of this document and various support documents are available from the EPA Home Page at the **Federal Register**--Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/EPA-TOX/1998/).

II. Background

EPA proposed health effects testing under section 4(a) of the Toxic Substances Control Act (TSCA) on June 26, 1996, for a number of HAPs chemicals (61 FR 33178) (FRL–4869–1). As indicated in the proposed HAPs test rule, EPA would use the data obtained from testing to implement several provisions of section 112 of the Clean Air Act (CAA), including the determination of residual risk, the estimation of the risks associated with accidental releases of chemicals, and determinations whether substances should be removed from the CAA section 112(b)(1) list of hazardous air pollutants (delisting). The data also would be used by other Federal agencies (e.g., Agency for Toxic Substances and Disease Registry (ATSDR), National Institute of Occupational Safety and Health (NIOSH), Occupational Safety and Health Administration (OSHA), and Consumer Product Safety Commission (CPSC)) in assessing chemical risks and in taking appropriate actions within their programs.

In the proposed HAPs test rule, EPA invited the submission of proposals for PK studies for the HAPs chemicals, which could provide the basis for negotiation of ECAs. These PK studies would be used to inform EPA about the use of route-to-route extrapolation of toxicity data from routes other than inhalation to predict the effects of inhalation exposure, as an alternative to testing proposed under the HAPs test rule. EPA received a PK proposal for maleic anhydride from the Chemical Manufacturers Association, Maleic Anhydride Panel (CMA MA Panel) on November 8, 1996. Based on the PK proposal received for maleic anhydride, the Agency developed a preliminary technical analysis. A copy of this preliminary technical analysis was sent to the CMA MA Panel on July 10, 1997. The CMA MA Panel reviewed EPA's analysis and notified EPA on September 3, 1997, that it has a continued interest in pursuing the ECA process. A copy of the PK proposal, the EPA preliminary technical analysis and related references, and correspondence is contained in the public record for this ECA process. These materials will be used during discussions at the negotiating meeting. EPA has decided to proceed with the ECA process for maleic anhydride and is providing public notice that the Agency is hereby initiating the procedures for ECA negotiations for the HAP chemical, maleic anhydride. The procedures for ECA negotiations are described at 40 CFR 790.22(b). EPA intends to publish, as appropriate, additional **Federal Register** documents to solicit interested parties and announce public meetings for other HAPs chemicals for which PK proposals were submitted.

The proposed HAPs test rule, as amended on December 24, 1997 (62 FR 67466) (FRL–5742–2), and the ECA negotiations on chemicals included in the proposed rule are separate and parallel activities. While the Agency's objective of obtaining data could be accomplished by either activity, EPA recognizes that the final testing program performed by industry may differ depending on whether it is accomplished under the final HAPs test rule or via the ECA process. During the course of ECA negotiations, additional information may be brought forward that could cause the Agency to re-evaluate the nature of the testing requirements as stated in the proposed HAPs test rule, as amended. This could result in the development of an ECA that would fulfill the Agency's data needs in ways not stated in the proposed HAPs test rule, as amended. It is therefore essential for all interested parties to recognize these differences at the outset and respond accordingly within the framework of these two separate and parallel activities. Comments on the proposed HAPs test rule, as amended, must be submitted under docket control number, OPPTS–42187A, as described in the proposed HAPs test rule published on June 26, 1996, as amended on December 24, 1997, and will be addressed by EPA via the rulemaking process, which is separate and distinct from the ECA process. Participation in the ECA process is described in Units II. through IV. of this document.

Negotiations on developing an ECA for the HAP chemical, maleic anhydride, will focus on the use of PK studies and mechanistic data to help meet testing requirements for maleic anhydride. In addition, discussion will include the adequacy of the available data base to be used for extrapolation to obtain the data needs identified for maleic anhydride in the proposed HAPs test rule, as amended. The objective of the ECA process is to conclude an ECA that will set in place an industry-sponsored testing program that will adequately address EPA's data needs for maleic anhydride.

III. Identification of Interested Parties

EPA is soliciting interested parties to monitor or participate in testing negotiations on an ECA for maleic anhydride. The CMA MA Panel, the submitter of the PK proposal for maleic anhydride, and the member companies of the CMA MA Panel are already considered interested parties and do not need to respond to this document. Additionally, any persons who respond to this document on or before January 30, 1998 will be given the status of interested parties. Interested parties must respond in writing to the address specified in ''ADDRESSES'' at the beginning of this document. These interested parties will not incur any obligations by being so designated. Negotiations will be conducted in one or more meetings open to the public. The negotiation time schedule for maleic anhydride will be established at the first negotiation meeting and will not exceed a period of 4 months from the initial meeting. If an ECA is not established in principle within this timeframe and EPA does not choose to extend the negotiation time period, negotiations will be terminated and testing will be required under the final HAPs test rule. If the testing from the ECA does not meet the Agency's needs, EPA reserves the right to enter into rulemaking.

IV. Public Participation in Negotiations

Under EPA regulations, the Agency is required to provide the public with an opportunity to comment on and participate in the development of ECAs. The procedural rule for ECAs (40 CFR part 790) contains provisions to ensure that the views of interested parties are taken into account during the ECA process.

Individuals and groups who respond to this document will have the status of interested parties. All negotiating meetings for the development of this ECA for maleic anhydride will be open to the public and minutes of each meeting will be prepared by EPA and placed in the public docket for this ECA process. The Agency will advise interested parties of meeting dates and make available meeting minutes, testing proposals, background documents, and other materials exchanged at or prepared for negotiating meetings. Where tentative agreement is reached on an acceptable testing program, a draft ECA will be made available for comment by interested parties and, if necessary, EPA will hold a public meeting to discuss any comments that have been received and determine whether revisions to the ECA are appropriate. EPA will not reimburse costs incurred by non-EPA participants in this ECA negotiation process.

ECAs will only be concluded where an agreement can be obtained which is satisfactory to the Agency, manufacturers or processors who are potential test sponsors, and other interested parties, concerning the need for and scope of testing. In the absence of an ECA, EPA reserves the right to proceed with rulemaking.

A. The Agency will not enter into an ECA if either:

1. EPA and affected manufacturers or processors cannot reach an agreement on the provisions of the ECA; or

2. The draft ECA is considered inadequate by other interested parties who have submitted timely written objections to the draft ECA.

B. EPA may reject these objections if the Agency concludes either that:

1. They are not made in good faith;

2. They are untimely;

3. They are not related to the adequacy of the proposed testing program or other features of the agreement that may affect EPA's ability to fulfill the goals and purposes of TSCA; or

4. They are not accompanied by a specific explanation of the grounds on which the draft agreement is considered objectionable.

EPA will prepare an explanation of the basis for each ECA. The explanatory document will summarize the agreement (including the required testing), explain the objectives of the testing, and outline the chemical's use and exposure characteristics. The document, which will also announce the availability of the ECA, will be published in the **Federal Register**.

V. Proposal of Export Notification Requirements for Maleic Anhydride

EPA intends to publish a proposed rule in an upcoming **Federal Register** document to require export notification by all persons who export or intend to export maleic anhydride under TSCA section 12(b) upon the successful conclusion of an ECA for maleic anhydride.

VI. Public Record and Electronic Submissions

As described above, maleic anhydride is listed as a chemical that would be subject to testing requirements under the proposed HAPs test rule, as amended. This ECA negotiation process and the proposed rule, as amended, are separate and parallel activities. The official record for this ECA action, including the public version, has been established under docket control number OPPTS–42199B (including comments and data submitted electronically as described below). The official record for this document also includes all material and submissions filed under docket control number OPPTS–42187A, the record for the proposed HAPs test rule, as amended, and all materials and submissions filed under docket control number OPPTS–42187B, the record for the receipt of alternative testing proposals for developing ECAs for HAPs chemicals.

The official record for this document, including the public version, which does not include any information claimed as CBI, has been established for this document under docket control number OPPTS–42199B. The public version of this record is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Rm. NE B–607, 401 M St., SW., Washington, DC 20460.

Electronic comments can be sent directly to EPA at:

oppt.ncic@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number, OPPTS–42199B. Electronic comments on this document may be filed online at many Federal Depository Libraries.

The record contains the following information:

A. **Federal Register** notices/EPA documents pertaining to this notice consisting of:

1. ''Proposed Test Rule for Hazardous Air Pollutants; Proposed Rule'' (61 FR 33178, June 26, 1996).

2. ''Amended Proposed Test Rule for Hazardous Air Pollutants; Extension of Comment Period'' (62 FR 67466, December 24, 1997).

B. PK proposal materials consisting of:

1. Chemical Manufacturers Association, Maleic Anhydride Panel, ''Developing an Inhalation Testing Program for Maleic Anhydride'' (November 8, 1996).

2. U.S. EPA, ''Preliminary EPA Technical Analysis of Proposed Industry Pharmacokinetics (PK) Strategy for Maleic Anhydride'' and cover letter (July 10, 1997).

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 5, 1998.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 98–558 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–42201B; FRL–5765–5]

Enforceable Consent Agreement Development for Hydrogen Fluoride; Solicitation of Interested Parties and Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is soliciting interested parties who want to monitor or participate in negotiations on an enforceable consent agreement (ECA) concerning the use of pharmacokinetics (PK) studies and mechanistic data to help meet testing requirements for hydrogen fluoride in the proposed hazardous air pollutants (HAPs) test rule. In addition, EPA invites all interested parties to attend a public meeting to initiate negotiations on the ECA for hydrogen fluoride.

DATES: EPA must receive written notification requesting designation as an interested party for hydrogen fluoride on or before January 30, 1998. Those persons who identify themselves as interested parties for hydrogen fluoride may submit written comments to EPA on the PK proposal for this chemical, on EPA's preliminary technical analysis, and on other materials in the docket for the proposed HAPs test rule, that relate to the ECA process for this chemical by January 30, 1998.

The public meeting is scheduled from 8:30 a.m. to 12:30 p.m. on February 5, 1998.

ADDRESSES: Each comment must bear the docket control number, OPPTS–42201B. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

EPA will address these comments at the public meeting.

Comments and data may also be submitted electronically to: oppt.ncic@epamail.epa.gov following the instructions under Unit VI. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this document. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will make the information available to the public without further notice to the submitter.

The public meeting will be held at EPA Headquarters, 401 M St., SW., Washington, DC in the EPA Conference Center, North Conference Area in Room 1.

FOR FURTHER INFORMATION CONTACT: *For additional information*: Susan B. Hazen, Director, Environmental Assistance Division (7408), Rm. E–543B, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail address: TSCA-Hotline@epamail.epa.gov.

For technical information: Richard W. Leukroth, Jr., Project Manager, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 260–0321; fax: (202) 260–8850; e-mail address: leukroth.rich@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

Internet: Electronic copies of this document and various support documents are available from the EPA Home Page at the **Federal Register**--Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/EPA-TOX/1998/).

II. Background

EPA proposed health effects testing under section 4(a) of the Toxic Substances Control Act (TSCA) on June 26, 1996, for a number of HAPs chemicals (61 FR 33178) (FRL–4869–1). As indicated in the proposed HAPs test rule, EPA would use the data obtained from testing to implement several provisions of section 112 of the Clean Air Act (CAA), including the determination of residual risk, the estimation of the risks associated with accidental releases of chemicals, and determinations whether substances should be removed from the CAA section 112(b)(1) list of hazardous air pollutants (delisting). The data also would be used by other Federal agencies (e.g., Agency for Toxic Substances and Disease Registry (ATSDR), National Institute of Occupational Safety and Health (NIOSH), Occupational Safety and Health Administration (OSHA), and Consumer Product Safety Commission (CPSC)) in assessing chemical risks and in taking appropriate actions within their programs.

In the proposed HAPs test rule, EPA invited the submission of proposals for PK studies for the HAPs chemicals, which could provide the basis for negotiation of ECAs. These PK studies would be used to inform EPA about the use of route-to-route extrapolation of toxicity data from routes other than inhalation to predict the effects of inhalation exposure, as an alternative to testing proposed under the HAPs test rule. EPA received a PK proposal for hydrogen fluoride from the Chemical Manufacturers Association, Hydrogen Fluoride Panel (CMA HF Panel) on November 27, 1996. Based on the PK proposal received for hydrogen fluoride, the Agency developed a preliminary technical analysis. A copy of this preliminary technical analysis was sent to the CMA HF Panel on June 26, 1997. The CMA HF Panel reviewed EPA's analysis and notified EPA on September 10, 1997, that it has a continued interest in pursuing the ECA process. A copy of the PK proposal, the EPA preliminary technical analysis and related references, and correspondence is contained in the public record for this ECA process. These materials will be used during discussions at the negotiating meeting. EPA has decided to proceed with the ECA process for hydrogen fluoride and is providing public notice that the Agency is hereby initiating the procedures for ECA

negotiations for the HAP chemical, hydrogen fluoride. The procedures for ECA negotiations are described at 40 CFR 790.22(b). EPA intends to publish, as appropriate, additional **Federal Register** documents to solicit interested parties and announce public meetings for other HAPs chemicals for which PK proposals were submitted.

The proposed HAPs test rule, as amended on December 24, 1997 (62 FR 67466) (FRL–5742–2), and the ECA negotiations on chemicals included in the proposed rule are separate and parallel activities. While the Agency's objective of obtaining data could be accomplished by either activity, EPA recognizes that the final testing program performed by industry may differ depending on whether it is accomplished under the final HAPs test rule or via the ECA process. During the course of ECA negotiations, additional information may be brought forward that could cause the Agency to re-evaluate the nature of the testing requirements as stated in the proposed HAPs test rule, as amended. This could result in the development of an ECA that would fulfill the Agency's data needs in ways not stated in the proposed HAPs test rule, as amended. It is therefore essential for all interested parties to recognize these differences at the outset and respond accordingly within the framework of these two separate and parallel activities. Comments on the proposed HAPs test rule, as amended, must be submitted under docket control number, OPPTS–42187A, as described in the proposed HAPs test rule published on June 26, 1996, as amended on December 24, 1997, and will be addressed by EPA via the rulemaking process, which is separate and distinct from the ECA process. Participation in the ECA process is described in Units II. through IV. of this document.

Negotiations on developing an ECA for the HAP chemical, hydrogen fluoride, will focus on the use of PK studies and mechanistic data to help meet testing requirements for hydrogen fluoride. In addition, discussion will include the adequacy of the available data base to be used for extrapolation to obtain the data needs identified for hydrogen fluoride in the proposed HAPs test rule, as amended. The objective of the ECA process is to conclude an ECA that will set in place an industry-sponsored testing program that will adequately address EPA's data needs for hydrogen fluoride.

III. Identification of Interested Parties

EPA is soliciting interested parties to monitor or participate in testing negotiations on an ECA for hydrogen fluoride. The CMA HF Panel, the submitter of the PK proposal for hydrogen fluoride, and the member companies of the CMA HF Panel are already considered interested parties and do not need to respond to this document. Additionally, any persons who respond to this document on or before January 30, 1998 will be given the status of interested parties. Interested parties must respond in writing to the address specified in ''ADDRESSES'' at the beginning of this document. These interested parties will not incur any obligations by being so designated. Negotiations will be conducted in one or more meetings open to the public. The negotiation time schedule for hydrogen fluoride will be established at the first negotiation meeting and will not exceed a period of 4 months from the initial meeting. If an ECA is not established in principle within this timeframe and EPA does not choose to extend the negotiation time period, negotiations will be terminated and testing will be required under the final HAPs test rule. If the testing from the ECA does not meet the Agency's needs, EPA reserves the right to enter into rulemaking.

IV. Public Participation in Negotiations

Under EPA regulations, the Agency is required to provide the public with an opportunity to comment on and participate in the development of ECAs. The procedural rule for ECAs (40 CFR part 790) contains provisions to ensure that the views of interested parties are taken into account during the ECA process.

Individuals and groups who respond to this document will have the status of interested parties. All negotiating meetings for the development of this ECA for hydrogen fluoride will be open to the public and minutes of each meeting will be prepared by EPA and placed in the public docket for this ECA process. The Agency will advise interested parties of meeting dates and make available meeting minutes, testing proposals, background documents, and other materials exchanged at or prepared for negotiating meetings. Where tentative agreement is reached on an acceptable testing program, a draft ECA will be made available for comment by interested parties and, if necessary, EPA will hold a public meeting to discuss any comments that have been received and determine whether revisions to the ECA are appropriate. EPA will not reimburse costs incurred by non-EPA participants in this ECA negotiation process.

ECAs will only be concluded where an agreement can be obtained which is satisfactory to the Agency, manufacturers or processors who are potential test sponsors, and other interested parties, concerning the need for and scope of testing. In the absence of an ECA, EPA reserves the right to proceed with rulemaking.

A. The Agency will not enter into an ECA if either:

1. EPA and affected manufacturers or processors cannot reach an agreement on the provisions of the ECA; or

2. The draft ECA is considered inadequate by other interested parties who have submitted timely written objections to the draft ECA.

B. EPA may reject these objections if the Agency concludes either that:

1. They are not made in good faith;

2. They are untimely;

3. They are not related to the adequacy of the proposed testing program or other features of the agreement that may affect EPA's ability to fulfill the goals and purposes of TSCA; or

4. They are not accompanied by a specific explanation of the grounds on which the draft agreement is considered objectionable.

EPA will prepare an explanation of the basis for each ECA. The explanatory document will summarize the agreement (including the required testing), explain the objectives of the testing, and outline the chemical's use and exposure characteristics. The document, which will also announce the availability of the ECA, will be published in the **Federal Register**.

V. Proposal of Export Notification Requirements for Hydrogen Fluoride

EPA intends to publish a proposed rule in an upcoming **Federal Register** document to require export notification by all persons who export or intend to export hydrogen fluoride under TSCA section 12(b) upon the successful conclusion of an ECA for hydrogen fluoride.

VI. Public Record and Electronic Submissions

As described above, hydrogen fluoride is listed as a chemical that would be subject to testing requirements under the proposed HAPs test rule, as amended. This ECA negotiation process and the proposed rule, as amended, are separate and parallel activities. The official record for this ECA action, including the public version, has been established under docket control number OPPTS–42201B (including comments and data submitted electronically as described below). The

official record for this document also includes all material and submissions filed under docket control number OPPTS–42187A, the record for the proposed HAPs test rule, as amended, and all materials and submissions filed under docket control number OPPTS–42187B, the record for the receipt of alternative testing proposals for developing ECAs for HAPs chemicals.

The official record for this document, including the public version, which does not include any information claimed as CBI, has been established for this document under docket control number OPPTS–42201B. The public version of this record is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Rm. NE B–607, 401 M St., SW., Washington, DC 20460.

Electronic comments can be sent directly to EPA at:
oppt.ncic@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number, OPPTS–42201B. Electronic comments on this document may be filed online at many Federal Depository Libraries.

The record contains the following information:

A. **Federal Register** notices/EPA documents pertaining to this notice consisting of:

1. ''Proposed Test Rule for Hazardous Air Pollutants; Proposed Rule'' (61 FR 33178, June 26, 1996).

2. ''Amended Proposed Test Rule for Hazardous Air Pollutants; Extension of Comment Period'' (62 FR 67466, December 24, 1997).

B. PK proposal materials consisting of:

1. Chemical Manufacturers Association, Hydrogen Fluoride (HF) Panel, ''Proposal for a Physiologically-Based Pharmacokinetic (PBPK) Model for Hydrogen Fluoride'' (June 26, 1997).

2. U.S. EPA, ''Preliminary EPA Technical Analysis of Proposed Industry Pharmacokinetics (PK) Strategy for Hydrogen Fluoride'' and cover letter (June 26, 1997).

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 5, 1998.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 98–559 Filed 1–8–98; 8:45 am]
BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–42200B; FRL–5765–3]

Enforceable Consent Agreement Development for Phthalic Anhydride; Solicitation of Interested Parties and Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is soliciting interested parties who want to monitor or participate in negotiations on an enforceable consent agreement (ECA) concerning the use of pharmacokinetics (PK) studies and mechanistic data to help meet testing requirements for phthalic anhydride in the proposed hazardous air pollutants (HAPs) test rule. In addition, EPA invites all interested parties to attend a public meeting to initiate negotiations on the ECA for phthalic anhydride.

DATES: EPA must receive written notification requesting designation as an interested party for phthalic anhydride on or before January 30, 1998. Those persons who identify themselves as interested parties for phthalic anhydride may submit written comments to EPA on the PK proposal for this chemical, on EPA's preliminary technical analysis, and on other materials in the docket for the proposed HAPs test rule, that relate to the ECA process for this chemical by January 30, 1998.

The public meeting is scheduled from 1 p.m. to 5 p.m. on February 5, 1998.

ADDRESSES: Each comment must bear the docket control number, OPPTS–42200B. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

EPA will address these comments at the public meeting.

Comments and data may also be submitted electronically to: oppt.ncic@epamail.epa.gov following the instructions under Unit VI. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this document. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will make the information available to the public without further notice to the submitter.

The public meeting will be held at EPA Headquarters, 401 M St., SW., Washington, DC in the EPA Conference Center, North Conference Area in Room 1.

FOR FURTHER INFORMATION CONTACT: *For additional information*: Susan B. Hazen, Director, Environmental Assistance Division (7408), Rm. E–543B, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail address: TSCA-Hotline@epamail.epa.gov.

For technical information: Richard W. Leukroth, Jr., Project Manager, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 260–0321; fax: (202) 260–8850; e-mail address: leukroth.rich@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

Internet: Electronic copies of this document and various support documents are available from the EPA Home Page at the **Federal Register**--Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/EPA-TOX/1998/).

II. Background

EPA proposed health effects testing under section 4(a) of the Toxic Substances Control Act (TSCA) on June 26, 1996, for a number of HAPs chemicals (61 FR 33178) (FRL–4869–1). As indicated in the proposed HAPs test rule, EPA would use the data obtained from testing to implement several provisions of section 112 of the Clean Air Act (CAA), including the determination of residual risk, the estimation of the risks associated with

accidental releases of chemicals, and determinations whether substances should be removed from the CAA section 112(b)(1) list of hazardous air pollutants (delisting). The data also would be used by other Federal agencies (e.g., Agency for Toxic Substances and Disease Registry (ATSDR), National Institute of Occupational Safety and Health (NIOSH), Occupational Safety and Health Administration (OSHA), and Consumer Product Safety Commission (CPSC)) in assessing chemical risks and in taking appropriate actions within their programs.

In the proposed HAPs test rule, EPA invited the submission of proposals for PK studies for the HAPs chemicals, which could provide the basis for negotiation of ECAs. These PK studies would be used to inform EPA about the use of route-to-route extrapolation of toxicity data from routes other than inhalation to predict the effects of inhalation exposure, as an alternative to testing proposed under the HAPs test rule. EPA received a PK proposal for phthalic anhydride from the Chemical Manufacturers Association, Phthalic Anhydride Producers Task Group (CMA PA Task Group) on November 22, 1996. Based on the PK proposal received for phthalic anhydride, the Agency developed a preliminary technical analysis. A copy of this preliminary technical analysis was sent to the CMA PA Task Group on July 10, 1997. The CMA PA Task Group reviewed EPA's analysis and notified EPA on September 3, 1997, that it has a continued interest in pursuing the ECA process. A copy of the PK proposal, the EPA preliminary technical analysis and related references, and correspondence is contained in the public record for this ECA process. These materials will be used during discussions at the negotiating meeting. EPA has decided to proceed with the ECA process for phthalic anhydride and is providing public notice that the Agency is hereby initiating the procedures for ECA negotiations for the HAP chemical, phthalic anhydride. The procedures for ECA negotiations are described at 40 CFR 790.22(b). EPA intends to publish, as appropriate, additional **Federal Register** documents to solicit interested parties and announce public meetings for other HAPs chemicals for which PK proposals were submitted.

The proposed HAPs test rule, as amended on December 24, 1997 (62 FR 67466) (FRL–5742–2), and the ECA negotiations on chemicals included in the proposed rule are separate and parallel activities. While the Agency's objective of obtaining data could be accomplished by either activity, EPA recognizes that the final testing program performed by industry may differ depending on whether it is accomplished under the final HAPs test rule or via the ECA process. During the course of ECA negotiations, additional information may be brought forward that could cause the Agency to re-evaluate the nature of the testing requirements as stated in the proposed HAPs test rule, as amended. This could result in the development of an ECA that would fulfill the Agency's data needs in ways not stated in the proposed HAPs test rule, as amended. It is therefore essential for all interested parties to recognize these differences at the outset and respond accordingly within the framework of these two separate and parallel activities. Comments on the proposed HAPs test rule, as amended, must be submitted under docket control number, OPPTS–42187A, as described in the proposed HAPs test rule published on June 26, 1996, as amended on December 24, 1997, and will be addressed by EPA via the rulemaking process, which is separate and distinct from the ECA process. Participation in the ECA process is described in Units II. through IV. of this document.

Negotiations on developing an ECA for the HAP chemical, phthalic anhydride, will focus on the use of PK studies and mechanistic data to help meet testing requirements for phthalic anhydride. In addition, discussion will include the adequacy of the available data base to be used for extrapolation to obtain the data needs identified for phthalic anhydride in the proposed HAPs test rule, as amended. The objective of the ECA process is to conclude an ECA that will set in place an industry-sponsored testing program that will adequately address EPA's data needs for phthalic anhydride.

III. Identification of Interested Parties

EPA is soliciting interested parties to monitor or participate in testing negotiations on an ECA for phthalic anhydride. The CMA PA Task Group, the submitter of the PK proposal for phthalic anhydride, and the member companies of the CMA PA Task Group are already considered interested parties and do not need to respond to this document. Additionally, any persons who respond to this document on or before January 30, 1998 will be given the status of interested parties. Interested parties must respond in writing to the address specified in ''ADDRESSES'' at the beginning of this document. These interested parties will not incur any obligations by being so designated. Negotiations will be conducted in one or more meetings open to the public. The negotiation time schedule for phthalic anhydride will be established at the first negotiation meeting and will not exceed a period of 4 months from the initial meeting. If an ECA is not established in principle within this timeframe and EPA does not choose to extend the negotiation time period, negotiations will be terminated and testing will be required under the final HAPs test rule. If the testing from the ECA does not meet the Agency's needs, EPA reserves the right to enter into rulemaking.

IV. Public Participation in Negotiations

Under EPA regulations, the Agency is required to provide the public with an opportunity to comment on and participate in the development of ECAs. The procedural rule for ECAs (40 CFR part 790) contains provisions to ensure that the views of interested parties are taken into account during the ECA process.

Individuals and groups who respond to this document will have the status of interested parties. All negotiating meetings for the development of this ECA for phthalic anhydride will be open to the public and minutes of each meeting will be prepared by EPA and placed in the public docket for this ECA process. The Agency will advise interested parties of meeting dates and make available meeting minutes, testing proposals, background documents, and other materials exchanged at or prepared for negotiating meetings. Where tentative agreement is reached on an acceptable testing program, a draft ECA will be made available for comment by interested parties and, if necessary, EPA will hold a public meeting to discuss any comments that have been received and determine whether revisions to the ECA are appropriate. EPA will not reimburse costs incurred by non-EPA participants in this ECA negotiation process.

ECAs will only be concluded where an agreement can be obtained which is satisfactory to the Agency, manufacturers or processors who are potential test sponsors, and other interested parties, concerning the need for and scope of testing. In the absence of an ECA, EPA reserves the right to proceed with rulemaking.

A. The Agency will not enter into an ECA if either:

1. EPA and affected manufacturers or processors cannot reach an agreement on the provisions of the ECA; or

2. The draft ECA is considered inadequate by other interested parties who have submitted timely written objections to the draft ECA.

B. EPA may reject these objections if the Agency concludes either that:

1. They are not made in good faith;

2. They are untimely;

3. They are not related to the adequacy of the proposed testing program or other features of the agreement that may affect EPA's ability to fulfill the goals and purposes of TSCA; or

4. They are not accompanied by a specific explanation of the grounds on which the draft agreement is considered objectionable.

EPA will prepare an explanation of the basis for each ECA. The explanatory document will summarize the agreement (including the required testing), explain the objectives of the testing, and outline the chemical's use and exposure characteristics. The document, which will also announce the availability of the ECA, will be published in the **Federal Register**.

V. Proposal of Export Notification Requirements for Phthalic Anhydride

EPA intends to publish a proposed rule in an upcoming **Federal Register** document to require export notification by all persons who export or intend to export phthalic anhydride under TSCA section 12(b) upon the successful conclusion of an ECA for phthalic anhydride.

VI. Public Record and Electronic Submissions

As described above, phthalic anhydride is listed as a chemical that would be subject to testing requirements under the proposed HAPs test rule, as amended. This ECA negotiation process and the proposed rule, as amended, are separate and parallel activities. The official record for this ECA action, including the public version, has been established under docket control number OPPTS–42200B (including comments and data submitted electronically as described below). The official record for this document also includes all material and submissions filed under docket control number OPPTS–42187A, the record for the proposed HAPs test rule, as amended, and all materials and submissions filed under docket control number OPPTS–42187B, the record for the receipt of alternative testing proposals for developing ECAs for HAPs chemicals.

The official record for this document, including the public version, which does not include any information claimed as CBI, has been established for this document under docket control number OPPTS–42200B. The public version of this record is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Rm. NE B–607, 401 M St., SW., Washington, DC 20460.

Electronic comments can be sent directly to EPA at:

oppt.ncic@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number, OPPTS–42200B. Electronic comments on this document may be filed online at many Federal Depository Libraries.

The record contains the following information:

A. **Federal Register** notices/EPA documents pertaining to this notice consisting of:

1. ''Proposed Test Rule for Hazardous Air Pollutants; Proposed Rule'' (61 FR 33178, June 26, 1996).

2. ''Amended Proposed Test Rule for Hazardous Air Pollutants; Extension of Comment Period'' (62 FR 67466, December 24, 1997).

B. PK proposal materials consisting of:

1. Chemical Manufacturers Association, Phthalic Anhydride Producers Task Group, ''Testing Proposal of the Chemical Manufacturers Association Phthalic Anhydride Producers Task Group in Response to EPA's Proposed Rule for Phthalic Anhydride'' (November 22, 1996).

2. U.S. EPA, ''Preliminary EPA Technical Analysis of Proposed Industry Pharmacokinetics (PK) Strategy for Phthalic Anhydride'' and cover letter (July 10, 1997).

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 5, 1998.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 98–562 Filed 1–8–98; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:02 a.m. on Tuesday, January 6, 1998, the Board of Directors of the Federal Deposition Insurance Corporation met in closed session to consider certain corporate and administrative enforcement activities.

In calling the meeting, the Board determined, on motion of Director Ellen Seidman (Director, Office of Thrift Supervision), seconded by Director Joseph H. Neely (Appointive), concurred in by Director Eugene A. Ludwig (Comptroller of the Currency), and Acting Chairman Andrew C. Hove, Jr., that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(6), (c)(8), and (c)(9)(A)(ii) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(6), (c)(8), and (c)(9)(A)(ii)).

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street, N.W., Washington, D.C.

Dated: January 6, 1998.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 98–696 Filed 1–7–98; 2:20 pm]

BILLING CODE 6714–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency has submitted the following proposed information collection to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

SUPPLEMENTARY INFORMATION: Executive Order 12862 requires ''all executive departments and agencies that provide significant services directly to the public'' to meet established customer service standards and to ''survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services. FEMA has developed and refined its Disaster Assistance Customer

Satisfaction Survey, developed a new housing inspection survey, follow-up survey, and is currently developing other human services survey instruments for voluntary agencies, other federal agencies, and state and local entities. FEMA will use various modes of data collection including mail, telephone, and computerized surveys. The information from the surveys will also be used to measure performance against the agency's missions and goals, consistent with the requirements of the Government Performance and Results Act.

Collection of Information

Title: FEMA Individual Disaster Assistance Customer Satisfaction and Program Effectiveness Surveys (Generic Clearance).

Type of Information Collection: Reinstatement, with change, of a previously approved collection for which approval has expired.

OMB Number: 3067–0256.

Abstract: The surveys provide FEMA with information about customer satisfaction while serving as a program evaluation tool. The surveys measure satisfaction with performance and help interpret the effects of disaster related policy changes or innovations. The surveys are also used to measure trends and patterns in customer satisfaction. FEMA will mail written surveys to a random sample of disaster assistance applicants for all disasters in which individual assistance is available. FEMA proposes to conduct a phone survey of Telegistration customers, Helpline customers, and officials from other Federal agencies, state and local governments, and voluntary agencies and a computerized survey of Federal Coordinating Officers and other FEMA disaster field office employees.

Affected Public: Survey respondents include individual disaster applicants, FEMA staff, state and local government officials, voluntary agency officials, and officials from other federal agencies involved in delivering disaster assistance. It is important to note that FEMA does not solicit survey responses from businesses or other for-profit institutions but it is possible that an individual applicant sampled will respond as a business owner.

Number of Respondents: 189,240.

Estimated Time per Respondent: 15 minutes per response.

Estimated Total Annual Burden Hours: 58,316.

Estimated Cost to the Government: $871,600.

Respondent Type	Number of respondents	Frequency of response	Hours per response	Annual burden hours
Individual disaster assistance applicants	176,715	1	0.25	44,179
Individual disaster assistance applicants callbacks	100	1	0.25	25
Federal Coordinating Officers	77	5	0.25	96
Emergency Response Team Staff	10.010	5	0.25	12,513
Officials from other Federal Agencies (OFA)	28	77	0.25	539
Officials from Voluntary Agencies	385	2	0.25	193
FEMA Headquarters Voluntary Agencies Officials	770	1	0.25	193
Regional OFA officials	770	2	0.25	385
Officials from state and local governments	385	2	0.25	193
Total	189,240	.....	[1]0.25	58,316

[1] Average.

Comments

Interested persons are invited to submit written comments on the proposed information collection to Victoria Wassmer, Desk Officer for the Federal Emergency Management Agency, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 within 30 days of the date of this notice.

FOR FURTHER INFORMATION CONTACT: Contact Kedra Mitchell, Program Specialist, Federal Emergency Management Agency, Response and Recovery Directorate, Office of Standards and Evaluations at (202) 646–3381 for additional information. Requests for copies of the information collection from Muriel B. Anderson, FEMA Information Collections Officer, Federal Emergency Management Agency, 500 C Street, SW, Room 316, Washington, DC 20472. Telephone number (202) 646–2625. FAX number (202) 646–3524.

Dated: December 24, 1997.

Reginald Trujillo,

Director, Program Services Division, Operations Support Directorate.

[FR Doc. 98–546 Filed 1–8–98; 8:45 am]

BILLING CODE 6718–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1193–DR]

Territory of Guam; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Territory of Guam (FEMA–1193–DR), dated December 17, 1997, and related determinations.

EFFECTIVE DATE: December 17, 1997.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 17, 1997, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the Territory of Guam, resulting from Typhoon Paka and associated torrential rains, high winds, high surf, and tidal surges on December 16, 1997, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (''the Stafford Act''). I, therefore, declare that such a major disaster exists in the Territory of Guam.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, Public Assistance, and Hazard Mitigation in the designated areas. Consistent

with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs. If warranted, for the first 72 hours, you are authorized to fund direct Federal assistance at 100 percent of the total eligible costs. You or your designee may extend the time period for this direct Federal assistance funding, if necessary. Under the provisions of the Insular Act, PL 95–134, if a waiver is requested, you are authorized to consider an adjustment of the cost sharing terms at a later date when more definitive information is available.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Dale R. Peterson of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following area of the Territory of Guam to have been affected adversely by this declared major disaster:

The Territory of Guam for Individual Assistance and Public Assistance.

The Territory of Guam is eligible to apply for assistance under the Hazard Mitigation Grant Program.

Direct Federal Assistance will be provided for the first 72 hours at 100 percent of total eligible costs.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

James L. Witt,

Director.

[FR Doc. 98–548 Filed 1–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1194–DR]

The Commonwealth of the Northern Mariana Islands; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of the Northern Mariana Islands (FEMA–1194–DR), dated December 24, 1997, and related determinations.

EFFECTIVE DATE: December 24, 1997.

EFFECTIVE DATES: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3630.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 24, 1997, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the Commonwealth of the Northern Mariana Islands, resulting from Typhoon Paka and associated torrential rains, high winds, high surf, and tidal surges on December 16, 1997, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (''the Stafford Act''). I, therefore, declare that such a major disaster exists in the Commonwealth of the Northern Mariana Islands.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, Public Assistance, and Hazard Mitigation in the designated areas. Consistent with the requirement that Federal Assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs. Under the provisions of the Insular Act, PL 95–134, if a waiver is requested, you are authorized to consider an adjustment of the cost sharing terms at a later date when more definitive information is available.

If warranted, for the first 72 hours, you are authorized to fund direct Federal assistance at 100 percent of the total eligible costs. You or your designee may extend the time period for this direct Federal assistance funding, if necessary.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint William L. Carwile, III of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following area of the Commonwealth of the Northern Mariana Islands to have been affected adversely by this declared major disaster:

The Island of Rota for Individual Assistance and Public Assistance.

All islands within the Commonwealth of the Northern Mariana Islands are eligible to apply for assistance under the Hazard Mitigation Grant Program.

Direct Federal Assistance will be provided for the first 72 hours at 100 percent of total eligible costs.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

James L. Witt,

Director.

[FR Doc. 98–547 Filed 1–8–98; 8:45 am]

BILLING CODE 6718–02–M

FEDERAL MARITIME COMMISSION

Security for the Protection of the Public Indemnification of Passengers for Nonperformance of Transportation; Notice of Issuance of Certificate (Performance)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation pursuant to the provisions of Section 3, Pub. L. 89–777 (46 U.S.C. 817(e)) and the Federal Maritime Commission's implementing regulations at 46 CFR Part 540, as amended:

Carnival Corporation, 3655 N.W. 87th Avenue, Miami, FL 33178–2193, Vessel: CARNIVAL TRIUMPH.

Ivaran Agencies Inc., Ivarans Rederi ASA, and Ivarans Rederi (d/b/a Ivaran Lines), Newport Financial Center, 111 Pavonia Avenue, Jersey City, NJ 07310–1755. Vessel: AMERICANA.

Manhattan Cruises, LLC, 444 Madison Avenue, Suite 401, New York, NY 10022, Vessel: EDINBURGH CASTLE.

Mediterranean Shipping Cruises S.p.A., Piazza Garibaldi 91, Naples, 80142 Italy, Vessel: MELODY.

Norwegian Cruise Line Limited (d/b/a Norwegian Cruise Line) 7665 Corporate Center Drive Miami, FL 33126, Vessel: NORWEGIAN DREAM AND NORWEGIAN WIND.

The Peninsular and Oriental Steam Navigation Company, Princess Cruises, Inc. and P & O Cruises (UK) Limited, 77 New Oxford Street, London WCIA 1PP England, Vessel: ARCADIA.

Premier Cruise Lines, Ltd. and Ulysses Cruises Inc. (d/b/a Premier Cruises), 901 S. America Way, Pier 7, Miami, FL 33132–2073, Vessel: STAR/SHIP OCEANIC.

Royal Olympic Cruises, Ltd. RO Cruises, Inc. and Caroline Shipping, Inc. One Rockefeller Plaza, Suite 315, New York, NY 10020, Vessel: STELLA SOLARIS.

Dated: January 5, 1998.

Joseph C. Polking,

Secretary.

[FR Doc. 98–524 Filed 1–8–98; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Security for the Protection of the Public Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages; Notice of Issuance of Certificate (Casualty)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages pursuant to the provisions of Section 2, Pub. L. 89–777 (46 U.S.C. 817(d)) and the Federal Maritime Commission's implementing regulations at 46 CFR Part 540, as amended:

Ivaran Agencies Inc., Ivarans Rederi ASA and A/S Ivarans Rederi (d/b/a Ivaran Lines), Newport Financial Center, 111 Pavonia Avenue, Jersey City, NJ 07310–1755
Vessel: AMERICANA

Mediterranean Shipping Cruises S.p.A. and Westria Holdings Inc., Piazza Garibaldi 91, Naples, 80142 Italy
Vessel: MELODY

New SeaEscape Cruises Ltd., Cruise Charter Ltd., Maritime Management Ltd., Maritime Entertainment Ltd., Belair Financial Services, Inc., Silvercone Holdings Limited, Joint Stock Company Transship and Winchester Navigation Limited, 140 S. Federal Highway, Dania, FL 33004
Vessel: ISLAND HOLIDAY

Norwegian Cruise Line Limited (d/b/a Norwegian Cruise Line), 7665 Corporate Center Drive, Miami, FL 33126
Vessel: NORWEGIAN DREAM and NORWEGIAN WIND

The Peninsular and Oriental Steam Navigation Company, Princess Cruises, Inc. and P & O Cruises (UK) Limited, 77 New Oxford Street, London WC1A 1PP England
Vessel: ARCADIA

Royal Olympic Cruises, Ltd., RO Cruises, Inc. and Caroline Shipping, Inc., One Rockefeller Plaza, Suite 315, New York, NY 10020
Vessel: STELLA SOLARIS

Saga International Holidays, Ltd., Saga Holidays Limited and Saga Shipping Company Limited, Middleburg Square, Folkestone, Kent CT20 1AZ England
Vessel: SAGA ROSE.

Dated: January 5, 1998.

Joseph C. Polking,

Secretary.

[FR Doc. 98–523 Filed 1–8–98; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

Ideal Consolidators, Inc., 2101 Rosecrans Avenue, Suite 6250, El Segundo, CA 90245, Officer: Alfred Yau, President.

Glodex, Corp., 4057 NW 79 Avenue, Miami, FL 33166, Officers: Marisela Riera, President, Jorge Mauricio Parra, General Manager.

Direct Speed Ltd., 147–48 175th Street 2/F, Jamaica, NY 11434, Officer: Lysander Li, Managing Director.

Dated: January 5, 1998.

Joseph C. Polking,

Secretary.

[FR Doc. 98–493 Filed 1–8–98; 8:45 am]

BILLING CODE 6730–01–M

Federal Reserve System

Sunshine Act meeting

AGENCY HOLDING THE MEETING: BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.

TIME AND DATE: 10:00 a.m., Wednesday, January 14, 1998.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Guidance on international financial and supervisory coordination issues.
2. Federal Reserve Bank and Branch director appointments.
3. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
4. Any matters carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Joseph R. Coyne, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.bog.frb.fed.us for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: January 7, 1998.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 98–662 Filed 1–7–98; 11:21 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Summary Data Component (SDC) of the National Child Abuse and Neglect Data System (NCANDS).

OMB No: 0980–0229.

Description: This information collection implements the provision of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq.*), as amended by Pub. L. 104–235, requiring that State agencies receiving the State child abuse and neglect grant annually provide, ''to the maximum extent practicable'' an annual data report. Data elements include the number of children reported for child abuse and neglect; the number of children for whom maltreatment was substantiated, unsubstantiated or determined to be false; the number of deaths resulting from child abuse or neglect; the number of children who received services; agency response times; and the number of workers responsible for child protective service (CPS) functions. The new annual State data report is being combined with the previously existing voluntary Summary Data Component of the National Child Abuse and Neglect Data System. The information collected will be used to understand better the experiences of children and families served by CPS agencies, and to help guide policy and program development at the National, State and local levels. ect.

Respondents: State, Local or Tribal Govt.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Summary data component	56	1	60	3,360

Estimated Total Annual Burden Hours: 3,360.

In compliance with the requirements of Section3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Information Services, Division of Information Resource Management Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: January 5, 1998.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 98–490 Filed 1–8–98; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[Program Announcement No. 93612–982]

Administration for Native Americans: Availability of Financial Assistance

AGENCY: Administration for Native Americans (ANA), Administration for Children and Families (ACF), DHHS.

ACTION: Announcement of availability of competitive financial assistance to assist eligible applicants in assuring the survival and continuing vitality of their Native American languages.

SUMMARY: The Administration for Native Americans (ANA) announces the availability of Fiscal Year 1998 funds and other available funds for Native American Language projects. Financial assistance provided by ANA is designed to assist applicants in designing projects which will promote the survival and continuing vitality of Native American languages.

Application Kit: Application kits, (Approved by the OMB under control number 0980–0204, which expires August 31, 1999) containing the necessary forms and instructions to apply for a grant under this program announcement, may be obtained from: Department of Health and Human Services, Administration for Children and Families, Administration for Native Americans, 370 L'Enfant Promenade, Mail Stop HHH 348F, Washington, D.C. 20447, Attention: 93612–982. You may telefax your request to: (202) 690–7441; confirm at (202)690–7776.

Copies of this program announcement and many of the required forms may be obtained electronically at the ANA World Wide Web Page: http://www.acf.dhhs.gov/programs/ana/index.html

The printed **Federal Register** notice is the only official program announcement. Although reasonable efforts are taken to assure that the files on the ANA World Wide Web Page containing electronic copies of this Program Announcement are accurate and complete, they are provided for information only. The applicant bears sole responsibility to assure that the copy downloaded and/or printed from any other source is accurate and complete.

DATES: The closing date for submission of applications is March 27, 1998.

FOR FURTHER INFORMATION CONTACT: Deborah Yatsko, Program Analyst, Department of Health and Human Services, Administration for Children and Families, Administration for Native Americans, 370 L'Enfant Promenade, Mail Stop HHH 348F, Washington, D.C. 20447, tel: (202) 690–7843, fax: (202) 690–7441, or e-mail: dyatsko@acf.dhhs.gov

SUPPLEMENTARY INFORMATION:

Part I

A. Purpose and Availability of Funds

The program announcement states the availability of fiscal year 1998 financial assistance to eligible applicants for the purpose of assisting Native Americans in assuring the survival and continuing vitality of their languages. Financial assistance awards made under this program announcement will be on a competitive basis and the proposals will be reviewed against the evaluation criteria in this announcement.

Approximately $2,000,000 in Fiscal Year 1998 has been allocated for category I and II grants. For Category I, Planning Grants (project length: 12 months), the funding level for a budget period of 12 months will be up to $50,000. For Category II, Design and or Implementation Grants (project length: up to 36 months), the funding level for a budget period of 12 months will be up to $125,000. In accordance with current agency policies, ANA may fund additional highly ranked applications if additional funds become available prior to the next competition.

B. Background

The Congress has recognized that the history of past policies of the United States toward Indian and other Native American languages has resulted in a dramatic decrease in the number of Native American languages that have survived over the past 500 years. Consequently, the Native American

Languages Act (Title 1, Pub. L. 101–477) was enacted to address this decline.

This legislation invested the United States government with the responsibility to work together with Native Americans to ensure the survival of cultures and languages unique to Native America. This law declared that it is the policy of the United States to ''preserve, protect and promote the rights and freedom of Native Americans to use, practice and develop Native American languages.'' While the Congress made a significant first step in passing this legislation in 1990, it served only as a declaration of policy. No program initiatives were proposed, nor any funds authorized to enact any significant programs in furtherance of this policy.

In 1992, Congressional testimony provided estimates that of the several hundred languages that once existed, about 150 are still spoken or remembered today. However, only 20 are spoken by persons of all ages, 30 are spoken by adults of all ages, about 60 are spoken by middle-aged adults, and 45 are spoken by the most elderly.

In response to this testimony, the Congress passed the Native American Languages Act of 1992 (the Act), P.L. 102–524, to assist Native Americans in assuring the survival and continuing vitality of their languages. Passage of the Act was an important second step in attempting to ensure the survival and continuation of Native Languages, as it provides the basic foundation upon which the Tribal nations can rebuild their economic strength and rich cultural diversity.

While the Federal government recognizes that substantial loss of Native American languages over the past several hundred years, the nature and magnitude of the status of Native American languages will be better defined when eligible applicants under the Act have completed language assessments.

The Administration for Native Americans (ANA) believes that the responsibility for achieving self-sufficiency rests with the governing bodies of Indian tribes, Alaska Native villages, and in the leadership of Native American groups. This belief supports the ANA principle that the local community and its leadership are responsible for determining goals, setting priorities, and planning and implementing programs which support the community's long-range goals.

Therefore, since preserving a language and ensuring its continuation is generally one of the first steps taken toward strengthening a group's identity, activities proposed under this program announcement will contribute to the social development of Native communities and significantly contribute to their efforts toward self-sufficiency.

The Administration for Native Americans recognizes that eligible applicants must have the opportunity to develop their own language plans, technical capabilities, and access to the necessary financial and technical resources in order to assess, plan, develop and implement programs to assure the survival and continuing vitality of their languages. ANA also recognizes that potential applicants may have specialized knowledge and capabilities to address specific language concerns at various levels. This program announcement reflects these special needs and circumstances.

C. Proposed Projects To Be Funded

Category I—Planning Grants

The purpose of a Planning Grant is to conduct an assessment and to develop the plan needed to describe the current status of the language(s) to be addressed and to establish community long-range goal(s) to ensure its surivival. Project activities may include, but are not limited to:

- data collection, compilation, organization and description of current language status through a ''formal'' method (e.g. work performed by a linguist, and/or a language survey conducted by community members) or an ''informal'' method (e.g. a community consensus of the language status based on elders, tribal scholars, and/or other community members);
- Establishment of community long-range language goals; and
- Acquisition of necessary training and technical assistance to administer the project and achieve project goal(s).

Category II—Design and/or Implementation Grants

The purposes of Design and/or Implementation Grants are (1) so tribes or communities may design and/or implement a language program to achieve their long-range goal(s); and to accomodate where the tribe or community is in their long-term language goal(s) continuum.

Applicants under Category II must be able to document that:

(a) Language information has been collected and analyzed, and that it is current (compiled within 36 months prior to the grant application);

(b) The community has established long-range language goals; and

(c) Community representatives are adequately trained so that the proposed project goals can be achieved.

Category II applications may include purchasing specialized equipment (including audio and video recording equipment, computers, and software) necessary to achieve the project objectives. The applicant must fully justify the need for this equipment and explain how it will be used to achieve the project objectives.

The types of projects ANA may fund under Category II include, but are not limited to:

- Establishment and support of a community Native American language project to bring older and younger Native Americans together to facilitate and encourage the teaching of Native American languages skills from one generation to another;
- Establishment of a project to train Native Americans to teach Native American languages to others or to enable them to serve as interpreters or translators of such languages;
- Development, printing, and dissemination of materials to be used for the teaching and enhancement of Native American languages;
- Establishment or support of a project to train Native Americans to produce or participate in television or radio programs to be broadcast in Native American languages; and
- Compilation, transcription and analysis of oral testimony to record and preserve Native American languages.

It is ANA's policy that funds will not be awarded for projects addressing dead languages. For purposes of this announcement, dead languages are those languages that are no longer spoken by any tribal or community member.

Requirement

The Commissioner shall determine the repository for copies of products from Native American language grants funded under this program announcement. At the end of the project period, products or project models of Native American languages grants funded by this program announcement should be sent to the designated repository. Specific information about the repository is in the ANA application kit.

Federally recognized Indian tribes are not required to comply with this requirement.

D. Eligible Applicants

The following organizations are eligible to apply for funding under this competitive area:

- Federally recognized Indian tribes;
- Consortia of Indian tribes (incorporated as a non-profit or formed

with one or more Federally recognized tribes);

- Incorporated non-Federally recognized tribes;
- Incorporated non-profit multi-purpose community-based Indian organizations;
- Urban Indian Centers;
- National or regional incorporated non-profit Native American organizations with Native American community-specific objectives;
- Alaska Native villages as defined in the Alaska Native Claims Settlement Act (ANCSA) and/or non-profit village consortia;
- Incorporated non-profit Alaska Native multi-purpose community-based organizations;
- Non-profit Alaska Native Regional Corporations/Associations in Alaska with village-specific projects;
- Non-profit Native organizations in Alaska with village-specific projects;
- Non-profit Alaska Native community entities or tribal governing bodies (Indian Reorganization Act or traditional Councils) as recognized by the Bureau of Indian Affairs;
- Public and non-profit private agencies serving Native Hawaiians (the populations served may be located on these islands or on the continental United States);
- Public and non-profit private agencies serving Native peoples from Guam, American Samoa, Palau, or the Commonwealth of the Northern Mariana Islands (The populations served may be located on these islands or in the United States);
- Tribally-controlled community colleges and tribally-controlled post-secondary Vocational Institutions; and
- Colleges and universities located in Hawaii, Guam, American Samoa, Palau or the Commonwealth of the Northern Mariana Islands which serve Native American Pacific Islanders.

Participating Organizations

If a tribal organization, or other eligible applicant, decides that the objective of its proposed Native American language project would be accomplished more effectively through a partnership arrangement with a tribal school, college, or university, the applicant shall identify such school, college or university as a participating organization in its application. Under a partnership agreement, the applicant will be responsible for the fiscal, administrative and programmatic management of the grant.

Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code or by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State or tribe in which the corporation or association is domiciled.

If the applicant, other than a tribe or an Alaska Native Village government, is proposing a project benefiting Native Americans, Alaska Natives, or both, it must provide assurance that its duly elected or appointed board of directors is representative of the community to be served. To establish compliance with this requirement in the regulations, applicants must provide information establishing that at lease ninety (90) percent of the individuals serving on a non-profit applicant's board fall into one or more of the following categories: (1) A current or past member of the community to be served; (2) a prospective participant or beneficiary of the project to be funded; or (3) have a cultural relationship with the community to be served.

Note: Under this program announcement, ANA will only accept one application which serves or impacts a reservation, tribe or Native American community. If a federally recognized Tribe or Alaska Native village chooses not to submit an application under this competitive area, it may support another applicant's project (e.g., a tribal organization) which serves or impacts a reservation. In this case, an applicant must include a tribal resolution which clearly demonstrates the tribe's approval of the application and the tribe's understanding that the other applicant's project supplants the tribe's authority to submit an application under the Native Language competitive area for the duration of the approved grant period.

E. Grantee Share of the Project

Grantees must provide at least 20 percent of the total approved cost of the project. The total approved cost of the project is the sum of the Federal share and the non-Federal share. The non-Federal share may be met by cash or in-kind contributions, although applicants are encouraged to meet their requirement through cash contributions. Therefore, a project requesting $125,000 in Federal funds must include a match of at least $31,250 (20% of total $156,250 project cost).

As per 45 CFR 74.2, In-kind contributions are defined as ''the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies, and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.''

This may include other Federal funding sources where the legislation or regulations authorize using specific types of funds for match, provided the source relates to the ANA project (e.g., Indian Self-Determination and Education Assistance funds, through the Department of the Interior and the Department of Health and Human Services). In addition, certain funds distributed to a tribe, including interest, by the Federal government, may be used for the non-Federal share. For example:

- Funds from the satisfaction of a claim made under Federal law;
- Funds collected and administered on behalf of such tribe or its constituent members; or
- Funds for general tribal administration or tribal development under a formula or subject to a tribal budgeting priority system such as, but not limited to, funds involved in the settlement of land or other judgment claims, severance or other royalty payments, or payments under the Indian Self-Determination Act (25 U.S.C. 450f et seq.) or tribal budget priority system.

An itemized budget detailing the applicant's non-federal share, and its source(s), must be included in an application.

If an applicant plans to charge or otherwise seek credit for indirect costs in its ANA application, a current copy of its Indirect Cost Agreement must be included in the application.

A request for a waiver of the non-Federal share requirement may be submitted in accordance with 45 CFR 1336.50(b)(3) of the Native American Program regulations.

Note: Applications originating from American Samoa, Guam, Palau, or the Commonwealth of the Northern Mariana Islands are covered under Section 501(d) of Public Law 95–134, as amended (48 U.S.C. 1469a) under which HHS waives any requirement for local matching funds under $200,000 (including in-kind contributions)

F. Review Criteria

The proposed project should address the Native American languages purposes stated and described in the ''Background'' (section B) of this announcement.

The evaluation criteria below are closely inter-related. Points are awarded only to applications which respond to these criteria. Proposed projects will be reviewed on a competitive basis using the following separate sets of evaluation criteria; one set for planning, the other for implementation grants:

I. Planning Grants

(1) Current Status of Native American Language(s) (15 points)

- The applicant fully describes the current status of Native American language(s) in the community.

Since obtaining this data may be part of the planning grant application being reviewed, applicants can meet this requirement by explaining their current language status and providing a detailed description of any circumstances or barriers which have prevented the collection of community language data. If documentation exists, describe it in terms of current language status.

(2) Goals and Available Resources (25 points)

(a) The application describes the proposed project's long-range goals and strategies, including:

- How the specific Native American long-range community goal(s) relate to the proposed project; and
- How the goal(s) fit within the context of the current language status.

(b) The application explains how the community and the tribal government (where one exists) intends to achieve these goals. Ways to demonstrate community and tribal government support for the project include:

- A resolution from tribes or tribal organizations stating that community involvement has occurred in project planning;
- Community surveys and questionnaires, including those developed to determine the level of community support for tribal resolutions; and
- Minutes of community meetings, tribal presentations and discussion forums; The type of community served will determine the type of documentation necessary to demonstrate participation. All tribes and communities, however, must indicate in their application how they intend to involve elders and other community members in their projects and include them in development of language goals and strategies and in evaluation of project outcomes.

Applications from National Indian and Native organizations must clearly demonstrate a need for the project, explain how the project was originated, state who the intended beneficiaries will be, and describe how the recipients will actually benefit from the project. National Indian and Native organizations should describe their membership and define how the organization operates.

(c) Available resources (other than ANA and the non-federal share) which will assist and be coordinated with the project are described. These resources should be documented by letters or documents of commitment of resources, and not ''letters of support''.

- ''Letters of support'' merely express another organization's endorsement of a proposed project. Such support letters and related documentation do not indicate a binding commitment and do not establish the authenticity of other resources.
- ''Letters and other documents of commitment'' are binding and specify the nature, amount and conditions under which another agency or organzation will support a project funded with ANA funds. These resources may be human, natural or financial, and may include other Federal and non-Federal resources.

Applicant statements that additional funding will be sought from other specific sources are not considered a binding commitment of outside resources.

If the applicant proposes to enter into an partnership arrangement with a school, college or university, documentation of this commitment must be included in the application.

(3) Project Objectives, Approach and Activities (30 points)

The proposed objectives in the Objective Work Plan (s) relate to the goal to ensure the survival and continuing vitality of Native American language(s). More specifically, together they will achieve for the tribe or community's language goals for the proposed project.

Each Objective Work Plan clearly describes:

- The tribal government's and community's active involvement in the continuing participation of Native American language speakers;
- Measurable or quantifiable results or outcomes;
- How the results or outcomes relate to the community's long-range goals or the establishment of those goals;
- How the project can be accomplished with the available or expected resources during the project period;
- How the main activities will be accomplished;
- Who specifically will conduct the activities under each objective; and
- What the next steps may be after the Planning project is completed.

(4) Organizational capabilities/ Qualifications (20 points)

(a) The management and administrative structure of the applicant is explained. Evidence of the applicant's ability to manage a project of the proposed scope is well-defined. The application clearly demonstrates the successful management of projects of similar scope by the organization and or by the individual designated to manage the project.

(b) Position descriptions and/or resumes of key personnel, including those of consultants, are presented. The position descriptions and/or resumes relate specifically to the staff proposed in the Approach Page and in the proposed budget of the application. Position descriptions very clearly describe the position and its duties and clearly relate to the personnel staffing required to achieve the project objectives. Resumes demonstrate that the proposed staff are qualified to carry out the proposed activities. Either the position descriptions or the resumes contain the qualifications, and/or specialized skills, necessary for overall quality management of the project. Resumes must be included if individuals have been identified for positions in the application.

Note: Applicants are strongly encouraged to give preference to Native Americans in hiring staff and subcontracting services under an approved ANA grant.

(5) Budget (10 points)

A detailed and fully explained budget is provided which:

- Justifies each line item, with a well-written justification, in the budget categories in Section B of the Budget Information of the application, including the applicant's non-federal share and its source;
- Includes and justifies sufficient cost and other necessary details to facilitate the determination of cost allowability and the relevance of these costs to the proposed project; and
- Requests funds which are appropriate and necessary for the scope of the proposed project.

Note: Applicants from the Native American Pacific Islands are not required to provide a 20 percent match for the non-federal share if it is under $200,000 and may not have points reduced for this policy. They are, however, expected to coordinate non-ANA resources for the proposed project, as are all ANA applicants.

II. Design and/or Implementation Grants

(1) Current Status of Native American Language(s) (10 points)

(a) The application fully describes the current status of the Native American language to be addressed; current status is defined as data compiled within the previous 48 months. The description of the current status minimally includes the following information:

- Number of speakers
- Age of speakers
- Gender of speakers
- Level(s) of fluency
- Number of first language speakers (Native language as the first language acquired)
- Number of second language speakers (Native language as the second language acquired)
- Where Native language is used (e.g. home, court system, religious ceremonies; church, media, school, governance and cultural activities)
- Source of data (formal and/or informal)
- Rate of language loss or gain

(b) The application fully describes existing community language or language training programs and projects, if any, in support of the Native American language to be addressed by the proposed project. Existing programs and projects may be formal (e.g., work by a linguist, and/or language survey conducted by community members) or ''informal'' (e.g., a community consensus of the language status based on elders, tribal scholars, and/or other community members).

The description should answer the following:

(1) Has applicant had a community language or language training program within the last 48 months? (2) Within the last 10 years?

If so, fully describe the program(s), and include the following:

- Program goals
- Number of program participants
- Number of speakers
- Age range of participants (e.g., 0–5, 6–10, 11–18, etc.)
- Number of language teachers
- Criteria used to acknowledge competency of language teachers
- Resources available to the applicant (e.g., valid grammars, dictionaries, and/or orthographics or describe other suitable resources)
- Program achievements

If applicant has never had a language program, a detailed explanation of what barriers or circumstances prevented the establishment of a community language program should be included.

(2) Goals and Available Resources (20 points)

(a) The application describes the proposed project's long-range goals and strategies, including:

- How the specific Native American long-range community goal(s) relate to the proposed project; and
- How the goal(s) fit within the context of the current language status;
- A clearly delineated strategy to assist in assuring the survival and continued vitality of the Native American languages addressed in the community.

(b) The application explains how the community and the tribal government (where one exists) intends to achieve these goals. Ways to demonstrate community and tribal government support for the project include:

- A resolution from tribes or tribal organizations stating that community involvement has occurred in project planning;
- Community surveys and questionnaires; and
- Minutes of community meetings, tribal presentations and discussion forums.

The type of community served will determine the type of documentation necessary to demonstrate participation. All tribes and communities, however, must indicate in their application how they intend to involve elders and other community members in their projects and include them in development of language goals and strategies.

Applications from National Indian and Native organizations must clearly demonstrate a need for the project, explain how the project was originated, state who the intended beneficiaries will be, and describe how the recipients will actually benefit from the project. National Indian and Native organizations should describe their membership and define how the organization operates.

(c) Available resources (other than ANA and the non-federal share) which will assist and be coordinated with the project are described. These resources should be documented by letters or documents of commitment of resources, and not ''letters of support''.

- ''Letters of support'' merely express another organization's endorsement of a proposed project. Such support letters and related documentation do not indicate a binding commitment and do not establish the authenticity of other resources.
- ''Letters and other documents of commitment'' are binding and specify the nature, amount and conditions under which another agency or organization will support a project funded with ANA funds. These resources may be human, natural or financial, and may include other Federal and non-Federal resources.

Applicant statements that additional funding will be sought from other specific sources are not considered a binding commitment of outside resources.

If the applicant proposes to enter into an partnership arrangement with a school, college or university, documentation of this commitment must be included in the application.

(3) Project Objectives, Approach and Activities (30 points)

The proposed objectives in the Objective Work Plan(s) relate to the goal to ensure the survival and continuing vitality of Native American language(s). More specifically, together they will achieve for the tribe or community's language goals for the proposed project. If the project is for more than one year, the application includes Objective Work Plans for each year (budget period) proposed.

Each Objective Work Plan clearly describes:

- The tribal government's and community's active involvement in the continuing participation of Native American language speakers;
- Measurable or quantifiable results or outcomes;
- How they relate to the community's long-range goals or the establishment of those goals;
- How the project can be accomplished with the available or expected resources during the project period;
- How the main activities will be accomplished;
- Who specifically will conduct the activities under each objective; and
- How the project will be completed, become self-sustaining, or be financed by other than ANA funds at the end of the project period.

(4) Organizational capabilities/ Qualifications (15 points)

(a) The management and administrative structure of the applicant is explained. Evidence of the applicant's ability to manage a project of the proposed scope is well-defined. The application clearly demonstrates the successful management of projects of similar scope by the organization and/or by the individual designated to manage the project.

(b) Position descriptions and/or resumes of key personnel, including those of consultants, are presented. The position descriptions and/or resumes relate specifically to the staff proposed in the Approach Page and in the proposed budget of the application. Position descriptions very clearly describe the position and its duties and clearly relate to the personnel staffing required to achieve the project objectives. Resumes demonstrate that the proposed staff are qualified to carry out the proposed activities. Either the position descriptions or the resumes contain the qualifications, and/or specialized skills, necessary for overall

quality management of the project. Resumes must be included if individuals have been identified for positions in the application.

Note: Applicants are strongly encouraged to give preference to Native Americans in hiring staff and subcontracting services under an approved ANA grant.

(5) Budget (10 points)

A detailed and fully explained budget is provided for each budget period requested which:

- Justifies each line item, with a well-written justification, in the budget categories in Section B of the Budget Information of the application, including the applicant's non-federal share and its source;
- Includes and justifies sufficient cost and other necessary details to facilitate the determination of cost allowability and the relevance of these costs to the proposed project; and
- Requests funds which are appropriate and necessary for the scope of the proposed project.

Note: Applicants from the Native American Pacific Islands are not required to provide a 20 percent match for the non-federal share if it is under $200,000 and may not have points reduced for this policy. They are, however, expected to coordinate non-ANA resources for the proposed project, as are all ANA applicants.

(6) Evaluation, Sharing and Preservation Plans (15 points)

The application should include the following three plans:

(a) An ''evaluation plan'' with a baseline to measure project outcomes, including, but not limited to, describing effective language growth in the community (e.g., an increase of Native American language use). This plan will be the basis for evaluating the community's progress in achieving its language goals and objectives.

(b) A ''sharing plan'' that identifies how the project's methodology, research data, outcomes or other products can be shared and modified for use by other tribes or communities. If this is not feasible or culturally appropriate, provide the reasons. The goal is to provide opportunities to ensure the survival and the continuing vitality of Native Languages.

(c) A ''plan to preserve project products'' describes how the products of the project will be preserved through archival or other culturally appropriate methods, for the benefit of future generations.

G. Application Due Date

The closing date for submission of applications under this program announcement is March 27, 1998.

H. For Further Information Contact

Deborah Yatsko, Program Analyst, Department of Health and Human Services, Administration for Children and Families, Administration for Native Americans, 370 L'Enfant Promenade, Mail Stop HHH 348F, Washington, DC 20447, tel: (202) 690–7843; e-mail:dyatsko@acf.dhhs.gov

Part II: General Guidance to Applicants

The following is provided to assist applicants to develop a competitive application.

A. Definitions

- ''Language preservation'' is the maintenance of a language so that it will not decline into non-use.
- ''Language vitality'' is the active use of a language in a wide range of domains of human life.
- ''Language replication'' is the application of a language program model developed in one community to other linguistically similar communities.
- ''Language survival'' is the maintenance and continuation of language from one generation to another in a wide range of aspects of community life.
- A ''multi-purpose community-based Native American organization'' is an association and/or corporation whose charter specifies that the community designates the Board of Directors and/or officers of the organization through an elective procedure and that the organization functions in several different areas of concern to the members of the local Native American community. These areas are specified in the by-laws and/or policies adopted by the organization. They may include, but need not be limited to, economic, artistic, cultural, and recreational activities, and the delivery of human services such as health care, day care, counseling, education, and training.
- A ''multi-year project'' is a project on a single theme that requires more than 12 months to complete and affords the applicant an opportunity to develop and address more complex and in-depth strategies than can be completed in one year. A multi-year project cannot be a series of unrelated objectives with activities presented in chronological order over a two or three year period.
- ''Budget Period'' is the interval of time (usually 12 months) into which the project period is divided for budgetary and funding purposes.
- ''Core administration'' is funding for staff salaries for those functions which support the organization as a whole, or for purposes unrelated to the actual management or implementation of work conducted under an ANA approved project.
- ''Real Property'' means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.
- ''Construction'' is the term which specifies a project supported through a discretionary grant or cooperative agreement, to support the initial building of a facility.

B. General Considerations

Non-ANA resources should be leveraged to strengthen and broaden the impact of the proposed project in the community. Project designs should explain how those parts of projects which ANA does not fund will be financed through other sources. For example, ANA does not fund construction. Applicants must show the relationship of non-ANA funded activities to those objectives and activities that are funded with ANA grant funds.

Costs of fundraising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions are unallowable under a grant award. However, even though these costs are unallowable for purposes of computing charges to Federal awards, they must be treated as direct costs for purposes of determining indirect cost rates and be allocated their share of the organization's indirect costs if they represent activities which (1) include the salaries of personnel, (2) occupy space, and (3) benefit from the organization's indirect costs.

All projects funded by ANA must be completed, or self-sustaining or supported with other than ANA funds at the end of the project period. ''Completed'' means that the project ANA funded is finished, and the desired result(s) have been attained. ''Self-sustaining'' means that a project will continue without outside resources. ''Supported by other than ANA funds'' means that the project will continue beyond the ANA project period, but will be supported by funds other than ANA's.

C. Activities That Cannot Be Funded by ANA

The Administration for Native Americans does not fund projects that:

- Operate indefinitely or require ANA funding on a recurring basis.
- Projects in which a grantee would provide training and/or technical assistance (T/TA) to other tribes or

Native American organizations which are otherwise eligible to apply to ANA (''third party T/TA'').

However, the purchase of T/TA by a grantee for its own use or for its members' use (as in the case of a consortium), where T/TA is necessary to carry out project objectives, is acceptable.

- The support of on-going social service delivery programs or the expansion, or continuation, of existing social service delivery programs.
- ANA will not fund the purchase of real property.
- ANA will not fund construction.
- Objectives or activities for the support of core administration of an organization.

''Core administration'' is funding for staff salaries for those functions which support the organization as a whole, or for purposes unrelated to the actual management or implementation of work conducted under an ANA approved project. However, functions and activities that are clearly project related are eligible for grant funding. For example, the management and administrative functions necessary to carry out an ANA approved project are not considered ''core administration'' and are, therefore, eligible costs. Additionally, ANA will fund the salaries of approved staff for time actually and reasonably spent to implement a funded ANA project.

Projects or activities that generally will not meet the purposes of this announcement are discussed further in Section H, ''General Guidance to Applicants'', below.

D. Multi-Year Projects

Only Category II ''Design and Implementation'' projects may be developed as multi-year projects, i.e. for up to three years. The information in this section is not applicable to planning projects.

A multi-year project is a project on a single theme that requires more than 12 to 17 months to complete. It affords the applicant an opportunity to develop and address more complex and in-depth strategies. A multi-year project cannot be a series of unrelated objectives with activities presented in chronological order over a two or three year period. Initial awards, on a competitive basis, will be for a one-year budget period (up to 17 months), although project periods may be for three years.

Applications for continuation grants funded under these awards beyond the one-year budget period, but within a two-to-three year project period, will be entertained in subsequent years on a non-competitive basis, subject to the availability of funds, satisfactory progress of the grantee and determination that continued funding would be in the best interest of the Government. Therefore, this program announcement does not apply to current ANA grantees with multi-year projects that apply for continuation funding for their second or third year budget periods.

E. Intergovernmental Review of Federal Programs

This program is not covered by Executive Order 12372 or 45 CFR part 100.

F. The Application Process

1. Availability of Application Forms

In order to be considered for a grant under this program announcement, an application must be submitted on the forms supplied and in the manner prescribed by ANA. The application kits containing the necessary forms and instructions may be obtained from: Department of Health and Human Services, Administration for Children and Families, Administration for Native Americans, 370 L'Enfant Promenade, SW, Mail Stop HHH 348F, Washington, D.C. 20447, Attention: 93612–982, Telephone: (202) 690–7776.

Copies of this program announcement and many of the required forms may be obtained electronically at the ANA World Wide Web Page: www.acf.dhhs.gov/programs/ana/index.html

The printed **Federal Register** notice is the only official program announcement. Although all reasonable efforts are taken to assure that the files on the ANA World Wide Web Page containing electronic copies of the Program Announcement are accurate and complete, they are provided for information only. The applicant bears sole responsibility to assure that the copy downloaded and/or printed from any other source is accurate and complete.

2. Application Submission

One signed original, and two copies, of the grant application, including all attachments, must be mailed on or before the closing date to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, S.W., Mail Stop 6C–462, Washington, D.C. 20447, Attention: Lois B. Hodge, ANA No. 93612–982.

Applications hand-carried by applicants, applicant couriers, or by overnight express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8:00 am and 4:00 pm at: U.S. Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, ACF Mail Room, Second Floor Loading Dock, Aerospace Center, 901 D Street, S.W., Washington, D.C. 20024.

The application (Form 424) must be signed by an individual authorized (1) to act for the applicant tribe or organization, and (2) to assume the applicant's obligations under the terms and conditions of the grant award, including Native American Program statutory and regulatory requirements.

Each tribe, Native American organization, or other eligible applicant may compete for one grant award under this program announcement.

The Administration for Native Americans will accept only one application for program announcement from any one applicant. If an eligible applicant sends in two applications for this program announcement, the one with the earlier postmark will be accepted for review unless the applicant withdraws the earlier application.

3. Application Consideration

The ANA Commissioner determines the final action to be taken on each grant application received under this program announcement.

The following points should be taken into consideration by all applicants:

- Incomplete applications and applications that do not conform to this announcement will not be accepted for review. Applicants will be notified in writing of any such determination by ACF. An incomplete application is one that is:
- Missing Form SF 424
- Does not have a signature on Form SF 424
- Does not include proof of non-profit status, if applicable

Complete applications that conform to all the requirements of this program announcement are subjected to a competitive review and evaluation process (discussed in section G below). Independent review panels consisting of reviewers familiar with American Indian Tribes and Native American communities and organizations, and Native American languages evaluate each application using the published criteria in this announcement. As a result of the review, a normalized numerical score will be assigned to each application.

- The Commissioner's funding decision is based on the review panel's analysis of the application,

recommendation and comments of ANA staff, State and Federal agencies having contract and grant performance related information, and other interested parties.

- The Commissioner makes grant awards consistent with the purpose of the Act, all relevant statutory and regulatory requirements, this program announcement, and the availability of funds.
- ANA staff cannot respond to requests for information regarding funding decisions prior to the official notification to the applicants.
- After the Commissioner has made decisions on all applications funded with fiscal year 1998 funds, unsuccessful applicants are notified in writing within 30 days. The notification will be accompanied by a critique including recommendations for improving the application.
- Successful applicants are notified through an official Financial Assistance Award (FAA) document. The FAA will state the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the award, the project period, the budget period, and the amount of the non-ACF matching share requirement.

G. The Review Process

1. Initial Application Review

Applications submitted by the closing date and verified by the postmark under this program announcement will undergo a pre-review to determine that:

- The applicant is eligible in accordance with the Eligible Applicants Section of this announcement; and
- The application is signed and submitted by the deadline explained in section G, Application Due Date.
- The application narrative, forms and materials submitted are adequate to allow the review panel to undertake an in depth evaluation and the project described is an allowable type. (All required materials and forms are listed in the Grant Application Checklist in the Application Kit).

Applications subjected to the pre-review described above which fail to satisfy one or more of the listed requirements will be ineligible or otherwise excluded from competitive evaluation.

2. Competitive Review of Accepted Applications

Applications which pass the pre-review will be evaluated and rated by an independent review panel on the basis of the specific evaluation criteria listed in Part II. These criteria are used to evaluate the quality of a proposed project, and to determine the likelihood of its success.

3. Appeal of Ineligibility

Applicants who are initially excluded from competitive evaluation because of ineligibility, may appeal an ANA decision of applicant ineligibility. Likewise, applicants may also appeal an ANA decision that an applicant's proposed activities are ineligible for funding consideration. The appeals process is stated in the final rule published in the **Federal Register** on August 19, 1996 (61 FR 42817).

H. General Guidance to Applicants

The following information is provided to assist applicants in developing a competitive application.

1. Program Guidance

- The Administration for Native Americans funds projects that demonstrate the strongest prospects for addressing the stated purposes of this program announcement.
- Projects will not be ranked on the basis of general financial need .
- In discussing the goals, strategy, and problems being addressed in the application, include sufficient background and/or history of the community concerning these issues and/or progress to date, as well as the size of the population to be served. This material will assist the reviewers in determining the appropriateness and potential benefits of the proposed project.
- In the discussion of community-based, long-range goals, non-Federally recognized and off-reservation groups are encouraged to include a description of what constitutes their specific ''community.''
- Applicants must document the community's support for the proposed project and explain the role of the community in the planning process and implementation of the proposed project. For tribes, a current signed resolution from the governing body of the tribe supporting the project proposal stating that there has been community involvement in the planning of this project will suffice as evidence of community support/involvement. For all other eligible applicants, the type of community you serve will determine the type of documentation necessary. For example, a tribal organization may submit resolutions supporting the project proposal from each of its members tribes, as well as a resolution from the applicant organization. Other examples of documentation include: community surveys; minutes of community meetings; questionnaires; tribal presentations; and/or discussion/position papers.
- Applications from National Indian and Native American organizations must demonstrate a need for the project, explain how the project was originated, state who the intended beneficiaries will be, and describe how the recipients will actually benefit from the project.
- An application should describe a clear relationship between the proposed project, language goals, and the community's long-range goals or plan.
- The project application, including the Objective Work Plans, must clearly identify in measurable terms the expected results, benefits or outcomes of the proposed project, and the positive or continuing impact that the project will have on the community.
- Supporting documentation, including letters of support, if available, or other testimonies from concerned interests other than the applicant should be included to demonstrate support for the feasibility of the project and the commitment of other resources to the proposed project.
- In the ANA Project Narrative, Section A of the application package, ''Resources Available to the Proposed Project,'' the applicant should describe any specific financial circumstances which may impact on the project, such as any monetary or land settlements made to the applicant, and any restrictions on the use of those settlements. When the applicant appears to have other resources to support the proposed project and chooses not to use them, the applicant should explain why it is seeking ANA funds and not utilizing these resources for the project.

Applications which were not funded under a previous years closing date and revised for resubmission should make a reference to the changes, or reasons for not making changes, in their current ANA application which are based on ANA panel review comments.

2. Technical Guidance

- It is strongly suggested that the applicant follow the Supplemental Guide included in the ANA application kit to develop an application. The Guide provides practical information and helpful suggestions, and is an aid to help applicants prepare ANA applications.
- Applicants are encouraged to have someone other than the author apply the evaluation criteria in the program announcement and score the application prior to its submission, in order to gain a better sense of the application's quality and potential

competitiveness in the ANA review process.

- For purposes of developing an application, applicants should plan for a project start date approximately 120 days after the closing date under which the application is submitted.
- The Administration for Native Americans will not fund essentially identical projects serving the same constituency.
- If a project could be supported by other Federal funding sources, the applicant should fully explain its reasons for not pursuing other Federal funds for the project.
- For purposes of this announcement, ANA is using the Bureau of Indian Affairs' list of federally recognized Indian tribes which includes nonprofit Alaska Native community entities or tribal governing bodies (IRA or traditional councils). Other federally recognized Indian tribes which are not included on this list (e.g., those Tribes which have been recently recognized or restored by the United States Congress) are also eligible to apply for ANA funds.
- The Administration for Native Americans will accept only one application under this program announcement from any one applicant. If an eligible applicant sends in two applications, the one with the earlier postmark will be accepted for review unless the applicant withdraws the earlier application.
- An application from a federally recognized Tribe, Alaska Native Village or Native American organization must be from the governing body of the Tribe or organization. ANA will not accept applications from tribal components which are tribally-authorized divisions of a larger tribe, unless the application includes a Tribal resolution which clearly demonstrates the Tribe's support of the project and the Tribe's understanding that the other applicant's project supplants the Tribe's authority to submit an application under that specific competitive area for the duration of the approved grant period.
- ANA will only accept one application which serves or impacts a reservation, Tribe, or Native American community. If a federally recognized Tribe, or Alaska Native village chooses not to submit an application under this announcement, it may support another applicant's project (e.g., a tribal organization) which serves or impacts a reservation. In this case, the applicant must include a Tribal resolution which clearly demonstrates the Tribe's support approval of the application and the Tribe's understanding that the other applicant's project supplants the Tribe's authority to submit an application under that specific competitive area for the duration of the approved grant period.
- The Objective Work Plan proposed should be of sufficient detail to become a monthly staff guide for project responsibilities if the applicant is funded.
- Applicants proposing multi-year projects under Category II must fully describe each year's project objectives and activities. Separate Objective Work Plans (OWPs) must be presented for each project year and a separate itemized budget of the Federal and non-Federal costs of the project for each budget period must be included.
- Applicants for multi-year projects under Category II must justify the entire time-frame of the project (i.e., why the project needs funding for more than one year) and clearly describe the results to be achieved for each objective by the end of each budget period of the total project period.
- The Administration for Native Americans will critically evaluate applications in which the acquisition of equipment is a major component of the Federal share of the budget. ''Equipment is tangible, non-expendable personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.'' During negotiation, such expenditures may be deleted from the budget of an otherwise approved application, if not fully justified by the applicant and deemed not appropriate to the needs of the project by ANA.
- Applicants are encouraged to request a legibly dated receipt from a commercial carrier or U.S. Postal Service as proof of timely mailing.

3. Grant Administrative Guidance

- The application's Form 424 must be signed by the applicant's representative authorized to act with full authority on behalf of the applicant.
- The Administration for Native Americans recommends that the pages of the application be numbered sequentially and that a table of contents and tabbing of the sections be provided. Simple
- An application with an original signature and two additional copies are required.
- The Cover Page (included in the Kit) should be the first page of an application, followed by the one-page abstract.
- The applicant should specify the entire project period length on the first page of the Form 424, Block 13, not the length of the first budget period. Should the application propose one length of project period and the Form 424 specify a conflicting length of project period, ANA will consider the project period specified on the Form 424 as the request. ANA may negotiate a reduction of the project period. The approved project period is shown on block 9 of a Financial Assistance Award.
- Line 15a of the Form 424 must specify the Federal funds requested for the first Budget Period, not the entire project period.
- Applicants may propose up to a 17 month project period under Category I and up to a 36 month project period under Category II.

4. Projects or Activities That Generally Will not Meet the Purposes of this Announcement

- Core administration functions, or other activities, which essentially support only the applicant's on-going administrative functions.
- Project goals which are not responsive to this program announcement.
- Proposals from consortia of tribes that are not specific with regard to support from, and roles of, member tribes. ANA expects an application from a consortium to have goals and objectives that will create positive impacts and outcomes in the communities of its members. Proposals from consortia of tribes should have individual objectives which are related to the larger goal of the proposed project. Project objectives may be tailored to each consortia member, but within the context of a common goal for the consortia. In situations where both a consortia of tribes and the tribes who belong to the consortia receive ANA funding, ANA expects that consortia groups will not seek funding that duplicates activities being conducted by their member tribes.
- Projects that will not be completed, self-sustaining, or supported by other than ANA funds, at the end of the project period.
- Renovation or alteration unless it is essential for the project. Renovation or alteration costs may not exceed the lesser of $150,000 or 25 percent of the total direct costs approved for the entire budget period.
- Projects originated and designed by consultants who provide a major role for themselves in the proposed project and are not members of the applicant organization, tribe or village.

I. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995, Pub. L. 104–13, the Department is required to submit to the Office of Management and Budget (OMB) for review and approval any reporting and

record keeping requirements in regulations including program announcements. This program announcement does not contain information collection requirements beyond those approved for ANA grant applications under the Program Narrative Statement by OMB.

J. Receipt of Applications

Applications must either be hand delivered or mailed to the address in Section F, The Application Process: Application Submission. The Administration for Native Americans cannot accommodate transmission of applications by fax or through other electronic media. Therefore, applications transmitted to ANA electronically will not be accepted regardless of date or time of submission and time of receipt. Videotapes and cassette tapes may not be included as part of a grant application for panel review.

Applications and related materials postmarked after the closing date will be classified as late.

1. Deadlines

- Mailed applications shall be considered as meeting an announced deadline if they are either received on or before the deadline date or sent on or before the deadline date and received by ACF in time for the independent review to: U.S. Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Mail Stop 6C–462, Washington, D.C. 20447.
- Applicants are cautioned to request a legibly dated U.S. Postal Service postmark or to obtain a legibly dated receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.
- Applications hand carried by applicants, applicant couriers, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date or postmarked on or before the deadline date, Monday through Friday (excluding Federal holidays), between the hours of 8:00 am and 4:30 pm at: U.S. Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, ACF Mailroom, 2nd Floor Loading Dock, Aerospace Center, 901 D Street, S.W., Washington, D.C. 20024.

(Applicants are cautioned that express/overnight mail services do not always deliver as agreed.)

- ACF cannot accommodate transmission of applications by fax or through other electronic media. Therefore, applications transmitted to ACF electronically will not be accepted regardless of date or time of submission and time of receipt.
- No additional material will be accepted, or added to an application, unless it is postmarked by the deadline date.

2. Late Applications

Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

3. Extension of Deadlines

Administration for Children and Families may extend an application deadline for applicants affected by acts of God such as floods and hurricanes, or when there is a widespread disruption of the mails. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

(Catalog of Federal Domestic Assistance Program Numbers: 93.612 Native American Programs; and 93.587 Promoting the Survival and Continuing Vitality of Native American Languages)

Dated: December 31, 1997.

Gary N. Kimble,

Commissioner, Administration for Native Americans.

[FR Doc. 98–583 Filed 1–8–98; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97N–0532]

Agency Information Collection Activities: Proposed Collection; Radioactive Drug Research Committees; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting requirements related to radioactive drugs used in research.

DATES: Submit written comments on the collection of information by March 10, 1998.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Karen L. Nelson, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Radioactive Drugs for Certain Research Uses—(21 CFR 361.1)—(OMB Control Number 0910–0053—Extension)

Under sections 201, 505, and 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 355, and 371), FDA has the authority to issue regulations governing the use of radioactive drugs for basic informational research, Section 361.1 (21 CFR 361.1) sets forth specific regulations regarding the establishment and composition of Radioactive Drug Research Committees and their role in approving and monitoring research studies utilizing radiopharmaceuticals. No study involving any administration of a radioactive drug to research subjects is permitted without the authorization of an FDA approved Radioactive Drug Research Committee (§ 361.1(d)(7)). The type of research that may be undertaken with a radiopharmaceutical drug must be intended to obtain basic information and not to carry out a clinical trial. The types of basic research permitted are specified in the regulation, and includes studies of metabolism, human physiology, pathophysiology, or biochemistry.

Section 361.1(c)(2) requires that each Radioactive Drug Research Committee shall select a chairman, who shall sign all applications, minutes, and reports of the committee. Each committee shall meet at least once each quarter in which research activity has been authorized or conducted. Minutes shall be kept and shall include the numerical results of votes on protocols involving use in human subjects. Under § 361.1(c)(3), each Radioactive Drug Research Committee shall submit an annual report to the FDA. The annual report shall include the names and qualifications of the members of, and of any consultants used by, the Radioactive Drug Research Committee, and for each study conducted during the preceeding year, using FDA Form 2915.

Under § 361.1(d)(5), each investigator shall obtain the proper consent required under the regulations. Each female research subject of childbearing potential must state in writing that she is not pregnant, or on the basis of a pregnancy test to be confirmed are present.

Under § 361.1(d)(8), the investigator shall immediately report to the Radioactive Drug Research Committee all adverse effects associated with use of the drug, and the committee shall then report to the FDA all adverse reactions probably attributed to the use of the radioactive drug.

Section 361.1(f) sets forth labeling requirements for radioactive drugs. These requirements are not in the reporting burden estimate because they are information supplied by the Federal Government to the recipient for the purposes of disclosure to the public (5 CFR 1320.3(c)(2)). Types of research studies not permitted under this regulation are also specified, and include those ''intended for (the) immediate therapeutic, diagnostic, or similar purposes or to determine the safety and effectiveness of the drug in humans for such purposes (i.e., to carry out a clinical trial).'' These studies require filing of an investigational new drug application (IND) under 21 CFR 312.1 and the associated information collections are covered in OMB Approval 0190–0014.

The primary purpose of this collection of information is to determine if the research studies are being conducted in accordance with required regulations. If these studies were not reviewed, human subjects could be subjected to inappropriate radiation and/or safety risks. Respondents to this information collection are the chairperson(s) of each individual Radioactive Drug Research Committee, investigators, and participants in the studies.

The source of the burden estimates was a phone survey of three committee chairpersons who were selected from different geographical areas and of varying levels of Radioactive Drug Research Committee membership and activities. These chairpersons were asked for their assessment of time expended, cost and views on completing the necessary reporting forms.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Form	No. of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
361.1(c)(3)	FDA 2914	100	1.0	100	1.0	100
361.1(c)(3)	FDA 2915	62	3.5	217	3.75	814
361.1(d)(5)		62	3.5	217	0.1	22
361.1(d)(8)		62	3.5	217	0	0
Totals						936

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Form	Number of recordkeepers	Annual frequency per recordkeeping	Hours per recordkeeper	Total hours
361.1(c)(2)	FDA 2914 and 2915	100	1 per qtr=4 per yr	10	1,000
Total					1,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: January 2, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–590 Filed 1–8–98; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Statement of Mission, Organization, Functions and Delegation of Authority

Part G, of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services, as amended at 60 FR 56606, November 9, 1995, and most recently amended at 61 FR 67048, December 19, 1996, is amended to reflect a realignment of the California Area Indian Health Service. The changes are as follows:

Delete the functional statements for the California Area Indian Health Service in their entirety and replace with the following:

Section GFG–00, California Area Indian Health Service—Mission

The California IHS provides a comprehensive health services delivery system for American Indians and Alaska Natives (AI/AN) with opportunity for maximum tribal involvement in developing and managing programs to meet their health needs. The goal of the California Area IHS is to raise the health level of the AI/AN people to the highest possible level.

Section GFG–10, Functions. Office of the Director (GFGA)

Provides overall direction and leadership for the California Area Indian Health Service (IHS) by: (1) Encouraging maximum consultation and participation by California Area tribes and tribal and urban Indian organizations in establishing the goals and objectives of the California Area IHS, and in developing the policies of the California Area IHS; (2) coordinates the California Area IHS activities and resources internally and externally with those of other Federal, State, local and privately funded health care programs to maximize quality health care services to tribal and urban Indians in the State of California; (3) ensuring compliance to the IHS guidelines and administrative procedures pertinent to Indian Self-Determination contracting processes and Tribal Self-Governance compacting; (4) assuring that Indian Tribes and Indian organizations are informed regarding pertinent health policy and program management issues and coordinates meetings and other communications with tribal delegations; (5) advocating for the health needs and concerns of American Indians and Alaska Natives (AI/AN); (6) developing and demonstrating methods and techniques for continuous improvement of health services management and delivery by California Area tribes and tribal and urban Indian organizations; (7) ensuring that the principles of Equal Employment Opportunity laws and the Civil Rights Act are applied in the management of the human resources of the California Area IHS, and (8) advises the Director, IHS, of issues and potential issues, relevant to the California Area, or to the IHS in general, and recommending and participating in actions to prevent or correct problems.

Office of Management Support (GFGAB)

(1) Provides advice to the Area Director and functional area managers on California Area IHS administrative and management policy and procedures requirements, delegations of authority, documenting the organizations and functions of the California Area IHS, personnel administration and management, and agency agreements management; (2) develops, recommends and implements processes for management accountability and the periodic assessment of managerial performance; (3) provides guidance and support to Area managers regarding resources, personal property, acquisition management; (4) provides a full complement of administrative services in support of the Area-wide health services delivery and management systems, i.e., forms management, travel management, communications management, supplies management, printing, mail management, etc.; (5) advises the Area Director and functional area managers on the civil service and commissioned corps personnel programs' administration and management requirements; (6) directs the personnel security and suitability clearance, and other ethics in employment programs, for the California Area IHS, and (7) provides advice, consultation, and assistance to tribal officials and tribal organizations on tribal health program personnel policy issues.

Resources Management Staff (GFGAB–1)

(1) Develops and submits the budget for the California Area IHS; (2) distributes, coordinates, and monitors resource allocations; (3) interprets policies, guidelines, manual issuances, and OMB circulars relevant to budget development, presentation and execution for the Area Director, functional area managers, and tribal and urban program officials; (4) directs the collection, review, and analysis of program and financial data to determine resource requirements; (5) recommends and coordinates Area budget execution; (6) maintains fund control; and (7) prepares reprogramming requests.

Acquisition Management Staff (GFGAB–2)

(1) Develops and recommends policies and procedures specific to acquisition operations in the California Area IHS that are consistent with higher echelon and government oversight agency policy issuances; (2) provides advice, technical consultation, and training to California Area managers and staff; (3) reviews and makes recommendations for approval/disapproval of contract-related documents such as: pre- and post-award documents, unauthorized commitments, procurement planning documents, Justification for Other Than Full and Open Competition, waivers, and deviations; (4) executes and administers contracts for the California Area IHS; (5) reviews, recommends, and issues delegations of acquisition authority in the California Area IHS, and (6) supports and maintains the IHS Contract Information System and controls entry of data into the HHS Contract Information System.

Office of Public Health (GFGAC)

(1) Provides leadership and consultation to tribal and urban public health programs on the IHS goals, objectives, policies, program standards, and priorities; (2) serves as the primary source of technical and policy advice to the Area Director, Area office staff, and tribal and urban health program officials on the full scope of clinical health care programs, including their quality assurance and preventive aspects, and tort claims; (3) participates in identifying and articulating the health needs of the AI/AN population in the State of California; (4) coordinates the availability and accessibility of Medicare and Medicaid programs, and other managed care programs' services, to AI/AN in the State of California; (5) provides consultation and technical support to tribal and urban public health programs including, but not limited to, dental services, diabetes and other chronic disease prevention, nutrition services, and nursing services, alcohol/substance abuse prevention and treatment, including the coordination of the Youth Regional Treatment Center

services; (6) provides assistance in the development and implementation of Area policy and procedures regarding managed care services, third party collections and reimbursements, health care facility accreditation, risk management and quality assurance; (7) coordinates the reimbursement of allowable costs for qualified high cost contract health service cases from the IHS Catastrophic Health Emergency Fund to tribal health care programs in the State of California; (8) serves as project officer on contract awarded in the State of California for the delivery of health care services, and coordinates activities for monitoring and evaluating contractor performance; (9) provides advice to the Area Director on the activities and issues related to the implementation of Title V of the American Indian Health Care Improvement Act, as amended, in the State of California; (10) provides support to urban Indian health programs and organizations in managing health programs and attending financial and other types of support available from other public and private agencies and organizations, and (11) designs, maintains, and controls the data collection, analysis, and publication of health program information in the activities.

Information Resource Staff (GFGAC–1)

(1) Is the principal advisor to the Area Director, functional area managers, and tribal and urban health program officials in the State of California, regarding the design and implementation of automated information systems; (2) provides advice on the installation and maintenance services to the Area managers and tribal and urban health programs on operational automated information systems used in the IHS, i.e., RPMS, CHSMIS, CDMIS, etc., for improved personal productivity and health services data collection; (3) provides reports and information on a priority basis and gathers, consolidates, and transmits automated RPMS data to central processing centers, and (4) serves as the focal point for clearance of requests to purchase information systems hardware and software for the California Area IHS.

Office of Environmental Health and Engineering (GFGAD)

(1) Serves as the principal advisor, advocate, consultant, and technical assistant on all services relating to Sanitation Facilities Construction, Environmental Health Services, Operation and Maintenance, Injury Prevention, and Facilities Management for the California Area IHS; (2) plans, coordinates, implements, and evaluates all aspects of Title I contracting and Title III compacting under the Indian Self-Determination and Education Assistance Act, as amended; (3) consults with tribal groups/organizations in the development and implementation of environmental health and engineering policies and initiatives; (4) provides consultation and technical guidance to tribal health programs including preventive maintenance surveys, personnel training, and fiscal reviews; (5) performs or directs surveys and investigations to determine the condition of tribal health facilities; (6) serves as the principal advisor regarding the real property management program which oversees owned and leased real property and GSA assigned space; interacts with GSA Region IX and Engineering Services to ensure adequacy of facilities, and (7) coordinates property management activities including space assignments, space need determinations, regulatory compliance, and reporting.

Division of Environmental Health Services (GFGAD1)

(1) Plans, coordinates, and evaluates the Area's Environmental Health Services program; (2) serves as the principle advisor on all matters pertaining to environmental health program activities, policies, and procedures; (3) plans, coordinates, implements, and evaluates a comprehensive Injury Prevention Program throughout the Area; (4) assists health programs to meet the goal of accreditation by the appropriate accrediting agency; (5) plans, coordinates, and evaluates the Area fluoridation program; and (6) Plans, coordinates, and evaluates the Area Operation and Maintenance Program.

Division of Sanitation Facilities Construction (GFGAD2)

(1) Plans, coordinates, and evaluates the Area's Sanitation Facilities Construction responsibilities; (2) serves as the principal advisor on matters relating to public health engineering and Sanitation Facilities Construction activities, policies, and procedures; (3) coordinates the provision of sanitation facilities for new housing projects sponsored by other Government agencies; and (4) coordinates the provision of sanitation facilities for new and existing housing.

OEHE District Offices: Redding District Office (GFGA1); Sacramento District Office (GFGA2); Escondido District Office (GFGA3)

(1) Implements the Sanitation Facilities Construction and Environmental Health Services responsibilities; (2) serves as the principal advisor to communities, individuals, contractors, and other organizations on all matters pertaining to Sanitation Facilities Construction and Environmental Health Services; (3) implements activities that assist all health programs to be attain accreditation by appropriate accrediting agencies; (4) implements the Area fluoridation and Operation and Maintenance activities, and (5) implements the provision of sanitation facilities for new housing projects sponsored by other government agencies and for existing housing.

Section GFG–20, The Order of Succession to the Area Director

Deputy Director
Associate Director, Office of Public Health
Associate Director, Office of Management Support
Associate Director, Office of Environmental Health and Engineering

Section GFG–30, California Area IHS—Delegations of Authority

All delegations and redelegations of authority made to officials in the California Area IHS that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further redelegation.

This reorganization shall be effective on the date of signature.

Dated: December 23, 1997.

Michael H. Trujillo,

Assistant Surgeon General Director.

[FR Doc. 98–534 Filed 1–8–98; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Center for Scientific Review Special Emphasis Panel (SEP) meetings:

Purpose/Agenda: To review individual grant applications.

Name of SEP: Clinical Sciences.
Date: January 12, 1998.
Time: 3:00 p.m.
Place: NIH, Rockledge 2, Room 4106, Telephone Conference.
Contact Person: Ms. Josephine Pelham, Scientific Review Administrator, 6701 Rockledge Drive, Room 4106, Bethesda, Maryland 20892, (301) 435–1786.

Name of SEP: Clinical Sciences.
Date: January 12, 1998.
Time: 3:00 p.m.
Place: NIH, Rockledge 2, Room 4100, Telephone Conference.
Contact Person: Dr. Paul Strudler, Scientific Review Administrator, 6701 Rockledge Drive, Room 4100, Bethesda, Maryland 20892, (301) 435–1716.

Name of SEP: Clinical Sciences.
Date: January 15, 1998.
Time: 12:00 p.m.
Place: NIH, Rockledge 2, Room 4106, Telephone Conference.
Contact Person: Ms. Josephine Pelham, Scientific Review Administrator, 6701 Rockledge Drive, Room 4106, Bethesda, Maryland 20892, (301) 435–1786.

This notice is being published less than 15 days prior to the above meetings due to the urgent need to meet timing limitations imposed by the grant review and funding cycle.

Name of SEP: Multidisciplinary Sciences.
Date: February 17, 1998.
Time: 8:00 a.m.
Place: Ramada Inn, Rockville, MD.
Contact Person: Dr. Daharam Dhindsa, Scientific Review Administrator, 6701 Rockledge Drive, Room 5206, Bethesda, Maryland 20892, (301) 435–1174.

Name of SEP: Multidisciplinary Sciences.
Date: February 20, 1998.
Time: 10:00 a.m.
Place: La Jolla Cove Suites, La Jolla, CA.
Contact Person: Dr. Lee Rosen, Scientific Review Administrator, 6701 Rockledge Drive, Room 5116, Bethesda, Maryland 20892, (301) 435–1171.

Name of SEP: Chemistry and Related Sciences.
Date: February 25, 1998.
Time: 12:00 p.m.
Place: NIH, Rockledge 2, Room 5152, Telephone Conference.
Contact Person: Dr. Jean Sipe, Scientific Review Administrator, 6701 Rockledge Drive, Room 5152, Bethesda, Maryland 20892, (301) 432–1743.

Name of SEP: Multidisciplinary Sciences.
Date: March 26, 1998.
Time: 8:00 a.m.
Place: Doubletree Hotel, Rockville, MD.
Contact Person: Dr. Nadarajen Vydelingum, Scientific Review Administrator, 6701 Rockledge Drive, Room 5210, Bethesda, Maryland 20892, (301) 432–1176.

Purpose/Agenda: To review Small Business Innovation Research.
Name of SEP: Multidisciplinary Sciences.
Date: February 9, 1998.
Time: 8:00 a.m.
Place: Holiday Inn-Georgetown, Washington DC.
Contact Person: Dr. Eileen Bradley, Scientific Review Administrator, 6701 Rockledge Drive, Room 5120, Bethesda, Maryland 20892, (301) 432–1179.

Name of SEP: Multidisciplinary Sciences.
Date: February 23–24, 1998.
Time: 8:00 a.m.
Place: Doubletree Hotel, Rockville, MD.
Contact Person: Dr. Dharam Dhindsa, Scientific Review Administrator, 6701 Rockledge Drive, Room 5206, Bethesda, Maryland 20892, (301) 432–1174.

Name of SEP: Chemistry and Related Sciences.
Date: March 9–10, 1998.
Time: 8:00 a.m.
Place: Hyatt Regency, Bethesda, MD.
Contact Person: Dr. Marjam Behar, Scientific Review Administrator, 6701 Rockledge Drive, Room 5218, Bethesda, Maryland 20892, (301) 435–1180.

Name of SEP: Chemistry and Related Sciences.
Date: March 11–12, 1998.
Time: 8:00 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Ronald Manning, Scientific Review Administrator, 6701 Rockledge Drive, Room 4158, Bethesda, Maryland 20892, (301) 432–1166.

The meetings will be closed in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 5, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–591 Filed 1–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the following National Heart, Lung, and Blood Institute Special Emphasis Panel.

The meeting will be open to the public to provide concept review of proposed contract or grant solicitations.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the Contact Person listed below in advance of the meeting.

Name of Panel: Vascular Medullary Compression and High Blood Pressure
Dates of Meeting: March 6, 1998.
Time of Meeting: 8:30 a.m.
Place of Meeting: Two Rockledge Center, Room 9100 and 9104, 6710 Rockledge Drive, Bethesda, Maryland 20892.

Agenda: To advise the National Heart, Lung, and Blood Institute on whether special efforts should be made to stimulate research on the association of vascular medullary compression and hypertension.

Contact Person: Paul A. Velletri, Ph.D., NHLBI/DHVD, Two Rockledge Center, 6701 Rockledge Drive, Rm. 10203, MSC 7956, Bethesda, Maryland 20892, (301) 435–0560.

(Catalog of Federal Domestic Assistance Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.939, Blood Diseases and Resources Research, National Institutes of Health)

Dated: January 5, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–595 Filed 1–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 United States Code Appendix 2), notice is hereby given of the following National Institute of General Medical Sciences Special Emphasis Panel (SEP) meeting:

Name of SEP: Chemistry Biology Interface (Teleconference).
Date: January 8, 1998.
Time: 1:00 p.m.–adjournment.
Place: NIH, NIGMS, Natcher Building, Room 1AS–13J, Bethesda, Maryland.
Contact Person: Dr. Irene Glowinski, Scientific Review Administrator, NIGMS, Natcher Building–Room 1AS–13J, Bethesda, Maryland 20892, Telephone: 301–594–2772.
Purpose/Agenda: To evaluate and review a grant application.

The meeting will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. The discussions of this application could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the application, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program Nos. [93.821, Biophysics and Physiological Sciences; 93.859, Pharmacological Sciences; 93.862, Genetics Research; 93.863, Cellular and Molecular Basis of Disease Research; 93.880, Minority Access Research Careers (MARC); and 93.375, Minority Biomedical Research Support (MBRS)], National Institutes of Health)

Dated: January 5, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–592 Filed 1–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism on February 12, 1998.

The meeting will be open to the public, as noted below, to discuss Institute programs and other issues relating to committee activities as indicated in the notice. Attendance by the public will be limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Ida Nestorio at 301–443–4376.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C. and sec. 10(d) of Public Law 93–463 for the review, discussion and evaluation of individual research grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications and programs, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

A summary of the meeting and the roster of committee members may be obtained from: Ms. Ida Nestorio, Office of Scientific Affairs, National Institute on Alcohol Abuse and Alcoholism, Willco Building, Suite 409, 6000 Executive Blvd., Rockville, MD 20892–7003, Telephone: 301–443–4376. Other information pertaining to the meeting may be obtained from the contact person indicated.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Executive Secretary: James F. Vaughan, 6000 Executive Blvd., Suite 409, Bethesda, MD 20892–7003, 301–443–4375.

Date of Meeting: February 12, 1998.

Place of Meeting: Conference Room E1 & E2, Building 45 (Natcher), NIH Campus, 9000 Rockville Pike, Bethesda, MD 20892.

Closed: Febraury 12, 1998—8:00 am to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Open: Febraury 12, 1998—10:00 am to 4:00 p.m.

Agenda: Discussion of Institute extramural research programs, and other program and peer review issues relevant to Council activities.

(Catalog of Federal Domestic Assistance Program No. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.891, Alcohol Research Center Grants; National Institutes of Health)

Dated: January 5, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–593 Filed 1–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting January 28, 1998, in Conference Room 1A1, in the Solar Building, located at 6003 Executive Blvd., Rockville, Maryland, of the AIDS Research Advisory Committee, which was published in the **Federal Register** on December 16 (62 FR 65815).

The Committee was to have convened at the Solar Building. The location has been changed to the Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland.

The entire meeting will be open to the public from 8:30 a.m. until adjournment on January 28, 1998.

Dated: January 5, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–594 Filed 1–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5235–N–37]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Department of Housing and Urban Development, Room 7256, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1226; TDD number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–20503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: January 2, 1998.

Fred Karnas, Jr.,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 98–377 Filed 1–8–98; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Information Collection to be Submitted to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed information collection; request for comments.

SUMMARY: The collection of information described below will be submitted to OMB for approval under the provisions of the Paperwork Reduction Act of 1995. Copies of specific information collection requirements, related forms and explanatory material may be obtained by contacting the Information Collection Clearance Officer of the U.S. Fish and Wildlife Service at the address and/or phone numbers listed below. An emergency request for clearance is currently being submitted to OMB for this information collection requirement.

DATES: Consideration will be given to all comments received on or before March 10, 1998.

ADDRESSES: Comments and suggestions on specific requirements should be sent to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 222 ARLSQ, 1849 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species, 703/358–2171.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service (Service) proposes to submit the following information collection requirements to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995, Pub. L. 104–13. Comments are invited on (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. The information collections in this program will not be part of a system of records covered by the Privacy Act (5 U.S.C. 552(a)).

Experimental populations established under section 10(j) of the Endangered Species Act of 1973 (ESA), as amended, require information collection and reporting to the Service. Section 9 of the ESA describes prohibited acts involving threatened or endangered species (16 U.S.C. section 1538 (a)(1)(B)). There are three major categories of information collected under the already issued experimental population rules. To date these categories have encompassed information relating to: (1) The general taking or removal of individuals of an experimental population, and (2) the authorized taking of individuals related to reports of depredation on livestock or pets caused by individuals that are part of an experimental population and (3) the collection of specimens or the recovery of dead animals that are part of an experimental population. These three categories have adequately described the types of information needed to evaluate the efficacy of the program and are expected to continue to accurately describe activities under the program.

Because individuals of designated experimental populations for species listed as threatened or endangered under the ESA are categorically protected, documentation of human-related mortalities, recovery of dead specimens and other types of take related to the status of experimental populations is important to the Service in order to monitor the success of reintroduction efforts, and recovery efforts in general. In order to minimize potential conflict with humans which could undermine recovery efforts, livestock depredations connected with experimental populations of listed species require prompt attention for purposes of determining the location, timing, and nature of the predatory behavior involved, accurate determination of the species responsible for a livestock kill, and the timely application of necessary control measures. The Service, in cooperation with the USDA/APHIS Division of Wildlife Services or other cooperating State or Federal agencies, relies on prompt public reporting of depredation in order to resolve livestock related problems, and therefore a time sensitive requirement for reporting problems (generally within 24 hours) to the appropriate Service office is necessary. Information collection is achieved primarily by means of telephone calls by members of the public to Service offices specified in the individual rules (some may choose to use facsimile or electronic mail). Information required is limited to the identity of the caller, species involved, time and place of an incident, the type of incident, and circumstances related to the incident described. The vast majority of the information supplied to the Service as a result of experimental population regulations, is provided by cooperating State and Federal agencies under cooperative agreement. However, some of the information collected by the Service under the experimental population rules is provided by the public.

The collected information can be separated into three categories; general take or removal, depredation related take, and specimen collection. General take or removal information refers to human related mortality including unintentional taking incidental to otherwise lawful activities (e.g. highway mortalities), take in defense of human life, take related to defense of property (if authorized) or take in the form of authorized harassment. Most contacts related to this type of information collection are in regard to sightings of experimental animals, or the inadvertent discovery of an injured or dead individual. Depredation related take refers to the reporting of take for management purposes, where livestock depredation has been documented or may include authorized harassment or lethal take of experimental animals in the act of attacking livestock. The information collection required by the rules for this type of take include the necessary follow-up reports after the Service has authorized harassment or lethal take of experimental animals in relation to confirmed instances of livestock depredation or in defense of human life. Specimen collection is for the purpose of documenting incidental or authorized scientific collection. Most of the information collection requirement for this take pertains primarily to the reporting of sightings of experimental population animals or the inadvertent discovery of an injured or dead individual. Information collection is required for necessary follow-up reports when the Service has authorized take of experimental animals for specimen collection.

The standard information collection includes the name, address, and phone number of the reporting party, location and time of the reported incident, species of experimental population involved. Reporting parties include, but are not limited to, individuals or households, farms, businesses, and other non-profit organizations. The reporting of specimen collections, recovery, or even the reporting of dead individuals from experimental populations is important to the Service's efforts in monitoring these individuals and for other scientific purposes.

Because the number of reports generated annually by the general public (rather than cooperating agencies or separately permitted individuals) under these rules is extremely small (far less than one report per year, per rule) and to assure thorough documentation of results, the Service is estimating the number of expected reports to assume a maximum number per year based on allowance for increased population size and public awareness of experimental populations.

The following experimental populations described under Title 50 of the Code of Federal Regulations contain information collection requirements:

50 CFR section	Species (scientific name)	Type of reporting
17.84(c)	Red Wolf (*Canis rufus*)	Take in defense of human life, incidental take. Take related to livestock depredation.
17.84(g)	Black footed ferret (*Mustela nigripes*)	Incidental take, specimen collection/reporting.
17.84(h)	Whooping crane (*Grus americana*)	Specimen collection/reporting.
17.84(i)	Gray wolf (*Canis lupus*)	Take in defense of human life, incidental take. Take related to livestock depredation.
17.84(j)	California condors (*Gymnogyps californianus*)	Specimen collection/reporting, incidental take.
Proposed Rules:		
17.84(k) (61 FR19237)	Mexican wolf (*Canis lupus baileyi*)	Take in defense of human life, incidental take. Take related to livestock depredation.
17.84(l) (62 FR 35762)	Grizzly bear (*Ursus horribilis*)	Take in defense of human life, incidental take. Take related to livestock depredation.

Title: Endangered and threatened Wildlife, 50 CFR 17.84, Experimental populations.

Description of respondents: private individuals and households, businesses, not-for-profit organizations, and farms.

Bureau form number: N/A.

Frequency of collection: On occasion.

BURDEN ESTIMATES FOR REPORTING REQUIREMENTS FOR EXPERIMENTAL POPULATIONS—ENDANGERED SPECIES

Type of report	No. of respondents	Average time required per report (minutes)	Total annual burden (hours)
General take or removal [a]	12	15	3
Depredation related take [b]	12	15	3
Specimen collection [c]	12	15	3

[a] General take or removal includes human related mortality including unintentional taking incidental to otherwise lawful activities (e.g. highway mortalities), take in defense of human life, take related to defense of property (if authorized) or take in the form of authorized harassment.

[b] Depredation related take is take for management purposes where livestock depredation has been documented and may include authorized harassment or authorized lethal take of experimental animals in the act of attacking livestock.

[c] Specimen collection, recovery, or reporting of dead individuals from experimental populations for documentation purposes or authorized scientific collection purposes.

Dated: January 5, 1998.

Gerry A. Jackson,

Assistant Director—Ecological Services.

[FR Doc. 98–501 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of a Comprehensive Conservation Plan for Occoquan Bay National Wildlife Refuge, Woodbridge, VA

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (Service) will make available a Comprehensive Conservation Plan (CCP) for Occoquan Bay National Wildlife Refuge, Woodbridge, Virginia. The Service is furnishing this notice in compliance with Service CCP policy:

(1) To advise other agencies and the public of our intentions, and

(2) To notify the public that a Finding of No Significant Impact and Environmental Assessment have been completed.

DATES: Distribution of the final CCP, Finding of No Significant Impact, and Environmental Assessment began the week of December 29, 1997. Documents will be available January 5, 1998.

ADDRESSES: Address questions and requests for plans to the following: Refuge Manager, Mason Neck National Wildlife Refuge, 14344 Jefferson Davis Highway, Woodbridge, Virginia, (703) 690–1297.

SUPPLEMENTARY INFORMATION: By federal law, all lands within the National Wildlife Refuge System are to be managed in accordance with an approved CCP. The CCP guides management decisions and identifies refuge goals, long-range objectives, and strategies for achieving refuge purposes. The planning process considered many elements, including habitat and wildlife management, public use, and cultural resources. The CCP will provide other agencies and the public with a clear understanding of the desired conditions for the Refuges and how the Service will implement management strategies. Public input was solicited through open houses, public meetings, workshops, and comments on the draft CCP. The draft CCP/Environmental Assessment (EA) was made available for public comment in late August 1997. A revised plan/EA reflecting comments and changes has been prepared along with a Finding of No Significant Impact.

This project was conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), NEPA Regulations (40 CFR parts 1500–1508), other appropriate Federal laws and regulations, including the National Wildlife Refuge System Improvement Act of 1997, Executive Order 12996, and Service policies and

procedures for compliance with those regulations.

Dated: January 5, 1998.

Ronald E. Lambertson,

Regional Director, U.S. Fish and Wildlife Service, Hadley, Massachusetts.

[FR Doc. 98–653 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Letters of Authorization To Take Marine Mammals

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of Letters of Authorization to take marine mammals incidental to oil and gas industry activities.

SUMMARY: In accordance with section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, and the U.S. Fish and Wildlife Service implementing regulations [50 CFR 18.27(f)(3)], notice is hereby given that Letters of Authorization to take polar bears incidental to oil and gas industry exploration, development, and production activities have been issued to the following companies:

Company	Activitiy	Location	Date issued
Western Geophysical (ARCO)	Exploration	NPRA	Nov. 7, 1997.
Western Geophysical (ARCO)	Exploration	Warthog	Nov. 7, 1997.
Western Geophysical	Exploration	Colville	Nov. 7, 1997.
BP Exploration (Alaska) Inc	Exploration	NWEileen	Nov. 7, 1997.
BP Exploration (Alaska) Inc	Exploration	Point Thomson	Nov. 7, 1997.
Western Geophysical (Anadarko)	Exploration	NPRA	Nov. 14, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. John W. Bridges at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: Letters of Authorization were issued in accordance with U.S. Fish and Wildlife Service Federal Rules and Regulations ''Marine Mammals; Incidental Take During Specified Activities'' (58 FR 60402; November 16, 1993); modified and extended (60 FR 42805; August 17, 1995).

Dated: December 19, 1997.

David B. Allen,

Regional Director.

[FR Doc. 98–585 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Liquor Control Ordinance of the Prairie Band of Potawatomi Reservation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This Notice is published in accordance with authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM8, and in accordance with the Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161. I certify that Resolution numbered PBP–97–52, Liquor Control Ordinance of the Prairie Band of Potawatomi Reservation, was duly adopted by the Prairie Band of Potawatomi Tribal Council on October 31, 1997. The Ordinance provides for the regulation of the activities of the manufacture, distribution, sale, and consumption of liquor on reservation lands subject to the jurisdiction of the Prairie Band of Potawatomi

DATES: This Ordinance is effective January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Bettie Rushing, Office of Tribal Services, 1849 C Street, NW, MS 4641–MIB, Washington, D.C. 20240–4001; telephone (202) 208–4400.

SUPPLEMENTAL INFORMATION: The Prairie Band of Potawatomi Tribal Council resolution numbered PBP–97–52 read as follows:

Liquor Control Ordinance of the Prairie Band of Potawatomi Reservation

Introduction

Title. This ordinance shall be known as the ''Prairie Band Potawatomi Liquor Ordinance.''

Authority. This ordinance is enacted pursuant to the Act of August 15, 1953, 67 Stat. 586, codified at 18 U.S.C. 1161, by the authority of the Prairie Band of Potawatomi Indian Tribal Council under The Constitution and Bylaws of the Prairie Band of Potawatomi Indians, Article V, Sections 1(g) and (I).

Purpose. The purpose of this ordinance is to regulate and control the possession and sale of liquor within the Prairie Band of Potawatomi Reservation. The enactment of a tribal ordinance governing liquor possession and sale on the Prairie Band of Potawatomi Reservation will increase the ability of the tribal government to control the sale, distribution and possession of liquor and will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal government services.

Effective date. This ordinance shall be effective on certification by the Secretary of the Interior and its publication in the **Federal Register**.

Article I. Declaration of Public Policy and Purpose.

(1) The introduction, possession, and sale of liquor on the Prairie Band of Potawatomi Reservation is a matter of special concern to the Prairie Band of Potawatomi.

(2) Federal Law currently prohibits the introduction of liquor into Indian Country (18 U.S.C. 1154 and other statutes), except as provided therein and expressly delegates to the tribes the decision regarding when and to what extent liquor transactions shall be permitted (18 U.S.C. 1161).

(3) The Prairie Band of Potawatomi Tribal Council finds that a complete ban on liquor within the Prairie Band of Potawatomi Reservation is ineffective and unrealistic. However, it recognizes that a need still exists for strict regulation and control over liquor transactions within the Prairie Band of Potawatomi Reservation, because of the many potential problems associated with the unregulated or inadequately regulated sale, possession, distribution, and consumption of liquor. The Prairie Band of Potawatomi Tribal Council finds that exclusive tribal control and regulation of liquor is necessary to achieve maximum economic benefit to the Tribe, to protect the health and welfare of tribal members, and to address specific concerns relating to alcohol use on the Prairie Band of Potawatomi Reservation.

(4) It is in the best interests of the Tribe to enact a tribal ordinance governing liquor sales on the Prairie Band of Potawatomi Reservation and which provides for exclusive purchase, distribution, and sale of liquor only on tribal lands within the exterior boundaries of the Prairie Band of Potawatomi Reservation. Further, the Tribe has determined that said purchase, distribution, and sale shall take place only at a tribally-owned gaming facility complex.

Article II. Definitions.

(1) As used in the title, the following words shall have the following meaning unless the context clearly requires otherwise:

(a) *Alcohol* means that substance known as ethyl alcohol, hydrated oxide of ethyl, alcohol, hydrated oxide of ethyl, ethanol, or spirits of wine, from whatever source or by whatever process produced.

(b) *Alcoholic Beverage* is synonymous with the term *liquor* as defined in Article II(f) of this Chapter.

(c) *Bar* means any establishment with special space and accommodations for the sale of liquor by the glass and for consumption on the premises as herein defined.

(d) *Beer* means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in pure water and containing the percent of alcohol by volume subject to regulation as an intoxicating beverage in the state where the beverage is located.

(e) *Tribal Council* means the governing body of the Prairie Band of Potawatomi Indians.

(f) *Liquor* includes all fermented, spirituous, vinous, or malt liquor or combinations thereof, and mixed liquor, a part of which is fermented, and every liquid or solid or semisolid or other substance, patented or not, containing distilled or rectified spirits, potable alcohol, beer, wine, brandy, whiskey, rum, gin aromatic bitters, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption and any liquid, semisolid, solid, or other substances, which contains more than one half of one percent of alcohol.

(g) *Liquor Store* means any store at which liquor is sold and, for the purpose of this ordinance, including stores only a portion of which are devoted to sale of liquor or beer.

(h) *Malt Liquor* means beer, strong beer, ale, stout and porter.

(i) *Package* means any container or receptacle used for holding liquor.

(j) *Public Place* includes state or county or tribal or federal highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; soft drink establishments, public buildings, public meeting halls, lobbies, halls and dining room of hotels, restaurants, theaters, gaming facilities, entertainment centers, stores, garages, and filling stations which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access; public conveyances of all kinds and character; and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public.

(k) *Sale* and *Sell* include exchange, barter and traffic, and also include the selling or supplying or distributing, by and means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatsoever commonly used to describe malt or brewed liquor or of wine by any person to any person.

(l) *Spirits* means any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen percent of alcohol by weight.

(m) *Wine* means any alcoholic beverage obtained by fermentation of the natural contents of fruits, vegetables, honey, milk or other products containing sugar, whether or not other ingredients are added, to which any saccharine substances may have been added before, during or after fermentation, and containing not more than seventeen percent of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel and angelica, not exceeding seventeen percent of alcohol by weight.

(n) *Prairie Band of Potawatomi Indians General Council* means the general council of the Prairie Band of Potawatomi Indians which is composed of the voting membership of the Tribe.

(o) *Prairie Band of Potawatomi Reservation* means all lands which are within the exterior boundaries of the eleven mile square of territory, which is recognized by the federal government as the Prairie Band of Potawatomi Indian Reservation.

(p) *Tribal Court* means the Prairie Band of Potawatomi Tribal Court.

Article III. Powers of Enforcement

(1) Prairie Band of Potawatomi Tribal Council. In furtherance of this ordinance, the Tribal Council shall have the following powers and duties:

(a) To publish and enforce rules and regulations adopted by the Tribal Council governing the sale, manufacture, distribution, and possession of alcoholic beverages on the Prairie Band of Potawatomi Indian Reservation;

(b) To employ managers, accountants, security personnel, inspectors and such other persons as shall be reasonably necessary to allow the Tribal Council to perform its function. Such employees shall be tribal employees;

(c) To issue licenses permitting the sale or manufacture or distribution of liquor on the Prairie Band of Potawatomi Reservation.

(d) To hold hearings on violations of this ordinance or for the issuance or revocation of licenses hereunder;

(e) To bring suit in the Tribal Court or other appropriate court to enforce this ordinance as necessary;

(f) To determine and seek damages for violation of the ordinance;

(g) To makes such reports as may be required by the Prairie Band of Potawatomi Tribal Council; and

(h) To collect taxes and fees levied or set by the Prairie Band of Potawatomi Tribal Council and to keep accurate records, books and accounts.

(2) *Limitation on Powers.* In the exercise of its powers and duties under this ordinance, the Tribal Council and its individual members shall not:

(a) Accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor or from any licensee;

(b) Waive the immunity of the Prairie Band of Potawatomi from suit without the express written consent and resolution of the Tribal Council.

(3) *Inspection Rights.* The premises on which liquor is sold or distributed shall be open for inspection by the Tribal Council at all reasonable times for the purposes of ascertaining whether the rules and regulations of the Tribal Council and this ordinance are being complied with.

Article IV. Sales of Liquor

(1) *License Required.* Sales of liquor and alcoholic beverages on Prairie Band of Potawatomi Reservation may only be made at businesses which hold a Prairie Band of Potawatomi Liquor License.

(2) *Sales for Cash.* All liquor sales on the Prairie Band of Reservation shall be on a cash only basis and no credit shall be extended to any person, organization, or entity, except that the provision does not prevent the payment for purchases with use of credit cards such as Visa, MasterCard, American Express, etc.

(3) *Sale for Personal Consumption.* All sales shall be for the personal use and consumption of the purchaser. Resale of any alcoholic beverage on the Prairie Band of Potawatomi Reservation is prohibited. Any person who is not

licensed pursuant to this ordinance who purchases an alcoholic beverage on the Prairie Band of Potawatomi Reservation and sells it, whether in the original container or not, shall be guilty of a violation of this ordinance and shall be subjected to paying damages to the Prairie Band of Potawatomi Indians as set forth herein.

(4) *Other Licenses.* In addition to or in lieu of the license otherwise provided by this ordinance, a retailer of alcoholic beverages may also be licensed under this ordinance to make sales of alcoholic beverages in the same manner (a) as allowed by Kansas law in the state of Kansas for similar Class A or B clubs or (b) as allowed by Kansas law outside of the Prairie Band of Potawatomi Reservation and in Jackson County, Kansas. Under no circumstances will any retailer be required to comply with any state or county laws, rules or regulations which are inapplicable for any reason or which are preempted by or in violation of federal law.

Article V. Licensing

(1) *Procedure.* In order to control the proliferation of establishments on the Prairie Band of Potawatomi Reservation which sell or serve liquor by the bottle or by the drink, all persons or entities which desire to sell liquor on the Prairie Band of Potawatomi Reservation must apply to the Prairie Band of Potawatomi Indians for a license to sell or serve liquor.

(2) *Application.* Any person or entity applying for a license to sell or serve liquor on the Prairie Band of Potawatomi Reservation must fill in the application provided for this purpose by the Prairie Band of Potawatomi Indians and pay such application fee as may be set from time to time by the Tribal Council for this purpose. Said application must be filled out completely in order to be considered.

(3) *Issuance of License.* The Tribal Council may issue a license if it believes that such issuance is in the best interests of the Prairie Band of Potawatomi Indians. The purpose of this ordinance is to permit liquor sales and consumption at the casino or casino-hotel facilities located on the Prairie Band of Potawatomi Reservation. Issuance of a license for any other purposes will not be considered to be in the best interests of the Prairie Band of Potawatomi Indians.

(4) *Period of License.* Each license may be issued for a period not to exceed two (2) years from the date of issuance.

(5) *Renewal of License.* A licensee may renew its license if the licensee has complied in full with this ordinance provided however, that the Tribal Council may refuse to renew a license if it finds that doing so would not be in the best interests of the health and safety of the Prairie Band of Potawatomi Indians.

(6) *Revocation of License.* The Tribal Council may suspend or revoke a license due to one or more violations of this ordinance upon notice and hearing at which the licensee is given an opportunity to respond to any charges against it and to demonstrate why the license should not be suspended or revoked.

(7) *Hearings.* Within 15 days after a licensee is mailed written notice of a proposed suspension or revocation of the license, of the imposition of fines or of other adverse action proposed by the Tribal Council under this ordinance, the licensee may deliver to the Tribal Council a written request for hearing on whether the proposed action should taken. A hearing on the issues shall be held before a person or persons appointed by the Tribal Council and a written decision will be issued. Such decisions will be considered final unless an appeal is filed with the Tribal Court within 15 days of the date of mailing the decision to the licensee. The Tribal Court will then conduct a hearing and will issue an order, which is final with no further right of appeal. All proceedings conducted under this and any other sections of this ordinance shall be in accord with due process of law.

(8) *Non-transferability of Licenses.* Licenses issued by the Tribal Council shall not be transferable and may only be utilized by the person or entity in whose name it was issued.

Article VI. Taxes

(1) *Sales Tax.* The Tribal Council shall have the authority, as may subsequently be specified under tribal law, to levy and to collect a tax on each retail sale of alcoholic beverage on the Prairie Band of Potawatomi Reservation based upon a percent of the retail sales price. All taxes from the sale of alcoholic beverages on the Prairie Band of Potawatomi Reservation shall be paid over to the General Treasury of the Prairie Band of Potawatomi Indians.

(2) *Taxes Due.* All taxes for the sale of liquor and alcoholic beverages on the Prairie Band of Potawatomi Reservation are due on the 15th day of the month following the end of the calendar quarter for which the taxes are due.

(3) *Delinquent Taxes.* Past due taxes shall accrue interest at 2% per month.

(4) *Reports.* Along with payment of the taxes imposed herein, the taxpayer shall submit a quarterly accounting of all income from the sale or distribution of liquor, as well as for the taxes collected.

(5) *Audit.* As a condition of obtaining a license, the licensee must agree to the review or audit of its book and records relating to the sale of liquor and alcoholic beverages on the Prairie Band of Potawatomi Reservation. Said review or audit may be done periodically by the Tribe or through its agents or employees whenever, in the opinion of the Tribal Council, such a review or audit is necessary to verify the accuracy of reports.

Article VII. Rules, Regulations and Enforcement

(1) In any proceeding under this ordinance, conviction of one unlawful sale or distribution of liquor shall establish prima facie intent of unlawfully keeping liquor for sale, selling liquor or distributing liquor in violation of this ordinance.

(2) Any person who shall in any manner sell or offer for sale or distribute or transport liquor in violation of this ordinance shall be subject to civil damages assessed by the Tribal Council.

(3) Any person within the boundaries of the Prairie Band of Potawatomi Reservation who buys liquor from any person other than a properly licensed facility shall be guilty of a violation of this ordinance.

(4) Any person who keeps or possesses liquor upon his person or in any place or on premises conducted or maintained by his principal or agent with the intent to sell or distribute it contrary to the provisions of this title, shall be guilty of a violation of this ordinance.

(5) Any person who knowingly sells liquor to a person under the influence of liquor shall be guilty of a violation of this ordinance.

(6) Any person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant, or employee of such person, who shall knowingly permit any person to drink liquor in any public conveyance shall be guilty of an offense. Any person who shall drink liquor in a public conveyance shall be guilty of a violation of this ordinance.

(7) No person under the age of 21 years shall consume, acquire or have in his possession any liquor or alcoholic beverage. No person shall permit any other person under the age of 21 to consume liquor on his premises or any premises under his control except in those situations set out in this section. Any person violating this section shall be guilty of a separate violation of this ordinance for each and every drink so consumed.

(8) Any person who shall sell or provide any liquor to any person under the age of 21 years shall be guilty of a violation of this ordinance for each sale or drink provided.

(9) Any person who transfers in any manner an identification of age to a person under the age of 21 years for the purpose of permitting such person to obtain liquor shall be guilty of an offense; provided, that corroborative testimony of a witness other than the underage person shall be a requirement of finding a violation of this ordinance.

(10) Any person who attempts to purchase an alcoholic beverage through the use of false or altered identification which falsely purports to show the individual to be over the age of 21 years shall be guilty of violating this ordinance.

(11) Any person guilty of a violation of this ordinance shall be liable to pay the Prairie Band of Potawatomi Indians the amount of $500 per violation as civil damages to defray the Tribe's cost of enforcement of this ordinance.

(12) When requested by the provider of liquor, any person shall be required to present official documentation of the bearer's age, signature and photograph. Official documentation includes one of the following:

(a) Driver's license or identification card issued by any state department of motor vehicles;

(b) United States Active Duty Military;

(c) Passport.

(13) Liquor which is possessed, including for sale, contrary to the terms of this ordinance are declared to be contraband. Any tribal agent, employee or officer who is authorized by the Tribal Council to enforce this section shall seize all contraband and preserve it in accordance with the provisions established for the preservation of impounded property.

(14) Upon being found in violation of the ordinance, the party shall forfeit all right, title and interest in the items seized which shall become the property of the Prairie Band of Potawatomi Indians.

Article VIII. Abatement

(1) Any room, house, building, vehicle, structure, or other place where liquor is sold, manufactured, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this ordinance or of any other tribal law relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor, and all property kept in and used in maintaining such place, is hereby declared to be a nuisance.

(2) The Chairman of the Tribal Council or, if the Chairman fails or refuses to do so, by a majority vote, the Tribal Council shall institute and maintain an action in the Tribal Court in the name of the Tribe to abate and perpetually enjoin any nuisance declared under this article. In addition to other remedies at tribal law, the Tribal Court may also order the room, house, building, vehicle, structure, or place closed for a period of one (1) year or until the owner, lessee, tenant, or occupant thereof shall give bond of sufficient sum from $1,000 to $15,000, depending upon the severity of past offenses, the risk of offenses in the future and any other appropriate criteria, payable to the Tribe and conditioned that liquor will not be thereafter manufactured, kept, sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this ordinance or of any other applicable tribal law and that he will pay all fines, costs and damages assessed against him for any violation of this ordinance or other tribal liquor laws. If any conditions of the bond be violated, the bond may be applied to satisfy any amounts due to the Tribe under this ordinance.

(3) In all cases where any person has been found in violation of this ordinance relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor, an action may be brought to abate as a nuisance any real estate or other property involved in the violation of the ordinance and violation of this ordinance shall be prima facie evidence that the room, house, building, vehicle, structure, or place against which such action is brought is a public nuisance.

Article IX. Revenue

(1) Revenue provided for under this ordinance, from whatever source, shall be expended for administrative costs incurred in the enforcement of this ordinance. Excess funds shall be subject to appropriation by the Tribal Council for essential governmental and social services.

Article X. Severability and Effective Date

(1) If any provision or application of this ordinance is determined by review to be invalid, such determination shall not be held to render ineffectual the remaining portions of this ordinance or to render such provisions inapplicable to other persons or circumstances.

(2) This ordinance shall be effective on such date as the Secretary of the Interior certifies this ordinance and publishes the same in the **Federal Register**.

(3) Any and all prior liquor control enactments of the Tribal Council which are inconsistent with the provisions of this ordinance are hereby rescinded.

Article XI. Amendment and Construction

(1) This ordinance may only be amended by a vote of the Tribal Council, the governing body of the Prairie Band of Potawatomi Indians.

(2) Nothing in this ordinance shall be construed to diminish or impair in any way the rights or sovereign powers of the Prairie Band of Potawatomi Indians or their tribal government.

Dated: January 7, 1998.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 98–694 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–045–1430–00; UTU–069117]

Public Land Order No. 7309; Partial Revocation of Public Land Order No. 4036; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes Public Land Order No. 4036 insofar as it affects 1,389.22 acres of public land withdrawn for the Bureau of Reclamation's Dixie Project. The land is no longer needed for reclamation purposes, and the revocation is needed to permit disposal of specific tracts of public land through exchange under Section 206 of the Federal Land Policy and Management Act and sale under the Recreation and Public Purposes Act. This action will open the land to surface entry and mining unless closed by overlapping withdrawals or temporary segregations of record. The land has been and will remain open to mineral leasing.

EFFECTIVE DATE: January 26, 1998.

FOR FURTHER INFORMATION CONTACT: LaVerne Steah, BLM Utah State Office, P.O. Box 45155, Salt Lake City, Utah 84145–0155, (801) 539–4114.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1994), it is ordered as follows:

1. Public Land Order No. 4036 dated June 6, 1966, which withdrew public land for the Bureau of Reclamation's

Dixie Project, is hereby revoked insofar as it affects the following described land:

Salt Lake Meridian

T. 42 S., R. 14 W.,
Sec. 3, lots 5 to 7, inclusive, lots 9 to 14, inclusive, and lots 17 to 20, inclusive;
Sec. 4, lots 6 to 8, inclusive;
Sec. 9, W½NE¼, E½W½, SE¼SW¼SW¼, and SE¼;
Sec. 10, lots 1 to 4, inclusive, lots 7 to 9, inclusive, SE¼NW¼, and W½SW¼;
Sec. 11, lot 2;
Sec. 15, lot 2;
Sec. 17, SE¼NE¼, and SE¼NE¼NE¼.

The area described contains 1,389.22 acres in Washington County.

2. At 9 a.m. on January 26, 1998, the land will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on January 26, 1998, shall be considered as simultaneously filed at that time. Those received thereafter shall be in the order of filing.

3. At 9 a.m. on January 26, 1998, the land will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1994), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: December 24, 1997.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 98–535 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–940–5700–00; CACA 39112]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management proposes to withdraw 57,459.18 acres of National Forest System lands in Fresno and Tulare Counties to protect 24 groves of Giant Sequoia trees. The proposed withdrawal is mandated by Presidential Proclamation Number 6457 of July 14, 1992. This notice closes the lands for up to 2 years from mining, and the operation of the mineral leasing laws and the Materials Act of 1947.

DATES: Comments and requests for a public meeting must be received by April 9, 1998.

ADDRESSES: State Director, BLM (CA–931), 2135 Butano Drive, Sacramento, California 95825–0451.

FOR FURTHER INFORMATION CONTACT: Either Duane Marti, BLM California State Office, 916–978–4675, or Erik T. Ostly, Sequoia National Forest, Forest Service, 209–784–1500, extension 1136.

SUPPLEMENTARY INFORMATION: On October 30, 1997, the Sequoia National Forest, Forest Service, filed an application to withdraw the following described National Forest System lands from location and entry under the United States mining laws (30 U.S.C. Ch. 2), and from the operation of the mineral leasing laws and the Materials Act of 1947, subject to valid existing rights:

Mount Diablo Meridian, California

(a). Converse Basin Giant Sequoia Grove

T. 13 S., R. 27 E.,
Sec. 1, lots 9 to 12, inclusive, and S½;
Sec. 2, lots 9 to 12, inclusive, and S½;
Sec. 11, all;
Sec. 12, all;
Sec. 13, all;
Sec. 14, E½;
Sec. 24, N½.
T. 12 S., R. 28 E.,
Sec. 31, SE¼;
Sec. 32, SW¼.
T. 13 S., R. 28 E.,
Sec. 4, lots 1 to 20, inclusive, W½SW¼, and E½SE¼;
Sec. 5, lots 1 to 20, inclusive, and S½;
Sec. 6, lots 13 to 22, inclusive, E½SW¼, and SE¼;
Sec. 7, lots 1, 3, and 4, NE¼, NE¼NW¼, S½NW¼, E½SW¼, and SE¼;
Sec. 8, W½;
Sec. 17, W½;
Sec. 18, lots 1 to 4, inclusive, E½, and E½W½;
Sec. 19, lot 1.

The area described contains 8,776.21 acres in Fresno County.

(b). Agnew Giant Sequoia Grove

T. 13 S., R. 29 E.,
Sec. 13, all;
Sec. 23, SE¼NE¼;
Sec. 24, N½.

The area described contains 1,000 acres in Fresno County.

(c). Evans Complex Giant Sequoia Grove

T. 13 S., R. 29 E.,
Sec. 7, Lots 3 and 4, E½, and E½SW¼;
Sec. 8, all;
Sec. 9, S½;
Sec. 10, SW¼;
Sec. 15, W½;
Sec. 16, all;
Sec. 17, all;
Sec. 18, lots 1 and 2, E½, and E½NW¼;
Sec. 20, N½;
Sec. 21, N½, NE¼SW¼, W½SW¼, and SE¼;
Sec. 22, all;
Sec. 23, SW¼;
Sec. 26, W½ and SE¼;
Sec. 27, all;
Sec. 28, all;
Sec. 34, N½ and N½S½;
Sec. 35, N½.

The area described contains 7,959.29 acres in Fresno County.

(d). Cherry Gap Giant Sequoia Grove

T. 13 S., R. 28 E.,
Sec. 19, S½NE¼, SE¼NW¼, E½SW¼, and SE¼;
Sec. 20, S½NW¼ and SW¼;
Sec. 29, N½NW¼;
Sec. 30, N½NE¼ and NE¼NW¼.

The area described contains 800 acres in Fresno County.

(e). Landslide Giant Sequoia Grove

T. 13 S., R. 29 E.,
Sec. 29, SW¼;
Sec. 30, lots 3 and 4, E½SW¼, and SE¼;
Sec. 31, lots 1 and 2, NE¼ and E½NW¼;
Sec. 32, NW¼NW¼.

The area described contains 838.92 acres in Fresno County.

(f). Indian Basin Giant Sequoia Grove

T. 13 S., R. 28 E.,
Sec. 4, E½SW¼ and W½SE¼;
Sec. 8, E½;
Sec. 9, all;
Sec. 16, NW¼;
Sec. 17, NE¼.

The area described contains 1,440 acres in Fresno County.

(g). Abbott Creek Giant Sequoia Grove

T. 13 S., R. 28 E.,
Sec. 30, lots 3 and 4, and E½SW¼.

The area described contains 159.95 acres in Fresno County.

(h). Grant Giant Sequoia Grove

T. 13 S., R. 27 E.,

Sec. 25, S½;
Sec. 36, all.

The area described contains 960 acres in Fresno County.

(i). Bearskin Giant Sequoia Grove

T. 13 S., R. 28 E.,
Sec. 34, S½NE¼ and SE¼;
Sec. 35, S½NW¼ and SW¼.

The area described contains 480 acres in Fresno County.

(j). Big Stump Giant Sequoia Grove

T. 14 S., R. 28 E.,
Sec. 7, lots 1 to 4, 7 to 8, 13 to 16, all inclusive, and E½W½;
Sec. 18, lots 1 and 2, NE¼, and E½NW¼.

The area described contains 765.75 acres in Tulare County.

(k). Redwood Mountain Giant Sequoia Grove

T. 14 S., R. 28 E.,
Sec. 10, N½ and portion of N½SE¼;
Sec. 16, NE¼ and W½;
Sec. 17, SE¼;
Sec. 20, E½;
Sec. 21, N½NE¼, SW¼NE¼, E½NW¼, SW¼NW¼, SW¼, W½SE¼;
Sec. 27, portion of NE¼SW¼, NW¼SW¼, S½SW¼, and portion of SW¼SE¼;
Sec. 28, NE¼, E½NW¼, N½SE¼, and SE¼SE¼.

The areas described aggregate 2,310 acres in Tulare County.

(l). Dillonwood Giant Sequoia Grove

T. 19 S., R. 30 E.,
Sec. 2, E½ and SE¼SW¼;
Sec. 4, lots 3 and 6, W½, NE¼SE¼, and W½SE¼;
Sec. 9, W½NE¼, SE¼NE¼, W½, and SE¼;
Sec. 10, SE¼NE¼, SW¼NW¼, and S½;
Sec. 11, E½NW¼ and SW¼NW¼.

The area described contains 2,108 acres in Tulare County.

(m). Mountain Home Giant Sequoia Grove

T. 19 S., R. 30 E.,
Sec. 13, E½,
Sec. 23, N½SW¼ and SE¼;
Sec. 24, NE¼, SW¼, and N½SE¼;
Sec. 25, NW¼NW¼;
Sec. 26, N½NE¼ and E½W½;
Sec. 27, N½NE¼, SE¼NE¼, and NE¼NW¼;
Sec. 35, SE¼NE¼, W½ and SE¼;
Sec. 36, W½SW¼.
T. 20 E., R. 30 E.,
Sec. 1, S½SE¼;
Sec. 2, lots 1 to 3, inclusive, S½NE¼, S½NW¼, N½SW¼, SW¼SW¼, N½SE¼SW¼, and SW¼SE¼SW¼;
Sec. 3, SE¼.
T. 19 S., R. 31 E.,
Sec. 7, lots 3 and 4, and E½SW¼;
Sec. 18, lots 1 and 2, E½NW¼, NE¼SW¼, and SE¼;
Sec. 19, lots 1 and 2, E½NE¼, and E½NW¼;
Sec. 20, N½, N½SW¼, SE¼SW¼, and SE¼;
Sec. 28, SE¼, NE¼SW¼, and S½SW¼;
Sec. 29, NW¼SW¼ and S½S½;
Sec. 30, E½SE¼;
Sec. 31, E½ and E½NW¼;
Sec. 32, N½ and SW¼;
Sec. 33, N½.
T. 20 S., R. 31 E.,
Sec. 5, lots 3 and 4, S½NW¼, and SW¼;
Sec. 6, lots 1, 2, 3, 6, 7, S½NE¼, SE¼NW¼, E½SW¼, and SE¼.

The areas described aggregate 6,617.34 acres in Tulare County.

(n). Alder Creek Giant Sequoia Grove

T. 20 S., R. 31 E.,
Sec. 8, E½;
Sec. 9, NW¼ and S½;
Sec. 17, E½.

The area described contains 1,120 acres in Tulare County.

(o). Belknap Complex Giant Sequoia Grove

T. 20 S., R. 31 E.,
Sec. 34, E½, N½NW¼, SE¼NW¼, NE¼SW¼, and S½SW¼;
Sec. 35, W½ and SE¼;
Sec. 36, all except for portion of W½.
T. 21 S., R. 31 E.,
Sec. 1, lots 5 to 7, inclusive, portions of Tracts 37, 39, 41, and 42, Tracts 38 and 40;
Sec. 2, lots 1 to 14, inclusive, portions of Tracts 39 and 42, Tract 43, and SW¼SW¼;
Sec. 3, lots 1 to 7, inclusive, S½NE¼, SE¼NW¼, E½SW¼, and SE¼;
Sec. 10, lots 1 and 2, NE¼, and E½NW¼;
Sec. 11, lots 1 and 2, portion of Tract 42, S½NE¼, and NW¼;
Sec. 12, lots 1 to 4, inclusive, portions of Tracts 41 and 42, S½N½, and SE¼.
T. 21 S., R. 32 E.,
Sec. 6, lots 7 to 15, inclusive, portions of Tracts 37 and 40, and Tract 39;
Sec. 7, lots 5 to 14, inclusive, Tracts 41 to 43, inclusive, and SE¼NE¼;
Sec. 8, SW¼;
Sec. 17, NW¼;
Sec. 18, lots 5 to 10, inclusive, Tracts 42 and 43, and SE¼NE¼.

The area described contains 6,412.38 acres in Tulare County.

(p). Freeman Creek Giant Sequoia Grove

T. 20 S., R. 32 E.,
Sec. 20, SE¼;
Sec. 21, S½;
Sec. 22, SW¼SW¼;
Sec. 27, W½W½;
Sec. 28, all;
Sec. 29, NE¼, NE¼NW¼, S½NW¼, and S½;
Sec. 32, all;
Sec. 33, NE¼, E½NW¼, W½W½E½NW¼NW¼, E½E½E½NW¼NW¼, W½NW¼NW¼, SW¼NW¼, and S½;
Sec. 34, NW¼NE¼, S½NE¼, W½, and SE¼;
Sec. 35, SW¼SW¼.
T. 21 S., R. 32 E.,
Sec. 2, lots 1 to 4, inclusive, SW¼, and N½SE¼;
Sec. 3, lots 1 to 4, inclusive, and S½;
Sec. 4, lots 1 to 4, inclusive, N½SW¼, and SE¼;
Sec. 5, lots 8 and 9;
Sec. 9, NE¼NE¼;
Sec. 10, N½;
Sec. 11, NW¼.

The area described contains 5,728.83 acres in Tulare County.

(q). Black Mountain Giant Sequoia Grove

T. 21 S., R. 30 E.,
Sec. 1, lots 12 to 14, inclusive, E½SW¼, and W½SE¼;
Sec. 11, SE¼SE¼;
Sec. 12, lots 1 to 11, inclusive, W½NE¼, NW¼, and NW¼SW¼;
Sec. 13, lot 1;
Sec. 14, lot 1.
T 20 S., R. 31 E.,
Sec. 31, S½SW¼ and W½SE¼.
T. 21 S., R. 31 E.,
Sec. 5, lot 4, SW¼NW¼, and S½;
Sec. 6, lots 5 to 10, inclusive, Tract 44, S½NE¼, SE¼NW¼, NE¼SW¼, and N½SE¼;
Sec. 7, Tracts 45 to 47, inclusive, W½SE¼, and S½SE¼SE¼;
Sec. 8, NE¼, N½NW¼, W½SW¼, SE¼SW¼, and SE¼;
Sec. 9, S½NW¼ and W½SW¼;
Sec. 16, N½N½NW¼;
Sec. 17, N½N½N½;
Sec. 18, lots 5, 7, and 9, N½NE¼NE¼

The area described contains 3,699.17 acres in Tulare County.

(r). Red Hill Giant Sequoia Grove

T. 21 S., R. 31 E.,
Sec. 21, lot 7;
Sec. 22, lots 3 to 5, inclusive, S½NE¼, and SE¼NW¼;
Sec. 23, lots 3 and 4, SW¼NE¼, and S½NW¼;
Sec. 26, NW¼, N½SW¼, and SW¼SW¼;
Sec. 27, lots 1 to 4, inclusive, W½E½, and E½W½;
Sec. 28, lots 5 to 8, inclusive.

The area described contains 1,148.01 acres in Tulare County.

(s). Peyrone Giant Sequoia Grove

T. 21 S., R. 31 E.,
Sec. 33, lot 8;
Sec. 34, lots 4 to 7, inclusive, SE¼NE¼, and N½SE¼;
Sec. 35, lot 4, SW¼NW¼, and NW¼SW¼.
T. 22 S., R. 31 E.,
Sec. 2, lots 3 and 4, S½NW¼, and NW¼SW¼;
Sec. 3, lots 1 to 4, inclusive, S½N½, SW¼, SW¼SE¼, and N½SE¼;
Sec. 4, lots 7 to 10, inclusive;
Sec. 9, lots 5, 7, and 8;
Sec. 10, N½NW¼ and S½;
Sec. 15, N½N½;
Sec. 16, lot 5.

The areas described aggregate 1,827.95 acres in Tulare County.

(t). Long Meadow Giant Sequoia Grove

T. 22 S., R. 31 E.,
Sec. 26, SW¼NE¼, SE¼NW¼, and S½;
Sec. 27, SE¼;
Sec. 34, E½NE¼;
Sec. 35, N½ and N½S½.

The area described contains 1,120 acres in Tulare County.

(u). Cunningham Giant Sequoia Grove

T. 22 S., R. 32 E.,

Sec. 30, S½SW¼;
Sec. 31, N½NW¼.

The area described contains 160 acres in Tulare County.

(v). Starvation Giant Sequoia Grove

T. 23 S., R. 31 E.,
Sec. 9, lot 4;
Sec. 10, S½SW¼;
Sec. 15, lots 3 to 6, inclusive;
Sec. 16, lots 1 to 3, W½E½.

The area described contains 559.80 acres in Tulare County.

(w). Packsaddle Giant Sequoia Grove

T. 23 S., R. 31 E.,
Sec. 13, W½;
Sec. 14, E½, SE¼NW¼, and SW¼;
Sec. 23, lots 1 and 8;
Sec. 24, lots 2 to 7, inclusive.

The area described contains 1,160.29 acres in Tulare County.

(x). Deer Creek Giant Sequoia Grove

T. 23 S., R. 31 E.,
Sec. 34, lot 7;
Sec. 35, lot 1.
T. 24 S., R. 31 E.,
Sec. 2, lot 4, SW¼NW¼, and NW¼SW¼;
Sec. 3, lot 1, SE¼NE¼, and NE¼SE¼.

The area described contains 307.29 acres in Tulare County.

The purpose of the proposed withdrawal is to protect 24 naturally occurring old-growth Giant Sequoia groves, pursuant to Presidential Proclamation Number 6457 of July 14, 1992.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the California State Director of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the California State Director within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary uses which may be permitted during this segregative period are those which are determined to be compatible with the use of the lands by the Forest Service.

Dated: December 29, 1997.

David McIlnay,

Chief, Branch of Lands.

[FR Doc. 98–582 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

Concession Contract, VA

AGENCY: National Park Service, Interior.

ACTION: Public Notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to award a concession contract authorizing retail sales for the public in Yorktown, Virginia within Colonial National Historical park for a period of five (5) years from date of contract execution.

EFFECTIVE DATE: March 10, 1998.

ADDRESSES: Interested parties should contact National Park Service, Colonial National Historical Park, P.O. Box 210, Yorktown, VA 23690, or phone (757) 898–3400, to obtain a copy of the prospectus describing the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The existing concessioner has performed its obligation to the satisfaction of the Secretary under an existing contract which expired by limitation of time on December 31, 1990, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the contract and in the negotiation of a new contract, providing that the existing concessioner submits a responsive offer (a timely offer which meets the terms and conditions of the Prospectus). This means that the contract will be awarded to the party submitting the best offer, provided that if the best offer was not submitted by the existing concessioner, then the existing concessioner will be afforded the opportunity to match the best offer. If the existing concessioner agrees to match the best offer, then the contract will be awarded to the existing concessioner.

If the existing concessioner does not submit a responsive offer, the right of preference in renewal shall be considered to have been waived, and the contract will then be awarded to the party that has submitted the best responsive offer.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be received by the Superintendent, Colonial National Historical Park, not later than the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Dated: December 19, 1998.

Alec Gould,

Superintendent, Colonial National Historical Park.

[FR Doc. 98–527 Filed 1–8–97; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Subsistence Resource Commission Meeting

SUMMARY: The Superintendent of Gates of the Arctic National Park and Preserve and the Chairperson of the Subsistence Resource Commission for Gates of the Arctic National Park and Preserve announce a forthcoming meeting of the Gates of the Arctic National Park and Preserve Subsistence Resource Commission.

The following agenda items will be discussed:

(1) Call to order.
(2) Roll call.
(3) Approval of summary of minutes from April 29—May 1, 1997 meeting.
(4) Review agenda.
(5) Superintendent's introduction of guests and review of Commission function and purpose.
(6) Superintendent's management/research reports.
a. Administration and management.
b. Park operations.
c. Resource management.
d. Subsistence program.
(7) Public and agency comments.
(8) Old business.
a. Correspondence.
b. Federal Subsistence Program update: 1997–1998 regulatory changes.
c. National Park Service Subsistence Program document.
d. Review of Subsistence Management Plan (draft).
(9) New business.
a. Election of officers.
b. Other park Subsistence Resource Commission actions.

c. Review of traditional use areas draft analysis.

d. Work session: Subsistence Hunting Program.

(10) Set time and place of next Subsistence Resource Commission meeting.

(11) Adjournment.

DATES: The meeting will begin at 8:00 a.m. on Wednesday, January 14, 1998 and break at approximately 5:00 p.m., reconvene at 7:00 and conclude at approximately 9:00 p.m. On Thursday, January 15, 1998, the meeting will reconvene at 8:30 a.m. and conclude at 3:30 p.m.

LOCATION: The meeting will be held at the Sophie Station Hotel in Fairbanks, Alaska.

FOR FURTHER INFORMATION CONTACT: Dave Mills, Superintendent, Gates of the Arctic National Park and Preserve, 201 First Avenue, Doyon Building, Fairbanks, Alaska 99707. Phone (907) 456–0281.

SUPPLEMENTARY INFORMATION: The Subsistence Resource Commissions are authorized under Title VIII, Section 808, of the Alaska National Interest Lands Conservation Act, Public Law 96–487, and operate in accordance with the provisions of the Federal Advisory Committees Act.

Robert D. Barbee,

Regional Director, Alaska Region.

[FR Doc. 98–526 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before January 3, 1998 Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127. Written comments should be submitted by January 26, 1998.

Carol D. Shull,

Keeper of the National Register.

COLORADO

Adams County

Thede Farmhouse, 3190 W. 112th Ave., Northglenn, 98000024

FLORIDA

Hendry County

Duff, Capt. F. Deane, House, 151 W. Del Monte Ave., Clewiston, 98000025

Pinellas County

Green—Richman Arcade, 689 Central Ave., St. Petersburg, 98000027

St. Johns County

Walker, Horace, House, 33 Old Mission Ave., St. Augustine, 98000026

GEORGIA

Bartow County

Benham Place, 222 Grassdale Rd., Cartersville vicinity, 98000030

Chatham County

Cuyler—Brownville Historic District, Roughly bounded by Anderson Ln., W. 31st St., Montgomery St., Victory Dr., Ogeechee Rd., and Hopkins St., Savannah, 98000028

MISSOURI

Butler County

Greer, Alfred W., House (Poplar Bluff MPS) 955 Kinzer St., Poplar Bluff, 98000029
Mark Twain School (Poplar Bluff MPS) 1012 N. Main St., Poplar Bluff, 98000031
Moore, J. Herbert, House (Poplar Bluff MPS) 445 N. Eleventh St., Poplar Bluff, 98000032
Moore, Thomas, House (Poplar Bluff MPS) 435 Lester St., Poplar Bluff, 98000033
Phillips, John Archibald, House (Poplar Bluff MPS) 522 Cherry St., Poplar Bluff, 98000034
South Sixth Street Historic District (Poplar Bluff MPS) 205–225–303 S. Sixth St., Poplar Bluff, 98000035
Wheatley Public School (Poplar Bluff MPS) 921 Garfield St., Poplar Bluff, 98000037
Williamson—Kennedy School (Poplar Bluff MPS) 614 Lindsay St., Poplar Bluff, 98000036

Osage County

Osage County Poorhouse, MO 621, 0.5 mi. S of Linn, Linn vicinity, 98000038

NEW MEXICO

McKinley County

Redwood Lodge (Route 66 through New Mexico MPS) 907 E. 66 Ave., Gallup, 98000051

NEW YORK

Orange County

Thompson, Robert A., House, NY 302, S of jct. of NY 302 and Dickerson Ave., Crawford, 98000039

OHIO

Hamilton County

Levy, Harry Milton, House, 2383 Observatory Ave., Cincinnati, 98000040

Lake County

Methodist Episcopal Church of Painesville, The, 71 N. Park Place, Painesville, 98000043

Preble County

Camden Public School, 110 W. Central Ave., Camden, 98000041

Wood County

Fort Meigs Aboriginal—33WO08—33WO445, 1.3 mi. SW of Perrysburg, Perrysburg vicinity, 98000042

PENNSYLVANIA

Delaware County

Albertson, Henry, Subdivision Historic District, Roughly bounded by N. Lansdowne, Clover, Wycombe, Price, and Stewart Aves., and Balfour Cir., Lansdowne, 98000044

SOUTH CAROLINA

Charleston County

Sparrow, James, House, 65 Cannon St., Charleston, 98000045

VIRGINIA

Albemarle County

Red Hills, 2051 Polo Grounds Rd., Charlottesville vicinity, 98000047

Mecklenburg County

Chase City High School, 132 Endly St., Chase City vicinity, 98000050

Orange County

Grelen, 15149 Grelen Dr., Orange vicinity, 98000049

Richmond Independent City

Whitworth, John, House, 2221 Grove Ave., Richmond, 98000048

Suffolk Independent City

Dumpling Island Archeological Site, Address Restricted, Suffolk vicinity, 98000046

[FR Doc. 98–584 Filed 1–8–98; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. International Business Machines Corporation and Storage Technology Corporation; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in a civil antitrust case, *United States* v. *International Business Machines Corporation and Storage Technology Corporation*, Case Number 1:97 CV 03040.

On December 18, 1997, the United States filed a Complaint alleging that an ''OEM Agreement'' between International Business Machines

Corporation)''IBM'') and Storage Technology Corporation (''STK'') unlawfully restrains competition in the market for disk storage subsystems (''DASD'') for mainframe computers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment prohibits IBM and STK from carrying out anticompetitive terms of the OEM Agreement and imposes requirements to restore competition in the market. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and remedies available to private litigants.

The public is invited to comment to the Justice Department and to the Court. Comments should be addressed to John F. Greaney, Chief, Computers & Finance Section, U.S. Department of Justice, Antitrust Division, 600 E. Street, N.W., Suite 9500, Washington, D.C. 20530 (telephone: (202) 307–6200). Comments must be received within sixty days.

Copies of the Complaint, Stipulation, proposed Final Judgment, and Competitive Impact Statement are available for inspection in Room 207 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, N.W., Washington, D.C. 20530 (telephone: (202) 514–2481), and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C. 20001. Copies of these materials may be obtained from the U.S. Department of Justice upon request and payment of a copying fee.

Rebecca P. Dick,

Director, Civil Non-Merger Enforcement.

Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the District of Columbia.

2. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on the defendants and by filing that notice with the Court.

3. The defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment, and shall, from the date of the filing of this Stipulation, comply with all the terms and provisions thereof as though the same were in full force and effect as an order of the Court.

4. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

Dated: December 18, 1997.

For Plaintiff, United States of America

John F. Greaney,

Chief, Computers and Finance Section, Antitrust Division, U.S. Department of Justice, Bicentennial Building, 600 E Street, NW., Suite 9300, Washington, DC 20530, (202) 307–6122.

For Defendant, International Business Machines Corporation

Evan R. Chesler,

Paul C. Saunders (Bar No. 973388),

Cravath, Swaine & Moore, Counsel for Defendant International, Business Machines Corporation, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, (212) 474–1000.

For Defendant, Storage Technology Corporation

J. Edd Stepp, Jr.,

Phillip H. Rudolph (Bar No. 392189),

Gibson, Dunn & Crutcher LLP, Counsel for Defendant Storage, Technology Corporation, 1050 Connecticut Avenue, NW., Washington, DC 20036–5306, (202) 955–8500.

Disclosure Pursuant to Rule 108(K)

Pursuant to Rule 108(k) of the Local Rules of this Court, the following is a list of all individuals entitled to be notified of the entry of the foregoing Stipulation and of the entry of the proposed Final Judgment:

John F. Greaney,

U.S. Department of Justice, Bicentennial Building, 600 E Street, N.W., Suite 9300, Washington, D.C. 20530, (202) 307–6122.

Evan R. Chesler,

Cravath, Swaine & Moore, Counsel for Defendant International Business Machines Corporation, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, (212) 474–1000.

J. Edd Stepp, Jr.,

Gibson, Dunn & Crutcher LLP, Counsel for Defendant Storage Technology Corporation, 333 South Grand Ave., Los Angeles, CA 90071, (213) 229–7000.

Final Judgment

WHEREAS, the United States of America, having filed its Complaint herein on December 18, 1997, and the United States and Defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of fact or law;

And whereas, Defendants having agreed to be bound by the provisions of this Final Judgment pending approval by the Court;

And whereas, the essence of this Final Judgment being prompt and certain action to ensure that the OEM agreement referred to herein will not substantially lessen competition in the development, production, or marketing of DASD as hereinafter defined;

And whereas, Defendants having represented to Plaintiff that the provisions of this Final Judgment can and will be accomplished;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby *Ordered, adjudged, and decreed* as follows:

I. Jurisdiction

This Court has jurisdiction over each of the parties hereto and the subject matter of this action. Venue is proper in this Court. The Complaint states a claim upon which relief may be granted against the Defendants under Section 1 of the Sherman Act (15 U.S.C. 1).

II. Definitions

A. *IBM* means International Business Machines Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agency and other person acting for or on behalf of any of them.

B. *STK* means Storage Technology Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

C. *Defendants* means, collectively or individually as the context request, IBM and/or STK.

D. *DASD* means direct access magnetic disk storage subsystems configured for attachment to IBM System 390 mainframe computers, any future versions, models, or generations of IBM System 390 mainframe computers (regardless of name or other product designation), and plug-compatible mainframe computers, without regard to whether or not such subsystems also attach to any other computer processor product. The term ''DASD'' does not include parts of

subassemblies sold or shipped to repair or upgrade existing DASD installations, and it does not include any used DASD.

E. *STK DASD* means any DASD product developed, manufactured, or supplied by STK at any time prior to the expiration of this Final Judgment, including but not limited to Iceberg, Kodiak, the products marketed by IBM as RAMAC Virtual Array and RAMAC Scaleable Array, and any future versions, models, or generations of any of the aforementioned products (regardless of name or other product designation). The term ''STK DASD'' does not include Virtual Storage Manager, any future versions, models, or generations thereof (regardless of name or other product designation), or any existing or future STK Nearline storage products, or any used DASD.

F. *Agreement* means any agreement or understanding, whether written or oral, formal or informal.

G. *OEM agreement* means the agreement dated June 7, 1996, pursuant to which IBM has purchased STK DASD, including all attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

H. *Modified OEM agreement* means the agreement dated December 18, 1997, pursuant to which IBM has agreed to purchase STK DASD from STK, and STK has agreed to sell STK DASD to IBM, including all attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

I. *STK Minimum* Means a number of terabytes of STK DASD determined for a twelve-month period by multiplying the number of months before January 1, 2000, included in such period by 10.5; multiplying the number of months after December 31, 1999, included in the period by 16; and adding the two products together. For example, the STK Minimum for the period from October 1, 1998, through September 30, 1999, would be 126 terabytes (10.5×12), and the STK Minimum for the period from October 1, 1999, through September 30, 2000, would be 175.5 terabytes ((10.5×3)+(16×9)).

J. *Purchase* means, in connection with IBM purchases of STK DASD, a transaction in which IBM requires title to the STK DASD purchased, other than a financing transaction that meets each of the following conditions: (1) IBM Credit Corporation acquires title to STK DASD, ordered by a customer from STK or an STK remarketer other than IBM, in order to finance the STK DASD; (2) such STK DASD carries an STK logo and conforms in appearance to other STK DASD sold by STK, or an STK remarketer other than IBM, to non-IBM purchasers; (3) the price for the STK DASD is negotiated between the customer and STK or an STK remarketer other than IBM, without participation by IBM; (4) such STK DASD is not installed on the customer's premises by IBM or any person acting on its behalf; (5) warranty service, if any, for such STK DASD is not provided by IBM or any person acting on its behalf; and (6) the transaction if financed by other than IBM would be considered a sale by STK under Section VI.A. of this Final Judgment. The term ''purchase'' does not include a transaction in which IBM may act as sales agent, distributor, or other channel of distribution in which IBM does not acquire title to the STK DASD.

K. *Change of control* means the acquisition by an entity of more than 20 percent of the outstanding common shares of STK representing the right to vote for STK's board of directors, the sale of all or substantially all of the assets of the assets of STK, or any consolidation, merger, or other reorganization of STK in which STK is not the continuing or surviving corporation or pursuant to which shares of such common stock would be converted into cash, securities, or other property.

L. *Derivative work* means a work that is based on an underlying work that would be a copyright infringement if prepared without the authorization of the copyright owner of the underlying work, Derivative works are subject to the ownership rights and licenses of others in the underlying work.

III. Applicability

A. The provisions of this Final Judgment apply to the Defendants, their successors and assigns, their subsidiaries, affiliates, directors, officers, managers, agents, employees, attorneys and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise. Defendants and each person bound by this Final Judgment shall cooperate in ensuring that the provisions of this Final Judgment are carried out.

B. Each Defendant shall require, as a condition of the sale or other disposition of all or substantially all of the assets used in its business for developing, manufacturing and selling DASD that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

C. Nothing contained in this Final Judgment is or has been created for the benefit of any third party, and nothing herein shall be construed to provide any rights to any third party.

IV. Terms of IBM Purchases From STK

A. Defendants may enter into or carry out any agreement pursuant to which IBM may in any manner distribute STK DASD, including any such agreement pursuant to which IBM may act as sales agent, distributor, or any other channel of distribution for STK DASD in which IBM does not acquire title to the STK DASD to be distributed, provided that in each such instance such agreement is not inconsistent with the provisions of this Final Judgment. The volume of STK DASD distributed under any such agreement, except in an agency agreement in which IBM acts only as agent for the end-user customer, shall be included in IBM's and not STK's volumes of terabytes computed pursuant to Section VI of this Final Judgment. Where IBM acts as agent to procure the STK DASD for the end-user customer and also finances the transaction, the STK DASD so distributed shall also be included in IBM's and not STK's volumes of terabytes computed pursuant to Section VI of this Final Judgment.

B. Defendants shall not make any changes to any of the terms of the modified OEM agreement, or enter into any other agreement, that would be inconsistent with any of the unexpired provisions of this Final Judgment. Defendants shall provide to the Antitrust Division of the United States Department of Justice written notice (or a copy) no later than 15 business days after receipt by the Defendants' Contract Administrators of any written amendment, executed by authorized representatives of Defendants, of the following documents included within the modified OEM agreement: the ''OEM Agreement Between IBM and STK'' dated December 18, 1997; the ''IBM Developer Base Agreement;'' the ''Statement of Work'' referenced in the IBM Developer Base Agreement; and the ''Description of Licensed Works'' (but not including any exhibits, attachments, or schedules to such documents, or other documents referenced in such documents).

C. Except to the extent set forth in this Final Judgment, Defendants shall not enter into or carry out any agreement that: (1) sets any IBM volume commitments, or provides for recovery payments or liquidated damages from IBM as a consequence of IBM's failure to purchase a certain volume of STK DASD; or (2) contains any provision

under which any IBM obligation to STK is contingent upon any level of sales or shipments of STK DASD by STK to persons other than IBM.

D. Except to the extent set forth in this Final Judgment, Defendants shall not enter into or carry out any agreement pursuant to which IBM is bound to purchase any volume of STK DASD, or that contains any provision requiring IBM to make payments for IBM's failure to purchase a certain volume of STK DASD; provided, however, that IBM may provide STK with non-binding monthly, quarterly, and/or 12-month estimates, expressed in terabytes or other units of storage capacity, of anticipated purchases of STK DASD, and IBM, subject to Section VI of this Final Judgment, may become contractually obligated to purchase STK DASD as follows: (1) On or after the 30th day before the beginning of a calendar quarter, IBM may bind itself to purchase up to 80 percent of its estimate of purchases for that quarter; (2) IBM may thereafter issue binding purchase orders for deliveries within such quarter without regard to the estimate; (3) to the extent that IBM's purchases of STK DASD for a given quarter are less than IBM's estimate for that quarter, IBM may bind itself to purchase during the subsequent quarter some or all of the difference between IBM's estimated and actual purchases from the prior quarter, in addition to up to 80 percent of its estimate for the subsequent quarter; and (4) in the event of termination or winding down of the modified OEM agreement, in the last quarter in which IBM provides an estimate of purchases, IBM may issue purchase orders for volumes to satisfy its future needs and such volumes may be delivered in that quarter or subsequent quarters. IBM shall issue purchase orders for STK DASD only to the extent that they reflect IBM's actual intention to purchase and take delivery of the STK DASD ordered. IBM shall purchase and pay for all STK DASD for which it becomes contractually obligated pursuant to the foregoing provisions; provided, however, that nothing in this Final Judgment shall preclude IBM and STK, in the event of a bona fide dispute concerning IBM's obligation to purchase or accept delivery of STK DASD under a purchase order, or concerning whether or to what extent IBM is obligated to purchase STK DASD under a specific binding estimate, from pursuing their remedies at law or resolving the dispute in a commercially reasonable manner.

E. Defendants: (1) May establish prices and volume discounts for the purchase of STK DASD by IBM, provided, however, that such discounts are based upon actual volumes of STK DASD and upgrades purchased, rather than projected volumes, and may reflect credits obtained as a result of STK's failure to meet on-time delivery, quality, or product deliverable requirements; but (2) shall not enter into or carry out any agreement in which any prices or other terms applicable to IBM's purchases of STK DASD are contingent upon any prices or other terms offered by STK to any prospective end-user customer for STK DASD.

F. If demand for STK DASD exceeds supply, Defendants shall not enter into or carry out any agreement that favors allocation to IBM over other purchasers if STK cannot meet delivery commitments. In all such situations, STK will allocate production for shipment to IBM and to other customers based upon the delivery dates requested in purchase orders received by STK for STK DASD from IBM or other customers. For a given date, STK will allocate production for shipment to IBM and to other customers on a pro rata terabyte basis.

V. Licenses; Product Development

A. IBM shall grant STK licenses effective immediately to all hardware and software developments and enhancements that have been funded by IBM under the OEM agreement or modified OEM agreement or that IBM is obligated to fund under the modified OEM agreement to Iceberg, Kodiak, future versions or models thereof, IXFP, and Snapshot (hereinafter, ''Funded Enhancements''), which shall be at least equivalent in scope to the licenses set forth in Attachment A of this Final Judgment.

B. STK may pay hardware and software royalties to IBM. For STK's sales, shipments, licenses, or other distribution of STK DASD, hardware upgrades or components therefor, and IXFP and Snapshot software to persons other than IBM that are shipped or otherwise distributed prior to April 1, 1999, royalties for Funded Enhancements and derivative works thereof used with the following (but not including royalties for customer service that include the right to install basic enhancements and maintenance modifications, and software and microcode, other than IXFP and Snapshot, distributed separately from hardware or major enhancements or hardware that are not based on capacity) may not exceed the amounts set forth below:

1. STK shall make a nonrefundable payment to IBM of $4 million during 1998, payable in equal quarterly installments beginning January 1, 1998. This payment will initially be applied to any royalties that become due under the modified OEM agreement for shipments before April 1, 1999. Unused portions of this payment that do not exceed $2 million may be credited toward royalties due for shipments after March 31, 1999.

2. For sales, leases, licenses, or any other distribution by STK of STK DASD, STK DASD hardware upgrades, or components to customers other than IBM, STK may pay IBM up to: (a) $0.08 per megabyte through December 31, 1998; and (b) $0.067 per megabyte from January 1, 1999, through March 31, 1999;

3. For each copy of IXFP software licensed or otherwise distributed by STK to customers other than IBM for use on STK DASD, STK may pay IBM up to: (a) $5,400 through December 31, 1997; (b) $5,500 from January 1, 1998 through December 31, 1998; and (c) $3,000 from January 1, 1999, through March 31, 1999;

4. For each copy of Snapshot software licensed or otherwise distributed by STK to customer other than IBM for use on STK DASD, STK may pay IBM up to: (a) $18,000 through December 31, 1998; and (b) $10,000 from January 1, 1999, through March 31, 1999. Except as provided above, STK may pay hardware and software royalties to IBM under the provisions of the modified OEM agreement, including but not limited to, to provision that beginning April 1, 1999, the royalties for each STK DASD subsystem or controller sold, leased, licensed, or otherwise conveyed by STK to customers other than IBM will not exceed the lesser of $3,500 or five percent of the revenue received. Except as otherwise provided in the modified OEM agreement with respect to a change of control or termination for cause, all royalties will become fully paid-up no later than (a) when the sum of all payments made by STK on account of such royalties, including any portion of the initial $4 million payment that can be credited to royalties after March 31, 1999, but excluding royalties paid under Section V.B.2., V.B.3., and V.B.4. above, equals $18 million, or (b) on December 31, 2002, whichever first occurs.

C. For the duration of the modified OEM agreement, IBM shall offer to sell to STK IBM disk drives and IBM disk drive replacements for use in STK DASD that IBM has assisted in enhancing or developing under the OEM agreement, regardless of whether such STK DASD are shipped to other customers, provided that IBM makes such disk drives generally available. Such offers shall be made under terms

no less favorable to STK than IBM's standard non-price terms and conditions, and at a price no greater than the average of the five lowest prices paid by IBM's OEM customers who have committed to purchase comparable quantities during the same calendar quarter.

D. The provisions of this Section V shall terminate on December 31, 2002.

VI. IBM Purchase Volumes

A. For each calendar year during the period January 1, 1999, through December 31, 2002, IBM's total purchases of STK DASD (measured in terabytes) for use in the United States shall not exceed 67 percent of the volume of STK DASD (measured in terabytes) purchased by IBM during the calendar year 1998 for use in the United States, unless (1) STK has already shipped a total of at least the STK Minimum to STK's United States customers other than IBM during the preceding 12 months, or (2) IBM and STK obtain prior approval of the United States under the provisions of section VI.B. below.

B. IBM may purchase STK DASD without regard to the limitation of Section VI.A. above if approved by the United States Department of Justice. The United States may approve such purchases upon the submission of a written request to the Antitrust Division of the United States Department of Justice, supported by both Defendants, and setting forth the additional purchase volumes requested, the time period(s) for which the additional purchases are requested, and the reasons and circumstances related to the request. The United States will approve the request if it concludes that notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM's proposed additional purchases would not substantially lessen that competition. The United States will not unreasonably withhold approval, and if it does not deny a request in writing setting forth the reasons for the denial within 30 days of submission, the request will be deemed approved. If the United States denies a request, the Court may review the matter upon the filing of an application by both Defendants. The Court may overrule a denial by the United States of a request made before January 1, 2001, only if Defendants establish that notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM's proposed additional purchases would not substantially lessen that competition. The Court may overrule a denial by the United States of a request made on or after January 1, 2001, only if Defendants establish either (1) that notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM's proposed additional purchases would not substantially lessen that competition or (2) that because of technological advances, the entry of new competitors, or otherwise, a material change has occurred since the date of this Final Judgment in the competition in the United States for the development, production and marketing of DASD, such that IBM's proposed additional purchases would not substantially lessen such competition.

C. The provisions of this Section VI shall terminate on December 31, 2002.

VII. Compliance Inspection

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege or doctrine:

A. Duly authorized representatives of the Department of Justice, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a Defendant made to its principal office, shall be permitted:

1. Access during regular office hours of Defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of Defendants and without restraint or interference from them, to interview or depose officers, employees, and agents of Defendants, who may have counsel present, regarding any such matters.

B. Defendants shall submit written reports with respect to matters contained in this Final Judgment as follows:

1. On the 30th day after the beginning of each calendar quarter, STK shall submit to the Antitrust Division of the United States Department of Justice a written report setting forth: (a) The total of IBM's purchases of STK DASD for use in the United States during the preceding quarter, measured in terabytes; (b) the total of IBM's distribution of STK DASD for use in the Untied States, through a means of distribution in which IBM did not acquire title to the STK DASD, during the preceding quarter, measured in terabytes; (c) the total of IBM Credit Corporation's purchases of STK DASD bearing STK's logo for use in the United States during the preceding quarter, measured in terabytes; (d) the total of STK's shipments of STK DASD to United States customers other than IBM pursuant to transactions in which IBM ordered such STK DASD as agent for such customers, during the preceding quarter, measured in terabytes; (e) the total of all other STK shipments of STK DASD to United States customers other than IBM during the preceding quarter, measured in terabytes.

2. Apart from the foregoing, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to Defendants' principal office, Defendants shall submit such written reports, under other if requested, with respect to any matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the courts of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to Plaintiff, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then ten (10) calendar days notice shall be given by Plaintiff to Defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which a defendant is not a party.

VIII. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be

necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

IX. Termination

This Final Judgment shall expire on the fifth anniversary of the date of its entry.

X. Public Interest

Entry of this Final Judgment is in the public interest.

United States District Judge.

Dated:

Attachment A

A. An STK Incidental Use License for any purpose.

B. For IKA Storage Systems, an STK Material Use License for any purpose.

C. For products other than IKA Storage Systems, an STK Material Use License for any purpose.

D. *STK Incidental Use License* means a nonexclusive, worldwide license to use (1) the ideas, concepts, and techniques contained in, (2) the structure, sequence and organization of, and (3) other nonliteral aspects of IBM Materials and their Derivative Works. Such license shall not include the right of STK to make a copy of any of the IBM Materials or any Derivative Work thereof owned by IBM which is substantially similar thereto and would constitute literal infringement under applicable copyright law.

E. *STK Material Use License* means a nontransferable, nonexclusive, worldwide, license to use, execute, reproduce, display, perform, transfer, distribute, sublicense, and prepare Derivative Works, of the IBM Materials and its Derivative Works. Such license includes the right of STK to authorize others to do any of the above, and also applies to associated audio and visual works. Except for the right to sublicense STK subsidiaries pursuant to Section 11.0 of the IDA, the right to sublicense under this definition is limited to granting sublicenses for microcode which include terms and conditions substantially similar to the STK Customer Agreement, to granting sublicenses for software other than microcode under the terms and conditions that STK uses for similar software of its own, and to granting sublicenses to third-party maintainers under reasonable terms and conditions. Nothing in this definition of STK Material Use License or elsewhere in the Modified OEM Agreement shall be construed, subject to the payment of royalities due, to prevent STK from distributing through OEMs other than IBM, Funded Enhancements that are incorporated in STK DASD, provided that nothing in the Final Judgment to which this definition is attached shall obligate IBM to grant to obligate IBM to permit STK to grant rights under such license to OEMs other than the right of STK to permit OEMs to distribute Funded Enhancements contained in STK products. In the event of a Change of Control, subject to the payment of royalties due and the acquiring entity's agreement to be bound by the Modified OEM Agreement, nothing in this license shall be construed to prevent the acquiring entity from developing, producing, or marketing Funded Enhancements incorporated in DASD.

F. *Change of Control* means the acquisition by an entity of more than 20 percent of the outstanding common shares of STK representing the right to vote for STK's board of directors, the sale of all or substantially all of the assets of STK, or any consolidation, merger, or other reorganization of STK in which STK is not the continuing or surviving corporation or pursuant to which shares of such common stock would be converted into cash, securities, or other property.

G. *Derivative Work* means a work that is based on a underlying work that would be a copyright infringement if prepared without the authorization of the copyright owner of the underlying work. Derivative works are subject to the ownership rights and licenses of others in the underlying work.

H. *Funded enhancements* means hardware and software developments and enhancements that have been funded by IBM under the OEM agreement of June 7, 1996 or the Modified OEM Agreement, or that IBM is obligated to fund under the Modified OEM Agreement.

I. *IBM* means International business Machines Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

J. *IBM Materials* means deliverables funded in accordance with the IBM Developer Agreement, attached as Exhibit 3 to the Modified OEM Agreement.

K. *IDA* means the IBM Developer Agreement, attached as Exhibit 3 to the Modified OEM Agreement.

L. *IKA Storage Systems* means Iceberg, Kodiak, and Arctic Fox storage systems, as defined in the IDA Description of Licensed Work (Attachment 2 to Exhibit 3 of the Modified OEM Agreement as Attachment).

M. *Modified OEM Agreement* means the agreement dated December 18, 1997, pursuant to which IBM has agreed to purchase STK DASD from STK and STK has agreed to sell STK DASD to IBM, including all attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

N. *STK* means Storage Technology Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

Competitive Impact Statement

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On December 18, 1997, The United States filed a civil antitrust complaint alleging that an ''OEM agreement'' dated June 7, 1996, between International Business Machines Corporation (''IBM'') and Storage Technology Corporation (''STK'') unreasonably restrained competition in the United States and worldwide in the sale of disk storage subsystems (''DASD'') for mainframe computers, in violation of Section 1 of the Sherman Act (15 U.S.C. 1). Before entering into the OEM agreement, IBM and STK competed with each other, and with only two other major competitors, in the development, production, and marketing of mainframe DASD in the United States and worldwide. With the OEM agreement, however, IBM became STK's exclusive outlet for STK's mainframe DASD products, thereby eliminating competition between them for sales of mainframe DASD to end-users.

At the same time as it filed the Complaint, the United States also filed a Stipulation and a proposed Final Judgment in settlement of the suit. As described in greater detail below, the proposed that made the OEM agreement an exclusive arrangement between IBM and STK, and will provide positive incentives for STK to resume its position as an independent competitor in the market.

The United States, IBM, and STK have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would

terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of Events Giving Rise to the Alleged Violation

A. The Defendants and Mainframe DASD

IBM is incorporated in the State of New York and is headquartered in Armonk, New York. IBM is by far the world's largest supplier of mainframe computers and related products. For the year 1996, IBM posted worldwide revenues of about $75 billion. In 1995, the last full year in which the IBM and STK were separate competitors in the mainframe DASK market, IBM had mainframe DASD sales of over $2 billion, representing shipments of about 588 ''terabytc'' of data storage capacity. The terabyte—equivalent to the amount of data that can be stored in hundreds of millions of pages of paper—is a standard industry measure of sales volume. In 1995, IBM sold 275 terabytes of mainframe DASD, for over $1.2 billion, in the United States.

STK is a Delaware corporation headquartered in Louisville, Colorado. STK reported total worldwide revenues of about $2 billion in 1996. STK's core businesses are computer data storage and retrieval systems, especially those for mainframe computer systems. Other than mainframe DASD, STK's major products are automated tape library storage systems for mainframe computers, and it is the world's dominant supplier of these tape systems. STK's 1995 worldwide sales of mainframe DASD were over $300 million, representing shipments of about 155 terabytes. Its U.S. sales of mainframe DASD were about $190 million, representing shipments of 100 terabytes.

DASD are computer data storage systems that utilize rotating magnetic disks. As defined in the Complaint and proposed Final Judgment, ''mainframe DASD,'' are DASD specifically designed to attach to and operate with IBM's System 390 computers, predecessor and successor models, and other manufacturers' IBM-plug-compatible computers.[1] As described in the Complaint, mainframe DASD perform high-speed and high-capacity data storage and retrieval functions that are essential to the operation of mainframe computers, which is turn are commonly and widely used for mission-critical data processing by business, educational, governmental, and other organizations throughout the world.[2]

B. The OEM Agreement

On June 7, 1996, IBM and STK entered into an OEM agreement pursuant to which STK agreed to supply IBM, and IBM committee to purchase for resale purposes, mainframe DASD products developed and manufactured by STK.[3] The parties agreed to extend the arrangement through the end of 1999, subject to terms for renewal. Before the OEM agreement, STK sold its mainframe DASD products in direct competition with IBM's internally developed and manufactured mainframe DASD products. Under the OEM agreement, however, IBM became STK's exclusive outlet for its mainframe DASD, and this relationship displaced the competition that had previously existed between them.

The OEM agreement required IBM to purchase certain minimum volumes and to make substantial payments to STK if it failed to meet the minimum purchases. The OEM agreement committed IBM to purchase annual and quarterly minimum volumes of STK's DASD products. For each of the years 1997 and 1998, IBM had to purchase minimum volumes of 710 terabytes, and thereafter, the parties were to negotiate new volume terms. If IBM failed to purchase the minimum volumes, STK would be free to terminate the agreement, and IBM would be obligated to pay liquidated damages of $75 million for a termination based on IBM's failure to meet the 1997 minimum volumes and $27 million for a termination based on IBM's failure to meet the 1998 minimum volumes.

Under the OEM agreement, IBM was also required to pay STK ''recovery payments,'' which increased proportionately with lower levels of purchases by IBM, but declined to zero as the purchases approached 400 terabytes in 1996 and 1500 terabytes in 1997 and 1998. For example, if IBM sold only the minimum 710 terabytes in 1997, it would owe STK up to $60 million in recovery payments for falling 790 terabytes short of the 1500. These recovery payments also took into account the proportion of IBM's total sales of STK's DASD products versus IBM's sales of its own DASD, so that the higher the proportion of STK products sold by IBM, the lower the recovery payments. The OEM agreement also required IBM to contribute $100 million over three years to help fund STK's on-going efforts and plans to improve the performance and capabilities of its mainframe DASD products.

Although the OEM agreement did not expressly provide that IBM would be STK's exclusive mainframe DASD distributor, it contained provisions that made independent sales by STK so unattractive economically that it gave IBM *de facto* exclusively. The OEM agreement provided that if STK sold mainframe DASD to anyone other than IBM, IBM would be freed from its purchase volume commitments, its obligation to make recovery payments or pay liquidated damages upon failure to achieve those commitments, and its duty to help fund STK's product development programs—obligations that in total were worth hundreds of millions of dollars to STK. Due to these prohibitive contractual consequences, internal STK documents referred to STK sales of mainframe DASD to anyone other than IBM as ''forbidden'' under the OEM agreement.[4] Shortly after entering into the OEM agreement, STK stopped all efforts to sell mainframe DASD to customers other than IBM; and STK became completely dependent on its former competitor to sell STK mainframe DASD to end-users.

C. The OEM Agreement Violates Section 1 of the Sherman Act

The Complaint alleges that the OEM agreement unlawfully restrained competition in the mainframe DASD market in the United States and worldwide, in violation of Section 1 of the Sherman Act. Mainframe DASD is a relevant antitrust market because there are no substitute products to which mainframe DASD purchasers would turn even if prices of mainframe DASD were to increase substantially.[5] The

[1] These mainframe computers are distinguishable from other computers in that they all operate with IBM mainframe computer operating systems, principal examples of which are IBM's OS–390, MVS, VSE, and VM operating systems. Some ''mainframe DASD'' attaches to and operates with other types of computers as well.

[2] Data search times measurable in milliseconds and high data-transfer rates make DASD suitable for on-line transaction processing, large volume batch processing, and other applications in which rapid access to large amounts of data is important.

[3] The OEM agreement was not subject to the prenotification requirements of § 7a of the Clayton Act, 15 U.S.C. 18a.

[4] To protect STK in the event it unintentionally entered into transactions that would trigger these severe financial penalties, STK insisted that it be allowed to make up to 12 otherwise ''forbidden sales'' over the life of the agreement. Another exception allowed STK to sell its mainframe DASD to others without penalty so long as STK first sold it to IBM and then repurchased it from IBM.

[5] Although other types of data storage devices exist—for example, tape, optical and electronic memory products—because of performance or cost differences, none of these other products are effective substitutes for DASD. Conversion to a non-mainframe computer system is also not an effective way to substitute away from mainframe DASD

Continued

OEM agreement greatly increased the level of concentration in a market that was already highly concentrated. In 1995, the last full year in which IBM and STK competed against each other, IBM had a worldwide market share of about 36 percent (based on total shipments of about 558 terabytes), while STK's share was about 10 percent (shipments of about 155 terabytes). The Herfindahl-Hirschman Index, a standard measure of market concentration, increased by 720 points, to a post-agreement level of 3767, as a result of the OEM agreement.[6] The reduction of competition from the OEM agreement has not been alleviated by new entry into the manufacture and marketing of mainframe DASD, and because such new entry would be extremely difficult and time-consuming, it is unlikely to occur in the foreseeable future.

The Complaint further alleges that the OEM agreement removed a significant competitive force from the marketplace. STK had been the low price bidder for numerous DASD sales, and IBM and STK products had been the top two choices for many customers. Competition from STK had contributed to the substantial erosion in prices of mainframe DASD in the years immediately prior to the OEM agreement. In this marketplace setting, the OEM agreement eliminated direct and significant competition between IBM and STK and deprived mainframe DASD customers of the benefits of that competition. As a consequence of the OEM agreement, the rapid decline in the price of mainframe DASD eased, and the parties' output of mainframe DASD fell below levels they had projected prior to the agreement. Thus, the OEM agreement has been anticompetitive and its violates Section 1 of the Sherman Act.

because of the substantial costs and risk of switching to an alternative computer platform.

[6] The HHI is well accepted as a measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in moderately concentrated and concentrated markets presumptively raise antitrust concerns under the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (rev. 1997).

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment bars IBM and STK from including in an OEM agreement terms that would prevent STK from selling mainframe DASD in competition with IBM. The modifications to the OEM agreement remove the provisions that made the agreement a *de facto* exclusive arrangement.[7] As a result, STK will suffer no economic penalty if it sells to customers other than IBM. The elimination of these restrictions makes the relationship between IBM and STK non-exclusive, and provides an incentive to STK to begin selling mainframe DASD as an independent competitor. Furthermore, the proposed Final Judgment creates additional incentives for STK to begin selling DASD independently by limiting the amount of mainframe DASD that STK may sell through IBM, unless STK sells significant amounts of mainframe DASD on its own. The purpose of these limitations, which are described in detail below, is to make it economically attractive for STK to seek out business from customers other than IBM. In setting these limitations, the proposed Final Judgment does not preclude STK sales though IBM that may arise under a non-exclusive OEM arrangement between them, but adds a positive incentive for STK to re-enter the mainframe DASD market as a seller independent of IBM.

Section IV of the proposed Final Judgment enjoins the anticompetitive contractual arrangements that have prevented STK from selling mainframe DASD independently of IBM. Except in limited specified contexts common in normal supply contracts,[8] Section IV prohibits IBM and STK from entering into or maintaining any agreement as to price, volume, or other terms that would be contingent upon either the level of IBM's mainframe DASD purchases from STK, or the level of STK's sales to customers other than IBM. The provisions of the OEM agreement that imposed upon IBM minimum purchase commitments and obligated it to pay recovery payments and liquidated damaged if those commitments were not met, and that established contractual penalties to STK for making mainframe DASD sales to customers other than IBM, are prohibited by Section IV.

Section V of the proposed Final Judgment contains technology licensing provisions designed to ensure that STK will not be prevented from independently marketing mainframe DASD improvements that STK had developed with IBM funding. These provisions require IBM to grant STK a license to all mainframe DASD hardware or software product improvements funded by IBM or for which it provided assistance under the OEM agreement. The license is subject to STK's payment of reasonable royalties, however, to allow IBM an appropriate return on its contributions.

Section VI.A. of the proposed Final Judgment provides a positive incentive for STK to compete against IBM, by requiring that STK must sell DASD on its own as a condition of making unconstrained sales to IBM. Under Section VI.A., beginning on January 1, 1999, IBM's U.S. purchases from STK in a calendar year may not exceed 67 percent of IBM's U.S. purchases in 1998, unless STK has shipped over the preceding twelve months a substantial volume of mainframe DASD to U.S. customers other than IBM. If STK fails to sell the specified amount to customers other than IBM, it may make additional sales to IBM only if the parties obtain prior approval from the United States pursuant to Section VI.B. The United States will grant or deny such approval on the basis of whether vigorous competition from STK has been restored, and whether such competition would be substantially lessened as a result of additional purchases by IBM. Section VI.B. also sets out a process and standard for judicial review should IBM or STK contest a denial by the United States.[9]

[7] See modified OEM agreement dated December 18, 1997, a redacted copy of which is attached hereto as a determinative document under the APPA. The redactions are necessary to avoid disclosure of competitively sensitive information. An unredacted copy will be made available to the Court upon request.

[8] The proposed Final Judgment allows IBM to provide STK with monthly and quarterly forecasts of its purchases, in order to enable STK to anticipate capacity requirements to fill IBM orders, while imposing strict limits on the extent to which IBM may actually bind itself to make purchases (Section IV.D.); permits IBM and STK to set prices for IBM purchases that reflect volume-based discounts and any credits obtained as a result of STK's failure to meet on-time delivery, quality, or product deliverable requirements (Section IV.E.); and allows STK to pay IBM specified unit based royalties for its sales of DASD to other customers, which would enable IBM to recover a portion of its investments in STK DASD product improvements (Section V).

[9] The proposed Final Judgment imposes on Defendants the burden of proof in such proceedings. For the period up to January 1, 2001, the proposed Final Judgment permits the Court to overrule a denial by the United States of a request for additional IBM purchases only if Defendants establish that, notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous and ongoing competition from STK in the United States for the development, production and marketing of DASD, and IBM's proposed additional purchases would not substantially lessen that competition. Beginning

Other provisions of the proposed Final Judgment are also aimed at fostering STK's competitive independence from IBM. Section IV.C. prohibits IBM and STK from avoiding the proscriptions of the Judgment by entering into a sales agency or distribution agreement that would not entail actual IBM purchases of mainframe DASD. Section IV.D restricts STK's reliance on IBM purchases by limiting the extent to which IBM volume forecasts and purchase orders may become binding. Section IV.E. limits the parties' ability to set IBM's prices on terms other than actual amounts purchased. Section IV.F. requires STK to allocate fairly production between the needs of IBM and that of other STK customers in the event of supply constraints. Finally, Section V.C. guarantees that IBM will continue to sell IBM disk drives used in STK's mainframe DASD products, at competitive prices and terms, so long as IBM makes such drives generally available to other purchasers.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register.** The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: John F. Greaney, Chief, Computers & Finance Section, Antitrust Division, United States Department of Justice, Suite 9500, 600 E Street, N.W., Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, proceeding to a full trial on the merits of its Complaint. The United States is satisfied, however, that the relief contained in the proposed Final Judgment should reestablish and maintain viable and effective competition in the mainframe DASD market that has otherwise been adversely affected by the OEM agreement. Thus, the proposed Final Judgment will benefit competition substantially to the same extent that the government could have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint, including the uncertainty over whether a remedy imposed after a long delay would be efficacious.

The United States also considered a claim for damages arising from increased prices paid by the United States for its purchases of mainframe DASD as a result of the reduction of competition caused by the OEM agreement. However, calculation and proof of such damages to the United States is likely to be complex and difficult, and the litigation necessary to secure the damages would be costly and protracted. During the pendency of the litigation, moreover, the OEM agreement would remain in effect, depriving the United States and all other mainframe DASD purchasers of the benefit of STK as an independent competitive source of supply. Purchases by the United States constitute only a modest percentage of all domestic DASD purchases. The United States concluded, therefore, that the public interest is better served overall by securing the immediate, certain, and substantial relief set forth in the proposed Final Judgment.

VII. Determinative Documents

One determinative document within the meaning of the APPA—the IBM–STK agreement dated December 18, 1997, which modifies the July 7, 1996, agreement in conformity with the terms of the proposed Final Judgment—was considered by the United States in formulating the proposed Final Judgment. A redacted copy of this document is attached hereto, is being filed with the Court, and will be available for public inspection.[10]

Dated: December 18, 1997.

Weeun Wang,
James J. Tierney,
Sanford M. Adler,
Richard I. Irvine,
Don Allen Resnikoff,
Molly L. DeBusschere,
J. Roberto Hizon,
Attorneys, Antitrust Division, U.S. Department of Justice, Computers & Finance Section, Suite 9500, 600 E Street, N.W., Washington, D.C. 20530, (202) 307–6200.

United States Memorandum Regarding Antitrust Consent Decree Procedures

The United States files this Memorandum to set forth the procedures regarding entry of the proposed Final Judgment, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''APPA''). The APPA applies only to antitrust cases brought by the United States.

1. On December 18, 1997, the United States filed a proposed Final Judgment and a Stipulation between the plaintiff and defendant in which both parties agreed to entry of the proposed Final Judgment.

2. The United States also filed a Competitive Impact Statement relating to the proposed Final Judgment, pursuant to the APPA, 15 U.S.C. 16(b).

on January 1, 2001, the proposed Final Judgment expands the review criteria beyond whether STK is a vigorous DASD competitor in the United States. Here, the proposed Final Judgment also permits the Court to overrule a denial by the United States if the Defendants establish that, because of technological advances, the entry of new competitors, or other material competitive changes, IBM's proposed additional purchases would not substantially lessen competition in the United States in the development, production or marketing of mainframe DASD.

[10] Certain confidential business information contained in the modified OEM agreement, but not significant to consideration of the proposed Final Judgment by the United States, has been redacted from the filed and publicly available copies. Due to the length of the modified OEM agreement, it will not be published in the **Federal Register**.

3. The APPA requires the United States to publish the proposed Final Judgment and Competitive Impact Statement in the **Federal Register** and in newspapers 60 days prior to entry of the Final Judgment. The Notice will inform members of the public that they may submit comments about the Final Judgment to the United States Department of Justice, Antitrust Division.

4. The United States will consider any comments it receives, respond to them, and publish the comments and responses in the **Federal Register**.

5. Pursuant to the APPA, at the expiration of the 60-day period, the United States will file with the Court the comments, its responses, and a Motion For Entry of The Final Judgment, unless it withdraws its consent to entry of the Final Judgment pursuant to Paragraph 2 of the December 18 Stipulation.

6. When the United States files its Motion For Entry of The Final Judgment, pursuant to the APPA the Final Judgment may be entered with or without further hearing, if the Court determines that entry is in the public interest.

Dated: December 18, 1997.

Weeun Wang,

James J. Tierney,

Sanford M. Adler,

Richard I. Irvine,

Don Allen Resnikoff,

Molly L. DeBusschere,

J. Roberto Hizon,

Attorneys, Antitrust Division, U.S. Department of Justice, Computers & Finance Section, Suite 9500, 600 E Street, N.W., Washington, D.C. 20530, (202) 307–6200.

Certificate of Service

The undersigned certifies that he is a paralegal employed by the Antitrust Division of the United States Department of Justice, and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that on December 18, 1997, he caused true copies of:

1. Complaint;
2. Stipulation;
3. proposed Final Judgment;
4. Competitive Impact Statement;
5. Plaintiff's Memorandum Regarding Antitrust Consent Decree Procedures;

and this certificate of service, to be served upon the persons at the place and addresses stated below, which are the last known addresses:

Counsel for International Business Machines Corporation

Evan R. Chessler, Esq., Cravath, Swaine & Moore, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019 (by facsimile (212–474–3700) and by overnight courier).

Counsel for Storage Technology Corporation

J. Edd Stepp, Jr., Esq., Gibson, Dunn & Crutcher 333 South Grand Avenue Los Angeles, CA 90071 (by facsimile (213–229–6466) and by overnight courier).

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. this _____th day of December, 1997.

J. Cory Allen,

Paralegal, Antitrust Division, U.S. Department of Justice, Computers & Finance Section, Suite 9500, 600 E Street, N.W., Washington, D.C. 20530, (202) 307–6200.

[FR Doc. 98–522 Filed 1–8–98; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

January 6, 1998.

The Department of Labor (DOL) has submitted the following public information collection requests (ICR's) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Department Clearance Officer, Todd R. Owen (202) 219–5096 ext. 143) or by E-Mail at Owen-Todd@dol.gov. Individuals who use a telecommunication device for the deaf (TTY/TDD) may call (202) 219–4720 between 1:00 p.m. and 4:00 p.m. Eastern Time, Monday–Friday.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 (202) 395–7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Mine Safety and Health Administration.

Title: Certificate of Electrical/Noise Training, MSHA Form 5000–1.

OMB Number: 1219–0001 (extension).

Frequency: On Occasion.

Affected Public: Businesses and other for profit; small business or organizations.

Number of Respondents: 3,800.

Estimated Time Per Respondent: 4.36 hours.

Total Burden Hours: 16,584.

Total annualized capital/startup costs: 0.

Total operating/maintaining costs: $389,049.

Description: MSHA Form 5000–1, Certificate of Electrical/Noise Training, is required to be used by instructors to report to MSHA for certification those persons who have satisfactorily completed either a coal mine electrical training program or a noise training course.

Agency: Pension and Welfare Benefits Administration.

Title: Summary Plan Description Requirements under the Employee Retirement Income Security Act (ERISA).

OMB Number: 1210–0039 (extension).

Frequency: On occasion.

Affected Public: Business or other for-profit; Not-for-profit institutions; individuals.

Number of Respondents: 194,235.

Estimated Time Per Respondent: Approximately 6 hours to develop the Summary Plan Descriptions (SPD's); preparation of a summary of such changes (SMM) will average 1 hour; and an estimated 2 minutes for reproduction and mailing of the document.

Total Burden Hours: 1,128,919.

Total annualized capital/startup costs: 0.

Total annual costs (in thousands): $82,242.

Description: As required by ERISA, this existing regulation provides plan

administrators with the procedures and guidelines necessary to furnish plan participants and beneficiaries with Summary Plan Descriptions that clearly explain their rights and obligations.

Agency: Pension and Welfare Benefits Administration.

Title: Notice of Enrollment Rights.

OMB Number: 1210–0101 (extension).

Frequency: On occasion.

Affected Public: Business or other for-profit; Not-for-profit institutions; Group Health Plans.

Number of Respondents: 14,590.

Estimated Time Per Respondent: .50 minutes.

Total Burden Hours: 5,715.

Total annualized capital/startup costs: 0.

Total annual costs (in thousands): $730.

Description: Under 29 CFR 2590.701–6 of the April 8 Interim Rules, a group health plan offering group health insurance coverage is obligated to provide a description of the plan's special enrollment rules. The special enrollment rules generally apply in circumstances when the participant initially declined to enroll in the plan, and subsequently would like to have coverage.

Agency: Pension and Welfare Administration.

Title: Notice of Pre-Existing Condition Exclusion.

OMB Number: 1210–0102 (extension).

Frequency: On occasion.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Group Health Plans.

Number of Respondents: 6,590.

Estimated Time Per Respondent: Notices to all eligible employees are estimated to take 1 hour for preparation of a notice, and .50 minutes for distribution. For notices to participants with insufficient prior coverage, it is estimated to take 1 hour per plan, and an average of 2 minutes for preparation.

Total Burden Hours: 8,150.

Total annualized capital/startup costs: 0.

Total annual costs (in thousands): $700.

Description: Pursuant to 29 CFR 2590.701–3(c), a group health plan offering group health insurance coverage may not impose any pre-existing condition exclusions on a participant unless the participant has been notified on the plan's provisions and his or her right to establish prior creditable coverage. 29 CFR 2590.701–4 requires that plans that use the alternative method of crediting coverage disclose their method at the time of a participant's enrollment in the plan. 29 CFR 2590.701–5(d) requires that before a plan imposes a pre-existing condition exclusion on a particular participant, it must first disclose that determination in writing, including the basis for the decision and an explanation of any appeal procedure.

Agency: Provision and Welfare Benefits Administration.

Title: Establishing Prior Creditable Coverage.

OMB Number: 1210–0103 (extension).

Frequency: On occasion.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Group Health Plans.

Number of Respondents: 15,604.

Estimated Time Per Respondent: Generation of the certification ranges from 2 to 5 minutes depending on when the certification is generated. .50 minutes was used for distribution for all applicable certifications and notices.

Total Burden Hours: 336,060.

Total annualized capital/startup costs (in thousands): $5,400.

Total annual costs (in thousands): $26,400.

Description: In order to meet the Health Insurance Portability and Accountability Act's goal of improving access to and portability of health care benefits, the statute provides that, after the submission of evidence establishing prior creditable coverage, a subsequent health insurance provider would be limited in the extent to which it could use pre-existing condition exclusions to limit coverage. This Information Collection Request covers the submission of materials sufficient to establish prior creditable coverage.

Todd R. Owen,

Departmental Clearance Officer.

[FR Doc. 98–570 Filed 1–8–98; 8:45 am]

BILLING CODE 4510–23–M

DEPARTMENT OF LABOR

Bureau of International Labor Affairs; U.S. National Administrative Office, National Advisory Committee for the North American Agreement on Labor Cooperation; Notice of Open Meeting by Teleconference

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of open meeting by teleconference, February 12, 1998.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 94–463), the U.S. National Administrative Office (NAO) gives notice of a meeting of the National Advisory Committee for the North American Agreement on Labor Cooperation (NAALC), which was established by the Secretary of Labor.

The Committee was established to provide advice to the U.S. Department of Labor on matters pertaining to the implementation and further elaboration of the NAALC, the labor side accord to the North American Free Trade Agreement (NAFTA). The Committee is authorized under Article 17 of the NAALC.

The Committee consists of 12 independent representatives drawn from among labor organizations, business and industry, and educational institutions.

DATES: The Committee will meet on February 12, 1998 from 4:00 p.m. to 5:00 p.m. The meeting will be by teleconference.

ADDRESS: U.S. Department of Labor, 200 Constitution Avenue, N.W., Room C–5515 (Executive Conference Room), Washington, D.C. 20210. The meeting is open to the public on a first-come, first served basis.

FOR FURTHER INFORMATION CONTACT: Irasema Garza, designated Federal Officer, U.S. NAO, U.S. Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room C–4327, Washington, D.C. 20210. Telephone 202–501–6653 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: Please refer to the notice published in the **Federal Register** on December 15, 1994 (59 FR 64713) for supplementary information.

Signed at Washington, D.C. on January 5, 1998.

Irasema T. Garza,

Secretary, U.S. National Administrative Office.

[FR Doc. 98–569 Filed 1–8–98; 8:45 am]

BILLING CODE 4510–28–M

DEPARTMENT OF LABOR

Employment Standards Administration/Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to

be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statues, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, N.W., Room S–3014, Washington, D.C. 20210.

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Connecticut
CT970001 (Feb. 14, 1997)
CT970003 (Feb. 14, 1997)
CT970004 (Feb. 14, 1997)
Maine
ME970006 (Feb. 14, 1997)
ME970010 (Feb. 14, 1997)
ME970022 (Feb. 14, 1997)
ME970026 (Feb. 14, 1997)
New York
NY970002 (Feb. 14, 1997)
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NY970004 (Feb. 14, 1997)
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Nebraska
NE970001 (Feb. 14, 1997)
NE970003 (Feb. 14, 1997)
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CO970009 (Feb. 14, 1997)
CO970010 (Feb. 14, 1997)
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Wyoming
WY970004 (Feb. 14, 1997)
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WY970009 (Feb. 14, 1997)
WY970021 (Feb. 14, 1997)
WY970023 (Feb. 14, 1997)

Volume VII

None

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon and Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the county.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at (703) 487–4630.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, D.C. This 31st day of December 1997.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 98–239 Filed 1–8–98; 8:45 am]

BILLING CODE 4510–27–M

PENSION BENEFIT GUARANTY CORPORATION

Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by Kane Transfer Company to the Freight Drivers and Helpers Local Union No. 557 Pension Fund

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of No Determination.

SUMMARY: This notice advises interested persons that the Pension Benefit Guaranty Corporation (the ''PBGC'') has declined to make a determination of substantial damage under section 4203(d)(4) of the Employee Retirement Income Security Act with respect to the cessation of contributions under the Freight Drivers and Helpers Local Union No. 557 Pension Fund by Kane Transfer Company. Section 4203(d) provides a special withdrawal rule for the trucking industry, under which a trucking employer is not considered to have withdrawn from the plan if certain conditions are met, including the furnishing of a bond or escrow. After the bond/escrow requirement has been satisfied, the PBGC may make a finding under section 4203(d)(4) that the cessation (considered together with other cessations) has substantially damaged the plan's contribution base. In this event, the employer will be treated as having withdrawn from the plan and the bond or escrow will be paid to the plan. Alternatively, the PBGC may find under section 4203(d)(5) that no substantial damage has been caused, in which case the bond will be canceled or the escrowed amount returned to the employer, and the employer will have no further liability under the plan. The purpose of this notice is to advise interested persons that the PBGC has declined to find substantial damage in this case.

FOR FURTHER INFORMATION CONTACT: Thomas T. Kim, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; telephone 202–326–4020 ext. 3581 (For TTY/TDD, call the Federal relay service at 1–800–877–8339 and ask to be connected to 202–326–4020).

SUPPLEMENTARY INFORMATION:

Background

Section 4203(d) of the Employee Retirement Income Security Act, as amended (''ERISA''), provides a special withdrawal rule for the trucking industry. That industry, for purposes of this rule, is considered to include the long and short haul trucking industry, the household goods moving industry, and the public warehousing industry. The rule is limited to trucking industry plans, i.e., plans under which substantially all of the contributions required are made by employers that have an obligation to contribute primarily for work in the trucking industry.

Under section 4203(d), a trucking employer will not be considered to have withdrawn from a trucking industry plan merely because the employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, if certain conditions are met. One condition is that the employer must not continue to perform work within the jurisdiction of the plan. Another condition is that the employer must furnish a bond or establish an escrow account in an amount equal to 50 percent of its withdrawal liability.

After the bond is posted or the escrow established, the PBGC may, within 60 months after the cessation of the employer's covered operations or obligation to contribute, make a determination about the effect of the cessation (considered together with any cessations by other employers) on the plan's contribution base. If the PBGC makes a finding under section 4203(d)(4) that the contribution base has suffered substantial damage, the employer will be treated as having withdrawn from the plan on the date when the obligation to contribute or covered operations ceased. In that event, the bond or escrow will be paid to the plan, and the employer will be liable for the remainder of the withdrawal

liability. If the PBGC makes a finding under section 4203(d)(5) that no substantial damage has occurred, or if it does not make a finding of substantial damage under section 4203(d)(4) within the 60-month period referred to above, then the bond will be canceled or the escrow refunded, and the employer will have no further liability with respect to the cessation.

The Request

The Freight Drivers and Helpers Local Union No. 557 Pension Fund (the ''Fund'') has requested that the PBGC find that the cessation of contributions by Kane Transfer Company (''Kane''), together with cessations by other contributing employers, has resulted in substantial damage to the Fund's contribution base. The Fund represents that over 90 percent of its contributing employers are trucking employers. It also asserts that Kane is a trucking employer and ceased all covered operations under the Fund in December 1993.

On June 9, 1997, the PBGC published (at 62 FR 31465) a notice of the pendency of the Fund's request. The notice solicited comments by interested persons; Kane submitted the only comment in response to the notice. The factual data in this notice are derived from information submitted by the parties.

The Decision

Over the 1980–1995 period, the contribution base of the Fund, i.e., the number of hours for which contributions are required, fell by nearly 60 percent, from 5.5 million in 1980 to 2.3 million in 1995. In the 5-year period ending with 1995, the contribution base declined by 13 percent (although the contribution base increased by about 3 percent between 1994 and 1995). The number of active employees declined from 3,496 in 1980 to 1,287 in 1995, a drop of over 60 percent. The number of active employees fell by just over 20 percent in the 1991–1995 period.

During the 1986–1994 period, 29 contributing employers withdrew from the Fund, leaving 28 employers in the Fund as of the end of 1994. Since 1990, 13 employers have withdrawn.

As the Fund's contribution base declined, its contribution rate increased. In 1980, the highest hourly rate was $1.13; in 1986, that rate was $1.95; and in 1995, it was $2.93. Net employer contributions have declined from nearly $8 million in 1986 to $6.3 million in 1995. However, since 1992, contributions have increased slightly. In the 1986–1995 period, benefit payments exceeded net contributions in all but one year. Plan assets increased by nearly 70 percent during this period.

The Fund's unfunded vested benefits in 1992, the year prior to Kane's withdrawal, was $12 million; in 1993, it rose to $18 million. Since 1993, unfunded vested benefits have declined. In 1994, the figure was $5.8 million, and as of the January 1, 1996 valuation, the market value of assets slightly exceeded the actuarial present value of all accumulated benefits.

The January 1, 1996 valuation indicates that projected employer contributions for 1996 would exceed the sum of normal cost, 15 year amortization of unfunded liabilities, and administrative costs (collectively, ''scheduled costs'') by 26 percent. In 1994 and 1995, contributions exceeded scheduled costs by 14 percent and 23 percent, respectively.

Kane has filed a response urging the PBGC to reject the Fund's request on the basis that the Fund has not shown that it has suffered substantial damage to its contribution base. Kane asserts that the Fund's contribution base has been stable or even increasing, ''having grown by 3% between 1994 and 1995.'' Furthermore, according to Kane, the documents submitted by the Fund show ''no unfunded liability * * * projected contributions exceeding projected costs by more than 20% in 1996, and tremendous income to the Fund from investment growth.''

After reviewing the information submitted by the Fund and by Kane, the PBGC concludes that it is unable to find that the Fund has suffered substantial damage to its contribution base as a result of Kane's cessation of contributions considered together with other cessations. Although the information submitted shows that the Fund has experienced a significant decline in contribution base units (''CBU's'') and total contributions since the 1980's, these declines must be considered in the context of the Fund's overall financial condition, which has been improving. Unfunded vested benefits have declined since 1993 and annual contributions are in excess of the amount required to meet the minimum funding standard. Furthermore, the Fund's assets have increased by nearly 70 percent during the 1986–1995 period. Those conditions militate against a finding of substantial damage to the contribution base.

Nevertheless, the facts presented do not demonstrate that the Fund has suffered no substantial damage to its contributions base as a result of employer cessations. Accordingly, the PBGC declines to find either substantial damage or no substantial damage, under ERISA sections 4203(d)(4) or (d)(5), respectively. The effect of this decision is that the bond or escrow furnished by Kane shall remain in place until the expiration of the 60-month period described in section 4203(d)(4), unless and until the PBGC should hereafter be requested to and make a finding of either substantial damage or no substantial damage as a result of Kane's cessation considered together with other employer cessations.

Issued at Washington, D.C., on this 30th day of December, 1997.

David M. Strauss,

Executive Director.

[FR Doc. 98–536 Filed 1–8–98; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review, Comment Request

Extension: Notice of Exempt Preliminary Roll-Up Communication, SEC File No. 270–396; OMB Control No. 3235–0452.

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request for extension of the previously approved collection of information discussed below.

A Notice of Exempt Preliminary Roll-Up Communication is required to be filed by a person making such a communication by Exchange Act Rules 14a–2(b)(4) and 14a–6(a). The Notice results in an estimated total annual reporting burden of 1 hour.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange commission, 450 Fifth Street, NW, Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 5, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–540 Filed 1–8–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22991; 812–10542]

Advantus Capital Management, Inc. et al.; Notice of Application

January 5, 1998.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act; and from certain disclosure requirements set forth in item 22 of Schedule 14A under the Securities Exchange Act of 1934 (the ''Exchange Act''); item 2, 5(b)(iii), and 16(a)(iii) of Form N–1A; item 3 of Form N–14; item 48 of Form N–SAR; and sections 6–07(2) (a), (b), and (c) of Regulation S–X.

Summary of Application

The order would permit applicants to enter into and materially amend investment management agreements with subadvisers without obtaining shareholder approval, and grant relief from certain disclosure requirements regarding advisory fees paid to the subadvisers.

Applicants

Advantus Series Fund, Inc. (the ''Fund'') (formerly MIMLIC Series Fund, Inc.) and Advantus Capital Management, Inc. (the ''Adviser'').

Filing Dates

The application was filed on March 5, 1997, and amended on August 22, 1997, and December 30, 1997.

Hearing or Notification of Hearing

An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 26, 1998, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 400 Robert Street North, St. Paul, MN 55101–2098.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenless, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. (202) 942–8090).

Applicants' Representations

1. The Fund is organized as a Minnesota corporation and is registered under the Act as an open-end management investment company. The Fund is comprised of twenty series (the ''Portfolios''), each of which has its own investment objectives and policies.[1] Shares of the Fund are sold only to insurance companies and their separate accounts. The Fund currently serves as the underlying investment medium for sums invested in variable annuity and variable life contracts (collectively, ''variable contracts'') issued by the Minnesota Mutual Life Insurance Company (''Minnesota Mutual''). Shares of the Portfolios are sold without sales charges or asset-based distribution charges.

2. The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940. The Adviser serves as investment adviser to the Fund pursuant to an advisory agreement between the Adviser and the Fund (the ''Advisory Agreement'').

3. Under the terms of the Advisory Agreement, the Adviser administers the business and affairs of the Fund. For all Portfolios, the Adviser furnishes the Fund, at its own expense, office space and all necessary office facilities, equipment, and personnel for servicing the investments of the Fund. The Adviser maintains all records necessary in the operation of the Fund, including records pertaining to its shareholders and investments. Each Portfolio pays the Adviser a fee for its services equal to a percentage of average daily net assets.

4. Currently, the Adviser manages certain of the Portfolios directly, and engages subadvisers (''Managers'') to manage certain of the Portfolios. Management of those Portfolios is provided by one Manager. In the future, the Adviser may allocate portions of a Portfolio's assets among multiple specialist Managers with dissimilar investment styles and security selection disciplines. The Adviser recommends selection of Managers to the Fund's board of directors (the ''Board'') based on the continuing quantitative and qualitative evaluation of their skills and proven abilities to manage assets pursuant to a specific investment style. When it employs one or more Managers to manage the investment and reinvestment of all or a portion of the assets of a Portfolio (the ''Manager of Managers Strategy''), the Adviser monitors the compliance of each Manager with the investment objectives and related policies of each Portfolio, reviews the performance of each Manager and reports periodically on performance to the Board, and recommends to the Board that the Fund terminate a particular Manager when deemed in the best interests of a Portfolio. Each Manager performs services pursuant to a written agreement (the ''Portfolio Management Agreement''). Managers' fees are paid by the Adviser out of its fees from the Portfolios at rates negotiated with the Managers by the Adviser.

5. Applicants request an exemption from section 15(a) of the Act and rule 18f–2 under the Act to permit the Fund and the Adviser to enter into and materially amend Portfolio Management Agreements without obtaining shareholder approval (*i.e.*, approval of the variable contract owners). For each Portfolio, applicants also request relief from certain disclosure requirements under the Act to disclose the following (both as a dollar amount and as a percentage of a Portfolio's net assets) (''Limited Fee Disclosure''): (a) Aggregate fees paid to the Adviser and any Manager that is an ''affiliated person'' (as defined in section 2(a)(3) of the Act) of either the Fund or the Adviser other than by reason of serving as a Manager to one or more of the Portfolios (an ''Affiliated Manager''); and (b) aggregate fees paid to Managers other than Affiliated Managers.

[1] Applicants also request relief with respect to: (a) any series of the Fund organized in the future; and (b) all subsequently registered open-end management investment companies that in the future: (i) serve as funding vehicles for variable annuity or variable life insurance contracts of Minnesota Mutual; (ii) are advised by the Adviser, or any entity controlling, controlled by, or under common control with, the Adviser; (iii) use a multi-manager structure as described in the application; and (iv) comply with the conditions to the requested order (''Future Companies'').

Applicants' Legal Analysis

1. Section 15(a) of the Act makes it unlawful for any person to act as investment adviser to a registered investment company except pursuant to a written contract that has been approved by a majority of the investment company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Items 2, 5(b)(iii), and 16(a)(iii) of Form N–1A require the Fund to disclose in its prospectus the investment adviser's compensation. Rule 20a–1 under the Act requires the disclosure of information in accordance with Schedule 14A under the Exchange Act. Items 22(a)(3)(iv), 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8), and 22(c)(9) of Schedule 14A, taken together, require that proxy statements for a shareholder meeting at which action is to be taken on an advisory contract, or that would establish new or higher advisory fees or expenses, disclose information regarding advisory fee rates and amounts. Item 48 of Form N–SAR provides that the Fund must disclose the rate schedule for advisory fees paid to its advisers, including the Managers. Sections 6–07(2) (a), (b), and (c) of Regulation S–X require that the Fund's financial statements contain information concerning fees paid to investment advisers, which could be interpreted to require disclosure of fees paid to the Managers. Item 3 of Form N–14, the prescribed registration form for business combinations involving open-end management investment companies, requires a fee table that shows current fees for the registrant and the company being acquired (and pro forma fees, if different).

3. Applicants state that the Fund's structure will be different from that of traditional investment companies. For the Portfolios that the Adviser does not manage directly, the Fund will employ the Manager of Managers Strategy. Applicants state that a Portfolio employing multiple Managers would give variable contract owners the opportunity to have their pooled assets divided among a group of Managers which the Adviser, based on its own analyses and experience, has determined is likely to make specific portfolio securities selections which will achieve the desired and defined objectives of the Portfolio. Applicants assert that variable contract owners also would obtain the Adviser's constant supervision of these Managers, so that the proportion of their assets subject to particular Manager styles can be reallocated (or new Managers introduced) in response to changing market conditions or Manager performance.

4. Applicants submit that investors in a Portfolio are, in effect, electing to have the Adviser manage the investment and reinvestment of a Portfolio's assets or select one or more Managers best suited to achieve that Portfolio's investment objectives. Part of that investor's investment decision, applicants argue, is a decision to have the selection of Managers made by a professional management organization, such as the Adviser, with substantial experience in making such evaluations and selections. Applicants state that Managers are concerned only with selection of portfolio investments in accordance with a Portfolio's investment objectives and policies, and do not have broader supervisory, management, or administrative responsibilities with respect to a Portfolio or the Fund. Thus, applicants believe that the role of the Managers, from the perspective of the investor, is comparable to that of the individual portfolio managers employed by other investment company advisory firms.

5. The Fund's prospectus and statement of additional information will include all required information concerning each Manager, except as modified by the proposed Limited Fee Disclosure. If a new Manager is retained, the Fund will furnish variable contract owners, within 60 days, all the information that would have been provided in a proxy statement, provided that information regarding fees would be modified by the proposed Limited Fee Disclosure.

6. Applicants contend that requiring shareholder approval of Portfolio Management Agreements places costs and burdens on the Fund and its shareholders that do not advance shareholder interests. Applicants additionally assert that variable contract owners are adequately protected by their voting rights concerning the Investment Advisory Agreement between the Fund and the Adviser, as well as by the responsibilities borne by the Adviser and the Board with respect to the Managers and the Portfolio Management Agreements.

7. Applicants note that the investment advisory fees paid to the Adviser will be disclosed in the Fund's prospectus and statement of additional information. Applicants contend that each investor will, therefore, be able to determine whether its cost for investment advisory services, including the selection and supervision of Managers (and the reallocation of assets among multiple Managers from time to time, if and where applicable), is competitive with the services and costs which the investor could obtain elsewhere. Applicants note that some Managers use a ''posted'' rate schedule to set their fees, particularly at lower asset levels. Based upon the Adviser's extensive experience in dealing with Managers and upon the Adviser's discussions with prospective Managers, applicants believe that some organizations will be unwilling to serve as Managers at any fee rate other than their ''posted'' fee rates, unless the rates negotiated for the Portfolios are not publicly disclosed. Applicants believe that forcing disclosure of Managers' fees would therefore tend to deprive the Adviser of its bargaining power while producing no benefit to variable contract owners, since the fees they pay would not be affected.

8. Section 6(c) of the Act provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants submit that the requested relief meets this standard.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. The Fund will disclose in its registration statement the Limited Fee Disclosure.

2. The Adviser will not enter into a Portfolio Management Agreement with an Affiliated Manger without that agreement, including the compensation to be paid thereunder, being approved by the variable contract owners with assets allocated to any subaccount of a separate account for which the applicable Portfolio serves as a funding medium.

3. At all times, a majority of the Board will continue to be persons each of whom is not an ''interested person'' of the Fund as defined in Section 2(a)(19) of the Act (''Independent Directors''), and the nomination of new or additional Independent Directors will continue to be at the discretion of the then existing Independent Directors.

4. Independent counsel knowledgeable about the Act and the duties of Independent Directors will be engaged to represent the Independent Directors of the Fund. The selection of such counsel will be within the discretion of the Independent Directors.

5. The Adviser will provide the Board, no less frequently than quarterly, information about the Adviser's profitability on a per-Portfolio basis. Such information will reflect the impact on profitability of the hiring or termination of any Manager during the applicable quarter.

6. Whenever a Manager is hired or terminated, the Adviser will provide the board information showing the expected impact on the Adviser's profitability.

7. When a Manager change is proposed for a Portfolio with an Affiliated Manager, the Fund's directors, including a majority of the Independent Directors, will make a separate finding, reflected in the Fund's board minutes, that the change is in the best interests of the Portfolio and variable contract owners with assets allocated to any sub-account of a separate account for which a Portfolio serves as a funding medium and does not involve a conflict of interest from which the Adviser or the Affiliated Manger derives an inappropriate advantage.

8. Before a Portfolio may rely on the order requested hereby, the operation of the Portfolio in the manner described in the application will be approved by a majority of its outstanding voting securities, as defined in the Act, pursuant to voting instructions provided by variable contract owners with assets allocated to any sub-account of a registered separate account for which a Portfolio serves as a funding medium or, in the case of a new Portfolio whose shareholders (*i.e.*, separate accounts) purchased shares on the basis of a prospectus containing the disclosure contemplated by condition 11 below, by the sole initial shareholder(s) before offering shares of that new Portfolio to variable contract owners through a separate account.

9. The Adviser will provide general management services to the Fund and its Portfolios, including overall supervisory responsibility for the general management and investment of each Portfolio's securities portfolio, and, subject to review and approval by the Board, will: (a) set the Portfolios' overall investment strategies; (b) select Managers; (c) when appropriate, allocate and reallocate a Portfolio's assets among multiple Managers; (d) monitor and evaluate the performance of Managers; and (e) ensure that the Managers comply with the Portfolio's investment objectives, policies, and restrictions.

10. Within 60 days of the hiring of any new Manager, variable contract owners with assets allocated to any registered separate account for which the Fund serves as a funding medium will be furnished all information about a new Manager or Portfolio Manager Agreement that would be included in a proxy statement, except as modified by the order to permit Limited Fee Disclosure. Such information will include Limited Fee Disclosure and any change in such disclosure caused by the addition of a new Manager. The Adviser will meet this condition by providing such variable contract owners with an information statement meeting the requirements of Regulation 14C and Schedule 14C under the Exchange Act. The information statement also will meet the requirements of Item 22 of Schedule 14A under the Exchange Act.

11. The Fund will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. In addition, the Fund will hold itself out to the public as employing the ''Manager of Managers Strategy'' described in the application. The prospectus relating to the Fund will prominently disclose that the Adviser has ultimate responsibility for the investment performance of each Portfolio employing subadvisers due to its responsibility to oversee the Managers and recommend their hiring, termination, and replacement.

12. No director or officer of the Fund or director or officer of the Adviser will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by that director or officer) any interest in a Manager, except for: (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser; or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Manager or any entity that controls, is controlled by, or is under common control with a Manager.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–537 Filed 1–8–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39505; File No. S7–24–89]

Joint Industry Plan; Solicitation of Comments and Order Approving Request To Extend Temporary Effectiveness of Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealers, Inc., the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc. and the Philadelphia Stock Exchange, Inc.

December 31, 1997.

I. Introduction

On December 30, 1997, the National Association of Securities Dealers, Inc. (''NASD''), on behalf of itself and the Boston Stock Exchange, Inc. (''BSE''), the Chicago Stock Exchange, Inc. (''CHX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') submitted to the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposal to extend the operation of a joint transaction reporting plan (''Plan'') [1] for Nasdaq/National Market (''Nasdaq/NM'') (previously referred to as Nasdaq/NMS) securities traded on an exchange on an unlisted or listed basis.[2] The proposal would extend the effectiveness of the Plan, as amended by Revised Amendment No. 9, as defined in footnote 3, through June 30, 1998.[3] The

[1] *See* Letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated December 30, 1997 (''December 1997 Extension Request''). The December 1997 Extension Request also requests the Commission continue to provide exemptive relief, previously granted in connection with the Plan on a temporary basis, from Rules 11Ac1–2 and 11Aa3–1 under the Securities Exchange Act of 1934, as amended (''Act''). 15 U.S.C. 78a *et seq.* The signatories to the Plan are the Participants for purposes of this release, however, the BSE joined the Plan as a ''limited participant'' and reports quotation information and transaction reports only in Nasdaq/NM securities listed on the BSE. Originally, the American Stock Exchange, Inc. (''Amex'') was a participant but withdrew its participation from the Plan in August 1994.

[2] Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits unlisted trading privileges (''UTP'') under certain circumstances. For example, Section 12(f), among other things, permits exchanges to trade certain securities that are traded over-the-counter (''OTC/UTP''), but only pursuant to a Commission order or rule. The present order fulfills this Section 12(f) requirement. For a more complete discussion of the Section 12(f) requirement, *see* November 1995 Extension Order, *infra* note 8.

[3] On March 18, 1996, the Commission solicited comment on a revenue sharing agreement among the Participants. *See* March 1996 Extension Order, *infra* note 8. Thereafter the Participants submitted

Continued

Commission also is extending certain exemptive relief as described below. The December 1997 Extension Request also requests that the Commission approve the Plan, as amended, on a permanent basis on or before June 30, 1998. During the six-month extension of the Plan, the Commission will determine whether to approve the proposed Plan, as amended, on a permanent basis.

II. Background

The Plan governs the collection, consolidation and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[4] The Commission approved trading pursuant to the Plan on a one-year pilot basis, with the pilot period to commence when transaction reporting pursuant to the Plan commenced. The Commission originally approved the Plan on June 26, 1990.[5] Accordingly, the pilot period commenced on July 12, 1993 and was scheduled to expire on July 12, 1994.[6] The Plan has since been in operation on an extended pilot basis.[7]

III. Description of the Plan

The Plan provides for the collection from Plan Participants and the consolidation and dissemination to vendors subscribers and others of quotation and transaction information in ''eligible securities.'' [8] The Plan contains various provisions concerning its operation, including: Implementation of the Plan; Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information; Reporting Requirements (including hours of operation); Standards and Methods of Ensuring Promptness, Accuracy and Completeness of Transaction Reports; Terms and Conditions Access; Description of Operation of Facility Contemplated by the Plan; Method and Frequency of Processor Evaluation; Written Understandings of Agreements Relating to Interpretation of, or Participation in, the Plan; Calculation of the Best Bid and Offer (''BBO''); Dispute Resolution; and Method of Determination and Imposition, and Amount of, Fees and Charges.[9]

IV. Exemptive Relief

In conjunction with the Plan, on a temporary basis scheduled to expire on December 31, 1997, the Commission granted an exemption to vendors from Rule 11Ac1–2 under the Act regarding the calculation of the BBO [10] and granted the BSE an exemption from the provision of Rule 11Aa3–1 under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. As discussed further below in the *Summary of Comments,* the Participants request in the December 1997 Extension Request that the Commission grant an extension of the exemptive relief described above to vendors until the BBO calculation issue is resolved. Additionally, in the December 1997 Extension Request, the Participants also request that the Commission grant an extension of the exemptive relief described above to the BSE for as long as the BSE is a Limited Participant under the Plan.

V. Summary of Comments

In the June 1997 Extension Order, the Commission requested comment on the following issues: whether the BBO calculation for securities traded pursuant to the Plan should be based on a price/time/size methodology or a price/size/time methodology; whether there is a need for an intermarket linkage for order routing and execution; and whether there is a need for a trade through rule. With respect to the BBO calculation issue, the Nasdaq Board approved a recommendation to modify the methodology for calculating the BBO on Nasdaq in order to prioritize quotes based on a price/size/time algorithm instead of the current price/time/size algorithm, provided that Nasdaq market makers are subject to a minimum quote size requirement of 100 shares for at least 1,000 Nasdaq securities. In furtherance of this goal, on October 29, 1997, the Commission approved an NASD proposal to extend and expand the ''Actual Size Rule'' [11] to a total of 150 securities from 100 securities.[12] In addition, the NASD has submitted a proposed rule change to establish an integrated order delivery and execution system for directed orders and non-directed orders.[13]

With respect to the intermarket linkage issue, the Nasdaq Board approved a recommendation to provide specialists on an exchange trading Nasdaq securities on a UTP basis access to SOES, or its successor system, to the same extent that registered Nasdaq market makers have access to SOES, provided that: Nasdaq market makers are afforded virtually identical access to the automated execution system operated by such UTP exchange and the

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certain technical revisions to the revenue sharing agreement (''Revised Amendment No. 9''). *See* Letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated September 13, 1996. *See also* September 1996 Extension Order, *infra* note 8.

[4] *See* Section 12(f)(2) of the Act.

[5] *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (''1990 Plan Approval Order'').

[6] *See* letter from David T. Rusoff, Foley & Lardner, to Betsy Prout, Division of Market Regulation (''Division''), SEC, dated May 9, 1994.

[7] *See* Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); Securities Exchange Act Release No. 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); Securities Exchange Act Release No. 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); Securities Exchange Act Release No. 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); Securities Exchange Act Release No. 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); Securities Exchange Act Release No. 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) (''November 1995 Extension Order''); Securities Exchange Act Release No. 36589 (December 13, 1995), 60 65696 (December 20); Securities Exchange Act Release No. 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); Securities Exchange Act Release No. 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); Securities Exchange Act Release No. 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996 (''March 18, 1996 Extension Order''); Securities Exchange Act Release No. 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996) (''September 1996 Extension order''); Securities Exchange Act Release No. 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); Securities Exchange Act Release No. 38457 (March, 31 1997), 62 FR 16880 (April 8, 1997); Securities Exchange Act Release No. 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997).

[8] The Plan defines ''eligible security'' as any Nasdaq/NM security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Act or which is listed on a national securities exchange.

[9] The full text of the Plan, as well as a ''Concept Paper'' describing the requirements of the Plan, are contained in the original filing which is available for inspection and copying in the Commission's public reference room.

[10] Rule 11Ac1–2 under the Act requires that the best bid or best offer be computed on a price/size/time algorithm in certain circumstances. Specifically, Rule 11Ac1–2 under the Act provides that ''in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or offer * * * shall be computed by ranking all such identical bids or offers * * * first by size * * * then by time.'' The exemption permits vendors to display the BBO for Nasdaq securities subject to the Plan on a price/time/size basis.

[11] *See* Securities and Exchange Act Release No. 39285 (October 29, 1997), 62 FR 59932 (November 5, 1997).

[12] *See* Securities Exchange Release No. 38513 (April 15, 1997), 62 FR 19369 (April 21, 1997). Under the Actual Size Rule, market makers in certain Nasdaq securities are subject to a minimum quotation size requirement of 100 shares instead of the applicable small order execution system (''SOES'') tier size for that security.

[13] SR–NASD–97–93, filed December 19, 1997. Directed orders are those that an order-entry firm chooses to send to a specific market maker, electronic communications network (''ECN'') or UTP exchange for delivery and execution, Non-directed orders are those that are not sent to a particular market maker or ECN. In other words, when the broker-dealer entering the order does not specify the particular market maker, ECN or UTP exchange it wants to access, the order will be sent to the next available executing participant quoting at the best price displayed in Nasdaq.

order execution algorithms of the exchange's automated execution system are virtually identical to SOES or its successor system.

In addition, in early 1998 the CHX intends to replace its existing system and begin using a system commonly known as BRASS, developed by Automated Securities Clearance, Limited (''ASC''), in order to access securities subject to the Plan. BRASS is a trade support and order routing system which offers subscribers, generally broker-dealers, software and hardware to enable them to perform various functions. ASC grants its subscribers a license to operate the BRASS software through a customized computer terminal purchased from ASC or by running the BRASS software on their own terminals. In the case of the CHX, ASC has specifically customized BRASS to meet the special needs of the CHX. Among other things, Nasdaq market makers that already subscribe to BRASS will be able to route OTC/UTP orders to specialists on the CHX floor through a SelectNet linkage with BRASS workstations on the CHX floor. Conversely, CHX specialists will be able to route orders into SelectNet through their BRASS workstations.[14] The Commission notes that ASC will be subject to the Commission's inspection and examination procedures with regards to the specific customized BRASS system that ASC will provide to the CHX because ASC will be operating a facility of an exchange.

With respect to the need for a trade through rule, the NASD continues to maintain in the December 1997 Extension Request that it would be more appropriate to address this issue once the issue of electronic access to Nasdaq market makers' quotes has been resolved. The CHX, however, believes that a trade through rule is currently necessary.[15]

The Commission continues to solicit comment regarding the BBO calculation and the trade through rule and also solicits comment on the CHX's use of the BRASS system.

VI. Discussion

The Commission finds that an extension of temporary approval of the operation of the Plan, as amended, through June 30, 1998, is appropriate and in furtherance of Section 11A of the Act. The Commission believes that such extension will provide the Participants with additional time to seek Commission approval of pending proposals concerning the BBO calculation [16] and to begin to make reasonable proposals concerning a trade through rule to facilitate the trading of OTC securities pursuant to UTP. While the Commission continues to solicit comment on these matters, the Commission believes that these matters should be addressed directly by the Participants on or before March 31, 1998 so that the Commission may have ample time to determine whether to approve the Plan on a permanent basis by June 30, 1998.

The Commission also finds that it is appropriate to extend the exemptive relief from Rule 11Ac1–2 under the Act until the earlier of June 30, 1998 or until such time as the calculation methodology for the BBO is based on a price/size/time algorithm pursuant to a mutual agreement among the Participants approved by the Commission. The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Aa3–1 under the Act, that requires transaction reporting plans to include market identifiers for transaction reports and last sale data, to the BSE through June 30, 1998. The Commission believes that the extensions of the exemptive relief provided to vendors and the BSE, respectively, are consistent with the Act, the Rules thereunder, and specifically with the objectives set forth in Sections 12(f) and 11A of the Act and in Rules 11Aa3–1 and11Aa3–2 thereunder.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission and all written communications relating to the proposed plan amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. All submissions should refer to File No. S7–24–89 and should be submitted by January 30, 1998.

VIII. Conclusion

It is therefore ordered, pursuant to Sections 12(f) and 11A of the Act and paragraph (c)(2) of Rule 11Aa3–2 thereunder, that the Participants' request to extend the effectiveness of the Joint Transaction Reporting Plan, as amended, for Nasdaq/National Market securities traded on an exchange on an unlisted or listed basis through June 30, 1998, and certain exemptive relief until June 30, 1998, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–497 Filed 1–8–98; 8:45 am]

BILLING CODE 8010–01–M

[14] *See* December 1997 Extension Request and Letter from George T. Simon, Foley & Lardner to Howard L. Kramer, Senior Associate Director, Division, SEC, dated December 12, 1997 (''CHX Letter'').

[15] *See* CHX Letter *id.*

[16] *See e.g.,* SR–NASD–97–93, *supra* note 12.

[17] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34–39512; File No. SR–CHX–97–34]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to the Trading of Nasdaq/NM Securities on the CHX

December 31, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 11, 1997, the Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organizations Statement of the Terms of Substance of the Proposed Rule Change

The Exchange requests a three month extension of the pilot program relating to the trading of Nasdaq/NM securities on the Exchange that is currently due to expire at the end of December, 1997. Specifically, the pilot program amended Article XX, Rule 37 and Article XX, Rule 43 of the Exchange's Rules and the Exchange proposes that the amendments remain in effect on a pilot basis through March 31, 1998.

[1] 15 U.S.C. § 78s(b)(1).

II. Self-regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and statutory basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 4, 1987, the Commission approved certain CHX rules and procedures relating to the trading of Nasdaq/NM securities on the CHX.[2] Among other things, these rules made the Exchange's Article XX, Rule 37(a) (''BEST Rule'') applicable to Nasdaq/NM securities and made Nasdaq/NM securities eligible for the automatic execution feature of the Exchange's Midwest Automated Execution System (''MAX system'').[3]

On January 3, 1997, the Commission approved,[4] on a one year pilot basis, a program that eliminated the requirement that CHX specialists automatically execute orders in Nasdaq/NM securities when the specialist is not quoting at the national best bid or best offer (''NBBO'').[5]

Under the pilot program, specialists must continue to accept agency [6] market orders or marketable limit orders in Nasdaq/NM securities, but only for orders of 100 to 1,000 shares rather than the 2,099 share limit previously in place.[7] Specialists, however, must accept all agency limit orders in Nasdaq/NM securities from 100 up to and including 10,000 shares for placement in the limit order book. As described below, however, specialists are required to automatically execute Nasdaq/NM orders only if they are quoting at the NBBO when the order was received.

The current pilot program requires the specialist to set the MAX auto-execution threshold at 1,000 shares or greater for Nasdaq/NM securities. Orders for a number of shares less than or equal to the auto-execution threshold will be automatically executed (in an amount up to the size of the specialist's quote) if the CHX specialist is quoting at the NBBO. Orders in securities quoted with a spread greater than the minimum variation are executed automatically after a fifteen second delay from the time the order is entered into MAX. The size of the specialist's bid or offer is then automatically decremented by the size of the execution. When the specialist's quote is exhausted, the system will generate an autoquote at an increment away from the NBBO,[8] as determined by the specialist from time to time, for either 100 or 1,000 shares, depending on the Nasdaq/NM security.[9]

When the specialist is not quoting a Nasdaq/NM security at the NBBO, it can elect, on an order-by-order basis, to manually execute orders in that security. If the specialist does not elect manual execution, market and marketable limit orders in that security that are of a size equal to or less than the auto-execution threshold will automatically be executed at the NBBO in MAX after a twenty second delay.[10]

Under the current pilot program, if the specialist elects manual execution, the specialist must either manually execute the order at the NBBO price or better, or act as an agent for the order in seeking to obtain the best available price for the order on a marketplace other than the Exchange. If the specialist decides to act as agent for the order, the current pilot requires the specialist to use order-routing systems to obtain an execution where appropriate. Market and marketable limit orders that are for a number of shares greater than the auto-execution threshold (''oversized'') are not subject to these requirements, and may be canceled within three minutes of being entered into MAX or designated as an open order.[11]

When the Commission approved the current program on a pilot basis, the Commission requested that, prior to requesting permanent approval, the Exchange submit a report to the Commission describing the Exchange's experience with the program. The Commission stated that the report should include at least six months worth of trading data. Due to programming issues, the pilot program was not implemented until April, 1997, and, consequently, six months of trading data did not become available until November, 1997. As a result, the Exchange is still processing the data necessary to compile the requested report. The Exchange believes that the data and report will be ready for submission to the Commission no later than January 31, 1998. In order to give the Commission adequate time to review the report prior to approving the pilot on a permanent basis, the Exchange is requesting the pilot be extended until March 31, 1998. The Exchange expects to submit a request for permanent approval simultaneously with the submission of the report to the Commission.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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[2] *See* Securities Exchange Act Release No. 24424 (May 4, 1987), 52 FR 17868 (May 12, 1987) (order approving File No. SR–MSR–87–2). *See also* Securities Exchange Act Release Nos. 28146 (June 26, 1990) (order expanding the number of eligible Nasdaq/NM securities to 100); and 36102 (August 14, 1995) (order expanding the number of eligible Nasdaq/NM securities to 500).

[3] The MAX system may be used to provide an automated delivery and execution facility for orders that are eligible for execution under the Exchange's BEST Rule and certain other orders. *See* CHX, Article XX, Rule 37(b). A MAX order that fits under the BEST parameters is executed pursuant to the BEST Rule via the MAX system. If an order is outside the BEST parameters, the BEST Rule does not apply, but MAX system handling rules do apply.

[4] *See* Securities Exchange Act Release No. 38119.

[5] The NBBO is the best bid or offer disseminated pursuant to SEC Rule 11Ac1–1.

[6] The term ''agency order'' means an order for the account of a customer, but shall not include professional orders as defined in CHX, Article XXX, Rule 2, interpretation and policy .04. A ''professional order'' is defined as any order for the account of a broker-dealer, the account of an associated person of a broker-dealer, or any account in which a broker-dealer or an associated person of a broker-dealer has any direct or indirect interest.

[7] The 100 to 2,099 share auto-acceptance threshold previously in place continues to apply to Dually Listed securities (those issues that are traded on the CHX and are listed on either the New York Stock Exchange or American Stock Exchange).

[8] Such increment is determined by the specialist from time to time. *See* Securities Exchange Act Release No. 38989 (August 28, 1977).

[9] Specifically, the autoquote will be for one normal unit of trading (usually 100 shares) in Nasdaq/NM securities that became subject to mandatory compliance with SEC Rule 11Ac1–4 on to January 20, 1997, and for 1,000 shares in other issues.

[10] The twenty second delay is designed, in part, to provide an opportunity for the order to receive price improvement from the specialist's displayed quote.

[11] If an oversized market or limit order is received by the specialist, he either rejects the order immediately or displays it. If the order is displayed, the specialist checks with the order entry broker to determine the validity of the oversized order. During the three minute period, the specialist can cancel the order and return it to the order entry firm, but until it is canceled the displayed order is eligible for execution. The Exchange has proposed to reduce the acceptance time frame from three minutes to one minute for oversized orders. *See* File No. SR–CHX–97–32.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose a burden on competition.

C. Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received from Members, Participants or Others

No comments were solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing also will be available for inspection and copying at the Exchange. All submissions should refer to file number SR–CHX–97–34 and should be submitted by January 30, 1998.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the Exchange's proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[12] which requires that an exchange have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also believes that the proposal is consistent with Section 11A(1)(D) and 11A(a)(1)(C) of the Act.

The CHX rules establish execution procedures and guarantees that attempt to provide an execution reflective of the best quotes among OTC market makers and specialists in Nasdaq/NM securities without subjecting CHX specialists to execution guarantees that are substantially greater than those imposed on their competitors. The Commission believes the pilot to not require automatic execution for Nasdaq/NM securities when the specialist is not quoting at the NBBO, and to allow the specialist to execute the order as agent, is intended to conform CHX specialist obligations to those applicable to OTC market makers in Nasdaq/NM securities, while recognizing that the CHX provides a separate, competitive market for Nasdaq/NM securities. The Commission finds that the pilot should continue until March 31, 1998, to provide the Commission adequate time to assess the requisite data from the Exchange and determine if approval on a permanent basis is warranted. In addition, the Commission is extending, until March 27, 1998, the pilot permitting CHX specialists to maintain a minimum quotation size of 100 shares for fifty Nasdaq/NM securities.[13] The Commission believes that extending these pilots preserves conformity between that which is required of a CHX specialists in a Nasdaq/NM security and that which is required of a Nasdaq market maker in the same security.

The Commission therefore finds good cause for approving the proposed rule change (SR–CHX–97–34) prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

It is therefore ordered, pursuant to Section 19(b)(2),[14] that the proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–538 Filed 1–8–98; 8:45 am]

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[12] 15 U.S.C. 78f(b)(5).

[13] *See* Securities Exchange Act Release No. 38156 (January 10, 1998), 62 FR 2415 (January 16, 1997), order approving reduction in the minimum quotation size for Nasdaq market makers in fifty Nasdaq/NM securities. A list of the 50 Nasdaq/NM securities is located on the Nasdaq website (www.nasdaq.com).

[14] 15 U.S.C. § 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39502; File No. SR–MSRB–97–13]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board To Revise the Effective Date of the Revised Study Outline for the Board's Municipal Securities Principal Qualification Examination (Test Series 53)

December 30, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. § 78s(b)(1), notice is hereby given that on December 18, 1997, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change (File No. SR–MSRB–97–13). The proposed rule change is described in Items, I, II, and III below, which Items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing herewith a proposed rule change to delay the effective date of the revised study outline for the Board's Municipal Securities Principal Qualification Examination (Test Series 53). The effective date of the revised study outline is being changed from January 1, 1998, to March 1, 1998.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The texts of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On October 16, 1997, the Board filed with the Commission a proposed rule

change (File No. SR–MSRB–97–7) to revise the study outline for the Municipal Securities Principal Qualification Examination (Test Series 53). The Board requested that the Commission delay the effectiveness of the revised study outline until January 1, 1998, in order to provide time to modify the examination to reflect the changes and for information concerning the revised outline to be distributed to the industry. The Commission approved the proposed rule change on November 12, 1997.[1]

It has come to the Board's attention that the revised Series 53 examination cannot be implemented by January 1, 1998. The Board has determined to delay implementation of the revised Series 53 examination until March 1, 1998, in order to provide adequate time for the network of Sylvan Technology Centers to prepare for administration of the examination.[2] This additional time will allow the Sylvan Technology Centers to ensure that procedures for the implementation of the revised Series 53 examination are in place, including an adequate supply of exhibit books for the examination in each testing location.

It is the Board's responsibility under Section 15B(b)(2)(A) of the Act to propose and adopt rules which:

> Provide that no municipal securities broker or municipal securities dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal security unless * * * such municipal securities broker or municipal securities dealer and every natural person associated with such municipal securities broker or municipal securities dealer meets such standards of training, experience, competence, and such other qualifications as the Board finds necessary or appropriate in the public interest or for the protection of investors.

Section 15B(b)(2)(A) of the Act also provides that the Board may appropriately classify municipal securities brokers and municipal securities dealers and their associated personnel and require persons in any such class to pass tests prescribed by the Board.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Board has designated this proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Board under Section 19(b)(3)(A) of the Act, which renders the proposed rule change effective upon receipt of this filing by the Commission. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and agruments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–97–13 and should be submitted by January 30, 1998.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–496 Filed 1–8–98; 8:45 am]

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[1] Securities Exchange Act Release No. 39320 (Nov. 12, 1997), 62 FR 61857 (Nov. 19, 1997).

[2] The Board has agreements with the National Association of Securities Dealers, Inc. to administer the Board's examinations. In 1996, NASD Regulation, Inc. contracted with Sylvan Learning Systems, Inc. to administer testing and continuing education to the securities industry.

[3] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39516; File No. SR–NASD–97–21]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Registration Category, Study Outline and Specifications for Series 55 Examination, Equity Trader

January 2, 1998.

I. Introduction

On March 26, 1997, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a new registration category, Equity Trader, and a new examination, Series 55.

The proposed rule change and Amendment No. 1[3] were published for comment in the **Federal Register** on April 28, 1997.[4] One comment was received on the proposal.[5] This order approves the proposal, as amended.

II. Description of the Proposal

The NASD proposes to adopt NASD Rule 1032(f)(1), which will require each registered representative who engages in proprietary or agency trades of equities, preferred securities or convertible debt securities, or who directly supervises such activities, to register as a limited representative-equity trader. In order to register as a limited representative-equity trader, the representative must be registered as a general securities representative or as a limited

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Craig L. Landauer, Associate General Counsel, NASD Regulation, to Yvonne Fraticelli, Esq., Division of Market Regulation, Commission, dated April 11, 1997 (''Amendment No. 1''). In Amendment No. 1, the Association clarified that registered representatives who have been ''grandfathered'' from taking the General Securities Representative (Series 7) or Limited Representative-Corporate Securities Examination (Series 62) will not be required to take either examination in order to qualify to take the Limited Representative-Equity Trader Examination (Series 55).

[4] *See* Securities Exchange Act Release No. 38534 (April 21, 1997), 62 FR 22984.

[5] *See* Letter from Dennis Marino, Chairman, and John N. Tognino, President, Security Traders Association (''STA''), to Jonathan G. Katz, Secretary, Commission, dated June 2, 1997. In its letter, the STA supported the proposed Series 55 examination, noting that ''[e]ntry qualifications and testing are the foundation for building investor confidence in the securities market.''

representative-corporate securities, and must pass the Series 55 examination.[6] The proposed rule contains an exemption for representatives whose principal trading activities involve executing orders on behalf of an affiliated investment company which is registered with the Commission under the Investment Company Act of 1940. The Association believes the exemption is appropriate because such traders generally are in the same position as buy-side professionals employed by investment companies, who would not be subject to the examination requirement.

The proposal provides that presently registered representatives who file an application to take the Series 55 within 30 days of the effective date of the rule must pass the Series 55 examination within two years of the effective date of the rule. A currently registered representative who fails to file an application to take the Series 55 within 30 days of the effective date of the rule must pass the Series 55 examination before conducting the activities described in NASD Rule 1032(f)(1). The Association believes that the two-year time period will provide representatives with sufficient time to study and to pass the Series 55 examination. The Series 55 examination will consist of 90 questions, and candidates will have three hours to complete the examination. The passing score for the examination will be 70%.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[7] Specifically, the Commission believes the proposal is consistent with the requirements of Sections 15(b)(7),[8] 15A(b)(6),[9] and 15A(g)(3),[10] of the Act. Section 15(b)(7)[11] states that a registered broker or dealer may not effect any transaction, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and all those associated with such broker or dealer meet certain standards of training, experience, competence, and such other qualifications as the Commission finds appropriate in the public interest or for the protection of investors. Section 15A(b)(6)[12] requires, in relevant part, that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts as practices, to promote just and equitable principles of trade, and to protect investors and the public interests. Section 15A(g)(3)[13] provide that a registered national securities association may deny membership to, or condition the membership of, a registered broker or dealer if such broker or dealer does not meet the requisite standards of knowledge and competence.

The Commission believes that the Series 55 examination will help to ensure that registered representatives required to take the examination have adequate knowledge of current NASD rules and of the Act. The Commission recognizes the importance to investors of the NASD's efforts to ensure that registered persons have an appropriate level of knowledge and expertise regarding applicable laws and regulations. By helping to establish this level of knowledge, the Commission believes that the Series 55 examination will help registered representatives carry out their responsibilities under the federal securities laws.

The Commission believes that the proposed examination focuses on relevant subject matter in view of changes in applicable laws, rules, regulations and industry practices. The Commission further believes that the topics covered by the Series 55 examination are appropriate and include a reasonably broad range of subject matter. Finally, the Commission believes that the two-year time period provided for currently registered representatives to pass the examination is reasonable and should provide currently registered representatives with sufficient time to prepare for the examination.[14]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–NASD–97–21), including Amendment No. 1, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–539 Filed 1–8–98; 8:45 am]

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[6] Representatives who have been ''grandfathered'' from taking the Series 7 or the Series 62 will not be required to take either examination in order to take the Series 55. *See* Amendment No. 1, *supra* note 3.

[7] In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78o(b)(7).

[9] 15 U.S.C. 78o–3(b)(6).

[10] 15 U.S.C. 78o–3(g)(3).

[11] 15 U.S.C. 78o(b)(7).

[12] 15 U.S.C. 78o–3(b)(6).

[13] 15 U.S.C. 78o–3(g)(3).

[14] As noted above, registered persons who file an application to take the Series 55 examination within thirty days after the effective date of the rule must pass the Series 55 within two years of the effective date of the rule.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39503; File No. SR–OCC–97–19]

Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Establishment of a Service Providing Theoretical Profit and Loss Values for Use in Calculating Net Capital Requirements for Listed Options and Related Positions and Relating to Fees and Charges Associated With the New Service

December 31, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 29, 1997, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–OCC–97–19) as described in Items I and II below, which items have been primarily prepared by OCC. The commission is publishing this notice and order to solicit comments from interested parties and to grant accelerated approval of the proposal.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will allow OCC to provide to its clearing members and to broker-dealers that are not OCC clearing members a new service which will provide theoretical profit and loss values for broker-dealers' use in calculating their net capital requirements under the Commission's uniform net capital rule[2] for listed options and related positions. OCC also is proposing to amend its schedule of fees to include fees for the new service.[3]

[1] 15 U.S.C. 78s (b)(1)

[2] Rule 15c3–1, 17 CFR 240.15c3–1.

[3] OCC's proposed schedule of fees for the new service is attached to this release as Exhibit 1.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and the basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements have been examined at the places specified in Item IV below. OCC has prepared summaries, as set forth in sections A, B, and C below, of the most significant aspects of these statements.[4]

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

On February 6, 1997, the Commission adopted amendments to its uniform net capital rule.[5] The amendments allow broker-dealers to use theoretical options pricing models to determine net capital requirements for listed options and related positions.

In the release adopting the amendments (''Adopting Release''),[6] the Commission discusses a pilot program that it had sponsored to evaluate a risk-based haircut system. OCC and the Chicago Board Options Exchange, Incorporated (''CBOE'') had been invited by the Commission's Division of Market Regulation (''Division'') to participate in the pilot program. In connection with the pilot program and with the concurrence of the Division, OCC developed the software and carried out the operations to calculate risk-based haircuts. Under the Commission's release proposing the amendments[7] and under the Division's no-action letter[8] regarding risk-based haircuts, broker-dealers in the pilot were required to use OCC's theoretical intermarket margining system to determine theoretical option prices.

OCC believes that the pilot program confirmed the theory that a risk-based haircut system reflects the risk inherent in options positions more accurately than systems used previously and that it significantly reduces haircuts for accounts having primarily hedged positions. In the Adopting Release, the Commission recognizes the pilot program's findings and allows all broker-dealers to employ theoretical option pricing models in determining net capital requirements for listed options and related positions. In addition, the Adopting Release states that OCC's theoretical options pricing methodology is deemed to be an approved model for calculating haircuts under the net capital rule for a period of two years from the effective date of the amendments to the net capital rule adopted in the Release.[9]

During both the pilot program and the period after effectiveness of the amendments to the uniform net capital rule, OCC has provided the theoretical profit and loss values free of charge to broker-dealers using its service. Beginning January 1, 1998, OCC intends to begin charging OCC clearing members for theoretical profit and loss values. OCC also will provide theoretical profit and loss values to broker-dealers that are not clearing members and will use the same fee structure. The proposed fee structure is based on the ongoing operational costs that OCC will incur to provide the service to broker-dealers regardless of whether they are OCC clearing members. The fee structure for OCC's theoretical profit and loss value service is attached as Exhibit 1.

Operationally, OCC will provide theoretical profit and loss values to broker-dealers through two means: (1) By computer interface or (2) by dial-up access through OCC's theoretical information online system (''TIO''). Broker-dealers that choose to receive data by computer interface will be required to receive each day a full file containing theoretical values for each class group.[10] Broker-dealers that choose to receive data by TIO will be able to receive partial theoretical information.

OCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[11] because it simplifies the net capital treatment of options and more accurately reflects the risk inherent in broker-dealer option position. OCC also believes that the proposed rule change allocates fees in an equitable manner.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Section 17A(b)(3)(F) of the Act[12] requires that the rules of a clearing agency be designed to remove impediments to and perfect the mechanism of a national system for prompt and accurate clearance and settlement of securities transactions. The Commission believes that the proposed rule change is consistent with OCC's obligations under Section 17A(b)(3)(F) because the use of OCC's theoretical profit and loss values should increase the accuracy of the valuation of broker-dealer option positions. This increased accuracy should allow OCC's clearing members and other broker-dealers using the service to improve their operations and therefore to improve the mechanism of the national clearance and settlement system.

In addition, Section 17A(b)(3)(D) of the Act[13] requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. The Commission believes that the proposed rule change is consistent with OCC'S obligations under Section 17A(b)(3)(D) because the fees for the theoretical profit and loss value services are applied equally to all broker-dealers using the service whether or not they are OCC clearing members.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the publication of notice of the filing. Approving the proposed rule change prior to the thirtieth day after publication of notice will allow OCC to continue to offer its theoretical profit and loss value service without interruption. This is important because currently OCC's model is the only approved theoretical options pricing model.

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[4] The Commission has modified the text of the summaries prepared by OCC.

[5] Securities Exchange Act Release No. 38248 (February 6, 1997), 62 FR 6474 (February 12, 1997). The amendments adopted in the release took effect on September 1, 1997.

[6] *Id.*

[7] Securities Exchange Act Release No. 33761 (March 15, 1994), 59 FR 13275 (March 21, 1994).

[8] Letter from Brandon Becker, Division of Market Regulation, Commission, to Mary L. Bender, First Vice President, CBOE, and to Timothy Hinkas, Vice President, OCC (March 15, 1994).

[9] OCC has informed the Commission that prior to the expiration of the two year approval period it will clarify the status of its theoretical option pricing model by appropriate approval from the examining authority designated pursuant to Section 17(d) of the Act, 15 U.S.C. 78q(d).

[10] OCC has informed the Commission that a full file will contain approximately 2000-3000 class groups.

[11] 15 U.S.C. 78q–1.

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 15 U.S.C. 78q–1(b)(3)(D).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making such submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the File No. SR–OCC–97–19 and should be submitted by January 30, 1998.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–97–19) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

Exhibit 1

Theoretical profit and loss values

Computer Interface:	
Monthly fee (per broker*) ..	$2,000.00
Month-end only (per class group for all class groups in the database**) (per broker)	0.10
Dial-up access (via Theoretical Information Online System) per class group per day per broker** ($200.00 minimum and $2,000.00 maximum per month per broker)	0.10

*''Per broker'' essentially means ''per seaparte net capital calculation,'' i.e., does not mean that the charges apply to each market-maker/specialist whose positions are taken into account calculating a broker's net capital.

** Approximately 2000–3000 class groups

[FR Doc. 98–494 Filed 1–8–98; 8:45 am]

BILLING CODE 8010–01–M

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39509; File No. SR–PTC–97–05]

Self-Regulatory Organizations; Participants Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Declaring a Dividend

December 31, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 16, 1997, the Participants Trust Company (''PTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–PTC–97–05) as described in Items I, II, and III below, which Items have been prepared by PTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substances of the Proposed Rule Change

The proposed rule change declares a divided in the amount of $1.05 per share, payable on January 20, 1998, to PTC's stockholders of record as of December 31, 1997.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Set forth in sections (A), (B), and (C) below, are the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

By letter dated March 27, 1989, from the Board of Governors of the Federal Reserve System (''Board of Governors''), PTC was prohibited from paying dividends to its stockholders.[3] By letter dated June 9, 1992, the Board of Governors relieved PTC of the restriction on payment of dividends with the understanding that dividends, if declared, would be declared periodically by PTC's Board of Directors and would be paid at a rate not to exceed the 90-day United States Treasury bill rate in effect at the time the dividend is declared.[4]

The Commission approved PTC's practice of paying dividends out of net profits subject to the limitations imposed by the Board of Governors and subject to the further requirements that (i) prior to using excess income from invested principal and interest (''P&I'') to pay a dividend, PTC's Board of Directors be advised of any amount related to the investment of P&I which has not been rebated and is part of the net profits used to declare the dividend and affirmatively approve the application of such excess P&I income for the dividend and (ii) PTC file a proposed rule change pursuant to Section 19(b)(3)(A) of the Act each time it declares a dividend.[5]

PTC has paid dividends: on January 18, 1993, in the amount of $.52 per share to stockholders of record as of the close of business on December 31, 1992;[6] on January 20, 1994, in the amount $.525 per share to stockholders of record as of the close of business on December 31, 1993;[7] on January 20, 1995, in the amount of $1.00 per share to stockholders of record as of the close of business on December 31, 1994;[8] on December 29, 1995, in the amount of $.98 per share to stockholders of record as of the close of business on December 21, 1995;[9] and on January 21, 1997, in the amount of $.98 per share to stockholders as of the close of business on December 31, 1996.[10]

At its meeting on December 11, 1997, PTC's Board of Directors declared a dividend payable on January 20, 1998, in the amount of $1.05 per share to stockholders of record as of the close of business on December 31, 1997. This dividend rate does not exceed the 90-

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] Letter from William A. Wiles, Secretary of the Board, Board of Governors, to Thomas A. Williams, Milbank, Tweed, Hadley & McCloy (March 27, 1989).

[4] Letter from Jennifer J. Johnson, Associate Secretary to the Board, Board of Governors, to Leopold S. Rassnick, Vice President and General Counsel, PTC (June 9, 1992).

[5] Securities Exchange Act Release No. 31746 (January 15, 1993), 58 FR 6319 [File No. SR–PTC–92–15].

[6] *Id.*

[7] Securities Exchange Act Release No. 33487 (January 18, 1994), 59 FR 3900 [File No. SR–PTC–93–07].

[8] Securities Exchange Act Release No. 35205 (January 9, 1995), 59 FR 3444 [File No. SR–PTC–94–08].

[9] Securities Exchange Act Release No. 36790 (January 30, 1996) 61 FR 4507 [File No. SR–PTC–95–09].

[10] Securities Exchange Act Release No. 38280 (February 12, 1997) 62 FR 8072 [File No. SR–PTC–96–09].

day United States Treasury bill rate in effect on December 11, 1997.[11] The dividend does not include any excess income attributable to investments of P&I as all such P&I related income with respect to fiscal year ended December 31, 1997, will be rebated to participants on a pro rata basis based on the amount of P&I disbursements to each participant.

PTC believes that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act[12] and the rules and regulations thereunder in that it provides for the equitable allocation of reasonable fees and other charges among participants.

(B) Self Regulatory Organization's Statement on Burden on Competition

PTC does not believe that the proposed rule change will impose any burden on competition.

(C) Self Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

PTC has neither solicited nor received comments on this proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(A)(i) of the Act[13] and subparagraph (e)(1) of Rule 19b–4[14] thereunder because the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise, in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of PTC. All submissions should refer to File No. SR–PTC–97–05 and should be submitted by January 30, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–495 Filed 1–8–98; 8:45 am]

BILLING CODE 8010–01–M

[11] The 90-day United States Treasury bill rate, as published in *The Wall Street Journal* on December 11, 1997, was 5.23%

[12] 15 U.S.C. 78q–1(b)(3)(D).

[13] 15 U.S.C. 78s(b)(3)(A)(i).

[14] 17 CFR 240.19b–4(e)(1).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 159/Working Group 4A; Local Area Augmentation System (LAAS) Minimum Aviation System Performance Standards (MASPS/Minimum Operational Performance Standards (MOPS)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 159/Working Group 4A meeting to be held January 26–30, 1998, starting at 9:00 a.m. on January 26 and concluding by 12:00 noon on January 30. The meeting will be held at the ARINC Facilities, Annapolis, MD. For local arrangements, Ms. Camilla Miller may be reached at (410) 266–4102 or cjm@arinc.com.

The agenda will be as follows:

(1) Chairmen's Introductory Remarks and Introduction of Attendees; (2) Review/Approval of Minutes of Previous Meeting; (3) Review of LAAS MASPS: (a) Appendixes E.3, F, G; (b) Sections 1, 4; (c) Completeness Check of Sections 2 and 3 and Appendix E.1–E.2; (d) Finalization of MASPS Scope; (4) LAAS ICD; (5) LAAS MOPS Draft Review and Discussion; (6) LAAS Ground Subsystem Specification; (7) Other business; (8) Date, Location, and Agenda of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact Mr. Harold Moses, RTCA Program Director, at (202) 833–9339 (phone), (202) 833–9434 (fax), of http://www.rtca.org (web site). Members of the public may present a written statement to the committee at any time.

Issued in Washington, D.C., on January 5, 1998.

Janice L. Peters,

Designated Official.

[FR Doc. 98–564 Filed 1–8–98: 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–97–2625]

Qualification of Drivers; Waiver Application; Vision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The FHWA announces its decision to grant the petition of David R. Rauenhorst for a waiver of the vision requirement contained in 49 CFR 391.41(b)(10).

EFFECTIVE DATE: This decision is effective on Jnauary 9, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Zywokarte, Office of Motor Carrier Research and Standards, (202) 366–1790, or Ms. Judy Rutledge, Office of Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: David R. Rauenhorst petitioned the FHWA for a waiver of the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of commercial motor vehicles in interstate commerce. The FHWA evaluated Mr. Rauenhorst's application on its merits, as required by the decision in *Rauenhorst v. United States Department of Transportation, Federal Highway Administration,* 95 F.3d 715 (8th Cir. 1996), and made a preliminary determination that the waiver should be granted. On July 2, 1997, the agency published notice of its preliminary determination and requested comments from the public. (62 FR 35881). The

comment period closed on August 1, 1997. Four comments were received, and their contents were carefully considered by the FHWA in reaching its final decision to grant Mr. Rauenhorst's petition for a waiver of the vision requirement in 49 CFR 391.41(b)(10).

Mr. Rauenhorst's Vision and Driving Experience

The vision requirement in 49 CFR 391.41(b)(10) provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

Mr. Rauenhorst is unable to meet the vision standard because a non-driving accident in 1976 caused him to sustain a retinal detachment in his right eye. As a result, vision in his right eye is limited to finger counting, and the capability of seeing movement, colors, and gross objects. Medical reports for 1995, 1996, and 1997 indicate that Mr. Rauenhorst's eye condition is non-degenerative and that the vision in the right eye is stable. Moreover, Mr. Rauenhorst has had 20/20 corrected vision in his left eye for the last three years, and, in his doctor's opinion, can safely operate any motor vehicle.

Whether Mr. Rauenhorst can safely operate a commercial motor vehicle is the critical question in this proceeding. Under 49 U.S.C. 31136(e), the FHWA may waive application of the vision standard to Mr. Rauenhorst only if the agency determines that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles. In making that determination, the FHWA has considered not only the medical evaluation of Mr. Rauenhorst's vision but also his driving record and experience. Mr. Rauenhorst has been self-employed as a commercial truck driver since 1974. During this time, he has driven tractor-trailer combinations more than 2 million miles to transport sugar beets and bulk commodities for seed companies. In the last ten years, with his limited vision, he has driven 1 million miles without an accident. Most significantly, his driving record for the past 3 years reflects no traffic violations as well as no accidents. This driving history demonstrates that Mr. Rauenhorst's vision deficiency has not compromised his ability to safely operate a commercial vehicle and that he has adapted his driving techniques to accommodate the limited vision in his right eye.

Mr. Rauenhorst's ability to operate a commercial vehicle is also evidenced by his possession of a valid commercial driver's license (CDL). Before issuing a CDL, States subject the driver to knowledge and performance tests designed to evaluate the driver's qualifications to drive the vehicle to be operated. Mr. Rauenhorst satisfied the testing standards for the State of Minnesota and holds a current CDL that was issued on April 10, 1995 and is valid until February 22, 1999. The current license was preceded by another Minnesota CDL which was effective from January 31, 1991, until February 22, 1995. By meeting his State's licensing requirements, Mr. Rauenhorst demonstrated his ability to operate a commercial vehicle with his limited vision to the satisfaction of the State.

Basis for Waiver Determination

To waive application of 49 CFR 391.41(b)(10) to Mr. Rauenhorst, the FHWA must find the waiver to be consistent with the public interest and the safe operation of commercial motor vehicles. (49 U.S.C. 31136(e)). We find that granting the waiver is consistent with the public interest. Mr. Rauenhorst has earned his living as a commercial truck driver since 1974, notwithstanding a vision deficiency which disqualifies him from operating a vehicle in interstate commerce. This waiver will allow him to broaden his employment opportunities by enabling him to operate commercial vehicles in interstate commerce. As a result, the economic viability of his business may be enhanced. In that regard, the waiver will allow the employment of a person with a disability, which is consistent with the public policies expressed in the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1992.

The waiver is also consistent with the safe operation of commercial motor vehicles. In reaching this determination, the FHWA has relied upon research studies designed to correlate past and future driving performance. Copies of the several studies relied upon here have been added to the docket.

The first major research in this area was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that accident rates for the same individual exposed to certain risks for two different time periods vary only slightly. (See Bates and Neyman, University of California Publications in Statistics, April 1952.) Other studies demonstrated theories of predicting accident proneness from accident history coupled with other factors. These factors, such as age, sex, geographic location, mileage driven and conviction history, are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future accidents. (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June, 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall accident predictor for both concurrent and nonconcurrent events is the number of single convictions. This California study used three consecutive years of data, comparing the experience of drivers in the first two years with the experience of those same drivers the final year.

Results of these studies support the principle that the best predictor of future performance by a driver is his past record of accidents and traffic violations. Mr. Rauenhorst's driving record reflects that he has had no accidents or traffic violations in the past three years. He established this record while driving with the limited vision caused by the retinal detachment in 1976, a fact which demonstrates that he has adapted his driving skills to accommodate his eye condition. Because Mr. Rauenhorst's driving history is the best predictor of future performance, absent any information indicating any reduction in visual capacity or other factor essential to the driving task, the FHWA has determined that his ability to drive safely can be projected into the future and that waiving application of the vision standard is consistent with the safe operation of commercial motor vehicles.

In granting this waiver, the FHWA is mindful that vision changes. A deterioration of Mr. Rauenhorst's vision in the future could affect his ability to operate a commercial vehicle as safely as he has in the past. For that reason, the FHWA will impose conditions on the waiver to ensure that Mr. Rauenhorst's vision is monitored annually. These conditions are consistent with the grandfathering provisions applied to drivers who participated in the vision waiver study program. They are found at 49 CFR 391.64(b) and include the following: (1) That Mr. Rauenhorst be physically examined every year (a) by an ophthalmologist or optometrist who attests to the fact that his vision continues to measure at least 20/40

(Snellen) in the better eye; and (b) by a medical examiner who attests to the fact that he is otherwise physically qualified under 49 CFR 391.41; (2) that he provide a copy of the ophthalmologist or optometrist report to the medical examiner at the time of the annual medical examination; and (3) that he keep a copy of the annual medical certification in his driver qualification file as long as he is self-employed or provide a copy to his employer for retention in the driver's qualification file, and retain a copy of the certification on his person while driving for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

The FHWA received four (4) comments to the docket in response to its July 2, 1997, notice of intent to grant Mr. Rauenhorst's application for a waiver. Each comment has been considered by the FHWA in reaching its final determination and is discussed below.

The International Brotherhood of Teamsters (IBT) supported the FHWA's determination to grant the waiver. Although favoring a conservative approach to waiving safety standards, the IBT agreed that Mr. Rauenhorst's stable medical condition, driving history, and agreement to periodic monitoring support a finding that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles.

The comment filed by the Insurance Institute for Highway Safety (IIHS) did not address Mr. Rauenhorst's waiver but instead urged the FHWA, in this proceeding and two others in which its comment was filed, to thoroughly verify all reports of crash rates made by drivers or motor carriers. Noting that self-reporting has, in the past, resulted in under reporting, the IIHS observed that drivers seeking waivers from medical qualifications have an economic incentive to understate their crashes and overstate their annual mileage. Those concerns are not a factor in this proceeding, however, because the FHWA did not rely on Mr. Rauenhorst's report of his accidents and traffic violations. Instead the agency required, and relied on, a certified copy of Mr. Rauenhorst's driving record from the State of Minnesota to prove that he has had no accidents or traffic violations in the past three years.

The American Trucking Associations (ATA) opposes granting waivers to drivers who cannot meet the existing medical standards. It believes that the current standards ensure that drivers are in sufficiently good health to drive safely and that the vision standard is particularly important because driving responses are based primarily on what is seen. If the waiver is granted, however, the ATA agrees that Mr. Rauenhorst should be subject to the same annual examination requirements that were imposed on the ''grandfathered'' drivers in FHWA Docket MC–96–2. Additionally, it believes that Mr. Rauenhorst should be required to report his involvement in any DOT-recordable accident directly to the FHWA and be prohibited from driving until he has undergone a medical and vision examination following the accident.

Except for his vision, Mr. Rauenhorst's health is not at issue because he meets all other medical qualification standards in 49 CFR 391.31(b). Moreover, the clean driving record he has established over the last three years with his limited vision reflects Mr. Rauenhorst's ability to make safe and appropriate driving responses to visual stimuli. Therefore, applying the Court's decision in *Rauenhorst* v. *United States Department of Transportation, Federal Highway Administration,* the FHWA is satisfied that Mr. Rauenhorst qualifies under 49 U.S.C. 31136 for a waiver of the vision requirements, subject to the conditions enumerated in this decision. One of those conditions requires him to undergo annual vision examinations which will disclose any deterioration in his visual capacity and will affect his qualifications for the waiver. In view of his driving record and stable vision over the last three years, there is no reason to believe that his vision will play any greater role in a potential accident than the vision of a driver who meets the vision standard. For that reason, the FHWA does not agree that special conditions regarding accident reporting and driving suspension are warranted.

In the fourth comment to the Docket, the Advocates for Highway and Auto Safety (AHAS) questions whether the administrative record in this case adequately addresses issues that are relevant to the merits of Mr. Rauenhorst's waiver application. Four particular issues are raised in its comment.

First, the AHAS does not think the record adequately reflects the magnitude of the retinal detachment, describes the extent to which the detachment has adversely affected Mr. Rauenhorst's vision, or provides any analysis of other aspects of his vision such as depth perception, peripheral vision, and visual acuity in the injured eye. But Mr. Rauenhorst's medical reports for 1995, 1996, and 1997 are part of the record in this case and indicate that he can count fingers, and see movement, colors, and gross objects with his right eye. They also reflect his doctor's opinion that the eye condition is stable, an opinion which necessarily considers the severity of the retinal detachment. Furthermore, the reports confirm that Mr. Rauenhorst has 20/20 corrected vision in his left eye and, therefore, provide an overview of his vision which the FHWA believes adequate to support its action in this case.

AHAS next points out that the record contains nothing to support the agency's statement that Mr. Rauenhorst has adapted his driving skills to accommodate his limited vision. We think the statement is supported by Mr. Rauenhorst's driving record. That he has driven the last three years without having an accident or being convicted of a traffic violation demonstrates that he has developed driving techniques to compensate for his vision impairment.

As its third issue, the AHAS objects that the record does not explain how Mr. Rauenhorst obtained a CDL in view of his legally disqualifying vision deficiency. Moreover, it wonders why the waiver is necessary if he holds a valid CDL. In raising this issue, the AHAS has misconstrued the relationship between a CDL and the driver qualification standards in 49 CFR 391.41. To operate a commercial motor vehicle in *interstate* commerce, a driver must have both a CDL and a medical card. The medical card is issued by a medical examiner who certifies that the driver meets the physical qualification standards in 49 CFR 391.41(b). Mr. Rauenhorst cannot meet those physical standards due to his vision, and, therefore, does not possess the medical card required to operate in interstate commerce. On the other hand, the CDL is issued by the driver's State and authorizes a person to drive a particular kind of commercial vehicle. Although States have physical qualification requirements compatible with those in 49 CFR 391.41(b), a State may waive those requirements for intrastate operations under certain conditions. Thus, it is possible for a driver to obtain a CDL but not be physically qualified to drive in interstate commerce. Mr. Rauenhorst falls into this category, and consequently his driving has been limited to intrastate commerce even though he holds a valid CDL. With a waiver of the vision requirement in 49 CFR 391.41(b)(10), he will be able to obtain a medical card and operate in interstate commerce.

Finally, the AHAS notes that the record contains no assessment of the character of mileage driven by Mr. Rauenhorst. It asserts that intrastate operations involve different driving conditions than interstate operations so Mr. Rauenhorst's mileage must be categorized in order to properly evaluate his experience and driving record. Such an approach would create a Catch-22 for persons seeking a waiver. Drivers like Mr. Rauenhorst do not physically qualify to drive in interstate commerce. If interstate driving experience is required before obtaining a waiver, a physically challenged driver would never qualify for a waiver, or, alternatively, would be compelled to drive illegally in interstate commerce to acquire the experience necessary to be evaluated for a waiver. The FHWA cannot sanction a standard that yields such a result. Moreover, intrastate driving amply tests the skills and capability of a driver.

Intrastate driving could very well expose the driver to more congested urban areas, narrower rural roads, a greater variety of vehicles, more pedestrians, and more vehicle traffic than exists on interstate highways. Intrastate driving also involves substantial driving on highways on the interstate system and on other roads built to interstate standards. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. For this reason, we believe Mr. Rauenhorst's intrastate driving experience provides an adequate basis for evaluating his ability to safely operate a CMV in interstate commerce.

Conclusion

After considering the comments to the Docket and based upon its evaluation of Mr. Rauenhorst's waiver application in accordance with *Rauenhorst* v. *United States Department of Transportation, Federal Highway Administration,* the FHWA waives application of the vision requirement in 49 CFR 391.41(b)(10) as it applies to Mr. Rauenhorst subject to the following conditions: (1) That Mr. Rauenhorst be physically examined every year (a) by an ophthalmologist or optometrist who attests to the fact that his vision continues to measure at least 20/40 (Snellen) in the better eye; and (b) by a medical examiner who attests to the fact that he is otherwise physically qualified under 49 CFR 391.41; (2) that he provide a copy of the ophthalmologist or optometrist report to the medical examiner at the time of the annual medical examination; and (3) that he keep a copy of the annual medical certification in his driver qualification file as long as he is self-employed or provide a copy to his employer for retention in the driver's qualification file, and retain a copy of the certification on his person while driving for presentation to a duly authorized Federal, State, or local enforcement official.

Authority: 49 U.S.C. 31136; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: December 31, 1997.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 98–568 Filed 1–8–98; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Environmental Impact Statement on the Proposed Commuter Rail Project Between Everett and Seattle, WA

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The Federal Transit Administration (FTA) and the Central Puget Sound Regional Transit Authority (RTA) intend to prepare an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA). The RTA will ensure that the EIS also satisfies the requirements of the Washington State Environmental Policy Act (SEPA). The FTA will be the NEPA lead agency. The RTA will be the SEPA lead agency. Corridor alternatives were evaluated in a SEPA plan-level EIS (1993) and in a Major Investment Study (1997).

The EIS will evaluate the Everett-Seattle Commuter Rail Project, including station location alternatives and track improvement/expansion design variations design alternatives in sensitive (shoreline and wetland) areas, along the 35-mile long corridor between Everett and Seattle, Washington. The project will generally, though not solely, be located in existing Burlington Northern Sante Fe Railway (BNSF) right-of-way. The proposed Commuter Rail Project is intended to provide peak-hour commuter rail service between key activity centers along the corridor, including two of the region's largest employment centers: Seattle and Everett. The commuter rail line will connect with the proposed Seattle-to-Tacoma/Lakewood commuter rail service, and the proposed Central Light Rail Transit line between north Seattle and SeaTac, Washington, at the King Street Station in Seattle.

The project will also evaluate site alternatives for a proposed commuter rail vehicle overnight storage and light maintenance facility or facilities. In addition, the EIS will evaluate the no-build alternative and any new reasonable alternatives generated through the scoping process.

Scoping will be accomplished through correspondence with interested persons, organizations, and federal, state, regional, and local agencies, as well as through meetings with interested persons. Five public scoping meetings will be held, as well as one interagency scoping meeting. See **DATES** below for details.

DATES: *Comment Due Date:* Written comments on the scope of alternatives and impacts to be considered should be sent to the RTA by February 20, 1998. See **ADDRESS** below. Oral comments should be made at one of the four public scoping meetings scheduled below. *Scoping Meetings:* Public scoping meetings will be held on the following days and locations:

Monday, February 2, 1998, from 5:00 p.m. to 8:00 p.m., Everett Senior Center, 3025 Lombard Street, Everett, WA

Wednesday, February 4, 1998, from 5:00 p.m. to 8:00 p.m., Rosehill Community Center, 304 Lincoln Ave., Mukilteo, WA

Thursday, February 5, 1998, from 5:00 p.m. to 8:00 p.m., Edmonds Public Library, Library Plaza Room, 650 Main Street, Edmonds, WA

Monday, February 9, 1998 from 5:00 p.m. to 8:00 p.m., Nordic Heritage Museum Auditorium, 3014 NW 67th St., Seattle, WA

Tuesday, February 10, 1998, from 5:00 p.m. to 8:00 p.m., Richmond Beach Congregational Church, Pilgrim Room, 1512 NW 195th St., Shoreline, WA

A scoping meeting for governmental agencies will be held on Monday, February 2, 1998, between 10:00 a.m. and 1:00 p.m., at the RTA, 1100 2nd Avenue, Suite 500, Seattle, WA 98101–3423. This meeting for governmental agencies will be held in the RTA's fourth floor Board conference room. All the locations for the scoping meetings are accessible to people with disabilities. People with special needs (such as individuals needing a language translator) should contact the RTA at the address below or by calling (206) 684–6776. A TDD number is also available: (206) 684–1395.

Scoping meetings will be held in an ''open-house'' format. Project

representatives will be available to discuss the project throughout the entire meeting. Informational displays and written materials will also be available throughout the entire meeting. In addition to written comments, which may be made at the meeting or as described below, individual oral comments will be recorded at the meeting.

ADDRESSES: *Written comments on the project scope should be sent to:* Perry Weinberg, Environmental Compliance Manager, Regional Transit Authority, 1100 Second Avenue, Suite 500, Seattle, WA 98101–3423; fax Number (206) 689–3525.

FOR FURTHER INFORMATION CONTACT: Mr. F. William Fort, Transportation Program Specialist, Federal Transit Administration, Region X, 915 Second Avenue, Room 3142, Seattle, WA 98174; phone number: (206) 220–4461.

SUPPLEMENTARY INFORMATION:

I. Scoping

The FTA and the RTA invite interested individuals, organizations, and federal, state, regional and local agencies to participate in defining the alternatives within the corridor to be evaluated in the EIS and identifying any significant, social, economic, or environmental issues related to the alternatives. An Environmental Scoping Information Report describing the project, the proposed alternatives, the impact areas to be evaluated, the public involvement program and the preliminary project schedule has been prepared. You may request a copy of the report by contacting the RTA at (206) 684–6776. Scoping comments may be made orally at the public scoping meetings or in writing. See **DATES** above for locations and times, and see the **ADDRESSES** section above for written comments. During scoping, comments should focus on identifying specific social, economic, or environmental impacts to be evaluated and suggesting alternatives that are more cost-effective or have fewer environmental impacts while achieving similar transit objectives.

Scoping materials will be available at the meeting or in advance of the meeting by contacting the RTA at (206) 684–6776. If you wish to be placed on the mailing list to receive further information as the project proceeds, please contact the following individual at the RTA: David Phillip Beal, Program Manager—Project Development, Commuter Rail Department (206) 684–1883.

II. Description of Study Area and Project Need

The Everett-Seattle Commuter Rail Project consists of a north-south corridor approximately 35 miles long between Everett and Seattle, Washington. The project will include a group of physical and operational improvements to existing tracks and rights-of-way, track, along with station facilities and systems in order to provide commuter rail service. These improvements may also include new tracks in some locations. Service is expected to operate during peak commute periods, with a total of 6 train trips in each direction. Trains will consist of 6 to 10 passenger cars pulled by a diesel locomotive.

Up to 7 stations will be developed to serve Seattle, Shoreline, Edmonds, Mukilteo, Everett and surrounding areas. Stations are proposed at the following locations: Edmonds Multi-modal, Mukilteo, Everett Bond St. AMTRAK station and Everett Multi-modal station. Provisional stations that are currently unfunded but that will be analyzed in this EIS include stations in the Ballard area of Seattle and the Richmond Beach area of Shoreline. An additional, currently unfunded station will be analyzed in the Seattle downtown/north waterfront area.

Station improvements will generally consist of a platform on each side of the tracks at most locations, a canopy over the platform, a fare machine, and related facilities. Bus access will be provided at all stations. Parking facilities will be provided to serve all of the stations except for the Seattle waterfront and, possibly, Ballard stations.

Track and other right-of-way improvements will be made to allow commuter rail to operate along this corridor, which is extensively used for freight operations. The existing railroad is double-tracked in most places. However, in order to operate commute rail in the corridor, it will be necessary to double-track in the several remaining single-track locations. It will also be necessary to add sidings in a number of locations. The EIS will analyze alternative designs for such facilities to minimize or avoid adverse impacts to sensitive resources, including the shoreline of Puget Sound and wetlands.

The proposed commuter rail project will provide an important and cost-effective alternative to the automobile in the congested I–5 corridor. The ridership forecast for the year 2010 is 3,000 to 4,000 passengers/day. Project need is described in the Documentation of Major Investment Study, RTA, March 12, 1997. This document is available from the RTA by calling (206) 684–6776.

III. Alternatives

The proposed Everett-Seattle Commuter Rail Project would largely be implemented in existing BNSF railroad right-of-way, except for some stations and parking facilities. Alternatives relating to alignment location and mode were previously considered and documented in the Major Investment Study (1997). Therefore, this project-level EIS will focus on alternative station locations, and alternative locations and/or designs for track facilities that minimize or avoid adverse impacts on sensitive environmental resources.

To date, the station locations and alternatives proposed for study in the EIS include the following:

- Seattle, North Downtown/ Waterfront (unfunded).
- Ballard in Seattle (provisional).
- Richmond Beach in Shoreline (provisional).
- Edmonds, at the site of the Edmonds Multi-modal Facility; or at the existing AMTRAK station.
- Mukilteo, at the site of the proposed Mukilteo Multi-modal Facility; or near the existing ferry passenger boarding point in downtown.
- Everett, at the existing Bond Street AMTRAK station; and
- Everett, at the new Everett Multi-modal Facility.

In addition to stations, other improvements required to implement commuter rail include double-tracking, and construction of additional sidings in a number of locations to allow operation of commuter rail in a heavily used freight corridor. Those improvements are described in detail in the Environmental Scoping Information Report, which is available from the RTA. The EIS will analyze design alternatives for track improvements that may have adverse environmental impacts on the waters of Puget Sound or on other natural resources including wetlands. The design alternatives may include rip-rap fill, bulkheads, and/or slope excavations.

The proposed project also includes construction of a commuter rail vehicle overnight storage and light maintenance facility or facilities. Alternative locations for the facility(ies) will be evaluated.

The No-Build alternative, which involves no change to transportation services or facilities in the corridor beyond those currently programmed, will also be evaluated in the EIS.

IV. Probable Effects/Potential Impacts for Analysis

The FTA and RTA plan to evaluate in the EIS all significant, social, economic, and environmental impacts of the alternatives. The EIS is being prepared largely to evaluate the potential environmental impacts on natural resources associated with track and siding improvements and additions, which may involve fill in shoreline or wetland areas. Other environmental and social impacts proposed for analysis include land use and neighborhood impacts, traffic and parking impacts near stations, traffic circulation, visual impacts, health and safety impacts, impacts on cultural and archaeological resources, impacts on parkland areas, and noise and vibration impacts. The impacts on natural areas, rare and endangered species, and earth, air and water quality, will also be covered. The impacts will be evaluated both for the construction period and for the long-term period of operations. Reasonable measures to mitigate adverse impacts will be identified.

V. FTA Procedures

The locally preferred commuter rail transit mode and its general alignment were selected previously on the basis of the evaluation in the Major Investment Study (1997). The EIS/PE process will assess the social, economic and environmental impacts of alternative station locations, maintenance facility locations, and track designs to minimize and mitigate adverse impacts. A draft EIS will be published and made available for public and agency review and comment, and public hearings will be held. On the basis of the draft EIS and the comments received, the RTA will refine the project design and complete preliminary engineering and the final EIS.

Issued on: January 5, 1998.

Shelly R. Brown,

Regional Counsel.

[FR Doc. 98–491 Filed 1–8–98; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33531]

Dallas Area Rapid Transit; Acquisition and Operation Exemption—Line of Union Pacific Railroad Company

Dallas Area Rapid Transit (DART), a political subdivision of the State of Texas, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire approximately 1.5 miles of rail line owned by Union Pacific Railroad Company (UP) from approximately milepost 749.75 to approximately milepost 748.25 in the vicinity of Garland, TX.[1]

The transaction was expected to be consummated on or soon after December 18, 1997, the effective date of the exemption.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33531, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on: Kevin M. Sheys, Oppenheimer Wolff & Donnelly, 1020 Nineteenth Street, N.W., Suite 400, Washington, DC 20036.

Decided: January 2, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 98–581 Filed 1–8–98; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33530]

RailTex, Inc., Indiana & Ohio Rail Corp., Cincinnati Terminal Railway Company, Indiana and Ohio Railroad, Inc., Indiana & Ohio Railway Company, and Indiana & Ohio Central Railroad, Inc; Corporate Family Transaction Exemption

RailTex, Inc. (RailTex),[1] Indiana & Ohio Rail Corp. (I&O),[2] Cincinnati Terminal Railway Company (CTER), Indiana and Ohio Railroad, Inc. (INOH), Indiana & Ohio Railway Company (IORY), and Indiana & Ohio Central Railroad, Inc. (IOCR) have jointly filed a verified notice of exemption. CTER and INOH will be merged into IORY. After consummation of the transaction, I&O will directly control two Class III railroads: the IORY and the IOCR.

The transaction was to be consummated on or after December 18, 1997. The transaction will simplify RailTex's corporate structure and eliminate costs associated with separate accounting, tax, bookkeeping and reporting functions.

The merger of CTER and INOH into IORY is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The parties state that the transaction will not result in changes in service levels, operational changes, or a change in the competitive balance with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33530, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Esq., Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005.

Decided: December 31, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 98–580 Filed 1–8–98; 8:45 am]

BILLING CODE 4915–00–P

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[1] Applicant states that it will grant trackage rights to UP (or UP's designee) on the subject line and that freight railroad operations on the subject line will be conducted by UP (or UP's designee) pursuant to the trackage rights. UP (or UP's designee) will seek the Board's approval for the trackage rights in a separate filing.

[1] RailTex is a noncarrier which directly controls 17 Class III railroads operating in 21 states, as well as 3 rail carriers that operate in Canada.

[2] RailTex also directly controls I&O, a noncarrier, which controls CTER, INOH, IORY, and IOCR, 4 Class III railroads that have been operated as a single system.

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 98—5]

Revocation of Bay Area Services; Customs Gauger Approval

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Revocation of Customs Gauger Approval.

SUMMARY: Bay Area Services, of Texas City, Texas, a Customs approved gauger, under Section 151.13 of the Customs Regulations (19 CFR 151.13), was found not operating in compliance with Customs laws and regulations. Specifically, Bay Area Services does not have a valid bond filed with Customs as required under Section 151.13(b)(8) of the Customs Regulations. Accordingly, pursuant to § 151.13(k) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval of Bay Area Services has been revoked with prejudice.

EFFECTIVE DATE: December 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Marcelino Borges, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Ave., NW, Suite 5.5–B, Washington, DC 20229 at (202) 927–1060.

Dated: December 3, 1997.

George D. Heavey,

Director, Laboratories and Scientific Services.

[FR Doc. 98–586 Filed 1–8–98; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Ruling 98–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Ruling 98–1, Limitations on Benefits and Contributions under Qualified Plans.

DATES: Written comments should be received on or before March 10, 1998 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue, NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Limitations on Benefits and Contributions under Qualified Plans.

OMB Number: 1545–1563.

Revenue Ruling Number: Revenue Ruling 98–1.

Abstract: Revenue Ruling 98–1 provides guidance on the limitations on benefits and contributions under section 415 of the Internal Revenue Code as amended by section 1449 of the Small Business Job Protection Act of 1996, including various options an employer may elect when implementing the amendments.

Current Actions: There are no changes being made to the revenue ruling at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 70,000.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 35,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 5, 1998.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 98–596 Filed 1–8–98; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 98–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 98–1, Nondiscrimination Testing.

DATES: Written comments should be received on or before March 10, 1998 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Nondiscrimination Testing.

OMB Number: 1545–1579.

Notice Number: Notice 98–1.

Abstract: Notice 98–1 provides guidance for discrimination testing under section 401(k) and (m) of the Internal Revenue Code as amended by section 1433(c) and (d) of the Small Business Job Protection Act of 1996. The guidance is directed to employers maintaining retirement plans subject to these Code sections.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 147,000.

Estimated Time Per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 49,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 5, 1998.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 98–597 Filed 1–8–98; 8:45 am]

BILLING CODE 4830–01–U

Corrections

Federal Register

Vol. 63, No. 6

Friday, January 9, 1998

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

LEGAL SERVICES CORPORATION

45 CFR Part 1630

Cost Standards and Procedures

Correction

In rule document 97–34120, beginning on page 68219, in the issue of Wednesday, December 31, 1997, make the following corrections:

1. On page 68219:

a. In the second column, in the first line, ''action'' should read ''act''.

b. In the third column, in the first complete paragraph, at the end of the fifth line, insert ''Guide'' after ''Audit''.

2. On page 68222, in the second column, in the line above the Paragraph (f) heading, ''LSG'' should read ''LSC''.

3. On page 68223, in the second column, in the third full paragraph, in the third line, ''supersedes'' should read ''supersede''.

4. On page 68224, in the first column, in the *Section 1630.8—Recovery of Disallowed Costs and Other Corrective Action* section, in the seventh line, ''costs'' should read ''cost''.

PART 1630—[CORRECTED]

5. On page 68225, in the first column, in the Authority citation, in the third line, ''105–11'' should read ''105–119''.

§ 1630.2 [Corrected]

6. On page 68225, in the first column:

a. In § 1630.2(e), in the sixth line, the word ''a'' should be removed.

b. In § 1630.2(f), in the first line, ''*decisions*'' should read ''*decision*''.

§ 1630.3 [Corrected]

7. On page 68225, in the third column, in § 1630.3(c) introductory text, in the last line, ''circumstance'' should read ''circumstances''.

§ 1630.12 [Corrected]

8. On page 68227, in the third column, in § 1630.12(b), in the second line, ''an'' should read ''in''.

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 6, 8, 12, 13, 16, 19, 32, 41, 43, 49, 52, and 53

[FAC 97-03; FAR Case 97-772; Item IV]

RIN 9000-AH24

Federal Acquisition Regulation; Reorganization of FAR Part 13, Simplified Acquisition Procedures

Correction

In rule document 97–31817, beginning on page 64916, in the issue of Tuesday, December 9, 1997, make the following corrections:

1. On page 64917, in the second column, in the designated paragraph 1, in the second line, ''6'' should read ''16''.

53.213 [Corrected]

2. On page 64929, in the table, in the Location column, in the third entry line, ''3.213(c)'' should read ''53.213(c)''.

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 97-03; FAR Case 97-009; Item X]

RIN 9000-AH81

Federal Acquisition Regulation; Protests to GAO

Correction

In rule document 97–31823, beginning on page 64933, in the issue of Tuesday, December 9, 1997, make the following correction:

33.104 [Corrected]

On page 64934, in the first column, in 33.104(h)(5), in the last line, ''section'' should read ''section—''

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAC 97-03; FAR Case 95-034; Item XI]

RIN 9000-AH18

Federal Acquisition Regulation; Novation and Related Agreements

Correction

In rule document 97–31824, beginning on page 64934, in the issue of Tuesday, December 9, 1997, make the following corrections:

42.1203 [Corrected]

1. On page 64935, in the first column, in 42.1203(c), in the fourth line, ''Governments'' should read ''Government's''.

42.1204 [Corrected]

2. On page 64935, in the third column, in 42.1204(g), in the last line, remove ''NOVATION AGREEMENT''.

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 97-03; FAR Case 95-017; Item III]

RIN 9000-AG87

Federal Acquisition Regulation; Final Overhead Settlement

Correction

In rule document 97–31816 beginning on page 64915, in the issue of Tuesday, December 9, 1997, make the following corrections:

1. On page 64915, in the second column, in the **Background** section, in the first bulleted paragraph, in the last line, ''contractors'' should read ''contractor's''.

52.216—13 [Corrected]

2. On page 64916, in the first column, in 52.216–13, in the second line, ''Payment Facilities'' should read ''Payment—Facilities''.

BILLING CODE 1505-01-D

Friday
January 9, 1998

Part II

Environmental Protection Agency

40 CFR Parts 122 and 123

National Pollutant Discharge Elimination System—Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 123

[No. W–97–12 (Proposed Rule) and No. W–97–15 (Information Collection Request); FRL–5937–8]

RIN 2040–AC82

National Pollutant Discharge Elimination System—Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The National Pollutant Discharge Elimination System (NPDES) existing storm water program (Phase I) is resulting in significant improvement of surface water quality in the United States by reducing polluted runoff from a large number of priority sources, including major industrial facilities, large and medium city storm sewers (''municipal separate storm sewer systems'' or ''MS4s''), as well as construction sites that disturb 5 or more acres. Today's proposed NPDES storm water regulations (Phase II), which will be finalized by March 1, 1999, would expand this existing national program to smaller municipalities and construction sites that disturb 1 to 5 acres. In this expansion, EPA is proposing ''safety valves'' which would allow certain sources to be excluded from the national program based on the lack of impact on water quality, as well as to pull in other sources not regulated on a national basis based on localized adverse impact on water quality. Finally, EPA is proposing to conditionally exclude from the NPDES storm water program, industrial facilities that have ''no exposure'' of industrial activities to storm water, thereby reducing application of the program to many industrial activities currently covered by the program that have no industrial storm water discharges. This rule would establish a cost effective, flexible approach for reducing negative environmental impact by storm water discharges from these currently unregulated sources.

The ''National Water Quality Inventory, 1994 Report to Congress'' indicates that storm water discharges from a variety of sources including separate storm sewers, construction, waste disposal, and resource extraction activities are major causes of water quality impairment; roughly 46 percent of the identified cases of water quality impairment of estuarine square miles surveyed, for example, are attributable to storm sewer runoff. EPA believes that the implementation of the six minimum measures, which focus on a ''best management practices'' (BMP) approach, identified for the small municipalities in this proposal should significantly reduce pollutants in urban storm water compared to existing levels in a cost effective manner. If after implementing the six minimum measures there is still a water quality problem, the municipality would expand or use better tailored BMPs in their minimum measures to result in water quality improvement. Similarly, EPA believes that implementation of BMP controls at small construction sites will also result in a significant reduction is pollutant discharges and an improvement in surface water quality. EPA believes this rule will cost significantly less than the existing 1995 rule that is currently in place, and will result in significant monetized financial, recreational and health benefits, as well as benefits that EPA has been unable to monetize, including reduced scouring and erosion of streambeds, improved aesthetic quality of waters, reduced eutrophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced siting costs of reservoirs. In addition, there will be an economic savings from the proposed ''no exposure'' streamlining. The rule would provide for a NPDES program approach that: encourages the use of general permits, provides flexibility for municipalities to determine the nature of storm water controls, provides flexibility in use of watershed approaches, is consistent with the existing storm water Phase I program, recognizes and includes existing programs, utilizes the existing NPDES program which is Federally enforceable and takes advantage of existing structures and mechanisms for public participation. EPA is inviting comment on alternative approaches that may be available to allow efficient and effective targeting of environmental problems for the Phase II program, without extension of the NPDES program to Phase II dischargers. EPA is committed to continue seeking the input of all stakeholders in the development of this proposed rule, including continuing to seek input and advice from the Phase II Subcommittee of the Urban Wet Weather Flows Federal Advisory Committee which was established in 1995.

DATES: *Public Comment Period for the Proposed Rule and Information Collection Request (ICR).* The public comment period for this proposed rule and ICR will be from date of publication in the **Federal Register** until April 9, 1998.

Public Meetings/Hearings. The public meetings/hearings will include a presentation on the proposed rule and allow interested parties the opportunity to provide written and/or oral comments for the official record. Public meetings/hearings will be held at the times and locations provided below. If all statements are finished before 4:00 pm the hearings may be finished early. The hearing dates are:

1. February 23, 1998, 1:00 p.m. to 4:00 p.m., Washington, DC
2. February 25, 1998, 1:00 p.m. to 4:00 p.m., Boston, Massachusetts
3. February 27, 1998, 1:00 p.m. to 4:00 p.m., Atlanta, Georgia
4. March 2, 1998, 1:00 p.m. to 4:00 p.m., Chicago, Illinois
5. March 4, 1998, 1:00 p.m. to 4:00 p.m., Dallas, Texas
6. March 6, 1998, 1:00 p.m. to 4:00 p.m., San Francisco, California

ADDRESSES: *Public Comments.* All public comments regarding the proposed rule shall be submitted by mail to: ''ATTN: Storm Water Proposed Rule Comment Clerk—W–97–12, Water Docket, Mail Code 4101, EPA; 401 M Street, SW; Washington, DC 20460.'' All public comments regarding the proposed amendment to the ICR shall be submitted by mail to: ''ATTN: Storm Water Proposed Rule ICR Comment Clerk—W–97–15, Water Docket, Mail Code 4101, EPA; 401 M Street, SW, Washington, DC 20460'' and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, D.C. 20503, marked ''Attention: Desk Officer for EPA.''

Please submit an original and three copies of your comments and enclosures (including references). Commenters who want EPA to acknowledge receipt of their comments should enclose a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted. Comments may also be submitted electronically to ow-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters or forms of encryption. Electronic comments must be identified by the docket number (W–97–12 (storm water proposed rule) and W–97–15 (storm water proposed rule ICR)). Comments and data will also be accepted on disks in WordPerfect in 5.1 format or ASCII file format. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

To ensure that EPA can read, understand and therefore properly respond to public comments, EPA would prefer that commenters cite, where possible, the paragraph(s) or sections in the proposed rule language, preamble or supporting documents to which the comment refers. Commenters should use a separate paragraph for each issue discussed.

Public Hearings. The hearing locations are:

1. Washington, DC—Auditorium of the USEPA Education Center, 401 M St. SW, Washington, DC 20460
2. Boston—John A. Volpe National Transportation Systems Center—Auditorium (Bldg. #2), 55 Broadway—Kendall Square, Cambridge, MA 02142
3. Atlanta—Atlanta Federal Center, (Room C, AFC Conference Center), 61 Forsyth St. SW, Atlanta, GA 30303–3104
4. Chicago—USEPA Region 5 (Rm 331) 77 W. Jackson Blvd., Chicago, IL 60604–3590
5. Dallas—USEPA Region 6 (Regional Conference Room, 12th floor), 1445 Ross Ave., Dallas, TX 75202–2733
6. San Francisco—USEPA Region 9 (Marianas/ Palau Room, First Floor), 75 Hawthorne Street, San Francisco, CA 94105–3901

Docket. The complete administrative record for the proposed rule and the ICR have been established under docket numbers W–97–12 (proposed rule) and W–97–15 (ICR), and includes supporting documentation as well as printed, paper versions of electronic comments. Copies of information in the record are available upon request. A reasonable fee may be charged for copying. The record is available for inspection and copying from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays at the Water Docket, EPA, Room 2616, 401 M Street, SW, Washington, D.C. For access to docket materials, please call 202/260–3027 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: George Utting, Office of Wastewater Management, Environmental Protection Agency, Mail Code 4203, 401 M Street, SW, Washington, DC 20460; (202) 260–5816; sw2@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: Entities potentially regulated by this action include:

Category	Examples of regulated entities
Federal Government.	Owners or operators of municipal separate storm sewer systems.
Tribal Government.	Owners or operators of a separate storm sewer system, or dischargers of storm water associated with industrial activity.
State Government.	Owners or operators of small municipal separate storm sewer systems.
Local Government.	Owners or operators of small municipal separate storm sewer systems (serving populations less than 100,000) and municipal construction and industrial activities.
Industry	Owners or operators of industrial facilities who may be dischargers of storm water associated with industrial or other activity.
Construction Activity.	Construction site owners or operators.
Public	Persons who may want to participate in the petition process.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether you are regulated by this action, you should carefully examine the applicability criteria in §§ 122.26(b)(15), 122.31, 122.32, and 123.35 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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Legal Authority: 33 U.S.C. 1311; 33 U.S.C. 1342; 33 U.S.C. 1361.

CFR Citation: 40 CFR 122; 40 CFR 123.

I. Background

A. Water Quality Concerns/Environmental Impacts

In 1972, Congress amended the Federal Water Pollution Control Act (referred to as the Clean Water Act (CWA)) to prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES program is a permit program designed to regulate point source discharges.

Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and municipal sewage. This focus developed because many sources of industrial process wastewater and municipal sewage were not adequately controlled and represented immediate and pressing environmental problems. Furthermore, these discharges were easily identified as responsible for poor, often drastically degraded, water quality conditions.

As pollution control measures for industrial process wastewater and municipal sewage were further developed, refined, and implemented, it became increasingly evident that more diffuse sources of water pollution were significant causes of water quality impairments. Specifically, storm water runoff draining large surface areas, such as agricultural and urban land, was found to be a major cause of adverse water quality impairment, including nonattainment of designated uses. In 1987, Congress amended the CWA to require implementation of a comprehensive approach for addressing storm water discharges under the NPDES program. Storm water discharges have a number of environmental effects that can occur from land development, illicit discharges, construction site runoff, and improper disposal of materials. The following section entitled, Studies and Assessments of Storm Water Runoff, discusses these four issues. Problems can also occur from agricultural storm water discharges and return flows from irrigated agriculture. This area of concern, however, is statutorily exempted from regulation under the NPDES program (see CWA section 502(14)). Other sources may be of concern in certain areas and can be addressed on a case-by-case (or category-by-category) basis through the NPDES permitting authority's designation authority.

Storm water runoff from lands modified by human activities can harm surface water resources, and, in turn, violate water quality standards, in two ways: (1) by changing natural hydrologic patterns and (2) by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables. Such contaminants are carried to nearby streams, rivers, lakes, and estuaries. Individually and combined, these pollutants can reduce water quality and threaten one or more designated beneficial uses. Often, an increased volume of runoff or contaminants can lead to violations of applicable State water quality standards.

1. Studies and Assessments of Storm Water Runoff

a. Urban Development

In support of today's proposal regarding land development, the United States Environmental Protection Agency (EPA) has relied on several broad-based assessments of storm water runoff and related water quality impacts, including: (1) *Nationwide Urban Runoff Program (NURP)* study (U.S. Environmental Protection Agency, Office of Water 1983. Final Report of the Nationwide Urban Runoff Program Washington, D.C.), (2) *America's Clean Water—The States' Nonpoint Source Assessment* (Association of State and Interstate Water Pollution Control Administrators 1985. America's Clean Water—The States' Nonpoint Source Assessment. Prepared in cooperation with the U.S. Environmental Protection Agency, Office of Water, Washington, D.C.), (3) *U.S. Geological Survey Urban-Storm Water Data Base for 22 Metropolitan Areas Throughout the United States* (Driver, N.E., Mustard, M.H., Rhinesmith, R.B. and Middleburg, R.F. 1985. U.S. Geological Survey Urban Storm Water Data Base for 22 Metropolitan Areas Throughout the United States. U.S. Geological Survey Report No. 85–337, Lakewood, CO.), and (4) *The National Water Quality Inventory, 1994 Report to Congress* (U.S. Environmental Protection Agency, Office of Water 1995. National Water Quality Inventory: 1994 Report to Congress Washington, D.C. EPA 841–R–95–005.) These studies, which provide important data regarding storm water runoff and associated pollutant loads, are briefly discussed below. (For an extensive summary and review of storm water research, see *Makepeace, D.K., Smith, D.W., and S.J. Stanley 1995.*

''Urban Storm Water Quality: Summary of Contaminant Data.'' Critical Reviews in Environmental Science and Technology, 25(2):93–139.).

The Nationwide Urban Runoff Program (NURP) study, which was conducted to facilitate understanding of the nature of urban runoff from residential, commercial, and industrial areas, is the largest study of storm water undertaken to date. One focus of the NURP study was to characterize the water quality of discharges from separate storm sewer systems that drain residential, commercial, and light industrial (industrial parks) sites. Storm water samples from 81 residential and commercial properties in 22 urban/suburban areas nationwide were collected and analyzed during a 5-year period, between 1978 and 1983. The majority of samples collected in the study were analyzed for eight conventional pollutants and three metals.

Data collected under the NURP study indicated that discharges from separate storm sewer systems draining runoff from residential, commercial, and light industrial areas carried more than ten times the level of total suspended solids (TSS) on an annual loading basis, as discharges from municipal sewage treatment plants that provide secondary treatment. The study compared TSS in runoff from residential and commercial sites (180 mg/l) with TSS in effluent from treatment plants providing secondary treatment (25 mg/l). The NURP study also indicated that runoff from residential and commercial areas carried somewhat higher annual loadings of chemical oxygen demand (COD), total lead, and total copper compared to effluent from secondary treatment plants.

When analyzing annual loadings associated with storm water runoff, it is important to note that discharges associated with urban runoff are highly intermittent and that short-term loadings may have shock loading effects on receiving water, such as low dissolved oxygen levels. NURP study findings also showed that fecal coliform counts in urban runoff are typically in the tens to hundreds of thousands per hundred milliliter of runoff during warm weather conditions, although the study suggested that fecal coliform may not be the most appropriate indicator organism for identifying potential health risks in storm water runoff.

Monitoring data summarized in the NURP study provide important information about urban runoff from residential, commercial, and light industrial areas. The NURP study did conclude, however, that the quality of urban runoff can be adversely affected by several sources of pollution that were not directly evaluated in the study, including illicit discharges, construction site runoff, and illegal dumping. The findings of the NURP study were reinforced by findings reported in a study entitled, *U.S. Geological Survey-Storm Water Data Base for 22 Metropolitan Areas Throughout the United States* (Driver et al., 1985). This report summarized monitoring data compiled during the mid-1980s, covering 717 storm events at 99 sites in 22 metropolitan areas. In sum, the U.S. Geological Survey (USGS) monitoring most consistently observed problems of metals and sediment concentrations in urban storm water runoff.

The report entitled, *America's Clean Water—the States' Nonpoint Source Assessment* (ASIWPCA, 1985), is a comprehensive study of diffuse pollution sources. Conducted under the sponsorship of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and EPA, the study revealed that 38 States reported urban runoff as a major cause of designated beneficial use impairment and 21 States reported storm water runoff from construction sites as a major cause of use impairment.

The National Water Quality Inventory, 1994 Report to Congress (U.S. EPA, 1995b) provides a national assessment of water quality, based on biennial reports submitted by the States under 305(b) of the CWA. In the 305(b) reports, States, Tribes, and Territories assess their individual water quality control programs by examining attainment or nonattainment of designated uses. A designated use is the legally applicable use specified in a water quality standard for a watershed, waterbody, or segment of a waterbody. As such, each 305(b) report must indicate the fraction of a States' waters that are fully supporting, partially supporting, or not supporting designated beneficial uses. Designated uses include support of aquatic life or water-contact recreation.

The 1994 Report to Congress—based on a compilation of 60 individual 305(b) reports submitted by States, Tribes, and Territories—assessed the following percentages of total waters nationwide: 17 percent of river and stream miles, 42 percent of lake, pond, and reservoir acres, and 78 percent of estuary square miles. In waterbodies where designated beneficial uses were not being met, States, Tribes, and Territories first identified and then assigned water quality impairments based on the following categories of sources: diffuse sources, industrial process wastewaters and municipal sewage, combined sewer overflows, and natural and other sources.

Leading sources of water quality impairment nationwide identified in the report include diffuse sources (i.e., urban storm water runoff—runoff from agricultural and urban sources, construction sites, land disposal of waste, and resource extraction), industrial process wastewaters, and municipal point sources. The report identified industrial process wastewaters as a leading source of pollution for 11 percent of impaired acres of lakes, ponds, and reservoirs and for 27 percent of acres of estuaries. The report cited municipal point sources as a leading source of pollution for 17 percent of impaired rivers and streams, 19 percent of impaired lakes, ponds, and reservoirs, and 39 percent of impaired estuaries. The report further assessed pollution from diffuse sources, including storm water runoff from agricultural and urban sources, construction sites, land disposal of waste, and resource extraction and indicated that diffuse sources were a leading cause of impaired waters, as follows. Twelve percent of rivers and streams were impaired by urban runoff/storm sewers, and 11 percent were impaired by resource extraction. Eighteen percent of lakes, ponds, and reservoirs impaired by urban runoff/storm sewers, and 11 percent were impaired by land disposal of wastes. Forty-six percent of estuaries were impaired by urban runoff/storm sewers, and 13 percent were impaired by land disposal of wastes. It should be noted that storm water runoff from urban areas contributes a much broader range of pollutants than the section 305(b) reports are intended to evaluate.

b. Illicit Discharges

Studies have shown that storm water discharges from separate storm sewer systems often include wastes and wastewater from non-storm water sources, commonly referred to as illicit discharges. These discharges are ''illicit'' because the storm sewer systems are not designed to accept and discharge, or to process, such wastes. These discharges would be required to be permitted under the CWA. As a result, illicit discharges to separate storm sewer systems can create severe widespread contamination and water-quality problems. A particular problem involves illicit discharges of sanitary wastes that can be directly linked to high bacterial counts in receiving waters and can be dangerous to public health.

The NURP study, discussed previously, determined that during

substantial dry periods, many storm water outfalls continue to discharge to receiving waterbodies. Pollutant levels in these flows, which are commonly referred to as dry weather flows, were shown to be high enough to significantly degrade receiving water quality.

The Ann Arbor and Ypsilanti water quality projects inspected 660 businesses, homes, and other buildings and identified 14 percent of the buildings as having improper storm sewer drain connections. The program assessment revealed that, on average, 60 percent of automobile-related businesses, including service stations, automobile dealerships, car washes, body shops, and light industrial facilities, had illicit connections to storm sewer drains. The program assessment also showed that a majority of the illicit discharges to the storm sewer system resulted from improper plumbing and connections, which had been approved by the municipality when installed. (*Huron River Pollution Abatement Program*, Washtenaw County Statutory Drainage Board, 1987.)

Inflows from aging sanitary sewer collection systems are another illicit discharge-related problem. Sanitary sewer systems frequently develop leaks and cracks resulting in discharges of pollutants to receiving waters through separate storm sewers. These pollutants include sanitary waste and sewer main construction materials (e.g., asbestos cement, brick, cast iron, vitrified clay). Municipalities have long recognized the problems of storm water infiltration into sanitary sewer collection systems, because this type of infiltration often disrupts the operation of the municipal sewage treatment plant. However, the reverse problem of sewage exfiltration out of the sanitary sewer collection system into the storm water collection system can occur during dry weather periods.

c. Construction Site Runoff

Storm water discharges generated during construction activities can cause an array of water quality impacts. Specifically, the biological, chemical, and physical integrity of the waters may become severely compromised. Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems (Novotny, V. and G. Chesters. 1989. ''Delivery of Sediment and Pollutants from Nonpoint Sources: A Water Quality Perspective.'' *Journal of Soil and Water Conservation,* 44(6): 568–576.). Estimates indicate that 80 percent of the phosphorus and 73 percent of the Kjeldahl nitrogen in streams is associated with eroded sediment (USDA. 1989. *The Second RCA Appraisal, Soil, Water and Related Resources on Nonfederal Land in the United States, Analysis of Condition and Trends,* cited in Fennessey, L.A.J., and A.R. Jarrett. 1994. ''The Dirt in a Hole: a Review of Sedimentation Basins for Urban Areas and Construction Sites.'' *Journal of Soil and Water Conservation,* 49(4): 317–323.).

In watersheds experiencing intensive construction activity, the localized impacts of water quality may be severe because of high pollutant loads, primarily sediments. Siltation is the second largest cause of impaired water quality in rivers and lakes (U.S. EPA, 1995b, p. ES–8.). Introduction of coarse sediment (coarse sand or larger) or a large amount of fine sediment is also a concern because of the potential of filling lakes and reservoirs (along with the associated remediation costs for dredging), as well as clogging stream channels (e.g., Paterson, R.G., Luger, M.I., Burby, E.J., Kaiser, E.J., Malcolm, H.R., and A.C. Beard. 1993. ''Costs and Benefits of Urban Erosion and Sediment Control: North Carolina Experience.'' *Environmental Management,* 17(2):167–178.). Large inputs of coarse sediment into stream channels will initially reduce stream depth and minimize habitat complexity by filling in pools (U.S. Environmental Protection Agency. 1991. *Monitoring Guidelines to Evaluate Effects of Forestry Activities on Streams in the Pacific Northwest and Alaska.* Seattle, WA: Region 10, Water Division. 166 pp. EPA/910/9–91–001.). In addition, studies have shown that stream reaches affected by construction activities often extend well downstream of the construction site. For example, between 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed were observed to be impacted by sediment inputs (Fox, H.L. 1974. *Effects of Urbanization on the Patuxent River, with Special Emphasis on Sediment Transport, Storage, and Migration.* Ph.D. Dissertation, Johns Hopkins University, Baltimore, Maryland, 276 pp. as cited in Klein, R.D. 1979. ''Urbanization and Stream Quality Impairment.'' *Water Resources Bulletin,* 15(4): 948–963.).

A primary concern at most construction sites is the erosion and transport process related to fine sediment because rain splash, rills (i.e., a channel small enough to be removed by normal agricultural practices and typically less than 1 foot deep), and sheetwash (*California Storm Water Best Management Practice Handbooks—Construction Activity,* Blue Print Service, Oakland, CA.) encourage the detachment and transport of this material to waterbodies. Forest road construction sites in steep areas or along stream banks, however, may initiate landslides, debris flows, or other types of mass wasting events (Megahan, W.F. 1984. ''Road Effects and Impacts—Watershed.'' In *Proceedings, Forest Transportation Symposium,* USDA Forest Service Region 2, Lakewood, CO. pp, 57–97). In these cases, coarse sediment inputs may be of greatest concern. Construction sites can also generate other pollutants associated with wastes onsite such as sanitary wastes or concrete truck washout.

Although streams and rivers naturally carry sediment loads, erosion from construction sites and runoff from developed areas can elevate these loads to levels well above those in undisturbed watersheds. It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use (Novotny, V. and H. Olem. 1994. *Water Quality: Prevention, Identification, and Management of Diffuse Pollution.* Van Nostrand Reinhold, NY. p. 36.). Results from both field studies and erosion models indicate that erosion rates from construction sites are typically an order of magnitude larger than row crops and several orders of magnitude greater than rates from well-vegetated areas, such as forests or pastures (U.S. Department of Agriculture, Soil Conservation Service. 1970. *Controlling Erosion on Construction Sites. Agriculture Information Bulletin,* Washington, D.C. 32 pp.; Meyer, L.D., Wischmeier, W.H., and W.H. Daniel. 1971. ''Erosion, Runoff and Revegetation of Denuded Construction Sites.'' *Transactions of the ASAE,* 14(1):138–141; Owen, O.S. 1975. *Natural Resource Conservation.* MacMillan, New York as cited in Paterson, R.G., Luger, M.I., Burby, R.J., Edward, J.K., Malcom, H.R., and A.C. Beard. 1993. ''Costs and Benefits of Urban Erosion and Sediment Control: The North Carolina Experience.'' *Environmental Management,* 17(2): 167–178.). Wolman and Schick (Wolman, M.G. and A.P. Schick. 1967. ''Effects of Construction on Fluvial Sediment, Urban and Suburban Areas of Maryland.'' *Water Resources Research,* 3(2): 451–464) studied the impacts of development on fluvial systems in

Maryland and determined that sediment yields in areas undergoing construction were 1.5 to 75 times greater than detected in natural or agricultural catchments. The authors summarize the potential impacts of construction on sediment yields by stating that ''the equivalent of many decades of natural or even agricultural erosion may take place during a single year from areas cleared for construction.'' (Wolman and Schick, 1967)

Similar impacts from storm water runoff have been reported in a number of other studies. For example, Daniel et al. monitored three residential construction sites in southeastern Wisconsin and determined that annual sediment yields were more than 19 times the yields from agricultural areas (Daniel, T.C., McGuire, D., Stoffel, D., and B. Miller. 1979. ''Sediment and Nutrient Yield from Residential Construction Sites.'' *Journal of Environmental Quality,* 8(3): 304–308.). Studies have examined the effects of road construction on erosion rates and sediment yields in forested areas. In northern Idaho, the erosion rate per unit area of surface cleared for logging road construction averaged 220 times the erosion rate of undisturbed areas over a 6-year period (Megahan, W.F., and W.J. Kidd. 1972. *Effects of Logging Roads on Sediment Production Rates in the Idaho Batholith.* USDA Forest Service Research Paper INT–123, Odgen, UT. 14pp.). Other studies have documented increased surface erosion following logging road construction, but at increases smaller than the 220-fold increase reported in the 1972 study (Megahan, 1984).

A highway construction project in West Virginia disturbed only 4.2 percent of a 4.72 square mile basin, but resulted in a three-fold increase in suspended sediment yields (Downs, S.C., and D.H. Appel. *Progress Report on the Effects of Highway Construction on Suspended-Sediment Discharge in the Coal River and Trace Fork, West Virginia.* U.S. Geological Survey Water Resources Investigations Report 84–4275, Charleston, WV. 20pp.). During the largest storm event, it was estimated that 80 percent of the sediment in the stream originated from the construction site. As is often the case, the increase in suspended sediment load could not be detected further downstream, where the drainage area was more than 50 times larger (269 sq. mi.). Another study evaluated the effect of 290 acres of highway construction on watersheds ranging in size from 5 to 38 square miles. Suspended sediment loads in the smallest watershed increased by 250 percent, and the estimated sediment yield from the construction area was 37 tons/acre over a 2-year period (Hainly, R.A. 1980. *The Effects of Highway Construction on Sediment Discharge into Blockhouse Creek and Stream Valley Run, Pennsylvania.* U.S. Geological Survey Water Resources Investigations Report 80–68, Harrisburg, PA. 50pp.). A more recent study in Hawaii showed that highway construction increased suspended sediment loads by 56 to 76 percent in three small (1 to 4 sq. mi.) basins (Hill, B.R. 1996. *Streamflow and Suspended-Sediment Loads Before and During Highway Construction, North Halawa, Haiku, and Kamooalii Drainage Basins, Oahu, Hawaii, 1983–91.* U.S. Geological Survey Water Resources Investigations Report 96–4259, Honolulu, HI. 34pp.) A 1970 study determined that sediment yields from construction areas can be as much as 500 times the levels detected in rural areas (National Association of Counties Research Foundation. 1970. *Urban Soil Erosion and Sediment Control.* U.S. Department of the Interior, Federal Water Quality Administration, Water Pollution Control Research Series, Program #15030 DTL, Washington, D.C.)

Yorke and Herb (Yorke, T.H., and W.J. Herb. 1978. *Effects of Urbanization on Streamflow and Sediment Transport in the Rock Creek and Anacostia River Basins, Montgomery County, Maryland, 1962–74.* U.S. Geological Survey Professional Paper 1003, Washington, DC.) evaluated nine subbasins in the Maryland portion of the Anacostia watershed for more than a decade in an effort to define the impacts of changing land use/land cover on sediment in runoff. Average annual suspended sediment yields for construction sites ranged from 7 to 100 tons/acre. Daniel et al. (Daniel et al., 1979) identified total storm runoff, followed by peak storm runoff, as the most influential factors controlling the sediment loadings from residential construction sites.

Storm water discharges from construction sites that occur when the land area is disturbed (and prior to surface stabilization) can severely impact designated uses. Examples of designated uses include public water supply, recreation, and propagation of fish and wildlife. The siltation process described previously can threaten all three designated uses by (1) depositing high concentrations of pollutants in public water supplies, (2) decreasing the depth of a waterbody which can result in its limited use by boaters, swimmers, and other recreational enthusiasts, and (3) directly impacting the habitat of fish and other aquatic species which can limit their ability to reproduce. Excess sediment can cause a number of other problems for waterbodies. It is associated with increased turbidity and reduced light penetration in the water column, as well as more long-term effects associated with habitat destruction and increased difficulty in filtering drinking water.

Numerous studies have examined the effect that excess sediment has on aquatic ecosystems. For example, sediment from road construction activity in Northern Virginia reduced aquatic insect and fish communities by up to 85 percent and 40 percent, respectively (Reed, J.R. 1997. *Stream Community Responses to Road Construction Sediments.* Bulletin No. 97. Virginia Water Resources Research Center, Virginia Polytechnic Institute, Blacksburg, Virginia, as cited in Klein, R.D. 1990. *A Survey of Quality of Erosion and Sediment Control and Storm Water Management in the Chesapeake Bay Watershed.* Chesapeake Bay Foundation, Annapolis, MD.) Other studies have shown that fine sediment (fine sand or smaller) adversely affects aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within a streambed, and reducing the intergravel dissolved oxygen by reducing the permeability of the bed material (Everest, F.H., Beschta, J.C., Scrivener, K.V., Koski, J.R., Sedell, J.R., and C.J. Cederholm. 1987. ''Fine Sediment and Salmonid Production: A Paradox.'' *Streamside Management: Forestry and Fishery Interactions,* Contract No. 57, Institute of Forest Resources, University of Washington, Seattle, WA. pp.98–142. For example, 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed in Maryland were found to have fine sediment amounts 15 times greater than normal (Fox, 1974 as cited in Klein, 1979). Benthic organisms in the streambed can be smothered by sediment deposits, causing changes in aquatic flora and fauna such as fish species composition (Wolman and Schick, 1967). In addition, the primary cause of coral reef degradation in coastal areas is attributed to land disturbances and dredging activities due to urban development (Rogers, C.S. 1990. ''Responses of Coral Reefs and Reef Organizations to Sedimentation.'' Marine Ecology Progress Series, 62:185–202.).

While most of the published data are from construction sites larger than 5 acres, there are no compelling reasons why erosion rates and sediment yields from smaller (less than 5 acres)

construction sites should be substantially different than those from larger (more than 5 acres) construction sites. The limited amount of data suggests that sediment yields from small sites are as high as or higher than the 20 to 150 tons/acre/year measured from larger sites (MacDonald, L.H. 1997. *Technical Justification for Regulating Construction Sites 1–5 Acres in Size.* Unpublished report submitted to the U.S. Environmental Protection Agency, Washington, DC. 28 pp.) Furthermore, logic suggests that the cumulative effects of numerous small sites will have impacts similar to those of larger sites in a particular area.

The expected contribution of small sites to total sediment yields depends, in part, on the extent to which erosion and sedimentation controls are being applied. Current storm water regulations require erosion and sedimentation controls on larger sites in urban areas which suggests that in the absence of any erosion and sedimentation controls smaller construction sites contribute a disproportionate amount of the total sediment from construction activities (MacDonald, 1997). Another view that supports the need for controls on smaller construction sites is that smaller sites are less likely to have an effective plan to control erosion and sedimentation, that these plans are less likely to be properly implemented and maintained, and that small sites are less likely to be inspected (Brown, W. and D. Caraco. 1997. *Controlling Storm Water Runoff Discharges from Small Construction Sites: A National Review.* Submitted to the U.S. Environmental Protection Agency, Office of Wastewater Management, Washington, DC. by the Center for Watershed Protection, Silver Spring, MD). Sediment delivery in urban areas should produce little difference between larger and smaller construction sites because the runoff from either site is usually delivered directly to the storm drain network.

Any assessment of impacts from smaller construction sites should consider the proportion of a particular area that is associated with small construction activity. Brown and Caraco (Brown and Caraco, 1997) surveyed 219 local jurisdictions to assess erosion and sediment control (ESC) programs. Seventy respondents provided data on the number of ESC permits for construction sites smaller than 5 acres. In 27 cases (38 percent of the respondents), more than three-quarters of the permits were for sites smaller than 5 acres; in another 18 cases (26 percent), more than half of the permits were for sites smaller than 5 acres.

In addition, data on the total acreage disturbed by smaller construction sites have been collected recently in two States (MacDonald, 1997). The most recent and complete data set is the listing of the disturbed area for each of the 3,831 construction sites permitted in North Carolina for 1994–1995 and 1995–1996. Nearly 61 percent of the sites that were 1 acre or larger were between 1.0 and 4.9 acres in size. This proportion was consistent between years. Data showed that this range of sites accounted for 18 percent of the total area disturbed by construction. The values showed very little variation between the 2 years of data. The total disturbed area for all sites over this 2-year period was nearly 33,000 acres, or about 0.1 percent of the total area of North Carolina.

As in many metropolitan areas, nine counties in the San Francisco Bay area only require ESC permits for sites larger than 5 acres. Nearly 70 percent of the 542 permits issued in the Bay area during the last 3 years were for sites between 5 and 25 acres in size. Conversations with several municipalities indicate that there may be as many as five construction sites smaller than 5 acres for every site larger than 5 acres (MacDonald, 1997). Given the available data, MacDonald (1997) estimates that construction sites less than 5 acres probably account for slightly less than one-third of the total area under construction. Regulating construction sites 1 to 5 acres in size will probably increase the amount of area being regulated by approximately 20 to 30 percent. Given the high erosion rates associated with most construction sites, this indicates that small construction sites can be a significant source of water quality impairment, particularly in small watersheds that are undergoing rapid development.

d. Improper Disposal of Materials

Improper disposal of materials may result in contaminated discharges from separate storm sewer systems in two ways. First, materials may be disposed of directly in a catch basin or other storm water conveyance. Second, materials disposed of on the ground may either drain directly to a storm sewer or be washed into a storm sewer during a storm event. Improper disposal of materials to street catchbasins and other storm sewer inlets often occurs because many people mistakenly believe that disposal to such areas is an environmentally sound practice. Part of the confusion may occur because some areas are served by combined sewer systems, which are part of the sanitary sewer collection system, and people assume that materials discharged to a catchbasin will reach an appropriate municipal sewage treatment plant. Materials that are commonly disposed of improperly include used oil; household toxic materials; radiator fluids; and litter, such as disposable cups, cans, and fast-food packages. EPA believes that there has been increasing success in addressing these problems through alternatives such as recycling and household pickup programs.

B. Statutory Background

In 1972, Congress enacted the CWA to prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. Congress added CWA section 402(p) in 1987 to require implementation of a comprehensive approach for addressing storm water discharges. Section 402(p)(1) prohibits EPA or NPDES-authorized States or Tribes from requiring NPDES permits for discharges composed entirely of storm water (''storm water discharges'') until October 1, 1992, except for the following five classes of storm water discharges specifically listed under section 402(p)(2):

(A) a discharge subject to an NPDES permit before February 4, 1987
(B) a discharge associated with industrial activity
(C) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more
(D) a discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000
(E) a discharge that an NPDES permitting authority determines to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States.

The October 1992 deadline was later extended to October 1, 1994, by the Water Resources Development Act of 1992.

Congress clarified and amended the requirements for NPDES permits for storm water discharges in section 402(p)(3)(A). This section requires storm water discharges associated with industrial activity to meet all applicable provisions of section 402 and section 301 of the CWA, including technology-based requirements and any more stringent requirements necessary to meet water quality standards. Section 402(p)(3)(B) establishes NPDES permit standards for discharges from municipal separate storm sewer systems. NPDES permits for discharges from municipal

separate storm sewer systems (1) may be issued on a system or jurisdiction-wide basis, (2) must include a requirement to effectively prohibit non-storm water discharges into the storm sewers, and (3) must require controls to reduce pollutant discharges to the maximum extent practicable, including best management practices. As with all point source discharges under the CWA, storm water discharges are subject to more stringent limitations when necessary to meet applicable water-quality based standards pursuant to CWA section 301(b)(1)(C).

In CWA section 402(p)(4), Congress established statutory deadlines for the initial steps in implementing the NPDES program for storm water. This section required development of NPDES permit application regulations, submission of NPDES permit applications, issuance of NPDES permits sources covered by section 402(p)(2), and compliance with NPDES permit conditions. This section instructed EPA to issue regulations specifying NPDES permitting application requirements by February 4, 1989. In addition, this section required industrial facilities and large municipal separate storm sewer systems to submit NPDES permit applications by February 4, 1990. Medium municipal separate storm sewer systems were to submit NPDES permit applications by February 4, 1992. EPA was required to issue or deny all NPDES permits 1 year after each of the respective deadlines, and facilities must comply with all permit conditions within 3 years of final NPDES permit issuance. All other storm water discharges fell under the statutory moratorium for the requirement for an NPDES permit. EPA and authorized NPDES States were prohibited from requiring a permit for such sources until October 1, 1994.

Congress granted extensions to the NPDES permit application process for selected classes of discharges associated with industrial activity. On December 18, 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act (ISTEA), which extended NPDES permit application deadlines for most storm water discharges associated with industrial activity from facilities that are owned or operated by certain municipalities. EPA and States authorized to administer the NPDES program could not require any municipality with a population of less than 100,000 to apply for or obtain an NPDES permit for any storm water discharge associated with industrial activity prior to October 1, 1992, except for storm water discharges from an airport, power plant, or uncontrolled sanitary landfill. See 40 CFR 122.26(e)(1); 57 FR 11524, April 2, 1992 (reservation of NPDES application deadlines for ISTEA facilities).

C. EPA's Reports to Congress

Under CWA section 402(p)(5), EPA, in consultation with the States, was required to conduct a study, first, to identify unregulated sources of storm water discharges, as well as to determine the nature and extent of pollutants in such discharges. Second, the study was to establish procedures and methods of control of such discharges to the extent necessary to mitigate impacts on water quality. Section 402(p)(5) also required EPA to report the results of the first two components of that study to Congress by October 1, 1988, and the final report by October 1, 1989.

In March 1995, EPA submitted a report wherein EPA reviewed and analyzed municipal and industrial facilities not already regulated under the initial NPDES regulations for storm water (U.S. Environmental Protection Agency, Office of Water. 1995. *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress.* Washington, D.C. EPA 833–K–94–002). The report also analyzed associated pollutant loadings and water quality impacts from these unregulated sources. Based on identification of unregulated municipal sources and analysis of information on impacts of storm water discharges from municipal sources, the report recommended that the storm water program focus on the 405 ''urbanized areas'' identified by the Bureau of the Census. The report further found that a number of discharges from unregulated industrial facilities warranted further investigation to determine the need for regulation. The report classified these unregulated industrial discharges in two groups, Group A and Group B. Group A included sources that may be considered a high priority for inclusion in the NPDES program for storm water because discharges from these sources are similar or identical to regulated sources. These ''look alike'' sources were not regulated in the initial NPDES regulations for storm water due to the language used to define ''associated with industrial activity.'' In the initial regulations for storm water, ''industrial activity'' is identified using Standard Industrial Classification (SIC) codes. The use of SIC codes lead to incomplete categorization of industrial activities with discharges that needed to be regulated to protect water quality. Group B included 18 industrial sectors, specifically sources that EPA expected to contribute to storm water contamination due to the activities conducted and pollutants anticipated onsite (e.g., vehicle maintenance, machinery and electrical repair, and intensive agricultural activities).

EPA reported on the latter component of the section 402(p)(5) study via President Clinton's Clean Water Initiative, which was released on February 1, 1994 (U.S. Environmental Protection Agency, Office of Water. 1994. *Clinton's Clean Water Initiative.* Washington, D.C. EPA 800–R–94–001). This report addresses a number of issues associated with NPDES requirements for storm water discharges and proposes (1) establishing a phased compliance with a water quality standards approach for discharges from municipal separate storm sewer systems with priority on controlling discharges from municipal growth and development areas, (2) clarifying that the maximum extent practicable standard should be applied in a site-specific, flexible manner, taking into account cost considerations as well as water quality effects, (3) providing an exemption from the NPDES program for storm water discharges from industrial facilities with no activities or no significant materials exposed to storm water, (4) providing extensions to the statutory deadlines to complete implementation of the NPDES program for the storm water program, (5) targeting urbanized areas for the requirements in the NPDES program for storm water, and (6) providing control of discharges from inactive and abandoned mines located on Federal lands in a more targeted, flexible manner.

D. EPA Regulations for the NPDES Program for Storm Water

The purpose of the regulations is to protect water quality. EPA's findings are explained in Section I.A. For the final step in implementation of the point source control program for storm water, CWA section 402(p)(6) requires EPA, in consultation with States and local officials, to issue regulations for the designation of the remaining unregulated discharges to be regulated to protect water quality based on studies conducted under section 402(p)(6), which is discussed below. Under section 402(p)(6), EPA is to establish an extension of the existing storm water program to regulate newly designated sources. At a minimum, the extension must establish (1) priorities, (2) requirements for State storm water management programs, and (3) expeditious deadlines. The section 402(p)(6) program may include

performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate. For additional background information about the initial steps in the NPDES program for storm water, see 55 FR 47990, November 16, 1990 (final regulations under CWA sections 402(p)(3) and (p)(4)); 60 FR 40230, August 7, 1995 (final regulations establishing permit application deadlines under section 402(p)(6)). EPA is currently subject to a consent order to propose supplemental rules under section 402(p)(6) by November 25, 1997 (on July 16, 1997, EPA filed papers to seek an extension of the signature date for today's proposal from the original date of September 1, 1997 to the current date) and to finalize these rules by March 1, 1999. See Natural Resources Defense Council, Inc. v. Browner, Civ. No. 95–634 PLF (D.D.C., April 7, 1995). The Agency and NRDC also entered into a settlement agreement to address the portions of the existing storm water rules remanded by the 9th Circuit according to the same schedule as the consent order.

The United States District Court for the District of Columbia entered a consent decree to resolve this litigation. EPA and NRDC have also stipulated to a modification of a companion settlement agreement to extend the date for proposal of regulations to address portions of the existing storm water regulations (no exposure and construction below 5 acres), which were remanded to the Agency by the U.S. Court of Appeals for the Ninth Circuit.

In today's notice, EPA is proposing to control storm water discharges of concern through the NPDES program. Please refer to today's preamble Section I.A. for a more detailed discussion of the impacts of urbanization on water quality. EPA is also strongly encouraging partnerships and the watershed approach as the management framework for efficiently, effectively, and consistently protecting and restoring aquatic ecosystems and protecting public health. These regulations are intended to facilitate the implementation of a watershed approach by providing the NPDES permitting authority and municipalities the flexibility to address local environmental problems by using general permits.

E. EPA Outreach Efforts

On September 9, 1992, EPA published a notice requesting information and public comment on how to prepare regulations under section 402(p)(6) (see 57 FR 41344). The notice identified three sets of issues associated with developing new NPDES storm water regulations: (1) how should EPA identify unregulated sources of storm water to protect water quality, (2) what types of control strategies should EPA develop for these sources, and (3) what are appropriate deadlines for implementing new requirements.

The September 9, 1992, notice presented a range of alternatives under each issue in an attempt to illustrate, and obtain input on, the full range of potential approaches for the regulation of unregulated sources to protect water quality. The notice recognized that potential sources for coverage under the section 402(p)(6) regulations would fall into two main categories: municipal separate storm sewer systems and individual (commercial and residential) sources. EPA recognized that a major distinction between most options for identifying sources to be regulated was either to require targeted municipalities to develop source controls and management programs for storm water discharges within their jurisdictions or to require permits for discharges from facilities on an individual basis.

EPA received more than 130 comments on the September 9, 1992, notice. Approximately 43 percent of the comments came from municipalities, 29 percent from trade groups or industries, 24 percent from State or Federal agencies, and approximately 4 percent from other miscellaneous sources. No comments were received from environmental groups. For further discussion of the comments received, see *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System: Report to Congress* (EPA, 1995a), pp. 1–21 to 1–22, and Appendix J (which provides a detailed summary of the comments received as they relate to the specific issues raised in the notice).

In early 1993, the Rensselaerville Institute and EPA held public and expert meetings to assist in developing and analyzing options for identifying unregulated sources and possible controls. The report on the 1993 meetings indicates that the two options most favored by the various groups participating were:

- A program in which States would select sources to be controlled in a manner that was consistent with criteria developed by EPA. The comprehensive program under section 402(p)(6) would provide States with flexibility to rely on either NPDES requirements or other frameworks to control targeted sources.
- A tiered approach that would provide for EPA selection of high priority sources for control by NPDES permits and State selection of other sources for control under a State water quality program other than the NPDES program.

(Appendix I, ''Report on the EPA Storm Water Management Program (Rensselaerville Study).'' EPA, 1995a).

EPA also conducted outreach with representatives of small entities in conjunction with the convening of a Small Business Advocacy Review Panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA). EPA, in consultation with the Small Business Administration, invited 29 small entity representatives and streamlining representatives to participate in this outreach effort. Many of the representatives contacted in this outreach had been working closely with EPA in developing this proposed rule through the FACA Committee and the Storm Water Phase II FACA Subcommittee. The further discussion of this process is found at Section VII, Regulatory Flexibility Act.

In May 1997, EPA conducted two telephone conference calls and held an all-day meeting at EPA headquarters to solicit the advice and recommendations of representatives. EPA eventually received 12 sets of written comments from representatives (see Small Business Advocacy Review Panel (SBREFA). August 7, 1997. *Final Report on EPA's Planned Proposed Rule for the National Pollutant Discharge Elimination System: Storm Water Phase II.*) On June 19, 1997, the Small Business Advocacy Review Panel was convened to review the proposed rule. The panel consisted of officials from EPA, the Small Business Administration, and the Office of Management and Budget. The panel considered representatives' comments previously submitted to EPA and allowed representatives to provide additional comments. Based on comments and its own discussions, the Panel has provided findings regarding the elements of an IRFA and specific recommendations regarding the proposed rule to EPA. The recommendations of the panel are discussed in Section VII.B., Regulatory Flexibility Act, SBREFA Panel Process.

F. The FACA Committee Effort

To assist EPA in coordinating implementation of the urban municipal wet weather water pollution control program, EPA established the Urban Wet Weather Flows Advisory Committee (hereinafter, ''FACA Committee'') under the Federal Advisory Committee Act (FACA). The Office of Management and Budget approved the charter for the FACA Committee on March 10, 1995. The

FACA Committee assisted EPA in developing cost-effective solutions for controlling the environmental and human health impacts of urban wet weather flows with a minimum of regulatory burden. The FACA Committee provided and continues to provide a forum for identifying and addressing issues associated with water quality impacts from these sources.

The FACA Committee has two subcommittees: the Storm Water Phase II FACA Subcommittee (the designation and comprehensive program requirements under CWA section 402(p)(6) are often referred to as ''Storm Water Phase II'') and the Sanitary Sewer Overflows (SSOs) FACA Subcommittee. Consistent with the requirements of FACA, the membership of both the FACA Committee and the subcommittees is balanced among EPA's various outside stakeholder interests, including representatives from municipalities, industrial and commercial sectors, agriculture, environmental and public interest groups, States, Indian Tribes, and EPA. Members have been selected and appointed for the duration of the process. A Federal official or EPA employee serves as the Designated Federal Officer and is present at all meetings. All FACA Committee and subcommittee meetings are open to the public and announced in advance in the **Federal Register**.

The Storm Water Phase II FACA Subcommittee met twelve times between September 1995 and October 1997. The 32 subcommittee members discussed the regulatory framework that serves as the basis for today's proposed rule at these meetings as well as during numerous conference calls. EPA provided subcommittee members with four successive drafts of the proposed rule and preamble, outlines of the rule, documents identifying changes made to each draft, and summaries of the written comments received on each draft, including how the comments had been addressed. EPA received extensive written comments from FACA members on a number of occasions, together with extensive oral feedback at a number of meetings and conference calls. Although the Storm Water Phase II FACA Subcommittee has not reached consensus on the details of today's proposal, they have provided EPA with significant input and insights, which EPA has tried to balance and address.

Today's proposed regulations respond to President Clinton's direction on regulatory reform. EPA sought to develop a common sense regulatory approach to allow EPA, States, and Tribes to ''manage for results'' and provide for ecosystem protection. EPA believes there is considerable latitude in CWA section 402(p)(6) in establishing the scope of coverage (i.e., the designation of sources to be regulated under the NPDES program for storm water, as well as the comprehensive program for regulating those sources). EPA has benefitted greatly from the variety of view points and the lively exchange of ideas through the FACA Committees and subcommittees. EPA has sought to build upon the issues raised in proposing the scope, method, and timing of the comprehensive program to regulate storm water and to more effectively provide outreach and technical assistance for these new regulations. The Storm Water Phase II FACA Subcommittee was also instrumental in discussing lessons learned from implementation of the existing NPDES program for storm water. Records and iterative draft versions of today's proposal have been available and continue to be available to the public at the Office of Wastewater Management's Home Page (see http://www.epa.gov/owm) or through the Point Source Information Provision Exchange System (PIPES) Home Page (see http://www.epa.gov/owmitnet/pipes/pipes.htm).

The FACA Committee has provided the Storm Water Phase II FACA Subcommittee with several recommendations for improving the existing NPDES program for storm water. Some of these recommendations are reflected as part of today's proposal. The FACA Committee provided recommendations, for example, for the proposal regarding a ''no exposure'' incentive for facilities with storm water discharges ''associated with industrial activity.'' EPA's proposal would apply this recommendation to the designation of unregulated sources under section 402(p)(6) as well. The FACA Committee also recommended that EPA clarify and define the standards applicable to NPDES permit controls for municipal separate storm sewer systems, specifically the standards that permits require for controls to reduce the discharge of pollutants ''to the maximum extent practicable'' (MEP).

G. Related Nonpoint Source Programs

1. Section 319 of the Clean Water Act

In 1987, section 319 was added to the Clean Water Act to provide a framework for funding State and local efforts to address pollutant sources not addressed by the NPDES program (i.e., nonpoint sources). To obtain funding, States are required to submit Nonpoint Source Assessment Reports identifying State waters that without additional control of nonpoint sources of pollution could not reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the CWA. States are also required to prepare and submit for EPA approval a statewide Nonpoint Source Management Program for controlling nonpoint source water pollution to navigable waters within the State and improving the quality of such waters. State program submittals must identify specific best management practices (BMPs) and measures that the State proposes to implement in the first 4 years after program submission to reduce pollutant loadings from identified nonpoint sources to levels required to achieve the stated water quality objectives.

State programs funded under section 319 can include both regulatory and nonregulatory State and local approaches. Section 319(b)(2)(B) specifies that a combination of ''nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects'' may be used, as necessary, to achieve implementation of the BMPs or measures identified in the section 319 submittals.

Although most States have generally emphasized the use of voluntary approaches in their section 319 programs, some States and local governments have implemented regulations and policies to control pollution from urban runoff. States such as Delaware and Florida, as well as local jurisdictions such as the Lower Colorado River Authority, are pursuing storm water management goals through numerical treatment standards for new development. Many States and local governments have enforceable erosion and sediment control regulations.

On a broader scale, nonpoint source pollution is being addressed at the watershed level by such programs as those being implemented by the State of Wisconsin, the Puget Sound Water Quality Authority, and the States that are parties to the Great Lakes Water Quality Agreement. A number of individual States and local communities have adopted legislation or regulations that limit development or require special management practices in areas surrounding water resources of special concern, such as Maryland's Critical Areas Act.

2. Section 6217 of the Coastal Zone Act Reauthorization Amendments

Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) of 1990 provides that States with

approved coastal zone management programs must develop and submit coastal nonpoint pollution control programs to EPA and the National Oceanic and Atmospheric Administration (NOAA) for approval. Failure to submit an approvable program will result in a reduction of Federal grants under both the Coastal Zone Management Act and section 319 of the CWA.

State coastal nonpoint pollution control programs under CZARA must include enforceable policies and mechanisms that ensure implementation of the management measures throughout the coastal management area. Section 6217(g)(5) defines management measures as ''economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives.'' Congress mandated a technology-based approach based on technical and economic achievability under the rationale that neither States nor EPA have the money, time, or other resources to create and expeditiously implement a program that depends on establishing cause and effect linkages between particular land use activities and specific water quality problems. If this technology-based approach fails to achieve and maintain applicable water quality standards and to protect designated uses, CZARA 6217(b)(3) requires additional management measures.

EPA issued *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* under 6217(g) in January 1993. The guidance identifies management measures for five major categories of nonpoint source pollution: agriculture, forestry, urban, marinas and recreational boating, and hydromodification. The management measures reflect the greatest degree of pollutant reduction that is economically achievable for each of the listed sources. These management measures provide reference standards for the States to use in developing or refining their coastal nonpoint programs. In general, the management measures were written to describe systems designed to reduce the generation of pollutants. A few management measures, however, contain quantitative standards that specify pollutant loading reductions. For example, the New Development Management Measure, which is applicable to construction in urban areas, requires (1) that by design or performance the average annual total suspended solid loadings be reduced by 80 percent and (2) to the extent practicable, that the pre-development peak runoff rate and average volume be maintained. The management measures approach was adopted to provide State officials flexibility in selecting strategies and management systems and practices that are appropriate for regional or local conditions, provided that equivalent or higher levels of pollutant control are achieved.

Storm water discharges regulated under the existing NPDES program, such as discharges from municipal separate storm sewers serving a population of 100,000 or more and construction activities that disturb 5 or more acres, do not need to be addressed in Coastal Nonpoint Pollution Control Programs. However, potential new sources, such as urban development adjacent to or surrounding municipal systems serving a population of 100,000 or more, smaller urbanized areas, and construction sites that disturb less than 5 acres, that are identified in management measures under section 6217 guidance need to be addressed in Coastal Nonpoint Pollution Control Programs until such discharges are issued an NPDES permit. EPA and NOAA have worked and continue to work together in their activities to ensure that authorities between NPDES and CZARA do not overlap.

EPA and NOAA published *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (1993), which addresses such issues as the basis and process for EPA/NOAA approval of State Coastal Nonpoint Pollution Control Programs, how EPA and NOAA expect State programs to implement management measures in conformity with EPA guidance, and procedures for reviewing and modifying State coastal boundaries to meet program requirements. The document clarifies that States generally must implement management measures for each source category identified in the EPA guidance developed under section 6217(g). The document also sets quantitative performance standards for some measures. Coastal Nonpoint Pollution Control Programs are not required to address sources that are clearly regulated under the NPDES program as point source discharges. Specifically, such programs would not need to address small municipal separate storm sewer systems and construction sites covered under NPDES storm water permits (both general and individual). The guidance also clarifies that regulatory and nonregulatory mechanisms may be used to meet the requirement for enforceable policies and mechanisms, provided that nonregulatory approaches are backed by enforceable State authority ensuring that the management measures will be implemented. Backup authority can include sunset provisions for incentive programs. For example, a State may provide additional incentives if too few owners or operators participate in a tax incentive program or develop mandatory requirements to achieve the necessary implementation of management measures.

H. Watershed-based Approach for Water Quality Programs

EPA is promoting an integrated watershed approach for storm water and other discharges that focuses on coordinated public and private sector efforts to address the highest priority water quality problems within hydrologically defined geographic areas. The watershed approach is a decisionmaking process that reflects a common strategy for information collection and analysis and a common understanding of the roles, priorities, and responsibilities of all stakeholders within a watershed. Implementation of the watershed approach is critical for the improvement of water quality in the United States, and the approach is an essential priority for EPA's water programs. EPA, therefore, is reevaluating its programs, including the NPDES, ground water, drinking water, and nonpoint source programs, to determine how they can be more effectively incorporated into the watershed approach.

EPA intends that a central role be given to watershed planning and analysis by permitting authorities implementing storm water programs under today's proposed rule. While States are not required to use a watershed approach, EPA believes that this approach would significantly improve implementation of today's proposed rule. As discussed in Section II.A., Overview, EPA designed today's proposed rule to facilitate watershed planning and analysis, particularly in the area of designating those storm water sources to be covered under the program or giving regulatory relief to storm water discharges already designated, but also in determining and implementing the requirements for the owners and operators of small municipal separate storm sewer systems. EPA expects that the NPDES permitting authority would work with State agencies who have jurisdiction

over nonpoint sources and other areas within the watershed not covered under the NPDES program in the development of a comprehensive watershed plan.

EPA's overall support of using watershed-based alternatives is described in greater detail in EPA's *Watershed Approach Framework* (June 1996; http:/www.epa.gov/OWOW/watershed/framework.html#6b) and *NPDES Watershed Strategy* (U.S. Environmental Protection Agency. March 1994. *Watershed Protection—NPDES Watershed Strategy.* Washington, D.C.). The *NPDES Watershed Strategy* discusses integration of NPDES program functions into a broader watershed protection approach and highlights areas for coordination with stakeholders to promote implementation of the approach. The *NPDES Watershed Strategy* is based on the following principles:

- Watershed protection approaches may vary in terms of specific elements, timing, and resources, but all should share a common emphasis and insistence on integrated actions, specific action items, and measurable environmental and programmatic milestones.
- Related activities within a basin or watershed must be coordinated to achieve the greatest environmental benefit and most effective level of stakeholder involvement.
- Actions relating to restoration and protection of surface water, ground water, and habitat within a basin should be based upon an integrated decision-making process, a common information base, and a common understanding of the roles, priorities, and responsibilities of all stakeholders within a basin.
- Staff and financial resources are limited and must be allocated to address environmental priorities as effectively and efficiently as possible.
- Program requirements that interfere or conflict with environmental priorities should be identified and revised to the extent possible.
- Accurate information and high quality data are necessary for decision-making and should be collected on an incremental basis; interim decisions should be made based on available data to prevent further degradation and promote restoration of natural resources.

The watershed approach would be most successful if all stakeholders are involved. In addition, within a geographic management unit (watershed/basin), a cycle of activities and a schedule for implementation must be established.

EPA recognizes that many States are coordinating their authorities, programs, and decisionmaking using a watershed management approach to achieve more efficient and better problem solving. The Agency will continue to encourage the use of the watershed approach through activities that include tailoring the EPA program to support this direction; publishing case studies for States to use as examples; creating a tools directory; undertaking other outreach efforts, such as a quarterly newsletter (*Watershed Events*); including watershed activities on the EPA Internet Home Page; training for permit writers and the regulated community; and sponsoring conferences, such as ''Watershed 96.''

State representatives of the Storm Water Phase II FACA Subcommittee supported watershed-based implementation strategies and controls and noted the following:

(T)he future demands a new model for managing water resources, based on well-defined geographic units such as basins or watersheds, that recognizes all the interconnections within the watershed that define the hydrologic cycle in that area, including surface and groundwaters as well as wetlands. The management of any watershed should reflect all of the things that make it unique, including specific precipitation patterns, topography, soil and geological characteristics, and land use.

A systems management approach would involve the development and operation of a comprehensive water resource management program—though ultimately it need not be limited to water resources—within the specific geographic area encompassing the basin or watershed. Components of such a comprehensive program would include water supply, water quality, water conservation, flood protection, land use, and protection of fish and wildlife resources. This can often be done effectively through comprehensive watershed management and planning.

As our government policies transition to a systems-based, comprehensive approach to managing water resources, we must introduce increased flexibility and latitude into current programs so that cross-categorical management of resources can flourish. Water resource management policies should also recognize the significant regional variance in the water resource. Management policies must be tailored to local hydrologic and ecological conditions. Any national policy should acknowledge unique regional and state characteristics and provide a framework for development strategies consistent with the national policy.

The States recognize that there are significant institutional obstacles, and that the new model needs to be developed in an evolutionary fashion. Substantial involvement of dischargers, users, and the general public will be essential. It will require unprecedented cooperation among many state and local entities, among state and federal agencies, and between states in the case of watersheds crossing state lines. Protection efforts should be coherent and coordinated to make the most efficient use of scarce resources and minimize inconsistency among federal, state, and local programs or agencies.

The FACA Committee is developing a recommended framework for integrating urban wet weather discharges, including storm water discharges, into the watershed approach that reflects the key principles outlined in EPA's *Watershed Approach Framework* and *NPDES Watershed Strategy*. The committee's recommendations are contained in a draft policy entitled, *A Watershed Alternative*. This framework would provide that all regulated discharges meet minimum requirements regardless of their geographic location. Based on a review and assessment of watershed conditions and a determination that water quality objectives are not being met in a particular watershed, watershed stakeholders would be able to choose to collectively pursue a watershed approach to address identified water quality problems. A key element of this watershed alternative is the development of a comprehensive watershed plan that describes (1) who will coordinate watershed planning and implementation, (2) the geographic area being covered by the watershed approach, (3) the watershed stakeholders participating in the planning and implementation effort, (4) assessments of aquatic resources and existing or potential water quality problems, (5) the coordinated watershed management activities that will be implemented, (6) the financial plan and schedule for completing the coordinated management activities, and (7) a mechanism for accountability. Once this plan were approved by the applicable regulatory authority(ies), relevant provisions of the watershed plan would be incorporated into relevant regulatory and nonregulatory mechanisms and progress in implementing the watershed plan would be evaluated periodically.

The watershed alternative has numerous inherent incentives, including greater opportunities to improve water quality and environmental conditions, more equitable allocation of resources, enhanced program efficiency and lower costs, improved coordination among programs, an improved basis for

management decisions, an emphasis on local decisionmaking, greater consistency and responsiveness, increased opportunities to use market-based incentives, and improved public relations.

EPA's key principals are also reflected in today's proposed rule. First, the Agency has structured the designation of additional sources by the permitting authority to facilitate the consideration of watershed impacts. The Agency also highly recommends that municipal storm water discharges that would be designated under this proposal be covered under general permits issued on a watershed-wide basis. Such permits could also be written to address other sources in the watershed as well. Where a comprehensive watershed plan has been developed, the Agency believes the components of that plan should be reflected in all permits issued to the parties addressed by the watershed plan.

Some stakeholders have raised concerns that the Agency is failing to consider watershed priorities in determining which sources will be designated and in the requirements to be imposed on such sources under today's proposal. The Agency disagrees. The Agency has limited its proposed designation to those sources generally believed to be of significant concern to water quality. While encouraging designation of additional sources based on considerations of water quality, including considerations made on a watershed basis, the Agency also proposes to allow a waiver of otherwise applicable requirements for some sources (construction sites under 5 acres and small municipal separate storm sewer systems serving less than 1,000 people) where the NPDES permitting authority participates in implementing a watershed plan and water quality is not impaired. Further, the Agency proposes flexible requirements for permittees in allowing consideration of BMPs tailored to the needs of the watershed. The Agency believes that this sort of flexibility will generally ensure watershed protection while allowing permitting authorities flexibility to tailor program implementation to the needs of a particular watershed and its stakeholders.

II. Description of Proposed Program

A. Overview

1. Objectives EPA Seeks to Achieve in Today's Proposal

EPA seeks to achieve several objectives in today's proposed rule. Under CWA section 402(p)(6), EPA is required to provide a comprehensive storm water program that designates and controls additional sources of storm water discharges to protect water quality. In addition, EPA is required to address discharges of storm water from the activities exempted under the 1990 storm water regulations that were remanded by the Ninth Circuit Court of Appeals in NRDC v. EPA (9th Circuit, 1992)—construction activities disturbing less than 5 acres and so-called ''light'' industrial activities not exposed to storm water (see discussion of ''no exposure'' below). EPA is also seeking to address the problem of so-called ''donut holes'' created by the existing NPDES storm water program. Donut holes are municipal separate storm sewer systems located within the urbanized areas that include systems covered by the existing NPDES storm water program, but are not currently addressed by the storm water program because of the particular drafting of the existing regulations. In other words, donut holes are gaps in the existing NPDES storm water program's regulatory scheme. EPA also is trying to facilitate and promote watershed planning as a framework for implementing water quality programs where possible.

Although the proposed program can be structured in various ways to regulate the remaining unregulated sources of storm water to protect water quality, EPA believes it can best achieve its objectives through flexible innovations within the framework of the NPDES program. Unlike the storm water regulations EPA promulgated in 1995, EPA no longer proposes to designate all storm water discharges for nationwide coverage under the NPDES program for storm water. The proposed framework for today's proposed rule is one that would balance both nationwide automatic designation and locally based designation. Nationwide designation would apply to those classes or categories of storm water discharges that EPA believes present a high likelihood of having adverse water quality impacts, regardless of location. EPA is proposing to designate the following sources on a nationwide basis: storm water discharges from small municipal separate storm sewer systems located in urbanized areas and construction activities that result in land disturbance equal to or greater than 1 acre. As noted under Section I.A.1, Studies and Assessments of Storm Water Runoff, these two sources can cause significant water quality impacts. Additional sources would not be covered on a nationwide basis either because EPA currently lacks information indicating a consistent potential for adverse water quality impact or because of EPA's belief that the likelihood of adverse impacts on water quality is low, with some exceptions on a more local basis. Additional individual sources or categories of storm water discharges could, however, be covered under the program through a local, watershed-based designation process. Permitting authorities may designate additional small municipal separate storm sewer systems when they develop designation criteria and apply these criteria to small municipal separate storm sewer systems located outside of an urbanized area, in particular those with a population of 10,000 or more and a population density of at least 1,000. Exhibit 1 illustrates the framework for today's proposal.

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Exhibit 1
Phase II Source Decisions

WATER QUALITY IMPACT OF SOURCES

LOW LIKELIHOOD/ INSUFFICIENT INFORMATION

HIGH LIKELIHOOD

NOT AUTOMATICALLY DESIGNATED BY RULE

NATIONAL ASSESSMENT

AUTOMATICALLY DESIGNATED BY RULE

- Non-Phase I small MS4s located outside Urbanized Areas.
- Construction activity that results in the land disturbance of less than 1 acre.
- Non-Phase I industrial and commercial sources.

- All non-Phase I small MS4s located outside Urbanized Areas.
- Construction activity that results in the land disturbance of greater than or equal to 1 acre and less than 5 acres.

BUT DESIGNATED BY PERMITTING AUTHORITY IF:

WATER QUALITY ASSESSMENT

BUT WAIVERS PROVIDED FOR:

- A small MS4 meets the designation criteria that permitting authorities are required to develop. The criteria must be applied to at least those small MS4s located in an area with a population of at least 10,000 and a population density of at least 1,000.
- Watershed plan, TMDL,* or other local water quality assessment defines need to cover small MS4s and construction activity not currently regulated.
- EPA or the State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

- Regulated small MS4s serving jurisdictions with a population of less than 1,000 where a watershed plan or TMDL assessment addresses the pollutants of concern.
- Construction activities between 1 and 5 acres where:
  (1) activity occurs during negligible rainfall period,
  (2) determination of low soil loss, or
  (3) a watershed plan or TMDL assessment addresses the pollutants of concern.

* EPA will continue to require States to comply with their TMDL implementation schedules.

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The framework for the proposal provides a significant degree of flexibility. The provisions for nationwide designation of construction and small municipal separate storm sewer systems in urbanized areas allow for a waiver of applicable requirements based on appropriate water quality conditions. The proposal would allow a permitting authority to waive otherwise applicable requirements for a regulated small municipal separate storm sewer system if the jurisdiction served by the system includes a population of less than 1,000 persons and meets additional water quality-based conditions. Water quality-based conditions would be the basis for a waiver of requirements of construction activities between 1 and 5 acres, as well. For construction sources, the rule would provide significant flexibility for waiving otherwise applicable regulatory requirements where a permitting authority determines, based on water quality and watershed considerations, that storm water controls are not needed. Coverage would extend to municipal and construction sources outside the nationwide designated classes or categories based on watershed and case-by-case assessments. For the municipal program, today's proposal would provide broad discretion to NPDES permitting authorities to develop and implement criteria for designating small municipal separate storm sewer systems outside of urbanized areas. Other storm water discharges from unregulated industrial, commercial, and residential sources would not be covered unless a permitting authority determines on a case-by-case, or categorical, basis that controls would be needed to protect water quality. EPA believes that the flexibility provided in today's proposed rule would facilitate watershed planning.

2. General Requirements for Regulated Entities Under Today's Proposal

Today's proposal defines additional classes and categories of storm water discharges for coverage under the NPDES program. Those dischargers proposed to be regulated by today's proposed rule would be required to seek coverage under an NPDES permit. Furthermore, all NPDES-authorized States and Tribes would be required to implement these provisions and make any necessary amendments to current State NPDES regulations to ensure consistency with today's proposal. EPA would remain the NPDES permitting authority for States and Tribes without NPDES authorization.

EPA proposes to regulate the remaining unregulated point sources of storm water under the NPDES permitting program for a variety of reasons, primarily programmatic, but also legal. The primary reason for regulating storm water under the NPDES program is for simplicity and predictability. EPA envisions a ''seamless'' program, particularly for regulating storm water discharges from municipal separate storm sewer systems, regardless of the relative size of the source. Forty-three jurisdictions (States and territories) administer the NPDES permit program, providing an opportunity for expeditious implementation of a comprehensive program to regulate storm water to protect water quality. The NPDES program is a comparatively mature regulatory program, and affected stakeholders are familiar with, if not accustomed to, how it operates. Regulations under the NPDES program are not enforceable against an affected entity until the effective date of a permit, thus providing an opportunity to identify particularized concerns and tailor permit conditions that are relevant and meaningful on an individualized basis. The NPDES permitting authority periodically reviews the NPDES permits to ensure that applicable requirements remain relevant and ensure adequate protection of receiving waters; CWA section 402(b)(1)(B) describes the 5-year permit term. In addition, NPDES permits are enforceable. Permittees, inspectors, and enforcement authorities understand the individualized permit obligations and, over the years, judicial precedents have established clear procedural standards for the enforcement of those obligations. The NPDES program also provides clear rules for citizen participation, not only in permitting and compliance monitoring, but also in enforcement.

Legal considerations also affect the Agency's proposal to regulate the remaining unregulated storm water under the NPDES permitting program. When Congress enacted the point source storm water provisions of section 402(p) in 1987, it also enacted programs for control of nonpoint sources under section 319. The statute appears to suggest, therefore, that EPA should control point sources under section 402(p) with different, ''regulatory'' programs than the programs for controlling nonpoint sources under section 319. While EPA fully anticipates that States will provide ''reasonable assurances'' for the control of nonpoint sources in a timely and effective manner, such assurances are not yet fully developed in practice. Several States have enacted laws that prescribe State regulation in a manner that is ''more stringent'' than Federal regulation. While the CWA explicitly preserves the authority for States to enact ''more stringent'' regulations to control discharges, the Agency would be concerned that providing maximum flexibility for States to establish ''non-NPDES'' programs would leave regulatory authorities in many States in a quandary to determine whether or not programs they would design are more or less stringent than a Federal program. The NPDES program provides a useful and recognized standard in these instances.

As noted earlier, the NPDES program has a proven record of reducing and eliminating pollutant discharges. The NPDES program also provides mechanisms to assure attainment and maintenance of water quality standards. Given that regulations under section 402(p)(6) are to regulate ''to protect water quality,'' the NPDES program provides a natural fit. Notwithstanding the preceding, however, the Agency recognizes the continuing imperative to assure that environmental regulations accomplish statutory objectives in the least burdensome and most cost-effective fashion. As explained further in this preamble, the form and substance of NPDES permits to address the sources designated in today's proposal would provide greater flexibility for the newly covered sources than the existing ''standard'' NPDES permit.

Today's proposal would establish requirements for NPDES permitting authorities, regulated small municipal separate storm sewer systems, construction activities disturbing equal to or greater than 1 acre and less than 5 acres of land, and other discharges designated by the permitting authority based on local conditions.

Today's proposal includes some new requirements for NPDES permitting authorities implementing the CWA section 402(p)(6) program. As noted above, EPA is making a significant effort to build flexibility into the program. At the same time, EPA is maintaining a level of national consistency, as appropriate. Permitting authorities would be required to generally ensure that the minimum requirements proposed today would be addressed by the regulated community (e.g., permitting authorities must ensure that permits issued to municipalities include the minimum control measures established under the program). Permitting authorities would also have the ability to make numerous decisions about the program including who is regulated under the program (e.g., case-

by-case designations and waivers), what the requirements are for regulated entities (e.g., waiving otherwise applicable provisions where certain conditions are met and developing a list of regionally appropriate, field-tested BMPs that it believes to be cost-effective), and what the allocation of responsibilities is between regulated entities.

The rule proposes to extend the municipal storm water program to include the following: small municipal separate storm sewer systems within urbanized areas (with the exception of tribally-owned systems that serve less than 1,000 persons and any other system waived from the requirements by the NPDES permitting authority), small municipal separate storm sewer systems meeting the criteria (to be established by the permitting authority) for designation, and any municipal separate storm sewer system contributing substantially to the storm water pollutant loadings of a regulated, physically interconnected municipal separate storm sewer system. Small municipal separate storm sewer systems include municipal, Tribal, State, and Federal facilities and other systems located in an urbanized area that fall within the definition of a municipal separate storm sewer system. These would include, for example, State departments of transportation, universities, and military bases.

Today's proposal would require all regulated small municipal separate storm sewer systems to develop and implement a storm water management program. Program components would include, at a minimum, measures to address requirements concerning public education and outreach, public involvement, illicit discharge detection and elimination, construction site runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention and good housekeeping of municipal operations. These program components would be implemented through NPDES permits. A municipality would be required to submit to the NPDES permitting authority, either in its NOI or individual permit application, the BMPs to be implemented and the measurable goals for each of the minimum control measures listed above.

The rule proposes to address all construction site activities involving clearing, grading and excavating land equal to or greater than 1 acre and less than 5 acres, unless requirements are otherwise waived by the NPDES permitting authority. Such sites, including construction site activities disturbing less than 1 acre of land that are designated by the permitting authority, would be required to implement requirements set forth in the NPDES permit, which may reference the requirements of a qualifying local program, issued to cover such sites.

The rule also proposes to address certain other sources regulated under the existing program for storm water. For municipally owned industrial sources required to be regulated under the existing NPDES storm water program but exempted from immediate compliance by the Intermodal Surface Transportation Act of 1991 (ISTEA), the rule proposes to maintain the existing deadline for seeking coverage under an NPDES permit (August 7, 2001) (EPA is requesting comment on the possibility of covering such sources in a single storm water permit for the municipality as a whole. See section II.I.3. below.) The rule also proposes to provide relief from NPDES storm water permitting requirements for industrial and other sources that provide a written certification of ''no exposure of industrial materials and activities to storm water.''

3. Integration of Today's Proposal With the Existing Storm Water Program

In developing today's proposal, members of both the FACA Committee and the Storm Water Phase II FACA Subcommittee encouraged EPA to seek opportunities to integrate, where possible, the proposed Phase II requirements with existing Phase I requirements, thus facilitating a ''seamless,'' unified storm water program. EPA believes that this objective is met by using the NPDES framework. This framework is already applied to regulated sources under the existing NPDES storm water program and would be extended to those sources that would be designated under today's proposed rule. This approach would facilitate program consistency, public access to information, and program oversight.

EPA believes that this proposal provides consistency in terms of program coverage and requirements for existing and newly proposed sources. For example, today's proposal would include most of the so-called donut holes—municipal separate storm sewer systems within urbanized areas that contain systems covered by the existing NPDES storm water program, but are not themselves addressed by the storm water program. In addition, the minimum controls required in today's proposal for regulated small municipal separate storm sewer systems would be very similar to a number of the permit requirements for medium and large municipal separate storm sewer systems under the existing storm water program. As proposed, permit requirements for all regulated municipal separate storm sewer systems (i.e., those under the existing program and those proposed today) would require implementation of BMPs. Furthermore, with regard to the development of permits to protect water quality, EPA intends to apply the August 1, 1996, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits* (hereinafter, ''Interim Permitting Approach'') (see Section II.L.1. for further description) to all municipal separate storm sewer systems covered by the existing and the proposed extension of the existing NPDES storm water program. EPA requests comment on the appropriateness of applying this approach to small municipal separate storm sewer systems regulated under this rule.

EPA is planning to apply similar permit requirements to construction sites below 5 acres as are applied to those above 5 acres. A waiver provision applicable to certain circumstances is proposed. In addition, today's rule proposes to allow compliance with qualifying local, Tribal, or State erosion and sediment controls to meet the erosion and sediment control requirements of the general permits for construction both above and below 5 acres.

4. General Permits

The proposal would recommend using general permits for all dischargers that would be covered under today's proposal. The use of general permits instead of individual permits reduces the administrative burden on permitting authorities, while also limiting the paperwork burden on regulated parties seeking permit coverage. Permitting authorities may, of course, require individual permits in some cases to address specific concerns, including permit noncompliance.

While general permits are probably most appropriately issued on a watershed-wide basis for all storm water permittees designated in this proposal, the Agency strongly recommends that general permits for municipal sources, in particular, be issued on a watershed basis. Permit conditions contoured to a specific watershed could reflect an approved watershed plan, special provisions concerning program implementation (e.g., allocation of responsibilities among permittees), applicable water quality standards, including designated uses, and timing of

implementation. Alternatively, the Agency recommends that municipal general permits be issued to cover the regulated small municipal separate storm sewer systems within urbanized areas. If the permitting authority issues a State-wide general permit, the permitting authority may include separate conditions tailored to individual watersheds or urbanized areas.

As discussed in Section I, today's proposed rule would provide an opportunity for regulated small municipal separate storm sewer systems to become co-permittees with municipal separate storm sewer systems covered under existing individual permits. EPA intends to consult with the Storm Water Phase II FACA Subcommittee in developing its general permits for the proposed program. The Agency would recommend that State NPDES permitting authorities use the EPA general permit as a guide in writing State-issued permits for newly regulated storm water sources. Furthermore, within the context of this rule, EPA intends to use the August 1, 1996, Interim Permitting Approach (see Section II.L.1. for further description) for sources regulated under the NPDES storm water program.

5. Tool Box

During the FACA process, many Storm Water Phase II FACA Subcommittee representatives expressed an interest in having EPA develop a ''tool box'' to assist States, Tribes, municipalities, and other parties involved in the Phase II program. EPA made a commitment to work with Storm Water Phase II FACA Subcommittee representatives in developing such a tool box, with the expectation that a tool box would facilitate implementation of the storm water program in an effective and cost-efficient manner. EPA is committed to having a preliminary working tool box by the time the proposed rule is finalized in 1999; EPA intends to have the tool box fully operational at the time of the general permit. EPA also intends to update the tool box as resources and data become available. The tool box would most likely include the following six main components: fact sheets, guidances, an information clearinghouse, training and outreach efforts, technical research, and support for demonstration projects.

In an attempt to avoid duplication, the Agency has undertaken an effort to identify and coordinate sources of information that relate to the storm water program from both inside and outside the Agency. Such information may include research and demonstration projects, grants, storm water management-related programs, and compendiums of available documents, including guidances, related directly or indirectly to the comprehensive NPDES storm water program. Based on this effort, EPA would develop a tool box containing fact sheets and guidance documents pertaining to the overall program and rule requirements (*e.g.*, guidance on municipal and construction programs, and permitting authority guidance on designation and waiver criteria); models of current programs aimed at assisting States, Tribes, municipalities, and others in establishing programs; a comprehensive list of reference documents organized according to subject area (*e.g.*, illicit discharges, watersheds, water quality standards attainment, funding sources, and similar types of references); educational materials; technical research data; and demonstration project results. The information collected by EPA will not only provide the background for tool box materials, but may also be included in, and made available through, an information clearinghouse. Due to cost concerns, EPA is still considering whether an information clearinghouse will be part of the tool box. EPA also intends to provide training workshops at the regional level with the expectation that the EPA regional offices then will assist States, Tribes, and municipalities with understanding the storm water program and will ensure that the regulated entities are aware of the availability of the tool box materials.

EPA has many funding mechanisms currently available to support activities related to storm water. These mechanisms will be included in the tool box. Many activities funded under grants and loan programs include programs in the nonpoint source area, storm water demonstration projects, and wastewater construction projects. EPA has already provided funding for numerous research efforts in these areas, including a database of BMP effectiveness studies, an assessment of technologies for storm water management, a study of the effectiveness of storm water BMPs for controlling the impacts of watershed imperviousness, protocols for wet weather monitoring, development of a dynamic model for wet weather flows, and numerous outreach projects.

EPA has entered into a cooperative agreement with the Urban Water Resources Research Council of the American Society of Civil Engineers (ASCE) to develop a scientifically-based approach and management tool for the information needed to evaluate the effectiveness of urban storm water runoff BMPs nationwide. The long-term goal of the project is to promote technical design improvements for BMPs and to better match their selection and design to the local storm water problems being addressed. The project team is collecting and evaluating existing BMP performance data, developing a BMP evaluation protocol, and designing and creating a database. Eventually the database will include the nationwide collection of information on the characteristics of structural and non-structural BMPs, data collection efforts (*e.g.*, sampling and flow gauging equipment), climatological characteristics, watershed characteristics, hydrologic data, and constituent data. The database will continue to grow as new BMP data become available. The database software will be distributed by CD–ROM and will be accessible through the Internet.

EPA and ASCE invite BMP designers, owners and operators to participate in the database development effort. To make this effort successful, a large database is essential. Interested persons are encouraged to submit their BMP performance evaluation data and associated BMP watershed characteristics for potential entry into the database. In addition, researchers planning to conduct BMP performance evaluations in the future are requested to compile and collect BMP reporting information according to a format being developed by ASCE. For more information, please contact Eric Strassler, EPA Engineering and Analysis Division, at 202–260–7150, e-mail: strassler.eric@epamail.epa.gov.

EPA intends to promote research consistent with the *Risk Management Research Plan for Wet Weather Flows* prepared by EPA's Office of Research and Development. This plan supports the priority research questions and needs of the Office of Water. Finalized in November 1996, the plan will be updated annually. It includes strategic research directions and identifies active and proposed projects for supporting each research area.

6. Deadlines Established in Today's Proposal

Exhibit 2 outlines the various deadlines proposed in today's rule. EPA believes that the dates proposed allow sufficient time for completion of both the NPDES permitting authority's and the permittee's program responsibilities. EPA requests comment on the appropriateness of the proposed deadline dates.

EXHIBIT 2.—TODAY'S PROPOSED RULE DEADLINES

Activity	Deadline date
Proposed Rule Becomes Final	3/1/99.
NPDES-Authorized States Modify NPDES Program	3/1/00.
NPDES-Authorized States Modify NPDES Program if Statutory Change is Required	3/1/01.
Permitting Authority Issues A Menu of BMPs for Regulated Small Municipal Separate Storm Sewer Systems (MS4s).	3/1/01.
ISTEA Sources Submit Permit Application	8/7/01.
Permitting Authority Issues General Permit(s) (if this type of permit coverage is selected)	3/1/02.
Regulated Small MS4s Submit Permit Application:	
a. If designated under § 122.32(a)(1) with 1990 Census as ''latest'' Census	a. 5/31/02.
b. If designated under § 122.32(a)(1) with 2000 Census as ''latest'' Census (2000 Census calculations to be completed approximately by August 2001).	b. 5/31/02.
c. If designated under § 122.32(a)(2)	c. Within 60 days of notice.
d. If designated under §§ 122.26(a)(9)(i) (C) or (D)	d. Within 180 days of notice.
Storm Water Discharges Associated With Other Activity Submit Permit Application	5/31/02.
Permitting Authority Designates Small MS4s under § 123.35(b)(2)	5/31/02 or 3/1/04 (if a watershed plan is in place).
Regulated Small MS4s' Program Developed and Implemented	2007.
Reevaluation of the Proposed Rule by EPA	3/1/12.
Permitting Authority Determination on a Petition	Within 180 days.
Non-Municipal Sources Designated Under § 122.26(a)(9)(i) (C) or (D) Submit Permit Application.	Within 180 days of notice.
Submission of No Exposure Certification	Every 5 years.

B. Readable Regulations

Today, EPA is proposing new regulations in a ''readable regulation'' format. This reader-friendly, plain English approach is a departure from traditional regulatory language and should enhance the rule's readability. These plain English regulations use questions and answers, ''you'' to identify the person who must comply, and ''must'' rather than ''shall.'' The legal implications of plain English are the same. The word ''must'' indicates a requirement. Words like ''should,'' ''could,'' or ''encourage'' indicate a recommendation or guidance. This new format, which minimizes the layers of subparagraphs, should also allow the reader to easily locate specific provisions of the regulation. Language within parentheses in today's proposal is intended as guidance. EPA requests comment on this new format and whether it provides sufficient distinction between legal obligations and EPA recommendations.

Some sections of today's proposed regulation are presented in the traditional language and format because these sections are amending or changing existing regulations. The readable regulation format was not used in these existing provisions in an attempt to avoid any possible confusion or disruption of the flow of the regulations.

C. Program Framework

EPA interprets CWA section 402(p)(6) to provide broad discretion in establishing the structural framework for the designation of additional sources, as well as the program to regulate those sources. The Agency believes it has the authority to develop the section 402(p)(6) storm water program either as part of the existing NPDES permit program or as a stand alone non-NPDES program (i.e., through an ''authorization by rule'' approach). Under either approach, the Agency would interpret section 402(p)(6) as directing the Agency to publish regulations that ''regulate'' the remaining unregulated sources, specifically to establish requirements that are federally enforceable under the CWA. At the same time that Congress enacted section 402(p), it enacted CWA section 319. Section 319(b)(2)(B) refers to ''nonregulatory or regulatory programs for enforcement.'' The Agency interprets this distinction as relevant for the purposes of interpreting the term ''regulate'' in section 402(p)(6). The Agency has considered many options for the framework, as discussed in this section. The Agency also notes that, although input from the Storm Water Phase II FACA Subcommittee was instrumental in the development of today's proposal, the subcommittee was unable to reach consensus on the structural framework for implementation.

1. Today's Approach—The NPDES Program Approach

As discussed in Section II.A, Overview, EPA sought to achieve certain goals in today's approach. EPA believes the best approach to meet these goals is through the use of the NPDES program. One of the specific goals that would be addressed through use of NPDES permits is equitable treatment of all municipal separate storm sewer systems within an urbanized area in order to solve the problem of donut holes. The existence of donut holes creates an equity problem because some similar discharges remain unregulated even though they cause the same water quality impacts. EPA believes that covering the unregulated discharges in these areas through the NPDES framework would provide the best method, given that this approach would cover urbanized areas under one single comprehensive and seamless regulatory program for storm water. For example, today's proposal would allow for a municipality to join as a co-permittee with a regulated municipality, referencing a common storm water management program (see Section II.H.3, Municipal Permit Requirements, for further discussion.) Similarly, construction activities under the existing storm water program and under today's proposed program covering 1 to 5 acres of disturbed land would be subject to essentially the same program requirements. The NPDES program approach, as proposed, is highly flexible in terms of a number of key provisions that would facilitate and promote watershed planning and sensitivity to local conditions. EPA made an intensive effort to include flexibility in today's proposed rule, and examples abound throughout the proposal. The following are some of the more significant examples of the flexible NPDES approach being proposed: using NPDES general permits for coverage of regulated sources on a watershed basis; incorporating qualifying local programs in NPDES permit requirements; selecting regionally appropriate BMPs

for municipalities; allowing minimum control measures to be implemented by another governmental entity; and allowing permitting authorities to waive otherwise applicable requirements for sources pursuant to watershed/TMDL assessments. Furthermore, EPA sought to accommodate State and Tribes seeking to coordinate the storm water program with other State and Tribal programs, including those that focus on watershed-based nonpoint source regulation.

EPA believes that a flexible approach must be in balance with the need for the program to be enforceable and to hold the regulated community accountable for fulfilling program requirements. As such, a significant benefit of using an NPDES approach is that permits would be enforceable under the CWA. Another concern for EPA and several Storm Water Phase II FACA Subcommittee members was that the program ensures citizen participation. Currently, the NPDES approach ensures citizen participation throughout the permit issuance process, as well as in enforcement proceedings.

In addition, the NPDES approach is suitable to cover all the sources that would be potentially regulated under CWA section 402(p)(6), including facilities owned or operated by Federal, State, or Tribal governments. Incorporating the section 402(p)(6) program into the NPDES approach capitalizes upon the existing governmental infrastructure for administration of the NPDES program. Moreover, much of the regulated community already understands the NPDES program and the way it works.

Some stakeholders shared concerns that the NPDES approach was unnecessarily burdensome and costly. In response, EPA proposes modifications to and clarifications about the NPDES program. EPA shares some of the stakeholder concerns; other concerns are merely misperceptions. EPA envisions that NPDES permitting authorities would use general permits for the majority of discharges designated for regulation under the comprehensive program. General permits should help to minimize any administrative burden on NPDES permitting authorities and expedite permit coverage for dischargers. The Agency also proposes provisions that would recognize actions by States and their political subdivisions in determining compliance with permit requirements. For example, small municipalities could rely on efforts by States or neighboring municipalities to satisfy permit obligations. This flexibility would allow both the permittee/municipality and the State to minimize unnecessary duplication. Another example from today's proposal would be the incorporation by reference of existing programs with locally developed standards for pollutant controls into NPDES permits. This would be to the benefit of permittees who might otherwise be subject to duplicative requirements by different levels of government (local, State, and Federal.)

2. Alternatives Considered

EPA considered a variety of alternative approaches to structure the proposed extension of the existing storm water program. Under the first option, EPA would develop a completely new non-NPDES regulatory system. Such an approach could include authorization of discharges ''by rule'' or some other type of permit program in which permits were not developed in the same way as NPDES permits. Under a second option, EPA would establish only a ''baseline'' scope of applicability for State and Tribal programs; the only nationally applicable EPA action would be the designation of sources. EPA would allow States and Tribes to use existing water pollution control programs (NPDES or otherwise) to regulate such designated sources. To the extent existing programs did not cover EPA's baseline program, States and Tribes would establish additional regulatory control mechanisms. A Storm Water Phase II FACA Subcommittee work group analyzed these approaches and provided valuable feedback to the Agency. A caucus of State representatives from the Storm Water Phase II FACA Subcommittee submitted a third option. Under their proposal, States and Tribes would have an option to develop an individual storm water management program. (As an alternative under this option, States and Tribes could choose to implement the program developed by EPA.) The individual State or Tribal storm water management program would use NPDES permits but would also rely on enforceable non-permit mechanisms (e.g., if EPA promulgated a regulation that ''deemed'' requirements under such non-permit mechanisms to be ''an effluent limitation or other limitation under CWA section 301''). Because section 402 is referenced in section 301(a), non-permit mechanisms developed by States according to the comprehensive program requirements of section 402(p)(6) would also constitute effluent limitations under section 301. Under the States' proposal, EPA would have to review and approve these programs to ensure that they provide for the same water quality results as those prescribed under the Federal program. Additionally, EPA would periodically evaluate the management plans and could require the State or Tribe to implement the Federal section 402(p)(6) program if the plan became inadequate. The State caucus representatives of the Storm Water Phase II FACA Subcommittee amplified this option in a discussion intended for inclusion in this preamble and for public comment thereon (see the next section entitled, State Alternative Program).

EPA believes the alternative approaches could provide many of the same benefits discussed previously relating to today's proposal. Specifically, EPA believes that the options could be designed to provide adequate integration of the storm water programs, enforceability, accountability, public participation, and coverage of sources (e.g., facilities owned or operated by Federal, State, or Tribal governments). The alternative approaches might also provide opportunities to streamline the control mechanisms that the Agency has not yet evaluated. Furthermore, the storm water management program proposal allows States and Tribes the maximum amount of flexibility in tailoring the section 402(p)(6) program to address their specific environmental problems.

The Agency does have some concerns about the alternative proposals, however. The alternatives establish new systems, which could cause a great deal of confusion. As explained previously, EPA is not yet aware of any such program currently in existence for regulation of storm water. None of the alternatives would provide any level of national consistency or predictability. This may be a special concern for industrial stakeholders operating in multiple States nationwide. The Agency has heard numerous concerns about inconsistencies in requirements from different jurisdictions. While today's proposed approach does not totally address this issue, the Agency at least attempts to establish a minimum program for ensuring a certain level of consistency nationwide.

In addition, EPA believes it would be very difficult to determine whether a State or Tribe has developed an adequate individual program that provides the same level of substantive control. The process of approving these alternative programs to determine whether they provide an equivalent or better level of control could take a great deal of time and further delay controlling unregulated point source discharges that are causing an adverse impact on water quality. Furthermore, if a non-NPDES option was included in

the final rule, EPA would need to determine which, if any, programmatic requirements of 40 CFR parts 122 *et seq.* should be applicable to State non-NPDES programs. EPA believes it would need to address some of the State program requirements from existing regulations including conflicts of interest among governing bodies who approve permits (consistent with CWA section 304(i)(D)), requirements for enforcement authority and penalty provisions, confidentiality of permit application information, EPA review of and objection to State permits, public notice and public hearings for permit issuance, citizens appeal of final-issued permits, and citizen intervention in enforcement proceedings. These provisions are particularly important for ensuring adequate enforcement and public participation, as well as integrity and public confidence in the program. EPA seeks comment on how these issues could be addressed in a non-NPDES program.

The Agency is seeking comment on today's proposal, as well as on the alternatives considered. Comment is further sought on whether a viable approach would be for EPA to adopt a State alternative approach for part of today's proposed storm water program. For example, were it to adopt a non-NPDES approach, EPA would need to determine what parts of the State's non-NPDES program could be submitted for EPA approval. It would seem that it is more prudent to specify particular parts of a storm water program, rather than the program in its entirety, as eligible for approval for a non-NPDES approach. Thus, a State or Tribe could propose a non-NPDES framework for the construction component (1 or more and less than 5 acres of disturbed land) of its storm water program. Likewise, a State or Tribe could propose a non-NPDES framework for storm water runoff from regulated small municipalities located outside of urbanized areas. Furthermore, another option could allow States or Tribes to seek approvability for a non-NPDES approach solely for sub-parts of the program, such as covering construction sites between 3 and 5 acres under an NPDES program, while covering between 1 and 3 acres in a non-NPDES program. In the municipal program, a non-NPDES program could be available for specific minimum control measures. EPA would like comment on these options for program approvability.

a. State Alternative Non-NPDES Program

State representatives on the Storm Water Phase II FACA Subcommittee have requested that EPA invite comment on an alternative program framework to be available to States in addition to the NPDES State storm water management program requirements in today's proposed rule.

Today's proposal would rely on the NPDES permit program to establish a comprehensive program to regulate designated sources. EPA believes, however, that section 402(p)(6) is subject to an interpretation that would allow for a comprehensive program to regulate designated sources through a regulatory program other than the NPDES permit program (e.g., through authorization by rule). For a State to qualify for a non-NPDES approach, it would probably have to decide to take such an approach from the start, however.

State representatives have suggested that a process be identified that would lead to the development of an alternative non-NPDES State storm water management program under CWA section 402(p)(6) for States wishing to take a more comprehensive approach than that of today's proposal. Under the States' proposal, States, Territories, and Tribes could elect either (1) to regulate the sources designated in today's proposal under the NPDES permit program according to the provisions of today's proposal (assuming the State, Territory, or Tribe is authorized to administer the NPDES program) or (2) to develop an alternate State storm water management program subject to public review and comment and Federal approval. The two major features of the alternative program are that it would be fully integrated into a State comprehensive water quality management program and it would include specific non-NPDES mechanisms for controlling storm water discharges. States would also have the option of employing some combination of the above.

i. Alternative Overview. Similar to today's NPDES proposal, States under the alternative proposal would need to specifically identify how urban storm water management activities would be coordinated with other water quality management activities, such as nonpoint source management and TMDL development. In addition, as proposed, the State storm water management program would be developed with involvement of municipalities, industries, environmental groups, and other stakeholders, much like the current NPDES process. Also, as with the NPDES program, the alternative program would focus principally on environmental results, rather than on the administrative or planning process itself. States propose more opportunity for citizen involvement in the initial development and implementation of the overall alternative program than is currently envisioned by today's NPDES proposal. In comparison with today's NPDES proposal, the alternative might allow for less opportunity for citizen involvement in the details of requirements imposed on dischargers (than is afforded under NPDES permits).

ii. State-Proposed Program Criteria. In seeking proposal of an alternative approach, State representatives on the Storm Water Phase II FACA Subcommittee have suggested criteria for EPA approval of an alternative State storm water management program. Such a program would be required:

(1) To demonstrate that it would result in equivalent or better protection of water quality and designated uses
(2) To provide assurances of implementation, including:
  a. Legal authorities of participating state and local agencies
  b. Resources to carry out implementation
  c. Enforceable mechanisms for implementation measures, including backup to voluntary measures
(3) To identify equivalent or better timeframes for implementation
(4) To allow equivalent or better public participation elements
(5) To provide for management of the same types of facilities in an equivalent or better manner or provide for management of activities that would result in equivalent or better protection
(6) To include objectives, measures, monitoring, and corrective action mechanisms adequate to assure that the program is being implemented and is effective

Other substantive considerations would include, at a minimum, a description of the mechanism by which storm water sources are (or would be) regulated; a description of the opportunities for public participation, including in the development of regulatory and nonregulatory mechanisms and enforcement; and a statement about the legal authority of the State to administer such a program by an officer of the State who is competent to provide such a statement.

In utilizing these criteria, the alternative program submission would cover, to at least the same extent, sources and related pollutants of concern designated in today's proposed rule (e.g., discharges from small municipal separate storm sewer systems

and from construction sites disturbing less than 5 acres, including opportunity for waiver provisions). For a State to qualify for approval of an alternative approach, the State program would need to cover additional wet weather sources not specifically designated in today's proposed rule as well. In addition, covered sources to be designated under today's proposal and other additional sources identified by the State alternative program would be expected to attain water quality standards, including designated uses. One area of flexibility that EPA foresees as a possibility under the alternative program relates to the minimum control measures required in today's NPDES proposal. Implementation of today's proposed minimum control measures in the alternative approach would not be necessary as long as the alternative program provided for control measures that addressed the same impacts to the same extent as today's proposed minimum control measures are intended to.

iii. Proposed Procedure for Approval and Periodic Review. If the final rule were to allow States an option for an alternative State storm water management program, States envision the need for both a Federal approval procedure and periodic EPA review. States would need to invest time, energy, and resources at the outset to develop such alternative programs. More planning would be necessary for such a submission than would otherwise be expected under today's proposal. In addition, a State electing to develop an alternative storm water management program might be required to evaluate, revise, and update its water quality management program at fixed intervals. States envision that, EPA, in conducting such reviews, would seek comments from the community on the performance of the statewide storm water management program. State representatives believe that this approach would provide the public within a State with much more meaningful involvement at the program level than is normally achieved through the issuance of individual or general permits.

iv. Proposed Procedure for Disapproval. State representatives have also suggested criteria for EPA use in the event that it becomes necessary to withdraw approval of a State storm water management program and require implementation of the federally prescribed NPDES program in today's proposed rule. They have proposed the following criteria:

(1) The State has not implemented its program or has ceased implementation of the program;

(2) The State is implementing its program, but the program is not effective in managing storm water from the same sources intended in the NPDES alternative;

(3) EPA has notified a State of deficiencies in its program and the State has not corrected them within 6 months, or 2 years if statutory revisions are necessary. (EPA is not required to provide the State time to make statutory revisions if the State legislature has already removed the original necessary State statutory program authority.)

EPA invites comment on the appropriateness of this alternative proposal. Specifically, comments are sought on the proposed alternative approval, review, and disapproval processes as they relate to requirements under 40 CFR Part 123. EPA invites comment on the appropriateness of these substantive criteria, including the appropriate level of specificity to ensure consistent application while providing States with flexibility, as well as the need for other substantive criteria. This would include enforceability of such an alternative to ensure equivalency or better protection of water quality as envisioned by the CWA and the need for national consistency in point source control requirements. EPA further invites comment on whether State processes for public participation would provide an adequate opportunity for input from regulated sources, as well as from the public in general.

In addition, the States have proposed that an alternative program could utilize State efforts undertaken to comply with Part 130 regulations (40 CFR Part 130). Although EPA is not proposing to amend the Part 130 regulations, EPA invites comment on how the existing Part 130 regulations could support an enforceable alternative State program. For a more complete discussion of the Part 130 regulations, see Section II.L.2, Total Maximum Daily Loads, of today's preamble.

3. Permits Versus Non-Permits

As noted previously, EPA proposes that the extension of the existing storm water program under section 402(p)(6) be administered as part of the NPDES permitting program (including the exemption for discharges associated with industrial activity composed entirely of storm water where there is ''no exposure'' to storm water). As such, the extension of the existing storm water program would be implemented through NPDES permits. NPDES permits are advantageous in many ways. As explained more fully in EPA's April 1995 guidance, *Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* (U.S. Environmental Protection Agency. July 1, 1994 (revised April 11, 1995). Memo: From Robert Perciasepe (Assistant Administrator for Water), Steven A. Herman (Assistant Administrator for Enforcement), and Jean C. Nelson (General Counsel) to Regional Administrators, Regarding ''Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits.''), compliance with an NPDES permit constitutes compliance with the CWA (see CWA section 402(k)). Moreover, certain NPDES discharges qualify as ''federally permitted releases'' under section 101(10) of the Comprehensive Environmental Response, Compensation and Liability Act, also known as Superfund (see 42 U.S.C. 9601(10); 40 CFR 117.12). Additionally, permits generally require an application or a notice of intent to be covered. This information exchange assures communication between the permitting authority and the regulated community. This communication is critical in ensuring that the regulated community is aware of the requirements and the permitting authority is aware of potential impacts to water quality. The NPDES permitting process includes the public as a valuable stakeholder and ensures that the public is included and information is made publicly available. Furthermore, NPDES permits are enforceable under the CWA by citizens and Federal, State, and Tribal governments, thus ensuring adequate protection against adverse impacts on water quality.

The Agency recognizes that using NPDES permits has some drawbacks. Issuing individual NPDES permits can be burdensome on permitting authorities and the regulated community. NPDES permits are only effective for 5 years. The time spent issuing permits could restrict resources to conduct public outreach, inspections, and enforcement. Commenters have noted that the application process is costly and confusing. To address a number of these problems, EPA encourages using general permits for the majority of sources to be designated under this proposal. NPDES general permits can cover a category of dischargers within a defined geographic area. Areas can be defined very broadly to include political boundaries (e.g., county), watershed boundaries, or State or Tribal land. Furthermore, EPA is working to streamline the permit

application/NOI process to reduce the burden on the regulated community. EPA is seeking comment on today's proposed approach.

The Storm Water Phase II FACA Subcommittee work group that considered the structural framework for the extension of the existing storm water program under section 402(p)(6) also considered the appropriate legal mechanism for implementation. The subcommittee discussed numerous options and considered including self-implementing rules or ''permits-by-rule.''

A self-implementing rule would be a regulation promulgated at the Federal, State, or Tribal level. The basic principle would be that the rule would spell out the specific requirements for dischargers. The rule could impose the exact same restrictions and conditions as an NPDES permit, but generally would be effective until modified by EPA, a State, or a Tribe. EPA considered addressing the storm water program under section 402(p)(6) directly by rule instead of through a permitting program. This approach could reduce the burden on the regulated community (e.g., by not requiring permit applications). Although this approach would provide consistency across the nation, it would not address site-specific problems very well or foster coordination with authorized NPDES State programs. In discussing this option, some stakeholders raised enforcement issues and the ability of EPA, States, and Tribes to determine which discharges were subject to the program. Although EPA has several programs with self-implementing requirements (e.g., the sewage sludge program, Part 129 toxic standards under the NPDES program, and categorical standards under the pretreatment program), the Agency does not propose to take this approach under section 402(p)(6). The Agency does, however, seek comment on such an alternative.

D. Federal Role

Today's proposal describes EPA's approach to develop the extension of the existing storm water program under CWA section 402(p)(6). As in all other Federal programs, the Federal government plays an integral role in developing, implementing, overseeing, and enforcing the program. This section describes EPA's role in the revised storm water program.

1. Develop Overall Framework of the Program

As discussed previously in the overview section, the storm water program under CWA section 402(p)(6) would consist of the rule, tool box, and permits. EPA's primary role would be to ensure timely development and implementation of all components. Today's proposal is a refinement of the first step in developing the program. EPA is fully committed to continuing to work with involved stakeholders on developing the tool box and issuing permits. As noted in today's proposal, EPA would be required to assess the municipal storm water program based on (1) evaluations of data from the NPDES municipal storm water program, (2) research of water quality impacts on receiving waters from storm water, and (3) research on BMP effectiveness. EPA will attempt to seek adequate resources, within annual budgetary constraints, to ensure that these evaluations, as well as the necessary research, can be completed. (Section II.H, Municipal Role, provides a more detailed discussion of this provision.)

2. Encourage Use of a Watershed Approach

EPA is promoting an integrated approach that focuses on public and private sector efforts to address the highest priority problems within hydrologically defined geographic areas. Today's proposal offers flexibility for States and Tribes to use a watershed approach and should facilitate watershed planning on the part of States and Tribes implementing the program. Section I.H. discusses the watershed approach in more depth.

3. Provide Financial Assistance

Another important role for the Federal government would be to assist financially in developing and implementing the storm water program under section 402(p)(6). EPA has no independent authority to establish a funding mechanism. Although Congress did not establish a fund to fully finance implementation of the proposed extension of the existing NPDES storm water program under section 402(p)(6), numerous Federal financing programs (administered by EPA and other Federal agencies) could provide some financial assistance. These programs include the CWA section 106 grant program, CWA section 104(b)(3) grant program, State surface and ground water management programs under the Safe Drinking Water Act, the environmental quality incentives program, the conservation reserve program, the wetlands reserve program, and the estuary management and Federal monitoring programs. Also, the Natural Resources Conservation Service (NRCS) has some grants available to assist in projects related to erosion and sediment controls. The Agency anticipates that some of these programs would provide funds to help develop and, in limited circumstances, implement the section 402(p)(6) storm water program. Because some Federal funds are only available for limited purposes, for example, nonpoint source control programs, and because section 402(p)(6) describes a program for controlling point source discharges of storm water, EPA solicits comment on suggestions on structuring the final rule to maximize opportunities for Federal financial assistance.

4. Implement the Program for Non-NPDES Authorized States, Tribes, and Territories

Since today's proposed approach utilizes the NPDES framework, EPA would be the permitting authority for several States, Tribes, and Territories. As such, EPA would have the same responsibilities as any other NPDES permitting authority—issuing permits, designating additional sources, and taking appropriate enforcement actions—and would seek to tailor the storm water program to the specific needs of the State, Tribe, or Territory. EPA would also provide support and oversight, including outreach, training, and technical assistance to the regulated communities. See the discussions below related to the NPDES permitting authority's responsibilities for today's proposed rule provisions, and note that Section II.G. of today's preamble provides a separate discussion.

5. Oversee State Programs

Under the NPDES program, EPA plays an oversight role for NPDES-approved States and Tribes. In this role, EPA and the States or Tribes work together to implement, enforce, and improve the NPDES program. Part of this oversight role includes working with States and Tribes to modify their programs where inadequacies exist. This role would be vitally important when States and Tribes make adjustments to develop, implement, and enforce the new section 402(p)(6) proposed extension of the existing NPDES storm water program. In addition, States maintain a continuing planning process (CPP) under section 303(e) of the CWA, which EPA periodically reviews to assess the program's achievements.

In its oversight role, EPA takes action to address States and Tribes who have voluntarily sought NPDES authorization but are not fulfilling their obligations under the NPDES program. If an NPDES-authorized State or Tribe failed to implement an adequate NPDES storm water program, for example, EPA would enter into extensive discussions to

resolve outstanding issues. EPA has the authority to withdraw the entire NPDES program (partial program withdrawal is not allowed under the CWA) when resolution cannot be reached.

EPA is also working with the States and Tribes to improve nonpoint source management programs and assessments to incorporate key program elements. Nonpoint source program elements can include protecting surface and ground water; establishing partnerships with public and private partners; using a balanced approach incorporating Statewide and watershed-abatement of existing impairments; preventing future impairments; developing processes to address both impaired and threatened waters; reviewing upgrades of all program components, including program revisions on a 5-year cycle; addressing Federal land management and activities inconsistent with State programs; and managing State/Tribal nonpoint source management programs. In addition, EPA has committed to help address nonpoint source pollution stemming from Federal lands and activities.

In particular, EPA works with the States and Tribes to strengthen their nonpoint source pollution programs to address agricultural sources through the CWA section 319 program. EPA is working with other government agencies, as well as with community groups, to effect voluntary changes regarding watershed protection and reduced nonpoint source pollution. Through the FACA process, the Agency would continue to work with States to ensure that the requirements of the proposed extension of the existing storm water program under section 402(p)(6) are consistent with elements of the nonpoint source management program.

In addition, EPA and NOAA have published programmatic and technical guidance to address coastal nonpoint source pollution. Under the existing coastal protection program, EPA and NOAA review State programs and provide technical and programmatic assistance to help the coastal States upgrade their Coastal Zone Management Programs. The Agency is committed to assisting States in identifying sources of funding to develop and implement State coastal nonpoint programs.

6. Comply With Applicable Requirements as a Discharger

Today's proposal covers federally owned or operated facilities in a variety of ways. These facilities are generally areas where people reside, such as a Federal prison, hospital, or military base. These facilities could be included under the definition of a regulated small municipal separate storm sewer system, which specifically includes systems operated by the Federal facilities. For Federally owned regulated small municipal separate storm sewer systems, the proposal would require compliance with the application deadlines that apply to regulated small municipal separate storm sewer systems generally. EPA believes that all Federally owned municipal separate storm sewer systems would serve populations less than 100,000. We invite comment on the appropriateness of this assumption.

Federal facilities could also be included under the section addressing storm water discharges associated with other activities, including construction. In any case, discharges from these government-owned facilities would need to comply with all applicable NPDES requirements and any additional water quality-related requirements imposed by a State, Tribal, or local government. Failure to comply could result in enforcement actions. Federally owned and operated facilities could act as models for municipal and private sector facilities and implement or test state-of-the-art management practices and control measures.

E. State Role

Today's proposal sets forth an NPDES approach for implementing the proposed extension of the existing storm water program under section 402(p)(6). The NPDES program is a voluntary federal program consistent with the principals of federalism. Because most States are approved to implement the NPDES program, they will tailor their storm water programs to address their water quality needs and objectives. Federally-recognized Tribes also have the opportunity to administer the NPDES program. Several Tribes are currently seeking NPDES authorization and, when approved, will also tailor the proposed extension of the existing NPDES storm water program to address their local needs and objectives. While EPA is proposing the basic framework for the section 402(p)(6) program, States and Tribes have an important role in fine-tuning the program to address the water quality issues within their jurisdictions. The basic framework would allow for adjustments based on factors that vary geographically, including climate patterns and terrain.

Where States or Tribes do not have NPDES authority, they are not required to implement the storm water program, but they may still participate in water quality protection through participating in the CWA section 401 certification process (for any permits) and through development of water quality standards and TMDLs when authorized to do so.

1. Develop the Program

In developing the proposed extension of the NPDES existing storm water program under section 402(p)(6), States and Tribes must evaluate whether revisions to their NPDES programs are necessary. If so, modifications must be made in accordance with § 123.62. Under § 123.62, States and Tribes must revise their NPDES programs within 1 year or 2 years if statutory changes are necessary. EPA believes this time period is appropriate for incorporating revisions to existing NPDES programs because the basic NPDES program already addresses storm water discharges from industrial and larger municipal sources.

EPA is considering modifying the 1 year timeframe to 2 years or 3 years if statutory changes are required, where a State or Tribe has a fully developed and approved watershed program (including enforceable nonpoint source controls) by the end of the first year. EPA supports implementing the section 402(p)(6) proposed storm water program as part of a watershed approach (see more detailed discussion in previous section on watersheds) and believes it is appropriate to offer institutional incentives as encouragement. EPA is specifically seeking comment on this issue.

A State or Tribal NPDES program must meet the requirements of section 402(b) or conform to the guidelines issued under section 304(i)(2) of the CWA. Today's proposal under § 123.25 adds specific cross references to the section 402(p)(6) program components to ensure that States and Tribes adequately address these. Furthermore, EPA is proposing § 123.35, which is discussed more fully in Section II.G, NPDES Permitting Authority's Role for the CWA section 402(p)(6) Municipal Program.

In tailoring the proposed extension of the existing NPDES storm water program to accommodate their needs, States and Tribes should coordinate and utilize the data collected under several programs, including water quality management programs, TMDL programs, and water quality monitoring programs. All States and Tribes have water quality standards that consist of designated uses, criteria, an antidegradation policy, and other implementation policies and procedures. Water quality management programs are geared to achieving these goals and must be updated every 3 years. In addition, States are required to submit a prioritized ranking of waters

requiring TMDLs. (See Sections II.L.1 and II.L.2 for more information on water quality standards and TMDLs, respectively) States and interstate agencies monitor for contaminants in ambient water, fish tissue, and specific point sources. In addition, they conduct intensive monitoring in watersheds (or at specific sites within a watershed) to develop efficient control strategies for point and nonpoint sources. CWA section 305(b) Reports summarize this information and must be submitted to EPA every 2 years. It is critical that States and Tribes evaluate existing monitoring programs, revise them as needed to ensure that meaningful data are being collected, and share information with the local communities. (See Section II.L.4 for additional information on monitoring.)

2. Comply With Applicable Requirements as a Discharger

Today's proposal would cover State or Tribally owned or operated separate storm water systems in a variety of ways. These systems generally drain areas where people reside, such as a prison, hospital, or other populated facility. These systems could be included under the definition of a regulated small municipal separate storm sewer system, which specifically includes systems operated by State departments of transportation. Alternatively, they could be included under the section addressing storm water discharges associated with other activities, including construction. In any case, discharges from these government-owned facilities would need to comply with all applicable NPDES requirements. Failure to comply could result in enforcement actions. State or Tribal facilities could act as models for municipal and private sector facilities and implement or test state-of-the-art management practices and control measures.

3. Communicate With EPA

Under approved NPDES programs, States and Tribes have an ongoing obligation to share information with EPA on a periodic basis. This dialogue is particularly important in the section 402(p)(6) storm water program where these governments continue to develop a great deal of the guidance and outreach related to water quality. EPA would continue to use the FACA process in developing materials related to the section 402(p)(6) program and input from States and Tribes throughout this process would be critical.

F. Tribal Role

1. Background

a. EPA's Indian Policy

EPA is committed to the nine principles outlined in its 1984 Indian Policy, which include working with Tribes in a government-to-government relationship, recognizing Tribal sovereignty, and dealing with the Tribal government as the primary party for decisionmaking and management of environmental issues on the Indian reservations, consistent with EPA standards and regulations (U.S. Environmental Protection Agency, American Indian Environmental Office. 1996. *Working Effectively With Tribal Governments.* Participant Manual, Interim Final, U.S. EPA Training Seminar). EPA has affirmed and carried forward its commitment to the 1984 Indian Policy in many ways. In this regard, on March 14, 1994, EPA established the American Indian Environmental Office and Tribal Operations Committee. EPA believes that the approach in today's proposal is consistent with the principles of the policy. Further, today's proposal has been developed with the participation of the EPA Indian Office, noted above.

In addition to storm water, the 1987 CWA amendments specifically focus on ''Indian Tribes.'' Under section 518, EPA may treat Indian Tribes in the same manner as States for the purposes of certain provisions of the CWA, including section 402 (National Pollutant Discharge Elimination System) and section 303 (water quality standards and implementation plans). Section 518(e) establishes a number of criteria for the treatment of an Indian Tribe in the same manner as a State. These criteria are discussed in a Federal regulation regarding Tribal eligibility for administering NPDES and State sludge management programs (see 58 FR 67966, December 22, 1993; see also 59 FR 64339, December 14, 1994). Upon meeting the criteria, a Tribe seeking authorization to administer one of the CWA water quality programs would acquire Treatment in the Same Manner as a State status for that program. Under EPA's final regulation, the Tribe's water quality or sludge management program authority could extend to lands within a ''Federal Indian reservation.'' The CWA section 518(h)(1) uses the term ''Federal Indian reservation'' to define the territorial limits for Tribal authority for CWA purposes. The preambles to EPA regulations, including NPDES program regulations, more fully explain the term Federal Indian reservation. Most notably, EPA has clarified that it considers ''trust lands,'' which were validly set apart for the use of Indians, to be ''within a reservation'' for purposes of the CWA (e.g., 58 FR 67970).

Once authorized as the permitting/program authority, a Tribe (instead of EPA) may operate the NPDES and sludge management programs on its reservations. Otherwise, EPA is generally the permitting/program authority within Indian country. In any case, the Tribe may also seek authority to operate a CWA section 303 water quality standards program. Tribes with approval to operate a CWA section 303 water quality standards program may also issue certifications under CWA section 401.

b. Existing NPDES Regulations for Storm Water

The existing NPDES regulations for storm water discharges associated with industrial activities extend coverage to private, State, and federally owned industrial facilities located on Indian reservations. Further, the NPDES regulations cover industrial facilities owned or operated by a Tribe with a population of more than 100,000 people within the reservation and cover all Tribally owned or operated airports, power plants, and uncontrolled sanitary landfills. The NPDES regulations for storm water associated with industrial activity established October 1, 1992, as the deadline to apply for NPDES permit coverage. EPA issued baseline NPDES storm water general permits covering industrial and construction activities in September 1992 and a multisector NPDES storm water general permit covering a number of industrial categories in September 1995, as revised. Many industrial facilities covered under the NPDES regulations for industrial activities, including construction, and located on Indian reservations are included in the applicability sections of these general permits and can seek general permit coverage for satisfying program requirements.

Existing storm water permit application regulations address storm water discharges from large and medium municipal separate storm sewer systems (§ 122.26(a)(1)). Regulations at § 122.2 define the term ''municipality'' to include ''an Indian Tribe or an authorized Indian Tribal organization.'' Consequently, the criteria used by the NPDES permitting authority for coverage of municipal dischargers extends to separate storm sewer systems that are Tribally owned or operated. At this time, no Indian reservations are covered under the existing municipal

NPDES storm water program. Thus, the appendices to the definitions of large and medium separate storm sewer systems (Part 122, Appendices F–I) list no reservations for automatic coverage. Likewise, EPA has not yet designated an Indian reservation for coverage based on other factors to be considered under CWA section 402(p)(2)(E).

2. Today's Proposal

The current proposed regulation for the extension of the existing NPDES program for storm water would cover two types of dischargers located on reservations. First, the proposal would designate storm water discharges from any regulated small municipal separate storm sewer system, including Tribally owned or operated systems. Second, the proposal would regulate discharges associated with construction activity disturbing between one and five acres of land, including sites located on reservations. Owners or operators in each of these categories of regulated activity would need to apply for coverage under an NPDES permit within 3 years and 90 days from the date of publication of the final rule. Under existing regulations, however, EPA or an authorized NPDES Tribe may require a specified storm water discharger to apply for NPDES permit coverage before this deadline based on a determination that the discharge is contributing to a violation of a water quality standard (including designated uses) or is a significant contributor of pollutants.

Under this proposal, a Tribal governmental entity may regulate storm water discharges on its reservation in two ways—as either an NPDES-authorized Tribe or a regulated ''municipality.'' If a Tribe is already authorized to operate the NPDES program, EPA would require the Tribe to implement today's proposed regulations for the NPDES program for storm water, as it does for authorized States, for covered dischargers located on the Indian reservation. (As discussed above, a Tribe may seek NPDES authorization from EPA to operate the NPDES program in the same manner as a State.) For an outline of the role and responsibilities of the permitting authority in the storm water program, see the proposed § 123.35 (and Section II.G. of today's preamble) and existing § 123.25(a).

Under today's proposed rule, a Tribe would be a regulated ''municipality'' for NPDES program purposes in two ways, and, therefore, be required to implement the six minimum control measures to the extent allowable under Federal law. (EPA recognizes that tribal regulation of non-members on fee lands within Federal Indian Reservations raises complex legal questions. See 58 FR 67966 and 59 FR 64339. Thus, the Agency invites comment that would assist the Agency in developing final rule language to recognize that Tribes with MS4s proposed for regulation under today's proposal would only need to implement the municipal measures proposed in section 122.34 to the extent such Tribes have authority under federal Indian law.) If the Indian reservation were located within an ''urbanized area,'' as defined in § 122.32(a)(1) of today's proposed rule, the Tribe could be an owner or operator of a regulated small municipal separate storm sewer system (only the urbanized area portion of the reservation would be regulated under an NPDES permit). As discussed below, Tribal owners or operators of regulated small municipal separate storm sewer systems—serving a population under 1,000 within the urbanized area portion of the reservation—would be exempted from the proposed storm water regulation. Tribes located outside an urbanized area would not automatically be covered, but would be able to request designation as a regulated small municipal separate storm sewer system from EPA.

EPA believes that only a few Tribes located in urbanized areas would meet the criteria to be regulated small municipal separate storm sewer systems. The Tribal representative on the Storm Water Phase II FACA Subcommittee asked EPA to provide a list of the Tribes located in urbanized areas that would fall within the NPDES storm water program under today's proposal. In December 1996, EPA developed a listing of federally recognized American Indian Areas located in Bureau of the Census-designated urbanized areas (see Appendix 1). Appendix 1 not only provides a listing of reservations and individual Tribes, but also the name of the particular urbanized area in which the reservation is located and an indication of whether the urbanized area contains a medium or large municipal separate storm sewer system that is already covered by the existing storm water regulations (''Phase I'').

There are 27 Tribes on this list; 20 are outside of Oklahoma and 7 are in Oklahoma. EPA recognizes that the list could have errors and invites comment on its accuracy. The applicability of CWA section 518 to Tribes located in Oklahoma would be determined on a case-by-case basis because of unique historical and legal considerations particular to that State. In authorization of the Oklahoma NPDES program, EPA retained jurisdiction to regulate discharges in ''Indian Country'' (61 FR 65049, December 10, 1996). In the cases of the 20 Tribes outside of Oklahoma, Tribal populations within urbanized areas range from very small numbers to more than 32,000. In the case of the seven Oklahoma Tribes, the population numbers are much larger. It is unlikely, however, that large populations fall within areas that would be determined to be an Indian reservation, as defined in section 518. In the cases of the 20 Tribes outside of Oklahoma, 9 Tribes have populations less than 1,000 and, thus, would be waived from proposed requirements for the municipal program. Eight Tribes have a population between 1,000 and 10,000, and 3 have a population above 10,000.

As mentioned previously, EPA proposes to exempt from the proposed municipal program those Tribally owned small municipal separate storm sewer systems in urbanized areas that serve populations equal to or less than 1,000 persons. As a practical matter, EPA believes that it may be unlikely that a Tribe with such a small population would have the technical, administrative, and governmental capability, including the staff, to implement a storm water management program. Unlike similarly situated political subdivisions of States, these Tribes in urbanized areas lack the opportunity for support from States. Moreover, EPA anticipates that a Tribe of this size might consider cooperative arrangements with surrounding local governmental entities regarding storm water program implementation. The nine exempt Tribes in urbanized areas (populations below 1,000) include:

- Augustine Band of Cahuilla Mission of Indians of the Augustine Reservation, CA.
- Cabazon Band of Cahuilla Mission of Indians of the Cabazon Reservation, CA.
- Redding Rancheria of California.
- Seminole Tribe of Florida, Dania, Big Cypress and Brighton Reservations.
- Penobscot Tribe of Maine.
- Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake).
- Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, NV.
- Reno-Sparks Indian Colony, NV.
- Ysleta del Sur Pueblo of Texas.

These nine Tribes in urbanized areas would not be subject to permit requirements under today's proposal, unless EPA subsequently and specifically designated the discharges from their storm water systems as a water quality problem. It is important to note that this is a preliminary list of exempted Tribes—it may be the case that additional tribally-owned small

municipal separate storm sewer systems would be eligible for the exemption based on the population in the portion of the reservation that is located within the urbanized area. EPA seeks comment on any additional Tribes listed in Appendix 1 that may qualify for this proposed exemption.

Outside of urbanized areas, non-authorized Tribes would be subject to potential designation by EPA based on the criteria established for designating all other small municipal separate storm sewer systems. A Tribe not otherwise covered by the proposed extension of the existing NPDES storm water program would also be able to request designation for coverage by EPA. In both cases, a Tribe would need to comply with all terms, limitations, and conditions of the applicable municipal NPDES permit. EPA designation and NPDES permit coverage would allow a Tribe to operate a federally recognized ''municipal'' storm water management program and extend Federal recognition to requirements the Tribe would place on dischargers of storm water into the Tribe's separate storm sewer system. This federal regulation could result in federal enforcement of the Tribal program. Moreover, the designation for NPDES coverage would provide an opportunity for a Tribe to enhance its role in the regulation of storm water discharges within its reservation without having to undertake the entire NPDES program and its existing requirements.

During the public comment period following today's proposal, EPA plans to notify each of the Tribes in urbanized areas that are or may be impacted by this proposed regulation and will engage in a discussion of the impact of the regulation on these Tribes. EPA invites comment regarding the appropriateness of its approach to Tribes in urbanized areas, specifically the proposed exemption for Tribal municipal separate storm sewer systems serving populations under 1,000 people.

3. Other Relevant Issues

During the Storm Water Phase II FACA Subcommittee process, the Tribal representative asked how EPA would apply the NPDES program with respect to non-federally recognized Indian reservations and Tribes. At present, EPA interprets section 518 of the CWA as applying only to federally recognized Tribes and Indian reservations and as not applicable to non-federally recognized Indian reservations and Tribes. EPA regional offices will deal with this issue on a case-by-case basis when it is brought to their attention. In addition, a State representative requested EPA to clarify the meaning of ''ownership of a Tribal municipal separate storm sewer system.'' In response, EPA notes that an Indian tribe or an authorized Indian Tribal organization is a municipality under section 502(4) of the CWA, unless a Tribe is treated as a State under section 518(e) of the CWA. ''Indian Tribe'' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

G. NPDES Permitting Authority's Role for the CWA Section 402(p)(6) Municipal Program

As noted previously, the NPDES permitting authority can be EPA or an authorized State or an authorized Tribe. For clarity, the following discussion describes the role of the NPDES permitting authority under today's proposal.

1. Comply With Other Requirements

NPDES permitting authorities would need to perform certain duties to implement the CWA section 402(p)(6) program. EPA is proposing § 123.35(a) to emphasize that permitting authorities have existing obligations under the NPDES program with which they must comply. Section 123.35 focuses on specific issues related to the role of the NPDES authority to support administration and implementation of the municipal storm water program under CWA section 402(p)(6).

2. Designate Sources

A new § 123.35(b) addresses the requirements for the NPDES permitting authority to designate sources of storm water discharges to be regulated under §§ 122.32 through 122.36 of today's proposed rule. NPDES permitting authorities would be required to develop a process, as well as criteria, to designate municipal sources and the authority to designate a small municipal separate storm sewer system where the otherwise applicable requirements have been waived under proposed § 122.33(b) if circumstances change. EPA is proposing that EPA may make designations if an NPDES-approved State or Tribe fails to do so.

NPDES permitting authorities could also designate areas that should be included in the storm water program (as regulated small municipal separate storm sewer systems) but are not located in an ''urbanized area'' and, therefore, would not be designated automatically. Such areas would be brought into the program if found to have actual or potential exceedances of water quality standards, including impairment of designated uses, or other adverse impacts on water quality, as determined by local conditions or watershed and TMDL assessments. EPA's aim is to address adversely impacted areas while protecting areas with the potential for problems. EPA encourages NPDES permitting authorities, local governments, and the interested public to work together in the context of a watershed plan to address water quality issues, including those associated with municipal storm water runoff (see Section I.H. of today's preamble for further discussion).

a. Develop Designation Criteria

Under a new § 123.35(b), the NPDES permitting authority would need to establish designation criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts. These criteria would need to be applied to all municipal separate storm sewer systems located outside of an urbanized area with a population of at least 10,000 and a population density of at least 1,000. EPA estimates a total of 583 incorporated places and 2 municipios in Puerto Rico (Arroyo and Fajardo) fall within this 10,000 population/1,000 density subset and would need to be examined for potential designation.

EPA would recommend that the NPDES permitting authority consider, in a balanced manner, certain locally-focused criteria for designating any incorporated place, county, or place under the jurisdiction of a governmental entity located outside of an urbanized area on the basis of other significant water quality impacts. EPA proposes to recommend consideration of criteria that would include discharge to sensitive waters, high growth or growth potential, high population density, contiguity to an urbanized area, significant contributor of pollutants to waters of the United States, and ineffective control of water quality concerns by other programs. The proposed designation criteria are intended to help encourage the permitting authority to use an objective method for identifying and designating, on a local basis, sources that adversely impact water quality.

- *Discharge to sensitive waters:* The potential impacts of storm water runoff depend, in part, on the sensitivity of the receiving waters. For example, cold water fisheries, such as trout streams, show greater levels of impairment from

poor erosion and sediment control programs than do other fisheries that are less dependent on the stream substrate. EPA recommends that permitting authorities identify, in coordination with Federal, State, and local agencies, and perhaps prioritize, designations with regard to the sensitivity of the resource. Sensitive waters generally include public drinking water intakes and their designated protection areas; swimming beaches and waters in which swimming occurs; shellfish beds; designated Outstanding National Resource Waters; National Marine Sanctuaries; waters within Federal, State, and local parks; and waters containing threatened or endangered species and their habitat, as well as other waters so designated.

- *High growth or growth potential:* To protect watersheds and their receiving waters from nearly certain adverse impacts, EPA proposes to recommend that areas of high growth or growth potential should also be identified and included in the designation criteria. Using this factor could minimize future restoration or retrofitting costs. Growth potential can be measured in various ways, including projected building starts, comprehensive plans, zoning maps, bond ratings, and the condition of infrastructure and building vacancies. EPA would recommend that, for any given 10-year period, discharges from municipal separate storm sewer systems in areas with localized population growth rates of more than 10 percent should be evaluated for designation. Members of the Storm Water Phase II FACA Subcommittee questioned whether a 1 percent threshold (10 percent over a 10-year period) for ''high'' growth was reasonable. According to EPA calculations based on Census data from 1980 to 1990, the average rate of growth in the United States during that 10-year period was more than 4 percent. For the same period, the average rate of growth within urbanized areas was 15.7 percent and the average for outside of urbanized areas was just more than 1 percent. EPA believes that these calculations help to support the statement that a growth percentage that is more than 10 times the national average for areas outside of urbanized areas is indeed a high rate of growth for these areas and should be a basis for designation of municipal storm water systems.
- *High population density:* Population density is related to the level of human activity, which has been shown to be directly linked to levels of impervious land surfaces. Therefore, EPA recommends ''high population density'' as one criterion for designation of municipal sources. Even areas with relatively low population densities (i.e., less than two residential units per acre) can have 10 to 20 percent impervious area (Schueler, T. 1987. *Controlling Urban Runoff: A Practical Manual for Planning & Designing Urban BMPs.* Metropolitan Washington Council of Governments). Macroinvertebrate diversity becomes poor when impervious land exceeds 10 to 15 percent (Klein, 1979). Since this study, extensive research from around the country has found this threshold to be consistent with other studies (Schueler, T. 1995. *Environmental Land Planning Series: Site Planning for Urban Stream Protection.* Prepared for Metropolitan Washington Council of Governments.). Further, higher density residential areas (i.e., two to ten residential units per acre) have been correlated with as much as 35 percent imperviousness. By recommending this criterion, EPA does not aim to encourage lower density development and urban sprawl but rather good urban design and development patterns.
- *Contiguity to an urbanized area:* The areas closely outside of an urbanized area have a good potential for future growth and may also have significant impacts on a neighboring regulated municipality that is within the urbanized area. This designation criterion would allow for an extension of the seamless coverage provided by the regulation of urbanized areas where necessary. The proposed rule also captures this concept in § 123.35(b)(4).
- *Significant contributor of pollutants to waters of the United States:* This criterion is one of the basic tenets of designation and is meant to capture all significantly contributing sources in an effort to have both comprehensive and equitable coverage (see CWA section 402(p)(2)(E), 40 CFR 122.26(a)(5)). It also aids in developing a watershed approach.
- *Ineffective control of water quality concerns by other programs:* EPA proposes to recommend that NPDES permitting authorities carefully consider whether the storm water runoff from a potentially designated area is effectively addressed under other regulations or programs, such as CZARA and other nonpoint source programs. For example, an area covered under the National Estuary Program (NEP) under CWA section 320 is required to develop a Comprehensive Conservation and Management Plan (CCMP) for managing the estuarine watershed. The CCMP addresses three general resource areas: water and sediment quality, living resources, and land use and water resources. The permitting authority could determine that the NEP comprehensively addresses impacts to water quality from storm water discharges for certain systems and, therefore, the systems would not need to be designated under the CWA section 402(p)(6) program.

These criteria are meant to be taken in the aggregate, with a great deal of flexibility as to how each would be weighed in order to best account for watershed and other local conditions and to allow for a more tailored case-by-case analysis. The application of criteria is meant to be geographically specific. Furthermore, each criterion does not have to be met in order for the owner or operator of a small municipal separate sewer system to qualify for designation, nor would a system necessarily be designated on the basis of one or two criteria alone. EPA plans to provide comprehensive guidance to more fully develop its recommendations for appropriate criteria, as well as offer detailed information on how the criteria could be applied and what standards could be used. EPA seeks comment on additional designation criteria, as well as the validity and applicability of the proposed criteria.

EPA believes that the application of the recommended designation criteria, when considered as a composite, would provide an objective indicator of real and potential water quality impacts from urban runoff on both the local and watershed levels. EPA encourages the application of the recommended criteria in a watershed context, thereby allowing for the evaluation of the water quality impacts of the portions of a watershed outside of an urbanized area. For example, situations exist where the urbanized area represents a small portion of a degraded watershed, and the adjacent nonurbanized areas of the watershed have significant cumulative effects on the quality of the receiving waters.

b. Apply Designation Criteria

After customizing the designation criteria for local geography, the permitting authority would have to apply such criteria, at a minimum, to any incorporated place, county, or place under the jurisdiction of a governmental entity (including but not limited to Tribal or Territorial governments) located outside of an urbanized area that has both a population of at least 10,000 and a population density of 1,000 people per square mile or greater (see proposed § 123.35(b)(2)). If the NPDES permitting authority determines that the place or county meets the criteria, they would need to designate all small municipal separate storm sewer systems

located in the place or county as regulated small municipal separate storm sewer systems under the NPDES storm water program within 3 years and 90 days of publication of the final rule. Alternatively, the NPDES authority could designate within 5 years from the date of final regulation if the designation criteria are applied on a watershed basis where a comprehensive watershed plan exists (a comprehensive watershed plan is one that includes the equivalents of TMDLs) (see proposed § 123.35(b)(3)). The Agency seeks to provide incentives for watershed-based designations.

The timeframe of 3 years and 90 days would allow States and Tribes up to 2 years to make any necessary statutory changes and receive program approval from EPA, an additional year to develop their general permit and designation criteria, and then 90 days for a regulated entity to submit its individual application or Notice of Intent (NOI) under a general permit. Assuming a March 1, 1999, final rule, the resulting deadline would be May 31, 2002. EPA believes this would be an adequate timeframe and would provide significant guidance to NPDES permitting authorities on the responsibilities to be completed during this period. If an NPDES-authorized State or Tribe does not develop and apply designation criteria, then EPA might do so.

EPA believes it has adequate authority to apply a State's designation criteria (or to develop and apply designation criteria) to designate sources in an authorized NPDES State. Such authority would derive from the text of section 402(p)(6), which provides for the designation of sources other than those already regulated under section 402(p)(2). EPA does not believe that section 402(c)(1), which requires EPA to suspend issuance of Federal NPDES permits in an authorized State, would preclude EPA designation of particular small municipal separate storm sewer systems (based on subsequently-developed criteria applicable in a particular State) after promulgation of today's proposed rule because designation of sources is independent of (and precedes) the issuance of permits. In addition, as discussed later in Section II.I.4. entitled, Residual Designation Authority, EPA believes that section 402(p)(6) provides the Agency with authority to subsequently designate individual sources under today's proposed rule. Today's approach for designation by EPA, even in authorized NPDES States, would also be consistent with the authority currently available to the Agency under the existing storm water regulations at 40 CFR 122.26(a)(1)(v). Similarly, the third party petition process for small municipal separate storm sewer systems (including expeditious deadlines for acting on such petitions) is consistent with the existing storm water regulations at 40 CFR 122.26(f) (4) & (5). EPA solicits comment on the proposed designation approach.

It is important to note that NPDES permitting authorities could designate any owner or operator of a municipal separate storm sewer system, including one below 10,000 in population and 1,000 in density. EPA established the 10,000/1,000 threshold primarily for prioritization purposes based on the likelihood of adverse water quality impacts at these population and population density levels. In addition, the 1,000 persons per square mile threshold is consistent with both the Bureau of the Census definition of an ''urbanized area'' (see Section II.H.2. below) and a Storm Water Phase II FACA Subcommittee work group's discussion concerning the definition of a regulated small municipal separate storm sewer system.

EPA has considered the request from some Storm Water Phase II FACA Subcommittee members that interim deadlines be established for development of designation criteria and believes that the designation deadline identified in today's proposed rule at § 123.35(b)(3) provides States and Tribes with a flexibility that allows them to develop and apply the criteria locally in a timely fashion, while at the same time establishing an expeditious deadline.

c. Designate Physically Interconnected Municipal Separate Storm Sewer Systems

In addition to applying criteria on a local basis for potential designation, the NPDES permitting authority would be required to designate any owner or operator of a municipal separate storm sewer system that contributes substantially to the storm water pollutant loadings of a physically interconnected municipal separate storm sewer system that is regulated by the NPDES storm water program (see proposed § 123.35(b)(4)). To be ''physically interconnected,'' the municipal separate storm sewer system, including roads with drainage systems and municipal streets, of one entity would be physically connected directly to the municipal separate storm sewer system of another entity. This provision would apply to all municipal separate storm sewer systems located outside of an urbanized area. EPA added this section in recognition of the concerns of local government representatives on the Storm Water Phase II FACA Subcommittee that a local government should not have to shoulder total responsibility for a storm water program when storm water discharges from another municipality are also contributing pollutants or adversely affecting water quality. This provision would also help to provide some consistency among municipalities and facilitate watershed planning in the implementation of the NPDES storm water program. EPA recommended physical interconnectedness in the existing NPDES storm water regulations as a factor for consideration in the designation of additional sources. The municipal caucus raised an additional concern relating to sheet runoff from one adjoining jurisdiction to another, thereby contributing to the discharges of a neighboring municipal separate storm sewer system. EPA would like comment on the extent to which this problem may exist and ways in which it could be addressed. EPA also welcomes comment on this proposed designation provision.

Today's proposal does not include interim deadlines for identifying physically interconnected municipal separate storm sewer systems. EPA believes that this determination would occur on a case-by-case basis where deadlines would only work to limit the permitting authority's ability to identify such systems. However, in accordance with the deadlines identified in § 123.35(b)(3) of today's proposal, EPA encourages the permitting authority to make that determination within 3 years from the date of publication of the final rule or within 5 years if the permitting authority is implementing a comprehensive watershed plan. Alternatively, the affected jurisdiction could use the petition process under 40 CFR 122.26(f) in seeking to have the permitting authority designate the contributing jurisdiction.

d. Address Public Petition for Designation

Today's proposal would recognize the existing opportunity for the public to petition the permitting authority for designation of a point source to be regulated to protect water quality, as contained in existing NPDES regulations (see 40 CFR 122.26(f)). Any person may petition the permitting authority to require an NPDES permit for a discharge composed entirely of storm water that contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States (see proposed § 123.35(c)). NPDES permitting authorities would have to make a final

determination on any petition within 180 days after receiving the petition (see proposed § 123.35(c)). EPA believes that setting a limit of 180 days balances the public's need for a final determination within a finite period of time and the NPDES permitting authority's need to control its workload. EPA is also proposing that if an NPDES-approved State or Tribe fails to act within the 180-day timeframe, EPA may make a determination on the petition. EPA believes that public involvement is an important component of the NPDES program for storm water and feels that this provision encourages public participation. Section II.K, Public Involvement/Public Role, further discusses this topic.

The Storm Water Phase II FACA Subcommittee provided EPA with extensive feedback on today's proposed approach. Several commenters have questioned the justification for the use of urbanized areas or the designation criteria selected by EPA as guidance to the NPDES permitting authority (see § 123.35(b)(1)). Municipal members of the subcommittee noted that the proposed rule could result in inequities among local governments and would not cover all contributors of pollutants to receiving waters. Some subcommittee representatives expressed concern that the proposed rule would impede the watershed approach due to its blanket coverage within urbanized areas but only specific designation outside of urbanized areas. Today's proposed rule addresses the problem of perceived inequities through the provision that any municipal separate storm sewer system can be designated by the permitting authority if found to be significantly contributing pollutants to the waters of the United States or contributing to an exceedance of water quality standards. EPA believes that the proposed approach, which provides for the designation of sources to be regulated based on local conditions, would facilitate watershed planning.

EPA relies on data summarized in the NURP study and in the CWA section 305(b) reports to support an approach for targeted designation outside of urbanized areas. EPA has developed designation criteria based on findings of the NURP study and other studies that indicate pollutants of concern, including total suspended solids, chemical oxygen demand, and temperature. These criteria were the subject of considerable discussion by the Storm Water Phase II FACA Subcommittee and were revised in response to recommendations from the subcommittee. EPA invites comment on this issue. EPA would be particularly interested in data submitted on storm water discharges and associated pollutants of concern.

3. Provide Waivers

EPA received comments from numerous State representatives that the proposal should recognize the efforts of existing State programs to address the significant concerns that potentially impact watersheds. In response, the Agency is proposing to provide some flexibility under § 122.33(b) that allows NPDES permitting authorities to waive otherwise applicable requirements for certain regulated small municipal sources. Such waivers could be granted in cases where the jurisdiction served by the regulated small municipal separate storm sewer system includes a population of less than 1,000 persons, its discharges are not contributing substantially to the storm water pollutant loadings of a physically interconnected regulated municipal separate storm sewer system, and the owner or operator of the small municipal separate storm sewer system has certified that storm water controls are not needed based on (1) wasteload allocations that are part of TMDLs that address the pollutants of concern, or (2) a comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs and addresses the pollutants of concern. If such a waiver is granted, the TMDLs or watershed plan would need to demonstrate with reasonable assurance that load reductions take place pursuant to CWA section 303(d). It is important to note that EPA will continue to require States to comply with their TMDL implementation schedules.

Where a State is the NPDES permitting authority, the permitting authority would be responsible for the development of the TMDLs or their equivalent determination as part of a watershed plan as well as the assessment of the extent a small municipal separate storm sewer system's discharge is contributing pollutants to a neighboring regulated system. In states where EPA is the permitting authority, EPA would use a State's watershed plan and TMDLs, where available. From these assessments, the permitting authority could make its determination regarding wasteload allocations and might determine that storm water controls are not required for certain small municipal separate storm sewer systems. Once these determinations are made, the owner or operator of the regulated small municipal separate storm sewer system, in seeking a waiver from the otherwise applicable requirements under today's proposal, would be responsible for certifying on a form provided by the NPDES permitting authority that they are covered by TMDLs or a watershed plan that indicates that discharges from their particular system are not having an adverse impact on water quality (i.e., they were not assigned wasteload allocations under TMDLs) and, therefore, implementation of storm water controls is not necessary and the waiver provision requirements have been met. Since the municipal waiver is indefinite, the owner or operator would not need to re-certify at the beginning of each permit term. EPA encourages the permitting authorities to make their waiver determinations as soon as possible in an attempt to avoid having the owners or operators of regulated small municipal separate storm sewer systems apply for a permit and begin to develop a program, but then later be waived from the applicable requirements. EPA seeks comment from permitting authorities on how they envision the process of implementing municipal waivers under today's proposed rule. Specifically, EPA would like comment on how the program could operate on a basis of self-certification for waivers.

The NPDES permitting authority could, at any time, mandate compliance with program requirements from a previously waived regulated small municipal separate storm sewer system if circumstances change. For example, a waiver could be withdrawn in circumstances in which the permitting authority later determines that a storm water discharge to a small stream would cause adverse impacts to water quality resulting in a violation of water quality standards. A ''change in circumstances'' could involve receipt of new information by the permitting authority.

EPA invites comments on concerns that the permitting authority could improperly grant waivers in an effort to provide relief to regulated entities based on concerns unrelated to water quality. EPA is also concerned that a permitting authority could redirect resources from other environmental programs in order to develop a watershed approach that promotes the issuance of the greatest number of waivers possible.

EPA also invites comment on the option of broadening the universe of potential waivers by waiving the requirements of all small municipal separate storm sewer systems that have a population below 5,000, rather than 1,000, and meet the same criteria as in today's proposal.

An option not proposed by EPA today is a waiver based on low population or low population density alone. EPA

considered a waiver option based on a simple population threshold. This option would have automatically waived all places within urbanized areas with a population of 1,000 persons or below. EPA found it difficult to justify a particular threshold number without allowing for more flexibility or additional criteria in order to determine if storm water controls were necessary. This option also did not fully account for water quality impacts and would create arbitrary donut holes, some of which could have significant impacts on water quality and should be regulated. Small entity representatives commented, however, that municipalities with less than 1,000 persons may lack the technical capacity to certify that their discharges are not contributing to adverse water quality impacts in areas where a TMDL or comprehensive watershed plan has not been developed by the permitting authority. This concern was shared by the Federal Small Business Advocacy Review Panel (see Section VII. below). EPA is thus requesting comment on the option of waiving coverage for all municipalities with less than 1,000 people (including those located in urbanized areas) unless the permitting authority determines that they should be required based on significant adverse water quality impacts.

In addition to waivers, the Agency is also considering possible approaches for providing incentives for local decisionmaking that would limit the adverse water quality impact associated with uncontrolled growth in a watershed. In situations where there are special controls or incentives (e.g. transferable development rights, traditional neighborhood development ordinances) in place directing development toward compact/mixed use development and away from wetlands, open space, or other protected lands, it may be possible to provide some relief to municipalities in terms of implementation of the proposed minimum control measures in areas of infill, or compact mixed use, the relief would pertain to minimum control measures concerning construction and new infill development or redevelopment. Where TMDLs are done in a watershed, the use of such controls or incentives by municipalities might be considered as the basis for the TMDLs. EPA solicits comment on this approach and any other recommendations for the use of such incentives.

4. Issue Permits

NPDES permitting authorities have a number of responsibilities regarding the permit process. The Agency is proposing §§ 123.35(d) through (g) to ensure a certain level of consistency for permits, yet providing numerous opportunities for flexibility. NPDES permitting authorities must issue NPDES permits to cover municipal sources that would be regulated under § 122.32 of today's proposed rule, unless waived under § 122.33(b). EPA encourages permitting authorities to use general permits as the vehicle for permitting and regulating small municipal separate storm sewer systems. The Agency notes, however, that some owners or operators may wish to take advantage of the option to join as a co-permittee with a municipality regulated under the existing NPDES storm water program.

Today's proposal includes a provision, § 123.35(f), that requires NPDES permitting authorities to include the requirements in proposed § 122.34 including as modified in accordance with §§ 122.33(a)(3), 122.34(c), 122.35(b)) for NPDES permits issued for regulated small municipal separate storm sewer systems. See Section II.H.3.a, Minimum Control Measures, for more details on the actual requirements.

In an attempt to avoid duplication of effort, EPA is specifically proposing in § 122.34(c) to allow NPDES permitting authorities to include permit provisions that incorporate by reference qualifying local, Tribal, or State municipal storm water management program requirements that address one or more of the minimum controls of proposed § 122.34(b). For a local, Tribal, or State program to ''qualify,'' it would need to impose, at a minimum, the relevant requirements of § 122.34(b). A regulated small municipal separate storm sewer system would still need to submit an application, either an individual application or an NOI under a general permit, but would follow the requirements of the qualifying local, Tribal, or State program instead. The Agency invites comment on this approach.

Under § 122.35(b), NPDES permitting authorities might also recognize existing responsibilities among governmental entities for the minimum control measures in an NPDES small municipal storm water permit. For example, the permit might allow for the State to be responsible for addressing construction site runoff and require that the municipalities develop substantive controls for the remaining minimum control measures. By acknowledging existing programs, this provision is meant to reduce the duplication of efforts and to increase the flexibility of the NPDES storm water program.

In § 123.35(e), EPA is proposing that NPDES permitting authorities specify a time period of up to 5 years from the issuance date of an NPDES permit for regulated small municipal separate storm sewer system owners or operators to fully develop and implement their storm water programs. EPA believes this time period is adequate. As discussed more fully below, permitting authorities should be providing extensive support to the local governments to assist them in developing and implementing their programs.

Under proposed § 123.35(g), if an NPDES permitting authority issues a general permit to authorize storm water discharges from regulated small municipal separate storm sewer systems, the NPDES permitting authority would also need to provide or issue a menu of regionally appropriate and field-tested BMPs that the permitting authority determines to be cost-effective. The regulated small municipal separate storm sewer systems could choose to either select from this menu or select other BMPs that they feel are appropriate. The purpose of this menu is to provide small municipal separate storm sewer systems with additional guidance to assist them in implementing their storm water program. The menu would be further elaborated upon in guidance materials provided as part of the tool box (for further discussion regarding the tool box see Section II.A.5.). The menu itself is not intended to replace more comprehensive BMP guidance materials. Separate guidance documents that discuss the results from EPA-sponsored nationwide general studies on the construction, operation and maintenance of BMPs would be provided as part of the tool box efforts.

The permitting authority may include this menu in the general permit when it is issued. This menu would need to be issued within two years of the publication of the final rule. This deadline tracks the amount of time that the State permitting authority would have to make any necessary regulatory or statutory changes to their program to accommodate the rule requirements. If an NPDES-approved State or Tribe failed to provide or issue this menu within two years of the publication of the final rule, EPA would be able to do so. Failure of the State to issue the menu of BMPs would not affect the legal status of the general permit. Measurable goals identified in a small municipal storm sewer system's NOI, or individual application, would not be considered a condition of the NPDES permit unless, and until, the permitting authority or EPA provided or issued the menu of

BMPs. The issuance of the menu of BMPs would be critical to assure protection of water quality since it triggers the permittee's requirement to meet narrative performance standards.

5. Support and Oversee the Local Programs

NPDES permitting authorities would be responsible for supporting and overseeing the local municipal programs. EPA is proposing § 123.35(h) to highlight issues associated with these responsibilities.

To the extent possible, NPDES permitting authorities should provide financial assistance to local municipalities, which often have limited resources, for the development and implementation of local programs. EPA recognizes that funding for programs at the State and Tribal levels may also be limited, but strongly encourages States and Tribes to provide whatever assistance possible. In lieu of actual dollars, NPDES permitting authorities could provide cost-cutting assistance in a number of ways. For example, NPDES permitting authorities could develop outreach materials for municipalities to distribute or the NPDES permitting authority could actually distribute the materials. Another option would be to implement an erosion and sediment control program across an entire State (or Tribal land), thus alleviating the need for the municipality to implement its own program. Obviously, NPDES permitting authorities would need to balance the need for site-specific controls, which could be best handled by a local municipality, with the need to offer financial relief. EPA, States, Tribes, and municipalities should work as a team in making these kinds of decisions.

NPDES permitting authorities would be responsible for overseeing the local programs. They would need to work with the regulated community and other stakeholders to assist in local program development and implementation. This might include sharing information, analyzing reports, and taking enforcement actions, as necessary. NPDES permitting authorities play a vital role in supporting local programs by providing technical and programmatic assistance, conducting research projects, and monitoring watersheds. Another important role for NPDES permitting authorities would be to ensure adequate legal authority at the local level so that municipalities could implement their part of the CWA section 402(p)(6) program.

NPDES permitting authorities are encouraged to coordinate and utilize the data collected under several programs. States and Tribes address point and nonpoint source storm water discharges through a variety of programs. In developing the CWA section 402(p)(6) program, EPA recommends that States and Tribes coordinate all of their water programs, including the continuing planning process (CPP), the existing storm water program, the CZARA program, and nonpoint source programs.

In addition, NPDES permitting authorities would be encouraged to use a brief (e.g., two-page) reporting format to facilitate compiling and analyzing data from submitted reports under proposed § 122.34. EPA would develop a model form for this purpose.

H. Municipal Role

1. Scope of Today's Proposal

The Agency has selected for today's proposal an equitable and comprehensive four-pronged approach for the designation and coverage of municipal sources. First, the approach would define for automatic coverage the sources believed to be of most concern. Second, the approach would designate sources that meet a set of objective criteria used to measure the potential for water quality impacts. Third, the approach would designate on a case-by-case basis sources that ''contribute substantially to the storm water pollutant loadings of a physically-interconnected [regulated] municipal separate storm sewer system.'' Finally, the approach would designate on a case-by-case basis, upon petition, sources that ''contribute to a violation of a water quality standard or are a significant contributor of pollutants.''

As explained earlier, today's proposed rule would automatically designate for regulation small municipal separate storm sewer systems located in urbanized areas and would require that NPDES permitting authorities examine for potential designation, at a minimum, a particular subset of small municipal separate storm sewer systems located outside of urbanized areas. Any small municipal separate storm sewer system automatically designated by the proposed rule or designated by the permitting authority under today's proposed rule would be defined as a ''regulated'' small municipal separate storm sewer system. Today's proposal also includes a provision that would allow for a waiver from the otherwise applicable requirements for some regulated small municipal separate storm sewer systems, where warranted, based on a comprehensive water quality-based assessment.

In today's proposed rule, all regulated small municipal separate storm sewer systems would need to establish a storm water program that meets the requirements of six minimum control measures, unless the system qualifies for, and the NPDES permitting authority grants, a waiver. These minimum control measures would be public education and outreach on storm water impacts, public involvement/participation, illicit discharge detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention/good housekeeping for municipal operations. Today's proposal would allow for a great deal of flexibility in how an owner or operator of a regulated small municipal separate storm sewer system would be authorized to discharge under an NPDES permit by providing various options for obtaining permit coverage and satisfying the required minimum control measures. For example, the NPDES permitting authority could incorporate by reference qualifying State, Tribal, or local programs in the NPDES general permit and could recognize existing responsibilities among different governmental entities for the implementation of minimum control measures. In addition, a regulated small municipal separate storm sewer system could participate in the storm water management program of an adjoining regulated medium or large municipal separate storm sewer system and could arrange to have another governmental entity implement a minimum control measure for them.

2. Municipal Definition

This section explains which small municipal separate storm sewer systems would be regulated under today's proposed rule. This section also proposes several definitions of terms used to describe the applicability of the proposed program requirements. For one particularly important definition, the definition of an ''urbanized area,'' the discussion includes case studies and a map as examples. This section concludes with a discussion of the three alternatives EPA considered for determining which small municipal separate storm sewer systems would be covered by today's proposed rule.

Regulatory Language in Today's Proposal

The CWA does not define the term ''municipal separate storm sewer.'' EPA has exercised its discretion to define the scope of municipal systems consistent with its existing regulations. EPA

defined municipal separate storm sewer in the existing storm water permit application regulations to mean, in part, a conveyance or system of conveyances (including roads with drainage systems and municipal streets) that is ''owned or operated by a State, city, town borough, county, parish, district, association, or other public body designed or used for collecting or conveying storm water which is not a combined sewer and which is not part of a Publicly Owned Treatment Works as defined at 40 CFR 122.26'' (see 40 CFR 122.26(b)(8)(i)). Today's proposed rule adds to this definition ''the United States'' as a potential owner or operator of a municipal separate storm sewer. This addition is meant to address an omission from existing regulations and to clarify that Federal facilities are, in fact, covered by the NPDES program for municipal storm water discharges when the Federal facility is like other regulated municipal separate storm sewer systems. Federal facilities may be like other municipal separate storm sewer systems due to similar residential populations and road systems; therefore, anticipated storm water discharges would also be similar.

The existing municipal permit application regulations define ''medium'' and ''large'' municipal separate storm sewer systems as those located in an incorporated place or county with a population of at least 100,000 (medium) or 250,000 (large) as determined by the latest Decennial Census (see 40 CFR 122.26(b)(4) and 122.26(b)(7)). In today's proposed rule, these regulations have been revised to define all medium and large municipal separate storm sewer systems as those meeting the above population thresholds according to the 1990 Decennial Census. The decision to ''freeze'' the definition of medium and large municipal separate storm sewer systems as of the 1990 Census was based on (1) a concern with deadlines, (2) an understanding that the permitting authority could always require more from owners or operators of municipal separate storm sewer systems serving ''newly over 100,000'' populations, and (3) the Agency's intention to merge the Phase I existing and Phase II proposed programs into a single seamless storm water program (see §§ 122.26(b)(4), (b)(7) and (b)(16)).

In today's proposed rule, owners or operators of small municipal separate sewer systems may be regulated under the NPDES program for storm water. Small municipal separate sewer systems are ''all municipal separate storm sewer systems that are not designated as a ''large'' or ''medium'' municipal separate storm sewer system, pursuant to 40 CFR 122.26(b)(4) and (b)(7), or designated under 40 CFR 122.26(a)(1)(v).'' Small municipal separate storm sewer systems include, but are not limited to, systems operated by local governments (including ''municipios''), State departments of transportation, and State, Tribal, and federal facilities. The term ''State, Tribal and federal facilities'' includes, but is not limited to, military installations, penitentiaries, universities and similar institutions with separate storm sewers draining areas. Municipal systems that were designated under 40 CFR 122.26(a)(1)(v) will continue to be regulated under the existing storm water program and, therefore, are not addressed under today's proposed rule.

In today's proposed rule (see §§ 122.32(a)(1) and 122.32(a)(2)), EPA defines ''regulated small municipal separate storm sewer systems'' to include all municipal separate storm sewers that are located in:

(1) An incorporated place, county (only the portion located in an urbanized area), or other place under the jurisdiction of a governmental entity (including but not limited to Tribal or Territorial governments) located in an urbanized area, as determined by the latest Decennial Census by the Bureau of the Census (see 55 FR 42592, October 22, 1990), except for Federal Indian reservations where the population within the urbanized area is under 1,000 persons.

(2) An incorporated place, county, or other place under the jurisdiction of a governmental entity other than those described in (1) above that is designated by the NPDES permitting authority. The NPDES permitting authority may designate any municipal separate storm sewer system located outside of an urbanized area. See Section II.G, NPDES Permitting Authority Role for the CWA section 402(p)(6) Municipal Program, for more details on this process.

Definitions of Key Terms and Phrases

The Bureau of the Census definition of ''incorporated place,'' adopted by EPA for purposes of today's proposal, is any place reported to the Bureau as legally in existence under the laws of the respective State as a city, borough, town, or village, with certain exceptions. (U.S. Department of Commerce, Bureau of the Census. 1994. *Geographic Areas Reference Manual*.) Because these Bureau of the Census exceptions would be included within the term ''county'' (see definition below), they would not impact the application of today's definition of a regulated small municipal separate storm sewer system in any way.

The Bureau of the Census definition of ''county,'' adopted by EPA for the purposes of today's proposal, is ''the primary legal subdivision of every State except Alaska and Louisiana.'' (USDC, 1994) For the purposes of today's proposed rule, the term ''county'' also includes Louisiana's county equivalent known as a parish and Alaska's county equivalent, which is an organized borough. A county's unincorporated territory includes all minor civil divisions and census-designated places but excludes all incorporated places. Therefore, any area that is not an incorporated place would be included within the definition of ''county,'' with the exception of Tribal or Territorial areas.

The phrase ''place under the jurisdiction of a governmental entity'' includes, but is not limited to, places within the jurisdiction of Tribes and Territorial governments. EPA is proposing this language in order to include governmental entities that are located within an urbanized area but whose government structure may not include incorporated places or counties. For example, Federal Indian reservations are neither incorporated places nor counties, but are sovereign entities, and Puerto Rico has ''municipios'' as their primary local government. The term ''Tribes'' includes any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation (40 CFR 122.2). ''Territorial governments'' include the following U.S. territories: the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. ''Municipio'' means a Puerto Rico division which has legally established boundaries and constitutes a governmental unit. ''Pueblo'' or ''ciudad'' means the barrio or group of barrios which are considered the municipio center of government.

''Federal Indian reservation'' means all land within the limits of any Indian reservation or rancheria under the jurisdiction of the U.S. Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation (40 CFR 122.2; see also Section II.F. of today's preamble and section 518 of the CWA).

Urbanized Areas Definition

The Bureau of the Census definition of ''urbanized area,'' adopted by EPA for

the purposes of today's proposed rule, is as follows:

An urbanized area (UA) comprises a place and the adjacent densely settled surrounding territory that together have a minimum population of 50,000 people.

The ''densely settled surrounding territory'' adjacent to the place consists of the following:

1. Territory made up of one or more contiguous census blocks having a population density of at least 1,000 people per square mile provided that it is:

a. Contiguous with and directly connected by road to other qualifying territory, or

b. Noncontiguous with other qualifying territory, and:

(1) Within 1 1/2 road miles of the main body of the urbanized area and connected to it by one or more nonqualifying census blocks that [a] are adjacent to the connecting road and [b] together with the outlying qualifying territory have a total population density of at least 500 people per square mile, or

(2) Separated by water or other undevelopable territory from the main body of the urbanized area, but within 5 road miles of the main body of the urbanized area, as long as the 5 miles include no more than 1 1/2 miles of otherwise nonqualifying developable territory.

2. A place containing territory qualifying on the basis of criterion 1 [above] will be included in the urbanized area in its entirety (or partially, if the place is an extended city) if that qualifying territory includes at least 50 percent of the population of the place. If the place does not contain any territory qualifying on the basis of the above criterion, or if that qualifying territory includes less than 50 percent of the place's population, the place is excluded in its entirety.

3. Other territory with a population density of less than 1,000 persons per square mile, provided that it:

a. Eliminates an enclave of no more than 5 square miles in the territory otherwise qualifying for the urbanized area when the surrounding territory qualifies on the basis of population density, or

b. Closes an indentation in the boundary of the territory otherwise qualifying for the urbanized area when the contiguous territory qualifies on the basis of population density, provided that the indentation is no more than 1 mile across the open end, has a depth at least two times greater than the distance across the open end, and encompasses no more than 5 square miles.

(55 FR 42592, October 22, 1990)

The full definition of an ''urbanized area'' has been included primarily for informational purposes. Because the Bureau of the Census determines urbanized areas based on the latest decennial census, the owner or operator of a municipal separate storm sewer system does not need to make any calculations to determine eligibility as a regulated small municipal separate storm sewer system. The Bureau of the Census provides detailed maps and comprehensive listings of all political entities within a given urbanized area. For a more detailed description of the treatment of urbanized areas for purposes of today's proposal, see the following discussion entitled, Nationwide Designation. Also, see Appendix 3 for a listing of urbanized areas of the United States and Puerto Rico.

a. Nationwide (''Automatic'') Designation

In today's proposed rule, all small municipal separate storm sewer systems located in an incorporated place, county, or other place under the jurisdiction of a governmental entity that is included within an urbanized area would be automatically designated as ''regulated'' small municipal separate sewer systems under today's proposed storm water program, provided that they were not previously designated into the existing storm water program. Unlike medium and large municipal separate storm sewer systems under the existing storm water regulations, not all small municipal separate storm sewer systems would be designated under today's proposal and, therefore, a distinction is made in the rule between ''small'' municipal separate storm sewer systems and ''regulated small'' municipal separate storm sewer systems.

EPA estimates that this automatic designation would include approximately 3,500 incorporated places and counties (about 16% of all incorporated places and counties nationwide), 41 municipios (more than 50% of all municipios in Puerto Rico), and 27 Tribes (although 9 of these Tribes would be exempted and there are other special considerations—see Section II.F, Tribal Role). In addition, as previously discussed, this definition would include State, Tribal, and Federal highways and facilities located within urbanized areas.

It is important to note that if a county or Federal Indian reservation is only partially included in an urbanized area, only the urbanized portion of the county or Federal Indian reservation would be regulated. Although rare, even if an incorporated place is only partially included in the urbanized area, then the entire place is regulated. The regulation of counties is meant to capture all unincorporated areas located within the urbanized area in an effort to create a seamless program by avoiding the creation of unregulated areas surrounded by regulated areas, sometimes referred to as ''donut holes'' in the regulatory scheme. For example, if an urbanized area contains a regulated medium or large municipal separate sewer system that has within its boundaries some incorporated places that were originally excluded from the storm water program due to the population threshold of 100,000, most of these previously unregulated donut holes would now be defined as regulated small municipal separate sewer systems under today's proposed rule and would be covered by the NPDES program for storm water.

In Puerto Rico, EPA is proposing to regulate the entire municipio where the total population is equal to or greater than 100,000. Those municipios include Bayamon, Caguas, Carolina, Mayaguez, Ponce, and San Juan. For the other municipios that are located within an urbanized area and have populations of less than 100,000, only the pueblo will be regulated.

i. Urbanized Area Description. There are 405 urbanized areas in the United States that cover 2 percent of total U.S. land area and contain approximately 63 percent of the nation's population (see Appendix 3 for a listing of urbanized areas of the United States and Puerto Rico). These numbers include U.S. Territories, although Puerto Rico is the only territory to have census-designated urbanized areas. Urbanized areas constitute the largest and most dense areas of settlement. The purpose of determining an ''urbanized area'' is to delineate the boundaries of development and map the actual built-up urban area. The Bureau of the Census geographers liken it to flying over an urban area and drawing a line around the boundary of the built-up area as seen from the air.

An ''urbanized area'' comprises one or more places—central place(s)—and the adjacent densely settled surrounding area—urban fringe—consisting of (1) incorporated places, (2) census designated places, and (3) county nonplace territory that together have a minimum population of 50,000. ''Central places'' include both incorporated and census-designated places. ''County nonplace territory'' is the area of the county that does not include incorporated or census-designated places. (It is important to note that ''county'' as defined for the purposes of today's proposed rule includes census-designated places). The urban fringe is a contiguous area with an average population density of at least 1,000 persons per square mile at its perimeter (see full ''urbanized area'' definition above).

The basic unit for delineating the urbanized area boundary is the census block. Census blocks are based on visible physical boundaries, such as the city block, when possible or on invisible political boundaries when not. In a

larger sense, the urbanized area determination is not based on political boundaries for counties or Federal Indian reservations but is for ''places.''

• Place—A place is included in its entirety whether or not all of its census blocks meet the urbanized area definition. Therefore, this part of the urbanized area determination is based on political boundaries. However, it should be noted that in rare cases (128 places), a place is not included in its entirety, but rather is only partly included within the urbanized area, due to the existence of large expanses of vacant or very sparsely populated territory within its incorporated area. (Such ''extended cities,'' as they are called, are most common in North Carolina due to their unique annexation laws.)

• County/Federal Indian reservation—A county is included in its entirety only if all of its census blocks, based on the county's unincorporated area, meet the urbanized area definition. Unlike a place, a county is often ''split'' into urbanized and non-urbanized portions, with no regard for political boundaries. Under today's proposed rule, only the urbanized portion of a ''split county'' would be covered. The same case applies to Federal Indian reservations.

Most owners or operators of municipal separate storm sewer systems would not need to independently determine the status of coverage under today's proposal. Most likely, a list of the places, counties, and other places under the jurisdiction of a governmental entity within an urbanized area would be published with the general permit. If not, they can contact their permitting authority or the Bureau of the Census to find out if their storm sewer systems are within an urbanized area. In addition, the necessary information should be available on the Bureau of the Census Internet Home Page (see http://www.census.gov/). Using data from the latest decennial census, the Census Bureau applies the urbanized area definition nationwide (including U.S. Tribes and Territories) and determines which places and counties are included within each urbanized area. For each urbanized area, the Bureau provides full listings of who is included, as well as detailed maps and special CD–ROM files for use with computerized mapping systems (such as GIS). Each State's data center receives a copy of the list, and some maps, automatically. The States also have the CD–ROM files and a variety of publications available to them for reference from the Bureau of the Census. In addition, local or regional planning agencies may have urbanized area files already. New listings for urbanized areas based on the 2000 Census will be available by July/August 2001, but the more comprehensive computer files will not be available until late 2001/early 2002. Appendix 6 to this preamble provides a list of incorporated places and counties proposed to be automatically designated as part of today's proposed rule.

Additional designations based on subsequent census years would be governed by the Bureau of the Census' definition of an urbanized area in effect for that year. Based on historical trends, EPA expects that any area (incorporated place, county, or other place) determined by the Bureau of the Census to be included within an urbanized area as of the 1990 Census would not later be excluded from the urbanized area as of the 2000 Census due to a possible change in the Bureau of the Census' urbanized area definition. However, it is important to note that even if this situation were to occur, a small municipal separate storm sewer system once automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year would remain regulated regardless of the results of subsequent urbanized area calculations.

Appendix 2 is a simplified urbanized area illustration to help demonstrate the concept of urbanized areas in relation to today's proposed rule. The ''urbanized area'' is the shaded area that includes within its boundaries incorporated places, a portion of a Federal Indian reservation, an entire county, and portions of three other counties. Any and all owners and operators of small municipal separate storm sewer systems located in the shaded area would be covered by the proposed rule. Any small municipal separate storm sewers located outside of the shaded area would be subject to potential designation by the permitting authority.

ii. Urbanized Area Profiles. To further illustrate the concept of urbanized areas, this section highlights two urbanized areas and their relationship to the NPDES storm water program. The first case study is the Milwaukee, Wisconsin, urbanized area, which already includes medium and large municipal separate storm sewer systems and would also include regulated small municipal separate storm sewer systems under today's proposed rule. The second case study is the Myrtle Beach, South Carolina, urbanized area, which would include only regulated small municipal separate storm sewer systems. Neither urbanized area has within its boundaries a Federal Indian reservation.

• Case Study 1: Milwaukee, WI (*total urbanized area population = 1,226,293*)

The Milwaukee, Wisconsin, urbanized area has at its core the large municipal separate storm sewer system of Milwaukee, which is contained within the county of Milwaukee. The urbanized area extends beyond the boundaries of the city of Milwaukee into the county of Milwaukee and the four surrounding counties of Racine, Wauklesha, Washington, and Ozaukee. The county of Milwaukee is entirely within the urbanized area, while the other four counties are only partially within it. A total of five counties would be included in the storm water program, but only the municipal separate storm sewer systems in the urbanized portions of the counties would be automatically designated. In addition to the five counties, 38 incorporated places are within the urbanized area and would also be automatically designated as regulated small municipal separate storm sewer systems under today's proposal: River Hills Village, Mequon, Germantown, Lannon, Sturtevant, Wind Point, Big Bend, Pewaukee, Bayside, North Bay, Butler, West Milwaukee, Thiensville, Elmwood Park, Elm Grove, Sussex, Fox Point, Hales Corners, Cedarburg, St. Francis, Grafton, Oak Creek, Brown Deer, Glendale, Greendale, Cudahy, Shorewood, Whitefish Bay, Franklin, Menomonee Falls, New Berlin, Brookfield, Greenfield, South Milwaukee, Wauwataso, Waukesha, West Allis, City of Racine. The result is a pattern where a regulated medium or large municipal separate storm sewer system core is surrounded by regulated small municipal separate storm sewer systems located within unincorporated areas (counties) and incorporated places. Each owner or operator of a municipal separate storm sewer system in these areas would be responsible for obtaining an NPDES permit for the discharges from their system.

• Case Study 2: Myrtle Beach, SC (*total urbanized area population = 58,384*)

The Myrtle Beach, South Carolina, urbanized area does not include a medium or large municipal separate storm sewer system. The entire urbanized area, with Myrtle Beach at its core, would meet the definition of a regulated small municipal separate storm sewer system. The Myrtle Beach urbanized area spreads into two counties, Harry and Georgetown counties, and covers only two incorporated places, Myrtle Beach and Surfside Beach. As was the case in the Milwaukee example, the counties of Harry and Georgetown are only partially

within the urbanized area. All owners or operators of municipal separate sewer systems located in the urbanized portions of Harry and Georgetown counties and in the two incorporated places would be included under the NPDES storm water program as regulated small municipal separate storm sewer systems, resulting in blanket coverage by the storm water program with no unregulated ''donut holes.''

iii. Rationale for Using Urbanized Areas. EPA proposes using urbanized areas to automatically designate regulated small municipal separate storm sewer systems on a nationwide basis for several reasons: (1) studies and data show a high correlation between degree of development/urbanization and adverse impacts on receiving waters due to storm water (U.S. EPA, 1983; Driver et al., 1985; Pitt, R.E. 1991. ''Biological Effects of Urban Runoff Discharges.'' Presented at the Engineering Foundation Conference: *Urban Runoff and Receiving Systems; An Interdisciplinary Analysis of Impact, Monitoring and Management,* August 1991. Mt. Crested Butte, CO. American Society of Civil Engineers, New York. 1992.; Pitt, R.E. 1995. ''Biological Effects of Urban Runoff Discharges,'' in *Storm water Runoff and Receiving Systems: Impact, Monitoring, and Assessment.* Lewis Publishers, New York.; Galli, J. 1990. *Thermal Impacts Associated with Urbanization and Storm water Management Best Management Practices.* Prepared for the Sediment and Storm water Administration of the Maryland Department of the Environment.; Klein, 1979), (2) this approach would target present and future growth areas as a preventative measure to help ensure water quality protection, (3) the determination of urbanized areas by the Bureau of the Census allows owners or operators of small municipal separate storm sewer systems to quickly determine whether they are included in the NPDES storm water program as a regulated small municipal separate storm sewer system, and (4) the blanket coverage within the urbanized area encourages the watershed approach and addresses the problem of ''donut-holes,'' where unregulated areas are surrounded by regulated areas. (Donut hole areas present a problem due to their contributing uncontrolled impacts on neighboring regulated communities and local waters.)

One drawback to the proposed approach is that it would divide some counties into regulated areas and nonregulated areas. Such ''split'' counties could have difficulty focusing efforts, such as public education and the maintenance and management of infrastructure on just the regulated areas. One commenter suggested that in the case of a ''split'' county, only the incorporated areas within the urbanized portion of the county should be regulated, not the entire urbanized portion of the county. EPA would prefer, however, to create a seamless program that does not create donut holes as this suggestion would do, but rather includes all of the municipal separate storm sewer systems within the urbanized area. EPA is attempting to eliminate the existence of donut hole areas because municipal separate storm sewer system discharge sources within them could contribute to water quality impairment and could adversely affect the storm water management efforts of the neighboring regulated communities. Furthermore, as noted previously, including the entire urbanized portion of a county would promote partnerships in watershed efforts to improve local water quality.

b. Municipal Designation by the Permitting Authority

Today's proposed rule would also allow NPDES permitting authorities to designate areas that should be included in the storm water program as regulated small municipal separate storm sewer systems but do not qualify under the regulatory ''urbanized areas'' definition. The proposed rule requires, at a minimum, that a set of designation criteria be applied to all small municipal separate storm sewer systems within a jurisdiction that includes a population of at least 10,000 and a population density of at least 1,000. Appendix 7 to this preamble provides a list of incorporated places and counties proposed to be potentially designated as part of today's proposed rule. In addition, the owner or operator of any small municipal separate storm sewer system may be the subject of a petition to the NPDES permitting authority for designation. See Section II.G, NPDES Permitting Authority's Role for the CWA section 402(p)(6) Municipal Program, for more details on the designation and petition processes. EPA believes that the approach of combining nationwide and local designation to determine municipal coverage in today's proposed rule balances the potential for significant impacts on water quality with local watershed protection and planning efforts. The Agency solicits comments on this approach and possible alternatives.

c. Waiving the Requirements for Regulated Small Municipal Separate Storm Sewer Systems

Today's proposed rule would include some flexibility in the nationwide coverage of all small municipal separate storm sewer systems located in urbanized areas by providing the NPDES permitting authority with the discretion to waive the otherwise applicable requirements of a regulated small municipal separate storm sewer system serving less than 1,000 people where assessments of local conditions and watersheds warrant such a waiver. Note that even if a regulated small municipal separate storm sewer system had requirements waived, it could subsequently be brought back into the program if circumstances change. See Section II.G, NPDES Permitting Authority's Role for the CWA section 402(p)(6) Municipal Program, for more details on this process.

i. Combined Sewer Systems. The definition of ''municipal separate storm sewer systems'' does not include combined sewer systems. A combined sewer system is a wastewater collection system that conveys sanitary wastewater and storm water through a single set of pipes to a publicly-owned treatment works (POTW) for treatment before discharging to a receiving waterbody. During wet weather events when the capacity of the combined sewer system is exceeded, the system is designed to discharge, prior to the POTW, directly into a receiving waterbody. Such an overflow is a combined sewer overflow, or CSO. Combined sewer systems are not subject to existing regulations for storm water, nor will they be subject to today's proposed regulations. EPA addresses combined sewer systems and CSOs in its National Combined Sewer Overflow (CSO) Control Policy that was issued on April 19, 1994 (59 FR 18688). The CSO Control Policy contains provisions for developing appropriate, site-specific NPDES permit requirements for combined sewer systems. CSO discharges are subject to BAT/BCT limits; municipal separate storm sewer systems are subject to MEP.

Some municipalities are served by both separate storm sewer systems and combined sewer systems. If such a municipality is located within an urbanized area, only the separate storm sewer system within that municipality would be included in the NPDES storm water program and subject to today's proposed rule. If the municipality is not located in an urbanized area, then the NPDES permitting authority would have discretion as to whether the separate storm sewer system is subject to today's

proposed rule. Under today's proposed rule, the NPDES permitting authority would use the same process to designate for coverage a municipal separate storm sewer system where the municipality is also served by a combined sewer system, as it would for municipalities that are served only by a separate storm sewer system. The Agency recognizes that municipalities that have both combined and separate storm sewer systems may wish to find ways to develop a unified program to meet all wet weather requirements more efficiently. EPA seeks comment on ways to achieve such a unified program.

d. Designation Alternatives Considered—Preliminary Options

In developing the proposed approach, EPA considered several alternative approaches for designation. Three of the primary options considered are discussed below, in no particular order. EPA seeks comment on all three of these options and welcomes ideas for other alternative options for determining the definition of a regulated small municipal separate storm sewer system.

i. Designation Option 1. One option EPA considered was the proposal suggested by the Storm Water Phase II FACA Subcommittee's Municipal De Minimis Work Group. Under this option, all municipal separate storm sewer systems would be included in the NPDES permit program, unless the system is aboveground, or underground and serving an area with a population density of less than 1,000. Local governments with no underground storm drain systems would be excluded, unless the NPDES permitting authority determined that storm drainage from aboveground (e.g., open drainage ditches) is within the control of the local government and that pollution from runoff from such drains is causing impairment to beneficial uses or exceedances of water quality standards in a permanent water body. This option would also exclude local governments with underground storm drains if they had a density of less than 1,000 persons/square mile (or some other criteria, such as building starts, rainfall, or percentage of imperviousness, if such parameters are proven better indicators of storm water pollution), unless:

- The NPDES authority finds that runoff from the local government drainage system is contributing to the impairment of beneficial uses or exceedances of water quality standards in a permanent waterbody. (The Municipal De Minimis Work Group purposely used the term ''permanent water body,'' and not the term ''waters of the United States,'' because they did not want intermittent streams, seasonal wetlands, etc. to be included. However, they did not define exactly what they envisioned to be a ''permanent water body.'') Any person could petition the NPDES authority to make or verify such a finding.
- Pollution from runoff from the local government drainage system either directly discharges to an adjacent municipality covered by these requirements or significantly contributes to the pollution from runoff that would otherwise be attributable to an adjacent municipality covered by these requirements.

While EPA believes that this option concerning aboveground/underground systems for densities of less than 1,000 persons has merit, the Storm Water Phase II FACA Subcommittee could not resolve issues associated with defining and quantifying the different types of ditches and drainage systems on a nationwide basis. The work group assumed that aboveground systems would consist primarily of vegetated ditches. However, enough data are not available to either prove or disprove this assumption. The work group found vegetated ditches highly desirable and worthy of exemption because of the benefits of natural management of storm water that they can provide. The pervious and contoured surface of vegetated ditches allows the water to percolate, resulting in an overall decrease in velocity and volume of flow and pollutant levels. However, these systems have variable removal efficiencies for pollutants and can potentially contribute additional pollutants to storm water runoff. Due to the variability of the types of aboveground system surfaces and the lack of data, EPA chose not to propose this option as its own. In addition, EPA had significant concerns about the number of smaller municipalities that would be permitted under such an approach, even though they might not contribute to significant water quality impacts. Under the approach selected for today's proposed rule, EPA believes that only those municipalities likely to contribute to significant water quality impacts would be designated into the storm water program.

ii. Designation Option 2. Another option, which was suggested by several members of the Storm Water Phase II FACA Subcommittee, would require all small municipal separate storm sewer systems to be regulated under the NPDES program for storm water and to implement the six minimum measures as described in today's approach, unless the owner or operator of the system could prove that the system is not causing adverse water quality impacts and not contributing to pollutant loads in the watershed. One commenter suggested the use of this approach with an automatic exemption based on objective criteria, such as low population and proximity to waters of the United States.

EPA acknowledges that this approach has advantages. It would guarantee that the areas of most concern are regulated, create a seamless storm water program without donut holes, avoid disputes over designation, and promote a watershed-based program because all sources in a watershed would already be in the program. In addition, its simple blanket coverage would create less confusion over whether an owner or operator of a municipal separate storm sewer system is in or out of the storm water program, and the burden for exclusion would be on the owner or operator of the municipal separate sewer system, not the permitting authority. Overall, this option best addresses the cumulative impact of all activities within a watershed that create environmental problems. By including only particular sources within a watershed, as is the case with the other options, the potential environmental benefits of the storm water program could be limited.

Although this option might appropriately address issues of fairness and simplicity, it fails to target the areas of greatest concern (i.e., areas causing significant water quality impacts) and instead would regulate all areas regardless of impacts, unless an exemption was approved. This approach, by including a universe of approximately 19,289 incorporated places and 17,796 minor civil divisions located in 3,141 counties, in addition to Tribal lands and Territories, could regulate many more entities than the current proposal, resulting in higher costs than today's proposal for all involved. The exemption process, which could apply to thousands of municipalities, would require them to spend valuable time and resources trying to prove that they have little or no impact on water quality, while the permitting authority would be saddled with the additional burden of processing and evaluating such requests. It may be the case that the administrative burden for a storm water program of this size, and the potential overregulation, would not justify the full coverage it would provide.

Furthermore, it would also be difficult to justify an automatic exemption based solely on the criteria of population size and proximity to waters of the United States. Total population (as opposed to

population density) is not a good measure of storm water impacts because it lacks an indication of where and how the population is distributed, both of which are significant factors addressed in today's proposal. For example, an area with high population could be less urbanized with fewer impacts on water quality than a place with lower population due to the size of the area involved in each. EPA anticipates extreme difficulty in determining and justifying a particular population threshold without also considering other factors that would help to both account for the variability of local conditions and indicate whether or not there are significant water quality impacts. Furthermore, a population threshold would still result in donut holes. Similar problems could be associated with the second criterion of ''proximity to waters of the United States.'' It is an important consideration but not much more telling than total population due to the variety of local conditions that could or could not make this criterion a significant factor in the determination of real or potential water quality impacts. Therefore, even the tandem use of these two criteria could lack enough information to make an informed and justifiable decision on an exemption. For the reasons discussed above, EPA chose not to propose this option.

iii. Designation Option 3. To satisfy CWA section 402(p)(5)(C), EPA recommended the approach outlined in *President Clinton's Clean Water Initiative.* This approach was similar to today's proposed approach in that the NPDES permitting authority would issue system-wide NPDES permits for all municipal separate storm sewer systems in census-designated urbanized areas. This option would require storm water management programs for municipal separate storm sewer systems in the 138 urbanized areas in which a medium or large municipal separate sewer system is located. At a minimum, the programs would address non-storm water discharges into storm sewers and storm water runoff from growth and development and significant redevelopment. NPDES permitting authorities would be encouraged to implement watershed approaches and more comprehensive program requirements where necessary and appropriate. In the remaining 267 census-designated urbanized areas (containing only small municipal separate storm sewer systems), municipal storm water management programs would be less stringent and required to focus only on controlling non-storm water discharges into storm sewers and storm water runoff from growth, development, and significant redevelopment activities.

By focusing on census-designated urbanized areas, many of the sources of greatest concern would be addressed, while also providing a clear definition of who is included in the storm water program. However, the tiered permitting requirements of this approach could create unnecessary confusion. EPA would not want to require regulated small municipal separate storm sewer systems in urbanized areas with a medium or large municipal separate storm sewer system to do more than those in urbanized areas without a medium or large municipal separate storm sewer system. Rather, EPA envisions progress toward a seamless, unified, and comprehensive NPDES storm water program with equivalent program requirements as the best approach. If this alternative option was adopted, three varying levels of requirements (the existing requirements plus two tiers for small municipal separate sewer systems) would eventually need to be unified instead of just two, as found under today's proposal. Although primarily concerned with growth associated with urbanized areas, this approach is also limited by its reliance on non-NPDES programs for addressing sources beyond urbanized areas. Environmental and municipal representatives on the Storm Water Phase II FACA Subcommittee agreed that any sources that are significant contributors of pollutants should be considered for regulation directly under an NPDES permit, including those outside of urbanized areas. For these reasons, EPA did not present this option as the lead option.

3. Municipal Permit Requirements

EPA is proposing that all owners or operators of regulated small municipal separate storm sewer systems, as defined at § 122.32, must seek coverage under an NPDES permit. EPA intends that the vast majority of discharges from these sources would be authorized under general permits issued by the NPDES permitting authority. These NPDES general permits would provide specific instructions for how to seek coverage, including application requirements. Typically, such application requirements would be satisfied by the submission of an NOI to be covered by the general permit.

For cases in which an NPDES general permit is not available or the NPDES permitting authority requests that an owner or operator be covered under an individual NPDES permit, EPA is proposing simplified individual permit application requirements at § 122.33. Under the simplified individual permit application requirements, the owner or operator would submit an application to the NPDES permitting authority that includes the information required under § 122.21(f), an estimate of square mileage served by the separate storm sewer system, and any additional information that the NPDES permitting authority requests. Consistent with CWA section 308 and analogous State law, the permitting authority could request any additional information to gain a better understanding of the system and the areas draining into the system.

Today's proposal also would allow an owner or operator of a regulated small municipal separate storm sewer system to join as a co-permittee in an existing NPDES permit issued to an adjoining medium or large municipal separate storm sewer system or designated source under the existing storm water program through a modification of that municipal separate storm sewer system's permit. This co-permittee provision would only apply if agreed to by all co-permittees. Under a co-permittee arrangement, the owner or operator of the regulated small system would need to comply with the applicable requirements of § 122.26 and the terms and conditions of the applicable permit, but would not be required to fulfill all the permit application requirements applicable to medium and large systems and permit condition requirements applicable to regulated small systems. Specifically, the regulated small system owner or operator would not be required to comply with the permit condition requirements of § 122.34 of today's proposal or with the application requirements of § 122.26(d)(1)(iii) (Part 1 source identification), § 122.26 (d)(1)(iv) (Part 1 discharge characterization), and § 122.26(d)(2)(iii) (Part 2 discharge characterization data). Furthermore, the owner or operator of the regulated small system could satisfy the requirements in § 122.26(d)(1)(v) (Part 1 management programs) and § 122.26(d)(2)(iv) (Part 2 proposed management program) by referring to the adjoining municipality's existing plan. An owner or operator pursuing this option would need to describe in the permit modification request how the adjoining municipality's storm water program addresses or would need to be supplemented in order to adequately address discharges from the municipal separate storm sewer system. The request would also need to explain the

role of the owner or operator in coordinating local storm water activities and describe the resources available to accomplish the plan.

EPA believes that this approach would support the goal of an integrated and coordinated national storm water program. Regulated small system owners or operators could take advantage of existing programs to ease the burden of creating their own from scratch. The proposal would allow them to conduct activities that are coordinated on a regional basis. For medium and large system owners or operators, this approach would promote the use of regional and watershed-based planning as an implementation framework for the storm water program and would create opportunities for sharing the resource and cost burden of the program with participating entities. EPA is particularly interested in comments regarding the actual implementation of this application provision. For instance, whether the provision contains the appropriate subsections of § 122.26(d) and whether the process as set forth creates an incentive to use this alternative for permit coverage.

In today's notice, EPA is proposing certain minimum control measures for all NPDES permits issued to regulated small municipal separate storm sewer systems, with the exception of joint co-permittees, as noted previously, to ensure equity and consistency among owners or operators. Any NPDES permit issued under this program would, at a minimum, require the owner or operator to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from a regulated system to the maximum extent practicable (MEP) and protect water quality (see MEP discussion in the following section). Narrative effluent limitations requiring implementation of BMPs would generally be considered the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reductions of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA. Examples of narrative effluent limitations include no floatables in storm water discharges and no visible sheen on waterbodies.

In the first two to three rounds of permit issuance, EPA envisions that implementation of the minimum measures and BMP-based program would be the extent of the storm water permit requirements for the large majority of regulated small municipal separate storm sewer systems. EPA assumes that a regulated small municipal separate storm sewer system implementing BMPs to satisfy the six minimum control measures would meet applicable water quality standards, because, though uncontrolled urban storm water continues to present a significant water quality problem, the six measures represent a significant level of control if properly implemented. EPA believes that the implementation of any controls, but particularly the six minimum measures identified in today's proposal, should significantly reduce pollutants in urban storm water compared to existing levels. If after implementing the six minimum control measures there is still a water quality problem associated with discharges from the municipal separate storm sewer system, the municipality would need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process would take two to three permit terms. During this time, EPA would revisit the regulations for the municipal storm water program. If additional specific measures to protect water quality were imposed, they would likely be the result of an assessment based on TMDLs, or the equivalent of TMDLs, where the proper allocations would be made to all contributing sources. EPA believes that the municipality's additional requirements, if any, should be guided by its equitable share based on a variety of considerations, such as cost effectiveness, proportionate contribution of pollutants, and ability to reasonably assume wasteload reductions. Narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reductions of pollutants to the maximum extent practicable, and water quality-based requirements of the Clean Water Act. See Section II.L, Water Quality Issues, for further discussion of this approach to permitting, consistent with EPA's interim permitting guidance.

The municipal caucus was concerned that a requirement to meet water quality standards would be interpreted by a permitting authority as a requirement to include water quality-based numeric limitations in municipal storm water permits. Municipal representatives believe that in many cases it would not be possible to develop a storm water program that would result in the attainment of numeric limitations, except at considerable cost. Today's proposal addresses this concern, as discussed above.

As part of this program, the owner or operator would be required to identify and submit to the NPDES permitting authority, either in an NOI to be covered under a general permit or in an individual permit application, the BMPs to be implemented and the measurable goals for each of the minimum control measures discussed in Section II.H.3.a., Program Requirements—Minimum Control Measures.

The term ''measurable goals'' is derived from negotiations among FACA representatives. Section 402(p)(6) of the CWA states that the program to regulate additional storm water discharges may include performance standards, guidelines, guidance, and management practices as appropriate. Discussions among FACA representatives resulted in the use of the term ''measurable goals.'' On the one hand, environmental representatives wanted to include performance standards as conditions of NPDES permits as a means of providing for specific, tangible activities to be undertaken within the municipal storm water management program. On the other hand, municipal representatives opposed the inclusion of performance standards, asserting that they were counter productive because they could encourage an owner or operator of a municipal separate storm sewer system to avoid risks associated with setting any standard that it felt it could not achieve with certainty. Out of this discussion, a compromise was reached in the use of the term ''measurable goals'' and the process embodied in the proposed rule. This process sets the issuance of a menu of regionally-appropriate BMPs as the conditions precedent to ''measurable goals'' becoming permit conditions. Some storm water management plans developed to meet requirements of the existing storm water program include provisions similar to the concept of ''measurable goals'' proposed today. Specifically, some municipal storm water management plans include, for example, inspection of or cleaning of a fixed number of storm drain inlets per year and a survey of all municipal right-of-ways to identify illicit connections to the municipal separate storm sewer system. Currently, existing permit application regulations for municipal separate storm sewer systems require identification and implementation of BMPS and not necessarily measurable goals, much less performance standards.

Qualifying State, Tribal, or local programs that meet the requirements of one or more of the minimum control measures could be incorporated by

reference into the NPDES municipal separate storm sewer system general permit. For more information regarding the general permit NOI or individual permit application, see Section II.H.3.b., Application Requirements.

Maximum Extent Practicable

Maximum extent practicable (MEP) is a technology-based control standard currently used in the existing municipal storm water program against which permit writers and permittees assess whether or not an adequate level of control has been proposed in the storm water management program. The Urban Wet Weather Flows Federal Advisory Committee recommended to EPA that MEP be applied to all permits issued to municipal separate storm sewer systems, including those proposed to be regulated today, to achieve greater cooperation and consistency, reduce conflicts and confusion, and improve economies of scale in the efforts of municipalities to manage storm water pollution.

In today's proposal, NPDES permits issued for regulated small municipal separate storm sewer systems, whether in the form of general or individual permits, would require the owner or operator to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants to the maximum extent practicable. The permittee would be expected to reduce the pollutants to the MEP through implementation of the following minimum control measures: Public education and outreach on storm water impacts, public involvement/participation, illicit discharge detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention/good housekeeping for municipal operations.

Under today's proposed approach, MEP would be determined through a series of steps associated with identification and implementation of the minimum control measures. In issuing the general permit, for example, the NPDES permitting authority would establish requirements for each of the minimum control measures and require municipalities to identify the BMPs to be performed and measurable goals to be achieved. Permittees would then be required to identify the BMPs and associated measurable goals for addressing each of the minimum control measures in their NOIs.

Upon receipt of the NOI from a municipality, the NPDES permitting authority would then have the opportunity to review the NOI to verify that the identified BMPs and measurable goals would meet the MEP requirement and, if necessary, could ask the permittee to revise the mix of BMPs to better reflect the requirement. A similar procedure could be established for a small municipal separate storm sewer system that is a co-permittee with a municipal separate storm sewer system that is already regulated in an individual NPDES permit. This process would be followed by actual program implementation by the municipality. Under the proposed approach, implementation of BMPs consistent with storm water management program requirements at § 122.34 and permit provisions at § 122.33 would constitute compliance with the standard of ''reducing pollutants to the maximum extent practicable.''

The pollutant reductions that represent MEP may be different for each municipality, given the unique storm water concerns that may exist and the differing possible remedies. Therefore, each permittee would determine the specific details in each of the six minimum control measures that represent MEP through an evaluative process. In this process, permittees and permit writers would evaluate the proposed storm water management controls to determine whether reduction of pollutants to the MEP could be achieved with the identified BMPs. EPA envisions that this evaluative process would consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. The FACA Committee is currently working to identify evaluative MEP criteria. Suggestions have included: (1) The effectiveness to address the pollutant(s) of concern, (2) public acceptance, (3) cost, (4) technical feasibility, and (5) compliance with Federal, State and local laws and regulations.

Prior to permit issuance, EPA plans to develop additional policy and technical guidance on the process of evaluating MEP for municipal separate storm sewer system permits based upon the recommendations received from the FACA Committee. This guidance would be applicable to both medium and large systems (addressed by existing requirements), as well as those addressed by today's proposal. It is important to note that States implementing their own NPDES programs may develop more stringent requirements than those proposed in today's rule. In any event, additional elaboration of the MEP determination process is not necessary prior to issuance of the final rule, because MEP is determined on a permit-by-permit basis.

a. Program Requirements—Minimum Control Measures

i. Public Education and Outreach on Storm Water Impacts. EPA is proposing that any NPDES permit issued to regulated small municipal separate storm sewer systems would require the owner or operator to implement a public education program to distribute educational materials to the community (or conduct equivalent outreach activities) about the impacts of storm water discharges on waterbodies and the steps to reduce storm water pollution. The State, EPA, environmental organizations or other public interest or trade organizations could provide materials, subject to the approval of the owner or operator of the municipal system. The materials or outreach programs should inform individuals and households about steps that can be taken to reduce storm water pollution, such as ensuring proper septic system maintenance, limiting the use and runoff of garden chemicals to appropriate amounts, properly disposing of used motor oil or household hazardous wastes, and becoming involved in local stream restoration activities. EPA would encourage individuals to participate in activities coordinated by youth service organizations, conservation corps, or other citizen groups. Other possible outreach materials could encourage citizens to participate in the municipal program by performing such services as roadside litter pickup and storm drain stenciling or highlight the potential public health risks to children if exposed to pollution when playing near storm drains. In addition, some of the materials or outreach programs should be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts to explain their impacts on storm water pollution (e.g., information to restaurants on the impact of grease clogging storm drains and to garages on the impacts of used oil discharges). The owner or operator is encouraged to tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as children.

EPA believes that as the public gains a greater understanding of the municipally developed program, the municipality is likely to gain more support for the program (including funding initiatives). In addition, compliance with the program would probably be greater if the public

understands the personal responsibilities expected of them and others. Well-informed citizens could even act as formal or informal educators to further disseminate information and gather support for the program, thus easing the burden on the municipalities to perform all educational activities. The public outreach provision has been tailored to respond to specific concerns raised in the course of the FACA process. For example, municipal representatives advocated the inclusion of language that would clarify that use of educational materials from outside groups, such as trade associations and environmental groups, would be subject to the approval of the municipality. Also, the above-referenced language addressing environmental justice concerns was in response to input from Storm Water Phase II FACA Subcommittee members.

Municipalities would be encouraged to enter into partnerships with their States in fulfilling the public education requirement. It may be much more cost-effective to utilize a State education program instead of numerous municipalities developing their own. Municipalities would also be encouraged to work with other organizations (e.g., environmental and nonprofit groups and industry) that might be able to assist in fulfilling this requirement. Many of these kinds of organizations already have educational materials, and the groups could work together to educate the public.

EPA requests comment on the appropriateness of the specified requirements for public education and outreach.

ii. Public Involvement/Participation. Public involvement is an integral part of the municipal storm water program. The Agency believes that the public can provide valuable input and assistance to the municipality's storm water program. The Agency, therefore, is proposing that the public play an active role in the development and implementation of the municipality's storm water management program.

The municipal storm water management program would need to include a public participation program that complies with applicable State and local public notice requirements. The public should participate as a partner in developing, implementing, and reviewing the storm water management program. Opportunities for members of the public to participate in program development and implementation could include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts. The public participation process should engage all economic and ethnic groups.

Early and frequent public involvement can shorten implementation schedules and broaden public support for a program. One challenge associated with public involvement is addressing conflicting viewpoints. Another challenge is in engaging the public in the public meeting and program design process. Nevertheless, EPA strongly believes that the overall benefits of an aggressive and inclusive program, including involvement of low-income and minority communities, is an essential component of a State, Tribal, Federal, and municipal storm water management program.

Public participation ensures a more successful storm water program by providing valuable expertise and a conduit to other programs and governments, which would be of primary importance if the municipal storm water program is to be implemented on a watershed basis. The public could act as volunteers in all aspects of the program, thus saving municipal resources. Another recognized benefit is that members of the public are less likely to raise legal challenges to a municipality's storm water program if they have been involved in the decisionmaking process and program development and, therefore, are partially responsible for the program themselves. Section II.K. provides further discussion on public involvement.

EPA requests comment on the appropriateness of the specified requirements for public involvement/participation.

iii. Illicit Discharge Detection and Elimination. Discharges from storm water drainage systems often include wastes and wastewater from non-storm water sources. EPA's Nationwide Urban Runoff Program (NURP) indicated that many storm water outfalls still discharge during substantial dry periods. Pollutant levels in these dry weather flows were shown to be high enough to significantly degrade receiving water quality. Results from a 1987 study conducted in Sacramento, California, revealed that slightly less than one-half of the water discharged from a municipal separate storm sewer system was not directly attributable to precipitation runoff (U.S. Environmental Protection Agency, Office of Research and Development. 1993. *Investigation of Inappropriate Pollutant Entries Into Storm Drainage Systems—A User's Guide.* Washington, D.C. EPA 600/R–92/238.) A significant portion of these dry weather flows results from illicit and/or inappropriate discharges and connections to the municipal separate storm sewer system. Illicit discharges enter the system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the storm drain system or spills collected by drain inlets). Under the existing NPDES program for storm water, permits for large and medium municipal separate storm sewer systems are to include an effective prohibition against non-storm water discharges into their storm sewers (see CWA section 402(p)(3)(B)(ii)). Further, EPA believes that in implementing municipal storm water management plans under these permits, large and medium municipalities generally found their illicit discharge detection and elimination programs to be cost-effective.

In today's proposal, any NPDES permit issued to an owner or operator of a regulated small municipal separate storm sewer system would, at a minimum, require that owner or operator to develop and implement an illicit discharge detection and elimination program. Inclusion of this measure for municipal storm water programs for regulated small municipalities would be consistent with the ''effective prohibition'' requirement for large and medium municipal separate storm sewer systems. Under such a program, the owner or operator would be required to demonstrate awareness of the system using maps or other existing documents. The owner or operator would also be required to develop (if not already completed) a storm sewer system map (or equivalent) showing the location of major pipes, outfalls, and topography. The map should identify areas of concentrated activities likely to be a source of storm water pollution, if the data already exist. To ensure the effectiveness of this measure, the owner or operator would be required to effectively prohibit through ordinance, order, or similar means (for nongovernmental owners or operators of municipal separate storm sewer systems), to the extent allowable under State or Tribal law, illicit discharges into the separate storm sewer system and implement appropriate enforcement procedures and actions as needed. This measure would also require the owner or operator to develop

and implement a plan to detect and address illicit discharges (including illegal dumping) to the system. Finally, the measure would require the owner or operator to inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste. These informational actions could include storm drain stenciling; a program to promote, publicize, and facilitate public reporting of illicit connections or discharges; and distribution of outreach materials. Recycling and other public outreach programs could be developed to address potential sources of illicit discharges, including used motor oil, antifreeze, pesticides, herbicides, and fertilizers.

EPA seeks comment regarding the prohibition and enforcement provision for this minimum measure and specifically requests comment regarding the implications of specifying that the owner or operator would have to implement the appropriate prohibition and enforcement procedures ''to the extent allowable under State or Tribal law.'' Concerns have been raised that by qualifying prohibition and enforcement procedures in this manner, the owner or operator could altogether ignore this minimum measure where appropriate authority did not exist. Municipalities have pointed out, however, that they cannot legally exceed the authority granted them under State law, which varies considerably from one state to another.

The illicit discharge detection and elimination program would not necessarily need to address all types of non-storm water discharges. As with the existing municipal application requirements, the following categories of non-storm water discharges or flows would only need to be addressed in the municipal storm water program where such discharges are identified as significant contributors of pollutants: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water. The program should address discharges or flows from fire fighting where such discharges or flows are identified as significant sources of pollutants.

The existing storm water permit application requirements at § 122.26(d), contain two sets of application requirements regarding illicit discharges that EPA does not propose to require of regulated small municipal separate storm sewer systems. Specifically, EPA does not propose to require regulated small system owners or operators to describe procedures to prevent, contain, and respond to spills that could discharge into the municipal separate storm sewer and controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary. This is pursuant to comments received from municipal representatives on the Storm Water Phase II FACA Subcommittee. EPA anticipates that these procedures are already effectuated through the implementation of existing municipal programs, such as emergency response teams and operation of the wastewater treatment system.

EPA requests comment on the appropriateness of the specified requirements for illicit discharge detection and elimination.

iv. Construction Site Storm Water Runoff Control. Over a short period of time, storm water discharges from construction site activity can contribute more pollutants, including sediment, to a receiving stream than had been deposited over several decades. Storm water runoff from construction sites can include pollutants other than sediment, such as phosphorus and nitrogen from fertilizer, pesticides, petroleum derivatives, construction chemicals, and solid wastes that may become mobilized when land surfaces are disturbed. Generally, properly implemented construction site ordinances are effective in reducing these pollutants. In many areas, however, the effectiveness of ordinances in reducing pollutants is limited due to inadequate enforcement or incomplete compliance with such local ordinances by construction site discharges of storm water. Not all construction site owners or operators properly maintain BMPs. For example, sediment traps and sediment basins may fill up and silt fencing may break or be overtopped.

Today's proposed rule would require owners or operators of regulated small municipal separate storm sewer systems to develop, implement, and enforce a pollutant control program to reduce pollutants in storm water runoff from construction activities that result in land disturbance of 1 or more acres to their municipal separate storm sewer systems as a part of their storm water management program. The owner or operator would need to use an ordinance or other regulatory mechanism that controls erosion and sediment to the maximum extent practicable and allowable under State, Tribal, or local law. The program also would need to ensure control of other waste at construction sites that could adversely impact water quality. This waste could include discarded building materials, concrete truck washout, and sanitary waste. The program would need to include, at a minimum, requirements for construction site owners or operators to implement appropriate BMPs, such as silt fences, temporary detention ponds and hay bales; provisions for pre-construction review of site management plans; procedures for receipt and consideration of information provided by the public; regular inspections during construction; and penalties to ensure compliance.

Today's proposal includes the program requirement to establish procedures for the receipt and consideration of information provided by the public in response to stakeholder concerns regarding public involvement and public access to information. This requirement further reinforces the public participation component of the municipal program by establishing a formal process for considering and responding to public inquiries regarding construction activities. Some stakeholders have expressed concern regarding the proposed site management plan provision, which would establish requirements for review but not for approval of such plans. EPA requests comment on expanding this provision to require both review and approval of construction site storm water plans. EPA also invites comment on the basic program components.

In conjunction with these requirements, EPA is also proposing to add § 122.44(s) which would allow the NPDES permit issued to regulated construction sites (described under § 122.26(b)(15)(i)) to incorporate by reference qualifying State, Tribal, or local erosion and sediment control program requirements. A qualifying State, Tribal, or local erosion and sediment control program would be one that meets the requirements of a municipal NPDES separate storm sewer permit or a program otherwise approved by the NPDES permitting authority for programs operating outside geographic boundaries of a permitted municipal separate storm sewer system. The NPDES permitting authority's approval of such programs would need to assure compliance with the minimum construction site control program requirements described above. The permitting authority could also include,

by reference in a general permit, those State, Tribal, or local requirements that meet the standard of best available technology (BAT) for those construction site storm water discharges identified at § 122.26(b)(14)(x) (i.e., sites disturbing more than 5 acres of land), including clearing, grading, and excavation activities. As a result of this provision, such local requirements would, in effect, provide the construction site erosion and sediment control requirements of the NPDES permit. Construction site owners and operators would be subject to only one set of erosion and sediment control requirements, thereby eliminating duplication. At the same time, noncompliance with the referenced local requirements would be considered noncompliance with the NPDES permit and would be federally enforceable.

EPA developed the ''incorporation by reference'' approach, which is similar to implementation efforts designed by the State of Michigan, to avoid duplication of effort in the development of regulatory requirements by different levels of government. Michigan relies on localities to develop substantive controls for storm water discharges associated with construction activities on a localized basis. The State agency, as the NPDES permitting authority, receives an NOI (termed ''notice of coverage'' by Michigan) under the general permit and tracks and exercises oversight, as appropriate, over the activity causing the storm water discharge. Michigan's goal under these procedures is to utilize the existing erosion and sediment control program infrastructure authorized under State law for storm water discharge regulation. (See U.S. Environmental Protection Agency, Office of Water. January 7, 1994. Memo: From Michael B. Cook, Director OWEC, to Water Management Division Directors, Regarding the ''Approach Taken by Michigan to Regulate Storm Water Discharges from Construction Activities.'')

EPA acknowledges that many owners or operators of small municipal separate storm sewer systems already administer local erosion and sediment control programs. EPA believes that today's proposed approach would recognize a municipality's flexibility in developing practical procedures to control construction site discharges from within its jurisdiction, while still requiring an NPDES permit to ensure an appropriate base level of water quality protection. Moreover, the Agency also believes that there is an appropriate role for the permitting authority as well as citizens groups in ensuring that construction site owners/operators comply with the requirements of an NPDES permit. Finally, EPA contemplates that there would be some permit provisions, such as requirements for site management plans, that are not typically required by local erosion and sediment control programs which would be required as one of the requirements of a construction general permit. Therefore, the Agency believes that the proposed dual approach of local controls and NPDES permitting most effectively ensures implementation of appropriate storm water control measures at construction sites while minimizing redundant controls. EPA solicits comment on this ''incorporation by reference'' approach.

Today's proposal for permit requirements for regulated construction sites (described under § 122.26(b)(15)(i)) would include developing a storm water pollution prevention plan (SWPPP). However, the current proposal for the municipal program minimum measure for construction site storm water control runoff does not contain an equivalent requirement—leaving a gap between the two areas of the proposal that address regulation of construction. EPA asks for comment as to the effect of this potential regulatory gap and whether the municipal program for construction should be made to include a requirement for developing a SWPPP. Specifically, EPA asks for comment on the effect this may have on the applicability of the provision allowing for an NPDES permit to incorporate by reference a qualifying local erosion and sediment control program. Currently, the proposal defines a local program as ''qualifying'' if it meets the minimum program requirements established in § 122.34(b)(4). EPA is concerned as to whether this raises a potential inequitable regulatory scheme where certain construction sites would need to be covered under a SWPPP because they are outside a covered municipality while nearby construction sites would not need SWPPP coverage because they are within a municipality that has a construction program that meets § 122.34(b)(4) requirements. EPA intends to facilitate the broadest application of the § 122.44(s) provision to avoid duplication of programmatic requirements and paperwork redundancy and seeks comment on a means to best achieve this goal.

In discussions with the Storm Water Phase II FACA Subcommittee, EPA considered structuring the permit requirements for the municipal construction program around five control principles that were to underlie the development of eight program elements to be implemented by the owner or operators of the municipal separate storm sewer system. The five principles were use of good site planning, minimization of soil movement, capture of sediment to the greatest degree possible, good housekeeping practices, and mitigation of the impacts of post-construction storm water discharges. The eight elements include a program description; coordination mechanisms with existing programs; requirements for nonstructural and structural BMPs; priorities for site inspections; educational and training measures; exemption of some construction activities due to limited impact; incentives, awards, or streamlining mechanisms available to developers; and description of staff and resources. Under this approach, any local program that incorporated these principles and elements into its storm water program would have been considered a ''qualifying'' local program that met Federal requirements. The elements suggested were modified from current requirements found at 40 CFR 122.26(d)(2)(iv)(D).

After in-depth discussion with all stakeholders, many of these elements were considered to be more appropriate as guidance than as regulatory requirements for small municipal systems. Some stakeholders expressed concerns about the applicability and interpretation of the five control principles and eight program elements on a national level, specifically that a single, national specification would be unworkable. Therefore, EPA is proposing regulatory text intended to build on the fundamental aspects of the existing NPDES program for municipal storm water, while streamlining and improving certain aspects of the program applicable to owners or operators of regulated small municipal separate storm sewer systems.

EPA requests comment on the appropriateness of the specified requirements for construction site control.

v. Post-Construction Storm Water Management in New Development and Redevelopment. The Nationwide Urban Runoff Program study and more recent investigations indicate that prior planning and designing for the minimization of pollutants in storm water discharges is the most cost-effective approach to storm water quality management. Reducing the discharge of pollutants after the discharge enters a storm sewer system is often more expensive and less efficient than preventing or reducing the discharge of pollutants at the source.

Increased human activity associated with development often results in increased discharges of pollutants. In addition, sediment and debris transport and deposition can directly impair aquatic life. If the involved parties consider water quality impacts from the beginning stages of projects, new development and possibly redevelopment allow opportunities for more water quality sensitive projects. For example, minimization of impervious areas, maintenance or restoration of natural infiltration, wetland protection, use of vegetated drainage ways, and use of riparian buffers have been shown to reduce pollutant loadings in storm water runoff from developed areas. EPA encourages local governments to identify specific problem areas within their jurisdictions and initiate innovative solutions and designs to focus attention on those areas through local planning.

In today's rule, EPA is proposing that owners or operators of regulated small municipal separate storm sewer systems develop, implement, and enforce a program that includes a plan to address storm water runoff from new development and redevelopment projects to their municipal separate storm sewer systems using site-appropriate and cost-effective structural and non-structural BMPs, as appropriate. The program would need to ensure that controls are in place that would prevent or minimize water quality impacts. The program should ensure adequate long-term operation and maintenance of BMPs. EPA would address questions regarding responsibility for long-term BMP operation and maintenance in guidance materials. EPA intends the term ''redevelopment'' to refer to alterations of a property that change the ''footprint'' of a site or building in such a way that results in the disturbance of equal to or greater than 1 acre of land. The term is not intended to include such activities as exterior remodeling, which would not be expected to cause adverse storm water quality impacts and offer no new opportunity for storm water controls.

EPA intends to provide guidance to owners or operators of municipal systems and permitting authorities on appropriate planning considerations, structural and non-structural controls, and post-construction operation and maintenance of BMPs. Guidance materials would also address questions regarding responsibility for long-term operation and maintenance of storm water controls. EPA also intends to present a broad menu of options as guidance allowing for flexibility to accommodate local conditions. EPA proposes to recommend that municipalities establish requirements for the use of cost-effective BMPs that minimize water quality impacts and attempt to maintain pre-development runoff conditions. In other words, post-development conditions should not be different from pre-development conditions in a way that adversely affects water quality. The municipal program should include structural and/or non-structural BMPs. EPA encourages locally-based watershed planning and the use of preventative measures, including non-structural BMPs, which are generally lower in cost than structural BMPs, to minimize water quality impacts. Non-structural BMPs are preventative actions that involve management and source controls. Examples of non-structural BMPs include policies and ordinances that result in protection of natural resources and prevention of runoff. These include requirements to limit growth to identified areas, protect sensitive areas such as wetlands and riparian areas, minimize imperviousness, maintain open space, and minimize disturbance of soils and vegetation.

Examples of structural BMPs include storage practices (wet ponds and extended-detention outlet structures), filtration practices (grassed swales, sand filters and filter strips), and infiltration practices (infiltration basins, infiltration trenches, and porous pavement). System owners or operators have significant flexibility both to develop this measure as appropriate to address local concerns and to apply new control technologies as they become available. Since storm water technologies are constantly being improved, EPA recommends that municipal requirements be responsive to these changes.

EPA requests comment on the appropriateness of the specified requirements for post-construction storm water management in new development and redevelopment.

vi. Pollution Prevention/Good Housekeeping for Municipal Operations. In today's proposal, any NPDES permit issued to an owner or operator of a regulated small municipal separate storm sewer system must, at a minimum, require the owner or operator to develop and implement a cost-effective operation and maintenance/training program with the ultimate goal of preventing or reducing pollutant runoff from municipal operations. EPA would encourage the owner or operator to consider the following in developing such a program: (1) Maintenance activities, maintenance schedules, and long-term inspection procedures for structural and other storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; (2) controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, and waste transfer stations—including programs that promote recycling and pesticide use minimization; (3) procedures for the proper disposal of waste removed from the separate storm sewer systems and areas listed above in (2), including dredge spoil, accumulated sediments, floatables, and other debris; and (4) ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporation of additional water quality protection devices or practices. In general, the requirement to develop and implement an operation and maintenance program, including local government employee training, is meant to ensure that municipal activities are performed in the most appropriate way to minimize contamination of storm water discharges, rather than requiring the municipality to undertake new activities.

Proper operation and maintenance of the municipal separate storm sewer system and the storm water pollution control structures is essential to the success of the management program overall. The effective performance of this program measure would hinge on the proper maintenance of the BMPs utilized. Without proper maintenance, BMP performance declines significantly over time, with rates of decline varying by BMP type and site conditions. Additionally, BMP neglect may produce health and safety threats, such as structural failure leading to flooding, undesirable animal and insect breeding, and odors. Maintenance of structural BMPs could include activities to restore the integrity of infiltration control BMPs such as replacing upper levels of gravel; dredging of detention ponds; and repair of outlet structure integrity. Non-structural BMPs could also require maintenance over time. For example, educational materials might need to be updated periodically.

EPA intends that controls for discharges from maintenance and storage yards listed above include controls for discharges from salt/sand storage locations and snow disposal areas operated by the municipality. EPA encourages coordination with flood control managers for the purpose of identifying and addressing the environmental impacts of existing and proposed flood management activities.

Using existing storm water pollution prevention training materials that could be available from the NPDES authorities or from other organizations whose materials are approved by the local government, the program would need to include local government employee training addressing these prevention measures in government operations (such as park, golf course and open space maintenance; fleet maintenance; planning, building oversight and storm water system maintenance). In developing this minimum program element, the Agency sought to identify existing practices and training as a means to avoid duplication of efforts and reduce overall costs. EPA also sought to emphasize those practices or programs designed and undertaken by municipalities to address non-storm water problems but also that have storm water pollution prevention benefits. In addition, EPA designed this municipal program measure intending to create a streamlined version of the permit application requirements for medium and large municipal separate storm sewer systems described at 40 CFR 122.26(d)(2)(iv). The streamlined approach is intended to provide more flexibility for these smaller municipalities. Today's proposed requirements provide for a consistent approach to control pollutants from operation and maintenance among medium, large, and regulated small municipal separate storm sewer systems.

By implementing a cost-effective operation and maintenance program, the municipal storm system owner or operator would serve as a model for the regulated community. Furthermore, the establishment of a long-term training and maintenance program could result in cost savings for the owner or operator by minimizing possible damage to the system from floatables and other debris and, consequently, reducing the need for repairs.

The proposed minimum measure, which originated with members of the Storm Water Phase II FACA Subcommittee, is similar to the requirements of the existing storm water program. EPA requests comment on the appropriateness of the specified requirements for pollution prevention/ good housekeeping for municipal operations.

vii. Satisfaction of Minimum Measure Obligations. Today's proposal would allow regulated small system owners or operators to satisfy their NPDES permit obligations for a minimum control measure by having another governmental or other entity perform the measure under the following circumstances: The other entity is implementing the control measure; the particular control measure (or component thereof) is at least as stringent as the corresponding NPDES permit requirements; and the owner or operator has requested, and the other entity has agreed to accept responsibility for, implementation of a particular control measure (or measures) on behalf of, and to satisfy, the owner or operator's municipal permit obligations. The owner or operator would need to specify in the § 122.34(f)(3) reports submitted to the NPDES permitting authority when the owner or operator relies on another person to satisfy the permit obligations. The owner or operator would remain responsible for compliance with the permit obligations if the entity fails to implement the control measure (or component thereof). Therefore, EPA would encourage the owner or operator to enter into a legally binding agreement with that entity to minimize any uncertainty regarding compliance with the NPDES permit.

In addition to the permittee-coordinated arrangement, today's proposal also includes a provision that would allow the NPDES permitting authority to recognize existing responsibilities among governmental entities for the control measures in an NPDES permit. For example, a State may have an existing erosion and sediment control program that adequately addresses construction site discharges to regulated small municipal separate storm sewer systems. The NPDES permitting authority in that State could draft the NPDES permit conditions such that the State is responsible for the construction site storm water discharge control minimum measure. Assuming that no other existing programs meet the requirements of the other minimum control measures, the municipality would be responsible for implementing those remaining minimum measures. Where the NPDES permitting authority recognizes existing responsibilities for one or more of the minimum control measures in an NPDES permit, these responsibilities would be waived from a regulated small system's storm water management plan and would remain waived as long as the other governmental entity implements the measure consistent with the proposed municipal program permit requirements at § 122.34(b). When the NPDES permitting authority recognizes an existing responsibility in an NPDES permit, the permittee would not be obligated to notify the other governmental entity about the arrangement. Instead, EPA anticipates it would be the responsibility of the NPDES permitting authority to do so.

b. Application Requirements, Including Notice of Intent

As part of the municipal program, the owner or operator of a regulated small municipal separate storm sewer system would be required to identify and submit to the NPDES permitting authority, either in a notice of intent (NOI) to be covered under a general permit or in an individual permit application, the BMPs that the owner or operator would implement and the measurable goals for the minimum control measures discussed previously. In reviewing NOIs submitted by the owners or operators of municipal systems, the NPDES permitting authority would need to pay particular attention to the BMPs and measurable goals identified for municipal separate storm sewer systems that are located in impaired watersheds. Where specific measurable goals to satisfy minimum control measures in paragraphs (b)(3) through (b)(6) of § 122.34 (illicit discharges detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, pollution prevention/ good housekeeping for municipal operations) are identified in an NOI, these goals would not constitute a condition of the NPDES permit, unless EPA or the State has provided or issued a menu of regionally appropriate, field-tested BMPs that it believes to be cost-effective. EPA has limited this provision to only four of the minimum control measures because the Agency does not believe that municipalities need the kind of technical assistance in developing measurable goals for public education and outreach or public involvement that might be essential in determining measurable goals for the other four minimum control measures. Measurable goals for the two minimum control measures of public education and outreach and public involvement would be required and would be enforceable permit conditions even without the issuance of the menu of BMPs. In the general permit NOI or individual permit application, the owner or operator would also be required to identify the month and year in which the owner or operator would start and would aim to complete each of the minimum control measures or indicate the frequency of the action.

The NPDES permitting authority would specify a time period (of up to five years) for the owner or operator to

fully develop and implement the program. The owner or operator would also be required to identify in the general permit NOI or individual permit application the person or persons responsible for implementing or coordinating the municipal storm water program. EPA intends to provide guidance on the development of BMPs and measurable goals. EPA would later modify, update, and supplement this guidance based on the assessments of the municipal storm water program and research conducted over the next 13 years.

EPA seeks comment on certain permit application provisions identified in today's proposed rule. First, EPA seeks comment on the potential implications of linking the enforceability of measurable goals identified in an NOI to EPA/State issuance of a menu of regionally appropriate BMPs. EPA also requests comment on the procedure for issuing a regionally appropriate menu of BMPs. For example, the menu could be developed and published concurrently with the general permit or prior to or after issuance of the general permit. Furthermore, commenters have raised concerns that if measurable goals become enforceable permit conditions without a menu of BMPs first being issued, the owner or operator of the municipal system would only propose easily attainable goals that might not achieve higher levels of water quality protection. Conversely, municipalities are concerned that measurable goals not become enforceable permit requirements until the permitting authority determines that they are, in fact, achievable through the use of cost-effective BMPs. EPA seeks comment on these concerns. Finally, EPA seeks comment on how an NOI form might best be formatted to allow for measurable goal information (e.g., through the use of check boxes or narrative descriptions) while taking into account the need to facilitate computer tracking.

c. Evaluation and Assessment

Under today's approach, owners or operators would be required to evaluate the appropriateness of their identified BMPs and progress toward achieving their identified measurable goals. The purpose of this evaluation is to determine whether or not the owner or operator is meeting the requirements of the minimum control measures identified in today's proposal. The NPDES permitting authority would be responsible for determining whether any monitoring needs to be conducted and could require monitoring in accordance with State/Tribe monitoring plans appropriate to the watershed. EPA does not encourage requirements for ''end-of-pipe'' monitoring for regulated small municipal storm sewer systems. Rather, EPA encourages permitting authorities to carefully examine existing ambient water quality and assess data needs. Permitting authorities should consider a combination of physical, chemical, and biological monitoring or the use of other environmental indicators such as exceedance frequencies of water quality standards, impacted dry weather flows, increased flooding frequency, and fish assemblage. (Claytor, R. and W. Brown. 1996. *Environmental Indicators to Assess Storm Water Control Programs and Practices.* Center for Watershed Protection, Silver Spring, MD.) Section II.L., Water Quality Issues, discusses monitoring in greater detail.

As recommended by the Intergovernmental Task Force on Monitoring Water Quality (ITFM), the NPDES permitting authority would be encouraged to consider the following watershed objectives in determining monitoring requirements: (1) to characterize water quality and ecosystem health in a watershed over time, (2) to determine causes of existing and future water quality and ecosystem health problems in a watershed and develop a watershed management program, (3) to assess progress of watershed management program or effectiveness of pollution prevention and control practices, and (4) to support documentation of compliance with permit conditions and/or water quality standards. With these objectives in mind, the Agency encourages participation in group monitoring programs that would take advantage of existing monitoring programs undertaken by a variety of governmental and nongovernmental entities. Many States may already have a monitoring program in effect on a watershed basis. The ITFM report is included in the docket for this proposal (Intergovernmental Task Force on Monitoring Water Quality. 1995. *The Strategy for Improving Water-Quality Monitoring in the United States: Final Report of the Intergovernmental Task Force on Monitoring Water Quality.* Copies can be obtained from: U.S. Geological Survey, Reston, VA.).

EPA expects that many types of entities would have a role in supporting group monitoring activities—including federal agencies, State agencies, the public, and various classes or categories of point source dischargers. It is possible that some regulated small municipal separate storm sewer systems would need to contribute to such monitoring efforts. EPA expects, however, that their participation in monitoring activities would be relatively limited. For purposes of today's proposal, EPA recommends that, in general, small municipalities not be required to conduct in the first permit term any additional monitoring beyond any they may be already performing. In the second and subsequent permit terms, EPA expects that some limited ambient monitoring might be appropriately required for perhaps half of the regulated small municipal separate storm sewer systems. EPA expects that such monitoring would only be done in several discrete locations for relatively few pollutants of concern. EPA does not anticipate ''end-of-pipe'' monitoring requirements for regulated small municipal separate storm sewer systems. EPA seeks comment on this approach, particularly from the perspective of dischargers other than small municipalities, on the sharing of responsibility for the support of monitoring activities.

i. Recordkeeping. The NPDES permitting authority would be required to include at least the minimum appropriate recordkeeping conditions in each permit. Additionally, the NPDES permitting authority could specify that permittees develop, maintain, and/or submit other records to determine compliance with permit conditions. The owner or operator would need to keep these records for at least 3 years but would not be required to submit records to the NPDES permitting authority unless specifically directed to do so. The owner or operator would be required to make the records, including the storm water management program, available to the public at reasonable times during regular business hours (see 40 CFR 122.7 for confidentiality provision). The owner or operator would also be able to assess a reasonable charge for copying and to establish advance notice requirements, not to exceed 2 business days, for members of the public.

ii. Reporting. Under today's proposal, the owner or operator of a regulated small municipal separate storm sewer system would be required to submit annual reports to the NPDES permitting authority for the first permit term. For subsequent permit terms, the owner or operator would need to submit reports in years 2 and 4 unless the NPDES permitting authority required more frequent reports. EPA determined that annual reports would be needed during the first 5-year permit term to help permitting authorities in track and assess the development of municipal programs, which should be well

established by the end of the initial term. Information contained in these reports could be used to respond to public inquiries.

The report would need to include (1) the status of compliance with permit conditions, an assessment of the appropriateness of identified BMPs and progress toward achieving measurable goals for each of the minimum control measures, (2) results of information collected and analyzed, including monitoring data, if any, during the reporting period, (3) a summary of what storm water activities the permittee plans to undertake during the next reporting cycle, and (4) a change in any identified measurable goal or goals that apply to the program elements.

The NPDES permitting authority would be encouraged to use a brief (e.g., two-page) reporting format to facilitate compiling and analyzing the data from submitted reports. The permitting authority would use the reports in evaluating compliance with permit conditions and, where necessary, would modify the permit conditions to address changed conditions. EPA requests comment on the appropriate content of the reports and the timing of the submittal.

iii. Permit-As-A-Shield. Section 122.36 describes the NPDES ''permit-as-a-shield'' coverage offered by section 402(k) of the CWA. Section 402(k) provides that compliance with an NPDES permit would be deemed compliance, for purposes of enforcement under CWA sections 309 and 505, with CWA sections 301, 302, 306, 307, and 403, except for any standard imposed under section 307 for toxic pollutants injurious to human health.

EPA's Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits, issued on July 1, 1994, and revised by EPA's policy memorandum on the same subject issued on April 11,1995, provides additional information on this matter.

d. Other Applicable NPDES Requirements

Any NPDES permit issued to an owner or operator of a regulated small municipal separate storm sewer system would also need to include other applicable NPDES permit requirements and standard conditions, specifically those requirements and conditions at 40 CFR 122.41 through 122.49 (EPA recognizes that reporting requirements for regulated small municipal separate storm sewer systems would be governed by proposed § 122.34 and not the existing requirements for medium and large municipal separate storm sewer systems at § 122.42(c)). In addition, the NPDES permitting authority is encouraged to consult the Interim Permitting Approach, issued on August 1, 1996. The discussion on the Interim Permitting Approach in Section II.L.1, Water Quality Standards, provides more information. Members of the municipal caucus expressed considerable concern that imposing these conditions would, in effect, undermine the intent of the program developed in consultation with the Storm Water Phase II FACA Subcommittee—to develop a program with a simplified set of permit requirements based on the implementation of BMPs. EPA does not believe that this is a concern. The provisions of §§ 122.41 through 122.49 establish permit conditions and limitations that are broadly applicable to the entire range of NPDES permits. These provisions should be interpreted in a manner that is consistent with provisions that address specific classes or categories of discharges. For example, § 122.44(d) is a general requirement that each NPDES permit shall include conditions to meet water quality standards. This requirement would be met by the specific approach outlined in today's proposal for the implementation of BMPs as the most appropriate form of effluent limitations to satisfy technology requirements and water quality-based requirements (see the introduction to Section II.H.3, Municipal Permit Requirements, Section II.H.3.g, Reevaluation of Rule, and the discussion of the Interim Permitting Policy in Section II.L.1.a. below).

e. Enforceability

NPDES permits are federally enforceable. Violators may be subject to the enforcement actions and penalties described in CWA sections 309, 504, and 505 or under appropriate State or local law. Compliance with a permit issued pursuant to section 402 of the Clean Water Act would be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403 (except any standard imposed under section 307 for toxic pollutants injurious to human health).

f. Deadlines

Under § 122.32(a)(1) of today's proposed rule, which automatically designates all small municipal separate storm sewers located in an ''urbanized area,'' owners or operators of regulated small municipal separate storm sewer systems would need to seek coverage under an NPDES permit within 3 years and 90 days from the date of publication of the final rule. Assuming a March 1, 1999, final rule, the resulting deadline would be May 31, 2002—this allows 90 days after the issuance of a general permit to submit the NOI. Owners or operators of regulated small municipal separate storm sewer systems that choose to be a co-permittee with an adjoining municipality or other governmental entity with an existing NPDES storm water permit would need to apply for a modification of that permit by May 31, 2002—allowing for 90 days as well. EPA recognizes that the use of the ''latest'' Decennial Census by the Bureau of the Census as a basis for nationwide designation raises an issue regarding applicable deadlines for municipalities brought into the program due to 2000 Census calculations. EPA proposes that small municipal separate storm sewer systems that are automatically designated as of the 2000 Census would need to seek coverage under an NPDES permit within 3 years and 90 days from the date of publication of the final rule. Since the official Bureau of the Census urbanized area calculation for the 2000 Census is expected to be published by August 2001, this proposed deadline would allow the affected municipalities to have approximately 9 months notice to prepare for compliance under the applicable permit. EPA invites comment on this proposed deadline for municipalities affected by the 2000 Census. EPA also seeks comment on the appropriateness of the range of time allowed for regulated small municipal separate storm sewer systems to prepare an NOI or permit application, which varies from 3 years and 90 days (if automatically designated by the 1990 Census) to 60 days (if designated by the NPDES permitting authority under proposed § 122.32(a)(2)), with 9 months in between (if automatically designated by the 2000 Census).

As stated above, owners or operators of regulated small municipal separate storm sewer systems designated by the NPDES permitting authority on a local basis under § 122.32(a)(2) would need to seek coverage under an NPDES permit within 60 days of notice, unless the NPDES permitting authority specifies a later date. EPA seeks comment specifically on whether 60 days provides adequate time for the preparation of an NOI or permit application or if a 90 day time period would be more appropriate.

g. Reevaluation of Rule

The municipal caucus of the Storm Water Phase II FACA Subcommittee asked EPA to demonstrate its commitment to revisit today's proposed rule as it applies to municipal separate

storm sewer systems and make changes where necessary after evaluating the storm water program and researching the effectiveness of municipal BMPs. Today, EPA is proposing § 122.37 to commit the Agency to revisit the regulations for the municipal storm water program, at §§ 122.32 through 122.26 and 123.35, after completion of the first two permit terms. The Agency intends to use this time to work closely with stakeholders on research efforts. Gathering and analyzing data related to the storm water program, including data regarding the effectiveness of BMPs, during this time would be critical to EPA's storm water program evaluation. The Agency does not intend to change today's proposed NPDES municipal storm water program until the end of this period, except under the following circumstances: a court decision requires changes; a technical change is necessary for implementation; or the CWA is modified, thereby requiring changes. After careful analysis, the Agency might also consider changes from consensus-based stakeholder requests for newly regulated municipal systems. EPA would apply the August 1, 1996, Interim Permitting Approach to today's proposed program during this interim period and would encourage all permitting authorities to use this approach in storm water permits for newly regulated municipal systems and in determining municipal requirements under a TMDL approach. After careful consideration of the data, EPA would make modifications as necessary. EPA is seeking comment on the proposal to re-evaluate the rule after 13 years from the date of publication of the final rule (i.e., following the completion of the first two permit terms).

In addition, proposed § 122.37 states that EPA strongly recommends that no additional requirements beyond the minimum control measures be imposed on regulated municipal separate storm water systems without the agreement of the affected municipal separate storm water system, except where adequate information exists in approved TMDLs or equivalents of TMDLs to develop more specific measures to protect water quality or until EPA's comprehensive evaluation is completed. The wasteload allocations that form part of approved TMDLs or equivalents of TMDLs would constitute ''adequate information to develop more specific conditions or limitations to meet water quality standards.'' EPA regulations at 40 CFR 122.44(d)(1)(vii) currently require that effluent limits in NPDES permits be consistent with assumptions and requirements of any available wasteload allocations for the discharge contained in EPA-approved TMDLs. Consequently, where wasteload allocations have been established for a municipal storm water source in approved TMDLs, the permit would need to include terms and conditions consistent with the assumptions and requirements of the wasteload allocations. These terms and conditions might include non-numeric requirements, such as implementation of BMPs coupled with some means to monitor effectiveness, if they are consistent with the assumptions and requirements of the conditions of the wasteload allocations.

I. Other Designated Storm Water Discharges

1. Background

Under section 402(p)(6), EPA is proposing to regulate categories of storm water discharges in addition to the municipal separate storm sewer systems described earlier. The proposal would designate certain construction activities for regulation as ''storm water discharges associated with other activity.'' Specifically, such discharges would include storm water discharges from construction sites disturbing equal to or greater than 1 acre and less than 5 acres, unless the NPDES permitting authority waives the application requirements.

Today's action also would maintain the existing application deadline from the August 7, 1995, rule for municipally owned or operated sources of industrial storm water exempted from the October 1, 1994, compliance deadline by the Intermodal Surface Transportation and Efficiency Act of 1991 (and the Water Resources Development Act of 1992). The proposed regulation, including application deadlines, for each of these classes is further explained below.

2. Construction

Today's proposal to regulate certain storm water discharges from construction sites disturbing less than 5 acres is consistent with the 9th Circuit remand in NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992). In that case, the court remanded portions of the existing storm water regulations related to discharges from construction sites. The existing regulations define ''storm water discharges associated with industrial activity'' to include only those storm water discharges from construction sites disturbing 5 acres or more of total land area (see 40 CFR 122.26(b)(14)(x)). In its decision, the court concluded that the 5-acre threshold was improper because the Agency had failed to identify information ''to support its perception that construction activities on less than 5 acres are non-industrial in nature'' (966 F.2d at 1306). The court remanded the exemption to EPA for further proceedings (966 F.2d at 1310). EPA's objectives in today's proposal include an effort to (1) address the 9th Circuit remand, (2) address water quality concerns associated with construction activities that disturb less than 5 acres of land, and (3) balance conflicting recommendations and concerns of stakeholders.

EPA responded to the 9th Circuit's request for further proceedings by consulting with the Storm Water Phase II FACA Subcommittee regarding possible approaches for addressing the remanded provision. Although the Subcommittee was not able to reach consensus on any of the issues relating to the construction remand, Subcommittee members provided considerable feedback concerning a variety of possible approaches. Today's proposal represents the Agency's effort to balance the concerns raised by various subcommittee representatives. This proposal would designate discharges from construction activities that disturb between 1 and 5 acres as ''discharges associated with other activity'' under section 402(p)(6), rather than as ''discharges associated with industrial activity'' under section 402(p)(2)(B). Although a size criterion alone may be an indicator of whether runoff from construction sites between 1 and 5 acres is ''associated with industrial activity,'' the Agency is instead proposing to rely on a size threshold in tandem with provisions that allow for designations and waivers based on potential for ''predicted water quality impairments'' to regulate such construction sites under section 402(p)(6) for the sake of simplicity and certainty and, most importantly, to protect water quality consistent with the mandate of section 402(p)(6). The proposal would include extended application deadlines for this new category of dischargers under the authority of section 402(p)(6) (see * 122.26(e)(1)(iii)). The proposed designation would also be consistent with EPA's earlier proposal to regulate this category of discharges as ''discharges associated with industrial activity'' (55 FR 48035–36).

Today's proposal would designate storm water discharges from certain construction sites under 5 acres for regulation based on the authorities of section 402(p)(6) because such sources should be regulated to protect water quality. Section I.A.1., under Construction Site Runoff, provides a detailed discussion of water quality

impacts resulting from construction site storm water runoff. Under section 402(p)(6), such designation also carries with it ''expeditious deadlines,'' which are important to ensure a nationally consistent timeperiod for the development and implementation of a program to regulate these sources. EPA invites comment on how the Agency should codify this proposed designation, as well as the statutory basis upon which EPA should rely for regulation of storm water discharges from construction sites less than 5 acres.

The proposed regulatory changes for storm water construction activities are not proposed in the same ''question and answer'' format as the other regulations proposed because ''storm water discharges associated with other activity'' would be included as a new category of dischargers in the NPDES regulations for storm water.

a. Scope

The definition of ''storm water discharges associated with other activity'' would include construction activities, including clearing, grading, and excavating activities, that result in the disturbance of equal to or greater than 1 acre and less than 5 acres (see new language at § 122.26(b)(15)). Such activities might include road building; construction of residential houses, office buildings, or industrial buildings; or demolition activity. Sites disturbing less than 1 acre would be included if they were part of a ''larger common plan of development or sale'' with a planned disturbance of equal to or greater than 1 and 5 acres. A ''larger common plan of development or sale'' would mean a contiguous area where multiple separate and distinct construction activities might be occurring at different times on different schedules under one plan (e.g., a housing development of five ¼ acre lots) (§ 122.26(b)(15)(i)(A)). Such sites would be required to seek coverage under an NPDES permit regardless of the number of lots in the larger plan because designation for permit coverage would be based on the total amount of disturbed land area. This proposed designation attempts to address the potential cumulative effects of numerous construction activities concentrated in a given area. These requirements would not apply to agricultural or silvicultural activities, which are exempt from NPDES permit requirements under 40 CFR 122.3.

Although all construction sites less than 5 acres could have a significant water quality impact cumulatively, EPA today is proposing to require that only construction sites that disturb land equal to or greater than 1 acre seek coverage under an NPDES permit. Categorical regulation of construction below this 1-acre threshold would overwhelm the resources of permitting authorities. The NPDES permitting authority could, however, designate for regulation those construction activities that disturb below 1 acre of land if a watershed or other local assessment indicated the need to do so. Furthermore, the permitting authority could designate any other construction activity ''based on the potential for adverse impact on water quality or for significant contribution of pollutants'' (see new § 122.26(a)(9)(i)(D) and § 122.26(b)(15)(i)(B)).

The proposed 1-acre threshold is based on a balanced consideration of recommendations from numerous stakeholders participating in the Storm Water Phase II FACA Subcommittee process. In today's proposed rule, EPA is attempting to regulate additional construction sites to better protect the nation's waters, while remaining sensitive to a concern that the Agency not regulate construction sites that might not have adverse water quality impacts. EPA believes that today's proposal would successfully accomplish this objective by coupling a 1-acre threshold that includes waiver options for sites that have been determined not to impact water quality with the provision that allows the designation authority to include sites below 1 acre that do impact water quality. Specifically, construction activity equal to or greater than 1 acre and less than 5 acres would be automatically designated except in those circumstances where owner or operator certifies that any of three specific waiver circumstances (described below) would apply. As mentioned previously, construction activity that disturbs less than 1 acre would not be automatically designated, but the NPDES permitting authority could designate such areas for permitting where there is reason to believe that impacts to water quality are likely to occur from activity on these sites. For example, if a trout hatchery area is located downstream from the proposed less than 1-acre site, the permitting authority would likely want to control the construction activity's impact on trout egg survival. EPA believes that coupling categorical designations with waivers would be necessary to address the challenge of providing a technical justification for a nationwide size threshold considering the hydrologic, climatologic, geographic, and geologic variations nationwide. EPA invites comment regarding this approach.

EPA also examined alternative size thresholds, including 0.5 acre, 1 acre, and 2 acres. EPA had difficulty evaluating the alternative size thresholds because, while directly proportional to the size of the disturbed site, the water quality threat posed by construction sites of differing sizes varies nationwide, depending on the local climatological, geological, geographical, and hydrological influences. In the interest of nationwide consistency, EPA does not propose to allow permitting authorities to set their own size thresholds. By selecting the 1 acre size threshold coupled with waivers and designation, EPA sought to make the regulation consistent on a national basis and to also provide permitting authorities with the opportunity to further designate those activities causing water quality impairments regardless of site size. Thus, oversight of discharges from construction site activities less than 5 acres would be consistent on a national basis and would ultimately allow local authorities to address those activities causing water quality impairment regardless of any cutoff or threshold acreage.

b. Waivers

Under the proposal, NPDES permitting authorities would have the option of providing a waiver to construction site owners or operators from permit requirements in three circumstances. The first waiver would be based on ''low predicted rainfall potential.'' The permitting authority would determine which times of year, if any, the waiver opportunity would be available for construction sites based on a table of R values published in the U.S. Department of Agriculture (USDA) Agricultural Handbook 703 (Renard, K.G., Foster, G.R., Weesies, G.A., McCool, D.K., and D.C. Yoder. 1997. *Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE)*. U.S. Department of Agriculture Handbook 703. Copies may be obtained from USDA-ARS, Southwest Watershed Research Center, 2000 East Allen Road, Tucson, AZ 85719.). These tables summarize average periodic rainfall data on a geographic basis throughout the United States. The second waiver would be based on ''low predicted soil loss.'' Under this waiver, the permittee would apply the Revised Universal Soil Loss Equation (RUSLE) to determine whether or not the second waiver would be available. The third waiver would be based on a consideration of ambient water quality. This waiver would be available after

development and implementation of TMDLs for the pollutants of concern from storm water discharges associated with construction site storm water runoff. This waiver would also be available after development and implementation of a TMDL-like allocation process in water bodies that are not impaired. Note that TMDLs are only required for water bodies listed under CWA section 303(d).

The first waiver would be time-sensitive and would be dependent on when during the year a construction activity takes place, how long it lasts, and the expected rainfall during that time. The waiver is intended to exempt the requirements for a permit when and where the permitting authority expects negligible rainfall. EPA anticipates that this waiver opportunity would respond to concerns about the requirement for a permit when it does not rain, especially in the arid western States. Under this waiver provision, the permitting authority could identify timeperiods when construction activity could be waived from permitting requirements where the rainfall erosivity factor (''R'' in the Revised Universal Soil Loss Equation (RUSLE)) is less than two during the period of construction activity for specific areas of the State. EPA believes that those areas receiving negligible rainfall during certain times of the year are unlikely to have storm water events that would adversely impact receiving streams and, consequently, BMPs would not be necessary on those smaller sites. This waiver would be most applicable to the arid regions of the country where the occurrence of rainfall follows a cyclic pattern—between no rain and extremely heavy rain. Review of rainfall records for these areas indicates that there are periods (up to 6 months) during which the number of events and quantity of rain are low enough that storm water runoff from small sites is predicted to be minimal. Default conditions that were included in this examination consisted of slope length (300 feet), slope steepness (3%), soil type (silt), no natural cover material, and no erosion control practices in place.

The second option for a waiver would be based on ''low predicted soil loss'' and would be available where application of the RUSLE by the permittee indicated negligible predicted soil loss. Developed initially by the USDA as a predictive tool to evaluate the potential for soil loss from agricultural lands at various times of the year and on a regional basis, the Universal Soil Loss Equation (USLE) was identified as a technique which could be useful in predicting construction site soil losses in the early 1970s (Wischmeir and Meyer, 1973). USLE is a widely used and easily accessible equation which predicts soil loss from four variables; rainfall erosivity, soil erodibility, length of slope, and steepness of slope. A refinement of USLE is reflected in the Revised Universal Soil Loss Equation (RUSLE), which provides a broader range of data within the individual variable. Several permitting authorities have recommended the utilization of the USLE or RUSLE for predicting construction site soil losses in their guidance documents that support implementation of the existing storm water program.

Today, EPA is proposing a modified use of the equation for purposes of predicting soil erosion rates from small construction sites using the RUSLE. The equation comprises the variables rainfall erosivity (R), soil erodibility (K), slope length (L), slope steepness (S), cover-management factor (C), and the support practice factor (P). The equation is:

A-RKLSCP

where A is the average soil erosion rate in tons per acre per year. This waiver provision would be applicable on a case-by-case basis where the annual soil loss rate for the period of construction for a site would be less than 2 tons/acre/year. The annual soil loss rate of less than 2 tons/acre/year would be calculated through the use of the equation, assuming the constants of no ground cover and no runoff controls in place. For the purposes of today's proposal, RUSLE would be used to predict where storm water discharges associated with construction activity (i.e., soil disturbance through clearing, grading, and excavating would not be expected to adversely affect water quality.)

The third waiver would be available where the State (or EPA) has completed either wasteload allocations that are part of TMDLs that address the pollutants of concern or a comprehensive watershed plan, implemented for the water body, in which the equivalents of TMDLs have been done as part of the watershed plan addressing the pollutants of concern from construction activities. The permitting authority would need to reflect relevant components of the comprehensive watershed plan or TMDLs in NPDES permits. The watershed plan, or TMDLs, would need to demonstrate with reasonable assurance that load reductions take place pursuant to CWA section 303(d) and that such discharge does not cause or have a potential to cause water quality impacts. In determining this waiver, EPA (if the NPDES permitting authority) might rely on a State's wasteload allocations that are part of TMDLs or a State's comprehensive watershed plan in which the equivalents of TMDLs has been done as part of the watershed plan. To qualify for this waiver option, the owner or operator would need to certify that the construction activity will take place, and storm water discharges will occur, within an area covered either by the TMDLs or comprehensive watershed plan. By using the term ''comprehensive watershed plan,'' EPA recognizes that TMDLs address ''impaired waters'' and that there may be TMDL-like activities on waters that are not found to be ''impaired.'' It is expected that when TMDLs are done there may be a determination, in some cases, that certain classes of sources such as small construction sites would not have to control their contribution of pollutants of concern to the waterbody in order for it to be in attainment (i.e., these sources are not assigned wasteload allocations) and, therefore, implementation of storm water controls would not be necessary under today's proposed storm water program.

EPA is continuing to review technical information to determine whether the waiver thresholds for rainfall erosivity and annual soil loss are the appropriate thresholds. The agency is also interested in comment regarding the feasibility of these waiver provisions. For example, concerns have been raised that application of the second waiver (case-by-case basis where the annual soil loss rate for the period of construction for a site would be less than 2 tons/acre/year) might not sufficiently protect sensitive ecosystems or species. Impacts from fine sediment could be heightened for coral reef systems or for extremely oligotrophic systems, such as Lake Tahoe in Nevada or Crater Lake in Oregon (see the general discussion of construction impacts in Section I.A.1., Construction Site Runoff). In addition, concerns have been raised that the second waiver provision would be too complicated and, thus, misapplied because the variables and assumptions in the RUSLE would be misinterpreted or misrepresented. EPA encourages the submission of data and other information that could ensure a waiver process that is fair and easily applied while providing sufficient protection for sensitive ecosystems.

Preliminary comments on the proposed waiver provisions also raised a process issue regarding how a permittee would qualify for a waiver. Today's proposal includes a certification process whereby the

permittee would certify to the NPDES permitting authority that it meets the particular waiver criteria or waiver requirements applicable in a particular State or watershed (see proposed § 122.26(b)(15)(i)(A)(1)–(3)). EPA invites comment on such a certification process and requests comment on any other similar process that could reduce the waiver processing burden for the NPDES permitting authority and the permittee while ensuring that waivers are granted only for those circumstances applicable under one of the three waiver options.

EPA also seeks comment from permitting authorities on how they envision the process of implementing waivers for construction activity based on TMDLs or TMDL-type assessments under watershed plans.

EPA invites comment on concerns that waivers might be improperly utilized in an effort to provide relief to regulated entities for reasons unrelated to water quality. In particular, concerns have been raised that an NPDES permitting authority might redirect resources from other environmental programs in order to develop a watershed approach that promotes the issuance of the greatest possible number of waivers.

In addition to waivers, the Agency is also considering possible approaches for providing incentives for local decisionmaking that would limit the adverse water quality impact associated with uncontrolled growth in a watershed. In situations where there are special controls or incentives (e.g. transferable development rights, traditional neighborhood development ordinances) in place directing development toward compact/mixed use development and away from wetlands, open space, or other protected lands, it may be possible to provide some relief to small construction sites in areas of less dense development, provided that the average development densities are very low (e.g., less than one unit per 25 acres). In addition, relief from requirements may also be appropriate where redevelopment construction replaces existing development and the new development results in a net water quality benefit. This type of incentive could be a consideration in development of TMDLs by State or local authorities. Based on a TMDL that recognizes that the discharges from areas of less development do not cause or have potential to cause water quality impacts, relief from small construction site permitting requirements could be granted. EPA solicits comment on this approach and any other recommendations for the use of such incentives.

c. Permit Process and Administration

As with any owner or operator of a point source discharge, the operator of the construction site would be responsible for applying for the NPDES permit as required by § 122.21(b). The operator of a construction activity would be the party or parties that either individually or collectively meet the following two criteria: (1) operational control over the site specifications, including the ability to make modifications in the specifications; and (2) day-to-day operational control of those activities at the site necessary to ensure compliance with permit conditions. If more than one party meets these criteria, then each party involved would need to be a co-permittee with any other operators. The operators could be the owner, the developer, the general contractor, or individual contractors.

As mentioned previously, the Agency has proposed extended application deadlines for small construction sites at § 122.26(e)(1)(iii). EPA also considered whether NOIs should be required of construction sites less than 5 acres. Requiring an NOI allows for greater accountability by, and tracking of, dischargers. It allows for better outreach to the regulated community, uses an existing and familiar mechanism, and is consistent with the existing requirements for construction activities. EPA recognizes, however, the paperwork burden for both the regulated community and regulators. The Agency is proposing not to specify the NOI requirements for NPDES general permits for storm water at § 122.28 to address the storm water discharges from construction activities proposed to be regulated at § 122.26(b)(15). EPA believes that this approach would provide the NPDES permitting authority with the discretion to decide whether or not to require NOIs for construction activity less than 5 acres. Thus, the proposal would increase flexibility for the permitting authority regarding program implementation. The Agency invites comment on whether NOI submission should be a requirement for general permits for construction activity less than 5 acres.

EPA expects that the vast majority of discharges of storm water associated with other activity identified in § 122.26(b)(15) would be regulated through general permits. In the event that an NPDES permitting authority decides to issue an individual construction permit, however, individual application requirements for these construction sites would be found at § 122.26(c)(1)(ii). Except for application deadlines and NOIs under general permits, the permit application requirements would be identical to those applicable to storm water discharges associated with industrial activity under the existing NPDES storm water program. EPA proposes to revise § 122.26 accordingly. For any discharges of storm water associated with other activity identified in § 122.26(b)(15) that are not authorized by a general permit, a permit application made pursuant to § 122.26(c) would need to be submitted to the Director by 3 years and 90 days after issuance of the final rule. All regulated sources would be required to seek coverage under an NPDES permit regardless of whether they discharge directly to waters of the United States or through a municipal separate storm sewer system to waters of the United States.

The Storm Water Phase II FACA Subcommittee also identified issues regarding linear construction projects (e.g., roads, highways, pipelines) that cross several jurisdictions. Some Subcommittee members were concerned about having to comply with multiple sets of requirements from various jurisdictions, including multiple local governments and States. Because EPA cannot issue NPDES permits in States authorized to implement the NPDES program and because EPA cannot preempt other more stringent local and State requirements, EPA is limited in its options to address these concerns. EPA believes that the option for incorporating by reference the local or State requirements (see discussion in Section II.I.2.d., Cross-Referencing State/Local Erosion and Sediment Control Programs) would limit the administrative burden on the operator responsible for discharges from linear construction projects. The operator could implement the most comprehensive of the various requirements for the whole project to avoid differing requirements for different sections of the project. In addition, EPA notes that discharges of dredged or fill material into waters of the United States that are regulated under section 404 of the CWA do not require NPDES permits (40 CFR 122.3(b)).

On a similar note, one comment or requested exemptions for ''routine maintenance'' activities such as repairing potholes, clearing out drainage ditches, and maintaining fire breaks, because these activities often involve rights-of-way extending across multiple regulatory jurisdictions. The commenter suggested that, at most, these activities by required to adhere to generic best

management practices. The Agency is interested in comments on how such an exemption would work, what the criteria for such an exemption would be, and the appropriate BMPs for such sites.

EPA also invites comment on recordkeeping requirements for today's proposed rule regarding construction. The NPDES program requires that the entity submitting the NOI keep its records on file for three years. Given that some smaller construction activities may last less than a year, some recommendations suggest that this file retention requirement be modified or deleted for such sites. EPA invites comment on appropriate and reasonable recordkeeping requirements.

d. Cross-Referencing State/Local Erosion and Sediment Control Programs

In developing the permit requirements for designated construction sites less than 5 acres, members of the Storm Water Phase II FACA Subcommittee asked EPA to try to minimize redundancy in the construction permit requirements. As previously discussed in the Construction Site Storm Water Runoff Control discussion (see Section II.H.3.a., Minimum Control Measures), the Agency is proposing to allow permitting authorities to incorporate by reference the requirements of qualifying State, Tribal, or local erosion and sediment control programs. The NPDES permitting authority would, of course, retain the authority to deny coverage under the general NPDES permit, disapprove inclusion of alternative requirements in the general permit, and could require that designated general permit applicants apply for an individual NPDES permit.

EPA envisions that this incorporation by reference approach would apply not only to the proposed newly regulated storm water discharges from construction sites between 1 and 5 acres, but also to discharges from larger construction sites already covered by the existing storm water regulations provided the program meets best available technology (BAT) requirements. Under existing regulations, storm water discharges ''associated with industrial activity'' are subject to the same technology-based standards as any other discharge under the CWA (except publicly owned treatment works and municipal separate storm sewer systems) (see CWA section 402(p)(3)(A)). The Agency invites comment on whether the imposition of controls designed to satisfy the proposed § 122.34(b) would assure compliance with CWA section 402(p)(3)(A) for discharges from construction sites over 5 acres. Note that the Agency does not intend that incorporation by reference of qualifying programs would relieve construction site discharges ''associated with industrial activity'' from the applicable requirements of CWA section 301.

EPA believes that this approach would best balance the need for consideration of specific local requirements and local implementation with the need for Federal and citizen oversight, and would extend supplemental NPDES requirements to construction sites. EPA solicits comment on this approach.

In a somewhat different context, municipal representatives recommended that construction activities undertaken by municipalities be covered by the municipal storm water permit rather than under a separate, distinct storm water permit for construction activity. The Agency agrees that this would be a reasonable approach. The Agency explored several possible ways to make such an approach possible during the development of today's proposal, and feels that there are some options that could achieve program objectives. One option would be to simply relieve municipalities that would be covered under today's proposal of requirements to submit an NOI for the general permit covering construction activity. Under this option, municipalities would still be subject to both types of permit, but would be relieved of the paperwork associated with filing NOIs. This option might require a revision to existing 122.28(b)(2)(v). Another option to address this concern would be to issue individual permits to municipalities seeking such a ''one-stop shopping'' approach that would include provisions covering the municipal storm water program and construction activity conducted by the municipality. Under such an option, municipalities might need to submit individual permit applications and the NPDES permitting authority might have to issue many more municipal permits. Under a third option, the general permit issued to small municipalities would include municipal storm water program requirements as well as construction site discharge components. This option would result in the issuance of a more complex general permit than EPA currently envisions for small municipalities. This complexity could be minimized, however, by organizing the general permit into distinct modules, one dealing with the six minimum measures, one with municipal construction, and possibly one with municipal industrial facilities (see Section II.I.3, ''Other Sources'' below). Alternatively, municipal general permits could potentially reference provisions included in construction general permits. As a practical matter, the controls for municipally-owned or operated construction would presumably dovetail with the requirements of the municipal minimum control measure for construction, at least for sites between 1 and 5 acres (construction less than 5 acres would have to meet BAT). The Agency seeks further input on these possible approaches and others that could be considered. Specifically, how would such an approach work, what would the permit look like, who would be covered, and what would be the responsibilities of covered municipalities.

In a similar vein, industrial representatives recommended that construction activities undertaken by permitted industrial storm water facilities be covered by the industrial storm water permit. Again, the Agency agrees with the concept. One option contemplated by the Agency would be to include in industrial storm water permits requirements for construction undertaken by permitted industrial facilities. Another option would be to cross-reference construction general permit provisions in industrial general permits. The Agency seeks comment on these possible approaches and others that could be considered.

e. Alternative Approaches

As previously discussed, EPA also examined size thresholds other than one acre for regulation. Although a range of size thresholds was mentioned in stakeholder comments, no data were offered to support such alternatives. The Agency solicits comments that would assist the Agency in making an informed decision as to an appropriate threshold related to environmental effect. Alternatively, the Agency also solicits comment on an approach by which only those construction sites located within urbanized areas would be automatically subject to permitting requirements. Under such an alternative, small construction sites outside urbanized areas would not be required to be covered by an NPDES permit unless specifically designated by the permitting authority on a case-by-case basis.

Some stakeholders asked EPA to consider allowing storm water discharges associated with construction activities between 1 and 5 acres to be regulated solely under municipal storm water programs where discharges to a municipal separate storm sewer system

are subject to a permit, rather than requiring construction site discharges to be subject to both NPDES permit requirements and municipal program requirements. Under such an approach, construction sites would only be subject to the requirements and oversight of a qualifying local program. The Agency has described the ''incorporation by reference'' approach of today's proposal and the rationale for the proposed approach elsewhere in this preamble. If EPA adopted this ''qualifying local program'' alternative, construction site operators in qualifying municipalities would not be subject to the requirements of an NPDES permit. The Agency solicits comment on this particular alternative and seeks input specifically on the effectiveness of local erosion and sediment control programs in the absence of NPDES permits incorporating such local programs. The Agency also solicits comment on the appropriate qualifications to establish for municipalities to qualify under such an alternative.

EPA considered several other alternatives for controlling construction storm water discharges on sites less than 5 acres, including state/local implementation only, Federal requirements/guidelines for local erosion and sediment control programs, and State-developed requirements. Small entity representatives recommended that EPA only establish a voluntary program based on EPA guidance, and perhaps including incentives for small site operators. This would effectively translate into a program which would not require such sites to be covered by an NPDES permit unless they were specifically designated by the permitting authority on a case-by-case basis. One commenter raised concerns that small site operators may lack the resources to put together a good site plan, which would likely be required under the proposed approach. EPA seeks comment on these alternatives, as well, including comment on how such programs have worked where they have been in effect.

In evaluating options to administer the storm water control program for discharges from construction sites, EPA considered an owner or operator certification program that would have allowed the owner or operator, or authorized representative, of a construction firm to apply for coverage once for all the firm's activities in one jurisdiction for the term of the NPDES permit. Focusing on operators in the ''construction industry'' (regardless of the size of the construction site) would have more closely paralleled the existing storm water program for discharges ''associated with industrial activity.'' This option would have allowed for the coverage of each site by submittal of one NOI, thereby reducing the paperwork burden substantially without sacrificing accountability. This option would have applied to all regulated construction site discharges, regardless of size. Homeowners who performed construction activities on their own property would have been exempt from the requirements for a permit under this option. This option would have focused instead on the construction ''industry.'' This option also would have resulted in a different proposal for municipal programs to control construction site discharges. Concerns with this option included issues regarding: identification of the responsible parties onsite (e.g., whether all parties could reasonably be held responsible for all permit conditions) and site-by-site identification of construction discharges for tracking compliance with permit conditions. Such a change also would have affected operators discharging storm water from existing, larger regulated construction sites by restructuring the entire regulatory scheme to focus on the ''industry'' of construction site operators, thus creating significant confusion among regulated entities and disruption in regulatory processes. Nonetheless, EPA invites comment on the option to establish what would amount to an NPDES-based ''licensing'' program for construction site operators within an NPDES jurisdiction (usually within State or Tribal boundaries).

Industrial stakeholders recommended that the regulation of construction site discharges under section 402(p)(6) should distinguish between ''low intensity'' small construction and ''high intensity'' small construction. While EPA proposes case-by-case waiver opportunities for small construction discharges (i.e., the second waiver opportunity for predicted soil loss of less than 2 tons/acre/year), the industrial commenters recommended that the designation of small construction site discharges categorically distinguish and exempt ''low intensity'' construction activity from the provisions of the proposed rule. The commenters recommended that construction activities include intense levels of clearing, grading and excavating associated with projects which meet the following criteria: clearing, grading and excavation activities with a duration in excess of six months; and construction of single or multiple story office or industrial buildings with a grade slab in excess of 15,000 square feet; or road building (does not include construction of wooden roads for access to remote locations); or construction of a residential home that is part of a larger common plan of development or sale. Under the industrial proposal, such ''high intensity'' small construction would be subject to Federal storm water regulations. The default, ''low intensity'' construction activity would not.

Today's proposal does not incorporate these suggestions because the Agency believes that regulation of storm water to protect water quality relates more to the disturbance of land surfaces (i.e., on a two dimensional, roughly horizontal plane) rather than to the activity or reason for the land disturbance. EPA proposes to regulate storm water discharges associated with construction activity from smaller sites, not the construction activity itself. EPA would consider this option in the final rule, however, if public comments demonstrate that a ''low intensity'' exclusion would relate to the intensity of the surface disturbance. The second waiver opportunity EPA proposes today does relate to the intensity of surface disturbance, and necessarily accounts for regional variation. The Agency, therefore, invites comment on how to define applicability provision to exclude ''low intensity'' surface disturbances associated with construction activity and still provide a simple, workable regulation that accounts for regional variability.

EPA believes the approach proposed in this proposal would provide EPA and the States with a more manageable program than the other alternatives discussed. The proposed approach should offer flexibility to State and local governments in managing their storm water programs with little or no interruption in the consistency of current environmental management and would assure appropriate tracking and enforcement mechanisms. EPA requests comment on the appropriateness of the scope and requirements of this part of today's proposed storm water program.

3. Other Sources

In the National Water Quality Inventory, 1994 Report to Congress submitted by EPA pursuant to section 402(p)(5), EPA examined the remaining unregulated point sources of storm water for the potential to adversely affect water quality. Due to very limited national data on which to estimate pollutant loadings on the basis of discharge categories, the discussion of the extent of unregulated storm water discharges is limited to an analysis of the number and geographic distribution

of the unregulated storm water discharges. Therefore, EPA is not proposing to designate any additional unregulated point sources of storm water on a nationwide, categorical basis. Instead, EPA is designating a category of sources to be regulated based on case-by-case post-promulgation designations by the NPDES permitting authority.

EPA did, however, evaluate a variety of categories of discharges for potential designation in the report to Congress. EPA's efforts to identify sources and categories of unregulated storm water discharges for potential designation for regulation under today's proposal started with an examination of approximately 7.7 million commercial, retail, industrial, and institutional facilities identified as ''unregulated.'' In general, the distribution of these facilities follows the distribution of population, with a large percentage of facilities concentrated within urbanized areas (see page 4–35 of Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program, EPA 833–K–94–002). This examination resulted in identification of two general classes of facilities with the potential for discharging pollutants to waters of the United States through storm water point sources. The first group (Group A) included sources that are very similar, or identical, to regulated ''storm water discharges associated with industrial activity'' but that were not included in the existing storm water regulations because EPA used SIC codes in defining the universe of regulated industrial activities. By relying on SIC codes, which were not classified according to environmental impacts, some types of storm water discharges that might otherwise be considered ''industrial'' were not included in the existing NPDES storm water program. The second general class of facilities (Group B) was identified on the basis of potential activities and pollutants that could contribute to storm water contamination.

EPA estimates that Group A has approximately 100,000 facilities. Discharges from facilities in this group, which may be of high priority due to their similarity to regulated storm water discharges from industrial facilities, include, for example, auxiliary facilities or secondary activities (e.g., maintenance of construction equipment and vehicles, local trucking for an unregulated facility, such as a grocery store) and facilities intentionally omitted from existing storm water regulations (e.g., treatment works with a design flow of less than 1 million gallons per day, and landfills that have not received industrial waste).

Group B consists of nearly one million facilities. EPA organized Group B sources into 18 sectors for the purposes of the report to Congress. The automobile service sector (e.g., gas/service stations, general automobile repair, new and used car dealerships, car and truck rental) makes up more than one-third of the total number of facilities identified in all 18 sectors.

EPA conducted a geographical analysis of the industrial and commercial facilities in Groups A and B. The geographical analysis shows that the majority are located in urbanized areas (see Section 4.2.2, Geographic Extent of Facilities, in the Report to Congress). In general, about 61 percent of Group A facilities and 56 percent of Group B facilities are located in urbanized areas. The analysis also showed that nearly twice as many industrial facilities are found in all urbanized areas as are found in large and medium municipalities alone. Notable exceptions to this generalization included lawn/garden establishments, small unregulated animal feedlots, wholesale livestock, farm and garden machinery repair, bulk petroleum wholesale, farm supplies, lumber and building materials, agricultural chemical dealers, and petroleum pipelines, which can frequently be located in smaller municipalities or rural areas.

In identifying potential categories of sources for designation in today's notice, EPA considered designation of discharges from Group A and Group B facilities. Based on input from the Storm Water Phase II FACA Subcommittee, EPA applied three criteria to each potential category in both groups to determine the need for designation: (1) The likelihood for exposure of pollutant sources included in that category, (2) whether such sources were adequately addressed by other environmental programs, and (3) whether sufficient data were available at this time on which to make a determination of adverse water quality impacts for the category of sources. As discussed previously, EPA searched for applicable nationwide data on the water quality impacts of such categories of facilities.

By application of the first criterion, the likelihood for exposure, EPA considered the nature of potential pollutant sources in exposed portions of such sites. As precipitation contacts industrial materials or activities, the resultant runoff is likely to be contaminated with pollutants. As the size of these exposed areas increases, EPA expects a proportional increase in the pollutant loadings leaving the site. If EPA concluded that a category of sources has a high potential for exposure of raw materials, intermediate products, final products, waste materials, byproducts, industrial machinery, or industrial activity to rainfall, the Agency rated that category of sources as having ''high'' potential for adverse water quality impact. EPA's application of the first criterion showed that a number of Group A and B sources have a high likelihood of exposure of pollutants.

Through application of the second criterion, EPA assessed the likelihood that pollutant sources are regulated in a comprehensive fashion under other environmental protection programs, such as programs under the Resource Conservation and Recovery Act (RCRA) or the Occupational Health and Safety Act (OSHA). If EPA concluded that the category of sources was sufficiently addressed under another program, the Agency rated that source category as having ''low'' potential for adverse water quality impact. Application of the second criterion showed that some categories were likely to be adequately addressed by other programs.

After application of the third criterion, availability of nationwide data on the various storm water discharge categories, EPA concluded that available data would not support any such nationwide designations. While such data could exist on a regional or local basis, EPA believes that permitting authorities should have flexibility to regulate only those categories of sources contributing to localized water quality impairments.

Therefore, today's proposal does not propose to designate any additional industrial or commercial category of sources. Rather, today's proposal would encourage control of storm water discharges from Groups A and B through self-initiated, voluntary BMPs, unless the discharge (or category of discharges) is individually or locally designated as described in the following section. The necessary data to support designation could be available on a local, regional, or watershed basis and would allow the NPDES permitting authority to designate a category of sources or individual sources on a case-by-case basis. If sufficient nationwide data become available in the future, EPA could at that time designate additional categories of industrial or commercial sources on a national basis.

EPA requests comment on the three-pronged analysis used to assess the need to designate additional industrial or commercial sources and invites suggestions regarding watershed-based designation. EPA also requests information regarding any available

national or local data on the potential water quality impacts of other currently unregulated point sources of storm water.

Finally, storm water discharges from facilities exempted by the Intermodal Surface Transportation and Efficiency Act of 1991 (discharges from industrial activities other than power plants, airports, and uncontrolled sanitary landfills that are owned or operated by municipalities of less than 100,000 people) were also identified as potential sources for designation under today's proposal. These facilities discharge storm water in the same manner (and are expected to use identical processes and materials) as the industrial facilities regulated under the existing regulations. As such, these facilities would pose similar water quality threats. The extended moratorium for these facilities was necessary to allow municipalities additional time to comply with NPDES requirements. EPA proposes to maintain August 7, 2001, as the NPDES permit application deadline for such municipally owned or operated facilities discharging industrial storm water. General permits are available in States where EPA issues permits and should already be available for such sources in most NPDES-authorized States. Based on advice and recommendations of small entity representatives, EPA also invites comment on whether permit authorization for these discharges could be combined with permit authorization for other discharges from the municipal separate storm sewer system.

Municipal representatives recommended to EPA that permit requirements for municipally-owned or operated industrial facilities be included in municipal storm water permits (this recommendation could be extended to cover municipally-owned construction activities, as well). As such, municipalities would be covered by a single permit, rather than by two or more separate permits. The Agency agrees with the recommendation and is considering options to implement it. One option would be to include relevant industrial storm water controls in the municipal storm water permits for the types of industrial facilities typically owned or operated by municipalities. Another option would be to cross-reference industrial storm water permit requirements in municipal storm water permits. A third option would be to design an additional minimum control measure for municipal storm water programs that would address municipally-owned or operated industrial facilities. The Agency seeks input on these options and suggestions as to any additional options. The Agency also seeks comment on any implementation issues associated with this recommended approach.

4. Residual Designation Authority

The NPDES permitting authority's existing designation authority, as well as the petition provisions would be retained. The proposed rule contains two provisions related to designation authority at §§ 122.26(a)(9)(i)(C) and (D). Subsection (C) would add designation authority where storm water controls are needed for the discharge based upon wasteload allocations that are part of TMDLs that address the pollutants of concern or upon a comprehensive watershed plan implemented for the waterbody that includes the equivalents of TMDLs and addresses the pollutants of concern. EPA intends that the NPDES permitting authority would have discretion in the matter of designations based on existing TMDLs under subsection (C) and would invite comment on the implementation of existing TMDLs as the basis for designation under today's proposed storm water program. Subsection (D) would carry forward residual designation authority under § 122.26(g) of the existing regulations. Under today's proposal, EPA and authorized States would continue to exercise the authority to designate remaining unregulated discharges composed entirely of storm water for regulation on a case-by-case basis (see proposed §§ 122.26(b)(15) and 123.35). The standard for designation would be the same as under the existing NPDES regulations for storm water. Individual sources would be subject to regulation if EPA or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This standard is based on the text of section 402(p). In today's proposed rule, EPA believes, as Congress did in drafting section 402(p)(2)(E), that individual instances of storm water discharge might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category. EPA does envision, however, that preservation of such regulatory authority would be necessary to subsequently address a source (or sources) of storm water discharges of concern on a localized or regional basis. As States and EPA implement TMDLs, for example, permitting authorities might need to designate some of the point sources of storm water not subject to regulation on categorical basis nationwide in order to assure progress toward compliance with water quality standards in the watershed. EPA intends that the TMDL-based waiver would be available prospectively, applying to future construction sites. This raises an issue of how this waiver provision could be applied to such sites.

One of the industrial stakeholders on the Storm Water Phase II FACA Subcommittee questioned the Agency's legal authority to provide for such residual designation authority. The stakeholder argued that the lapse of the October 1, 1994, permitting moratorium under section 402(p)(1) eliminated the significance of the section 402(p)(2) exceptions to the moratorium, including the exception for discharges of storm water determined to be contributing to a violation of a water quality standard or a significant contributor of pollutants under section 402(p)(2)(E). The stakeholder further argued that EPA's authority to designate sources for regulation under section 402(p)(6) is limited to storm water discharges other than those described under section 402(p)(2). Because section 402(p)(2)(E) describes individually designated discharges, the stakeholder concluded that regulations under section 402(p)(6) cannot provide for post-promulgation designation of individual sources. EPA disagrees.

First, as explained previously, EPA anticipates that NPDES permitting authorities may yet determine that individual unregulated point sources of storm water discharges may require regulation on a case-by-case basis. This conclusion is consistent with the Congress' recognition of the potential need for such designation under the first phase of storm water regulation as described in section 402(p)(2)(E). Under section 402(p)(2)(E), Congress recognized the need for both EPA and the State to retain authority to regulate unregulated point sources of storm water under the NPDES permit program. Second, to the extent that section 402(p)(6) requires designation of a ''category'' of sources, EPA would designate such (as yet unidentified) sources as a category that should be regulated to protect water quality. Though such sources may exist and discharge today, if neither EPA nor the NPDES permitting authority has designated the source for regulation under section 402(p)(2)(E) to date, then section 402(p)(6) provides EPA with authority to designate such sources.

The Agency would make this designation of a category of ''not yet identified'' sources in order to ensure that sources that should be regulated based on local concerns could be

regulated even if data does not exist to support nationwide regulation of such sources. EPA does not believe that the language in section 402(p) should be interpreted to preclude States from exercising designation authority under this category after promulgation of a final rule because any such designation (and subsequent regulation of designated sources) would be within the ''scope'' of the NPDES program.

EPA also believes that sources regulated pursuant to a State designation would be part of (and regulated under) a Federally approved State NPDES program, and thus subject to enforcement under CWA sections 309 and 505. Under existing NPDES State program regulations, State programs that are ''greater in scope of coverage'' are not part of the Federally-approved program. By contrast, any such State regulation of sources in this ''reserved category'' would be within the scope of the Federal program because today's proposal would recognize the need for such post promulgation designations of unregulated point sources of storm water. Such regulation would be ''more stringent'' than the Federal program rather than ''greater in scope of coverage'' (40 CFR 123.1(h)).

In addition, EPA does not interpret the congressional direction in section 402(p)(6) to preclude regulation of point sources of storm water that should be regulated to protect water quality. Under CWA section 510, Congress expressly recognized and preserved the authority of States to adopt and enforce more stringent regulation of point sources, as well as any requirement respecting the control or abatement of pollution. Section 510 applies, ''except as expressly provided'' in the CWA. The CWA does expressly provide affirmative limitations on the regulation of certain pollutant sources through the point source control program in section 502(14), which excludes agricultural storm water and return flows from irrigated agriculture from the definition of point source, and section 402(l), which again limits applicability of the section 402 permit program for return flows from irrigated agriculture, as well as for storm water runoff from certain oil, gas, and mining operations. EPA does not interpret section 402(p)(6) as an express provision limiting the authority to designate point sources of storm water for regulation on a case-by-case basis after the promulgation of final regulations. Any source of storm water is encouraged to assess its potential for storm water contamination and take preventive measures against contamination. Such proactive actions could result in the avoidance of future requirements.

Finally, EPA evaluated the proposal under which owners or operators of regulated small, medium, and large municipal separate storm sewer systems would be responsible for controlling discharges from industrial and other facilities into their systems in lieu of requiring NPDES permit coverage for the individual facilities. EPA does not propose this framework due to concerns with administrative and technical burden on the municipalities, as well as concerns about such an intergovernmental mandate. EPA does, however, request comments on this approach.

J. Conditional Exemption for ''No Exposure'' of Industrial Activities and Materials to Storm Water

1. Background

As noted previously, the 9th Circuit remanded to EPA for further rulemaking a portion of the definition of ''storm water discharge associated with industrial activity'' that exempted the category of industrial activity identified as ''light industry'' (NRDC v. EPA, 966 F.2d 1292, 1305 [9th Cir. 1992]). In addition to the rulemaking conducted under section 402(p)(6) on August 7, 1995, today's proposal also responds to that remand. In the 1990 storm water regulations, EPA exempted facilities in the category from the requirement for an NPDES permit if the industrial materials or activities were not ''exposed'' to storm water (see 40 CFR 122.26(b)(14) [introductory text]). The Agency has reasoned that most of the activity at these types of facilities takes place indoors and that emissions from stacks, use of unhoused manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust or particles would be atypical (55 FR 48008, November 16, 1990).

The Ninth Circuit determined that the exemption was arbitrary and capricious for two reasons (966 F.2d at 1305). First, the court found that EPA had not established a record to support its assumption that light industry that was not exposed to storm water was not ''associated with industrial activity,'' particularly when other types of industrial activity not exposed to storm water remained ''associated with industrial activity.'' The court specifically found that ''[t]o exempt these industries from the normal permitting process based on an unsubstantiated assumption about this group of facilities is arbitrary and capricious'' (966 F.2d at 1305). Second, the court concluded that the exemption impermissibly ''altered the statutory scheme'' for permitting because the exemption relied on the unverified judgement of the light industrial facility operator to determine non-applicability of the permit application requirements. In other words, the court was critical that the operator would determine for itself that there was no exposure and then simply not apply for a permit without any further action. Without a basis for ensuring the effective operation of the permitting scheme—either that facilities would self-report actual exposure or that EPA would be required to inspect and monitor such facilities—the court vacated and remanded the rule to EPA for further rulemaking (966 F.2d at 1305).

Under today's proposal, the Agency responds to both of the bases for the court's remand. First, the exemption from permitting based on ''no exposure'' applies to all industrial categories listed in the existing storm water regulations, regardless of the type of industry. The court's opinion rejected EPA's distinction between light industry and other industry, but it did not preclude an interpretation that treats ''non-exposed'' industrial facilities in the same fashion. Presuming that an industrial facility adequately precludes exposure of industrial materials and activities to storm water, EPA proposes to treat discharges from ''non-exposed'' industrial facilities in a manner similar to the way Congress intended for discharges from administrative buildings and parking lots; specifically, permits would not be required on a categorical basis. To assure that discharges from industrial facilities really are similar to discharges from administrative buildings and parking lots, and to respond to the second basis for the court's remand, EPA proposes that the permitting exemption be conditional. The person responsible for a point source discharge from a ''no exposure'' industrial source must meet the conditions of the exemption and provide a certification pursuant to 40 CFR 122.22 for tracking and accountability purposes. EPA believes today's proposal, therefore, is fully consistent with the direction provided by the court.

A major objective of the FACA Committee at the outset (August 1995), was to streamline and reinvent certain troublesome or problematic aspects of the existing storm water permitting program. One area identified was the mandatory applicability of the permitting program to all industrial facilities, even those ''light'' industrial activities that are of very low risk or of

no risk to storm water contamination. Such dischargers could have no industrial sources of storm water contamination on the industrial plant site, yet they are still required to acquire an NPDES storm water permit and meet all permitting requirements. Examples of such facilities would be a soap manufacturing plant (SIC Code 28) or hazardous waste treatment and disposal facility, where all industrial activities, even loading docks, are inside a building or under a roof.

Committee members advised EPA that the existing storm water program needed to be revised to allow such facilities to seek an exemption from the NPDES storm water permitting requirements. Committee members agreed that such an exemption should also provide a strong incentive for other industrial facilities that might conduct some industrial activities outdoors exposed to rainfall and runoff to move the activities under cover or into buildings to prevent contamination of rainfall and storm water runoff. The committee believed that such a no-exposure permit exemption provision could be a valuable incentive for storm water pollution prevention.

Over approximately 2 years, the Phase I Improvement Work Group of the FACA Committee developed and recommended to EPA the concept of a no-exposure incentive provision, which EPA is proposing by making a change to the existing storm water rules and adding a new storm water rule provision, including a no-exposure certification process as discussed below.

EPA relied upon the no-exposure concept developed by the FACA Committee in developing today's proposal regarding ''no exposure.'' EPA proposes to incorporate the recommendations of the committee by deleting the sentence regarding ''no exposure'' for the facilities in § 122.26(b)(14)(xi) and adding a new section—§ 122.26(g) Conditional Exemption for No Exposure of Industrial Activities to Storm Water. In accordance with the committee's recommendations, the proposed no-exposure provision refers to all classes of industrial and other facilities discharging storm water that would be defined under existing § 122.26(b)(14), except construction defined under existing § 122.26(b)(14)(x) and proposed § 122.26(b)(15)(i) and sources individually designated under §§ 122.26(a)(1)(v), 122.26(a)(9)(i)(B),(C), & (D) and 122.26(g)(3). Thus, proposed § 122.26(g) would make all classes of industrial facilities eligible for exemption from the identification as ''associated with industrial activity'' under the existing regulations.

Today's proposal represents a significant expansion in the scope of the no-exposure provision originally promulgated in the 1990 rule for only light industry. The intent of this proposal is to provide industrial facilities that are entirely indoors a simplified method of complying with the CWA. This could include facilities that are located within a larger office building, or at which the only items permanently exposed to precipitation are roofs, parking lots, vegetated areas, and other non-industrial areas or activities.

Although the FACA Committee agreed in principle to the basic concept of this exemption, committee members could not resolve two significant issues related to the actual implementation of the concept. The first issue relates to how to account for storm water runoff from parking lots, roof tops, lawns, and other non-industrial areas of an industrial facility. These types of storm water discharges, which may contain pollutants or which may result in excess storm water flows, are not directly regulated under the existing storm water permitting program because they are not ''storm water discharges associated with industrial activity.''

The second issue involves an industrial facility that achieves no exposure by constructing large amounts of impervious surfaces, such as roofs (where previously there were pervious or porous surfaces into which storm water could infiltrate), which results in a significant increase in storm water volume flowing off the industrial facility and thus causes adverse receiving water impacts simply due to the increased quantity of storm water flow. Although discussed extensively, the FACA Committee was not able to reach a consensus recommendation on how to fully address these two remaining issues.

From the perspective of the environmental groups on the committee, excessive storm water flows from an industrial site and pollutants from non-industrial areas of the site are potentially a significant cause of receiving water impairment and, as such, should not be allowed to occur as a result of achieving no exposure and gaining an exemption from an NPDES storm water permit. Environmental groups believe that storm water discharges from impervious areas at an industrial facility are generally more frequent, and many of them larger, than discharges from the preexisting natural surfaces. These discharges will contain pollutants typical of commercial areas, streets, and roads and are an equal threat to direct human uses of the water and can cause equal damage to aquatic life and its habitat. The environmental groups believe that these storm water discharges should be permitted in the same way that residential and commercial storm water discharges are permitted and that, otherwise, these discharges—their volume alone often destructive of aquatic life and habitat, and containing conventional pollutants as well—would escape the control required under the CWA.

The industry representatives support streamlining the existing storm water permitting program by exempting no-exposure facilities. They believe that creating this exemption, however, does not create in EPA the authority to regulate other activities not subject to the existing storm water program. Industry representatives point out that since 1990, the NPDES storm water permitting program has excluded administrative buildings, parking lots, and other non-industrial areas from permitting or other regulatory requirements. The industry representatives also reserved the right to address the legal authority provided by Congress to EPA to regulate the amount of storm water discharged from these areas. Industry representatives believe that if Congress or EPA addresses the issue of flow, it should be addressed on a broader scale than merely through the no-exposure exemption.

Municipal representatives believe that EPA has no authority under any existing legal framework to regulate flow. Developing federal parameters for the control of flow would result in federal intrusion into land use planning, an authority that they claim is solely within the purview of State government and their political subdivisions. Local governments are aware of the impact that flows have on receiving waters and, as has been well documented, take the appropriate steps to ameliorate negative results within the context of locally developed and agreed upon long-term land use plans. Under no circumstances will local governments agree to share or cede this authority with or to federal agencies or departments.

Given the lack of consensus by the FACA Committee on these two remaining key issues, EPA is soliciting public comment on potential ways to address these issues, if possible, in the context of the proposed no-exposure exemption.

In an effort to address the second issue the FACA Committee recommended that the no-exposure 5-year certification form (discussed below) should be modified to add an additional question that asks the facility operator to provide information

indicating if large amounts of impervious surfaces were created to qualify for the no-exposure exemption. To respond to the question, a series of four boxes would be checked by the facility operator indicating approximately how much impervious area was created, if any, to achieve no exposure. These boxes would be (1) none, (2) less than 1 acre, (3) 1 to 5 acres, and (4) more than 5 acres. This question would provide additional information that would help the NPDES permitting authority determine whether or not an NPDES storm water permit should be required for the facility.

In order to be covered under the no-exposure provision, EPA proposes that an owner or operator of an otherwise regulated facility would need to submit to the NPDES permitting authority the no exposure form certifying that the facility meets the no-exposure requirements (see Appendix 4 for the Draft No Exposure Certification Form). This requirement would apply across all categories of industrial activity covered by the existing program, except discharges associated with construction activity, and would include those facilities currently in § 122.26(b)(14)(xi) (''light industry'') that are not permitted based upon a claim of ''no exposure.'' The category (xi) ''light'' industrial facilities that claim to have no exposure of materials to storm water are not required under the existing regulations to submit any type of form to the permitting authority, but would need to submit a certification under today's proposal. The facility would need to allow the NPDES permitting authority or operator of a municipal separate storm sewer system (where there is a storm water discharge to the municipal system) to inspect the facility and to make such inspection reports publicly available, upon request. In addition, based on committee recommendations, EPA proposes that the certification would require only minimal amounts of information from the facility claiming the no-exposure exemption. The NPDES permitting authority would maintain a simple registration list that should impose minimal administrative burden, but that would allow for tracking of industrial facilities claiming the exemption.

EPA envisions the NPDES storm water program to be implemented primarily through general permits and the no exposure certification to be submitted at the ''beginning'' of each permit term. However, EPA invites comment on situations that may affect the timing of submission of the no exposure certification, for example, in cases where a facility's process water and storm water are covered under an individual permit.

2. Definition of ''No Exposure''

For purposes of this section, ''no exposure'' would mean that all industrial materials or activities are protected by storm resistant sheltering so that they are not exposed to rain, snow, snowmelt, or runoff. Industrial materials or activities would refer to those activities or materials described under § 122.26(b)(14) (e.g., material handling equipment, industrial machinery, raw materials, intermediate products, byproducts, or industrial waste products, however packaged). Barrels, drums, dumpsters, and other packaging containing industrial wastes are inherently prone to leak and therefore could be a source of exposure, thereby precluding the facility from qualifying for the exemption.

The FACA Committee held lengthy discussions on the definition of no exposure pertaining to barrels, drums, dumpsters, and other packaging containers. The committee could not agree on whether barrels, drums, dumpsters, and other packaging containers that are outdoors should trigger the disqualification of an industrial facility from the no-exposure exemption. One perspective expressed was that any such containers that are stored outdoors should constitute exposure and the need for a permit, whether or not they are leaking. The opposing perspective was that containers should be allowed to be stored outdoors and not be considered exposure as long as they were not actually leaking. The committee also discussed the concept of ''potential to leak'' as a trigger for exposure, but could not agree on this approach. Therefore, EPA is soliciting public comment on this issue and the approach proposed in today's rule.

The term ''storm resistant shelter'' is intended to include completely roofed and walled buildings or structures, as well as structures with only a top cover but no side coverings, provided material under the structure is not otherwise subject to any run-on and subsequent runoff of storm water. For purposes of this provision, emissions from roof stacks/vents that are regulated and in compliance under other environmental protection programs and that do not cause storm water contamination would be considered not exposed. EPA requests comment on the scope of roof stacks/vents that would be covered by this provision. EPA welcomes, in particular, any suggestions as to ways in which this provision might be narrowed so as to focus on significant stack emissions that could result in identifiable levels of storm water contamination. Visible ''track out'' (i.e., pollutants carried on the tires of vehicles) or windblown raw materials would be deemed ''exposed.'' Leaking pipes containing contaminants exposed to storm water would be deemed ''exposed,'' as would past sources of storm water contamination that remain onsite. General refuse and trash, not of an industrial nature, would not be considered exposed industrial materials.

While the intent of this provision is to promote permanent no exposure, EPA understands that certain machinery, such as trucks, could pass between buildings and, during passage, would be exposed to rain and snow. Adequately maintained mobile equipment (e.g., trucks, automobiles, trailers, or other such general purpose vehicles found at the industrial site that are not industrial machinery or material handling equipment and that are not leaking contaminants or are not otherwise a source of industrial pollutants) could be exposed to precipitation or runoff. Such activities alone would not prevent a facility from being able to certify no exposure under this provision. Similarly, trucks or other vehicles located at vehicle maintenance facilities awaiting maintenance, as defined at 40 CFR 122.26(b)(14)(viii), that are not leaking contaminants or are not otherwise a source of industrial pollutants, would not be considered exposed.

In addition, EPA recognizes that other instances could occur where permanent no exposure of industrial activities or materials is not possible and, therefore, is proposing that under such conditions, materials and activities be covered with temporary covers, such as tarps, between periods of permanent enclosure. This proposal would not specify every such situation, instead EPA intends that permitting authorities would address this issue on a case-by-case basis. Permitting authorities could determine the circumstances under which temporary structures would or would not meet the requirements of this section. Until permitting authorities determined otherwise, temporary coverage of industrial materials or activities would be allowable under this section during facility renovation or construction, provided the temporary cover achieved the intent of this section. Moreover, exposure that results from a leak in protective covering would only be considered exposure if not corrected prior to the next storm water discharge event.

While the intent of this proposal would be to reduce the regulatory

burdens on industrial facilities and government agencies, the FACA Committee suggested that the NPDES permitting authority should consider a compliance assessment program to ensure that facilities that have availed themselves of this no-exposure option meet the applicable requirements. Inspections would be conducted at the discretion of the NPDES permitting authority and would likely be coordinated with other facility inspections. EPA expects, however, that the permitting authority would conduct inspections when it became aware of potential water quality impacts possibly caused by the facility's storm water discharges or when requested to do so by affected members of the public. The intent of this provision would be that the 5-year no-exposure certification be fully available to, and enforceable by, appropriate federal and State authorities under the CWA. Private citizens could enforce against facilities for discharges of storm water that are inconsistent with a no-exposure certification if storm water discharges from such facilities are not otherwise permitted.

The FACA Committee recommended that the certifying party not allow any actions taken to qualify for this provision to result in a net environmental detriment. The phrase ''no net environmental detriment,'' however, seemed too imprecise a phrase to use within this context. Therefore, EPA is proposing to implement this recommendation by requiring that actions taken to qualify for this provision shall not interfere with the attainment or maintenance of water quality standards, including designated uses. Permitting authorities would be able, where necessary, to make a determination by evaluating the activities changed at the industrial site to achieve no exposure and assess whether these changes adversely impact, or have the potential to impact, water quality standards, including designated uses. EPA anticipates that most efforts to achieve no exposure would employ simple good housekeeping and contaminant cleanup activities. Other efforts could involve moving materials and industrial activities indoors into existing buildings or structures.

In very limited cases, industrial operators could make major changes at a site to achieve no exposure. These efforts could include constructing a new building or cover to eliminate exposure or constructing structures to prevent run-on and storm water contact with industrial materials or activities. Where major changes were undertaken to achieve no exposure that increase the impervious area of the site, the facility operator would need to provide information on this in the certification form discussed above. Using this information, and other available data and information, permitting authorities should be able to assess whether any major change has resulted in increased pollutant concentrations or loadings, toxicity of the storm water runoff, or a change in natural hydrological patterns that would interfere with the attainment and maintenance of water quality standards, including designated uses or appropriate narrative, chemical, biological, or habitat criteria where such State water quality standards exist. In these instances, the facility operator and their NPDES permitting authority should take appropriate actions to ensure that attainment or maintenance of water quality standards can be achieved. The NPDES permitting authority could determine the need for the facility to obtain coverage under an individual permit or a general permit to ensure that appropriate actions are taken to address water quality impacts.

Another issue that the FACA Committee discussed but was unable to reach consensus on was whether or not the facility operator should bear the burden of determining whether the activities undertaken to achieve no exposure impact, or have the potential to impact, water quality standards, or whether the NPDES permitting authority should be responsible for making that determination. Some members of the FACA Committee indicated that facility operators are not sufficiently trained to conduct water quality impact assessments, nor privy to the necessary information, and, therefore, would not be able to make these determinations. Similarly, these members highlighted that under the existing NPDES permitting program, the NPDES permitting authority appears to have this responsibility (see 40 CFR 122.44(d)). Other committee members explained that only the facility operator would know exactly what changes were made at the industrial site to achieve no exposure and, therefore, should make the determination. Other committee members were concerned that these determinations would place an extensive burden on permitting authorities. In today's proposed rule, the NPDES permitting authority would have the primary responsibility for determining potential or actual water quality impacts; however, this determination would be based upon specific information that the operator would be required to provide. Given the differing opinions expressed by committee members regarding this provision, EPA is also inviting public comment on this aspect of the no exposure incentive.

EPA envisions that general permits would be used to implement the program and that the owner or operator would submit a written certification to the permitting authority once every 5 years at the ''beginning'' of the permit term or prior to commencing discharges during a permit term. Upon request, the owner or operator would also need to submit a copy of the certification to the municipality in which the facility is located. EPA invites comment on situations that may affect the timing of submission of the certification. For example, some States are transitioning toward ''specific'' general permits (industry or watershed-based), and to the extent possible, to individual permits—making it likely that more than one general permit may be applicable to a given facility and raising an issue as to when to submit a ''no exposure'' certification.

Once a facility operator has established that the facility meets the definition of no exposure, it would be imperative that the operator of the facility maintains the no-exposure condition. Failure to do so would result in the unauthorized discharge of pollutants to waters of the United States, which could result in penalties under the CWA. Where a facility operator determines that exposure would occur in the future due to some anticipated change at the facility, the operator would need to submit an application and acquire storm water permit coverage prior to such discharge to avoid such penalties.

3. Options Considered

In the course of the ''no-exposure dialogue,'' the FACA Committee considered a number of options for implementing the no-exposure provision, including regulating qualifying industrial facilities by (1) an NPDES general permit for no-exposure facilities, (2) a no-exposure permit by rule, (3) a modification of the definition of ''storm water associated with industrial activity'' such that industrial facilities without exposure could instead be covered under the requirements of a new or different storm water program, and (4) a watershed approach to no exposure. The FACA Committee did not fully support any of these options.

Some committee members thought that options 1 and 2 provided little incentive to achieve no exposure. However, Option 1 was considered the most enforceable, and Option 2 was

considered to have the advantage of enforceability and potential for reduced administrative burden.

Under Option 3, the definition of ''discharge associated with industrial activity'' at § 122.26(b)(14) would be modified such that facilities with no exposure could lose their status as ''storm water discharges associated with industrial activity'' under the existing regulations. Rather, these facilities would become storm water dischargers under today's proposed rule and would be required to do whatever the final section 402(p)(6) regulation required. This option would not track, however, the proposed requirements of today's rule because the rule would not impose any requirements on undesignated sources. EPA anticipates that permitted sources would be expected to comply with requirements similar to those for industrial facilities permitted under the existing storm water program. Option 4 had virtually no support.

K. Public Involvement/Public Role

The Phase II Subcommittee discussed the appropriate role of the public in successful implementation of a municipal storm water program. The Subcommittee generally agreed that a successful municipal storm water program requires an educated and actively involved public. Although efforts to educate and involve the public consume limited staff and financial resources, the benefits are numerous. An educated public increases program compliance from residents and businesses as they realize their individual and collective responsibility for protecting water resources. For instance, an educated and motivated public could reduce pollutant loadings by limiting the use of garden chemicals. Moreover, an educated public is more likely to understand the environmental benefits of a municipal storm water program and, therefore, may be more willing to fund such a program. The program is also more likely to receive public support and participation when the public is actively involved from the program's inception and allowed to participate in the decisionmaking process. In a time of limited staff and financial resources, public volunteers offer diverse backgrounds and expertise that may be used to plan, develop, and implement a program that is tailored to local needs. The public's participation is also useful in the areas of information dissemination/education and reporting of violators, where large numbers of community members can be more effective than a few regulators. The public may undertake several roles in the municipal storm water program to help ensure a beneficial and workable program for all involved. The public is encouraged to contact the NPDES permitting authority or local municipal separate storm sewer operator for information on the municipal storm water program and ways to participate. Such information may also be available from local environmental or other public advocacy groups.

EPA is inviting comment regarding the appropriate role of the public in a municipal storm water program, and the best approach that EPA can take in the final regulation to provide appropriate recognition of this role and involvement. The advantages of active public involvement include reduced pollutant loadings, increased program support, and vigilant protection of waterbodies. Some examples of such involvement follow. First of all, the public may be subject to local storm water program requirements, guidelines, and financial costs. For example, the public could be subject to a local ordinance that prohibits dumping used oil down storm sewers. In addition, members of the public might choose to participate as actively involved partners in program planning, development, and implementation (e.g., participate in public meetings and other opportunities for input, perform lawful volunteer monitoring, assist in program coordination with other preexisting and related programs, report suspected violators to the municipal, State, or Tribal authorities), aid in the development and distribution of educational materials, and provide public training activities. In addition, the public could protect waterbodies by taking civil action under section 505 of the CWA against any person who is alleged to be in violation of an effluent standard or permit condition. In such situations, members of the public would be strongly encouraged, however, to resolve any disagreements or concerns directly with the parties involved, either informally or through any available alternative dispute resolution process.

The public could also petition the NPDES permitting authority to require an NPDES permit for a discharge composed entirely of storm water that contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. In evaluating such a petition, the NPDES permitting authority would be encouraged to consider the set of designation criteria developed for the evaluation of the small municipal separate storm sewer systems located outside of an urbanized area in places with a population of at least 10,000 and a population density of 1,000 or more. The NPDES permitting authority must make a final determination within 180 days of receiving a petition.

Public involvement and participation pose challenges, however. It requires a substantial initial investment of staff and financial resources, which could be very limited. Even with this investment, the public might not be interested in participating. In addition, public participation could slow down the decisionmaking process. Nevertheless, EPA believes the public is vital to the long-term success of the municipal storm water program and strongly encourages public involvement and participation.

In response to comments from the Storm Water Phase II FACA Subcommittee, EPA believes it is important for the public to seek administrative remedies before filing civil suit under section 505 of the CWA. EPA also received comments stressing the need to suggest to the public that they have a responsibility to fund the municipal storm water program. While EPA believes it is important that the program be adequately funded, as a federal agency it cannot take a position on the appropriate mechanism or level for such funding.

L. Water Quality Issues

The CWA combines a technology-based approach with a water quality-based approach to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters . . . .'' EPA and most States issue NPDES permits to point source discharges of pollutants to meet the technology-based and water quality-based requirements of the act. Technology-based requirements are the minimum level of control and are generally applicable nationwide. When the technology-based controls are not sufficient for the waterbody to support the water quality standards that States or Tribes adopted for their waters, the CWA requires development of more stringent permit limits and control programs to ensure compliance with water quality standards.

1. Water Quality Standards

Water quality standards are the cornerstone of a State's or Tribe's water quality management program. States and Tribes adopt water quality standards for waters within their jurisdictions. Water quality standards define a use for a waterbody and describe the specific water quality criteria to achieve that use. Examples of designated uses are recreation and protection of aquatic life. Water quality criteria can include chemical, physical,

or biological parameters, expressed as either numeric limits or narrative statements. The water quality standards also contain antidegradation policies to protect existing uses and high quality water. The antidegradation policy ensures that water quality improvements are conserved, maintained, and protected. States and Tribes review their water quality standards every 3 years and, if appropriate, revise them. Water quality standards provide the goals for the waterbody, serve as the regulatory basis of water quality management programs, and are benchmarks by which success is ultimately gauged for a given waterbody or watershed.

EPA recognizes that urban runoff is not the only contributor of pollutants and other stressors to urban waterways. Controls on urban runoff, however, represent an opportunity to prevent or capture a significant portion of the pollutants that are causing or contributing to violations of water quality standards, including impairment of designated uses. Storm Water Phase II FACA Subcommittee municipal representatives expressed concern that municipalities not be liable for loadings attributable to other sources. Today's proposal contains provisions that establish a BMP-based program with measurable goals that must meet the standard of MEP and protect water quality. In the first two to three rounds of storm water permits, EPA envisions that this would be the extent of the municipal requirements for a large majority of regulated entities. If additional specific measures to protect water quality were imposed, they would likely be the result of an assessment based on TMDLs, or the equivalent of TMDLs, where the proper allocations would be made to all contributing sources. EPA believes that the municipality's additional requirements, if any, should be guided by its equitable share based on a variety of considerations, such as cost effectiveness, proportionate contribution of pollutants, and ability to reasonably assume wasteload reductions.

a. Permitting Policy

As a result of today's proposed regulation, NPDES general permits that would be issued to owners or operators of regulated small municipal separate storm sewer systems, as well as storm water discharges associated with other activity, will be the primary mechanism used to implement these requirements. As is the case in the issuance of any NPDES permit, the permitting authority would use its NPDES program requirements, including 40 CFR 122.44 in establishing appropriate permit terms. EPA intends to issue NPDES permits consistent with the August 1, 1996, Interim Permitting Approach guidance (61 FR 43761, November 6, 1996.) This guidance describes the interim permitting approach as follows:

> In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.
>
> The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the interim permitting approach only addresses water quality-based effluent limitations, it also does not affect technology-based effluent limitations, such as those based on effluent limitations guidelines or developed using best professional judgment, that are incorporated into storm water permits.
>
> Each storm water permit should include a coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations of subsequent permits. Such a monitoring program may include ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.
>
> This interim permitting approach applies only to EPA; however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

EPA would encourage authorized States and Tribes to adopt policies similar to the Interim Permitting Approach when developing its storm water program. For a discussion of appropriate monitoring activities, see Section II.L.4. below.

2. Total Maximum Daily Loads

A TMDL analysis includes the determination of the relative contributions of pollutants from point, nonpoint, and natural background sources, including a margin of safety of pollutants that can be discharged to a water quality-limited waterbody to meet water quality standards. More specifically, an allowable TMDL is defined as the sum of the individual wasteload allocations for existing and future point sources (including storm water) and load allocations for existing and future nonpoint sources (including diffuse runoff and agricultural storm water) and natural background materials with a margin of safety incorporated to account for uncertainty in the analysis. TMDLs are required in the CWA section 303(d)(1) for waters that will not achieve water quality standards after implementation of technology-based controls. These provisions have been codified in 40 CFR 130.7.

The Part 130 regulations were designed to implement CWA sections 106, 205(g), 205(j), 208, 303, and 305, which address ambient water quality monitoring and planning for implementation, including funding and periodic reporting of ambient water quality for the development of a national inventory. Section 130.5 describes a continuing water quality planning process designed to implement CWA section 303(e). Of particular significance for an alternative State storm water management program described above are the provisions of § 130.6, which describes water quality management planning under sections 208 and 303. The water quality management regulations specify some of the elements of water quality management, including provisions for point and nonpoint source management and control. The nonpoint source management elements include, for example, regulatory and nonregulatory programs, activities, and BMPs for a variety of sources, including urban storm water (see 40 CFR 130.6(c)(4)(iii)(G)). State representatives have suggested that requirements for State storm water management under section 402(p)(6) could derive from, and be developed through, these water quality management provisions of Part 130. EPA is not proposing any amendments to the Part 130 regulations at this time, but is inviting comment on how the existing Part 130 regulations could be used to support the proposed

State alternative program described in this proposal.

TMDL analyses include estimates of loadings from storm water discharges. Load reductions obtained through the implementation of BMPs required in the NPDES program for storm water should be reflected in the TMDL analysis. Through the TMDL analysis, the relative contribution of storm water discharges within a watershed will be determined.

EPA has formed a Federal Advisory Committee to provide advice to EPA on identifying water quality-limited waterbodies, establishing TMDLs for them as appropriate, and developing appropriate watershed protection programs for these impaired waters in accordance with section 303(d). The committee operates under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT).

3. Anti-Backsliding

In general, the term ''anti-backsliding'' refers to statutory and regulatory provisions at CWA sections 303(d)(4) and 402(o) and 40 CFR 122.44(l) that prohibit the renewal, reissuance, or modification of an existing NPDES permit to contain effluent limits, permit terms, limitations and conditions, or standards that are less stringent than those established in the previous permit. There are, however, exceptions to this prohibition (known as ''antibacksliding exceptions''), which are also presented in sections 303(d)(4), 402(o) and 40 CFR 122.44(l).

The issue of backsliding from prior permit limits, standards, or conditions is not expected to initially apply to most storm water dischargers designated under today's proposal because they generally have not been previously authorized by an NPDES permit. However, the backsliding prohibition would apply if a storm water discharge was previously covered under another NPDES permit. Also, the antibacksliding prohibition could apply when an NPDES storm water permit is reissued, renewed, or modified. In most cases, however, EPA does not believe that these provisions would restrict revisions to storm water NPDES permits.

4. Monitoring

EPA encourages States to provide a multiyear monitoring strategy in their CWA section 106 grant application to provide the framework for State/EPA agreement on the States' annual work plans. The strategy should include both ambient and program-specific monitoring activities for nonpoint sources, lakes, estuaries, wetlands, and wet weather surveys. States should also include monitoring for NPDES, TMDL, and section 305(b) activities. Finally, the State should describe how these activities were integrated to provide all information necessary to support the State water quality management programs. Specific elements recommended for State monitoring program work plans include identification of indicators to be used to measure progress toward goals and reference conditions for baselines; identification of methods used; identification of water quality problems; sampling and laboratory analytical support with a field manual and quality assurance/quality control (QA/QC) plans; provisions for data storage, management, and sharing; training and support for all involved persons, including volunteer reporting through the section 305(b) process; and annual program evaluation.

As part of EPA's efforts to further implementation of urban wet weather programs using a watershed approach, the Agency is working to develop a practical approach to monitoring that would provide meaningful results. Under today's approach, assessment, evaluation, and recordkeeping requirements beyond those required by the NPDES regulations would be left to the discretion of the NPDES permitting authority. The NPDES permitting authority (EPA or the authorized State or Tribe) would determine monitoring requirements in accordance with State or Tribe monitoring plans appropriate to the watershed. For purposes of today's proposal, EPA recommends that, in general, small municipalities not be required to conduct in the first permit term any additional monitoring beyond any they may be already performing. In the second and subsequent permit terms, EPA expects that some limited ambient monitoring might be appropriately required for perhaps half of the regulated small municipal separate storm sewer systems. However, EPA encourages participation in monitoring programs appropriate to watershed protection. The permitting authority may wish to consult the recommendations made in the report prepared by the Intergovernmental Task Force on Monitoring Water Quality (ITFM). For further discussion regarding monitoring activities and the ITFM report, see Section II.H.3.c, Evaluation and Assessment.

EPA and the FACA Committee have developed a paper entitled *''Watershed Assessment: A Critical Tool for Stakeholders''* (November 7, 1997) which is intended to supplement a draft watershed-based policy statement entitled *''A Watershed Alternative.''* The policy approach described in the *Watershed Alternative* would promote a watershed-based assessment as an essential element of watershed-based programs for protecting water quality. The *Watershed Assessment* paper amplifies this element, describing varying levels of resources and stakeholder needs for developing watershed assessment plans. It also acknowledges the importance of designing each assessment plan to address specific stakeholder interests. The paper states that each plan should include unique assessment goals and objectives, selected baseline, sampling methods, procedures for analysis, record keeping and reporting, and schedules for periodic evaluation. Additionally, the paper sets out the various roles and responsibilities of stakeholders. Also, it contains an expansive bibliography that gives resource managers suggested references to aid them in carrying out each stage of the watershed assessment plan.

III. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* EPA prepared an Information Collection Request (ICR) document (ICR No.1820.01), a copy of which may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M Street, S.W.; Washington, D.C. 20460, or by calling (202) 260–2740.

Information collection requirements under this proposed rule would include requirements to submit an NPDES permit application or notice for coverage under an NPDES general permit, as well as to comply with applicable recordkeeping and reporting requirements. Under the proposed rule, certain construction sites under 5 acres and small regulated municipal separate storm sewer systems would be required to retain records of data used to complete their NPDES permit applications or NOIs. In addition, small regulated municipal separate storm sewer systems would be required to submit annual reports in the first permit term and reports in years 2 and 4 in subsequent permit terms.

Under the proposed rule, the owners or operators of regulated small municipal separate storm sewer systems would be required to submit reports containing information which the permitting authority could use to assess

the effectiveness of individual storm water programs. This information could be further used at the time of permit renewal to ensure that appropriate measures would be taken by the owner or operator to revise its storm water program as needed. Information that might be contained in the reports includes monitoring data, and a self-assessment of progress toward pollutant reduction or programmatic goals which were established as permit conditions. Compliance with the applicable information collection requirements imposed under this proposed rule would be mandatory, pursuant to section 402.

Exhibit 3 presents annual and average total burden and cost estimates for Phase II respondents (for 3 years under the Paperwork Reduction Act). Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust existing ways for complying with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

EXHIBIT 3.—ANNUAL AND AVERAGE ANNUAL TOTAL BURDEN ESTIMATES FOR PHASE II RESPONDENTS

[For 3 years under the Paperwork Reduction Act]

Activity	Projected respondents per year	Estimated burden hours per respondent	Projected annual burden (Hrs)[1]	Projected annual cost ($)[1]
I. Construction Sources:				
Notice of Intent	95,889	1.0	95,889	$2,876,670
Development of SWPPPs	95,889	14.6	1,399,979	47,361,303
Individual Application	0	9.1	0	0
Recordkeeping	95,889	0.1	9,589	211,243
Notice of Termination	95,889	0.5	47,945	765,674
Annual Subtotal	.....	.....	1,554,361	51,214,890
II. Small Regulated Municipalities:				
Notice of Intent	4,154	40	166,160	4,341,761
Individual Application	0	88.2	0	0
Co-Applicant Application	0	146	0	0
Retention of Records	4,154	1	4,154	108,544
Annual Report Preparation and Submittal	4,154	21	87,234	2,279,424
Year 1 Subtotal	.....	.....	257,548	6,729,729
Years 2 and 3 Annual Subtotal (i.e., not including applications)[2]	.....	.....	91,388	2,387,968
Average Annual Burden and Cost[3]	.....	.....	146,775	3,835,222
Average Annual Program Total[4]	.....	.....	1,701,135	55,050,112

[1] Totals may not add because of rounding.

[2] Retention of Records (4,154) + Annual Report Preparation and Submittal (87,234) = Years 2 and 3 Annual Subtotal (91,388).

[3] Average annual cost for the municipal component of the program is calculated by taking the year 1 subtotal (i.e., applications plus retention of records and annual report preparation and submittal; $6,729,729) plus the average total for each of the years 2 and 3 (recordkeeping plus annual report preparation and submittal, i.e., 2 x $2,387,968), which equals $11,505,665. This is divided by 3 (the number of years the ICR is valid) to equal $3,835,222.

[4] Burden total calculated as the sum of the construction source annual subtotal plus the municipal average annual burden. Cost total calculated as the sum of the construction source annual subtotal and the municipal average annual cost.

Given the requirements of today's proposed regulation, there would be no capital and no operations and maintenance costs associated with information collection requirements of the rule. Similarly, there would be no capital/startup or operating and maintenance costs associated with the information collection requirements of the rule.

The government burden associated with the proposed extension of the existing storm water program would impact State, Tribal, and Territorial governments (NPDES-authorized governmental entities) that have storm water program authority, as well as the Federal government (i.e., EPA), where it is acting as the NPDES permitting authority in States, Tribes, and Territories that are not authorized to administer the NPDES program. As of May 1997, 42 States and the Virgin Islands had NPDES authority. EPA estimates that 96,962 construction starts and 3,749 small municipal separate storm sewer systems would be regulated within authorized governmental entities. EPA estimates that 18,815 construction starts and 405 small municipal separate storm sewer systems would be regulated in non-authorized States, Tribes, and Territories.

The estimated burden that would be imposed upon authorized governmental entities and the Federal government is estimated to be 241,282 hours for authorized States and 38,933 for the Federal government, for a total of 280,215. This estimate is based on the average time that governments would expend to carry out the following activities: review, respond to, and enter a construction NOI into a data base (1 hour); review and enter a Notice of Termination (NOT) into a data base (0.5 hours); process permit applications from owners or operators of regulated small municipal separate storm sewer systems using the NOI (4 hours); issue permits to regulated small municipal separate storm sewer systems (160 hours); and review annual reports submitted by

regulated small municipal separate storm sewer systems (30 hours).

Today's proposed rule also would include a conditional exemption from the existing storm water permit application requirements for industrial facilities that can certify that their industrial materials or activities have no exposure to storm water. This exemption would be conditioned upon the owner or operator certifying that their facility meets the no exposure requirements. Because the information collection burden associated with this certification, as well as the reduced information collection requirements associated with becoming exempt from the existing storm water permit regulations, are being developed at this time but are most appropriately considered as part of the existing storm water regulations, the incremental change in information collection burden associated with the no exposure requirements has been estimated in a separate section of the economic analysis accompanying today's proposed storm water rule.

The proposed no exposure provision would expand the applicability of the ''no exposure'' exemption to more industrial entities than currently contemplated. Under the existing rule, permit application requirements are reserved for storm water discharges associated with light industrial materials and activities identified under § 122.26(b)(14)(xi) if those materials and activities have no exposure to storm water. Today's proposed rule would expand the applicability of the ''no exposure'' exemption to include all industrial activity regulated under § 122.26(b)(14) (except category (x), construction). The proposed no exposure provision would be applied through the use of a written certification process, thus representing a slight burden increase for ''light'' industries with no exposure. There would be both new costs and cost savings. The new costs would relate to the certification requirement and State and Federal implementation costs. The new cost savings would be based on relief from all existing compliance requirements for those industrial facilities that qualify. The net impact of the proposed no exposure provision for regulated industrial facilities would be an annual net savings ranging from $89 million to $2,499 million. The total cost to Federal and State governments would range from $0.6 to $1.1 million annually.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques. Comments are specifically requested on the potential to shorten the recordkeeping period for construction activity less than 5 acres to less than the proposed 3 years. Send comments on the ICR to ''ATTN: Storm Water Proposed Rule ICR Comment Clerk—W–97–15, Water Docket, Mail Code 4101, EPA; 401 M Street, SW, Washington, D.C. 20460'' and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, D.C. 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Because OMB is required to make a decision concerning the ICR between 30 and 60 days after January 9, 1998, a comment to OMB is best assured of having its full effect if OMB receives it by February 9, 1998. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

IV. Executive Order 12866

Under *Executive Order 12866 of September 30, 1993: Regulatory Planning and Review,* (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the executive order. The order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because it could have an annual effect on the economy of $100 million or more. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

EPA developed detailed cost estimates for the incremental requirements imposed under today's proposed regulation and the regulatory options considered and applied these estimates to the potentially regulated universe of storm water sources designated under today's proposal. These estimates, including descriptions of the methodology and assumptions used, are described in detail in the *Economic Analysis of the Storm Water Phase II Proposed Rule,* which is included in the record of this rulemaking. Exhibit 4 summarizes the low-high cost range associated with the basic elements of the proposed rule.

EXHIBIT 4.—COMPARISON OF ANNUAL COMPLIANCE COST ESTIMATES

[Millions of 1997 Dollars]

	No regulation of phase II sources	August 7, 1995, final rule	Plan B	September 30, 1996 draft proposed rule	February 13, 1997 draft proposed rule	Proposed phase II rule
Construction	$0	$278–$976	$261–$914	$177–$683	$115–$476	$115–$476
Municipal	0	701–3,085	388–2,236	23–393	23–393	23–393
Industrial	0	1,218–74,824	0	46–2,632	46–2,632	0
Total Cost	0	2,197–78,885	649–3,150	246–3,708	184–3,501	138–869

In interpreting these costs, a number of caveats should be born in mind. The primary component of the municipal costs is the implementation of the six minimum measures. These were estimated from a sample of 21 permit applications for Phase I municipalities. Cost categories from these applications corresponding to the six required Phase II minimum measures were identified and used to calculate, for each measure, the percent of municipalities that would incur costs for that measure, and for those that would, a range of per capita costs. Municipalities that did not show costs for a particular measure on their permit application were assumed to already have programs in place to comply with that measure, and thus incur no additional costs. Also, per capita costs that were more than two standard deviations above or one standard deviation below the mean were dropped because they were not representative of most cities. This evaluation was done separately for the first permit cycle and the second and third permit cycles. In estimating the costs for the second and third permit cycles, cost elements were dropped that would be expected to occur only once, such as development of municipal ordinances, or assessment of appropriate O&M requirements for municipal operations. The first, second, and third permit cycle costs were then combined to get an average annual cost over the first 15 years of the program.

The estimated percentages of affected municipalities and the range of per capita costs for each of the six minimum measures are presented in Exhibit 5.

EXHIBIT 5.—PERCENTAGE OF MUNICIPALITIES AFFECTED AND RANGE OF PER CAPITA COSTS FOR SIX MINIMUM MEASURES

Measure	Percent of municipalities expected to incur costs (percent)	Low end of range of per capita costs	High end of range of per capita costs
First Permit Cycle:			
Public Education	39	$0.02	$0.34
Public Involvement	100	0.19	0.20
Illicit Discharge D&E	90	0.04	2.61
Const Site SW Runoff Control	83	0.04	1.59
Post Construction SW Mgt	4	1.09	1.09
PP/GH of Municipal Ops	71	0.01	2.00
2nd and 3rd Permit Cycles:			
Public Education	39	0.01	0.34
Public Involvement	100	0.12	0.12
Illicit Discharge D&E	73	0.04	2.17
Const Site SW Runoff Control	80	0.01	0.83
Post Construction SW Mgt	4	1.09	1.09
PP/GH of Municipal Ops	67	0.01	1.08

Concerns have been raised that using data from Phase I permit applications to calculate Phase II costs may lead to either an understatement or overstatement of these costs. Since Phase II communities are smaller and less densely populated, they will probably have fewer structures to maintain, systems to map, and connections to inspect for illicit discharges than Phase I municipalities, although whether this is also true on a per capita basis is not clear. They may also be able to coordinate with nearby Phase I programs for some measures, such as public education. However, to the extent that there are significant fixed costs and economies of scale associated with implementation of the measures, the per capita costs for Phase II municipalities may be higher than those for Phase I municipalities. Also, it is not clear whether the costs listed on permit applications represent the entire compliance costs for the Phase I municipalities sampled. EPA requests comment on its methodology of using estimated costs from Phase I permit applications to project per capita costs for Phase II municipalities. EPA especially requests any data that might provide a better indication of actual compliance costs for these types of measures for smaller municipalities.

EPA also requests comment on its projection that compliance costs will be lower in the 2nd and 3rd permit cycles. This projection is based on the fact that some program elements, such as development of municipal ordinances and identification of illicit connections, will only have to be done once, in the first permit cycle. However, concern has been raised that there may be counteracting tendencies for subsequent permit cycle costs to be higher, such as population growth and more areas being classified as urbanized areas.

Concern has also been expressed that it may not be appropriate to apply the percentages of Phase I municipalities that apparently incurred costs for implementation of each measure to the estimation of Phase II costs. Because Phase II municipalities are smaller, they may be less likely than Phase I municipalities to already have adequate storm water programs in place and thus be more likely to incur additional costs as a result of this rule. As a sensitivity analysis, EPA has estimated the municipal costs under the assumption that 100 percent of covered Phase II municipalities would incur costs for each measure. Under this assumption the municipal costs for the first permit cycle would range from $110 million to $690 million with a mean of $238 million; second and third permit cycles would range from $98 million to $494 million with a mean of $209 million. EPA requests comment on its projections of the percentage of Phase II municipalities expected to incur costs for each measure, and any data that might help refine these estimates for the final rule.

To estimate costs to owner/operators of small construction sites, EPA first gathered national data on building permits issued over 15 years. Over the period from 1980 to 1994, there was a 1.3 percent average annual increase in the number of building permits issued. This growth rate was used to project total building starts through the year 2015. To estimate what percentage of these starts would be between 1 and 5 acres, EPA used more detailed data from

Prince George's County, Maryland to determine for each category of building permit (residential, commercial, etc.) what percentage was between 1 and 5 acres and applied these percentages to the national totals. Of the projected 645,709 building sites for the year 2000, EPA estimated that 22 percent, or 140,485 would be between 1 and 5 acres, based on the Prince George's County (PGC) data. EPA recognizes that PGC may not be representative of the entire country and requests any data that commenters may have that might be used to develop a better estimate of the number of construction sites between 1 and 5 acres.

EPA next estimated the number of sites located in States that already require permits for sites between 1 and 5 acres, and removed these from its cost calculations because sites in these States would not be expected to incur additional costs, beyond those already involved in State permitting. This removed 19 percent of the estimated sites between 1 and 5 acres, leaving a projected 111,357 sites in the year 2000 that would be expected to incur incremental costs as a result of this rule. Finally, EPA estimated the percentage of these sites that are already subject to local sediment and erosion control (SEC) requirements. Based on a survey of 113 localities, EPA estimated that 37 percent of sites between 1 and 5 acres, or 41,202 in the year 2000, would already be subject to local controls and would thus not incur incremental costs to implement SEC measures. EPA estimates that these sites would incur costs for the preparation of Notices of Intent, Notices of Termination, and Storm Water Pollution Prevention Plans only, while the remaining 70,155 sites would incur costs for implementation of SEC controls as well. EPA notes that sites in coastal areas subject to the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) would be required to implement sediment and erosion controls even without the proposed rule. SEC costs for sites in those areas should thus not be considered incremental costs of this rule. However, because EPA is not sure how much overlap exists between coastal zone areas, States that already have permitting programs for small construction sites, and localities that already have SEC requirements, EPA did not remove additional sites from the rule costs specifically because they were located in areas subject to CZARA (note, for example, that most State permitting programs are in such areas). EPA requests comment on its procedure for adjusting the number of sites subject to incremental costs to account for programs and requirements already in place.

The proposed rule would allow the NPDES permitting authority to waive applicability of requirements to storm water discharges from small construction sites based on three different criteria. In the economic analysis the Agency has projected that 15 percent of the construction sites that would be covered by today's proposal would be eligible to receive such waivers. Based on an informal survey of individuals familiar with the construction industry, EPA believes the percentage of sites eligible for waivers would probably fall between 5 and 25 percent. If the number of sites eligible for waivers were 25 percent, rather than the 15 percent used in the EA, projected compliance costs for small construction sites would be correspondingly lower. Similarly, if only 5 percent of sites turned out to be eligible for waivers, compliance costs would be correspondingly higher. The construction cost analysis does not include any costs for the preparation and submission of waiver applications, but the agency believes these costs will be negligible. EPA solicits comments and data on its assumptions regarding construction waivers.

Because today's proposed rule provides a significant degree of flexibility to the NPDES permitting authority and designated sources proposed for regulation, the actual costs of implementing today's proposed storm water rule depend greatly on how the NPDES permitting authority and regulated sources implement the program. To some extent, this flexibility is reflected in the broad ranges of costs. EPA believes that because of the significant flexibility provided by the proposed rule, the low to middle ranges of costs are most representative of the actual costs likely to be incurred.

Estimates of monetized benefits associated with today's proposed regulation were derived using an aggregate, ''top-down'' approach. Under this approach, the underlying data and assumptions were geared to a national scale (e.g., national value of the commercial fishery and nationwide beach visit data). EPA chose this approach because research indicated that, given the variability of local situations and the scarcity of data on both local conditions and on extrapolation methods, a bottom-up approach was not deemed to be feasible at this time. Nevertheless, information from more geographically confined studies provided important data that support such a monetized benefit analysis. In addition, local and regional experiences also verified some of the impacts and benefits that EPA had estimated at a national level.

The basic methodology for the top-down approach was as follows. For each of the various categories of financial, recreational, and health benefits, EPA first estimated the total value if all surface waters of the United States were cleaned up to a level that supported their designated uses. Next, using information on the degree and causes of water quality impairment from EPA's 1994 and 1996 Section 305(b) National Water Quality Inventory Report to Congress, EPA estimated the portion of total impairment (and thus total benefits) attributable to storm water runoff. Although it varied by benefit category, generally between 5 and 10 percent of total water quality impairment was found to be attributable to either urban or construction storm water runoff. Finally, EPA determined the share of storm water benefits that should be attributed to the Phase II rule specifically.

One consequence of the approach used to estimate monetized benefits is that, unlike the cost analysis, the benefits analysis only provides monetized estimates of the benefits associated with today's proposed regulatory alternative. To account for the fact that any storm water control may not be 100-percent effective, EPA estimated the effectiveness of the storm water BMPs proposed in today's rule and applied these estimates to the total monetized benefits of the proposal. Due to the uncertainty regarding effectiveness of different BMPs, as well as that regarding the appropriate share of storm water benefits to allocate to each of EPA's wet weather programs, EPA developed three scenarios to estimate proposal benefits. In Scenario 1 (high benefits scenario), it was assumed that Phase II BMPs would be 90 percent effective in controlling pollution from storm water runoff, that 5/7 of health benefits should be allocated to storm water programs (Phases I and II) and 2/7 should be allocated to EPA's sanitary sewer overflow (SSO) program, and that most municipal storm water benefits should be allocated 50 percent to Phase I and 50 percent to Phase II. The exceptions were benefits for avoided costs of building or replacing water storage capacity, 75 percent of which were to be allocated to Phase II, and benefits for avoided costs of freshwater navigational dredging, 25 percent of which were allocated to Phase II. In Scenario 2 (medium benefits scenario), it was assumed that Phase II BMPs would be 80 percent effective, that all

health benefits should be allocated to storm water programs, and again, that most municipal storm water benefits should be allocated evenly between Phases I and II, with the same two exceptions. In Scenario 3 (low benefits scenario), it was assumed that Phase II BMPs would be only 60 percent effective, that all health benefits should be allocated to storm water programs, and that all municipal storm water benefits, including those for avoided costs of building or replacing water storage capacity and freshwater navigational dredging, should be allocated evenly between Phases I and II. In Scenario 1, all water storage replacement and navigational dredging costs were allocated to storm water programs (Phases I and II), while in Scenarios 2 and 3, 96 percent of these benefits were allocated to storm water programs and 4 percent to other wet weather programs. In all three scenarios, 40 percent of storm water construction benefits were allocated to Phase II. The Economic Analysis document accompanying today's action provides a detailed description of the basis rationale for each of these scenarios.

Exhibit 6 summarizes annual benefits attributed to the proposed Phase II rule.

EXHIBIT 6.—SUMMARY OF TOTAL ANNUAL MONETIZED BENEFITS FROM IMPLEMENTATION OF THE PROPOSED STORM WATER RULE

[Millions of 1997 Dollars]

Benefits category	Scenario 1 annual value	Scenario 2 annual value	Scenario 3 annual value
Municipal Benefits	$114–$379	$100–$333	$66–$222
Construction Benefits	61–195	53–169	40–127
Total	175–574	153–502	106–349

EPA was able to develop a partial monetary estimate of expected benefits for today's storm water proposed rule for municipal and construction benefits. Summing the monetized benefits for each of the scenarios across these categories results in total benefits ranging from approximately $106 million to $574 million (1997 $) annually for the proposed rule.

EPA is requesting comment on several aspects of its benefits estimation methodology. The largest single category of estimated benefits is avoided costs of building or replacing water storage capacity (reservoirs) lost to sediment deposition. EPA estimates that an average of 820,000 acre feet of storage capacity is lost to pollution sources each year. EPA further estimates that ⅓ of this capacity will be replaced by building new reservoirs, at a cost of $420 to $1500 per acre foot, and ⅔ of this capacity will be restored by dredging, at a cost of roughly $3,500 to $11,000 per acre foot. This yields annual water storage replacement costs of $2 to $6 billion annually. EPA estimates that roughly 8 percent of these costs (or $170 to $510 million) are attributable to storm water runoff. EPA allocated 75 percent of the benefits from avoiding these costs in Scenarios 1 and 2 to Phase II, because it believes that most reservoirs are likely to be outside of densely populated Phase I areas. In Scenario 3, these benefits are allocated evenly between Phases I and II. Concern has been expressed that these benefits estimates may be too high, especially given that the total amount actually spent on navigational dredging attributable to pollution sources annually is only $180 million (to remove 83 million cubic yards), compared to the $2 to $6 billion that EPA estimates would be required to replace the estimated 1.3 billion cubic yards of water storage capacity lost to pollution sources annually. On the other hand, the temporary nature and intermittent frequency of reservoir dredging and the frequent need to deploy and remove heavy equipment and dispose of spoil often in confined areas, may elevate costs on a per cubic yard basis for reservoirs versus navigational dredging. EPA has no data on the actual amount spent on water storage capacity replacement. EPA thus requests comment on its methodology for estimating these avoided costs, on its allocation of these avoided costs between Phases I and II, and any data that would allow it to refine these estimates for the final rule. EPA also requests comment on whether it would be appropriate to discount these benefits, and by how much, given that much of the actual replacement of lost storage capacity may not occur for several decades. EPA further notes that many other categories of benefits may also entail significant lags and requests comment on the appropriateness of discounting benefits to account for these lags generally.

EPA is also requesting comment on its methodology for estimating marine recreational and commercial benefits for fishing and swimming. Specifically, the current estimates are based on the degree of estuarine impairment attributable to storm water, although EPA recognizes that a significant share of marine fishing and swimming occurs in open coastal waters rather than estuaries. EPA has assumed that full restoration of these resources would result in a 20 percent increase in their value, based roughly on the degree of estuarine impairment. A concern has been raised that the degree of impairment in open coastal waters may be significantly different than that of estuaries, and the value of full restoration of open coastal resources correspondingly changed. Concern has also been raised that the current estimates do not account for the substitutability of resources, but rather assume that the total amount of current marine fishing and swimming is limited by the availability of unimpaired estuarine and coastal areas. EPA requests comment on its methodology for estimating these benefits, and any data, especially on the degree of impairment of open coastal waters or the fraction of marine fishing and swimming that occurs in such waters, that would allow it to refine these estimates for the final rule.

As a sensitivity analysis, EPA also performed an alternative benefits estimate using a different ''bottoms-up'' approach based on its Clean Water Act Effects Model. The modeling approach examined impacts of all wet weather events together: SSOs, CSOs (Combined Sewer Overflows) and storm water Phase I and II. This would provide an upper bound estimates for storm water control. (For this analysis, it was possible to break out CSOs as separate data exists for these events.)

Changes in water quality relate to changes in how humans use the resource. This analysis estimated

changes to water quality based on assumptions about the level of control EPA would expect from the CWA's wet weather programs. Next, the Agency estimated the changes in human use and enjoyment of the resource. The Agency applied ''willingness-to-pay (WTP)'' values from Mitchell/Carson (1993) contingent valuation survey results, which estimates the amount of money people are willing to pay for water quality improvement. (Mitchell/Carson estimates include values for recreation use as well as nonuse values.)

The model examined three different wet-weather programs under three loadings reduction scenarios based on differences in such factors as average annual rainfall in different hydrologic regions and changes in removals. For each of these scenarios EPA further estimated low, medium and high values to account for wide ranges in variability. The following discussion of results is based on medium values in these three scenarios.

The results of this analysis show a range of monetized benefit of $1 to $7 billion for all urban wet weather programs. The results of the modeling did not split out storm water impacts from SSO impacts. Applying the percentages used in the top down approach (5/7 storm water, 2/7 SSO), EPA derived an estimate for storm water Phase II. Using the medium results, averaged between the low and the high estimates, benefit estimates for the proposed rule fall within a range of $526 million to $3.56 billion. The wide range of these estimates is due to the very flexible nature of the proposal, which would provide communities with a wide range of options to consider for control of storm water.

There are additional benefits to storm water control that cannot be quantified or monetized. The estimate of monetized benefits presented here may thus understate the true value of storm water controls because it may omit additional numerous mechanisms by which society is likely to benefit from reduced storm water pollution, such as improved aesthetic quality of waters, benefits to wildlife and to threatened and endangered species, option existence values, cultural values, and biodiversity benefits. The estimates of freshwater recreational benefits included in the monetized benefits analysis are based on the Mitchell/Carson ''willingness-to-pay'' study. Mitchell/Carson estimates the value people are willing to pay to restore all of the nation's waters to fishable/swimmable quality, and thus presumably already includes associated ''non-use'' values. However, EPA believes there are non-use values that are not captured in the Mitchell/Carson estimates and thus not included in the monetized benefits estimates.

These environmental and health benefits are also important. Another benefit that EPA did not specifically monetize is the benefits of flood control to the extent that Phase II storm water controls reduce downstream flooding. In addition, the Agency relied on a geographically-limited data set (Santa Monica Bay, California) to measure the benefits of illness avoided due to storm water controls.

A significant category of benefits that the Agency could not specifically monetize is ecological benefits. Urbanization can adversely affect water quality by increasing the amount of sediment, nutrients, metals and other pollutants associated with land disturbance and development. Not only is there a dramatic increase in the volume of water runoff but there may also be a substantial decrease in that water's quality due to stream scour, runoff and dispersion of toxic pollutants, and oversiltation. The higher flow volumes in the tributary streams and channels create a ''domino'' effect of ecological impacts. Erosion of stream banks and incision of the stream floor result in sediment movement and eventually buildup in downstream environments. Sediment covers the stream bed, smothers fish eggs and spawning grounds, interferes with hatching, and can clog the gills and filter systems of fish and aquatic invertebrates. This latter effect can result in retarded growth, systemic disfunction, or asphyxiation. Subsequent loss of aquatic life has a ripple effect up the food chain.

High nutrient levels often lead to eutrophication of the aquatic system. This entails the blue/green surface algae bloom, water discoloration, and depressed levels of dissolved oxygen. Heavy metals can have toxic effects on aquatic life. Heavy metals in the water column and sediments have been connected with respiratory problems in fish and often destroy or infect the insect populations which serve as the primary food source for many fish species. High bacteria levels from animal excrement and carcasses, septic runoff or illegal dumping by motor homes and others affect critical estuarine habitats which are the nation's most productive finfish, oyster, clam and shrimp fisheries. EPA requests comment on the extent to which additional consideration of these ecological benefits is needed and appropriate methodologies for quantifying and monetizing them.

Exhibit 7 compares the estimated national annual monetized total benefits associated with the proposed storm water regulations with the monetized costs associated with the proposed regulation. Because EPA is uncertain of the exact monetized benefit, the benefits for each scenario have been compared to costs. The net total benefits (social benefits less social costs) for the three benefits scenarios range from positive $34 million in Scenario 1 to negative $531 million in Scenario 3.

EXHIBIT 7.—COMPARISON OF TOTAL ANNUAL MONETIZED BENEFITS TO TOTAL ANNUAL COSTS FOR THE PROPOSED PHASE II STORM WATER RULE

[Millions of 1997 Dollars]

Benefit categories	Scenario 1 value	Scenario 2 value	Scenario 3 value
Financial Benefits	$93–$267	$80–$228	$51–$144
Recreational Benefits	$81–$304	$72–$271	$54–$203
Health Benefits	$1–$3	$1–$3	$1–$2
	$175–$574	$153–$502	$106–$349
Cost categories	Value	(Low-High)	
Compliance Costs	.....	$138–$869	.....
Administration Costs	.....	$3–$11	.....
Total Monetized Costs	.....	$141–$880	.....
Net Monetized Benefits	$34–$(306)	$12–$(378)	$35–$(531)

The proposed storm water rule includes a provision that would allow owners or operators of facilities with existing discharges associated with industrial activity to certify that if significant materials or industrial activities are not exposed to storm water the owners or operators could apply for an exemption from the requirements of the NPDES permitting program. This provision is included in today's proposed storm water rule but would only apply to sources regulated under existing rules. Therefore, EPA has decided not to factor the costs savings associated with this exemption into the costs analysis for today's proposed rule. Rather, the cost savings associated with this exemption is addressed separately in the Economic Analysis.

V. Unfunded Mandates Reform Act/ Executive Order 12875

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Tribal, and local governments and the private sector. Under UMRA section 202, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, Tribal, and local governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, UMRA section 205 generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under UMRA section 203 a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule contains a Federal mandate that may result in expenditures of $100 million or more for State, Tribal, and local governments, in the aggregate, or the private sector in any 1 year. Accordingly, under UMRA section 202, EPA has prepared a written statement, which is summarized below.

A. UMRA Section 202 Written Statement

EPA proposes today's storm water regulation pursuant to the specific mandate of Clean Water Act § 402(p)(6), as well as sections 301, 308, 402, and 501. (33 U.S.C. §§ 1342(p)(6), 1311, 1318, 1342, 1361.) Section 402(p)(6) of the CWA requires that EPA designate sources to be regulated to protect water quality and establish a comprehensive program to regulate those sources. In a separate document in the administrative record, EPA describes the qualitative and monetized benefits associated with the proposed storm water rule and then compares the monetized benefits with the estimated costs for the proposed rule. The Agency also developed a partial monetary estimate of expected benefits for the proposed rule for financial benefits, recreational benefits, and health benefits. Summing the monetized benefits, for each of the scenarios, across these categories results in total benefits ranging from approximately $106 million to $574 million (1997 $) annually for the proposed rule. Because EPA is uncertain of the exact monetized benefit, three benefit scenarios were created and compared to costs for the proposed regulation.

In that document, EPA reviewed the potential for this proposed rule to have a significant effect on the economy or upon unemployment and determined that the unemployment impacts will be minimal, if any at all.

First, the proposed rule does not address industries involved in production, but rather small municipal separate storm sewer systems and construction sites under 5 acres. Second, flexibility within the proposed rule would allow municipalities to tailor proposed individual municipal storm water program requirements to their needs and financial position. Finally, discussions with representatives within the construction industry indicate that construction costs would likely be passed on to consumers. EPA believes that these same reasons would result in the proposed rule having minimal or no unemployment impacts. EPA also assessed the social costs of the proposed regulation and estimates the total social costs of the proposed rule to range from approximately $141 million to $878 million annually (1997 $). The proposed rule would not have the potential to increase costs for industrial manufacturers and producers because the proposed rule does address storm water discharges from other types of industrial facilities.

B. Description of Intergovernmental Consultation

Consistent with the intergovernmental consultation provisions of section 204 of the UMRA and Executive Order 12875, Enhancing the Intergovernmental Partnership, EPA consulted with elected representatives of various levels of government in a variety of ways. First, EPA provided States, local, and tribal governments and the private sector with the opportunity to comment on alternative approaches to the proposed regulations through publishing a notice requesting information and public comment on the approach for the CWA section 402(p)(6) regulations in the **Federal Register** on September 9, 1992 (57 FR 41344). This notice presented a full range of regulatory alternatives under each issue in an attempt to illustrate, and obtain input on, the regulation of unregulated sources to protect water quality. Approximately 43 percent of the more than 130 comments received came from municipalities and 24 percent from State or Federal agencies. These comments provided the genesis for many of the provisions in the proposed storm water rule, including reliance on the NPDES program framework (including general permits), providing State and local governments flexibility in selecting additional sources requiring regulation on a localized basis, focusing on high priority polluters and providing certain exemptions for facilities that do not pollute, focusing on pollution prevention and best management practices, and incorporating watershed-based concerns in targeting.

Second, in early 1993, EPA, in conjunction with the Rensselaerville Institute held public and expert meetings to assist in developing and analyzing options for identifying unregulated storm water sources and possible controls. These meetings again allowed participants an opportunity to provide input into the CWA section 402(p)(6) program development process. The proposed rule reflects several of the key concerns identified in these groups, including provisions that provide flexibility to the States and to other

permitting authorities to select sources to be controlled in a manner consistent with criteria developed by EPA.

Finally, EPA established the Urban Wet Weather Flows Advisory Committee (FACA), including a Storm Water Phase II Subcommittee. Consistent with the Federal Advisory Committee Act, the membership of the Storm Water Phase II Subcommittee was balanced among EPA's various outside stakeholder interests, including representatives from State governments, municipal governments (both elected officials and appointed officials) and tribal governments, as well as industrial and commercial sectors, agriculture, environmental and public interest groups. The Storm Water Phase II Subcommittee met approximately every other month between September 1995 and June 1997. In addition to meetings, conference calls, and correspondence, Subcommittee members were provided three opportunities to comment in writing on preliminary draft approaches and actual drafts of the proposed rule and preamble. Ultimately, the 32 Subcommittee members recommended many of the portions making up the regulatory framework in the proposed rule.

C. Selection of the Least Costly, Most Cost-Effective or Least Burdensome Alternative That Achieves the Objectives of the Statute

The proposed regulation is based on a ''flexible'' NPDES program alternative. This alternative evolved over time and incorporates aspects of each of the other alternatives in order to respond to concerns presented by the various interests represented in the Storm Water Phase II Subcommittee. A primary characteristic of the proposed rule is the flexibility it offers both the permitting authority and the sources proposed for regulation (small MS4s and small construction sites), such as general permits, best management practices suited to specific locations, and allowing MS4s to develop their own program goals. EPA developed detailed cost estimates for the incremental requirements imposed under the proposed regulation, and for each of the alternatives, and applied these estimates to the potentially regulated universe of remaining unregulated point sources of storm water. The Agency compared the estimated annual range of costs imposed under the proposed regulation and other major options considered. The range of values for each option included the costs for compliance including paperwork requirements for the owners and operators of small construction sites, industrial facilities, and MS4s and administrative costs for State and Federal NPDES permitting authorities.

Because the proposed rule provides a significant degree of flexibility to the permitting authority and sources proposed for regulation, the actual costs of implementing the proposed storm water rule are highly dependent on how the program is implemented by the permitting authority and the sources proposed for regulations. To some extent, this flexibility is reflected in the broad ranges of costs. EPA believes that because of the significant flexibility provided by the proposed rule, the low to middle ranges of costs are most representative of the actual costs likely to be incurred. In the administrative record supporting today's proposal, EPA estimated ranges of costs associated with six different options for today's proposal. For each option, EPA estimate a cost range. From the highest of the high estimates to the lowest of the low, the cost range varied between no cost and $79 billion dollars. The least costly, most cost-effective or least burdensome option is the ''no regulation'' option. This option, however, would not achieve the objectives of CWA section 402(p)(6) because remaining unregulated point sources of storm water need to be regulated to protect water quality. The remaining option that is both the least costly, most cost-effective or least burdensome and accomplishes the objectives of the rule is the proposed rule in its current form. Today's proposal represents the lowest cost range option (between $106 million to $574 million dollars).

Although Congress did not establish a fund to fully finance implementation of the proposed extension of the existing NPDES storm water program under section 402(p)(6), numerous Federal financing programs (administered by EPA and other Federal agencies) could provide some financial assistance. These programs include CWA section 106 grant program CWA section 104(b)(3) grant program, State surface and ground water management programs under the Safe Drinking Water Act, the environmental quality incentives program, the conservation reserve program, the wetlands reserve program, and the estuary management and Federal monitoring programs. Also, the Natural Resources Conservation Service (NRCS) has some grants available to assist in projects related to erosion and sediment controls.

D. Small Government Agency Plan

In developing the proposed rule, EPA consulted with small governments pursuant to its interim plan established under UMRA section 203 to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments. Though today's proposal would expand the NPDES program (with modifications) to certain municipal separate storm sewer systems serving populations below 100,000 people and though many systems are owned by small governments, EPA does not think the proposed rule might significantly or uniquely affect small governments. As explained in the Regulatory Flexibility Act section of the preamble, EPA today certifies that the proposed rule will not have a significant impact on small governmental jurisdictions. In addition, the proposed requirements would not have a unique impact on small governments because larger governments would also be affected. Notwithstanding this finding, the Agency sought to provide elected officials of small governments (and their representatives) with an opportunity for early and meaningful participation through FACA process. In addition, EPA is committed to providing guidance for the operators of the municipal separate storm sewer systems (which would likely include small governments) developed in conjunction with the Storm Water Phase II FACA Subcommittee.

As mentioned previously, 43 percent of the comments received on the September 9, 1992, notice were from municipal governments. In addition, the following groups participated as members of the Storm Water Phase II FACA Subcommittee: the Conference of Mayors, the National League of Cities, the National Association of Towns and Townships, the National Association of Counties, the CSO Partnership, the Water Environment Federation, and the Association of Metropolitan Sewerage Agencies. Through such participation and exchange, EPA notified potentially affected small governments of requirements under consideration, allowed officials of affected small governments to have meaningful and timely input into the development of regulatory proposals, and will inform, educate, and advise small governments on compliance with the regulatory requirements. The Agency is also undertaking efforts to develop a ''tool box'' of aids (e.g., fact sheets, guidance, information clearinghouse, training, education, research, and pilot programs) to be made available to regulated entities and permitting authorities to facilitate implementation of today's proposed regulation.

VI. Executive Order 12898

Executive Order 12898 established a Federal policy for incorporating environmental justice into Federal agency missions by directing agencies to identify and address in their programs, policies, and activities, as appropriate, the disproportionately high and adverse human health or environmental effects on minority and low-income populations. EPA ensured proper consideration of environmental justice concerns during the section 402(p)(6) rulemaking by selecting a balanced FACA membership and specifically inviting a representative of the Environmental Justice Information Center to participate on the Storm Water Phase II FACA Subcommittee. EPA examined the potential impact of today's proposed storm water rule on minority and low-income populations and worked to develop a proposed rule that would address environmental justice concerns. Discussions with the Storm Water Phase II FACA Subcommittee contributed to these efforts.

Three aspects of today's proposed storm water regulation would support environmental justice objectives. First, the proposed rule would result in improvements in water quality in the areas around small municipalities and certain industries that impact water quality. These improvements would benefit all persons living in or using these areas, including minority populations and low-income populations. Second, the proposed rule would provide a high degree of flexibility to the NPDES permitting authority to address high priority contaminated storm water discharges based on community input and public participation. This ability to focus program requirements on priority needs or areas should serve as an additional tool to address environmental justice concerns. Third, the proposed rule specifies that public education and outreach programs required of small municipal separate storm sewer systems should be tailored to address the concerns of all communities, particularly minority and disadvantaged communities, as well as children. The proposed rule also specifies that compliance with required public involvement and participation requirements should include efforts to engage all economic and ethnic groups.

In addition, partly in consideration of the executive order, EPA proposes to exempt Tribes in urbanized areas with populations of less than 1,000 from the requirements of today's proposed rule.

VII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), whenever EPA is required to publish notice of general rulemaking, EPA must prepare an initial regulatory flexibility analysis (IRFA) describing the economic impact of the proposal on small entities, unless the Administrator certifies that a proposed rule will not have a ''significant economic impact on a substantial number of small entities.'' After consideration of the economic impacts of today's proposed rule on small entities, the Administrator certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding today's certification, EPA has prepared an IRFA. In addition, prior to determining that today's proposal should be certified, EPA convened a Small Business Advocacy Review Panel under the RFA, as amended by the Small Business Regulatory Fairness Act (SBREFA), to evaluate and minimize the potential impacts of the proposed rule on small entities.

A. Economic Impact on Small Entities

EPA assessed the potential economic impact of today's proposed storm water regulation on small entities. As the first step in its evaluation, EPA identified those small entities potentially affected by the proposal. In identifying these small entities, EPA used the definitions of small businesses, small governmental jurisdictions (e.g., municipalities), and small organizations (e.g., nonprofit organizations) established by the RFA. Based on data from the 1990 U.S. Census, EPA estimated that a total of 3,614 small governmental jurisdictions (specifically, municipalities) would be affected by the proposed rule. In addition, 11 Indian Tribes, as small governmental jurisdictions who own/operate municipal separate storm sewer systems, would also be affected. Next, EPA estimated that 187,610 construction firms in Standard Industrial Classification (SIC) Code 15 would be subject to the proposal, if adopted. EPA recognizes, however, that this number may over-estimate the number of small businesses subject to the proposal. The data do not permit the Agency to distinguish between small construction firms whose activities include land clearing and site preparation—the proposal's requirements would apply to such operations—and those small construction firms that do not prepare sites. Finally, the proposed rule would not apply to any small not-for-profit organizations.

In the next step of the Agency's evaluation, EPA analyzed the potential economic impact of the proposed rule on the small entities it had identified as likely to be subject to the proposed rule. In the case of those small municipalities that would be affected if the proposal is adopted, EPA evaluated the potential impact using a ''revenue test.'' Under this test, EPA looked at the total annual cost of complying with the proposed requirements in relation to total annual municipal revenues. EPA calculated total annual compliance cost based on mean costs ($2.67 per capita and $555 per municipality) and the population reported in the 1990 Census. EPA estimated annual revenues based on data from the 1992 Census of Governments, using state-specific estimates of annual revenue per capita for municipalities in three population size categories (fewer than 10,000, 10,000–25,000, and 25,000–50,000).

Based on this evaluation, the Administrator certifies that today's proposed storm water rule will not have a significant economic impact on a substantial number of small municipalities. Estimated compliance costs represent more than 1 percent of estimated revenues for only 62 municipalities of the affected small municipalities—approximately 1.7 percent of small municipalities—and less than 3 percent of estimated revenues for all but 4 municipalities—approximately 0.1 percent of affected small municipalities. In both absolute and relative terms, the impact is not significant.

EPA also assessed the potential impact of the rule on Indian Tribes using the same revenue test applied to municipalities. However, revenue per capita for tribal governments was not available. Therefore, EPA used the State-specific municipal per capita revenue estimates by size category and adjusted these estimates downward based on the ratio of per capita income on the reservation to per capita income for the State. EPA then multiplied the adjusted estimates of per capita revenue by the reservation population and conducted the screening analysis in the same manner as for municipalities (assuming annual compliance costs of $2.67 per capita and $555 per reservation). EPA assumed that all Tribes with populations between 1,000 and 100,000 would have to comply with the rule and Tribes in Oklahoma would

not be regulated.[5] Estimated compliance costs represent more than 1 percent of total estimated revenues for only 2 Indian Tribes. The remaining 9 Indian Tribes have compliance costs less than 1 percent of estimated revenues. The Administrator therefore certifies that this rule will not have a significant economic impact on a substantial number of small governmental jurisdictions regardless of whether the municipal and tribal impacts are analyzed separately or combined.

For small businesses, in most instances, EPA evaluates the potential impact by using a ''sales test.'' Under a sales test, EPA compares the cost of complying with proposed requirements to a small business' total annual sales. In developing the inputs to this test, EPA calculated the compliance costs based on ''unit costs'' (i.e., compliance costs per single-family home) rather than costs per developer/contractor because of the uncertainties associated with estimating how many units an ''average'' developer/contractor might develop or build in a typical year. Therefore, EPA's analysis was not exactly a ''sales test,'' but was developed to derive the kind of results that are comparable to results from a sales test. EPA approximated the sales test by estimating compliance costs for single-family homes under various scenarios and comparing those costs with the median sales price of a single-family home. The results of this approximation show that the cost of complying with the proposed rule will not exceed 1 percent of the average sales price of a single family home for an array of the most likely economic and regulatory scenarios. EPA reached this conclusion after controlling for sites of different size and the changes in compliance costs per site (i.e., single family home) that depend upon the need to implement erosion and sediment controls as a result of the proposed rule.

Because of the absence of data to specifically assess compliance costs per developer/contractor as a percentage of total annual sales (i.e., a very direct estimate of the impact on potentially affected small businesses), EPA performed additional market analysis to examine the ability of potentially affected firms to pass along regulatory costs to buyers for single-family homes constructed using the storm water control program proposed today. Obviously, if the small construction companies that would be subject to the proposal are able to pass the costs of compliance, either completely or partially, on to their purchasers, then the proposed rule's impact is significantly reduced. EPA conducted this supplemental analysis using available data and published economic literature. The analysis evaluated the potential effects of complying with this proposed rule on the market for single-family houses for both the short and long term including potential changes in the price and sales of single-family homes. The Agency assessed the effect on average monthly mortgage rates for a range of potential interest rates. EPA has concluded that the costs to site developers and building contractors, and the potential changes in housing prices and monthly mortgage payments for single-family home buyers, are not expected to have a significant impact on the market for single-family houses including most potentially affected small firms that are actively participating in this market. EPA's analysis projects the impact of the rule on small site developers and building contractors will be minimal because these companies are expected to pass regulatory costs on to home buyers without a significant impact on sales. Based on this assessment, the Administrator also certifies that the proposal will not have a significant economic impact on a substantial number of small businesses.

B. SBREFA Panel Process

As previously explained earlier in the preamble, EPA has conducted an extensive outreach effort in developing today's storm water proposal. EPA held a number of public and expert meetings to assist in preparing the proposal, and the Agency established a FACA Committee specifically to provide a forum for addressing storm water issues.

EPA also convened a Small Business Advocacy Review Panel (''Panel''), as described in RFA section 609, in June 1997. Because EPA's economic assessment was incomplete, the Agency was not initially certain whether the proposed rule would have a significant economic impact on a substantial number of small entities. A number of small entity representatives were actively involved with EPA through the FACA process, and were, therefore, broadly knowledgeable about the proposal under development. Prior to convening the Panel, EPA consulted with the Small Business Administration to identify a group of small entity representatives to advise the Panel. The Agency distributed a briefing package describing its preliminary analysis under the RFA to this group (as well as to representatives from the Office of Management and Budget and the Small Business Administration) and also conducted two telephone conference calls and an all-day meeting at EPA Headquarters in May of 1997. With this preliminary work complete, in June 1997, EPA formally convened the interagency Panel, comprising representatives from the Office of Management and Budget, the Small Business Administration, EPA's Office of Water and EPA's Small Business Advocacy Chair. The Panel received written comments from representatives based on their involvement in the earlier meetings, and invited additional comments to be submitted during the term of the Panel itself.

Consistent with RFA requirements, the Panel evaluated the assembled materials and small-entity comments on issues related to: (1) a description and number of small entities to which the proposed rule would apply; (2) a description of the projected record keeping, reporting and other compliance requirements applicable to small entities; (3) identification of other Federal rules that may duplicate, overlap, or conflict with the proposed rule; and (4) regulatory alternatives that would minimize any significant economic impact of the proposed rule on small entities that would also accomplish the stated objectives of the CWA section 402(p)(6).

On August 7, 1997, the Panel provided a Final Report (hereinafter, ''Report'') to the EPA Administrator. The Report noted that, because of the extensive outreach conducted by the Agency, and due to the Agency's responsiveness in addressing stakeholder concerns, small entity representatives raised fewer concerns than might otherwise have been expected. A copy of the Report is included in the docket for this proposed rule. Notwithstanding today's certification that the proposed rule will not have a significant economic impact on a substantial number of small entities, the Agency has incorporated many of the Panel's recommendations into today's proposal.

The Panel acknowledged and commended EPA's efforts prior to its Report to work with stakeholders, including small entities, through the Storm Water Phase II FACA Subcommittee. As discussed in the Background section of this preamble (Section I.F. The FACA Committee

[5] The determination of applicability to Oklahoma Tribes would be done on a case-by-case basis. In authorization of the Oklahoma NPDES program, EPA retained jurisdiction to regulate discharges in Indian Country (61 FR 65049, 12/10/96). However, EPA believes it is unlikely that large populations of Oklahoma Tribes would fall within areas that would be determined to be a Federal Indian Reservation, and thus, subject to regulation (see preamble).

Effort) the subcommittee provided extensive input in the development of today's proposal. The Agency also provided FACA members with copies of the Economic Analysis of the proposal, which includes the initial regulatory flexibility analysis. EPA has sought to build upon the recommendations made by members of the federal advisory committee and has responded to numerous issues raised by them concerning the scope, method, and timing of the program outlined in today's proposal. The SBREFA Panel stated that, because of the extensive outreach conducted by the Agency and the Agency's responsiveness in addressing stakeholder concerns, commenters during the SBREFA process raised fewer concerns than might otherwise have been expected. Based on the advice and recommendations of the Storm Water Phase II FACA Subcommittee, as well as the Panel Report, the proposal includes a number of provisions designed to minimize any significant impact of the proposed rule on small entities as explained below and in Appendix 5 of today's notice.

Municipal representatives commented to the Panel that small municipal separate storm sewers systems in urbanized areas serving less than 1,000 people might lack the capacity to certify that their discharges do not have significant adverse water quality impacts. EPA responded that the technical basis for such certification would generally be produced by the permitting authority, in the form of a TMDL or watershed plan. The Panel was concerned, however, that in the absence of a TMDL or watershed plan developed by other parties (i.e., States or EPA), municipalities under 1,000 would have difficulty taking advantage of this waiver provision. The Panel recommended that EPA invite comment on this issue, and EPA has done so (Section II.G.3, NPDES Permitting Authority's Role—Provide Waivers).

Municipal representatives also suggested to the Panel that small municipal separate storm sewer systems serving less than 1,000 people in urbanized areas should be automatically exempt, just as EPA is proposing to exempt systems operated by Tribes of less than 1,000. As further explained in Section F., Tribal Role, EPA believes that the situations of very small Tribes are not comparable to those of small municipalities because Tribes cannot generally rely on administrative support from a State permitting authority in the way municipalities can. Based on the positions taken by OMB and SBA in the Report, however, EPA has agreed to request comment on this issue as well.

Other small business representatives also questioned the Panel about the proposed comprehensive program to regulate construction activities that result in the land disturbance of 1 acre up to 5 acres. The Panel recommended that EPA revise the preamble to the proposed rule to invite comment on alternatives to the proposed requirements, including a discussion of the concerns expressed by small entity representatives and their specific suggestions for addressing them. The Agency has included the suggested alternatives in its discussion of construction requirements in this preamble, in Section II. I. Other Designated Storm Water Discharges.

Both municipal and industrial representatives commented to the Panel that, to avoid redundance, requirements for construction activities undertaken by municipalities or industrial facilities should be incorporated within their respective permits (provided that the permits detail sediment and erosion controls). Similarly, municipal representatives commented that requirements for industrial facilities operated by municipalities should be covered under municipal storm water permits. The Panel recommended that EPA explore and request comment on these ideas in the preamble of the proposed rule. The Panel reported that these options may be appropriate for municipalities or industrial facilities with individually-issued NPDES permits, but may be difficult to administer under NPDES general permits. The Agency has discussed and solicited comment on the first two of these options—condensing construction requirements into a single municipal or industrial storm water permit—as part of the preamble discussion of construction requirements, in Section II.I. Other Designated Storm Water Discharges. The Agency has discussed and solicited comment on the third of these options—condensing industrial storm water requirements for municipally owned or operated industrial facilities into a single municipal storm water permit—in the preamble as part of the discussion of industrial requirements, in Section II.I.3. Other Sources.

The Panel also received comments on a preliminary draft of the revisions to the existing storm water rules providing relief to parties certifying ''no exposure'' to rainfall events that could produce storm water runoff. Commenters indicated that, as drafted, the provision would preclude such certification (and thus deny appropriate exemption from permitting requirements) to certain deserving facilities. Such facilities include those that undergo a ''temporary operational change'' or that maintain vehicles outdoors without generating pollution. The Panel recommended that the Agency discuss these comments with the Urban Wet Weather Flows FACA Committee and revise the proposal as far as possible to allow all facilities preventing the actual discharge of pollutants to make use of the ''no exposure'' EPA complied with that recommendation as well.

In addition to looking for ways to redesign today's proposal to limit its impacts on small entities, the Agency has been working with the Storm Water Phase II Subcommittee to develop considerable support for implementation through the ''tool box'' approach discussed in the Section II.A.5. of this preamble. The tool box would include fact sheets, guidances, an information clearinghouse, training and outreach efforts, technical research, and support for demonstration projects.

EPA's outreach to small entities covered by this proposal and its accommodation of their legitimate needs have been aggressive and highly responsive. The Agency actively invites comments on all aspects of the proposal and its impacts on small entities so that the final rule will reflect the most auspicious balance between necessary environmental protection and appropriate respect for the genuine limitations of small entities in understanding and complying with applicable requirements.

VIII. National Technology Transfer and Advancement Act

Under § 12(d) of the National Technology Transfer and Advancement Act, the Agency is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. ''Voluntary consensus standards'' are ''technical standards'' (e.g., materials specifications, test methods, sampling procedures, business practices, management systems practices, etc.) that are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

Today's proposed rule would not even prescribe nationally applicable substantive control standards, either for construction site storm water or municipal storm sewers. Such control standards would be developed on a

State or local basis. Thus, as a threshold matter, the concept of ''technical standards'' would not apply to the regulatory activities proposed today.

EPA requests comment on these findings. If a commenter believes that today's rule relies on technical standards, the Agency also solicits information about the identification and possible use of any potentially applicable voluntary consensus standards for the final rule.

List of Subjects in 40 CFR Parts 122 and 123

Environmental protection, Administrative procedure, Water pollution control.

Dated: December 15, 1997.

Carol M. Browner,

Administrator.

Appendices to the Preamble

APPENDIX 1 TO PREAMBLE—FEDERALLY-RECOGNIZED AMERICAN INDIAN AREAS LOCATED IN BUREAU OF THE CENSUS URBANIZED AREAS

[Based on 1990 Census data]

State	American Indian area	Urbanized area
AZ	Pascua Yacqui Reservation (pt.), Pascua Yacqui Tribe of Arizona	Tuscon, AZ (Phase I).
AZ	Salt River Reservation (pt.), Salt River Pima-Maricopa Indian Community of the Salt River Reservation, California.	Phoenix, AZ (Phase I).
AZ	San Xavier Reservation (pt.), Tohono O'odham Nation of Arizona (formerly known as the Papago Tribe of the Sells, Gila Bend & San Xavier Reservation).	Tucson, AZ (Phase I).
CA	Augustine Reservation, Augustine Band of Cahuilla Mission of Indians of the Augustine Reservation, CA.	Indio-Coachella, CA (Phase I).
CA	Cabazon Reservation, Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation, CA.	Indio-Coachella, CA (Phase I).
CA	Fort Yuma (Quechan) (pt.), Quechan Tribe of the Fort Yuma Indian Reservation, California and Arizona.	Yuma, AZ–CA.
CA	Redding Rancheria, Redding Rancheria of California	Redding, CA.
FL	Hollywood Reservation, Seminole Tribe	Fort Lauderdale, FL (Phase I).
FL	Seminole Trust Lands, Seminole Tribe of Florida, Dania, Big Cypress and Brighton Reservations.	Fort Lauderdale, FL (Phase I).
ID	Fort Hall Reservation and Trust Lands, Shosone-Bannock Tribes of the Fort Hall Reservation of Idaho.	Pocatello, ID.
ME	Penobscot Reservation and Trust Lands (pt.), Penobscot Tribe of Maine	Bangor, ME.
MN	Shakopee Community, Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake)	Minneapolis-St. Paul, MN (Phase I).
NM	Sandia Pueblo (pt.), Pueblo of Sandia, New Mexico	Albuquerque, NM (Phase I).
NV	Las Vegas Colony, Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada	Las Vegas, NV (Phase I).
NV	Reno-Sparks Colony, Reno-Sparks Indian Colony, Nevada	Reno, NV (Phase I).
OK	Osage Reservation (pt.), Osage Nation of Oklahoma	Tulsa, OK (Phase I).
OK	Absentee Shawnee-CitizensBand of Potawatomi TJSA (pt.), Absentee-Shawnee Tribe of Indians of Oklahoma, Citizen Potawatomi Nation, Oklahoma.	Oklahoma City, OK (Phase I).
OK	Cherokee TJSA 9 (pt.), Cherokee Nation of Oklahoma, United Keetoowah Band of Cherokee Indians of Oklahoma.	Ft. Smith, AR–OK; Tulsa, OK (Phase I).
OK	Cheyenne-Arapaho TJSA (pt.), Cheyenne-Arapaho Tribes of Oklahoma	Oklahoma City, OK (Phase I).
OK	Choctaw TJSA (pt.), Choctaw Nation of Oklahoma	Ft. Smith, AR–OK (Phase I).
OK	Creek TJSA (pt.), Alabama-Quassarte Tribal Town of the Creek Nation of Oklahoma, Kialegee Tribal Town of the Creek Indian Nation of Oklahoma, Muscogee (Creek) Nation of Oklahoma, Thlopthlocco Tribal Town of the Creek Nation of Oklahoma.	Tulsa, OK (Phase I).
OK	Kiowa-Comanche-Apache-Ft. Sill Apache, Apache Tribe of Oklahoma, Comanche Indian Tribe, Oklahoma, Fort Sill Apache Tribe of Oklahoma, Kiowa Indian Tribe of Oklahoma.	Lawton, OK.
TX	Ysleta del Sur Reservation, Ysleta Del Sur Pueblo of Texas	El Paso, TX–NM (Phase I).
WA	Muckleshoot Reservation and Trust Lands (pt.), Muckleshoot Indian Tribe of the Muckleshoot Reservation.	Seattle, WA (Phase I).
WA	Puyallup Reservation and Trust Lands (pt.), Puyallup Tribe of the Puyallup Reservation, WA	Tacoma, WA (Phase I).
WA	Yakima Reservation (pt.), Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, WA.	Yakima, WA.
WI	Oneida (West) (pt.), Oneida Tribe of Wisconsin	Green Bay, WI.

Please Note:

''(pt.)'' indicates that the American Indian Area (AIA) listed is only partially located within the referenced urbanized area.

''(Phase I)'' indicates that the urbanized area includes a medium or large MS4 currently regulated under the existing NPDES storm water program (i.e. Phase I).

The first line under ''American Indian Area'' is the name of the reservation/colony/rancheria as it appears in the Bureau of the Census data. Under this first line, the names of the tribes included in the AIA are listed as they appear on the Bureau of Indian Affairs' list of Federally Recognized Indian Tribes. [Federal Register: Nov. 13, 1996, Vol. 66, No. 220, pgs. 58211–58216]

Information for Tribal Jurisdiction Statistical Areas (TSJAs) in Oklahoma was also included in the table. These areas are defined in conjunction with the Federally-recognized tribes in Oklahoma who have definite land areas under their jurisdiction, but do not have reservation status.

Sources: Mike Radcliffe, Geography Division, Bureau of the Census.

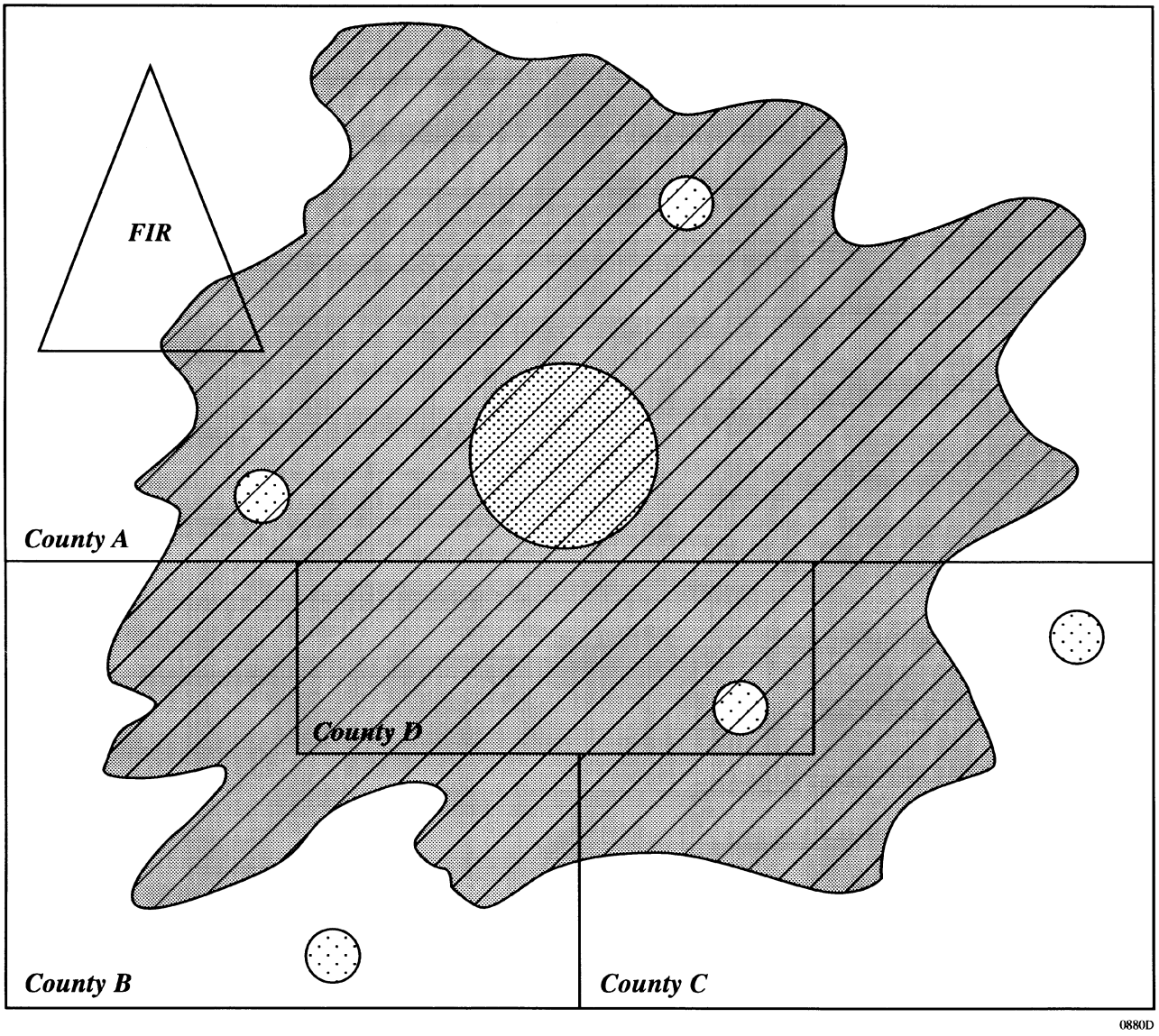
1990 Census of Population and Housing, Summary Population and Housing Characteristics, United States. Tables 9 & 10. [1990 CPH–1–1].

Federal Register: Nov. 13, 1996, Vol. 66, No. 220, pgs. 58211–58216.

BILLING CODE 6560–55–P

Appendix 2 to Preamble

Urbanized Area Illustration



Central Place

Incorporated Place

Federal Indian Reservation (FIR)

Unincorporated "Urbanized Area" Portion of a County

Urbanized Area

BILLING CODE 6560–50–C

Appendix 3 to Preamble—Urbanized Areas of the United States and Puerto Rico (based on 1990 Census data)

Alabama

Anniston
Auburn—Opelika
Birmingham
Columbus, GA—AL
Decatur
Dothan
Florence
Gadsden
Huntsville
Mobile
Montgomery
Tuscaloosa

Alaska

Anchorage

Arizona

Phoenix
Tucson
Yuma, AZ—CA

Arkansas

Fayetteville-Springdale
Fort Smith, AR—OK
Little Rock—North Little Rock
Memphis, TN—AR—MS
Pine Bluff
Texarkana, AR—TX

California

Antioch—Pittsburgh
Bakersfield
Chico
Davis
Fairfield
Fresno
Hemet—San Jacinto
Hesperia—Apple Valley—Victorville
Indio—Coachella
Lancaster—Palmdale
Lodi
Lompoc
Los Angeles
Merced
Modesto
Napa
Oxnard—Ventura
Palm Springs
Redding
Riverside—San Bernardino
Sacramento
Salinas
San Diego
San Francisco—Oakland
San Jose
San Luis Obispo
Santa Barbara
Santa Cruz
Santa Maria
Santa Rosa
Seaside—Monterey
Simi Valley
Stockton
Vacaville
Visalia
Watsonville
Yuba City
Yuma

Colorado

Boulder
Colorado Springs
Denver
Fort Collins
Grand Junction
Greeley
Longmont
Pueblo

Connecticut

Bridgeport—Milford
Bristol
Danbury, CT—NY
Hartford—Middletown
New Britain
New Haven—Meriden
New London—Norwich
Norwalk
Springfield, MA—CT
Stamford, CT—NY
Waterbury
Worcester, MA—CT

Delaware

Dover
Wilmington, DE—NJ—MD—PA

District of Columbia

Washington, DC—MD—VA

Florida

Daytona Beach
Deltona
Fort Lauderdale—Hollywood—Pompano Beach
Fort Myers—Cape Coral
Fort Pierce
Fort Walton Beach
Gainesville
Jacksonville
Kissimmee
Lakeland
Melbourne—Palm Bay
Miami—Hialeah
Naples
Ocala
Orlando
Panama City
Pensacola
Punta Gorda
Sarasota—Bradenton
Spring Hill
Stuart
Tallahassee
Tampa—St. Petersburg—Clearwater
Titusville
Vero Beach
West Palm Beach—Boca Raton—Delray Beach
Winter Haven

Georgia

Albany
Athens
Atlanta
Augusta
Brunswick
Chattanooga
Columbus
Macon
Rome
Savannah
Warner Robins

Hawaii

Honolulu
Kailua

Idaho

Boise City
Idaho Falls
Pocatello

Illinois

Alton
Aurora
Beloit, WI—IL
Bloomington—Normal
Champaign—Urbana
Chicago, IL—Northwestern IN
Crystal Lake
Davenport—Rock Island—Moline, IA—IL
Decatur
Dubuque
Elgin
Joliet
Kankakee
Peoria
Rockford
Round Lake Beach—McHenry, IL—WI
St. Louis, MO—IL
Springfield

Indiana

Anderson
Bloomington
Chicago, IL—Northwestern IN
Elkhart—Goshen
Evansville, IN—KY
Fort Wayne
Indianapolis
Kokomo
Lafayette—West Lafayette
Louisville, KY—IN
Muncie
South Bend—Mishawaka, IN—MI
Terre Haute

Iowa

Cedar Rapids
Davenport—Rock Island—Moline, IA—IL
Des Moines
Dubuque, IA—IL—WI
Iowa City
Omaha, NE—IA
Sioux City, IA—NE—SD
Waterloo—Cedar Falls

Kansas

Kansas City, MO—KS
Lawrence
St. Joseph, MO—KS
Topeka
Wichita

Kentucky

Cincinnati, OH—KY
Clarksville, TN—KY
Evansville, IN—KY
Huntington—Ashland, WV—KY—OH
Lexington-Fayette
Louisville, KY-IN
Owensboro

Louisiana

Alexandria
Baton Rouge
Houma
Lafayette
Lake Charles
Monroe
New Orleans
Shreveport
Slidell

Maine

Bangor

Lewiston—Auburn
Portland
Portsmouth—Dover—Rochester, NH—ME

Maryland

Annapolis
Baltimore
Cumberland
Frederick
Hagerstown, MD—PA—WV
Washington, DC—MD—VA
Wilmington, DE—NJ—MD—PA

Massachusetts

Boston
Brockton
Fall River, MA—RI
Fitchburg—Leominster
Hyannis
Lawrence—Haverhill, MA—NH
Lowell, MA—NH
New Bedford
Pittsfield
Providence—Pawtucket, RI—MA
Springfield, MA—CT
Taunton
Worcester, MA—CT

Michigan

Ann Arbor
Battle Creek
Bay City
Benton Harbor
Detroit
Flint
Grand Rapids
Holland
Jackson
Kalamazoo
Lansing—East Lansing
Muskegon
Port Huron
Saginaw
South Bend—Mishawaka, IN—MI
Toledo, OH-MI

Minnesota

Duluth, MN—WI
Fargo—Moorhead, ND—MN
Grand Forks, ND—MN
La Crosse, WI—MN
Minneapolis—St.Paul
Rochester
St. Cloud

Mississippi

Biloxi—Gulfport
Hattiesburg
Jackson
Memphis, TN—AR—MS
Pascagoula

Missouri

Columbia
Joplin
Kansas City, MO—KS
St. Joseph, MO—KS
St. Louis, MO—IL
Springfield

Montana

Billings
Great Falls
Missoula

Nebraska

Lincoln
Omaha, NE—IA
Sioux City, IA—NE—SD

Nevada

Las Vegas
Reno

New Hampshire

Lawrence—Haverhill, MA—NH
Lowell, MA—NH
Manchester
Nashua
Portsmouth—Dover—Rochester, NH—ME

New Jersey

Allentown—Bethlehem—Easton, PA—NJ
Atlantic City
New York, NY—Northeastern NJ
Philadelphia, PA-NJ
Trenton, NJ—PA
Vineland—Millville
Wilmington, DE—NJ—MD—PA

New Mexico

Albuquerque
El Paso
Las Cruces
Santa Fe

New York

Albany—Schenectady—Troy
Binghamton
Buffalo—Niagara Falls
Danbury, CT—NY
Elmira
Glens Falls
Ithaca
Newburgh
New York, NY—Northeastern NJ
Poughkeepsie
Rochester
Stamford, CT—NY
Syracuse
Utica—Rome

North Carolina

Asheville
Burlington
Charlotte
Durham
Fayetteville
Gastonia
Goldsboro
Greensboro
Greenville
Hickory
High Point
Jacksonville
Kannapolis
Raleigh
Rocky Mount
Wilmington
Winston-Salem

North Dakota

Bismark
Fargo—Moorhead, ND—MN
Grand Forks, ND-MN

Ohio

Akron
Canton
Cincinnati, OH—KY
Cleveland
Columbus
Dayton
Hamilton
Huntington—Ashland, WV—KY—OH
Lima
Lorain—Elyria
Mansfield
Middletown
Newark
Parkersburg, WV—OH
Sharon, PA—OH
Springfield
Steubenville—Weirton, OH—WV—PA
Toledo, OH-MI
Wheeling, WV-OH
Youngstown—Warren

Oklahoma

Fort Smith, AR—OK
Lawton
Oklahoma City
Tulsa

Oregon

Eugene—Springfield
Longview
Medford
Portland—Vancouver, OR—WA
Salem

Pennsylvania

Allentown—Bethlehem—Easton, PA—NJ
Altoona
Erie
Hagerstown, MD—PA—WV
Harrisburg
Johnstown
Lancaster
Monessen
Philadelphia, PA—NJ
Pittsburgh
Pottstown
Reading
Scranton—Wilkes-Barre
Sharon, PA—OH
State College
Steubenville—Weirton, OH—WV—PA
Trenton, NJ—PA
Williamsport
Wilmington, DE—NJ—MD—PA
York

Rhode Island

Fall River, MA—RI
Newport, RI
Providence—Pawtucket, RI—MA

South Carolina

Anderson
Augusta, GA—SC
Charleston
Columbia
Florence
Greenville
Myrtle Beach
Rock Hill
Spartanburg
Sumter

South Dakota

Rapid City
Sioux City, IA—NE—SD
Sioux Falls

Tennessee

Bristol, TN—Bristol, VA
Chattanooga, TN—GA
Clarksville, TN—KY
Jackson
Johnson City

Kingsport, TN—VA
Knoxville
Memphis, TN—AR—MS
Nashville

Texas

Abilene
Amarillo
Austin
Beaumont
Brownsville
Bryan—College Station
Corpus Christi
Dallas—Fort Worth
Denton
El Paso, TX—NM
Galveston
Harlingen
Houston
Killeen
Laredo
Lewisville
Longview
Lubbock
McAllen—Edinburg—Mission
Midland
Odessa
Port Arthur
San Angelo
San Antonio
Sherman—Denison
Temple
Texarkana, TX—Texarkana, AR
Texas City
Tyler
Victoria
Waco
Wichita Falls

Utah

Logan
Ogden
Provo—Orem
Salt Lake City

Vermont

Burlington

Virginia

Bristol, TN—Bristol, VA
Charlottesville
Danville
Fredericksburg
Kingsport, TN—VA
Lynchburg
Norfolk—Virginia Beach—Newport News
Petersburg
Richmond
Roanoke
Washington, DC—MD—VA

Washington

Bellingham
Bremerton
Longview, WA—OR
Olympia
Portland—Vancouver, OR—WA
Richland—Kennewick—Pasco
Seattle
Spokane
Tacoma
Yakima

West Virginia

Charleston
Cumberland, MD—WV
Hagerstown, MD—PA—WV
Huntington—Ashland, WV—KY—OH
Parkersburg, WV—OH
Steubenville—Weirton, OH—WV—PA
Wheeling, WV—OH

Wisconsin

Appleton—Neenah
Beloit, WI—IL
Duluth, MN—WI
Eau Claire
Green Bay
Janesville
Kenosha
La Crosse, WI—MN
Madison
Milwaukee
Oshkosh
Racine
Round Lake Beach—McHenry, IL—WI
Sheboygan
Wausau

Wyoming

Casper
Cheyenne

Puerto Rico

Aquadilla
Arecibo
Caguas
Cayey
Humacao
Mayaguez
Ponce
San Juan
Vega Baja—Manati

Appendix 4 to Preamble

Checklist for No-Exposure Certification for NPDES Storm Water Permitting

Instructions—EPA Form XXX–X

Who May File a No-Exposure Certification

In accordance with the Clean Water Act, all industrial facilities that discharge storm water meeting the definition of storm water associated with industrial activity must apply for coverage under a National Pollutant Discharge Elimination System (NPDES) permit. However, permit coverage is not required at facilities that can certify a ''no-exposure'' condition exists. This document may be used to certify that at the facility described herein, a condition of no-exposure exists. This certification is under the auspices of the EPA only and must be made at least once every five years. Should the industrial activity change such that a condition of no-exposure no longer exists, this certification is no longer valid and coverage under an NPDES storm water permit must be sought.

Definition of No-Exposure

No-exposure exists at an industrial facility when all industrial materials or activities, including, but not limited to, material handling equipment, industrial machinery, raw materials, intermediate products, by-products or waste products, however packaged, are protected by a storm-resistant shelter so as not to be exposed to rain, snow, snowmelt, or runoff. Adequately maintained mobile equipment (trucks, automobiles, trailers or other such general purpose vehicles found at the industrial site which themselves are not industrial machinery or material handling equipment and which are not leaking contaminants or are not otherwise a source of industrial pollutants) may be exposed to precipitation or runoff.

Completing the Form

You must type or print in the spaces provided only. One form must be completed for each facility or site for which you are seeking to certify no-exposure.

Section I. Facility Operator Information

Provide the legal name (no colloquial names) of the person, firm, public organization, or any other entity that operates the facility or site described in this certification. The name of the operator may or may not be the same as the name of the facility. The operator is the legal entity that controls the facility's operation, rather than the plant or site manager. Enter the complete address (P.O. Box numbers OK) and telephone number of the operator.

Section II. Facility/Site Location Information

Enter the facility's or site's official or legal name and complete street address (directional address OK if no street address exists). Do not provide a P.O. Box number as the street address. In addition, provide the latitude and longitude of the facility to the nearest 15 seconds of the approximate center of the site (if you do not know your site's latitude and longitude, call 1–800–USA–MAPS).

Section III. Exposure Checklist

Circle ''Yes'' or ''No'' as appropriate to describe conditions at your facility. For the purposes of this document, ''material'' is defined as any raw material, intermediate product, finished product, by-product or waste product, however packaged. ''Material handling activities'', by definition, include storage, loading and/or unloading, transportation or conveyance of a raw material, intermediate product, finished product, by-product or waste product.

Interpretation of Results

If you answer ''Yes'' to ANY of questions a. through r. in Section III, a potential for exposure exists at your site and you cannot certify a no-exposure condition exists. You must obtain (or already have) coverage under an NPDES Storm Water permit. After obtaining permit coverage, you can institute modifications to eliminate the potential for a discharge of storm water exposed to industrial activity, and then claim no-exposure and terminate coverage under the existing permit.

Section IV. Certification

Federal statutes provide for severe penalties for submitting false information on this application form. Federal regulations require this application to be signed as follows:

For a corporation: by a responsible corporate officer, which means: (i) president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision making functions, or (ii) the manager of one or more manufacturing, production, or operating

facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars) if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures [note, wording subject to change as a result of NPDES streamlining, rnd. II];

For a partnership or sole proprietorship: by a general partner or the proprietor; or

For a municipality, State, Federal, or other public facility: by either a principal executive officer or ranking elected official.

Where To File This Form

Mail the completed form to:

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXX
U.S. Environmental Protection Agency (4203)
401 M St. SW
Washington, DC 20460

BILLING CODE 6560–50–P

CHECKLIST FOR NO-EXPOSURE CERTIFICATION (Continued)

I. Facility Operator Information

Name:		Phone:
Address:		
City:	State:	Zip Code:

II. Facility/Site Location Information

Facility Name:		
Facility Address:		
City:	State:	Zip Code:
County Name:	Latitude:	Longitude:

III. Exposure Checklist

Are any of the following items exposed to precipitation, now or in the foreseeable future, AND is the drainage from these areas discharged from the site to surface waters of the US or to a municipal separate storm sewer system?

a.	vehicles used in material handling (excepting adequately maintained mobile equipment)	Yes	No
b.	industrial machinery or equipment	Yes	No
c.	residue from the cleaning of machinery or equipment	Yes	No
d.	materials associated with vehicular maintenance, cleaning or fueling	Yes	No
e.	materials or products during loading/unloading or transporting activities	Yes	No
f.	materials or products at uncovered loading docks	Yes	No
g.	materials or products stored outdoors (excepting products intended for outside use, e.g., cars)	Yes	No
h.	materials or products handled/stored on roads or railways owned or maintained by the certifier	Yes	No
i.	materials or spill/leak residues accumulated in storm water inlets	Yes	No
j.	residuals on the ground from spills/leaks (including subsurface residuals from percolation)	Yes	No
k.	materials contained in open or deteriorated storage tanks/drums/containers	Yes	No
l.	industrial activities conducted outdoors	Yes	No
m.	materials or products from past outdoor industrial activity	Yes	No
n.	waste material	Yes	No
o.	process wastewater disposed of outdoors (unless otherwise permitted)	Yes	No
p.	particulate matter from roof stacks/vents not otherwise regulated (i.e., under an air quality control permit) and in quantities detectable in the storm water outflow.	Yes	No
q.	visible deposits of residuals near roof or side vents	Yes	No
r.	spills/leaks resulting from maintenance of stacks or air exhaust systems	Yes	No

Have you paved or roofed over a large, formerly exposed, pervious area in order to qualify for no-exposure? Yes No
Please indicate approximately how much area was paved or roofed over from the choices below. ***(Completing this question does not influence your qualifying for the no exposure exemption and is for informational purposes.)***

___ *none* ___ *less than one acre* ___ *one to five acres* ___ *more than five acres*

CHECKLIST FOR NO-EXPOSURE CERTIFICATION (Continued)

IV. Certification

I certify that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the facility identified in this document.

I understand that I am obligated to make this certification once every five years to the NPDES permitting authority and, if requested, to the municipality (or other local government) in which this facility is located providing the facility discharges storm water into the local municipal separate storm sewer system (MS4). I understand that I must seek coverage under an NPDES storm water permit prior to any point-source discharge of exposed storm water from the facility. I understand that I must allow the permitting authority, or municipality where the discharge is into the MS4, to perform inspections to confirm the condition of no-exposure and to make such inspection reports publicly available upon request.

Additionally, I certify under penalty of law this document was prepared under my direction and that qualified personnel gathered and evaluated the information submitted. Based upon my knowledge of the personnel directly involved in gathering the information, the information is true, accurate and complete. I am aware there are significant penalties for providing false information, including the possibility of fine and imprisonment.

Signed: _____ Date: _____

Print Name and Title: _____

BILLING CODE 6560–50–C

Appendix 5 to Preamble—Regulatory Flexibility for Small Entities

A. Regulatory Flexibility for Municipal Storm Sewer Systems (MS4s)

Different Compliance, Reporting, or Timetables That Are Responsive to Resources of Small Entities

NPDES permitting authority would issue general permits instead of requiring individual permits. This flexibility would avoid the high application costs and administrative burden associated with individual permits.

NPDES permitting authority could specify a time period of up to five years for small MS4s to fully develop and implement their program.

Analytic monitoring would not be required.

After the first permit term and subsequent permit terms, submittal of a summary report would only be required in years two and four. Phase I municipalities are currently required to submit a detailed report each year.

Brief reporting format encouraged to facilitate compiling and analyzing data from submitted reports. EPA would develop a model form for this purpose.

Clarifying, Consolidating, or Simplifying Compliance and Reporting Requirements

The proposed rule would avoid duplication in permit requirements by allowing the NPDES permitting authority to incorporate by reference State, Tribal, or local programs under a NPDES general permit. Compliance with these programs would be considered compliance with the NPDES general permit.

The proposed rule would allow the NPDES permitting authority to recognize existing responsibilities among different municipal entities to satisfy obligations for the minimum control measures. For example, a State program may address construction site storm water runoff. Municipalities would be relieved of that obligation and would only be responsible for the remaining minimum control measures.

The proposed rule would allow a small MS4 to satisfy its NPDES permit obligations if another governmental entity is already implementing a minimum control measure in the jurisdiction of the small MS4. The following conditions would need to be met:

1. The particular control measure (or component thereof) is equivalent to what the NPDES permit requires,
2. The other entity is implementing the control measure, and
3. The small MS4 has requested, and the other entity has agreed to accept responsibility for implementation of the control measure on your behalf and to satisfy your permit obligation.

The proposed rule would allow a covered small MS4 to "piggy-back" on to the storm water management program of an adjoining Phase I MS4. A small MS4 would be waived from the application requirements of § 122.26(d)(1)(iii), (iv) and (d)(2)(iii) [discharge characterization] and may satisfy the requirements of § 122.26(d)(1)(v) and (d)(2)(iv) [identifying a management plan] by referencing the adjoining Phase I MS4's storm water management plan.

The proposed rule would accommodate the use of the watershed approach through NPDES general permits that could be issued on a watershed basis. A municipality could develop measures that are tailored to meet their watershed requirements. Municipalities' storm water management program could tie into watershed-wide plans.

Performance Rather Than Design Standards for Small Entities

Small governmental jurisdictions whose MS4s are covered by this proposed rule would be allowed to choose the best management practices (BMPs) to be implemented and the measurable goals for each of the minimum control measures:

1. Public education and outreach on storm water impacts.
2. Public Involvement/Participation.
3. Illicit discharge detection and elimination.

4. Construction site storm water runoff control for sites of one or more acre.

5. Post-construction storm water management in new development and redevelopment for sites of one or more acre.

6. Pollution prevention/good housekeeping for municipal operations.

EPA would provide guidance and would recommend, but not mandate, certain BMPs for some of the minimum control measures listed above.

Small governmental jurisdictions would identify the measurable goals for each of the minimum control measures listed above. In their reports to the NPDES permitting authority, the small MS4s would need to evaluate their progress towards achievement of their identified measurable goals.

Waivers for Small Entities From Coverage

The proposed rule would waiver from coverage Indian Tribes located within an urbanized area and whose population is less than or equal to 1,000 people.

The proposed rule would allow the permitting authority to waive from coverage MS4s owned or operated by small governmental jurisdictions located within an urbanized area and serving a population less than or equal to 1,000 people where the permitting authority determines:

1. Implementation of a TMDL that addresses the pollutants of concern, or

2. Implementation of a comprehensive watershed plan for the water body.

B. Regulatory Flexibility for Construction Activities

Different Compliance, Reporting, or Timetables That Are Responsive to Resources of Small Entities

The proposed rule would give the relevant Director of the NPDES permitting program discretion not to require the submittal of a notice of intent (NOI) for coverage under a NPDES general permit, thereby reducing administrative and financial burden. Currently, all construction sites disturbing greater than 5 acres must submit an NOI.

Clarifying, Consolidating, or Simplifying Compliance and Reporting Requirements

The proposed rule would avoid duplication by allowing the NPDES permitting authority to incorporate by reference State, Tribal, or local programs under a NPDES general permit. Compliance with these programs would be considered compliance with the NPDES general permit.

Performance Rather Than Design Standards for Small Entities

The operator of a covered construction activity would select and implement the BMPs most appropriate for the construction site based on the operator's storm water pollution prevention plan.

Waivers for Small Entities From Coverage

Waivers could be granted based on the use of the revised Universal Soil Loss Equation. Universal Soil Loss Equation (USLE)

(A) *Default/Low-Risk Exemption:* When rainfall energy factor (R from Universal Soil Loss Equation) is less than 2 during periods of construction activity, a permit would not be required.

(B) *Case-by-Case Determination:* A permit would not be required for sites having an annual soil loss less than 2 tons/acre/year.

The NPDES permitting authority could waive from coverage construction activities disturbing from 1 acre up to 5 acres of land where the permitting authority determines that storm water controls are not needed based on:

1. Implementation of a TMDL that addresses the pollutants of concern, or

2. Implementation of a comprehensive watershed plan for the water body.

C. Regulatory Flexibility for Industrial/Commercial Facilities

Waivers for Small Entities From Coverage

The proposed rule would provide a ''no-exposure'' waiver provision for Phase I industrial/commercial facilities. Those facilities seeking this provision would simply need to complete a self-certification form.

Appendix 6 of Preamble—Incorporated Places and Counties Proposed To Be Automatically Designated Under the Storm Water Phase II Proposed Rule (From the 1990 Census of Population and Housing—U.S. Census Bureau)

(This List May Change With the Decennial Census)

AL Anniston
AL Attalla
AL Auburn
AL Autauga County
AL Blue Mountain
AL Calhoun County
AL Colbert County
AL Dale County
AL Decatur
AL Dothan
AL Etowah County
AL Flint City
AL Florence
AL Gadsden
AL Glencoe
AL Grimes
AL Hartselle
AL Hobson City
AL Hokes Bluff
AL Houston County
AL Kinsey
AL Lauderdale County
AL Lee County
AL Madison County
AL Midland City
AL Montgomery County
AL Morgan County
AL Muscle Shoals
AL Napier Field
AL Northport
AL Opelika
AL Oxford
AL Phenix City
AL Prattville
AL Priceville
AL Rainbow City
AL Russell County
AL Sheffield
AL Southside
AL Sylvan Springs
AL Talladega County
AL Tuscaloosa
AL Tuscaloosa County
AL Tuscumbia
AL Weaver

AZ Apache Junction
AZ Chandler
AZ El Mirage
AZ Gilbert
AZ Guadalupe
AZ Maricopa County
AZ Oro Valley
AZ Paradise Valley
AZ Peoria
AZ Pinal County
AZ South Tucson
AZ Surprise
AZ Tolleson
AZ Youngtown
AZ Yuma
AZ Yuma County

AR Alexander
AR Barling
AR Benton County
AR Cammack Village
AR Crawford County
AR Crittenden County
AR Farmington
AR Fayetteville
AR Fort Smith
AR Greenland
AR Jacksonville
AR Jefferson County
AR Johnson
AR Marion
AR Miller County
AR North Little Rock
AR Pine Bluff
AR Pulaski County
AR Saline County
AR Shannon Hills
AR Sherwood
AR Springdale
AR Sunset
AR Texarkana
AR Van Buren
AR Washington County
AR West Memphis
AR White Hall

CA Apple Valley
CA Belvedere
CA Benicia
CA Brentwood
CA Butte County
CA Capitola
CA Carmel-by-the-Sea
CA Carpinteria
CA Ceres
CA Chico
CA Compton
CA Corte Madera
CA Cotati
CA Davis
CA Del Rey Oaks
CA Fairfax
CA Hesperia
CA Imperial County
CA Lakewood
CA Lancaster
CA Larkspur
CA Lodi
CA Lompoc
CA Marin County
CA Marina
CA Marysville
CA Merced
CA Merced County
CA Mill Valley
CA Monterey
CA Monterey County
CA Morgan Hill

CA Napa
CA Napa County
CA Novato
CA Pacific Grove
CA Palm Desert
CA Palmdale
CA Piedmont
CA Redding
CA Rocklin
CA Rohnert Park
CA Roseville
CA Ross
CA San Anselmo
CA San Buenaventura (Ventura)
CA San Francisco
CA San Joaquin County
CA San Luis Obispo
CA San Luis Obispo County
CA San Rafael
CA Sand City
CA Santa Barbara
CA Santa Barbara County
CA Santa Cruz
CA Santa Cruz County
CA Santa Maria
CA Sausalito
CA Scotts Valley
CA Seaside
CA Shasta County
CA Solano County
CA Sonoma County
CA Stanislaus County
CA Sutter County
CA Tiburon
CA Tulare County
CA Vacaville
CA Victorville
CA Villa Park
CA Visalia
CA Watsonville
CA West Sacramento
CA Yolo County
CA Yuba City
CA Yuba County

CO Adams County
CO Arvada
CO Boulder
CO Boulder County
CO Bow Mar
CO Broomfield
CO Cherry Hills Village
CO Columbine Valley
CO Commerce City
CO Douglas County
CO Edgewater
CO El Paso County
CO Englewood
CO Evans
CO Federal Heights
CO Fort Collins
CO Fountain
CO Garden City
CO Glendale
CO Golden
CO Grand Junction
CO Greeley
CO Greenwood Village
CO Jefferson County
CO La Salle
CO Lakeside
CO Larimer County
CO Littleton
CO Longmont
CO Manitou Springs
CO Mesa County
CO Mountain View
CO Northglenn
CO Pueblo
CO Pueblo County
CO Sheridan
CO Thornton
CO Weld County
CO Westminster
CO Wheat Ridge

CT Ansonia
CT Bridgeport
CT Bristol
CT Danbury
CT Derby
CT Fairfield County
CT Groton
CT Hartford
CT Hartford County
CT Litchfield County
CT Meriden
CT Middlesex County
CT Middletown
CT Milford
CT Naugatuck
CT New Britain
CT New Haven
CT New Haven County
CT New London
CT New London County
CT Norwalk
CT Norwich
CT Shelton
CT Tolland County
CT Waterbury
CT West Haven
CT Windham County
CT Woodmont

DE Camden
DE Dover
DE Kent County
DE Newark
DE Wyoming

FL Alachua County
FL Baldwin
FL Bay County
FL Belleair Shore
FL Biscayne Park
FL Brevard County
FL Callaway
FL Cape Canaveral
FL Cedar Grove
FL Charlotte County
FL Cinco Bayou
FL Clay County
FL Cocoa
FL Cocoa Beach
FL Collier County
FL Daytona Beach
FL Daytona Beach Shores
FL Destin
FL Edgewater
FL El Portal
FL FLorida City
FL Fort Pierce
FL Fort Walton Beach
FL Gainesville
FL Gulf Breeze
FL Hernando County
FL Hillsboro Beach
FL Holly Hill
FL Indialantic
FL Indian Harbour Beach
FL Indian River County
FL Indian River Shores
FL Indian Shores
FL Kissimmee
FL Lazy Lake
FL Lynn Haven
FL Malabar
FL Marion County
FL Martin County
FL Mary Esther
FL Melbourne
FL Melbourne Beach
FL Melbourne Village
FL Naples
FL New Smyrna Beach
FL Niceville
FL Ocala
FL Ocean Breeze Park
FL Okaloosa County
FL Orange Park
FL Ormond Beach
FL Osceola County
FL Palm Bay
FL Panama City
FL Parker
FL Ponce Inlet
FL Port Orange
FL Port St. Lucie
FL Punta Gorda
FL Rockledge
FL Santa Rosa County
FL Satellite Beach
FL Sewall's Point
FL Shalimar
FL South Daytona
FL Springfield
FL St. Johns County
FL St. Lucie
FL St. Lucie County
FL Stuart
FL Sweetwater
FL Titusville
FL Valparaiso
FL Vero Beach
FL Virginia Gardens
FL Volusia County
FL Walton County
FL Weeki Wachee
FL West Melbourne
FL Windermere

GA Albany
GA Athens
GA Bartow County
GA Bibb City
GA Brunswick
GA Catoosa County
GA Centerville
GA Chattahoochee County
GA Cherokee County
GA Chickamauga
GA Clarke County
GA Columbia County
GA Columbus
GA Conyers
GA Dade County
GA Dougherty County
GA Douglas County
GA Douglasville
GA Fayette County
GA Floyd County
GA Fort Oglethorpe
GA Glynn County
GA Grovetown
GA Henry County
GA Houston County
GA Jones County
GA Lee County
GA Lookout Mountain
GA Mountain Park
GA Oconee County

GA Payne
GA Rockdale County
GA Rome
GA Rossville
GA Stockbridge
GA Vernonburg
GA Walker County
GA Warner Robins
GA Winterville
GA Woodstock
ID Ada County
ID Ammon
ID Bannock County
ID Bonneville County
ID Chubbuck
ID Garden City
ID IDaho Falls
ID Iona
ID Pocatello
IL Addison
IL Algonquin
IL Alorton
IL Alsip
IL Alton
IL Antioch
IL Arlington Heights
IL Aroma Park
IL Aurora
IL Bannockburn
IL Barrington
IL Bartlett
IL Bartonville
IL Batavia
IL Beach Park
IL Bedford Park
IL Belleville
IL Bellevue
IL Bellwood
IL Bensenville
IL Berkeley
IL Berwyn
IL Bethalto
IL Bloomingdale
IL Bloomington
IL Blue Island
IL Bolingbrook
IL Bourbonnais
IL Bradley
IL Bridgeview
IL Broadview
IL Brookfield
IL Brooklyn
IL Buffalo Grove
IL Burbank
IL Burnham
IL Burr Ridge
IL Cahokia
IL Calumet City
IL Calumet Park
IL Carbon Cliff
IL Carol Stream
IL Carpentersville
IL Cary
IL Caseyville
IL Centreville
IL Champaign
IL Champaign County
IL Cherry Valley
IL Chicago
IL Chicago Heights
IL Chicago Ridge
IL Cicero
IL Clarendon Hills
IL Coal Valley
IL Collinsville
IL Colona
IL Columbia
IL Cook County
IL Country Club Hills
IL Countryside
IL Crest Hill
IL Crestwood
IL Crete
IL Creve Coeur
IL Crystal Lake
IL Darien
IL Decatur
IL Deer Park
IL Deerfield
IL Des Plaines
IL Dixmoor
IL Dolton
IL Downers Grove
IL Dupo
IL DuPage County
IL East Alton
IL East Dubuque
IL East Dundee
IL East Hazel Crest
IL East Moline
IL East Peoria
IL East St. Louis
IL Edwardsville
IL Elgin
IL Elk Grove Village
IL Elmhurst
IL Elmwood Park
IL Evanston
IL Evergreen Park
IL Fairmont City
IL Fairview Heights
IL Flossmoor
IL Ford Heights
IL Forest Park
IL Forest View
IL Forsyth
IL Fox Lake
IL Fox River Grove
IL Frankfort
IL Franklin Park
IL Geneva
IL Gilberts
IL Glen Carbon
IL Glen Ellyn
IL Glencoe
IL Glendale Heights
IL Glenview
IL Glenwood
IL Golf
IL Grandview
IL Granite City
IL Grayslake
IL Green Oaks
IL Green Rock
IL Gurnee
IL Hainesville
IL Hampton
IL Hanover Park
IL Harristown
IL Hartford
IL Harvey
IL Harwood Heights
IL Hawthorn Woods
IL Hazel Crest
IL Henry County
IL Hickory Hills
IL Highland Park
IL Highwood
IL Hillside
IL Hinsdale
IL Hodgkins
IL Hoffman Estates
IL Hometown
IL Homewood
IL Indian Creek
IL Indian Head Park
IL Inverness
IL Itasca
IL Jerome
IL Jo Daviess County
IL Joliet
IL Justice
IL Kane County
IL Kankakee
IL Kankakee County
IL Kendall County
IL Kenilworth
IL Kildeer
IL La Grange
IL La Grange Park
IL Lake in the Hills
IL Lake Barrington
IL Lake Bluff
IL Lake County
IL Lake Forest
IL Lake Villa
IL Lake Zurich
IL Lakemoor
IL Lakewood
IL Lansing
IL Leland Grove
IL Libertyville
IL Lincolnshire
IL Lincolnwood
IL Lindenhurst
IL Lisle
IL Lockport
IL Lombard
IL Long Grove
IL Loves Park
IL Lynwood
IL Lyons
IL Machesney Park
IL Macon County
IL Madison
IL Madison County
IL Markham
IL Marquette Heights
IL Maryville
IL Matteson
IL Maywood
IL McCook
IL McCullom Lake
IL McHenry
IL McHenry County
IL McLean County
IL Melrose Park
IL Merrionette Park
IL Midlothian
IL Milan
IL Moline
IL Monroe County
IL Montgomery
IL Morton
IL Morton Grove
IL Mount Prospect
IL Mount Zion
IL Mundelein
IL Naperville
IL National City
IL New Lenox
IL New Millford
IL Niles
IL Normal
IL Norridge
IL North Aurora
IL North Barrington
IL North Chicago

IL North Pekin
IL North Riverside
IL Northbrook
IL Northfield
IL Northlake
IL Norwood
IL O'Fallon
IL Oak Brook
IL Oak Forest
IL Oak Grove
IL Oak Lawn
IL Oak Park
IL Oakbrook Terrace
IL Oakwood Hills
IL Olympia Fields
IL Orland Hills
IL Orland Park
IL Oswego
IL Palatine
IL Palos Heights
IL Palos Hills
IL Palos Park
IL Park City
IL Park Forest
IL Park Ridge
IL Pekin
IL Peoria
IL Peoria County
IL Peoria Heights
IL Phoenix
IL Plainfield
IL Pontoon Beach
IL Posen
IL Prospect Heights
IL Richton Park
IL River Forest
IL River Grove
IL Riverdale
IL Riverside
IL Riverwoods
IL Robbins
IL Rock Island
IL Rock Island County
IL Rockdale
IL Rockton
IL Rolling Meadows
IL Romeoville
IL Roscoe
IL Roselle
IL Rosemont
IL Round Lake
IL Round Lake Beach
IL Round Lake Heights
IL Round Lake Park
IL Roxana
IL Sangamon County
IL Sauget
IL Sauk Village
IL Savoy
IL Schaumburg
IL Schiller Park
IL Shiloh
IL Shorewood
IL Silvis
IL Skokie
IL Sleepy Hollow
IL South Beloit
IL South Chicago Heights
IL South Elgin
IL South Holland
IL South Roxana
IL Southern View
IL Springfield
IL St. Charles
IL St. Clair County
IL Steger
IL Stickney
IL Stone Park
IL Streamwood
IL Summit
IL Sunnyside
IL Swansea
IL Tazewell County
IL Thornton
IL Tinley Park
IL Tower Lakes
IL Troy
IL University Park
IL Urbana
IL Venice
IL Vernon Hills
IL Villa Park
IL Warrenville
IL Washington
IL Washington Park
IL Waukegan
IL West Chicago
IL West Dundee
IL Westchester
IL Western Springs
IL Westmont
IL Wheaton
IL Wheeling
IL Will County
IL Willow Springs
IL Willowbrook
IL Wilmette
IL Winfield
IL Winnebago County
IL Winnetka
IL Winthrop Harbor
IL Wood Dale
IL Wood River
IL Woodridge
IL Worth
IL Zion
IN Allen County
IN Anderson
IN Beech Grove
IN Bloomington
IN Boone County
IN Carmel
IN Castleton
IN Chesterfield
IN Chesterton
IN Clark County
IN Clarksville
IN Clermont
IN Country Club Heights
IN Crown Point
IN Crows Nest
IN Cumberland
IN Daleville
IN Delaware County
IN Dyer
IN East Chicago
IN Edgewood
IN Elkhart
IN Elkhart County
IN Evansville
IN Fishers
IN Floyd County
IN Gary
IN Goshen
IN Greenwood
IN Griffith
IN Hamilton County
IN Hammond
IN Hancock County
IN Hendricks County
IN Highland
IN Hobart
IN Homecroft
IN Howard County
IN Indian Village
IN Jeffersonville
IN Johnson County
IN Kokomo
IN Lafayette
IN Lake County
IN Lake Station
IN Lawrence
IN Madison County
IN Meridian Hills
IN Merrillville
IN Mishawaka
IN Monroe County
IN Muncie
IN Munster
IN New Albany
IN New Chicago
IN New Haven
IN New Whiteland
IN Newburgh
IN North Crows Nest
IN Ogden Dunes
IN Osceola
IN Portage
IN Porter
IN Porter County
IN River Forest
IN Rocky Ripple
IN Roseland
IN Schererville
IN Seelyville
IN Sellersburg
IN Selma
IN South Bend
IN Southport
IN Speedway
IN Spring Hill
IN St. John
IN St. Joseph County
IN Terre Haute
IN Tippecanoe County
IN Vanderburgh County
IN Vigo County
IN Warren Park
IN Warrick County
IN West Lafayette
IN West Terre Haute
IN Westfield
IN Whiteland
IN Whiting
IN Williams Creek
IN Woodlawn Heights
IN Wynnedale
IN Yorktown
IN Zionsville
IA Altoona
IA Asbury
IA Bettendorf
IA Black Hawk County
IA Buffalo
IA Carter Lake
IA Cedar Falls
IA Clive
IA Coralville
IA Council Bluffs
IA Dubuque
IA Dubuque County
IA Elk Run Heights
IA Evansdale
IA Hiawatha
IA Iowa City
IA Johnson County
IA Johnston
IA Le Claire

IA Linn County
IA Marion
IA Norwalk
IA Panorama Park
IA Pleasant Hill
IA Polk County
IA Pottawattamie County
IA Raymond
IA Riverdale
IA Robins
IA Scott County
IA Sergeant Bluff
IA Sioux City
IA University Heights
IA Urbandale
IA Warren County
IA Waterloo
IA West Des Moines
IA Windsor Heights
KS Bel Aire
KS Countryside
KS Doniphan County
KS Douglas County
KS Eastborough
KS Elwood
KS Fairway
KS Haysville
KS Johnson County
KS Kechi
KS Lake Quivira
KS Lawrence
KS Leawood
KS Lenexa
KS Merriam
KS Mission
KS Mission Hills
KS Mission Woods
KS Olathe
KS Park City
KS Prairie Village
KS Roeland Park
KS Sedgwick County
KS Shawnee
KS Shawnee County
KS Westwood
KS Westwood Hills
KY Alexandria
KY Anchorage
KY Ashland
KY Audubon Park
KY Bancroft
KY Barbourmeade
KY Beechwood Village
KY Bellefonte
KY Bellemeade
KY Bellevue
KY Bellewood
KY Blue Ridge Manor
KY Boone County
KY Boyd County
KY Briarwood
KY Broad Fields
KY Broeck Pointe
KY Bromley
KY Brownsboro Farm
KY Brownsboro Village
KY Bullitt County
KY Cambridge
KY Campbell County
KY Catlettsburg
KY Cherrywood Village
KY Christian County
KY Cold Spring
KY Covington
KY Creekside
KY Crescent Park
KY Crescent Springs
KY Crestview
KY Crestview Hills
KY Crossgate
KY Daviess County
KY Dayton
KY Douglass Hills
KY Druid Hills
KY Edgewood
KY Elsmere
KY Erlanger
KY Fairmeade
KY Fairview
KY Flatwoods
KY Florence
KY Forest Hills
KY Fort Mitchell
KY Fort Thomas
KY Fort Wright
KY Fox Chase
KY Glenview
KY Glenview Hills
KY Glenview Manor
KY Goose Creek
KY Graymoor-Devondale
KY Green Spring
KY Greenup County
KY Hebron Estates
KY Henderson
KY Henderson County
KY Hickory Hill
KY Highland Heights
KY Hills and Dales
KY Hillview
KY Hollow Creek
KY Hollyvilla
KY Houston Acres
KY Hunters Hollow
KY Hurstbourne
KY Hurstbourne Acres
KY Independence
KY Indian Hills
KY Indian Hills Cherokee Section
KY Jeffersontown
KY Jessamine County
KY Keeneland
KY Kenton County
KY Kenton Vale
KY Kingsley
KY Lakeside Park
KY Langdon Place
KY Latonia Lakes
KY Lincolnshire
KY Ludlow
KY Lyndon
KY Lynnview
KY Manor Creek
KY Maryhill Estates
KY Meadow Vale
KY Meadowbrook Farm
KY Meadowview Estates
KY Melbourne
KY Middletown
KY Minor Lane Heights
KY Mockingbird Valley
KY Moorland
KY Murray Hill
KY Newport
KY Norbourne Estates
KY Northfield
KY Norwood
KY Oak Grove
KY Old Brownsboro Place
KY Owensboro
KY Park Hills
KY Parkway Village
KY Pioneer Village
KY Plantation
KY Plymouth Village
KY Poplar Hills
KY Prospect
KY Raceland
KY Richlawn
KY Riverwood
KY Robinswood
KY Rolling Fields
KY Rolling Hills
KY Russell
KY Seneca Gardens
KY Shively
KY Silver Grove
KY South Park View
KY Southgate
KY Spring Mill
KY Spring Valley
KY Springlee
KY St. Matthews
KY St. Regis Park
KY Strathmoor Gardens
KY Strathmoor Manor
KY Strathmoor Village
KY Sycamore
KY Taylor Mill
KY Ten Broeck
KY Thornhill
KY Villa Hills
KY Watterson Park
KY Wellington
KY West Buechel
KY Westwood
KY Whipps Millgate
KY Wilder
KY Wildwood
KY Winding Falls
KY Windy Hills
KY Woodland Hills
KY Woodlawn
KY Woodlawn Park
KY Worthington
KY Wurtland
LA Alexandria
LA Baker
LA Ball
LA Bossier City
LA Bossier Parish
LA Broussard
LA Caddo Parish
LA Calcasieu Parish
LA Carencro
LA Denham Springs
LA East Baton Rouge Parish
LA Houma
LA Lafayette
LA Lafayette Parish
LA Lafourche Parish
LA Lake Charles
LA Livingston Parish
LA Monroe
LA Ouachita Parish
LA Pineville
LA Plaquemines Parish
LA Port Allen
LA Rapides Parish
LA Richwood
LA Scott
LA Slidell
LA St. Bernard Parish
LA St. Charles Parish
LA St. Tammany Parish
LA Sulphur
LA Terrebonne Parish
LA West Baton Rouge Parish

LA West Monroe
LA Westlake
LA Zachary

ME Androscoggin County
ME Auburn
ME Bangor
ME Brewer
ME Cumberland County
ME Lewiston
ME Old Town
ME Penobscot County
ME Portland
ME South Portland
ME Westbrook
ME York County

MD Allegany County
MD Annapolis
MD Bel Air
MD Berwyn Heights
MD Bladensburg
MD Bowie
MD Brentwood
MD Brookeville
MD Capitol Heights
MD Cecil County
MD Cheverly
MD Chevy Chase
MD Chevy Chase Section Five
MD Chevy Chase Section Three
MD Chevy Chase Village
MD College Park
MD Colmar Manor
MD Cottage City
MD Cumberland
MD District Heights
MD Edmonston
MD Elkton
MD Fairmount Heights
MD Forest Heights
MD Frederick
MD Frostburg
MD Funkstown
MD Gaithersburg
MD Garrett Park
MD Glen Echo
MD Glenarden
MD Greenbelt
MD Hagerstown
MD Highland Beach
MD Hyattsville
MD Kensington
MD Landover Hills
MD Laurel
MD Martin's Additions
MD Morningside
MD Mount Rainier
MD New Carrollton
MD North Brentwood
MD Riverdale
MD Rockville
MD Seat Pleasant
MD Smithsburg
MD Somerset
MD Takoma Park
MD University Park
MD Walkersville
MD Washington Grove
MD Williamsport

MA Attleboro
MA Barnstable County
MA Berkshire County
MA Beverly
MA Bristol County
MA Brockton
MA Cambridge
MA Chelsea
MA Chicopee
MA Essex County
MA Everett
MA Fall River
MA Fitchburg
MA Gloucester
MA Hampden County
MA Hampshire County
MA Haverhill
MA Holyoke
MA Lawrence
MA Leominster
MA Lowell
MA Lynn
MA Malden
MA Marlborough
MA Medford
MA Melrose
MA Middlesex County
MA New Bedford
MA Newton
MA Norfolk County
MA Northampton
MA Peabody
MA Pittsfield
MA Plymouth County
MA Quincy
MA Revere
MA Salem
MA Somerville
MA Springfield
MA Suffolk County
MA Taunton
MA Waltham
MA Westfield
MA Woburn
MA Worcester County

MI Allegan County
MI Allen Park
MI Auburn Hills
MI Battle Creek
MI Bay City
MI Bay County
MI Belleville
MI Benton Harbor
MI Berkley
MI Berrien County
MI Beverly Hills
MI Bingham Farms
MI Birmingham
MI Bloomfield Hills
MI Burton
MI Calhoun County
MI Cass County
MI Center Line
MI Clarkston
MI Clawson
MI Clinton County
MI Clio
MI Davison
MI Dearborn
MI Dearborn Heights
MI Detroit
MI East Detroit
MI East Grand Rapids
MI East Lansing
MI Eaton County
MI Ecorse
MI Essexville
MI Farmington
MI Farmington Hills
MI Ferndale
MI Flat Rock
MI Flushing
MI Franklin
MI Fraser
MI Garden City
MI Genesee County
MI Gibraltar
MI Grand Blanc
MI Grandville
MI Grosse Pointe
MI Grosse Pointe Farms
MI Grosse Pointe Park
MI Grosse Pointe Shores
MI Grosse Pointe Woods
MI Hamtramck
MI Harper Woods
MI Hazel Park
MI Highland Park
MI Holland
MI Hudsonville
MI Huntington Woods
MI Ingham County
MI Inkster
MI Jackson
MI Jackson County
MI Kalamazoo
MI Kalamazoo County
MI Keego Harbor
MI Kent County
MI Kentwood
MI Lake Angelus
MI Lansing
MI Lathrup Village
MI Lincoln Park
MI Livonia
MI Macomb County
MI Madison Heights
MI Marysville
MI Melvindale
MI Monroe County
MI Mount Clemens
MI Mount Morris
MI Muskegon
MI Muskegon County
MI Muskegon Heights
MI New Baltimore
MI Niles
MI North Muskegon
MI Northville
MI Norton Shores
MI Novi
MI Oak Park
MI Oakland County
MI Orchard Lake Village
MI Ottawa County
MI Parchment
MI Pleasant Ridge
MI Plymouth
MI Pontiac
MI Port Huron
MI Portage
MI River Rouge
MI Riverview
MI Rochester
MI Rochester Hills
MI Rockwood
MI Romulus
MI Roosevelt Park
MI Roseville
MI Royal Oak
MI Saginaw
MI Saginaw County
MI Shoreham
MI South Rockwood
MI Southfield
MI Southgate
MI Springfield
MI St. Clair
MI St. Clair County

MI St. Clair Shores
MI St. Joseph
MI Stevensville
MI Swartz Creek
MI Sylvan Lake
MI Taylor
MI Trenton
MI Troy
MI Utica
MI Walker
MI Walled Lake
MI Washtenaw County
MI Wayne
MI Wayne County
MI Westland
MI Wixom
MI Wolverine Lake
MI Woodhaven
MI Wyandotte
MI Wyoming
MI Ypsilanti
MI Zeeland
MI Zilwaukee

MN Andover
MN Anoka
MN Apple Valley
MN Arden Hills
MN Benton County
MN Birchwood Village
MN Blaine
MN Bloomington
MN Brooklyn Center
MN Brooklyn Park
MN Burnsville
MN Champlin
MN Chanhassen
MN Circle Pines
MN Clay County
MN Coon Rapids
MN Cottage Grove
MN Crystal
MN Dayton
MN Deephaven
MN Dilworth
MN Duluth
MN Eagan
MN East Grand Forks
MN Eden Prairie
MN Excelsior
MN Falcon Heights
MN Farmington
MN Fridley
MN Gem Lake
MN Golden Valley
MN Greenwood
MN Ham Lake
MN Hennepin County
MN Hermantown
MN Hilltop
MN Hopkins
MN Houston County
MN Inver Grove Heights
MN La Crescent
MN Lake Elmo
MN Lakeville
MN Landfall
MN Lauderdale
MN Lexington
MN Lilydale
MN Lino Lakes
MN Little Canada
MN Long Lake
MN Loretto
MN Mahtomedi
MN Maple Grove
MN Maple Plain
MN Maplewood
MN Medicine Lake
MN Medina
MN Mendota
MN Mendota Heights
MN Minnetonka
MN Minnetonka Beach
MN Minnetrista
MN Moorhead
MN Mound
MN Mounds View
MN New Brighton
MN New Hope
MN Newport
MN North Oaks
MN North St. Paul
MN Oakdale
MN Olmsted County
MN Orono
MN Osseo
MN Plymouth
MN Prior Lake
MN Proctor
MN Ramsey
MN Ramsey County
MN Robbinsdale
MN Rochester
MN Rosemount
MN Roseville
MN Sartell
MN Sauk Rapids
MN Savage
MN Scott County
MN Sherburne County
MN Shoreview
MN Shorewood
MN South St. Paul
MN Spring Lake Park
MN Spring Park
MN St. Anthony
MN St. Cloud
MN St. Louis County
MN St. Paul Park
MN Stearns County
MN Sunfish Lake
MN Tonka Bay
MN Vadnais Heights
MN Victoria
MN Waite Park
MN WA County
MN Wayzata
MN West St. Paul
MN White Bear Lake
MN Willernie
MN Woodbury
MN Woodland

MS Bay St. Louis
MS Biloxi
MS Brandon
MS Clinton
MS D'Iberville
MS DeSoto County
MS Flowood
MS Forrest County
MS Gautier
MS Gulfport
MS Hancock County
MS Harrison County
MS Hattiesburg
MS Hinds County
MS Horn Lake
MS Jackson County
MS Lamar County
MS Long Beach
MS Madison
MS Madison County
MS Moss Point
MS Ocean Springs
MS Pascagoula
MS Pass Christian
MS Pearl
MS Petal
MS Rankin County
MS Richland
MS Ridgeland
MS Southaven
MS Waveland

MO Airport Drive
MO Andrew County
MO Arnold
MO Avondale
MO Ballwin
MO Battlefield
MO Bel-Nor
MO Bel-Ridge
MO Bella Villa
MO Bellefontaine Neighbors
MO Bellerive
MO Belton
MO Berkeley
MO Beverly Hills
MO Birmingham
MO Black Jack
MO Blue Springs
MO Boone County
MO Breckenridge Hills
MO Brentwood
MO Bridgeton
MO Buchanan County
MO Calverton Park
MO Carl Junction
MO Carterville
MO Cass County
MO Charlack
MO Chesterfield
MO Clarkson Valley
MO Claycomo
MO Clayton
MO Cliff Village
MO Columbia
MO Cool Valley
MO Cottleville
MO Country Club
MO Country Club Hills
MO Country Life Acres
MO Crestwood
MO Creve Coeur
MO Crystal Lake Park
MO Dellwood
MO Dennis Acres
MO Des Peres
MO Duquesne
MO Edmundson
MO Ellisville
MO Fenton
MO Ferguson
MO Flordell Hills
MO Florissant
MO Frontenac
MO Gladstone
MO Glen Echo Park
MO Glenaire
MO Glendale
MO Grandview
MO Grantwood Village
MO Greendale
MO Greene County
MO Hanley Hills
MO Hazelwood
MO Hillsdale
MO Houston Lake
MO Huntleigh

MO Iron Gates
MO Jackson County
MO Jasper County
MO Jefferson County
MO Jennings
MO Joplin
MO Kimmswick
MO Kinloch
MO Kirkwood
MO Ladue
MO Lake St.Louis
MO Lake Tapawingo
MO Lake Waukomis
MO Lakeshire
MO Leawood
MO Lee's Summit
MO Liberty
MO Mac Kenzie
MO Manchester
MO Maplewood
MO Marlborough
MO Maryland Heights
MO Moline Acres
MO Normandy
MO North KS City
MO Northmoor
MO Northwoods
MO Norwood Court
MO O'Fallon
MO Oakland
MO Oakland Park
MO Oaks
MO Oakview
MO Oakwood
MO Oakwood Park
MO Olivette
MO Overland
MO Pagedale
MO Parkdale
MO Parkville
MO Pasadena Hills
MO Pasadena Park
MO Pine Lawn
MO Platte County
MO Platte Woods
MO Pleasant Valley
MO Randolph
MO Raymore
MO Raytown
MO Redings Mill
MO Richmond Heights
MO Riverside
MO Riverview
MO Rock Hill
MO Saginaw
MO Shoal Creek Drive
MO Shrewsbury
MO Silver Creek
MO St. Ann
MO St. Charles
MO St. Charles County
MO St. George
MO St. John
MO St. Joseph
MO St. Louis
MO St. Louis County
MO St. Peters
MO Sugar Creek
MO Sunset Hills
MO Sycamore Hills
MO Town and Country
MO Twin Oaks
MO Unity Village
MO University City
MO Uplands Park
MO Valley Park
MO Velda Village
MO Velda Village Hills
MO Vinita Park
MO Vinita Terrace
MO Warson Woods
MO Weatherby Lake
MO Webb City
MO Webster Groves
MO Wellston
MO Westwood
MO Wilbur Park
MO Winchester
MO Woodson Terrace

MT Billings
MT Cascade County
MT Great Falls
MT Missoula
MT Missoula County
MT Yellowstone County

NE Bellevue
NE Boys Town
NE Dakota County
NE Douglas County
NE La Vista
NE Lancaster County
NE Papillion
NE Ralston
NE Sarpy County
NE South Sioux City

NH Dover
NH Hillsborough County
NH Manchester
NH Merrimack County
NH Nashua
NH Portsmouth
NH Rochester
NH Rockingham County
NH Somersworth
NH Strafford County

NJ Absecon
NJ Allendale
NJ Allenhurst
NJ Alpha
NJ Alpine
NJ Asbury Park
NJ Atlantic City
NJ Atlantic County
NJ Atlantic Highlands
NJ Audubon
NJ Audubon Park
NJ Avon-by-the-Sea
NJ Barrington
NJ Bay Head
NJ Bayonne
NJ Beachwood
NJ Bellmawr
NJ Belmar
NJ Bergen County
NJ Bergenfield
NJ Berlin
NJ Bernardsville
NJ Beverly
NJ Bloomingdale
NJ Bogota
NJ Boonton
NJ Bordentown
NJ Bound Brook
NJ Bradley Beach
NJ Brielle
NJ Brigantine
NJ Brooklawn
NJ Buena
NJ Burlington
NJ Burlington County
NJ Butler
NJ Camden
NJ Camden County
NJ Cape May County
NJ Carlstadt
NJ Carteret
NJ Chatham
NJ Chesilhurst
NJ Clayton
NJ Clementon
NJ Cliffside Park
NJ Clifton
NJ Closter
NJ Collingswood
NJ Cresskill
NJ Cumberland County
NJ Deal
NJ Demarest
NJ Dover
NJ Dumont
NJ Dunellen
NJ East Newark
NJ East Orange
NJ East Rutherford
NJ Eatontown
NJ Edgewater
NJ Elizabeth
NJ Elmwood Park
NJ Emerson
NJ Englewood
NJ Englewood Cliffs
NJ Englishtown
NJ Essex County
NJ Fair Haven
NJ Fair Lawn
NJ Fairview
NJ Fanwood
NJ Fieldsboro
NJ Florham Park
NJ Fort Lee
NJ Franklin Lakes
NJ Freehold
NJ Garfield
NJ Garwood
NJ Gibbsboro
NJ Glassboro
NJ Glen Rock
NJ Gloucester City
NJ Gloucester County
NJ Guttenberg
NJ Hackensack
NJ Haddon Heights
NJ Haddonfield
NJ Haledon
NJ Harrington Park
NJ Harrison
NJ Hasbrouck Heights
NJ Haworth
NJ Hawthorne
NJ Helmetta
NJ Hi-Nella
NJ Highland Park
NJ Highlands
NJ Hillsdale
NJ Ho-Ho-Kus
NJ Hoboken
NJ Hopatcong
NJ Hudson County
NJ Hunterdon County
NJ Interlaken
NJ Island Heights
NJ Jamesburg
NJ Jersey City
NJ Keansburg
NJ Kearny
NJ Kenilworth
NJ Keyport

NJ Kinnelon
NJ Lakehurst
NJ Laurel Springs
NJ Lavallette
NJ Lawnside
NJ Leonia
NJ Lincoln Park
NJ Linden
NJ Lindenwold
NJ Linwood
NJ Little Ferry
NJ Little Silver
NJ Loch Arbour
NJ Lodi
NJ Long Branch
NJ Longport
NJ Madison
NJ Magnolia
NJ Manasquan
NJ Mantoloking
NJ Manville
NJ Margate City
NJ Matawan
NJ Maywood
NJ Medford Lakes
NJ Mendham
NJ Mercer County
NJ Merchantville
NJ Metuchen
NJ Middlesex
NJ Middlesex County
NJ Midland Park
NJ Millstone
NJ Milltown
NJ Millville
NJ Monmouth Beach
NJ Monmouth County
NJ Montvale
NJ Moonachie
NJ Morris County
NJ Morris Plains
NJ Morristown
NJ Mount Arlington
NJ Mount Ephraim
NJ Mountain Lakes
NJ Mountainside
NJ National Park
NJ Neptune City
NJ Netcong
NJ New Brunswick
NJ New Milford
NJ New Providence
NJ Newark
NJ Newfield
NJ North Arlington
NJ North Haledon
NJ North Plainfield
NJ Northfield
NJ Northvale
NJ Norwood
NJ Oakland
NJ Oaklyn
NJ Ocean City
NJ Ocean County
NJ Ocean Gate
NJ Oceanport
NJ Old Tappan
NJ Oradell
NJ Palisades Park
NJ Palmyra
NJ Paramus
NJ Park Ridge
NJ Passaic
NJ Passaic County
NJ Paterson
NJ Paulsboro
NJ Pennington
NJ Penns Grove
NJ Perth Amboy
NJ Phillipsburg
NJ Pine Beach
NJ Pine Hill
NJ Pine Valley
NJ Pitman
NJ Plainfield
NJ Pleasantville
NJ Point Pleasant
NJ Point Pleasant Beach
NJ Pompton Lakes
NJ Prospect Park
NJ Rahway
NJ Ramsey
NJ Raritan
NJ Red Bank
NJ Ridgefield
NJ Ridgefield Park
NJ Ridgewood
NJ Ringwood
NJ River Edge
NJ Riverdale
NJ Riverton
NJ Rockaway
NJ Rockleigh
NJ Roseland
NJ Roselle
NJ Roselle Park
NJ Rumson
NJ Runnemede
NJ Rutherford
NJ Saddle River
NJ Salem County
NJ Sayreville
NJ Sea Bright
NJ Sea Girt
NJ Seaside Heights
NJ Seaside Park
NJ Secaucus
NJ Shrewsbury
NJ Somerdale
NJ Somers Point
NJ Somerset County
NJ Somerville
NJ South Amboy
NJ South Belmar
NJ South Bound Brook
NJ South Plainfield
NJ South River
NJ South Toms River
NJ Spotswood
NJ Spring Lake
NJ Spring Lake Heights
NJ Stanhope
NJ Stratford
NJ Summit
NJ Sussex County
NJ Tavistock
NJ Tenafly
NJ Teterboro
NJ Tinton Falls
NJ Totowa
NJ Trenton
NJ Union Beach
NJ Union City
NJ Union County
NJ Upper Saddle River
NJ Ventnor City
NJ Victory Gardens
NJ Vineland
NJ Waldwick
NJ Wallington
NJ Wanaque
NJ Warren County
NJ Watchung
NJ Wenonah
NJ West Long Branch
NJ West NY
NJ West Paterson
NJ Westfield
NJ Westville
NJ Westwood
NJ Wharton
NJ Wood-Ridge
NJ Woodbury
NJ Woodbury Heights
NJ Woodcliff Lake
NJ Woodlynne

NM Bernalillo County
NM Corrales
NM Dona Ana County
NM Las Cruces
NM Los Ranchos de Albuquerque
NM Mesilla
NM Rio Rancho
NM Santa Fe
NM Santa Fe County
NM Sunland Park

NY Albany
NY Albany County
NY Amityville
NY Ardsley
NY Atlantic Beach
NY Babylon
NY Baldwinsville
NY Baxter Estates
NY Bayville
NY Beacon
NY Belle Terre
NY Bellerose
NY Bellport
NY Binghamton
NY Blasdell
NY Briarcliff Manor
NY Brightwaters
NY Bronxville
NY Brookville
NY Broome County
NY Buchanan
NY Buffalo
NY Camillus
NY Cayuga Heights
NY Cedarhurst
NY Chemung County
NY Chestnut Ridge
NY Clayville
NY Clinton
NY Cohoes
NY Colonie
NY Cornwall on Hudson
NY Croton-on-Hudson
NY Depew
NY Dobbs Ferry
NY Dutchess County
NY East Hills
NY East Rochester
NY East Rockaway
NY East Syracuse
NY East Williston
NY Elmira
NY Elmira Heights
NY Elmsford
NY Endicott
NY Erie County
NY Fairport
NY Farmingdale
NY Fayetteville
NY Fishkill
NY Floral Park
NY Flower Hill

NY Fort Edward
NY Freeport
NY Garden City
NY Glen Cove
NY Glens Falls
NY Grand View-on-Hudson
NY Great Neck
NY Great Neck Estates
NY Great Neck Plaza
NY Green Island
NY Hamburg
NY Harrison
NY Hastings-on-Hudson
NY Haverstraw
NY Hempstead
NY Herkimer County
NY Hewlett Bay Park
NY Hewlett Harbor
NY Hewlett Neck
NY Hillburn
NY Horseheads
NY Hudson Falls
NY Huntington Bay
NY Irvington
NY Island Park
NY Islandia
NY Ithaca
NY Johnson City
NY Kenmore
NY Kensington
NY Kings Point
NY Lackawanna
NY Lake Grove
NY Lake Success
NY Lancaster
NY Lansing
NY Larchmont
NY Lattingtown
NY Lawrence
NY Lewiston
NY Lindenhurst
NY Liverpool
NY Lloyd Harbor
NY Long Beach
NY Lynbrook
NY Malverne
NY Mamaroneck
NY Manlius
NY Manorhaven
NY Massapequa Park
NY Matinecock
NY Menands
NY Mill Neck
NY Mineola
NY Minoa
NY Monroe County
NY Montebello
NY Mount Kisco
NY Mount Vernon
NY Munsey Park
NY Muttontown
NY Nassau County
NY New Hartford
NY New Hempstead
NY New Hyde Park
NY New Rochelle
NY New Square
NY NY Mills
NY Newburgh
NY Niagara County
NY Niagara Falls
NY North Hills
NY North Syracuse
NY North Tarrytown
NY North Tonawanda
NY Northport
NY Nyack
NY Old Brookville
NY Old Westbury
NY Oneida County
NY Onondaga County
NY Orange County
NY Orchard Park
NY Oriskany
NY Ossining
NY Oswego County
NY Patchogue
NY Peekskill
NY Pelham
NY Pelham Manor
NY Phoenix
NY Piermont
NY Pittsford
NY Plandome
NY Plandome Heights
NY Plandome Manor
NY Pleasantville
NY Pomona
NY Poquott
NY Port Chester
NY Port Dickinson
NY Port Jefferson
NY Port WA North
NY Poughkeepsie
NY Putnam County
NY Rensselaer
NY Rensselaer County
NY Rochester
NY Rockland County
NY Rockville Centre
NY Rome
NY Roslyn
NY Roslyn Estates
NY Roslyn Harbor
NY Russell Gardens
NY Rye
NY Rye Brook
NY Saddle Rock
NY Sands Point
NY Saratoga County
NY Scarsdale
NY Schenectady
NY Schenectady County
NY Scotia
NY Sea Cliff
NY Shoreham
NY Sloan
NY Sloatsburg
NY Solvay
NY South Floral Park
NY South Glens Falls
NY South Nyack
NY Spencerport
NY Spring Valley
NY Stewart Manor
NY Suffern
NY Suffolk County
NY Syracuse
NY Tarrytown
NY Thomaston
NY Tioga County
NY Tompkins County
NY Tonawanda
NY Troy
NY Tuckahoe
NY Ulster County
NY Upper Brookville
NY Upper Nyack
NY Utica
NY Valley Stream
NY Village of the Branch
NY Wappingers Falls
NY Warren County
NY Washington County
NY Waterford
NY Watervliet
NY Webster
NY Wesley Hills
NY West Haverstraw
NY Westbury
NY Westchester County
NY White Plains
NY Whitesboro
NY Williamsville
NY Williston Park
NY Woodsburgh
NY Yonkers
NY Yorkville
NC Alamance County
NC Apex
NC Archdale
NC Asheville
NC Belmont
NC Belville
NC Bessemer City
NC Biltmore Forest
NC Black Mountain
NC Brookford
NC Brunswick County
NC Buncombe County
NC Burke County
NC Burlington
NC Cabarrus County
NC Carrboro
NC Cary
NC Catawba County
NC Chapel Hill
NC China Grove
NC Clemmons
NC Concord
NC Conover
NC Cramerton
NC Dallas
NC Davidson County
NC Durham County
NC Edgecombe County
NC Elon College
NC Fletcher
NC Forsyth County
NC Garner
NC Gaston County
NC Gastonia
NC Gibsonville
NC Goldsboro
NC Graham
NC Greenville
NC Guilford County
NC Harnett County
NC Haw River
NC Hickory
NC High Point
NC Hildebran
NC Hope Mills
NC Indian Trail
NC Jacksonville
NC Jamestown
NC Kannapolis
NC Landis
NC Leland
NC Long View
NC Lowell
NC Matthews
NC McAdenville
NC Mebane
NC Mecklenburg County
NC Mint Hill
NC Montreat
NC Mount Holly

NC Nash County
NC New Hanover County
NC Newton
NC Onslow County
NC Orange County
NC Pineville
NC Pitt County
NC Randolph County
NC Ranlo
NC Rocky Mount
NC Rowan County
NC Rural Hall
NC Spring Lake
NC Stallings
NC Thomasville
NC Union County
NC Wake County
NC Walkertown
NC Wayne County
NC Weaverville
NC Wilmington
NC Winterville
NC Woodfin
NC Wrightsville Beach

ND Bismarck
ND Burleigh County
ND Cass County
ND Fargo
ND Grand Forks
ND Grand Forks County
ND Lincoln
ND Mandan
ND Morton County
ND West Fargo

OH Addyston
OH Allen County
OH Amberley
OH Amelia
OH Amherst
OH Arlington Heights
OH Auglaize County
OH Aurora
OH Avon
OH Avon Lake
OH Barberton
OH Bay Village
OH Beachwood
OH Beavercreek
OH Bedford
OH Bedford Heights
OH Bellaire
OH Bellbrook
OH Belmont County
OH Belpre
OH Bentleyville
OH Berea
OH Bexley
OH Blue Ash
OH Brady Lake
OH Bratenahl
OH Brecksville
OH Brice
OH Bridgeport
OH Brilliant
OH Broadview Heights
OH Brook Park
OH Brooklyn
OH Brooklyn Heights
OH Brookside
OH Brunswick
OH Butler County
OH Campbell
OH Canfield
OH Canton
OH Carlisle
OH Centerville
OH Chagrin Falls
OH Chesapeake
OH Cheviot
OH Cincinnati
OH Clark County
OH Clermont County
OH Cleveland
OH Cleveland Heights
OH Cleves
OH Coal Grove
OH Cridersville
OH Cuyahoga County
OH Cuyahoga Falls
OH Cuyahoga Heights
OH Deer Park
OH Delaware County
OH Doylestown
OH Dublin
OH East Cleveland
OH Eastlake
OH Elmwood Place
OH Elyria
OH Englewood
OH Erie County
OH Euclid
OH Evendale
OH Fairborn
OH Fairfax
OH Fairfield
OH Fairfield County
OH Fairlawn
OH Fairport Harbor
OH Fairview Park
OH Forest Park
OH Fort Shawnee
OH Franklin
OH Franklin County
OH Gahanna
OH Garfield Heights
OH Geauga County
OH Girard
OH Glendale
OH Glenwillow
OH Golf Manor
OH Grand River
OH Grandview Heights
OH Green
OH Greene County
OH Greenhills
OH Grove City
OH Groveport
OH Hamilton
OH Hamilton County
OH Hanging Rock
OH Harbor View
OH Hartville
OH Heath
OH Highland Heights
OH Hilliard
OH Hills and Dales
OH Holland
OH Hubbard
OH Huber Heights
OH Hudson
OH Independence
OH Ironton
OH Jefferson County
OH Kent
OH Kettering
OH Kirtland
OH Lake County
OH Lakeline
OH Lakemore
OH Lakewood
OH Lawrence County
OH Lexington
OH Licking County
OH Lima
OH Lincoln Heights
OH Linndale
OH Lockland
OH Lorain
OH Lorain County
OH Louisville
OH Loveland
OH Lowellville
OH Lucas County
OH Lyndhurst
OH Macedonia
OH Madeira
OH Mahoning County
OH Maineville
OH Mansfield
OH Maple Heights
OH Marble Cliff
OH Mariemont
OH Martins Ferry
OH Mason
OH Massillon
OH Maumee
OH Mayfield
OH Mayfield Heights
OH McDonald
OH Medina County
OH Mentor
OH Mentor-on-the-Lake
OH Meyers Lake
OH Miami County
OH Miamisburg
OH Middleburg Heights
OH Middletown
OH Milford
OH Millbury
OH Millville
OH Minerva Park
OH Mingo Junction
OH Mogadore
OH Monroe
OH Montgomery
OH Montgomery County
OH Moraine
OH Moreland Hills
OH Mount Healthy
OH Munroe Falls
OH New Miami
OH New Middletown
OH New Rome
OH Newark
OH Newburgh Heights
OH Newtown
OH Niles
OH North Bend
OH North Canton
OH North College Hill
OH North Olmsted
OH North Randall
OH North Ridgeville
OH North Royalton
OH Northfield
OH Northwood
OH Norton
OH Norwood
OH Oakwood
OH Oakwood
OH Obetz
OH Olmsted Falls
OH Ontario
OH Orange
OH Oregon
OH Ottawa County
OH Ottawa Hills
OH Painesville

OH Parma
OH Parma Heights
OH Pepper Pike
OH Perrysburg
OH Poland
OH Portage County
OH Powell
OH Proctorville
OH Ravenna
OH Reading
OH Reminderville
OH Reynoldsburg
OH Richfield
OH Richland County
OH Richmond Heights
OH Riverlea
OH Riverside
OH Rocky River
OH Rossford
OH Seven Hills
OH Shadyside
OH Shaker Heights
OH Sharonville
OH Shawnee Hills
OH Sheffield
OH Sheffield Lake
OH Silver Lake
OH Silverton
OH Solon
OH South Amherst
OH South Euclid
OH South Point
OH South Russell
OH Springboro
OH Springdale
OH Springfield
OH St. Bernard
OH Stark County
OH Steubenville
OH Stow
OH Strongsville
OH Struthers
OH Sugar Bush Knolls
OH Summit County
OH Sylvania
OH Tallmadge
OH Terrace Park
OH The Village of Indian Hill
OH Timberlake
OH Trenton
OH Trotwood
OH Trumbull County
OH Twinsburg
OH Union
OH University Heights
OH Upper Arlington
OH Urbancrest
OH Valley View
OH Valleyview
OH Vandalia
OH Vermilion
OH Wadsworth
OH Waite Hill
OH Walbridge
OH Walton Hills
OH Warren
OH Warren County
OH Warrensville Heights
OH Washington County
OH Wayne County
OH West Carrollton City
OH West Milton
OH Westerville
OH Westlake
OH Whitehall
OH Wickliffe
OH Willoughby
OH Willoughby Hills
OH Willowick
OH Wintersville
OH Wood County
OH Woodlawn
OH Woodmere
OH Worthington
OH Wyoming
OH Youngstown
OK Arkoma
OK Bethany
OK Bixby
OK Broken Arrow
OK Canadian County
OK Catoosa
OK Choctaw
OK Cleveland County
OK Comanche County
OK Creek County
OK Del City
OK Edmond
OK Forest Park
OK Hall Park
OK Harrah
OK Jenks
OK Jones
OK Lake Aluma
OK Lawton
OK Logan County
OK Midwest City
OK Moffett
OK Moore
OK Mustang
OK Nichols Hills
OK Nicoma Park
OK Norman
OK Oklahoma County
OK Rogers County
OK Sand Springs
OK Sequoyah County
OK Smith Village
OK Spencer
OK The Village
OK Tulsa County
OK Valley Brook
OK Wagoner County
OK Warr Acres
OK Woodlawn Park
OK Yukon
OR Central Point
OR Columbia County
OR Durham
OR Jackson County
OR Keizer
OR King City
OR Lane County
OR Marion County
OR Maywood Park
OR Medford
OR Phoenix
OR Polk County
OR Rainier
OR Springfield
OR Troutdale
OR Wood Village
PA Adamsburg
PA Alburtis
PA Aldan
PA Aliquippa
PA Allegheny County
PA Allenport
PA Altoona
PA Ambler
PA Ambridge
PA Archbald
PA Arnold
PA Ashley
PA Aspinwall
PA Avalon
PA Avoca
PA Baden
PA Baldwin
PA Beaver
PA Beaver County
PA Beaver Falls
PA Bell Acres
PA Belle Vernon
PA Bellevue
PA Ben Avon
PA Ben Avon Heights
PA Berks County
PA Bethel Park
PA Bethlehem
PA Big Beaver
PA Birdsboro
PA Blair County
PA Blakely
PA Blawnox
PA Boyertown
PA Brackenridge
PA Braddock
PA Braddock Hills
PA Bradfordwoods
PA Brentwood
PA Bridgeport
PA Bridgeville
PA Bridgewater
PA Bristol
PA Brookhaven
PA Brownstown
PA Brownsville
PA Bryn Athyn
PA Bucks County
PA California
PA Cambria County
PA Camp Hill
PA Canonsburg
PA Carbondale
PA Carnegie
PA Castle Shannon
PA Catasauqua
PA Centre County
PA Chalfant
PA Chalfont
PA Charleroi
PA Chester
PA Chester County
PA Chester Heights
PA Cheswick
PA Churchill
PA Clairton
PA Clarks Green
PA Clarks Summit
PA Clifton Heights
PA Coal Center
PA Coatesville
PA Collegeville
PA Collingdale
PA Columbia
PA Colwyn
PA Conshohocken
PA Conway
PA Coplay
PA Coraopolis
PA Courtdale
PA Crafton
PA Cumberland County
PA Daisytown
PA Dale
PA Dallas

PA Dallastown
PA Darby
PA Dauphin County
PA Delaware County
PA Delmont
PA Dickson City
PA Donora
PA Dormont
PA Dover
PA Downingtown
PA Doylestown
PA Dravosburg
PA Duboistown
PA Duncansville
PA Dunlevy
PA Dunmore
PA Dupont
PA Duquesne
PA Duryea
PA East Conemaugh
PA East Lansdowne
PA East McKeesport
PA East Petersburg
PA East Pittsburgh
PA East Rochester
PA East Washington
PA Easton
PA Eastvale
PA Economy
PA Eddystone
PA Edgewood
PA Edgeworth
PA Edwardsville
PA Elco
PA Elizabeth
PA Ellport
PA Ellwood City
PA Emmaus
PA Emsworth
PA Erie
PA Erie County
PA Etna
PA Exeter
PA Export
PA Fallston
PA Farrell
PA Fayette City
PA Fayette County
PA Ferndale
PA Finleyville
PA Folcroft
PA Forest Hills
PA Forty Fort
PA Fountain Hill
PA Fox Chapel
PA Franklin
PA Franklin County
PA Franklin Park
PA Freedom
PA Freemansburg
PA Geistown
PA Glassport
PA Glendon
PA Glenfield
PA Glenolden
PA Green Tree
PA Greensburg
PA Hallam
PA Harrisburg
PA Harveys Lake
PA Hatboro
PA Hatfield
PA Haysville
PA Heidelberg
PA Hellertown
PA Hermitage
PA Highspire
PA Hollidaysburg
PA Homestead
PA Homewood
PA Houston
PA Hughestown
PA Hulmeville
PA Hummelstown
PA Hunker
PA Ingram
PA Irwin
PA Ivyland
PA Jacobus
PA Jeannette
PA Jefferson
PA Jenkintown
PA Jermyn
PA Jessup
PA Johnstown
PA Kenhorst
PA Kingston
PA Koppel
PA Lackawanna County
PA Laflin
PA Lancaster
PA Lancaster County
PA Langhorne
PA Langhorne Manor
PA Lansdale
PA Lansdowne
PA Larksville
PA Laurel Run
PA Laureldale
PA Lawrence County
PA Lebanon County
PA Leesport
PA Leetsdale
PA Lehigh County
PA Lemoyne
PA Liberty
PA Lincoln
PA Lititz
PA Loganville
PA Lorain
PA Lower Burrell
PA Luzerne
PA Luzerne County
PA Lycoming County
PA Macungie
PA Madison
PA Malvern
PA Manor
PA Marcus Hook
PA Marysville
PA Mayfield
PA McKees Rocks
PA McKeesport
PA Mechanicsburg
PA Media
PA Mercer County
PA Middletown
PA Millbourne
PA Millersville
PA Millvale
PA Modena
PA Mohnton
PA Monaca
PA Monessen
PA Monongahela
PA Montgomery County
PA Montoursville
PA Moosic
PA Morrisville
PA Morton
PA Mount Oliver
PA Mount Penn
PA Mountville
PA Munhall
PA Municipality of Monroeville
PA Municipality of Murrysville
PA Nanticoke
PA Narberth
PA New Brighton
PA New Britain
PA New Cumberland
PA New Eagle
PA New Galilee
PA New Kensington
PA New Stanton
PA Newell
PA Newtown
PA Norristown
PA North Belle Vernon
PA North Braddock
PA North Catasauqua
PA North Charleroi
PA North Irwin
PA North Wales
PA North York
PA Northampton
PA Northampton County
PA Norwood
PA Oakmont
PA Old Forge
PA Olyphant
PA Osborne
PA Paint
PA Palmyra
PA Parkside
PA Patterson Heights
PA Paxtang
PA Penbrook
PA Penn
PA Penndel
PA Pennsbury Village
PA Phoenixville
PA Pitcairn
PA Pittsburgh
PA Pittston
PA Pleasant Hills
PA Plum
PA Plymouth
PA Port Vue
PA Pottstown
PA Pringle
PA Prospect Park
PA Rankin
PA Reading
PA Red Lion
PA Ridley Park
PA Rochester
PA Rockledge
PA Roscoe
PA Rose Valley
PA Rosslyn Farms
PA Royalton
PA Royersford
PA Rutledge
PA Scalp Level
PA Schwenksville
PA Scranton
PA Sewickley
PA Sewickley Heights
PA Sewickley Hills
PA Sharon
PA Sharon Hill
PA Sharpsburg
PA Sharpsville
PA Shillington
PA Shiremanstown
PA Sinking Spring
PA Somerset County

PA Souderton
PA South Coatesville
PA South Greensburg
PA South Heights
PA South Williamsport
PA Southmont
PA Southwest Greensburg
PA Speers
PA Spring City
PA Springdale
PA St. Lawrence
PA State College
PA Steelton
PA Stockdale
PA Sugar Notch
PA Swarthmore
PA Swissvale
PA Swoyersville
PA Tarentum
PA Taylor
PA Telford
PA Temple
PA Thornburg
PA Throop
PA Trafford
PA Trainer
PA Trappe
PA Tullytown
PA Turtle Creek
PA Upland
PA Verona
PA Versailles
PA Wall
PA Warrior Run
PA Washington
PA Washington County
PA Wernersville
PA Wesleyville
PA West Brownsville
PA West Chester
PA West Conshohocken
PA West Easton
PA West Elizabeth
PA West Fairview
PA West Homestead
PA West Lawn
PA West Mayfield
PA West Middlesex
PA West Mifflin
PA West Newton
PA West Pittston
PA West Reading
PA West View
PA West Wyoming
PA West York
PA Westmont
PA Westmoreland County
PA Wheatland
PA Whitaker
PA White Oak
PA Wilkes-Barre
PA Wilkinsburg
PA Williamsport
PA Wilmerding
PA Wilson
PA Windber
PA Windsor
PA Wormleysburg
PA Wrightsville
PA Wyoming
PA Wyomissing
PA Wyomissing Hills
PA Yardley
PA Yatesville
PA Yeadon
PA Yoe
PA York
PA York County
PA Youngwood

PR Aguada Municipio
PR Aguadilla Municipio
PR Aguas Buenas Municipio
PR Aibonito Municipio
PR Anasco Municipio
PR Arecibo Municipio
PR Bayamon Municipio
PR Cabo Rojo Municipio
PR Caguas Municipio
PR Camuy Municipio
PR Canovanas Municipio
PR Carolina Municipio
PR Catano Municipio
PR Cayey Municipio
PR Cidra Municipio
PR Dorado Municipio
PR Guaynabo Municipio
PR Gurabo Municipio
PR Hatillo Municipio
PR Hormigueros Municipio
PR Humacao Municipio
PR Juncos Municipio
PR Las Piedras Municipio
PR Loiza Municipio
PR Manati Municipio
PR Mayaguez Municipio
PR Moca Municipio
PR Naguabo Municipio
PR Naranjito Municipio
PR Penuelas Municipio
PR Ponce Municipio
PR Rio Grande Municipio
PR San German Municipio
PR San Juan Municipio
PR San Lorenzo Municipio
PR Toa Alta Municipio
PR Toa Baja Municipio
PR Trujillo Alto Municipio
PR Vega Alta Municipio
PR Vega Baja Municipio
PR Yabucoa Municipio

RI Bristol County
RI Central Falls
RI Cranston
RI East Providence
RI Kent County
RI Newport
RI Newport County
RI Pawtucket
RI Providence
RI Providence County
RI Warwick
RI Washington County
RI Woonsocket

SC Aiken
SC Aiken County
SC Anderson
SC Anderson County
SC Arcadia Lakes
SC Berkeley County
SC Burnettown
SC Cayce
SC Charleston
SC Charleston County
SC Columbia
SC Cowpens
SC Darlington County
SC Dorchester County
SC Florence
SC Florence County
SC Folly Beach
SC Forest Acres
SC Fort Mill
SC Georgetown County
SC Goose Creek
SC Hanahan
SC Horry County
SC Irmo
SC Isle of Palms
SC Lexington County
SC Lincolnville
SC Mount Pleasant
SC Myrtle Beach
SC North Augusta
SC North Charleston
SC Pickens County
SC Pineridge
SC Quinby
SC Rock Hill
SC South Congaree
SC Spartanburg
SC Spartanburg County
SC Springdale
SC Sullivan's Island
SC Summerville
SC Sumter
SC Sumter County
SC Surfside Beach
SC West Columbia
SC York County

SD Minnehaha County
SD North Sioux City
SD Pennington County
SD Rapid City

TN Alcoa
TN Anderson County
TN Bartlett
TN Blount County
TN Brentwood
TN Bristol
TN Carter County
TN Church Hill
TN Clarksville
TN Collegedale
TN East Ridge
TN Elizabethton
TN Farragut
TN Germantown
TN Hamilton County
TN Hawkins County
TN Hendersonville
TN Jackson
TN Johnson City
TN Jonesborough
TN Kingsport
TN Knox County
TN Lakesite
TN Lookout Mountain
TN Loudon County
TN Madison County
TN Maryville
TN Montgomery County
TN Mount Carmel
TN Mount Juliet
TN Red Bank
TN Ridgeside
TN Rockford
TN Shelby County
TN Signal Mountain
TN Soddy-Daisy
TN Sullivan County
TN Sumner County
TN Washington County
TN Wilson County

TX Addison
TX Alamo
TX Alamo Heights

TX Allen
TX Azle
TX Balch Springs
TX Balcones Heights
TX Bayou Vista
TX Baytown
TX Bedford
TX Bell County
TX Bellaire
TX Bellmead
TX Belton
TX Benbrook
TX Beverly Hills
TX Bexar County
TX Blue Mound
TX Bowie County
TX Brazoria County
TX Brazos County
TX Brookside Village
TX Brownsville
TX Bryan
TX Buckingham
TX Bunker Hill Village
TX Cameron County
TX Carrollton
TX Castle Hills
TX Cedar Hill
TX Cedar Park
TX Cibolo
TX Clear Lake Shores
TX Clint
TX Cockrell Hill
TX College Station
TX Colleyville
TX Collin County
TX Combes
TX Converse
TX Copperas Cove
TX Corinth
TX Coryell County
TX Crowley
TX Dallas County
TX Dalworthington Gardens
TX Deer Park
TX Denison
TX Denton
TX Denton County
TX DeSoto
TX Dickinson
TX Donna
TX Double Oak
TX Duncanville
TX Ector County
TX Edgecliff
TX Edinburg
TX El Lago
TX El Paso County
TX Euless
TX Everman
TX Farmers Branch
TX Flower Mound
TX Forest Hill
TX Fort Bend County
TX Friendswood
TX Galena Park
TX Galveston
TX Galveston County
TX Grand Prairie
TX Grapevine
TX Grayson County
TX Gregg County
TX Groves
TX Guadalupe County
TX Haltom City
TX Hardin County
TX Harker Heights
TX Harlingen
TX Hedwig Village
TX Hewitt
TX Hickory Creek
TX Hidalgo County
TX Highland Park
TX Highland Village
TX Hill Country Village
TX Hilshire Village
TX Hitchcock
TX Hollywood Park
TX Howe
TX Humble
TX Hunters Creek Village
TX Hurst
TX Hutchins
TX Impact
TX Jacinto City
TX Jefferson County
TX Jersey Village
TX Katy
TX Keller
TX Kemah
TX Kennedale
TX Killeen
TX Kirby
TX La Marque
TX La Porte
TX Lacy-Lakeview
TX Lake Dallas
TX Lake Worth
TX Lakeside
TX Lakeside City
TX Lancaster
TX League City
TX Leander
TX Leon Valley
TX Lewisville
TX Live Oak
TX Longview
TX Lubbock County
TX Lumberton
TX McAllen
TX McLennan County
TX Meadows
TX Midland
TX Midland County
TX Mission
TX Missouri City
TX Montgomery County
TX Morgan's Point
TX Nash
TX Nassau Bay
TX Nederland
TX Nolanville
TX North Richland Hills
TX Northcrest
TX Nueces County
TX Odessa
TX Olmos Park
TX Palm Valley
TX Palmview
TX Pantego
TX Pearland
TX Pflugerville
TX Pharr
TX Piney Point Village
TX Port Arthur
TX Port Neches
TX Portland
TX Potter County
TX Primera
TX Randall County
TX Richardson
TX Richland Hills
TX River Oaks
TX Robinson
TX Rockwall
TX Rockwall County
TX Rollingwood
TX Rose Hill Acres
TX Rowlett
TX Sachse
TX Saginaw
TX San Angelo
TX San Benito
TX San Juan
TX San Patricio County
TX Sansom Park
TX Santa Fe
TX Schertz
TX Seabrook
TX Seagoville
TX Selma
TX Shavano Park
TX Sherman
TX Shoreacres
TX Smith County
TX Socorro
TX South Houston
TX Southside Place
TX Spring Valley
TX Stafford
TX Sugar Land
TX Sunset Valley
TX Tarrant County
TX Taylor County
TX Taylor Lake Village
TX Temple
TX Terrell Hills
TX Texarkana
TX Texas City
TX Tom Green County
TX Travis County
TX Tye
TX Tyler
TX Universal City
TX University Park
TX Victoria
TX Victoria County
TX Wake Village
TX Watauga
TX Webb County
TX Webster
TX Weslaco
TX West Lake Hills
TX West University Place
TX Westover Hills
TX Westworth
TX White Oak
TX White Settlement
TX Wichita County
TX Wichita Falls
TX Williamson County
TX Wilmer
TX Windcrest
TX Woodway
UT American Fork
UT Bluffdale
UT Bountiful
UT Cache County
UT Cedar Hills
UT Centerville
UT Clearfield
UT Clinton
UT Davis County
UT Draper
UT Farmington
UT Farr West
UT Fruit Heights
UT Harrisville
UT Highland

UT Hyde Park
UT Kaysville
UT Layton
UT Lehi
UT Lindon
UT Logan
UT Mapleton
UT Midvale
UT Millville
UT Murray
UT North Logan
UT North Ogden
UT North Salt Lake
UT Ogden
UT Orem
UT Pleasant Grove
UT Pleasant View
UT Providence
UT Provo
UT River Heights
UT Riverdale
UT Riverton
UT Roy
UT Sandy
UT Smithfield
UT South Jordan
UT South Ogden
UT South Salt Lake
UT South Weber
UT Springville
UT Sunset
UT Syracuse
UT Uintah
UT Utah County
UT Washington Terrace
UT Weber County
UT West Bountiful
UT West Jordan
UT West Point
UT West Valley City
UT Woods Cross

VT Burlington
VT Chittenden County
VT Essex Junction
VT South Burlington
VT Winooski

VA Albemarle County
VA Alexandria
VA Amherst County
VA Bedford County
VA Botetourt County
VA Bristol
VA Campbell County
VA Charlottesville
VA Colonial Heights
VA Danville
VA Dinwiddie County
VA Fairfax
VA Falls Church
VA Fredericksburg
VA Gate City
VA Gloucester County
VA Hanover County
VA Herndon
VA Hopewell
VA James City County
VA Loudoun County
VA Lynchburg
VA Manassas
VA Manassas Park
VA Occoquan
VA Petersburg
VA Pittsylvania County
VA Poquoson
VA Prince George County
VA Richmond
VA Roanoke
VA Roanoke County
VA Salem
VA Scott County
VA Spotsylvania County
VA Stafford County
VA Suffolk
VA Vienna
VA Vinton
VA Washington County
VA Weber City
VA Williamsburg
VA York County

WA Algona
WA Auburn
WA Beaux Arts Village
WA Bellevue
WA Bellingham
WA Benton County
WA Bonney Lake
WA Bothell
WA Bremerton
WA Brier
WA Clyde Hill
WA Cowlitz County
WA Des Moines
WA DuPont
WA Edmonds
WA Everett
WA Fife
WA Fircrest
WA Franklin County
WA Gig Harbor
WA Hunts Point
WA Issaquah
WA Kelso
WA Kennewick
WA Kent
WA Kirkland
WA Kitsap County
WA Lacey
WA Lake Forest Park
WA Longview
WA Lynnwood
WA Marysville
WA Medina
WA Mercer Island
WA Mill Creek
WA Millwood
WA Milton
WA Mountlake Terrace
WA Mukilteo
WA Normandy Park
WA Olympia
WA Pacific
WA Pasco
WA Port Orchard
WA Puyallup
WA Redmond
WA Renton
WA Richland
WA Ruston
WA Selah
WA Spokane
WA Spokane County
WA Steilacoom
WA Sumner
WA Thurston County
WA Tukwila
WA Tumwater
WA Union Gap
WA Vancouver
WA West Richland
WA Whatcom County
WA Woodway
WA Yakima
WA Yakima County
WA Yarrow Point

WV Bancroft
WV Barboursville
WV Belle
WV Benwood
WV Berkeley County
WV Bethlehem
WV Brooke County
WV Cabell County
WV Cedar Grove
WV Ceredo
WV Charleston
WV Chesapeake
WV Clearview
WV Dunbar
WV East Bank
WV Follansbee
WV Glasgow
WV Glen Dale
WV Hancock County
WV Huntington
WV Hurricane
WV Kanawha County
WV Kenova
WV Marmet
WV Marshall County
WV McMechen
WV Mineral County
WV Moundsville
WV Nitro
WV North Hills
WV Ohio County
WV Parkersburg
WV Poca
WV Putnam County
WV Ridgeley
WV South Charleston
WV St. Albans
WV Triadelphia
WV Vienna
WV Wayne County
WV Weirton
WV Wheeling
WV Wood County

WI Allouez
WI Altoona
WI Appleton
WI Ashwaubenon
WI Bayside
WI Beloit
WI Big Bend
WI Brookfield
WI Brown County
WI Brown Deer
WI Butler
WI Calumet County
WI Cedarburg
WI Chippewa County
WI Chippewa Falls
WI Combined Locks
WI Cudahy
WI Dane County
WI De Pere
WI Eau Claire
WI Eau Claire County
WI Elm Grove
WI Elmwood Park
WI Fitchburg
WI Fox Point
WI Franklin
WI Germantown
WI Glendale
WI Grafton
WI Green Bay
WI Greendale

WI Greenfield
WI Hales Corners
WI Holmen
WI Howard
WI Janesville
WI Kaukauna
WI Kenosha
WI Kenosha County
WI Kimberly
WI Kohler
WI La Crosse
WI La Crosse County
WI Lannon
WI Little Chute
WI Maple Bluff
WI Marathon County
WI McFarland
WI Menasha
WI Menomonee Falls
WI Mequon
WI Middleton
WI Monona
WI Muskego
WI Neenah
WI New Berlin
WI North Bay
WI Oak Creek
WI Onalaska
WI Oshkosh
WI Outagamie County
WI Ozaukee County
WI Pewaukee
WI Pleasant Prairie
WI Racine
WI Racine County
WI River Hills
WI Rock County
WI Rothschild
WI Schofield
WI Sheboygan
WI Sheboygan County
WI Sheboygan Falls
WI Shorewood
WI Shorewood Hills
WI South Milwaukee
WI St. Francis
WI Sturtevant
WI Superior
WI Superior
WI Sussex
WI Thiensville
WI Washington County
WI Waukesha
WI Waukesha County
WI Wausau
WI Wauwatosa
WI West Allis
WI West Milwaukee
WI Whitefish Bay
WI Wind Point
WI Winnebago County

WY Casper
WY Cheyenne
WY Evansville
WY Laramie County
WY Mills
WY Natrona County

Appendix 7 of Preamble—Incorporated Places and Counties Potentially Designated (Outside Urbanized Areas)[1] Under the Storm Water Phase II Proposed Rule

[Proposed to be Examined by the Permitting Authority Under § 123.35(b)(2)]

(From the 1990 Census of Population and Housing—U.S. Census Bureau)

(This List May Change With the Decennial Census)

AL Jacksonville
AL Selma

AZ Douglas

AK Arkadelphia
AK Benton
AK Blytheville
AK Conway
AK El Dorado
AK Hot Springs
AK Magnolia
AK Rogers
AK Searcy
AK Stuttgart

CA Arcata
CA Arroyo Grande
CA Atwater
CA Auburn
CA Brawley
CA Calexico
CA Clearlake
CA Corcoran
CA Delano
CA Dinuba
CA Dixon
CA El Centro
CA El Paso De Robles
CA Eureka
CA Gilroy
CA Grover City
CA Hanford
CA Hollister
CA Lemoore
CA Los Banos
CA Madera
CA Manteca
CA Oakdale
CA Oroville
CA Paradise
CA Petaluma
CA Porterville
CA Red Bluff
CA Reedley
CA Ridgecrest
CA Sanger
CA Selma
CA Tracy
CA Tulare
CA Turlock
CA Ukiah
CA Wasco
CA Woodland

CO Canon City
CO Durango
CO Lafayette
CO Louisville
CO Loveland
CO Sterling

FL De Land

[1] Listed incorporated places have at least 10,000 population and 1,000 population density. Please note that no counties meet the 10,000/1,000 threshold.

FL Eustis
FL Key West
FL Leesburg
FL Palatka
FL St. Augustine
FL St. Cloud

GA Americus
GA Carrollton
GA Cordele
GA Dalton
GA Dublin
GA Griffin
GA Hinesville
GA Moultrie
GA Newnan
GA Statesboro
GA Thomasville
GA Tifton
GA Valdosta
GA Waycross

ID Caldwell
ID Coeur D'alene
ID Lewiston
ID Moscow
ID Nampa
ID Rexburg
ID Twin Falls

IL Belvidere
IL Canton
IL Carbondale
IL Centralia
IL Charleston
IL Danville
IL De Kalb
IL Dixon
IL Effingham
IL Freeport
IL Galesburg
IL Herrin
IL Jacksonville
IL Kewanee
IL Lincoln
IL Macomb
IL Marion
IL Mattoon
IL Morris
IL Mount Vernon
IL Ottawa
IL Pontiac
IL Quincy
IL Rantoul
IL Sterling
IL Streator
IL Taylorville
IL Woodstock

IN Bedford
IN Columbus
IN Connersville
IN Crawfordsville
IN Frankfort
IN Franklin
IN Greenfield
IN Huntington
IN Jasper
IN La Porte
IN Lebanon
IN Logansport
IN Madison
IN Marion
IN Martinsville
IN Michigan City
IN New Castle
IN Noblesville
IN Peru
IN Plainfield

IN Richmond
IN Seymour
IN Shelbyville
IN Valparaiso
IN Vincennes
IN Wabash
IN Warsaw
IN Washington

IA Ames
IA Ankeny
IA Boone
IA Burlington
IA Fort Dodge
IA Fort Madison
IA Indianola
IA Keokuk
IA Marshalltown
IA Mason City
IA Muscatine
IA Newton
IA Oskaloosa
IA Ottumwa
IA Spencer

KS Arkansas City
KS Atchison
KS Coffeyville
KS Derby
KS Dodge City
KS El Dorado
KS Emporia
KS Garden City
KS Great Bend
KS Hays
KS Hutchinson
KS Junction City
KS Leavenworth
KS Liberal
KS Manhattan
KS Mcpherson
KS Newton
KS Ottawa
KS Parsons
KS Pittsburg
KS Salina
KS Winfield

KY Bowling Green
KY Danville
KY Frankfort
KY Georgetown
KY Glasgow
KY Hopkinsville
KY Madisonville
KY Middlesborough
KY Murray
KY Nicholasville
KY Paducah
KY Radcliff
KY Richmond
KY Somerset
KY Winchester

LA Abbeville
LA Bastrop
LA Bogalusa
LA Crowley
LA Eunice
LA Hammond
LA Jennings
LA Minden
LA Morgan City
LA Natchitoches
LA New Iberia
LA Opelousas
LA Ruston
LA Thibodaux

ME Waterville

MD Aberdeen
MD Cambridge
MD Salisbury
MD Westminster

MA Newburyport

MI Adrian
MI Albion
MI Alpena
MI Big Rapids
MI Cadillac
MI Escanaba
MI Grand Haven
MI Marquette
MI Midland
MI Monroe
MI Mount Pleasant
MI Owosso
MI Sturgis
MI Traverse City

MN Albert Lea
MN Austin
MN Bemidji
MN Brainerd
MN Faribault
MN Fergus Falls
MN Hastings
MN Hutchinson
MN Mankato
MN Marshall
MN New Ulm
MN North Mankato
MN Northfield
MN Owatonna
MN Stillwater
MN Willmar
MN Winona

MS Brookhaven
MS Canton
MS Clarksdale
MS Cleveland
MS Columbus
MS Greenville
MS Greenwood
MS Grenada
MS Indianola
MS Laurel
MS Mccomb
MS Meridian
MS Natchez
MS Starkville
MS Vicksburg
MS Yazoo City

MO Cape Girardeau
MO Carthage
MO Excelsior Springs
MO Farmington
MO Hannibal
MO Jefferson City
MO Kennett
MO Kirksville
MO Marshall
MO Maryville
MO Mexico
MO Moberly
MO Poplar Bluff
MO Rolla
MO Sedalia
MO Sikeston
MO Warrensburg
MO Washington

MT Bozeman
MT Havre
MT Helena
MT Kalispell

NE Beatrice
NE Columbus
NE Fremont
NE Grand Island
NE Hastings
NE Kearney
NE Norfolk
NE North Platte
NE Scottsbluff

NV Elko

NJ Bridgeton
NJ Princeton Borough

NM Alamogordo
NM Artesia
NM Clovis
NM Deming
NM Farmington
NM Gallup
NM Hobbs
NM Las Vegas
NM Portales
NM Roswell
NM Silver City

NY Amsterdam
NY Auburn
NY Batavia
NY Canandaigua
NY Corning
NY Cortland
NY Dunkirk
NY Fredonia
NY Fulton
NY Geneva
NY Gloversville
NY Jamestown
NY Kingston
NY Lockport
NY Massena
NY Middletown
NY Ogdensburg
NY Olean
NY Oneonta
NY Oswego
NY Plattsburgh
NY Potsdam
NY Watertown

NC Albemarle
NC Asheboro
NC Boone
NC Eden
NC Elizabeth City
NC Havelock
NC Henderson
NC Kernersville
NC Kinston
NC Laurinburg
NC Lenoir
NC Lexington
NC Lumberton
NC Monroe
NC New Bern
NC Reidsville
NC Roanoke Rapids
NC Salisbury
NC Sanford
NC Shelby
NC Statesville
NC Tarboro
NC Wilson

ND Dickinson
ND Jamestown
ND Minot
ND Williston

OH Alliance

OH Ashland
OH Ashtabula
OH Athens
OH Bellefontaine
OH Bowling Green
OH Bucyrus
OH Cambridge
OH Chillicothe
OH Circleville
OH Coshocton
OH Defiance
OH Delaware
OH Dover
OH East Liverpool
OH Findlay
OH Fostoria
OH Fremont
OH Galion
OH Greenville
OH Lancaster
OH Lebanon
OH Marietta
OH Marion
OH Medina
OH Mount Vernon
OH New Philadelphia
OH Norwalk
OH Oxford
OH Piqua
OH Portsmouth
OH Salem
OH Sandusky
OH Sidney
OH Tiffin
OH Troy
OH Urbana
OH Van Wert
OH Washington
OH Wilmington
OH Wooster
OH Xenia
OH Zanesville

OK Ada
OK Altus
OK Bartlesville
OK Chickasha
OK Claremore
OK Mcalester
OK Miami
OK Muskogee
OK Okmulgee
OK Owasso
OK Ponca City
OK Stillwater
OK Tahlequah
OK Weatherford

OR Albany
OR Ashland
OR Astoria
OR Bend
OR City of the Dalles
OR Coos Bay
OR Corvallis
OR Grants Pass
OR Hermiston
OR Klamath Falls
OR La Grande
OR Lebanon
OR Mcminnville
OR Newberg
OR Pendleton
OR Roseburg
OR Woodburn

PA Berwick Borough
PA Bloomsburg
PA Butler
PA Carlisle Borough
PA Chambersburg Borough
PA Ephrata Borough
PA Hazleton
PA Indiana Borough
PA Lebanon
PA Meadville
PA New Castle
PA Oil City
PA Pottsville
PA Sunbury
PA Uniontown
PA Warren

SC Clemson
SC Easley
SC Gaffney
SC Greenwood
SC Newberry
SC Orangeburg

SD Aberdeen
SD Brookings
SD Huron
SD Mitchell
SD Vermillion
SD Watertown
SD Yankton

TN Brownsville
TN Cleveland
TN Collierville
TN Cookeville
TN Dyersburg
TN Greeneville
TN Lawrenceburg
TN Mcminnville
TN Millington
TN Morristown
TN Murfreesboro
TN Shelbyville
TN Springfield
TN Union City

TX Alice
TX Alvin
TX Andrews
TX Angleton
TX Bay City
TX Beeville
TX Big Spring
TX Borger
TX Brenham
TX Brownwood
TX Burkburnett
TX Canyon
TX Cleburne
TX Conroe
TX Coppell
TX Corsicana
TX Del Rio
TX Dumas
TX Eagle Pass
TX El Campo
TX Gainesville
TX Gatesville
TX Georgetown
TX Henderson
TX Hereford
TX Huntsville
TX Jacksonville
TX Kerrville
TX Kingsville
TX Lake Jackson
TX Lamesa
TX Levelland
TX Lufkin
TX Mercedes
TX Mount Pleasant
TX Nacogdoches
TX New Braunfels
TX Palestine
TX Pampa
TX Pecos
TX Plainview
TX Port Lavaca
TX Robstown
TX Rosenberg
TX Round Rock
TX San Marcos
TX Seguin
TX Snyder
TX Stephenville
TX Sweetwater
TX Taylor
TX The Colony
TX Uvalde
TX Vernon
TX Vidor

UT Brigham City
UT Cedar City
UT Spanish Fork
UT Tooele

VT Rutland

VA Blacksburg
VA Christiansburg
VA Front Royal
VA Harrisonburg
VA Leesburg
VA Martinsville
VA Radford
VA Staunton
VA Waynesboro
VA Winchester

WA Aberdeen
WA Anacortes
WA Centralia
WA Ellensburg
WA Moses Lake
WA Mount Vernon
WA Oak Harbor
WA Port Angeles
WA Pullman
WA Sunnyside
WA Walla Walla
WA Wenatchee

WV Beckley
WV Bluefield
WV Clarksburg
WV Fairmont
WV Martinsburg
WV Morgantown

WI Beaver Dam
WI Fond du Lac
WI Fort Atkinson
WI Manitowoc
WI Marinette
WI Marshfield
WI Menomonie
WI Monroe
WI Oconomowoc
WI River Falls
WI Stevens Point
WI Sun Prairie
WI Two Rivers
WI Watertown
WI West Bend
WI Whitewater
WI Wisconsin Rapids

WY Evanston
WY Gillette
WY Green River

WY Laramie
WY Rock Springs
WY Sheridan

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. In § 122.26, revise paragraphs (a)(9), (b)(4)(i), (b)(7)(i), (b)(8)(i), (b)(14) introductory text, (b)(14)(xi); redesignate paragraph (b)(15) as paragraph (b)(17) and add new paragraphs (b)(15) and (b)(16); revise paragraph (c) heading, paragraphs (c)(1) introductory text first sentence, (c)(1)(i) introductory text, (c)(1)(i)(C) first sentence, (c)(1)(i)(E) introductory text, (c)(1)(ii) first sentence of introductory text, (e)(1)(ii); add paragraph (e)(1)(iii); revise paragraphs (f)(4), (f)(5), and (g) to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) * * *

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not otherwise already required by paragraph (a)(1) of this section to obtain a permit, owners or operators shall be required to obtain a NPDES permit if:

(A) The discharge is from a small municipal separate storm sewer system required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with other activity pursuant to paragraph (b)(15) of this section;

(C) The Director determines that storm water controls are needed for the discharge based on:

(*1*) Wasteload allocations that are part of ''total maximum daily loads'' (TMDLs) that address the pollutants of concern; or

(*2*) A comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs, and addresses the pollutants of concern; or

(D) The Director determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Owners or operators of municipal separate storm sewer systems designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section, shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Owners or operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section, shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Owners or operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section, shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

* * * * *

(b) * * *

(4) * * *

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (appendix F of this part); or

* * * * *

(7) * * *

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (appendix G of this part); or

* * * * *

(8) * * *

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

* * * * *

(14) For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at 40 CFR part 401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas.

* * * * *

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221–25;

* * * * *

(15) *Storm water discharges associated with other activity* means the discharge from any conveyance used for collecting and conveying storm water that needs to be regulated to protect water quality. For the categories of facilities identified in this paragraph, the term includes the entire facility except areas located at the facility separated from the plant's operational activities. Such separated areas may include office buildings and accompanying parking lots, as long as the drainage from the separated areas is not mixed with storm water drained from the plant's operational activities. The following types of facilities or activities are sources of ''storm water discharges associated with other activity'' for the purposes of this paragraph:

(i) *Construction activities.* (A) Construction activities including clearing, grading, and excavating activities that result in land disturbance of equal to or greater than one acre and less than five acres. Sites disturbing less than one acre are included if they are part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one and less than five acres. The NPDES permitting authority may waive the otherwise applicable requirements for a storm water discharge from construction activities that disturb less than five acres where:

(*1*) The rainfall erosivity factor (''R'' in the Revised Universal Soil Loss Equation) is less than two during the period of construction activity. The owner/operator must certify that construction activity will take place during the period when the rainfall erosivity factor is less than two;

(*2*) On a case-by-case basis the annual soil loss for a site will be less than two tons/acre/year. The owner or operator must certify that the annual soil loss for their site will be less than two tons/acre/year through the use of the Revised Universal Soil Loss Equation, assuming the constants of no ground cover and no runoff controls in place; or

(*3*) Storm water controls are not needed based on:

(*i*) Wasteload allocations that are part of ''total maximum daily loads'' (TMDLs) that address the pollutants of concern. The owner or operator must certify that the construction activity will take place, and storm water discharges will occur, within an area covered by the TMDLs; or

(*ii*) A comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs, and addresses the pollutants of concern. The owner or operator must certify that the construction activity will take place, and storm water discharges will occur, within an area covered by the watershed plan.

(B) Any other construction activity designated by the NPDES permitting authority based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

(ii) Any other discharges, except municipal separate storm sewer systems, designated by the NPDES permitting authority pursuant to paragraph (a)(9) of this section.

EXHIBIT 1 TO § 122.26(b)(15).—SUMMARY OF COVERAGE OF ''STORM WATER DISCHARGES ASSOCIATED WITH OTHER ACTIVITY''* UNDER THE NPDES STORM WATER PROGRAM

[*See definition in § 122.26(b)(15)]

Automatic Designation:	
Required Nationwide Coverage	Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. Sites disturbing less than one acre are included if part of a larger common plan of development or sale. (see § 122.26(b)(15)(i)(A)).
Potential Designation:	
Optional Evaluation and Designation by the Permitting Authority.	(1) Construction activities that result in a land disturbance of less than one acre based on the potential for adverse impact on water quality or for significant contribution of pollutants. (see § 122.26(b)(15)(i)(B)). (2) Any other non-municipal storm water discharges. (see § 122.26(b)(15)(ii)).
Automatic Designation:	
Required nationwide Coverage	Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. Sites disturbing less than one acre are included if part of a larger common plan of development or sale. (see § 122.26(b)(15)(i)(A)).
Potential Waiver:	
Waiver from Requirements as Determined by the Permitting Authority.	Any automatically designated construction activity where the owner/operator certifies: (1) A rainfall erosivity factor of less than two, or (2) An annual soil loss of less than two tons/acre/year, or (3) That the activity will occur within an area where controls are not needed based on ''waste load allocations'' that are part of total maximum daily loads (TMDLs), or a comprehensive watershed plan. (see § 122.26(b)(15)(i)(A)).

(16) *Small municipal separate storm sewer system* means all municipal separate storm sewer systems that are not designated as ''large'' or ''medium'' municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section; or designated under paragraph (a)(1)(v) of this section.

* * * * *

(c) *Application requirements for storm water discharges associated with industrial activity or storm water discharges associated with other activity—*

(1) *Individual application.* Dischargers of storm water associated with industrial or other activity are required to apply for an individual permit, apply for a permit through a group application, or seek coverage under a promulgated storm water general permit. * * *

(i) Except as provided in § 122.26(c)(1)(ii) through (c)(1)(iv), the operator of a storm water discharge associated with industrial or other activity subject to this section shall provide:

* * * * *

(C) A certification that all outfalls that should contain storm water discharges associated with industrial or other activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. * * *

* * * * *

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 from all outfalls containing a storm water discharge associated with industrial or other activity for the following parameters:

* * * * *

(ii) The operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with other activity solely under paragraph (b)(15)(i) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. * * *

* * * * *

(e) * * *

(1) * * *

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, the permit application must be submitted to the Director by August 7, 2001.

(iii) For any storm water discharge associated with other activity identified in paragraph (b)(15) of this section that is not authorized by a general or individual permit, the permit application made under paragraph (c) of this section must be submitted to the Director by {insert date 3 years and 90 days from date of publication of final rule in the **Federal Register**}.

* * * * *

(f) * * *

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate sewer system as defined by paragraphs (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small municipal separate storm sewer system in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) *Conditional exemption for ''no exposure'' of industrial activities and materials to storm water.* Discharges composed entirely of storm water do not require an NPDES permit if the owner or operator of the facility satisfies the conditions of this paragraph concerning ''no exposure.'' For purposes of this section, ''no exposure'' means all industrial materials or activities are protected by a storm resistant shelter so that they are not exposed to rain, snow, snowmelt, or runoff. Industrial materials or activities include, but are not limited to, material handling equipment, industrial machinery, raw materials, intermediate products, by-products, or waste products, however packaged. This exemption does not apply to storm water discharges from facilities identified in paragraphs (b)(14)(x) and (b)(15)(i) of this section and sources individually designated under paragraphs (a)(1)(v), (a)(9)(i)(B),(C)&(D) and (g)(3) of this section. Actions taken to qualify for this provision shall not interfere with the attainment or maintenance of water quality standards, including designated uses. To establish that the facility meets the definition of no exposure described in this paragraph, an owner or operator must submit a written certification to the NPDES permitting authority once every five years.

(1) Any owner or operator claiming the no exposure exemption must:

(i) Notify the NPDES permitting authority at the beginning of each permit term or prior to commencing discharges during a permit term;

(ii) Allow the permitting authority, or the municipality where the facility discharges into a municipal separate storm sewer system, to inspect the facility and allow the permitting authority or the municipality to make such inspection reports publicly available upon request;

(iii) Upon request, also submit a copy of the certification to the municipality in which the facility is located; and

(iv) Sign and certify the certification in accordance with § 122.22.

(2) If there is a change in circumstances which causes exposure of industrial activities or materials to storm water, the owner or operator must comply immediately with all the requirements of the storm water program including applying for and obtaining coverage under an NPDES permit.

(3) Even if an owner or operator certifies to no exposure under paragraph (g)(1) of this section, the NPDES permitting authority still retains the authority to require the owner or operator of a facility to apply for an individual or general permit if the permitting authority has determined that the discharge:

(i) Is, or may reasonably be, causing or contributing to the violation of a water quality standard; or

(ii) Is, or may reasonably be, interfering with the attainment or maintenance of water quality standards, including designated uses.

3. Revise § 122.28(b)(2)(v) to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(2) * * *

(v) Discharges other than discharges from publicly owned treatment works, combined sewer overflows, municipal separate storm sewer systems, primary industrial facilities, and storm water discharges associated with industrial activity, may, at the discretion of the Director, be authorized to discharge under a general permit without submitting a notice of intent where the Director finds that a notice of intent requirement would be inappropriate.

* * * * *

4. Add undesignated centerheadings and §§ 122.30 through 122.37 to subpart B to read as follows:

General Purpose of the CWA Section 402(p)(6) Storm Water Program

§ 122.30 What is the purpose of the CWA section 402(p)(6) storm water regulations?

(a) Under the statutory mandate in section 402(p)(6) of the Clean Water Act, the purpose of this portion of the storm water program is to designate additional sources that need to be regulated to protect water quality and to establish a comprehensive storm water program to regulate these sources. (Since the storm water program is part of the National Pollutant Discharge Elimination System (NPDES) Program, you should also refer to § 122.1 which addresses the broader purpose of the NPDES program.)

(b) Storm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in two ways: by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables.

(c) EPA strongly encourages partnerships and the watershed approach as the management framework for efficiently, effectively, and consistently protecting and restoring aquatic ecosystems and protecting public health.

Tribal Role for the CWA Section 402(p)(6) Storm Water Program

§ 122.31 As a Tribe, what is my role under the CWA section 402(p)(6) storm water program?

As a Tribe you may:

(a) Be authorized to operate the NPDES program including the storm water program, after EPA determines that you are eligible for treatment in the same manner as a State under §§ 123.31 through 123.34 of this chapter. (If you do not have an authorized NPDES program, EPA generally will implement the program on your reservation as well as other Indian country.);

(b) Be classified as an owner or operator of a regulated small municipal separate storm sewer system, as defined in § 122.32, to the extent the population within the urbanized area of the reservation is greater than or equal to 1,000 persons. (Designation of your Tribe as an owner or operator of a small municipal separate storm sewer system for purposes of this part is an approach that is consistent with EPA's 1984 Indian Policy of operating on a government-to-government basis with EPA looking to Tribes as the lead governmental authorities to address environmental issues on their reservations as appropriate. If you operate a separate storm sewer system that meets the definition of a regulated small municipal separate storm sewer system, your reservation would be subject to the requirements under §§ 122.33 through 122.35. If you are not designated as a regulated small municipal separate storm sewer system, you may ask EPA to designate you as such for the purposes of this part. Being regulated as a small municipal separate storm sewer system and having coverage under an NPDES permit may benefit you by enhancing your ability to establish and enforce certain

requirements for facilities that discharge storm water into your separate storm sewer system.); or

(c) Be a discharger of storm water associated with industrial or other activity under §§ 122.26(b)(14) or (b)(15), in which case you must meet the applicable requirements. Within Indian country, the NPDES permitting authority generally would be EPA, unless you are authorized to administer the NPDES program.

Municipal Role for the CWA Section 402(p)(6) Storm Water Program

EXHIBIT 1 TO SUBPART B.—SUMMARY OF COVERAGE OF SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS* UNDER THE NPDES STORM WATER PROGRAM

[*See definition at § 122.26(b)(16)]

Who is Designated/Covered Under This Part?	
Automatic Designation Required Nationwide Coverage	All owners or operators of small municipal separate storm sewer systems (MS4s) located *within* an ''urbanized area.'' (see § 122.32(a)(1)).
Potential Designation: Required Evaluation by the Permitting Authority for Coverage.	All owners or operators of small MS4s located *outside* of an ''urbanized area'' with a population of at least 10,000 *and* a population density of at least 1,000. (see §§ 122.32(a)(2) and 123.35(b)(2)). All owners or operators of small MS4s that contribute substantially to the storm water pollutant loadings of a physically interconnected MS4 that is regulated by the NPDES storm water program. (see §§ 122.32(a)(2) and 123.35(b)(4)).
Potential Designation: Optional Evaluation by the Permitting Authority for Coverage.	Owners and operators of small MS4s located *outside* of an ''urbanized area'' with a population of less than 10,000 *or* a density of less than 1,000. (see §§ 122.32(a)(2) and 123.35(b)(3)).
Who is Eligible for a Waiver or an Exemption From the Small MS4 Permit Requirements?	
Potential Waiver: Locally-Based Waiver from Requirements as Determined by the Permitting Authority.	Owners or operators of small MS4s, located *within* an ''urbanized area,'' with a jurisdiction of less than 1,000 persons and a system that is not contributing substantially to the pollutant loadings of a physically interconnected MS4 may certify that storm water controls are not needed based on: (1) Waste load allocations that are part of ''total maximum daily loads'' (TMDLs) that address the pollutants of concern; or (2) A comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs, and addresses the pollutants of concern.
Exemption: Not Defined as a Regulated Small MS4	Federal Indian reservations where the population within the ''urbanized area'' portion of the reservation is less than 1,000 persons.

§ 122.32 As an owner or operator of a small municipal separate storm sewer system, am I regulated under the CWA section 402(p)(6) municipal storm water program?

(a) You are a regulated small municipal separate storm sewer system if you are the owner or operator of a small municipal separate storm sewer system, including but not limited to systems owned or operated by local governments, State departments of transportation, and State, Tribal, and Federal facilities; and you meet the following definition. Regulated small municipal separate storm sewer systems are defined as all small municipal separate storm sewer systems that are located in:

(1) An incorporated place, county (only the portion located in an urbanized area), or other place under the jurisdiction of a governmental entity, including but not limited to Tribal or Territorial governments, located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census, except for Federal Indian reservations where the population within the urbanized area of the reservation is under 1,000 persons;

(2) An incorporated place, county, or other place under the jurisdiction of a governmental entity other than those described in paragraph (a)(1) of this section that is designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(2) and (b)(4) of this chapter, or is based upon a petition under § 122.26(f).

(b) You may be the subject of a petition, by any person, to the NPDES permitting authority to require an NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. Upon a final determination by the NPDES permitting authority, you would be required to comply with §§ 122.33 through 122.35.

(c) If you receive a waiver under § 122.33(b), you may subsequently be designated back into the municipal storm water program by the NPDES permitting authority if circumstances change. (See also § 123.35(b) of this chapter.)

§ 122.33 If I am an owner or operator of a regulated small municipal separate storm sewer system, must I apply for an NPDES permit? If so, by when do I have to seek coverage under an NPDES permit? If so, who is my NPDES permitting authority?

(a) If you are the owner or operator of a regulated small municipal separate storm sewer system under § 122.32, you must seek coverage under a general or individual NPDES permit, unless waived under paragraph (b) of this section, as follows:

(1) If you are seeking coverage under a general permit, you must submit a Notice of Intent (NOI). The general permit will explain the steps necessary to attain coverage.

(2) If you are seeking coverage under an individual permit, you must submit an individual application to your NPDES permitting authority that includes the information required under § 122.21(f) and the following information:

(i) Estimate of square mileage served by your separate storm sewer system, and

(ii) Any additional information that your NPDES permitting authority requests.

(3) If there is an adjoining municipality or other governmental entity with an issued NPDES storm water permit that is willing to have you participate in its storm water program, you may jointly with that adjoining municipality or other governmental entity seek a permit modification to include your municipality or other governmental entity in the relevant portions of that NPDES permit. If you choose this option you will need to comply with the permit application requirements of § 122.26, in lieu of the requirements of § 122.34. You do not need to comply with the specific application requirements of § 122.26(d)(1)(iii) and (iv) and (d)(2)(iii) (discharge characterization). You may satisfy the requirements in § 122.26 (d)(1)(v) and (d)(2)(iv) (identifying a management plan) by referring to the adjoining municipality's storm water management plan. (In referencing an adjoining municipality's storm water management plan, you should briefly describe how the existing plan will address discharges from your municipal separate storm sewer system or would need to be supplemented in order to adequately address your discharges, explain the role you will play in coordinating storm water activities in your jurisdiction, and detail the resources available to you to accomplish the plan.)

(b) The NPDES permitting authority may waive the requirements otherwise applicable to you if you are an owner or operator of a regulated small municipal separate storm sewer system, as defined in § 122.32(a)(1), the jurisdiction served by your system includes a population of less than 1,000 ersons, your system is not contributing substantially to the storm water pollutant loadings of a physically interconnected regulated municipal separate storm sewer system (see § 123.35(b)(4) of this chapter), and you have certified that storm water controls are not needed based on:

(1) Wasteload allocations that are part of ''total maximum daily loads'' (TMDLs) that address the pollutants of concern; or

(2) A comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs, and addresses the pollutants of concern.

(c) If you are an owner or operator of a regulated small municipal separate storm sewer system:

(1) Designated under § 122.32(a)(1), you must apply for coverage under an NPDES permit, or apply for a modification of an existing NPDES permit under paragraph (a)(3) of this section, by {insert date 3 years and 90 days from date of publication of final rule}.

(2) Designated under § 122.32(a)(2), you must apply for coverage under an NPDES permit, or apply for a modification of an existing NPDES permit under paragraph (a)(3) of this section, within 60 days of notice, unless the NPDES permitting authority grants a later date.

(d) If you are located in an NPDES authorized State, Tribe, or Territory, then that State, Tribe, or Territory is your NPDES permitting authority. Otherwise, your NPDES permitting authority is the EPA Regional Office. (You should call your EPA Regional Office to find out who your NPDES permitting authority is.)

§ 122.34 As an owner or operator of a regulated small municipal separate storm sewer system, what will my NPDES municipal storm water permit require?

(a) Your NPDES municipal storm water permit will, at a minimum, require you to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from your municipal separate storm sewer system to the maximum extent practicable (MEP) and protect water quality. Your storm water management program must include the minimum control measures described in paragraph (b) of this section. For purposes of this section, narrative effluent limitations requiring implementation of best management practices (BMPs), are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reductions of pollutants to the maximum extent practicable, and water quality-based requirements of the Clean Water Act. Implementation of the best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 will constitute compliance with the standard of ''reducing pollutants to the maximum extent practicable.'' Your NPDES permitting authority will specify a time period of up to 5 years from the date of permit issuance for you to develop and implement your program.

(b) *Minimum control measures. (1) Public education and outreach on storm water impacts.* You must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that can be taken to reduce storm water pollution. (You may use storm water educational materials provided by your State, Tribe, EPA, or, subject to the approval of the local government, environmental or other public interest or trade organizations. The materials or outreach programs should inform individuals and households about the steps they can take, such as ensuring proper septic system maintenance, limiting the use and runoff of garden chemicals, becoming involved in local stream restoration activities that are coordinated by youth service and conservation corps and other citizen groups, and participating in storm drain stenciling, to reduce storm water pollution. In addition, some of the materials or outreach programs should be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. You are encouraged to tailor your outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as children.)

(2) *Public involvement/participation.* You must comply with State, Tribal and local public notice requirements. (You should include the public in developing, implementing, and reviewing your storm water management program. The public participation process should make efforts to reach out and engage all economic and ethnic groups. You may consider impanelling a group of citizens to participate in your decision-making process, hold public hearings, or work with volunteers.)

(3) *Illicit discharge detection and elimination.* You must:

(i) Develop, if not already completed, a storm sewer system map, or equivalent, showing the location of major pipes, outfalls, and topography. In addition, if data already exist, show areas of concentrated activities likely to be a source of storm water pollution;

(ii) To the extent allowable under State or Tribal law, effectively prohibit, through ordinance, order, or similar means, illicit discharges into your storm sewer system and implement appropriate enforcement procedures and actions;

(iii) Implement a plan to detect and address illicit discharges, including illegal dumping, to your system; and

(iv) Inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste. (Actions may include storm drain stenciling, a program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials.)

(4) *Construction site storm water runoff control.* You must develop, implement, and enforce a program to reduce pollutants in storm water runoff to your municipal separate storm sewer system from construction activities that result in land disturbance of greater than or equal to one acre. You must use an ordinance or other regulatory mechanism that controls erosion and sediment to the maximum extent practicable and allowable under State or Tribal law. Your program must control other waste at the construction site that may adversely impact water quality, such as discarded building materials, concrete truck washout, and sanitary waste. Your program also must include, at a minimum, requirements for construction site owners or operators to implement appropriate BMPs, provisions for pre-construction review of site management plans, procedures for receipt and consideration of information submitted by the public, regular inspections during construction, and penalties to ensure compliance. (See § 122.44(s))

(5) *Post-construction storm water management in new development and redevelopment.* You must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that result in land disturbance of greater than or equal to one acre and that discharge into your municipal separate storm sewer system. Your program must include a plan to implement site-appropriate and cost-effective structural and non-structural best management practices (BMPs) and ensure adequate long-term operation and maintenance of such BMPs. Your program must ensure that controls are in place that would prevent or minimize water quality impacts. (If the involved parties consider water quality impacts from the beginning stages of projects, new development and potentially redevelopment allow opportunities for water quality sensitive projects. EPA recommends that municipalities establish requirements for the use of cost-effective BMPs that minimize water quality impacts and attempt to maintain pre-development runoff conditions. In other words, post-development conditions should not be different from pre-development conditions in a way that adversely affects water quality. The municipal program should include structural and/or non-structural BMPs. EPA encourages locally-based watershed planning and the use of preventative measures, including non-structural BMPs, which are generally lower in cost than structural BMPs, to minimize water quality impacts. Non-structural BMPs are preventative actions that involve management and source controls. Examples of non-structural BMPs include policies and ordinances that result in protection of natural resources and prevention of runoff. These include requirements to limit growth to identified areas, protect sensitive areas such as wetlands and riparian areas, minimize imperviousness, maintain open space, and minimize disturbance of soils and vegetation. Examples of structural BMPs include storage practices (wet ponds and extended-detention outlet structures), filtration practices (grassed swales, sand filters and filter strips), and infiltration practices (infiltration basins, infiltration trenches, and porous pavement). Storm water technologies are constantly being improved, and EPA recommends that municipal requirements be responsive to these changes.)

(6) *Pollution prevention/good housekeeping for municipal operations.* You must develop and implement a cost-effective operation and maintenance program with the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, your State, or Tribe, or from other organizations whose materials are approved by the local government, your program must include local government employee training to prevent and reduce storm water pollution from government operations, such as park and open space maintenance, fleet maintenance, planning, building oversight, and storm water system maintenance. (EPA recommends that, at a minimum, you consider the following in developing your program: maintenance activities, maintenance schedules, and long-term inspection procedures for structural and other storm water controls to reduce floatables and other pollutants discharged from your separate storm sewers; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewer systems and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices. In general, the requirement to develop and implement an operation and maintenance program, including local government employee training, is meant to ensure that municipal activities are performed in the most appropriate way to minimize contamination of storm water discharges, rather than requiring the municipality to undertake new activities.)

(c) The NPDES permitting authority may include permit provisions in your NPDES permit that incorporate by reference qualifying local, State or Tribal municipal storm water management program requirements that address one or more of the minimum controls of § 122.34(b). Qualifying local, State or Tribal program requirements must impose, at a minimum, the relevant requirements of paragraph (b) of this section.

(d) You must identify and submit to your NPDES permitting authority either in your notice of intent or in your permit application (see § 122.33) the following information: best management practices (BMPs) to be implemented and the measurable goals for each of the storm water minimum control measures at paragraphs (b)(1) through (b)(6) of this section, the month and year in which you will start and aim to complete each of the measures or indicate the frequency of the action, and the person or persons responsible for implementing or coordinating your storm water management program. Measurable goals to satisfy minimum control measures in paragraphs (b)(3) through (b)(6) of this section identified in a notice of intent will not constitute a condition of the permit, unless EPA or your State or Tribe has provided or issued a menu of regionally appropriate and field-tested BMPs that EPA or your State or Tribe believes to be cost-effective. (EPA will provide guidance on developing BMPs and measurable goals and modify, update, and supplement such guidance based on the assessments of the NPDES municipal storm water program and research conducted by (date 13 years from effective date of final rule).

(e) You must comply with other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the

provisions of §§ 122.41 through 122.49, as appropriate.

(f) *Evaluation and assessment.* (1) *Evaluation.* You must evaluate program compliance, the appropriateness of your identified best management practices, and progress towards achieving your identified measurable goals. (The NPDES permitting authority may determine monitoring requirements for you in accordance with State/Tribal monitoring plans appropriate to your watershed. Participation in a group monitoring program is encouraged.)

(2) *Record keeping.* You must keep records required by the NPDES permit for at least 3 years. You must submit your records to the NPDES permitting authority only when specifically asked to do so. You must make your records, including your storm water management program, available to the public at reasonable times during regular business hours (see § 122.7 for confidentiality provision). (You may assess a reasonable charge for copying. You may require a member of the public to provide advance notice, not to exceed two working days.)

(3) *Reporting.* You must submit annual reports to the NPDES permitting authority for your first permit term. For subsequent permit terms, you must submit reports in year two and four unless the NPDES permitting authority requires more frequent reports. Your report must include:

(i) The status of compliance with permit conditions, an assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measures;

(ii) Results of information collected and analyzed, including monitoring data, if any, during the reporting period;

(iii) A summary of the storm water activities you plan to undertake during the next reporting cycle; and

(iv) A change in any identified measurable goals that apply to the program elements.

§ 122.35 As an owner or operator of a regulated small municipal separate storm sewer system, what if another governmental or other entity is already implementing a minimum control measure in my jurisdiction?

(a) You may rely on another entity to satisfy your NPDES permit obligations to implement a minimum control measure if: the other entity is implementing the control measure; the particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and you have requested, and the other entity has agreed to accept responsibility for implementation of the control measure on your behalf to satisfy your permit obligation. You must note in your § 122.34(f)(3) reports when you are relying on another entity to satisfy your permit obligations. You remain responsible for compliance with your permit obligations if the other entity fails to implement the control measure (or component thereof). Therefore, EPA encourages you to enter into a legally binding agreement with that entity if you want to minimize any uncertainty about compliance with your permit.

(b) Where appropriate, the NPDES permitting authority may recognize existing responsibilities among governmental entities for the minimum control measures in your NPDES permit. (For example, a State or Tribe may be responsible for addressing construction site runoff and municipalities may be responsible for the remaining minimum control measures. You are not required to provide notice to the other governmental entity when your NPDES permit recognizes the entity and its existing responsibilities.) Where the permitting authority recognizes an existing responsibility for one or more of the minimum control measures in your permit, your responsibility to include such minimum control measure, or measures, in your storm water management program is waived so long as the other governmental entity implements the measure consistent with the requirements of § 122.34(b).

§ 122.36 As an owner or operator of a regulated small municipal separate storm sewer system, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?

NPDES permits are federally enforceable. Violators may be subject to the enforcement actions and penalties described in Clean Water Act sections 309 (b), (c), and (g) and 505, or under applicable State or local law. Compliance with a permit issued pursuant to section 402 of the Clean Water Act would be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for toxic pollutants injurious to human health.

§ 122.37 Will the municipal storm water program regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter change in the future?

EPA will evaluate the municipal storm water regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter after {insert date 13 years from date of publication of final rule in the **Federal Register**} and make any necessary revisions. (EPA will conduct an enhanced research effort and compile a comprehensive evaluation of the NPDES municipal storm water program. EPA strongly recommends that no additional requirements beyond the minimum control measures be imposed on regulated small municipal separate storm sewer systems without the agreement of the owner or operator of the affected municipal separate storm sewer system, except where adequate information exists in approved TMDLs or equivalents of TMDLs to develop more specific measures to protect water quality, or until EPA's comprehensive evaluation is completed. EPA will evaluate the regulations based on data from the NPDES municipal storm water program, from research on receiving water impacts from storm water, and the effectiveness of best management practices (BMPs).)

5. Add § 122.44(s) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25)

* * * * *

(s)(1) For storm water discharges from construction sites identified in § 122.26(b)(15)(i), the Director may include permit provisions that incorporate by reference qualifying State, Tribal, or local sediment and erosion control program requirements. A qualifying State, Tribal, or local sediment and erosion control program is one that meets the requirements of a municipal NPDES separate storm sewer permit or a program otherwise approved by the Director. For the Director to approve such programs, the program must meet the minimum program requirements established under § 122.34(b)(4).

(2) For storm water discharges identified in § 122.26(b)(14)(x), the Director may include by reference State, Tribal or local requirements that meet the standard of ''best available technology'' (BAT) as defined, for example, in the storm water general permit.

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 123.25 is amended by adding paragraphs (a)(39) through (a)(46) to read as follows:

§ 123.25 Requirements for permitting.

(a) * * *

(39) § 122.30 (What is the purpose of the CWA section 402(p)(6) storm water regulations?);

(40) § 122.31 (For Indian Tribes only) (As a Tribe, what is my role under the CWA section 402(p)(6) storm water program?)

(41) § 122.32 (As an owner or operator of a small municipal separate storm sewer system, am I regulated under the CWA section 402(p)(6) municipal storm water program?);

(42) § 122.33 (If I am an owner or operator of a regulated small municipal separate storm sewer system, must I apply for an NPDES permit? If so, by when do I have to seek coverage under an NPDES permit? If so, who is my NPDES permitting authority?);

(43) § 122.34 (As an owner or operator of a regulated small municipal separate storm sewer system, what will my NPDES municipal storm water permit require?);

(44) § 122.35 (As an owner or operator of a regulated small municipal separate storm sewer system, what if another governmental or other entity is already implementing a minimum control measure in my jurisdiction?);

(45) § 122.36 (As an owner or operator of a regulated small municipal separate storm sewer system, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?);

(46) § 122.37 (Will the municipal storm water program regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter change in the future?);

* * * * *

3. Add an undesignated centerheading and § 123.35 to subpart B to read as follows:

NPDES Permitting Authority Role for the CWA section 402(p)(6) Municipal Program

§ 123.35 As the NPDES Permitting Authority for regulated small municipal separate storm sewer systems, what is my role?

(a) You must comply with the requirements for all NPDES permitting authorities under parts 122, 123, 124, and 125 of this chapter. (This section is meant only to supplement those requirements and discuss specific issues related to the small municipal storm water program.)

(b) You must develop a process, as well as criteria, to designate incorporated places, counties, or other places under the jurisdiction of a governmental entity, other than those described in § 122.32(a)(1) of this chapter, as regulated small municipal separate storm sewer systems to be covered under the CWA section 402(p)(6) program. This process must include the authority to designate a small municipal separate storm sewer system waived under paragraph (d) of this section if circumstances change. EPA may make designations under this section if a State or Tribe fails to comply with the requirements listed in this paragraph. In making your designations, you must:

(1) Develop criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts. (EPA recommends as guidance for determining other significant water quality impacts a balanced consideration of the following designation criteria on a watershed or other local basis: discharge to sensitive waters, high growth or growth potential, high population density, contiguity to an urbanized area, significant contributor of pollutants to waters of the United States, and ineffective control of water quality concerns by other programs.);

(2) Apply such criteria, at a minimum, to any incorporated place, county, or other place under the jurisdiction of a governmental entity located outside of an urbanized area that has a population density of at least 1,000 people per square mile and a population of at least 10,000;

(3) Designate any incorporated place, county or other place under the jurisdiction of a governmental entity that meets the selected criteria by {insert date three years and 90 days from date of publication of final rule in the FEDERAL REGISTER}. You may have until {insert date five years from date of publication of final rule in the FEDERAL REGISTER} to apply the designation criteria on a watershed basis where there is a comprehensive watershed plan. You may apply these criteria to make additional designations at any time, as appropriate; and

(4) Designate any incorporated place, county, or other place under the jurisdiction of a governmental entity that contributes substantially to the storm water pollutant loadings of a physically interconnected municipal separate storm sewer system that is regulated by the NPDES storm water program.

(c) You must make a final determination within 180 days from receiving a petition under § 122.32(b) of this chapter (or analogous State or Tribal law). If a State or Tribe fails to do so, EPA may make a determination on the petition.

(d) You must issue permits consistent with §§ 122.32 through 122.35 of this chapter to all regulated small municipal separate storm sewer systems. You may waive the requirements otherwise applicable to regulated small municipal separate storm sewer systems, as defined in § 122.32(a)(1) of this chapter, if the jurisdiction of the regulated small municipal separate storm sewer system includes a population of less than 1,000 persons, its discharges are not contributing substantially to the storm water pollutant loadings of a physically interconnected regulated municipal separate storm sewer system (see paragraph (b)(4) of this section), and the owner or operator of the regulated small municipal separate storm sewer system has certified that storm water controls are not needed based on:

(1) Wasteload allocations that are part of ''total maximum daily loads'' (TMDLs) that address the pollutants of concern; or

(2) A comprehensive watershed plan, implemented for the waterbody, that includes the equivalents of TMDLs, and addresses the pollutants of concern.

(e) You must specify a time period of up to 5 years from the date of permit issuance for owners or operators of small municipal separate storm sewer systems to fully develop and implement their storm water program.

(f) You must include the requirements in § 122.34 of this chapter including as modified in accordance with §§ 122.33(a)(3), 122.34(c), or 122.35(b) of this chapter, in any permit issued for regulated small municipal separate storm sewer systems. (You may include permit provisions in a regulated small municipal separate storm sewer system NPDES permit that incorporates by reference qualifying local, State or Tribal municipal storm water management program requirements that address one or more of the minimum controls of § 122.34(b) of this chapter (see § 122.34(c) of this chapter). Qualifying local, State or Tribal program requirements must impose, at a minimum, the relevant requirements of § 122.34(b) of this chapter.)

(g) If you plan to issue a general permit to authorize storm water discharges from small municipal separate storm sewer systems, you must provide or issue by {insert 2 years from date of publication of final rule in the **Federal Register**} a menu of regionally appropriate and field-tested BMPs that you believe to be cost-effective from which regulated small municipal separate storm sewer systems can select. Failure to issue the menu of BMPs would not affect the legal status of the general permit. If a State or Tribe fails

to provide or issue the menu, EPA may do so.

(h) You must incorporate additional measures necessary to ensure effective implementation of your State storm water program for regulated small municipal separate storm sewer systems. (EPA recommends consideration of the following:

(1) You are encouraged to use a general permit for regulated small municipal separate storm sewer systems;

(2) To the extent that there is a dedicated funding source, you should play an active role in providing financial assistance to owners and operators of regulated small municipal separate storm sewer systems;

(3) You should support local programs by providing technical and programmatic assistance, conducting research projects, performing watershed monitoring, and providing adequate legal authority at the local level;

(4) You are encouraged to coordinate and utilize the data collected under several programs including water quality management programs, TMDL programs, and water quality monitoring programs;

(5) Where appropriate, you may recognize existing responsibilities among governmental entities for the control measures in an NPDES small municipal storm water permit (see § 122.35(b) of this chapter); and

(6) You are encouraged to use a brief (e.g., two page) reporting format to facilitate compiling and analyzing data from submitted reports under § 122.34(f)(3) of this chapter. EPA will develop a model form for this purpose.)

[FR Doc. 98–180 Filed 1–8–98; 8:45 am]

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Federal Register

Friday
January 9, 1998

Part III

Department of Health and Human Services

Health Care Financing Administration

42 CFR Part 411

Medicare Program; Physicians' Referrals; Issuance of Advisory Opinions; Final Rule

42 CFR 411 et al.

Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 411

[HCFA–1902–IFC]

RIN: 0938–AI38

Medicare Program; Physicians' Referrals; Issuance of Advisory Opinions

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period incorporates into HCFA's regulations the provisions of section 1877(g)(6) of the Social Security Act (the Act), as added by section 4314 of the Balanced Budget Act of 1997. Section 1877(g)(6) requires that the Secretary issue written advisory opinions to outside parties concerning whether the referral of a Medicare patient by a physician for certain designated health services (other than clinical laboratory services) is prohibited under the physician referral provisions in section 1877 of the Act. Section 1877 not only prohibits certain referrals under the Medicare program, but also affects Federal financial participation payments to States under the Medicaid program for medical assistance consisting of designated health services furnished as the result of certain physician referrals. This final rule sets forth the specific procedures HCFA will use to issue advisory opinions.

EFFECTIVE DATES: The regulations are effective January 9, 1998.

Comment Date: Comments will be considered if we receive them at the appropriate address as provided below, no later than 5 p.m on March 10, 1998.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1902–IFC, P.O. Box 26688, Baltimore, MD 21207.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments may also be submitted electronically to the following e-mail address: hcfa1902ifc.hcfa.gov. E-mail comments must include the full name and address of the sender and must be submitted to the referenced address in order to be considered. All comments must be incorporated in the e-mail message because we may not be able to access attachments. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1902–IFC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

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FOR FURTHER INFORMATION CONTACT: Joanne Sinsheimer (410) 786–4620.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legislative history of section 1877

Section 6204 of the Omnibus Budget Reconciliation Act of 1989 (OBRA'89), Public Law 101–239, enacted on December 19, 1989, added section 1877 to the Social Security Act (the Act). (Unless we indicate otherwise, all references in this document to sections of the law are references to the Act.) In general, section 1877 as it read under OBRA'89 provided that, if a physician (or an immediate family member of a physician) had a financial relationship with a clinical laboratory, that physician could not make a referral to the laboratory for the furnishing of clinical laboratory services for which Medicare might otherwise pay. It also provided that the laboratory could not present or cause to be presented a Medicare claim or bill to any individual, third party payer, or other entity for clinical laboratory services furnished under the prohibited referral. Additionally, it required a refund of any amount collected from an individual as the result of billing for an item or service furnished under a prohibited referral. These provisions were effective for referrals made on or after January 1, 1992.

The statute defined ''financial relationship'' as an ownership or investment interest in the entity providing clinical laboratory services or a compensation arrangement between the physician (or immediate family member) and the entity. The statute provided a number of exceptions to the prohibition. Some of these exceptions applied to both ownership/investment interests and compensation arrangements, while other exceptions applied to only one or the other of these. Additionally, the statute imposed reporting requirements relating to a physician's (or family member's) financial relationships and provided for sanctions.

Section 4207(e) of the Omnibus Budget Reconciliation Act of 1990 (OBRA'90), Public Law 101–508, enacted on November 5, 1990, amended certain provisions of section 1877 to clarify the definitions in section 1877(h), alter the reporting requirements, and to provide an additional exception to the prohibition.

Section 1877 was extensively revised by section 13562 of the Omnibus Budget Reconciliation Act of 1993 (OBRA'93, Public Law 103–66, enacted on August 10, 1993). It modified the prior law to apply to referrals for ten ''designated health services'' in addition to clinical

laboratory services, modified some exceptions, and added new ones. Some of the amendments were retroactively effective to January 1, 1992, while others (such as the expansion to the additional designated health services) did not become effective until January 1, 1995. Section 152 of the Social Security Act Amendments of 1994 (SSA'94), Public Law 103–432, enacted on October 31, 1994, amended the list of designated services, effective January 1, 1995. It also changed the reporting requirements in section 1877(f) and amended some of the effective dates of the OBRA'93 provisions. The amended list of designated health services includes:

- Clinical laboratory services.
- Physical therapy services.
- Occupational therapy services.
- Radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services.
- Radiation therapy services and supplies.
- Durable medical equipment and supplies.
- Parenteral and enteral nutrients, equipment, and supplies.
- Prosthetics, orthotics, and prosthetic devices and supplies.
- Home health services.
- Outpatient prescription drugs.
- Inpatient and outpatient hospital services.

Section 13624 of OBRA'93 extended aspects of the referral prohibition to the Medicaid program, adding a new paragraph (s) to section 1903 of the Social Security Act. This provision denies Federal financial participation (FFP) payment under the Medicaid program to a State for certain expenditures for designated health services. A State cannot receive FFP for designated health services furnished to an individual on the basis of a physician referral that would result in a denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same terms and conditions as under the State Medicaid plan. Section 13624 also specified that the reporting requirements in section 1877(f) and the civil money penalty provision in section 1877(g)(5) (which relates to reporting) apply to a provider of a designated health service for which payment may be made under Medicaid in the same manner as they apply to a provider of a designated health service for which payment may be made under Medicare. Section 1903(s) applies to a physician's referrals made on or after December 31, 1994.

B. Regulations relating to section 1877

On March 11, 1992, we published a proposed rule (57 FR 8588) setting forth the self-referral prohibition and exceptions to the prohibition in section 1877, as enacted by OBRA' 89 and amended by OBRA '90, relating to a physician's referrals for clinical laboratory services.

On August 14, 1995, we published, at 60 FR 41914, a final rule with comment period that incorporated into the Medicare regulations the provisions of section 1877 that relate to the prohibition on physician referrals for clinical laboratory services. The August 1995 final rule contains revisions to the March 11, 1992, proposal based on comments submitted by the public. Further, it incorporates the amendments and exceptions created by OBRA '93 and the amendments in SSA '94 that relate to referrals for clinical laboratory services. It addresses only those changes that had a retroactive effective date of January 1, 1992; it does not incorporate those modifications to section 1877 that became effective for referrals made on or after January 1, 1995. (Even though the August 1995 final rule incorporates OBRA '93 and SSA '94 provisions, it generally only reiterates them without interpreting them. We interpreted the new provisions only in a few instances in which it was necessary to do so in order to implement the statute at all.)

We are publishing elsewhere in this same issue of the **Federal Register** a proposed rule that interprets the OBRA'93 and SSA '94 provisions described above and incorporates and interprets the provisions of section 1877 that became effective on January 1, 1995, and concern the other designated health services. This proposed rule also addresses the application of sections 1877 and 1903(s) to the Medicaid program.

C. Advisory Opinions: Section 4314 of Public Law 105–33

Section 4314 of the Balanced Budget Act of 1997, Public Law 105–33, enacted on August 5, 1997, added section 1877(g)(6) to the Act. This provision requires that the Department provide additional formal guidance to outside parties regarding the application of the physician referral statute.

Section 1877(g)(6)(A) requires that the Secretary issue written advisory opinions concerning whether a referral relating to designated health services (other than clinical laboratory services) is prohibited under the provisions in section 1877. This paragraph states that each advisory opinion issued by the Secretary will be binding on the Secretary and the party or parties who requested the opinion.

Section 1877(g)(6)(B) requires the Secretary, in issuing physician referral advisory opinions, to apply the rules in paragraphs (b)(3) and (4) of section 1128D of the Act, to the extent practicable. Section 1128D was added to the Act by section 205 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104–191, effective August 21, 1996. It requires the Secretary, in consultation with the Attorney General, to issue written advisory opinions to particular parties on certain specified matters involved in applying the anti-kickback statute in section 1128B(b) of the Act, the safe harbor provisions in 42 CFR 1001.952, as well as other health care fraud and abuse sanctions handled by the Office of Inspector General (OIG).

Section 1128D(b)(3)(A) prohibits the OIG in its advisory opinions from addressing whether fair market value will be or was paid or received for any goods, services, or property. Section 1128D(b)(3)(B) prohibits the OIG from addressing whether an individual is a bona fide employee within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986. As noted above, HCFA is required to apply these provisions ''to the extent practicable.'' We are incorporating these provisions in their entirety into our own advisory opinion rules.

Section 1128D(b)(4)(A) states that the OIG advisory opinions are binding on the Secretary and the party or parties requesting the opinion. Section 1128D(b)(4)(B) provides that if a party fails to seek an advisory opinion, this fact may not be introduced into evidence to prove that the party intended to violate the provisions of sections 1128, 1128A, or 1128B. We are also required to apply these provisions ''to the extent practicable.'' We are incorporating section 1128D(b)(4)(B) in its entirety. However, we are not incorporating section 1128D(b)(4)(A) because we believe that it is redundant with our own advisory authority in section 1877(g)(6)(A). This provision states that each advisory opinion issued by the Secretary will be binding on the Secretary and on the party or parties requesting the opinion.

Section 1877(g)(6)(B) also requires us to take into account the regulations promulgated by the OIG to cover advisory opinions, issued by the OIG under the authority of section 1128D(b)(5). We believe that ''take into account'' means that we should use the OIG regulations as our model, but that we are not bound to follow them. We have attempted to follow the OIG

regulations as closely as possible in each instance in which we believed that it was reasonable to do so.

Section 1128D(b)(5)(A) states that the OIG's regulations must provide for—

- The procedure to be followed by a party applying for an advisory opinion;
- The procedure to be followed by the Secretary in responding to a request for an advisory opinion;
- The interval in which the Secretary will respond;
- The reasonable fee to be charged to the party requesting an advisory opinion; and
- The manner in which advisory opinions will be made available to the public.

Under section 1128D(b)(5)(B), the OIG is required to issue an advisory opinion to a party by not later than 60 days after receiving the request for the opinion and to charge the requesting party a fee that is equal to the costs the Secretary incurs in responding to the request.

The OIG's procedures for advisory opinions are set forth in 42 CFR part 1008. They were published as an interim final rule with comment period on February 19, 1997 (62 FR 7350). In section III. of this preamble, we discuss each of the elements required by section 1128D(b)(5)(A) (for the OIG's regulations). Many of our procedures are based on those articulated in the OIG regulations.

II. Provisions of the Interim Final Rule with Comment Period

A. Overview of the advisory opinion requirement

This interim final rule with comment period creates regulations at sections 411.370 through 411.389 that establish procedures for the advisory opinions described in section 1877(g)(6). These advisory opinions will provide the public with meaningful advice regarding whether, based on specific facts, a physician's referrals for a designated health service (other than a clinical laboratory service) are prohibited by the referral provisions in section 1877. The advisory opinion process will be meaningful to any parties who are interested in learning whether a particular business arrangement involving a physician (or a physician's immediate family member) will result in the physician being prohibited from making certain referrals under the Medicare program. This process also could prove significant to parties who are interested in the status of a physician's referrals under the Medicaid program. That is because the FFP provision in section 1903(s) of the Act depends upon whether a physician's referrals would be prohibited under the Medicare rules if the Medicare program covered a designated health service in the same manner as it is covered under the State Medicaid plan.

In an advisory opinion, we will restate the material facts known to us, present our analysis, and provide conclusions about how we believe the law applies to the facts presented. We will base our analysis on our interpretation of the provisions in section 1877.

Section 1877(g)(6) requires advisory opinions only on the issue of whether a referral relating to designated health services (other than clinical laboratory services) is a prohibited referral under section 1877. If a physician has an unexcepted financial relationship with an entity, as defined by the statute and our regulations, then that physician's referrals for designated health services for a Medicare patient would be prohibited, regardless of the intent of any of the parties involved in the arrangement. Thus, our advisory opinions will be fact-based, and will contain no discussions about what we believe the parties knew when they entered into the arrangement or what they may have intended.

While section 1877 is primarily a payment ban that is effective regardless of the intent of the parties involved, there are additional sanctions under section 1877(g)(3) and (g)(4) that include elements of knowledge or intent. Section 1877(g)(4), in fact, imposes a penalty for certain referrals that might not otherwise be prohibited, if the parties involved in an arrangement have a particular purpose in mind. This provision applies to any physician or other entity that enters into an arrangement or scheme (such as a cross-referral arrangement) that the physician or entity knows or should know has a principal purpose of ensuring referrals by the physician to a particular entity that, if the physician directly made referrals to that entity, would be in violation of section 1877. Sanctions under this provision include potentially significant civil money penalties and possible exclusion from the Medicare and other health care programs.

We do not believe that section 1877(g)(6) requires us to express any opinion about what the parties to an arrangement knew or intended, for purposes of any of the sanctions in section 1877(g) (3) and (4). Even if we wished to comment on any intent-based aspect of the referral provisions, we believe that it is not practical for us to make an independent determination of the subjective intent of the parties based only upon written materials that have been submitted by the requestor. While we expect requestors to submit complete written descriptions of their arrangements and transactions, along with relevant portions of documents, these materials do not afford a satisfactory basis upon which we could make a reliable determination of subjective intent.

Section 1877(g)(6)(A) states that an advisory opinion shall be binding on the Secretary and on the party or parties requesting an opinion. It is also our view that an advisory opinion may legally be relied upon only by the requestors.

We believe that advisory opinions are capable of being misused by persons *not* a party to the transaction in question in order to inappropriately escape liability. Advisory opinions are intended only to address the facts of a particular arrangement. A third party may implement an arrangement that appears similar to the arrangement described in the advisory opinion, but the third party may introduce *additional* factors that may make a difference in the outcome of an advisory opinion.

As set forth below, this interim final rule with comment period has been developed primarily to address the following issues:

- The procedure to be followed by a party applying for an advisory opinion.
- The procedure we will follow in responding to a request.
- The interval within in which we will respond to a request for an advisory opinion.
- The reasonable fee we will charge to the party requesting an advisory opinion.
- The manner in which we will make advisory opinions available to the public.

This final rule with comment period does not address the substance or the content of advisory opinions issued by us.

B. Responsibilities of outside parties seeking advisory opinions

1. Who can request an advisory opinion

Any individual or entity may submit a request to us for a written advisory opinion about whether a physician's referral relating to a designated health service, other than a clinical laboratory service, is prohibited under section 1877. We anticipate that most requests will involve financial relationships that involve health care business arrangements. Therefore, for purposes of this discussion, we will generally use the term ''arrangement'' to refer to the factual circumstances that are involved

in a request for an advisory opinion, even though some requests might involve facts that are not related to a business arrangement.

As indicated above, the advisory opinion process is designed to provide authoritative guidance to participants in particular arrangements. Therefore, the arrangement in question must either be in existence at the time of the request for an advisory opinion or, with respect to prospective arrangements, there must be a good faith intention to enter into the described arrangement in the near future. (With respect to prospective conduct, we are stating that the requestor can declare the intention to enter into the arrangement contingent upon receiving a favorable advisory opinion from us or from both us and the OIG.)

Requestors who are not individuals are required to disclose certain ownership information, so that we can check to ensure that the matter which is the subject of the advisory opinion request is not under current investigation. We are also requiring that requestors inform us, to the best of their knowledge, about whether the arrangement involved in the request is the subject of any current investigations.

2. Matters not subject to an advisory opinion

As explained above, even if a party requests it, we will not address the issue of whether fair market value was, or will be, paid or received for any goods, services, or property or the issue of whether an individual is a bona fide employee within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986.

In addition, we do not believe that it is appropriate to provide advisory opinions to persons *not* involved in the arrangement in question. For example, we believe that a description of a competitor's arrangement is not the proper subject of an advisory opinion since the participants to the particular transaction would not be involved in the request. A party to an actual arrangement—either existing or about to be entered into—is in a position to provide full and complete information regarding the facts in question. By contrast, third parties are not in a position to provide a reliable statement about the facts of a particular arrangement in which the third party is not a participant. In addition, it is unclear who would be bound by an advisory opinion on an arrangement that does not involve the requestor.

Similarly, we do not believe it is appropriate to provide advisory opinions on hypothetical or generalized arrangements. Section 1877(g)(6) requires the Secretary to issue advisory opinions concerning ''whether a referral relating to designated health services (other than clinical laboratory services) is prohibited under this section.'' (Emphasis added.) We interpret this provision to mean a specific referral involving a physician in a specific situation. We also believe there are reasons to avoid opinions on generalized arrangements. Because of the complexity of the business arrangements that exist in today's health care community, physician referral cases are not likely to be the same in all material respects. The introduction by a party of any *additional* factors could make a material difference in the resulting opinion. We believe it would not be possible for an advisory opinion to reliably identify all the possible hypothetical factors that might lead to different results.

3. Initiating the process for an advisory opinion

A requestor must submit a written request for an advisory opinion in order to initiate the process. The request must clearly and thoroughly present a complete description of the situation that is the subject of the advisory opinion. The request should include all facts that would be relevant in determining whether a particular situation could result in a physician's referrals being prohibited under section 1877. To the extent that the request provides the necessary information in a clear and orderly manner, we will be better able to process it.

We are requiring any submission to include copies of all relevant documents or relevant portions of documents, such as financial statements, contracts, leases, employment agreements and court documents (requestors may withhold irrelevant portions), as well as descriptions of any other arrangements or relationships that may affect the documents or our analysis. In addition, the submission should include a narrative description of the arrangement. In making the request, a requestor must include the identities (including names and addresses) of the requestor and all other actual and potential parties to the arrangement, to the extent known to the requestor. In addition, the request must include the Taxpayer Identification Number (TIN) of the requestor. The Debt Collection Improvement Act of 1996 (section 31001 of Public Law 104–134) requires agencies to collect the TIN from all persons or businesses ''doing business with a Federal agency.'' (See 31 U.S.C. 7701(c).) We believe that requesting, receiving, and paying for our work on an advisory opinion fits into the category of ''doing business with a Federal agency.'' Therefore, a request for an advisory opinion must include the TIN of the requestor. The TIN will be used for purposes of collecting and reporting on any delinquent amounts arising out of the requestor's failure to render proper payment for the advisory opinion. In addition to the above information, we are also requiring the requestor to identify a designated contact person who will be available to communicate with us.

We are also requiring that requestors make two certifications as part of their request for an advisory opinion. If the requestor is an individual, the individual must sign the certification; if the requestor is a corporation, it must be signed by the Chief Executive Officer, or a comparable officer; if the requestor is a partnership, it must be signed by a managing partner; and, if the requestor is a limited liability company, the certification must be signed by a managing member. The responsible individual must certify that all of the information provided as part of the request is true and correct, and constitutes a complete description of the facts regarding which an advisory opinion is being sought, to the best of the requestor's knowledge. If the request relates to prospective conduct, the regulations state that the request must also include a certification that the requestor intends in good faith to enter into the arrangement described in the request. A requestor may make this certification contingent upon receiving a favorable advisory opinion from us or from both us and the OIG.

While all submissions should include the above categories of information, we cannot in these interim final regulations provide complete details on exactly what information a requestor must provide. We anticipate that we will receive requests that involve a wide variety of business arrangements, some of which may be quite complex. At a minimum, any request must describe the entities and parties involved in an arrangement, the specific terms of the arrangement, and the direct or indirect relationship between the physician (or a physician's immediate relative) and any entity that furnishes designated health services. Requestors should also include any information they believe demonstrates that the arrangement meets one of the exceptions to the referral prohibition.

We are soliciting public comment and input on any other types of information that a requestor should routinely provide and intend to address this point

further in any revised final rulemaking. In the interim, prior to submitting a request for an advisory opinion, *we strongly advise* that a requestor contact us to inquire about the information HCFA will need to process a request of the type the requestor intends to submit. Inquiries can be made by telephoning Joanne Sinsheimer at (410) 786–4620. We may, depending on the subject matter of the inquiry, informally provide parties with preliminary questions to help them structure their requests. Our goal is to help ensure that the requests include the factual information we will need to respond to them. Requestors should (but are not required to) answer these questions in their requests for an advisory opinion. If the information we need is in the first submission, we will be better able to render a prompt, concise, and appropriate advisory opinion. We welcome comments on this approach.

The regulation also requires that a requestor inform us about whether the parties involved in the request have also asked for or are planning to ask for an advisory opinion on the arrangement in question from the OIG under section 1128D(b) of the Act. We plan to routinely exchange information with the OIG on requests that we receive and on our intended responses. We plan, in particular, to establish a system that will help guarantee adequate coordination when parties have asked for opinions from both us and the OIG.

4. Fees charged to requesting parties

There is no express authority for us to charge a user fee to individuals who request an advisory opinion under section 4314 of the Balanced Budget Act of 1997. However, in the absence of express authority for this particular purpose, we can rely on the authority for collecting such a fee provided by the Independent Offices Appropriations Act of 1952 (IOAA), 31 U.S.C. 9701. That statute generally governs Federal agencies' imposition and collection of user fees. In § 9701(a), the Congress expressed its intent that each service or thing of value provided by a Government agency to a person is to be self-sustaining to the extent possible. Section 9701(b) authorizes agencies to prescribe regulations establishing the fee for a service or thing of value provided by the agency. The fee must be ''fair'' and based on the cost to the government of providing the service or thing, the value of the service or thing to the recipient, public policy or interest served, and other relevant facts. 31 U.S.C. 9701(b).

In 1974, the Supreme Court ruled that the user fee statute must be read narrowly as authorizing not a ''tax'' (which may be levied only by Congress and need not relate to benefits bestowed on the taxpayer), but a ''fee'' for a particular benefit. *National Cable Television Ass'n, Inc.* v. *United States,* 415 U.S. 336 (1974)(FCC had authority to impose fees; costs that inure to the public's benefit should not be included in the fee imposed). In a companion case, *Federal Power Commission* v. *New England Power Company,* 415 U.S. 345 (1974), the Court opined that the Office of Management and Budget (OMB) had properly construed the user fee statute in a 1959 circular, which stated that a reasonable charge ''should be made to each identifiable recipient for a measurable unit or amount of government service or property from which he derives a special benefit.'' *Id.* at 349. The OMB Circular A–25 was revised in 1993, and currently provides under the heading ''General policy'' that a user charge ''will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.'' 58 FR 38142, 38144. The language of currently applicable OMB guidance to agencies about when a ''special benefit'' will be considered to accrue for purposes of imposing a charge is virtually identical to that cited by the Court with approval. *Id.* at 349, fn. 3.

More recent appellate court decisions addressing agencies' authority to impose user fees similarly examine the extent to which there is a ''*specific* service that confers a *special* private benefit on an *identifiable* beneficiary.'' *Seafarers Int'l Union of N. Am.* v. *Coast Guard,* 81 F.3d 179, 184 (D.C. Cir. 1996) (emphasis in original). *See, also, Engine Mfrs. Ass'n* v. *EPA,* 20 F.2d 1177 (D.C. Cir. 1994) and *Central & Southern Motor Freight Tariff Ass'n* v. *United States,* 777 F.2d 722 (D.C. Cir. 1985). We believe that the advisory opinions we must provide under section 4314 fall squarely into this category. That is, they are an ''extra'' service that an interested party can request from the Secretary, they relate to the party's own, unique situation, and they are binding on the Secretary and the requesting party alone, with no general application.

Section 411.372(b)(9) requires that a requestor make payment for an advisory opinion directly to us. We believe that HCFA has the authority to both collect and retain the fees. Annual appropriations acts have since 1996 authorized our retention of otherwise authorized user fees, and this authority would apply to all user fees we are authorized to collect. The retention language appears in the most recent appropriations act, enacted on November 13, 1997, Public Law 105–78, in the paragraphs covering appropriations for our program management. This language states that, in carrying out titles XVIII and XIX of the Act, the Secretary is authorized to use a specific amount of money that will be transferred from the Federal Hospital Insurance and the Federal Supplementary Medical Insurance Trust Funds, together with ''such sums as may be collected from authorized user fees and the sale of data, which shall remain available until expended, * * *.''

Since section 1877(g)(6) of the Act requires that we take into account the OIG regulations implementing section 1128D(b)(5), we have modeled our user fee on the fee that appears in those regulations. Under section 1128D(b)(5)(A)(iv), the OIG regulations must provide for a ''reasonable fee'' to be charged to the party requesting an advisory opinion. Section 1128D(b)(5)(B)(ii) requires that requestors be charged a fee equal to the costs incurred by the Department in responding to the request.

We have adopted the ''actual cost'' fee from the OIG regulations. Section 411.375(b) of our regulations indicates that in determining the actual costs, we will factor in the salary, benefits, and overhead costs of policy analysts, attorneys, and others who may work on analyzing requests and writing advisory opinions, including administrative and supervisory support for these individuals. Because we expect that requests may range widely in their complexity, we do not believe it is possible to calculate or accurately estimate the cost of providing an advisory opinion in advance. In fact, the OIG has interpreted section 1128D(b)(5)(B)(ii) to require a fee that represents the *actual* costs that it has incurred in processing each individual request. We are also reflecting this concept in our regulations.

We have included in our regulations the OIG's requirement that, once the advisory opinion process is complete, either because we have issued the opinion or the request has been withdrawn, the requestor is responsible for paying an amount equal to the costs incurred by the Government in responding to the request.

Although we cannot reliably project the processing costs in advance, we can make broad estimates that may be of use to prospective requestors. We estimate that, currently, the actual cost of processing a request, including salaries, benefits and overhead, would be approximately $75 an hour. We must include in our estimate the time of

technical staff, attorneys, supervisors, and support staff, as well as others with whom we may consult on various issues.

The time it will take us to process a request will depend on the complexity of the request and the quality of the submission. Simple requests might only take a few hours. For example, a request concerning whether a physician can refer patients to his wife, who works for a physical therapy facility, may take approximately 3 hours to analyze and produce a written opinion. On the other hand, a request involving the application of the physician referral rules to a large, multi-party, intricate business arrangement may take us in excess of 40 hours to fully analyze and produce a written advisory opinion.

We believe that it is reasonable to expect that requests for an advisory opinion will, at present, cost at least $250 for initial processing. It will take time for us to carefully read and analyze every request for an advisory opinion and to ensure that we have accurately understood all the material facts in each request. Accordingly, the regulations provide for a nonrefundable payment of $250 that must accompany any request for an advisory opinion that we receive through the end of 1998. Once we have gained experience in estimating the resources we will need and have factored in any inflation in our costs, we may need to revise our initial fee through a program issuance. We expect to revise the fee periodically after December 31, 1998.

Because we do not believe that we can accurately estimate our costs in advance for a particular request, we intend to try to accommodate requestors who may want to limit the costs of receiving an advisory opinion. The regulations provide that requestors may designate a ''triggering dollar amount'' in their requests for an advisory opinion. If we calculate that the cost of processing a request has reached, or is likely to exceed, that triggering amount, we will stop processing the request and promptly notify the requestor. The requestor may then decide to either authorize us to continue or withdraw the request. We believe we will be able to more accurately reflect costs in advance once we have gained experience. In the interim, this triggering mechanism should be useful in helping to ensure that requestors do not pay costs far in excess of what they expect to pay when they submit their requests.

Section 411.375(c)(4) of the regulations specifically indicates that, while a requestor may withdraw a request for an advisory opinion at any time, he or she will be responsible for any costs we incurred in processing the request before it was withdrawn.

When we have completed the advisory opinion as discussed below, or the requestor has withdrawn the request, we will calculate the total costs that we incurred in processing the request. In calculating this amount, we will take into account any previous payments associated with the request, such as the initial $250 fee, and then notify the requestor of the amount he or she still owes. Once the requestor has paid the full cost, we will release the opinion to the requestor.

We believe that our approach for payment and release will be sufficient for the vast majority of requests for advisory opinions. However, we also believe that we need an additional procedure for cases in which the request will necessitate that we acquire expert advice. We may, for example, need to consult with accountants or with business professionals in order to better understand complex financial relationships.

Because such expert reviews will entail additional time and expense, we believe that we should treat differently any request that requires outside consultation rather than just a standard application of the governing law to a given set of facts. If we determine that we require an expert opinion, we will obtain an estimate for the costs of the opinion and provide the requestor with that estimate. The requestor may then decide to either pay the estimated cost of the expert review or withdraw the request. If the requestor pays the estimated cost, we will promptly refer the matter to the expert for review. Once the outside expert has provided us with the review, we will continue the advisory opinion process by applying the expert evaluation to the legal questions at issue. If the expert evaluation ultimately costs more than the estimated cost, we will bill the requestor for the additional expense as part of the Department's overall costs in responding to the request. These additional costs will be included when we determine whether we are approaching a requestor's ''triggering dollar amount.''

We intend to begin processing requests as soon as we receive them. However, although we will be charging user fees for the cost to the Government for responding to these requests, we will not be adding staff until we determine the volume of requests and the complexity of the legal issues and fact patterns. Once we have had some experience processing requests for advisory opinions, we intend to reconsider the method described in this section for calculating fees. We are specifically soliciting comments on our methodology for determining costs.

C. HCFA's responsibilities

1. Reviewing requests for advisory opinions

Once we receive a request for an advisory opinion, we will promptly examine it to determine if it appears to contain sufficient information for us to form the basis for an informed advisory opinion. (Generally speaking, a request is most likely to be sufficient if the requestor sought our advice before submitting a formal request, and the request contains responses to any preliminary questions we may have posed at that time.) If a request does not appear to us to be sufficient, we will promptly notify the requestor about the additional information we need. On the other hand, if the request appears to be sufficient, we will accept the request. In all cases, we will either ask for additional information or accept the request within 15 working days after we receive the request. If we have requested additional information and the requestor resubmits the advisory opinion request, we will assess the resubmission within 15 working days to determine whether it can be accepted or whether we still need further information. At the point when we accept the request, we will notify the requestor by U.S. mail of the date of our acceptance.

We believe that this approach will provide us with a reasonable amount of time to identify requests that do not contain sufficient information. We are limiting the time period for this initial assessment in order to ensure that we promptly process requests that appear to be complete. We are interested in public comments on whether we have developed an appropriate method for screening advisory opinion requests before we accept them.

Even in situations in which we have accepted a request, we reserve the right to later determine that we need additional information. If we decide that additional information is necessary, we will notify the requestor in the same manner as we would notify a requestor before accepting a request. The time period between when we notify the requestor about the additional information we need and when we receive the requested information will not be counted as part of the time within which we must issue an opinion.

Because we believe that we may need to make fact-intensive inquiries in order to render many advisory opinions, we

anticipate that we may need to request additional information from many requestors. In responding, the requestor should provide us with the necessary information and include with it a certification from the same individual who certified the original request for an advisory opinion (or, if the requestor is an entity, from an individual who is in a comparable position).

2. Timeframe for issuing advisory opinions

Section 1128D(b)(5)(B) of the Act requires that the OIG issue an advisory opinion within 60 days after it has received the request for the opinion. The OIG has reflected this timeframe in its regulations at 42 CFR 1008.43. Because section 1877(g)(6) does not impose any deadline, we have established our own 90-day timeframe for most requests. In addition, for requests that we determine, in our discretion, involve complex legal issues or highly complicated fact patterns, we reserve the right to issue an advisory opinion within a reasonable timeframe. We have created this timeframe based upon our perception that we will receive many requests for advisory opinions and that a large percentage will involve complex fact patterns. This perception is based on the quantity and the nature of phone calls we have received, on a daily basis, over many years. We believe that the number of requests will be affected by the fact that the referral provisions in section 1877 apply to many parties because they can be triggered regardless of the intent of the parties. In addition, if an arrangement involves a physician who has a problematic financial relationship with an entity that furnishes designated health services, the parties must know that the arrangement meets an exception before that physician can refer. We have also based our timeframe on staffing limitations.

Although we will be charging user fees for the cost to the Government for responding to these requests, we will not be adding staff until we determine the volume of requests and the complexity of the legal issues and fact patterns.

Once we have had some experience processing requests for advisory opinions, we intend to reevaluate the timeframe to ensure that it is fair and to determine whether more staff is necessary. We are specifically soliciting comments on this issue.

We intend to begin processing requests as soon as we receive them. Once we receive a request that appears to meet all the submission criteria, we will promptly accept the request and our 90-day period for issuing an opinion will begin. We will send the advisory opinion to the requestor by regular U.S. mail by the end of the 90-day period and once the requestor has paid all the required fees.

We believe that under certain circumstances the running of our 90-day period for issuing an opinion should be tolled (suspended). The suspended periods will only reflect time when we cannot work on analyzing the request. If we notify a requestor that the costs have reached, or are likely to exceed, the triggering amount designated by that requestor, we will stop processing the request until the requestor instructs us to continue. Similarly, if we notify a requestor of the need for, and estimated cost of, an outside expert opinion on a nonlegal issue, the regulations state that we will stop processing the request until the requestor pays the estimated cost and the outside expert provides its opinion. Likewise, in those instances in which we request additional information from the requestor that we believe is necessary for us to issue the advisory opinion, we will stop processing the opinion until we receive the additional information.

The time period for issuing an advisory opinion does not include the time after we notify the requestor that the advisory opinion is complete and the requestor must pay the full balance due for the cost of the opinion.

While we intend to issue advisory opinions within 90 days of receiving the request, we do not believe that the 90-day time period should include delays in the processing of the request that are not within our control. With the exception of the delay that occurs while we wait for a necessary outside expert opinion, all of the possible events that can suspend the period are under the exclusive control of the requestor. We believe that for the vast majority of advisory opinion requests, the 90-day period will only be suspended for those periods during which the requestor has not paid a required fee or has not provided the information we need to process the request.

We will issue an advisory opinion to the requestor after we have considered the complete description of all the facts the requestor has provided to us. In the opinion, we will restate the material facts known to us, present our analysis, and provide conclusions about how we believe the law applies to the facts presented to us.

3. Dissemination of advisory opinions

Section 1128D(b)(5)(A)(v) requires that the OIG's regulations describe the manner in which advisory opinions will be made available to the public. We have adopted the OIG's policy as follows: As set forth in § 411.384(b) of these regulations, once we issue an advisory opinion to a requestor, we will promptly make a copy of that opinion available for public inspection (in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC (phone: 202–690–7890)) during our normal hours of operation and on our web site (http://www.hcfa.gov/regs/aop/). We also anticipate that commercial publishers and trade groups are likely to make advisory opinions widely available to interested members of the public. We welcome public comments and additional suggestions about disseminating advisory opinions to the public.

We will make available documents that are related to a request for an advisory opinion and have been submitted to us and any related internal government documents, to the extent we are required to do so by the Freedom of Information Act (FOIA) (5 U.S.C. 552). If a requestor provides information it believes is not subject to disclosure under FOIA, such as items that the requestor believes are trade secrets or privileged and confidential commercial or financial information, the requestor should identify this information in the manner described in 45 CFR 5.65 (c) and (d). The requestor's assertions about the nature of the information, however, are not controlling.

In addition, although a document may be exempt from disclosure under FOIA, facts reflected in that document may become part of the advisory opinion that HCFA will provide to the public. We will describe the material facts of the arrangement in question in the body of each advisory opinion, which will be made fully available to the public. To the extent that it may be necessary to reveal specific facts that could be regarded as confidential information, we believe we have the authority to do so under sections 1106(a) and 1877(g)(6) of the Act. We do not intend to release any such facts unless we believe it is necessary to do so.

4. Rescission of an advisory opinion

Section 411.382 reserves our right to rescind or revoke an advisory opinion after we issue it, in limited circumstances. For example, we can rescind an opinion if we learn after issuing it that the arrangement in question may lead to fraud and abuse. In such a situation, we will notify the requestor that we have rescinded and make the notice available to the same extent as an advisory opinion. The

requestor would not be subject to sanctions for any actions it took prior to the notice of rescission, if the requestor relied in good faith on the advisory opinion (unless we establish that the requestor failed to provide us with material information when it submitted the request for the opinion) and where the parties promptly discontinue the action upon receiving notice that we have rescinded or revoked our approval. We would also allow the parties to discontinue the action within what we believe is a reasonable ''wind down'' period, if we believe that the business arrangement is one that cannot be discontinued immediately. We are specifically soliciting comments on whether this approach reasonably balances the Government's need to ensure that advisory opinions are legally correct and the requestor's interest in finality.

5. Scope and effect of advisory opinions

Section 411.387 of these regulations addresses the scope and effect of advisory opinions. When we issue an advisory opinion under this process, it is legally binding on the Department and the requestor, but only with respect to the specific conduct of the particular requestor. Section 1877(g)(6)(A) requires only that an advisory opinion issued by the Secretary be binding upon the Secretary and the party or parties requesting the opinion. In light of this provision, the Department is not legally bound with respect to the conduct of a third party, even if the conduct of that party appears similar to the conduct of the requestor. Thus, under these regulations, no third parties are bound by nor may they rely upon an advisory opinion. Each advisory opinion will apply legal standards to a set of facts involving certain known persons who provide specific statements about key factual issues. A third party may create a look-alike arrangement, but any *additional* characteristics could lead to an unfavorable opinion. Therefore, by their very nature, advisory opinions cannot be applied generally.

We believe that even if a party has received a favorable advisory opinion from us regarding a particular arrangement, the Government is not totally prevented from commencing an action against a party to that arrangement. For example, this could occur if a requestor has failed to disclose a material fact. In any such action under sections 1128, 1128A or 1128B of the Act, an individual or entity who has requested and received an advisory opinion from us regarding the arrangement in question may seek to introduce the advisory opinion into evidence in the proceeding.

III. Regulatory Impact Analysis

We have examined the impact of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, most hospitals, and most other providers, physicians, and health care suppliers are small entities, either by nonprofit status or by having revenues of $5 million or less annually.

Section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis for any proposed rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

This rule establishes procedures for us to receive, review, and respond to requests for advisory opinions on the issue of whether a physician's referrals for certain designated health services are prohibited under section 1877 of the Social Security Act. This rule does not address the substance of section 1877 nor the substance or content of the advisory opinions we may issue in the future. Any effect an advisory opinion may have on the behavior of health care providers is the result of the substantive content of section 1877 and of the advisory opinions themselves, and not this rule.

Parties interested in advisory opinions will incur certain costs in requesting the opinions. However, it is the law that allows us to require that requestors pay cost-based fees for advisory opinions. This rule merely lays out procedures for paying the costs.

Estimated number of respondents: Many individuals and entities that provide certain designated health services that may be paid for by Medicare or Medicaid could potentially have questions regarding the referral provisions in section 1877.

We estimate that, within the last year, we received an average of eight telephone calls each day regarding the physician self-referral provisions. We believe that some percentage of calls involved issues and situations about which the callers would be unlikely to request written advisory opinions. Nevertheless, we believe that we can use the number of inquiries as a basis for estimating the number of requests we are likely to receive for advisory opinions. Using this basis, we estimate that 200 physicians, health care entities, and other entities or individuals will request advisory opinions within the first year following publication of this rule. We also anticipate that the number of requests will decline in subsequent years, unless there are significant changes in the law. The costs to these requestors will vary depending on the complexity of each request. Compared, however, to the costs of seeking private legal advice, we believe that the fees charged for our review will not be substantial, and in many cases will not exceed the $250 minimum payment.

Obviously, the actual number of requests could be larger since, for the first time, formal written opinions are available. Conversely, the numbers could be smaller for a combination of many unquantifiable reasons, such as the desire not to subject an arrangement to official scrutiny.

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), if a rule has a significant economic effect on a substantial number of small businesses, the Secretary must specifically consider the effects of the rule on small business entities and analyze regulatory options that could lessen the impact of the rule. As stated above, this rule does not address the substance of section 1877 of the Act or the substance of advisory opinions that may be issued in the future. It describes the *process* by which an individual or entity may receive an opinion about how section 1877 applies to particular business practices. The aggregate economic impact of this rulemaking on small business entities should, therefore, be minimal.

Thus, we have concluded, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small business entities, and that a regulatory flexibility analysis is not required for this rulemaking.

In accordance with the provisions of E.O. 12866, this regulation was reviewed by the Office of Management and Budget.

IV. Authority for an Interim Final Rule with Comment Period, and Waiver of Delayed Effective Date

We ordinarily publish a general notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. That rule would have included a reference to the legal authority under which we are proposing it, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Further, we generally provide for final rules to be effective no sooner than 30 days after the date of publication unless we find good cause to waive the delay.

In order to implement the provisions in section 1877(g)(6) in a timely manner, section 1877(g)(6)(C) gives us the authority to promulgate regulations that take effect on an interim basis after notice and pending opportunity for public comment. We have chosen to exercise this authority for the following reasons. We believe that the statutory requirement that we accept requests for advisory opinions that are submitted on or after November 4, 1997, makes it imperative that, by that date, we have in place specific procedures to address how we will receive and process advisory opinion requests. It would be contrary to the public interest for us to receive and process advisory opinions without first setting forth procedural guidelines. We also believe that the 60-day period for public comment established by this interim final rule will protect the public's interest in this rulemaking, while providing us with additional input and recommendations, without unduly delaying the advisory opinion process. We are therefore publishing the advisory opinion procedures as an interim final rule with comment period. We also find that for good cause it would be against the public interest to delay the effective date of this rule. We will respond to all appropriate and relevant public comments that we receive during the 60-day comment period, and we will make any necessary revisions to these regulations through a revised final rule.

V. Collection of Information Requirements

In order to provide appropriate advisory opinions, we will need certain information from the parties who request advisory opinions. Sections 411.372, 411.373, and 411.378 of this interim final rule contain information collection requirements that require approval by OMB. We are required to solicit public comments under section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995. Specifically, comments are invited on (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

We are requesting an emergency review of this interim final rule with comment period. In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are submitting to OMB the collection of information requirements described below for emergency review. We are requesting an emergency review because the collection of this information is needed before the expiration of the normal time limits under OMB's regulations at 5 CFR part 1320, to ensure compliance with section 1877(g)(6)(D) of the Act, which was added by section 4314 of the Balanced Budget Act of 1997. Section 1877(g)(6)(D) requires us to respond to requests for advisory opinions that are submitted after November 3, 1997. We cannot reasonably comply with normal clearance procedures because of the statutory deadline and public harm is likely to result if the agency cannot provide for advisory opinions.

We are providing a 3-day public comment period from the date of publication of this interim final rule, with OMB review and approval 4 days from the date of publication, and a 180-day approval. During this 180-day period, we will publish a separate **Federal Register** notice announcing the initiation of an extensive 60-day agency review and public comment period on these requirements. We will submit the requirements for OMB review and an extension of this emergency approval.

Title: HCFA Advisory Opinion Procedure.

Summary of the collection of information: Section 4314 of Public Law 105–33, in establishing section 1877(g)(6) of the Act, requires the Department to provide advisory opinions to the public regarding whether a physician's referrals for certain designated health services are prohibited under the other provisions in section 1877 of the Act. These regulations provide the procedures under which members of the public may request advisory opinions from HCFA. Because all requests for advisory opinions are purely voluntary, respondents will only be required to provide information to us that is relevant to their individual requests.

The following discussion describes the aggregate effect of the collections of information included in the text of this interim final rule.

Respondents: The ''respondents'' for the collection of information described in these regulations will be self-selected individuals and entities that choose to submit requests for advisory opinions to HCFA. We anticipate that the respondents will include health care providers of many types, from physicians who are sole practitioners to large diversified publicly-traded corporations.

Estimated number of respondents: 200. This estimate is based on the number of telephone calls we have received regarding the physician referral provisions.

Estimated number of responses per respondent: 1.

Estimated total annual burden on respondents: We believe that the burden of preparing a request for an advisory opinion will vary widely depending upon the size and complexity of the business transactions in question. We estimate that the average burden for each submitted request for an advisory opinion will be in the range of 2 to 40 hours. We further believe that the burden for most requests will be closer to the lower end of the range, with an average burden of 10 hours per respondent. Total burden for this proposed information collection is estimated to be 2000 hours.

We are requiring that requests for advisory opinions involve existing conduct, or conduct in which the requestor intends to engage. We anticipate that most requests will involve business arrangements into which the requesting party intends to enter. Because the facts will relate to business plans, we believe the requesting party in many cases will already have collected and analyzed all or almost all of the information we will need in order to review the request. Therefore, in order to request an advisory opinion, the requestor will most likely simply need to compile for our examination information that the requestor has already collected and reviewed. In some cases, however, the requestor may need to expend a more significant amount of time in order to submit information relating to a complex arrangement that involves a large number of parties.

Comments on this information collection should be sent to both:

Health Care Financing Administration, Office of Information Services, Information Technology Investment Management Group, Division of HCFA Enterprise Standards, Attn: HCFA–1902–IFC, Room C2–26–17, 7500 Security Boulevard, Baltimore, MD 21244–1850

and

Allison Herron Eydt, HCFA Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, 725 17th Street, NW, Washington, D.C. 20503.

You may also fax comments on these paperwork reduction requirements to the Health Care Financing Administration at (410) 786–1415 and to Ms. Eydt at (202) 395–6974. All comments should refer to file code HCFA–1902–IFC.

To be considered, you must submit comments on these paperwork reduction requirements to the individuals listed above within 3 days after this interim final rule is published in the **Federal Register**.

List of Subjects in 42 CFR Part 411

Administrative practice and procedures, Fraud, Grant programs—health, Health facilities, Health professions, Medicaid, Medicare, Penalties.

42 CFR part 411 is amended as set forth below:

PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

1. The authority citation for part 411 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. Sections 411.370, 411.372, 411.373, 411.375, 411.377 through 411.380, 411.382, 411.384, and 411.386 through 411.389 are added to subpart J to read as follows:

§ 411.370 Advisory opinions relating to physician referrals.

(a) *Period during which HCFA will accept requests.* The provisions of §§ 411.370 through 411.389 apply to requests for advisory opinions that are submitted to HCFA after November 3, 1997, and before August 21, 2000, and to any requests submitted during any other time period during which HCFA is required by law to issue the advisory opinions described in this subpart.

(b) *Matters that qualify for advisory opinions and who may request one.* Any individual or entity may request a written advisory opinion from HCFA concerning whether a physician's referral relating to designated health services (other than clinical laboratory services) is prohibited under section 1877 of the Act. In the advisory opinion, HCFA determines whether a business arrangement described by the parties to that arrangement appears to constitute a ''financial relationship'' (as defined in section 1877(a)(2) of the Act) that could potentially restrict a physician's referrals, and whether the arrangement or the designated health services at issue appear to qualify for any of the exceptions to the referral prohibition described in section 1877 of the Act.

(1) The request must involve an existing arrangement or one into which the requestor, in good faith, specifically plans to enter. The planned arrangement may be contingent upon the party or parties receiving a favorable advisory opinion. HCFA does not consider, for purposes of an advisory opinion, requests that present a general question of interpretation, pose a hypothetical situation, or involve the activities of third parties.

(2) The requestor must be a party to the existing or proposed arrangement.

(c) *Matters not subject to advisory opinions.* HCFA does not address through the advisory opinion process—

(1) Whether the fair market value was, or will be, paid or received for any goods, services, or property; and

(2) Whether an individual is a bona fide employee within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986.

(d) *Facts subject to advisory opinions.* HCFA considers requests for advisory opinions that involve applying specific facts to the subject matter described in paragraph (b) of this section. Requestors must include in the advisory opinion request a complete description of the arrangement that the requestor is undertaking, or plans to undertake, as described in § 411.372.

(e) *Requests that will not be accepted.* HCFA does not accept an advisory opinion request or issue an advisory opinion if—

(1) The request is not related to a named individual or entity;

(2) HCFA is aware that the same, or substantially the same, course of action is under investigation, or is or has been the subject of a proceeding involving the Department of Health and Human Services or another governmental agency; or

(3) HCFA believes that it cannot make an informed opinion or could only make an informed opinion after extensive investigation, clinical study, testing, or collateral inquiry.

(f) *Effects of an advisory opinion on other Governmental authority.* Nothing in this part limits the investigatory or prosecutorial authority of the OIG, the Department of Justice, or any other agency of the Government. In addition, in connection with any request for an advisory opinion, HCFA, the OIG, or the Department of Justice may conduct whatever independent investigation it believes appropriate.

§ 411.372 Procedure for submitting a request.

(a) *Format for a request.* A party or parties must submit a request for an advisory opinion to HCFA in writing, including an original request and 2 copies. The request must be addressed to: Health Care Financing Administration, Department of Health and Human Services, Attention: Advisory Opinions, P.O. Box 26505, Baltimore, MD 21207.

(b) *Information HCFA requires with all submissions.* The request must include the following:

(1) The name, address, telephone number, and Taxpayer Identification Number of the requestor.

(2) The names and addresses, to the extent known, of all other actual and potential parties to the arrangement that is the subject of the request.

(3) The name, title, address, and daytime telephone number of a contact person who will be available to discuss the request with HCFA on behalf of the requestor.

(4) A complete and specific description of all relevant information bearing on the arrangement, including—

(i) A complete description of the arrangement that the requestor is undertaking, or plans to undertake, including: the purpose of the arrangement; the nature of each party's (including each entity's) contribution to the arrangement; the direct or indirect relationships between the parties, with an emphasis on the relationships between physicians involved in the arrangement (or their immediate family members who are involved) and any entities that provide designated health services; the types of services for which a physician wishes to refer, and whether the referrals will involve Medicare or Medicaid patients;

(ii) Complete copies of all relevant documents or relevant portions of documents that affect or could affect the arrangement, such as personal services or employment contracts, leases, deeds, pension or insurance plans, financial statements, or stock certificates (or, if these relevant documents do not yet exist, a complete description, to the best of the requestor's knowledge, of what these documents are likely to contain);

(iii) Detailed statements of all collateral or oral understandings, if any; and

(iv) Descriptions of any other arrangements or relationships that could affect HCFA's analysis.

(5) Complete information on the identity of all entities involved either directly or indirectly in the arrangement, including their names, addresses, legal form, ownership structure, nature of the business (products and services) and, if relevant, their Medicare and Medicaid provider numbers. The requestor must also include a brief description of any other entities that could affect the outcome of the opinion, including those with which the requestor, the other parties, or the immediate family members of involved physicians, have any financial relationships (either direct or indirect, and as defined in section 1877(a)(2) of the Act and § 411.351), or in which any of the parties holds an ownership or control interest as defined in section 1124(a)(3) of the Act.

(6) A discussion of the specific issues or questions the requestor would like HCFA to address including, if possible, a description of why the requestor believes the referral prohibition in section 1877 of the Act might or might not be triggered by the arrangement and which, if any, exceptions to the prohibition the requestor believes might apply. The requestor should attempt to designate which facts are relevant to each issue or question raised in the request and should cite the provisions of law under which each issue or question arises.

(7) An indication of whether the parties involved in the request have also asked for or are planning to ask for an advisory opinion on the arrangement in question from the OIG under section 1128D(b) of the Act (42 U.S.C. 1320a-7d(b)) and whether the arrangement is or is not, to the best of the requestor's knowledge, the subject of an investigation.

(8) The certification(s) described in § 411.373. The certification(s) must be signed by—

(i) The requestor, if the requestor is an individual;

(ii) The chief executive officer, or comparable officer, of the requestor, if the requestor is a corporation;

(iii) The managing partner of the requestor, if the requestor is a partnership; or

(iv) A managing member, if the requestor is a limited liability company.

(9) A check or money order payable to HCFA in the amount described in § 411.375(a).

(c) *Additional information HCFA might require.* If the request does not contain all of the information required by paragraph (b) of this section, or, if either before or after accepting the request, HCFA believes it needs more information in order to render an advisory opinion, it may request whatever additional information or documents it deems necessary. Additional information must be provided in writing, signed by the same person who signed the initial request (or by an individual in a comparable position), and be certified as described in § 411.373.

§ 411.373 Certification.

(a) Every request must include the following signed certification: ''With knowledge of the penalties for false statements provided by 18 U.S.C. 1001 and with knowledge that this request for an advisory opinion is being submitted to the Department of Health and Human Services, I certify that all of the information provided is true and correct, and constitutes a complete description of the facts regarding which an advisory opinion is sought, to the best of my knowledge and belief.''

(b) If the advisory opinion relates to a proposed arrangement, in addition to the certification required by paragraph (a) of this section, the following certification must be included and signed by the requestor: ''The arrangement described in this request for an advisory opinion is one into which [the requestor], in good faith, plans to enter.'' This statement may be made contingent on a favorable advisory opinion, in which case the requestor should add one of the following phrases to the certification:

(1) ''if HCFA issues a favorable advisory opinion.''

(2) ''if HCFA and the OIG issue favorable advisory opinions.''

§ 411.375 Fees for the cost of advisory opinions.

(a) *Initial payment.* Parties must include with each request for an advisory opinion submitted through December 31, 1998, a check or money order payable to HCFA for $250. For requests submitted after this date, parties must include a check or money order in this amount, unless HCFA has revised the amount of the initial fee in a program issuance, in which case, the requestor must include the revised amount. This initial payment is nonrefundable.

(b) *How costs are calculated.* Before issuing the advisory opinion, HCFA calculates the costs the Department has incurred in responding to the request. The calculation includes the costs of salaries, benefits, and overhead for analysts, attorneys, and others who have worked on the request, as well as administrative and supervisory support for these individuals.

(c) *Agreement to pay all costs.* (1) By submitting the request for an advisory opinion, the requestor agrees, except as indicated in paragraph (c)(3) of this section, to pay all costs the Department incurs in responding to the request for an advisory opinion.

(2) In its request for an advisory opinion, the requestor may designate a triggering dollar amount. If HCFA estimates that the costs of processing the advisory opinion request have reached or are likely to exceed the designated triggering dollar amount, HCFA notifies the requestor.

(3) If HCFA notifies the requestor that the actual or estimated cost of processing the request has reached or is likely to exceed the triggering dollar amount, HCFA stops processing the request until the requestor makes a written request for HCFA to continue. If HCFA is delayed in processing the request for an advisory opinion because of this procedure, the time within which HCFA must issue an advisory opinion is suspended until the requestor asks HCFA to continue working on the request.

(4) If the requestor chooses not to pay for HCFA to complete an advisory opinion, or withdraws the request, the requestor is still obligated to pay for all costs HCFA has identified as costs it incurred in processing the request for an advisory opinion, up to that point.

(5) If the costs HCFA has incurred in responding to the request are greater than the amount the requestor has paid, HCFA, before issuing the advisory opinion, notifies the requestor of any additional amount that is due. HCFA does not issue an advisory opinion until the requestor has paid the full amount that is owed. Once the requestor has paid HCFA the total amount due for the costs of processing the request, HCFA issues the advisory opinion. The time period HCFA has for issuing advisory opinions is suspended from the time HCFA notifies the requestor of the amount owed until the time HCFA receives full payment.

(d) *Fees for outside experts.* (1) In addition to the fees identified in this section, the requestor also must pay any required fees for expert opinions, if any, from outside sources, as described in § 411.377.

(2) The time period for issuing an advisory opinion is suspended from the time that HCFA notifies the requestor that it needs an outside expert opinion

until the time HCFA receives that opinion.

§ 411.377 Expert opinions from outside sources.

(a) HCFA may request expert advice from qualified sources if HCFA believes that the advice is necessary to respond to a request for an advisory opinion. For example, HCFA may require the use of accountants or business experts to assess the structure of a complex business arrangement or to ascertain a physician's or immediate family member's financial relationship with entities that provide designated health services.

(b) If HCFA determines that it needs to obtain expert advice in order to issue a requested advisory opinion, HCFA notifies the requestor of that fact and provides the identity of the appropriate expert and an estimate of the costs of the expert advice. As indicated in § 411.375(d), the requestor must pay the estimated cost of the expert advice.

(c) Once HCFA has received payment for the estimated cost of the expert advice, HCFA arranges for the expert to provide a prompt review of the issue or issues in question. HCFA considers any additional expenses for the expert advice, beyond the estimated amount, as part of the costs HCFA has incurred in responding to the request, and the responsibility of the requestor, as described in § 411.375(c).

§ 411.378 Withdrawing a request.

The party requesting an advisory opinion may withdraw the request before HCFA issues a formal advisory opinion. This party must submit the withdrawal in writing to the same address as the request, as indicated in § 411.372(a). Even if the party withdraws the request, the party must pay the costs the Department has expended in processing the request, as discussed in § 411.375. HCFA reserves the right to keep any request for an advisory opinion and any accompanying documents and information, and to use them for any governmental purposes permitted by law.

§ 411.379 When HCFA accepts a request.

(a) Upon receiving a request for an advisory opinion, HCFA promptly makes an initial determination of whether the request includes all of the information it will need to process the request.

(b) Within 15 working days of receiving the request, HCFA—

(1) Formally accepts the request for an advisory opinion;

(2) Notifies the requestor about the additional information it needs, or

(3) Declines to formally accept the request.

(c) If the requestor provides the additional information HCFA has requested, or otherwise resubmits the request, HCFA processes the resubmission in accordance with paragraphs (a) and (b) of this section as if it were an initial request for an advisory opinion.

(d) Upon accepting the request, HCFA notifies the requestor by regular U.S. mail of the date that HCFA formally accepted the request.

(e) The 90-day period that HCFA has to issue an advisory opinion set forth in § 411.380(c) does not begin until HCFA has formally accepted the request for an advisory opinion.

§ 411.380 When HCFA issues a formal advisory opinion.

(a) HCFA considers an advisory opinion to be issued once it has received payment and once the opinion has been dated, numbered, and signed by an authorized HCFA official.

(b) An advisory opinion contains a description of the material facts known to HCFA that relate to the arrangement that is the subject of the advisory opinion, and states HCFA's opinion about the subject matter of the request based on those facts. If necessary, HCFA includes in the advisory opinion material facts that could be considered confidential information or trade secrets within the meaning of 18 U.S.C. 1095.

(c)(1) HCFA issues an advisory opinion, in accordance with the provisions of this part, within 90 days after it has formally accepted the request for an advisory opinion, or, for requests that HCFA determines, in its discretion, involve complex legal issues or highly complicated fact patterns, within a reasonable time period.

(2) If the 90th day falls on a Saturday, Sunday, or Federal holiday, the time period ends at the close of the first business day following the weekend or holiday;

(3) The 90-day period is suspended from the time HCFA—

(i) Notifies the requestor that the costs have reached or are likely to exceed the triggering amount as described in § 411.375(c)(2) until HCFA receives written notice from the requestor to continue processing the request;

(ii) Requests additional information from the requestor until HCFA receives the additional information;

(iii) Notifies the requestor of the full amount due until HCFA receives payment of this amount; and

(iv) Notifies the requestor of the need for expert advice until HCFA receives the expert advice.

(d) After HCFA has notified the requestor of the full amount owed and has received full payment of that amount, HCFA issues the advisory opinion and promptly mails it to the requestor by regular first class U.S. mail.

§ 411.382 HCFA's right to rescind advisory opinions.

Any advice HCFA gives in an opinion does not prejudice its right to reconsider the questions involved in the opinion and, if it determines that it is in the public interest, to rescind or revoke the opinion. HCFA provides notice to the requestor of its decision to rescind or revoke the opinion so that the requestor and the parties involved in the requestor's arrangement may discontinue any course of action they have taken in accordance with the advisory opinion. HCFA does not proceed against the requestor with respect to any action the requestor and the involved parties have taken in good faith reliance upon HCFA's advice under this part, provided—

(a) The requestor presented to HCFA a full, complete and accurate description of all the relevant facts; and

(b) The parties promptly discontinue the action upon receiving notice that HCFA had rescinded or revoked its approval, or discontinue the action within a reasonable ''wind down'' period, as determined by HCFA.

§ 411.384 Disclosing advisory opinions and supporting information.

(a) Advisory opinions that HCFA issues and releases in accordance with the procedures set forth in this subpart are available to the public.

(b) Promptly after HCFA issues an advisory opinion and releases it to the requestor, HCFA makes available a copy of the advisory opinion for public inspection during its normal hours of operation and on the DHHS/HCFA web site.

(c) Any predecisional document, or part of such predecisional document, that is prepared by HCFA, the Department of Justice, or any other Department or agency of the United States in connection with an advisory opinion request under the procedures set forth in this part is exempt from disclosure under 5 U.S.C. 552, and will not be made publicly available.

(d) Documents submitted by the requestor to HCFA in connection with a request for an advisory opinion are available to the public to the extent they are required to be made available by 5 U.S.C. 552, through procedures set forth in 45 CFR part 5.

(e) Nothing in this section limits HCFA's obligation, under applicable

laws, to publicly disclose the identity of the requesting party or parties, and the nature of the action HCFA has taken in response to the request.

§ 411.386 HCFA's advisory opinions as exclusive.

The procedures described in this subpart constitute the only method by which any individuals or entities can obtain a binding advisory opinion on the subject of a physician's referrals, as described in § 411.370. HCFA has not and does not issue a binding advisory opinion on the subject matter in § 411.370, in either oral or written form, except through written opinions it issues in accordance with this subpart.

§ 411.387 Parties affected by advisory opinions.

An advisory opinion issued by HCFA does not apply in any way to any individual or entity that does not join in the request for the opinion. Individuals or entities other than the requestor(s) may not rely on an advisory opinion.

§ 411.388 When advisory opinions are not admissible evidence.

The failure of a party to seek or to receive an advisory opinion may not be introduced into evidence to prove that the party either intended or did not intend to violate the provisions of sections 1128, 1128A or 1128B of the Act.

§ 411.389 Range of the advisory opinion.

(a) An advisory opinion states only HCFA's opinion regarding the subject matter of the request. If the subject of an advisory opinion is an arrangement that must be approved by or is regulated by any other agency, HCFA's advisory opinion cannot be read to indicate HCFA's views on the legal or factual issues that may be raised before that agency.

(b) An advisory opinion that HCFA issues under this part does not bind or obligate any agency other than the Department. It does not affect the requestor's, or anyone else's, obligations to any other agency, or under any statutory or regulatory provision other than that which is the specific subject matter of the advisory opinion.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 2, 1997.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Dated: December 30, 1997.

Donna E. Shalala,

Secretary.

[FR Doc. 98–270 Filed 1–5–98; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 411, 424, 435, and 455

[HCFA–1809–P]

RIN 0938–AG80

Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would incorporate into regulations the provisions of sections 1877 and 1903(s) of the Social Security Act. Under section 1877, if a physician or a member of a physician's immediate family has a financial relationship with a health care entity, the physician may not make referrals to that entity for the furnishing of designated health services under the Medicare program, unless certain exceptions apply. The following services are designated health services:

- Clinical laboratory services.
- Physical therapy services.
- Occupational therapy services.
- Radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services.
- Radiation therapy services and supplies.
- Durable medical equipment and supplies.
- Parenteral and enteral nutrients, equipment, and supplies.
- Prosthetics, orthotics, and prosthetic devices and supplies.
- Home health services.
- Outpatient prescription drugs.
- Inpatient and outpatient hospital services.

In addition, section 1877 provides that an entity may not present or cause to be presented a Medicare claim or bill to any individual, third party payer, or other entity for designated health services furnished under a prohibited referral, nor may the Secretary make payment for a designated health service furnished under a prohibited referral.

Section 1903(s) of the Social Security Act extended aspects of the referral prohibition to the Medicaid program. It denies payment under the Medicaid program to a State for certain expenditures for designated health services. Payment would be denied if the services are furnished to an individual on the basis of a physician referral that would result in the denial of payment for the services under Medicare if Medicare covered the services to the same extent and under the same terms and conditions as under the State plan.

This proposed rule incorporates these statutory provisions into the Medicare and Medicaid regulations and interprets certain aspects of the law. The proposed rule is based on the provisions of section 1903(s) and section 1877 of the Social Security Act, as amended by section 13562 of the Omnibus Budget Reconciliation Act of 1993, and by section 152 of the Social Security Act Amendments of 1994.

DATES: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on March 10, 1998. We will also consider comments that we received in response to the final rule with comment period, ''Physician Financial Relationships With, and Referrals to, Health Care Entities That Furnish Clinical Laboratory Services and Financial Relationship Reporting Requirements,'' which we published in the **Federal Register** on August 14, 1995 (60 FR 41914).

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1809–P, P.O. Box 26688, Baltimore, MD 21207.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments may also be submitted electronically to the following e-mail address: hcfa1809p.hcfa.gov. E-mail comments must include the full name and address of the sender and must be submitted to the referenced address in order to be considered. All comments must be incorporated in the e-mail message because we may not be able to access attachments. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1809–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

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FOR FURTHER INFORMATION CONTACT: Joanne Sinsheimer (410) 786–4620.

SUPPLEMENTARY INFORMATION: To assist readers in referencing sections contained in this proposed rule, we are providing the following table of contents:

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I. Background

A. Problems Associated With Physician Self-referrals

When a patient seeks medical care, his or her physician has a major role in determining the kind and amount of health care services the patient will receive. Having a financial interest in an entity that furnishes these services can affect a physician's decision about what medical care to furnish a patient and who should furnish the care. In fact, numerous studies have raised serious concerns about the referral patterns of physicians who make self-referrals (referrals to entities with which they or their family members have financial relationships).

In June 1988, Congress mandated that the Office of Inspector General (OIG) of the Department of Health and Human Services conduct a study on physician ownership of and compensation from health care entities to which the physicians make referrals. The OIG reported that patients of referring physicians who owned or invested in independent clinical laboratories received 45 percent more laboratory services than all Medicare patients in general. The OIG found similar effects on utilization associated with the existence of compensation arrangements between laboratories and physicians. Patients of these physicians used 32 percent more laboratory services than all Medicare patients in general. (''Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress,'' Office of Inspector General, DHHS, pages 18 and 21 (May 1989)). Based in part on the results of this study, Congress enacted, in November of 1989, section 1877 of the Social Security Act (the Act). (Unless otherwise indicated, references to sections of the law below are to sections of the Act.) We discuss section 1877 in detail below.

Subsequent studies have supported the OIG findings on self-referrals. The studies indicate that other types of services are also associated with higher utilization and increased costs. For example, in 1991 the Florida Cost Containment Board (the Board) analyzed the effect of joint venture arrangements on the following aspects of health care: access, costs, charges, utilization, and quality. A joint venture was defined as any ownership or investment interest or compensation arrangement involving physicians (or any health care professionals who make referrals) and an entity providing health care goods or services.

The Board found that doctor-owned clinical laboratories, diagnostic imaging centers, and physical therapy and rehabilitation centers performed more procedures on a per-patient basis and charged higher prices than nondoctor-affiliated facilities. The Board concluded that there might be referral problems or the results did not allow clear conclusions for ambulatory surgical centers, durable medical equipment suppliers, home health agencies, and radiation therapy centers. The study revealed that little or no impact existed for acute care hospitals and nursing homes. (''Joint Ventures Among Health Care Providers in Florida,'' State of Florida Health Care Cost Containment Board (Sept. 1991)).

Additionally, in 1994, the General Accounting Office (GAO) released an analysis of 2.4 million diagnostic imaging services ordered by 17,900 physicians in the State of Florida. The GAO found that Florida physicians with a financial interest in joint venture imaging centers had higher referral rates for almost all types of imaging services than other Florida physicians. The differences in the referral rates were greatest for costly high-technology imaging services. For example, owners of joint ventures ordered 54 percent more magnetic resonance imaging scans for patients than did non-owners.

The GAO study also found that Florida physicians, group practices, or other practice affiliations with imaging facilities in their own offices ordered imaging tests more frequently than physicians who referred their patients to imaging facilities outside their practices. The in-practice imaging rates were about 3 times higher for magnetic resonance imaging scans; about 2 times higher for computed tomograph scans; 4.5 to 5.1 times higher for ultrasound, echocardiography, and diagnostic nuclear medicine imaging; and about 2 times higher for complex and simple X-rays. (GAO Report, ''Medicare: Referrals to Physician-owned Imaging Facilities Warrant HCFA's Scrutiny,'' No. B–253835; pages 2, 3, and 10, October 1994.)

Several other studies, appearing in the New England Journal of Medicine and the Journal of the American Medical Association, have found increased utilization for a variety of services when the physicians have a financial relationship with the entity to which they refer their patients. (See, for example, Bruce J. Hillman, M.D., and others, ''Physicians' Utilization and Charges for Outpatient Diagnostic Imaging in a Medicare Population,'' Journal of the American Medical Association, Vol. 268, No. 15 (Oct. 21, 1992), pp. 2050–2054; Hemenway D., Killen A., and others, ''Physicians' Responses to Financial Incentives—Evidence From a For-profit Ambulatory Care Center,'' New England Journal of Medicine, Vol. 322, No. 15 (April 12, 1990), pp. 1059–1063; Alex Swedlow and others, ''Increased Costs and Rates of Use in the California Workers' Compensation System as a Result of Self Referral by Physicians,'' New England Journal of Medicine, Vol. 327, No. 21 (Nov. 19, 1992), pp. 1502–1506.)

B. Legislation Designed to Address Self-referrals and Similar Practices

1. Legislative History of Section 1877

Section 6204 of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89), Public Law 101–239, enacted on December 19, 1989, added section 1877 to the Social Security Act. In general, section 1877 as it read under OBRA '89 provided that, if a physician (or an immediate family member of a physician) had a financial relationship with a clinical laboratory, that physician could not make a referral to the laboratory entity for the furnishing of clinical laboratory services for which Medicare might otherwise pay. (For the sake of brevity, whenever we refer to ''immediate family member'' or ''family member,'' this means ''a member of the physician's immediate family.'') It also provided that the laboratory could not present or cause to be presented a Medicare claim or bill to any individual, third party payer, or other entity for clinical laboratory services furnished under the prohibited referral. Additionally, it required a refund of any

amount collected from an individual as a result of a billing for an item or service furnished under a prohibited referral.

The statute defined ''financial relationship'' as an ownership or investment interest in the entity or a compensation arrangement between the physician (or immediate family member) and the entity. The statute provided a number of exceptions to the prohibition. Some of these exceptions applied to both ownership/investment interests and compensation arrangements, while other exceptions applied to only one or the other of these. Additionally, the statute imposed reporting requirements and provided for sanctions.

Section 4207(e) of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90), Public Law 101–508, enacted on November 5, 1990, amended certain provisions of section 1877 to clarify definitions and reporting requirements relating to physician ownership and referral and to provide an additional exception to the prohibition.

Section 13562 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Public Law 103–66, enacted on August 10, 1993, extensively revised section 1877. It modified the prior law to apply to referrals for ten ''designated health services'' in addition to clinical laboratory services, modified some exceptions, and added new ones. Section 152 of the Social Security Act Amendments of 1994 (SSA '94), Public Law 103–432, enacted on October 31, 1994, amended the list of designated services, effective January 1, 1995. (Section II of this preamble contains a listing of the designated health services.) It also changed the reporting requirements in section 1877(f) and amended some of the effective dates of the OBRA '93 provisions.

Section 13624 of OBRA '93 extended aspects of the referral prohibition to the Medicaid program. It amended section 1903 of the Act by adding a new paragraph (s). This provision denies Federal financial participation (FFP) payment under the Medicaid program to a State for certain expenditures for designated health services. A State cannot receive FFP for designated health services furnished to an individual on the basis of a physician referral that would result in a denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same terms and conditions as under the State Medicaid plan. Section 13624 also specified that the reporting requirements of section 1877(f) and the civil money penalty provision of section 1877(g)(5) (which relates to reporting) apply to a provider of a designated health service for which payment may be made under Medicaid in the same manner as they apply to a provider of a designated health service for which payment may be made under Medicare.

We describe the provisions of section 1877, as amended, in detail in part A of section II of this preamble. We discuss section 1903(s) in part B of section II.

2. Recent Provisions and How They Relate to Each Other

Congress has enacted into law several provisions governing financial relationships between entities furnishing health care services and those health care professionals who refer patients to them. For example, the ''anti-kickback statute'' provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration to induce the furnishing of items or services covered by Medicare or State health care programs (including Medicaid, and any State program receiving funds under titles V or XX of the Act). (This provision was originally enacted in 1972 as part of the Social Security Amendments of 1972, Public Law 92–603. It was revised in 1977 (in Public Law 95–142) to read as it does today. It was subsequently recodified by the Medicare and Medicaid Program Patient Protection Act of 1987 (Public Law 100–93). It currently appears at 42 U.S.C. 1320a–7b(b)(2) and section 1128B(b) of the Social Security Act.)

Both the anti-kickback statute and section 1877 address Congress' concern that health care decisionmaking can be unduly influenced by a profit motive. When physicians have a financial incentive to refer, this incentive can affect utilization, patient choice, and competition. Physicians can overutilize by ordering items and services for patients that, absent a profit motive, they would not have ordered. A patient's choice can be affected when physicians steer patients to less convenient, lower quality, or more expensive providers of health care, just because the physicians are sharing profits with, or receiving remuneration from, the providers. And lastly, where referrals are controlled by those sharing profits or receiving remuneration, the medical marketplace suffers since new competitors can no longer win business with superior quality, service, or price. Although the purposes behind the anti-kickback statute and section 1877 are similar, it is important to analyze them separately. In other words, to operate lawfully under Medicare and Medicaid, one must comply with both statutes.

Anti-kickback statute: The anti-kickback statute is a criminal statute that applies to those who *knowingly and willfully* offer, pay, solicit, or receive remuneration to induce the furnishing of items or services under Medicare or State health care programs (including Medicaid). The offense is classified as a felony and is punishable by fines of up to $25,000 and imprisonment for up to 5 years. Violation of the statute is also a basis for exclusion from Medicare and Medicaid.

Since the statute on its face is very broad, a number of health care entities expressed concern after its enactment that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and can therefore lead to criminal prosecution. Congress addressed this fact by enacting section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987. This provision requires the Department of Health and Human Services to issue ''safe harbors,'' specifying those payment practices that will not be subject to criminal prosecution under the anti-kickback statute and will not provide a basis for an exclusion. The safe harbors are not mandatory in the sense that one is *required* to fit into a safe harbor. The safe harbors exist to provide absolute immunity to those arrangements.

Section 1877: Section 1877 prohibits physicians from referring Medicare patients to certain entities for designated health services if the physician (or an immediate family member) has a financial relationship with the entity, *unless* the relationship fits into an exception. Certain aspects of section 1877 also affect Medicaid referrals. While there are other remedies, section 1877 is primarily a payment ban that is effective *regardless of intent.* Many of the exceptions in section 1877 are similar to the safe harbors under the anti-kickback statute, such as exceptions for certain employees, personal service arrangements, and space and equipment rentals. The exceptions are different in the sense that, under section 1877, a physician is *required* to meet an exception if the physician wants to make an otherwise prohibited referral, while under the anti-kickback statute, a health care provider is not required to meet a safe harbor. That is, if a provider meets a safe harbor, it is automatically protected from prosecution. If a provider does not meet a safe harbor, it may still be in compliance with the anti-kickback statute and therefore be safe from prosecution, but that

determination would be based on a case-by-case assessment of the facts.

C. HCFA and OIG Regulations Relating to Section 1877

On December 3, 1991, we issued an interim final rule with comment period (56 FR 61374) setting forth the reporting requirements under section 1877(f). On March 11, 1992, we published a proposed rule (57 FR 8588) setting forth the self-referral prohibition and exceptions to the prohibition in section 1877, as these provisions were amended by OBRA '90, and as they relate to referrals for clinical laboratory services.

On October 20, 1993, the OIG published a proposed rule (58 FR 54096) that would set forth in regulations the penalty provisions specified in sections 1877(g)(3) and (g)(4). The final rule with comment period implementing the civil money penalty provisions was published on March 31, 1995 (60 FR 16580).

On August 14, 1995, we published a final rule with comment period in the **Federal Register** (60 FR 41914) that incorporated into regulations the provisions of section 1877 that relate to the prohibition on physician referrals for clinical laboratory services. The August 1995 final rule contains revisions to the March 11, 1992 proposal based on comments submitted by the public. Further, it incorporates the amendments and exceptions created by OBRA '93 and the amendments in SSA '94 that relate to referrals for clinical laboratory services.

The final rule addresses only those changes that had a retroactive effective date of January 1, 1992; it does not incorporate those modifications made to section 1877 that became effective for referrals made after December 31, 1994. (Even though the August 1995 final rule incorporates OBRA '93 and SSA '94 provisions, it generally only reiterates them without interpreting them. We interpreted the new provisions only in a few instances in which it was necessary to do so in order to implement the statute at all.) The final rule also responds to comments received on the December 1991 interim final rule covering the reporting requirements. In addition, it revises the regulations established by that rule to incorporate the amendments to section 1877(f) made by SSA '94, to apply to any future reporting that we require.

II. Sections 1877 and 1903(s) of the Act and the Provisions of This Proposed Rule

Many of the provisions covered below are discussed in detail in the preamble of either the March 1992 proposed rule or the August 1995 final rule in the context of referrals for clinical laboratory services. We are proposing, as discussed below, to leave a number of these provisions unchanged except to apply them to the additional designated health services. Readers who desire more background information on these provisions are referred to the earlier documents.

We are also proposing to amend the provisions of the August 1995 final regulation to reflect other changes in section 1877 that were enacted in OBRA '93 or in SSA '94 and became effective on January 1, 1995. In part A of this section, we discuss how we have altered the final regulation to apply it to the additional designated health services, and to reflect the statutory changes in section 1877 that took effect on January 1, 1995. Part B of this section covers the changes made by section 13624 of OBRA '93 to the Medicaid program in section 1903(s) of the Act. Section 13624 applies aspects of the referral prohibition to the Medicaid program for referrals made on or after December 31, 1994. We discuss in part B how we propose to amend the Medicaid regulations to reflect the statutory changes.

In section III of this preamble we discuss in detail how we propose to interpret any provisions in sections 1877 and 1903(s) that we believe are ambiguous, incomplete, or that provide the Secretary with discretion. We also discuss policy changes or clarifications we propose to make to the August 1995 rule. In section IV, we present some of the most common questions concerning physician referrals that we received from the health care community. We include in section IV our interpretations of how the law applies in the situations described to us.

A. Reflecting the Statutory Changes in Section 1877

1. General Prohibition

With certain exceptions, section 1877(a)(1)(A) prohibits a physician from making a referral to an entity for the furnishing of designated health services, for which Medicare may otherwise pay, if the physician (or an immediate family member) has a financial relationship with that entity. This provision as it related to clinical laboratory services was incorporated into our regulations at § 411.353(a) by the August 1995 final rule. We would revise § 411.353(a) to apply the prohibition to referrals for designated health services.

Section 1877(a)(1)(B) prohibits an entity from presenting, or causing to be presented, either a Medicare claim or a bill to any individual, third party payor, or other entity for designated health services furnished under a prohibited referral. This provision, with regard to clinical laboratory services, was incorporated into our regulations at § 411.353(b) by the August 1995 final rule. We would revise § 411.353(b) to apply it to claims or bills for any of the designated health services.

2. Definitions

For purposes of section 1877, the statute provides definitions of a number of terms. Because they are important to understanding the general prohibition set forth above, we discuss certain of these definitions immediately below. The statutory definitions of other terms are presented elsewhere in this preamble when relevant.

a. Referral, referring physician

As defined by section 1877(h)(5), a ''referral'' means the following:

- The request by a physician for an item or service for which payment may be made under Medicare Part B, including the request by a physician for a consultation with another physician (and any test or procedure ordered by, or to be performed by (or under the supervision of) that other physician).
- The request or establishment of a plan of care by a physician that includes the furnishing of designated health services.

Section 1877(h)(5)(C), however, provides an exception to this definition in the case of a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, (and as added by OBRA '93) a request by a radiologist for diagnostic radiology services, and a request by a radiation oncologist for radiation therapy if the services are furnished by (or under the supervision of) the pathologist, radiologist, or radiation oncologist, respectively, as a result of a consultation requested by another physician.

The August 1995 final rule incorporated section 1877(h)(5), with regard to clinical laboratory services, into our regulations by defining ''referral'' at § 411.351. We interpreted a referral as the request by a physician for, or the ordering of, any item or service covered under Medicare Part B. We interpreted the referral for other items or services as a request by a physician that includes the provision of laboratory services or the establishment of a plan of care by a physician that includes the provision of laboratory services. We also included the statutory exception for certain clinical diagnostic laboratory tests and pathological examination services requested by a pathologist.

This proposed rule would revise the definition of ''referral'' to apply it to referrals for designated health services. In accordance with section 1877(h)(5)(C), we would also add the exception to the definition described above relating to a request by a radiologist for diagnostic radiology services and a request by a radiation oncologist for radiation therapy. In addition, we would make a technical change in this section. We would remove the phrase ''any item or service'' and replace it with the phrase ''any service.'' Because the term ''services'' is defined in our regulations (at § 400.202) to include ''items,'' the phrase ''any item or service'' contains a redundancy. Hereinafter, unless we specifically state otherwise, we use the term ''service(s)'' as including ''item(s).'' We have also made several other changes to the definition that are discussed in section III of this preamble.

Also, in accordance with section 1877(h)(5), the August 1995 final rule at § 411.351 defined ''referring physician'' as a physician (or group practice) who makes a referral as defined in § 411.351. This proposed rule would retain this definition, but with one amendment that is described in section IV.A.5 of this preamble.

b. Designated health services

Section 1877(h)(6) defines ''designated health services'' as any of the following services:

- Clinical laboratory services.
- Physical therapy services.
- Occupational therapy services.
- Radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services.
- Radiation therapy services and supplies.
- Durable medical equipment and supplies.
- Parenteral and enteral nutrients, equipment, and supplies.
- Prosthetics, orthotics, and prosthetic devices and supplies.
- Home health services.
- Outpatient prescription drugs.
- Inpatient and outpatient hospital services.

This proposed rule would incorporate this definition of ''designated health services'' into our regulations at § 411.351, except that, for purposes of definition, we would combine radiology services and radiation therapy services and supplies. Also, we propose to define each of these designated health services in § 411.351. We explain our definitions and interpretations in section III of this preamble.

c. Financial relationship

Section 1877(a)(2) describes a financial relationship between a physician (or an immediate family member) and an entity as being an ownership or investment interest in the entity or a compensation arrangement between a physician (or immediate family member) and the entity. (We discuss compensation arrangements in the next section). The statute provides that an ownership or investment interest may be established through equity, debt, or other means. The statute further specifies that an ownership or investment interest includes an interest in an entity that holds an ownership or investment interest in any entity furnishing designated health services.

The August 1995 final rule incorporated this definition into our regulations, with regard to clinical laboratory services, at § 411.351. That section specifies that a financial relationship includes an interest in an entity that holds an ownership or investment interest in any entity providing laboratory services. This proposed rule would revise the definition to specify that a financial relationship includes an interest in an entity that holds an ownership or investment interest in any entity providing designated health services. We have also made certain other changes described in section III of this preamble.

d. Compensation arrangement, remuneration

Section 1877(h)(1)(A) defines a ''compensation arrangement'' as any arrangement involving any remuneration between a physician (or immediate family member) and an entity, other than an arrangement involving only remuneration described in section 1877(h)(1)(C). Section 1877(h)(1)(B) defines ''remuneration'' to include ''any remuneration, directly or indirectly, overtly or covertly, in cash or in kind.'' Section 1877(h)(1)(C) provides that a compensation arrangement does not include the following types of remuneration:

- The forgiveness of amounts owed for inaccurate tests or procedures, mistakenly performed tests or procedures, or the correction of minor billing errors.
- The provision of items, devices, or supplies that are used solely to—
  + Collect, transport, process, or store specimens for the entity providing the item, device, or supply; or
  + Order or communicate the results of tests or procedures for the entity.
- A payment made by an insurer or a self-insured plan to a physician to satisfy a claim, submitted on a fee-for-service basis, for the furnishing of health services by that physician to an individual who is covered by a policy with the insurer or by the self-insured plan, if—
  + The health services are not furnished, and the payment is not made, under a contract or other arrangement between the insurer or the plan and the physician;
  + The payment is made to the physician on behalf of the covered individual and would otherwise be made directly to the individual;
  + The amount of the payment is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account directly or indirectly the volume or value of any referrals; and
  + The payment meets any other requirements the Secretary may impose by regulation as needed to protect against Medicare program or patient abuse.

The above definitions of a ''compensation arrangement'' and ''remuneration'' were incorporated into our regulations at § 411.351 by the August 1995 final rule. In the definition of ''compensation arrangement,'' we clarified that such an arrangement could be either direct or indirect. This proposed rule would retain that definition. Also, because the statute defines ''remuneration'' only by referring to how the remuneration might be made (for example, in cash or in kind), we interpreted remuneration to mean any payment, discount, forgiveness of debt, or other benefit. This proposed rule would retain the definition of ''remuneration,'' with one change. We will consider that payments made by an insurer to a physician are not ''remuneration'' if they meet the requirements in the statute, and if the amount of the payment does not take into account directly or indirectly other business generated between the parties. We explain this change in section III.E.3 of this preamble.

3. General Exceptions to the Prohibition on Physician Referrals

Section 1877(b) provides for general exceptions to the prohibition on referrals. (General exceptions are exceptions that apply to both ownership/investment interests and compensation arrangements.)

Because the first two of these exceptions apply to a ''group practice,'' we begin with a discussion of ''group practice'' as defined in section 1877. A ''group practice,'' as defined in section 1877(h)(4), is a group of two or more physicians legally organized as a

partnership, professional corporation, foundation, not-for-profit corporation, faculty practice plan, or similar association, that meets the following conditions:

- Each physician member of the group furnishes substantially the full range of services that the physician routinely furnishes, including medical care, consultation, diagnosis, or treatment, through the joint use of shared office space, facilities, equipment, and personnel.
- Substantially all of the services of the physician members of the group are furnished through the group, are billed under a billing number assigned to the group, and amounts so received are treated as receipts of the group (the ''substantially all'' test, which we discuss below). (The predecessor provision, that is, the provision as it read before January 1, 1995, required that the services be billed in the name of the group (not that they be billed under a billing number assigned to the group).)
- The overhead expenses of and the income from the practice are distributed in accordance with methods previously determined.
- Except for profits and productivity bonuses that meet the conditions described below, no physician member of the group directly or indirectly receives compensation based on the volume or value of referrals by the physician. (Added by OBRA '93 to be effective January 1, 1995.)
- Members of the group personally conduct at least 75 percent of the physician-patient encounters of the group practice. (Added by OBRA '93 to be effective January 1, 1995.)
- The group practice complies with all other standards established by the Secretary in regulations.

With regard to the above definition, section 1877(h)(4)(B) establishes the following ''Special Rules'':

- A physician in a group practice may be paid a share of the overall profits of the group, or a productivity bonus based on services personally performed or services incident to the personally performed services, so long as the share or bonus is not determined in any manner that is directly related to the volume or value of referrals by the physician. (Added by OBRA '93 to be effective for referrals made on or after January 1, 1995.)
- In the case of a faculty practice plan associated with a hospital, institution of higher education, or medical school with an approved medical residency training program in which physician members may furnish a variety of different specialty services and furnish professional services both within and outside the group, as well as perform other tasks such as research, the conditions contained in the definition of ''group practice'' apply only with respect to the services furnished within the faculty practice plan.

Our August 1995 final rule established a definition of ''group practice'' at § 411.351 based on the statute as it read effective January 1, 1992. In implementing the statute, we interpreted the provision requiring that ''substantially all'' of the services of the physician members be furnished through the group as meaning 75 percent of the patient care services of the group practice. (We discuss additional requirements and definitions related to the ''substantially all'' test in section II.A.6. of this preamble.) As stated above, OBRA '93 made certain revisions to the definition of a group practice, effective January 1, 1995. This proposed rule would revise the definition of ''group practice'' at § 411.351 to conform with the changes made by OBRA '93. Therefore we would do the following:

- Remove the requirement that substantially all of the services must be billed in the name of the group. We would specify, instead, that substantially all of the services must be billed under a billing number assigned to the group.
- Add the above provisions restricting payments made to physicians based on volume or value of referrals, with the exception for profits and productivity bonuses.
- Add that members of the group must personally conduct at least 75 percent of the physician-patient encounters of the group practice.

In addition, for reasons explained in the August 1995 final rule, the definition would continue to provide that the ''substantially all'' test does not apply to any group practice that is located solely in a health professional shortage area (HPSA). Also, for group practices located outside of a HPSA, any time spent by group practice members providing services in a HPSA should not be used to calculate whether the group practice located outside the HPSA has met the ''substantially all'' test. We have also made several other changes to the definition of a group practice, which are discussed later in this preamble.

a. Exception—physician services

Section 1877(b)(1) specifies that the prohibition does not apply to services furnished on a referral basis if the services are physician services, as defined in section 1861(q), furnished personally by (or under the personal supervision of) another physician in the same group practice as the referring physician. Our August 1995 final rule incorporated this provision at § 411.355(a), covering physician services as we have defined them at § 410.20(a). This proposed rule retains § 411.355(a).

b. Exception—in-office ancillary services

Section 1877(b)(2) specifies that the prohibition does not apply to referrals for certain in-office ancillary services. We consider in-office ancillary services to be all designated health services that can be provided in an in-office setting, except durable medical equipment (excluding infusion pumps) and parenteral and enteral nutrients, equipment, and supplies. (In other words, referrals for infusion pumps can qualify for the exception. However, the exception does not apply to referrals for the in-office provision of other durable medical equipment and parenteral and enteral nutrients, equipment, and supplies.) To qualify for the exception, an ownership or investment interest in the services must meet any requirements the Secretary sets forth in regulations to protect against Medicare program or patient abuse. Additionally, the ancillary services must meet the following requirements:

- The services must be furnished personally by the referring physician, a physician who is a member of the same group practice as the referring physician, or an individual who is directly supervised by the physician or by another physician in the group practice. Also, the services must be furnished in either of the following:

+ A building in which the referring physician (or another physician who is a member of the same group practice) furnishes physician services unrelated to the furnishing of designated health services. (The predecessor provision read ''* * * unrelated to the furnishing of clinical laboratory services.'')

+ In the case of a referring physician who is a member of a group practice, in another building that is used by the group practice for either of the following:

++ Furnishing some or all of the group's clinical laboratory services.

++ The centralized provision of the group's designated health services (other than clinical laboratory services). (This provision, which was added by OBRA '93, became effective January 1, 1995.) Note that OBRA '93 also contains an undesignated paragraph following this provision that reads as follows: ''unless the Secretary determines other terms and conditions under which the

provision of such services does not present a risk of program or patient abuse, * * *.'' As discussed in the August 1995 final rule, it is our interpretation that this paragraph is intended to provide for the possibility of our liberalizing the conditions described in section 1877(b)(2)(A)(ii)(II); that is, the conditions concerning the provision of services in ''another building'' that is used by a group practice.

- The ancillary services must be billed by one of the following:

+ The physician performing or supervising the services.

+ A group practice of which the physician is a member under a billing number assigned to the group practice. (Prior to January 1, 1995, this provision did not require that the services be billed under a group practice's billing number.)

+ An entity that is wholly owned by the physician or group practice.

The August 1995 final rule incorporated into our regulations an in-office ancillary services exception that was based on the statutory provision, as it was in effect on January 1, 1992, at § 411.355(b). This proposed rule would revise § 411.355(b) to conform it to the current statutory provision. That is, it would—

- Specify that the exception does not apply to durable medical equipment (other than infusion pumps) or to parenteral and enteral nutrients, equipment, and supplies; and
- Revise paragraph (b)(2) of § 411.355 to require that the services be furnished in one of the following locations:

+ A building in which the referring physician (or another physician who is a member of the same group practice) furnishes physician services unrelated to the furnishing of designated health services.

+ A building that is used by the group practice for the provision of some or all of the group's clinical laboratory services.

+ A building that is used by the group practice for the centralized provision of the group's designated health services (other than clinical laboratory services).

- Indicate that when a group practice bills for ancillary services, the services must be billed under a billing number assigned to the group practice.

We have also made several other changes to the in-office ancillary services exception that we discuss in section III of this preamble.

For purposes of the in-office ancillary services exception, the August 1995 final rule also defined ''direct supervision'' at § 411.351. The rule defines this term as supervision by a physician who is present in the office suite and immediately available to provide assistance and direction throughout the time services are being performed. This proposed rule would retain that definition, with several changes that are meant to clarify the meaning of the term ''present in the office suite.'' We discuss these changes in section III of this preamble.

c. Exception—certain prepaid health plans

Section 1877(b)(3) specifies that the prohibition on referrals does not apply to services furnished by certain prepaid health plans. To qualify for the exception, the services must be furnished by a Federally-qualified health maintenance organization (within the meaning of section 1310(d) of the Public Health Services Act) to its enrollees or by a prepaid health care organization to its enrollees under a contract or agreement with Medicare under one of the following statutory authorities:

- Section 1876, which authorizes us to enter into contracts with health maintenance organizations and competitive medical plans to furnish covered items and services on a risk-sharing or reasonable cost basis.
- Section 1833(a)(1)(A), which authorizes payment for Medicare Part B services to prepaid health plans on a reasonable cost basis.
- Section 402(a) of the Social Security Amendments of 1967 or section 222(a) of the Social Security Amendments of 1972, both of which authorize us to conduct demonstration projects involving payments on a prepaid basis.

The August 1995 final rule incorporated section 1877(b)(3) into our regulations at § 411.355(c). We are proposing to set forth at § 435.1012(b) an exception for services provided by organizations analogous to those cited above to enrollees under the Medicaid program. We discuss this proposal in section III of this preamble.

d. Other exceptions

Effective January 1, 1995, section 1877(b)(4) authorizes the Secretary to provide in regulations for additional exceptions for financial relationships, beyond those specified in the statute, if she determines that they do not pose a risk of Medicare program or patient abuse. The Secretary determined, based on the rationale explained in the August 1995 final rule, that referrals for certain clinical laboratory services furnished in an ambulatory surgical center or end stage renal disease facility, or by a hospice do not pose a risk of Medicare program or patient abuse. The Secretary found no risk of abuse when payments for these services are included in the ambulatory surgical center payment rate, the end stage renal disease composite payment rate, or as part of the hospice payment rate, respectively. Therefore, the August 1995 final rule incorporated an exception for those services into our regulations at § 411.355(d). This proposed rule would retain that provision, with a change discussed below. Because this proposed rule covers 10 additional designated health services, this exception would now apply to any of the designated health services provided in the same manner.

As we noted in the August 1995 final rule, we excepted the listed services because they are furnished as part of a composite rate that cannot vary in response to utilization. We are amending § 411.355(d) to allow the Secretary to except services furnished under other payment rates that the Secretary determines provide no financial incentive for either underutilization or overutilization, or any other risk of program or patient abuse. We are specifically soliciting comments on whether there are analogous composite rates under the Medicaid program that are similarly guaranteed not to result in program or patient abuse. Commenters who are interested in this issue should demonstrate why they believe a particular kind of service should qualify for the exception.

4. Exceptions That Apply Only to Certain Ownership or Investment Interests

The statute also provides that certain ownership or investment interests do not constitute a ''financial relationship'' for purposes of the section 1877 prohibition on referrals.

a. Exception—certain investment securities and shares

Under section 1877(c), the prohibition on referrals does not apply in the case of ownership by a physician (or immediate family member) of the following:

- Investment securities (including shares or bonds, debentures, notes, or other debt instruments) that may be purchased on terms generally available to the public and that are—
- Securities listed on the New York Stock Exchange, the American Stock Exchange, or any regional exchange in which quotations are published on a daily basis, or foreign securities listed on a recognized foreign, national, or regional exchange in which quotations are published on a daily basis, or

• Securities traded under an automated interdealer quotation system operated by the National Association of Securities Dealers, and

• In a corporation that had, at the end of the corporation's most recent fiscal year or on average during the previous 3 fiscal years, stockholder equity exceeding $75 million. (OBRA '93 also included, until January 1, 1995, securities in a corporation that, at the end of the corporation's most recent fiscal year, had total assets exceeding $100 million.)

• Ownership of shares in a regulated investment company as defined in section 851(a) of the Internal Revenue Code of 1986 if the company had, at the end of the company's most recent fiscal year or on average during the previous 3 fiscal years, total assets exceeding $75 million.

The August 1995 final rule incorporated the above provision into our regulations at §§ 411.356 (a) and (b). This proposed rule would remove from § 411.356(a) that portion of the provision that expired on January 1, 1995, and would make certain other changes described in section III of this preamble.

b. Exception—ownership or investment interest in certain health care facilities

Section 1877(d) provides additional exceptions to the prohibition on physician referrals for certain designated health services furnished by three types of facilities if the physician (or immediate family member) has an ownership or investment interest in the facilities:

• Designated health services furnished by a hospital located in Puerto Rico.

• Designated health services furnished in a rural area by an entity if substantially all of the designated health services furnished by the entity are furnished to individuals residing in a rural area. A ''rural area'' is defined in section 1886(d)(2)(D) as meaning an area outside of a Metropolitan Statistical Area. (Until January 1, 1995, this provision read as follows: ''In the case of clinical laboratory services if the laboratory furnishing the services is in a rural area (as defined in section 1886(d)(2)(D)).'')

• Designated health services furnished by a hospital outside of Puerto Rico if the referring physician is authorized to perform services at the hospital and the ownership or investment interest is in the hospital itself (and not merely in a subdivision of the hospital).

The August 1995 final rule incorporated section 1877(d), as it related to clinical laboratory services, into our regulations at § 411.356(c). In establishing the rural provider exception in the regulations, we required that referred laboratory testing be performed on the premises of the rural laboratory (if not performed on the premises, the laboratory performing the testing was required to bill the Medicare program directly). As described in the preamble to the proposed rule covering referrals for clinical laboratory services (57 FR 8598 (March 11, 1992)), we believe that Congress included this exception in order to benefit Medicare beneficiaries who live in rural areas where laboratories may not be available without the financial support of local physicians. We included the additional requirement to prevent situations in which physicians who own an urban laboratory set up a storefront or ''shell'' laboratory with a rural address in order to use the rural exception. In this scenario, the urban owner could make referrals to the rural laboratory, which would in turn refer the tests to the physician's urban laboratory. Alternatively, urban laboratories with physician owners could set up rural laboratories for the purpose of performing tests referred by the physician owners for their urban patients.

Because section 1877(d)(2) has been amended to apply only to designated health services that are actually furnished in a rural area (they cannot be transferred to an urban provider), and only by providers that provide designated health services to a predominantly rural population, we no longer believe that the extra requirement is necessary. We are therefore proposing to remove it from § 410.356(c).

The August 1995 final regulation adopted the OBRA '93 standard that substantially all of the designated health services furnished by the rural entity are furnished to individuals residing in a rural area. We interpreted ''substantially all'' as meaning at least 75 percent of the services. In addition, § 411.356(c) provided an exception, until January 1, 1995, for an ownership or investment interest in a hospital if the physician's ownership or investment interest does not relate (directly or indirectly) to the furnishing of clinical laboratory services. This exception was based on section 1877(b)(4) as it read under OBRA '90. OBRA '93, as amended by SSA '94, retained this provision only until January 1, 1995.

This proposed rule would revise § 411.356(c) to reflect the statutory provision as it became effective on January 1, 1995 and to apply § 411.356(c) to entities providing any of the designated health services. We would change the requirement that a rural entity be located in a rural area to instead except referrals for designated health services furnished in a rural area by an entity that furnishes substantially all of its designated health services to individuals residing in a rural area. We would continue to interpret ''substantially all'' as being at least 75 percent of the services furnished by the entity. In addition, this proposed rule would remove the exception that expired on January 1, 1995.

5. Exceptions That Apply Only to Certain Compensation Arrangements

Section 1877(e) provides that certain compensation arrangements are not considered a ''financial relationship'' for purposes of the prohibition on physician referrals.

a. Exception—rental of office space

Section 1877(e)(1)(A) provides an exception for payments made by a lessee to a lessor for the use of premises if the following conditions are met:

• The lease is in writing, signed by the parties, and specifies the premises covered by the lease.

• The space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the rental or lease. Also, the space is used exclusively by the lessee when being used by the lessee, except that the lessee may make payments for the use of space consisting of common areas under certain conditions. That is, acceptable payments for common areas cannot exceed the lessee's pro rata share of expenses for that space based upon the ratio of the space used exclusively by the lessee to the total amount of space (other than common areas) occupied by all persons using the common areas.

• The lease provides for a term of rental or lease of at least 1 year.

• The rental charges over the term of the lease are set in advance, are consistent with fair market value, and are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

• The lease would be commercially reasonable even if no referrals were made between the parties.

• The lease meets any other requirements the Secretary may impose by regulation, as needed to protest against Medicare program or patient abuse.

''Fair market value'' is defined by section 1877(h)(3) as the value in arm's-length transactions, consistent with the general value market, and, with respect

to rentals or leases, the value of rental property for general commercial purposes (not taking into account its intended use) and, in the case of a lease of space by a lessor that is a potential source of patient referrals to the lessee, not adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor. (Meeting the fair market value standard is a requirement for several of the other compensation-related exceptions in the statute. We discuss these other exceptions later in this preamble.)

The August 1995 final rule incorporated the provisions of section 1877(e)(1)(A) into our regulations at § 411.357(a), without imposing any additional requirements. This proposed rule would retain § 411.357(a). In addition, the final rule incorporated the definition of ''fair market value'' in § 411.351. This proposed rule would retain the definition. Also, since the statute requires that fair market value be ''consistent with the general market value,'' we have added to the definition an explanation of ''general market value.''

b. Exception—rental of equipment

Section 1877(e)(1)(B) provides an exception for payments made by a lessee of equipment to the lessor for the use of the equipment if the following conditions are met:

- The lease is set out in writing, signed by the parties, and specifies the equipment covered by the lease.
- The equipment rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the rental or lease and is used exclusively by the lessee when being used by the lessee.
- The lease provides for a term of rental or lease of at least 1 year.
- The rental charges over the term of the lease are set in advance, are consistent with fair market value, and are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
- The lease would be commercially reasonable even if no referrals were made between the parties.
- The lease meets any other requirements the Secretary may impose by regulation as needed to protect against Medicare program or patient abuse.

The August 1995 final rule incorporated this provision into our regulations at § 411.357(b), without imposing any additional requirements. This proposed rule would retain § 411.357(b), with minor editorial changes.

c. Exception—bona fide employment relationship

Under section 1877(e)(2), any amount paid by an employer to a physician (or an immediate family member of the physician) who has a bona fide employment relationship with the employer for the provision of services does not constitute a compensation arrangement for purposes of the prohibition if the following conditions are met:

- The employment is for identifiable services.
- The amount of the remuneration under the employment is consistent with the fair market value of the services and (except for certain productivity bonuses) is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.
- The remuneration is made in accordance with an agreement that would be commercially reasonable even if no referrals were made to the employer.
- The employment meets any other requirements the Secretary may impose by regulation as needed to protect against Medicare program or patient abuse.

The statute provides that, under this exception, a productivity bonus that is based on services performed personally by the physician (or immediate family member) does not violate the ''volume or value of referrals'' standard.

''Employee'' is defined in section 1877(h)(2) as an individual who would be considered to be an employee of the entity under the usual common law rules that apply in determining employer-employee relationships, as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986.

The August 1995 final rule incorporated the provisions of section 1877(e)(2) into our regulations at § 411.357(c), without imposing any additional requirements. This proposed rule would retain § 411.357(c), but with additional requirements that we describe in section III. The final rule also incorporated the definition of ''employee'' into our regulations at § 411.351. Again, this proposed rule would retain that definition.

d. Exception—personal service arrangements

Under section 1877(e)(3)(A), remuneration from an entity under an arrangement (including remuneration for specific physician services furnished to a nonprofit blood center) does not constitute a compensation arrangement for purposes of the prohibition on referrals if the following conditions are met:

- The arrangement is set out in writing, signed by the parties, and specifies the services covered by the arrangement.
- The arrangement covers all of the services to be furnished by the physician (or immediate family member) to the entity.
- The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement.
- The term of the arrangement is for at least 1 year.
- The compensation to be paid over the term of the arrangement is set in advance, does not exceed fair market value, and, except in the case of a physician incentive plan (as described below) is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
- The services to be performed under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates State or Federal law.
- The arrangement meets any other requirements the Secretary may impose by regulation as needed to protect against program or patient abuse.

The August 1995 final rule incorporated section 1877(e)(3)(A) into our regulations at § 411.357(d)(1), without imposing any additional requirements. This proposed rule would retain § 411.357(d)(1), with several changes that we discuss in section III of this preamble.

Section 1877(e)(3)(B)(i) provides that, in the case of a physician incentive plan between a physician and an entity, the compensation may be determined in a manner (through a withhold, capitation, bonus, or otherwise) that takes into account, directly or indirectly, the volume or value of any referrals or other business generated between the parties, if the plan meets the following requirements:

- No specific payment is made (directly or indirectly) under the plan to a physician or a physician group as an inducement to reduce or limit medically necessary services provided with respect to a specific individual enrolled with the entity.
- If the plan places a physician or a physician group at substantial financial risk as determined by the Secretary under section 1876(i)(8)(A)(ii), the plan

complies with any requirements the Secretary may impose under that section.

- Upon request by the Secretary, the entity provides the Secretary with access to descriptive information regarding the plan, in order to permit the Secretary to determine whether the plan is in compliance with the requirements listed above.

(Note: Sections 1876(i)(8) and 1903(m)(2)(A) require that physician incentive plans be regulated. On March 27, 1996, we published, at 61 FR 13430, a final rule with comment period that implemented this legislation for purposes of both the Medicare and Medicaid programs by establishing requirements at § 417.479 (for Medicare) and at § 434.70 (for Medicaid). A final rule amending the final rule with comment was published on December 31, 1996 at 61 FR 69034.)

The August 1995 final rule incorporated section 1877(e)(3)(B)(i) into our regulations at § 411.357(d)(2). Because of the establishment at § 417.479 of requirements concerning incentive plans, this proposed rule would revise § 411.357(d)(2). It would replace the reference to requirements established by the Secretary under section 1876(i)(8)(A)(ii) of the Act with a reference to the requirements of § 417.479. We would also reverse the order of paragraphs (ii) and (iii) of § 411.357(d)(2) because we believe this order reflects a more logical progression. In addition, we would delete existing § 411.357(d)(3), which contains a time-sensitive provision related to personal services arrangements that, based on the statute, is now obsolete.

Section 1877(e)(3)(B)(ii) defines a ''physician incentive plan'' as any compensation arrangement between an entity and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services provided with respect to individuals enrolled with the entity. The August 1995 final rule incorporated this definition into our regulations at § 411.351. This proposed rule would retain that definition.

e. Exception—remuneration unrelated to the provision of designated health services

Prior to OBRA '93, section 1877(b)(4) provided an exception for any financial relationship with a hospital if the financial relationship does not relate to the provision of clinical laboratory services. OBRA '93 eliminated this provision, but SSA '94 reinstated it until January 1, 1995. OBRA '93 also added paragraph (e)(4) to section 1877, retroactive to January 1, 1992. Under section 1877(e)(4), remuneration provided by a hospital to a physician that does not relate to the furnishing of designated health services does not constitute a compensation arrangement for purposes of the prohibition on referrals. Section 1877(e)(4) differs from the predecessor provision at section 1877(b)(4) in that it retains only the compensation aspect of the exception. In addition, it applies only to remuneration from a hospital to a physician (that is, it does not include remuneration from a physician to a hospital) if the remuneration does not relate to the furnishing of designated health services. Also, the exception does not apply to remuneration from a hospital to a member of a physician's immediate family.

The August 1995 final rule incorporated the provisions of sections 1877(b)(4) and (e)(4) as they were effective on January 1, 1992, and as they relate to compensation, into our regulations at § 411.357(g). This proposed rule would revise § 411.357(g) by removing that portion that was based on the predecessor provision of section 1877(b)(4), since that provision has expired. We would also revise that portion of § 411.357(g) that was based on section 1877(e)(4) by changing the reference to remuneration not related to the furnishing of clinical laboratory services to remuneration not related to the furnishing of designated health services. We have also made several other changes described in section III of this preamble.

f. Exception—physician recruitment

Section 1877(e)(5) provides that remuneration provided by a hospital to a physician to induce the physician to relocate to the area serviced by the hospital in order to be a member of the hospital's medical staff does not constitute a compensation arrangement for purposes of the prohibition on referrals if the following conditions are met:

- The physician is not required to refer patients to the hospital.
- The amount of remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.
- The arrangement meets any other requirements the Secretary may impose by regulation as needed to protect against program or patient abuse.

The August 1995 final rule incorporated the provisions of section 1877(e)(5) into our regulations at § 411.357(e), with additional requirements. Under our authority to impose additional requirements, we specified that the arrangement and its terms must be in writing and signed by both parties. We also specified that the physician must not be precluded from establishing staff privileges at another hospital or referring business to another entity. This proposed rule would retain § 411.357(e), with a minor editorial change.

g. Exception—isolated transaction

Section 1877(e)(6) provides that an isolated transaction, such as a one-time sale of property or a practice, is not considered to be a compensation arrangement for purposes of the prohibition on referrals if the following conditions are met:

- The amount of remuneration for the transaction is consistent with fair market value and is not determined, directly or indirectly, in a manner that takes into account the volume or value of referrals by the physician.
- The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the entity.
- The arrangement meets any other requirements the Secretary may impose by regulation as needed to protect against Medicare program or patient abuse.

The August 1995 final rule incorporated the provisions of section 1877(e)(6) into our regulations at § 411.357(f), with additional requirements. Under our authority to impose additional requirements, we specified that there can be no additional transactions between the parties for 6 months after the isolated transaction, except for transactions that are specifically excepted under one of the other exceptions provided in the regulations. This proposed rule would retain § 411.357(f), with a minor editorial change. In addition, we established definitions of ''transaction'' and ''isolated transaction'' at § 411.351. We defined a ''transaction'' as an instance or process of two or more persons doing business. We defined an ''isolated transaction'' as one involving a single payment between two or more persons. We specified that a transaction that involves long-term or installment payments is not considered an isolated transaction. This proposed rule would retain those definitions, with the clarification that ''transactions'' can involve persons or entities.

h. Exception—certain group practice arrangements with a hospital

Section 1877(e)(7) provides that an arrangement between a hospital and group under which designated health services are furnished by the group but

are billed by the hospital does not constitute a compensation arrangement for purposes of the prohibition on referrals if the following conditions are met:

- With respect to the services furnished to a hospital inpatient, the arrangement is for the provision of inpatient hospital services under section 1861(b)(3).
- The arrangement began before December 19, 1989, and has continued in effect without interruption since that date.
- With respect to the designated health services covered by the arrangement, substantially all of those services furnished to patients of the hospital are furnished by the group under the arrangement.
- The arrangement is set out in a written agreement that specifies the services to be furnished by the parties and the amount of compensation.
- The compensation paid over the term of the agreement is consistent with fair market value, and the compensation per unit of services is fixed in advance and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
- The compensation is provided under an agreement that would be commercially reasonable even if no referrals were made to the entity.
- The arrangement between the parties meets any other requirements the Secretary may impose by regulation as needed to protect against Medicare program or patient abuse.

The August 1995 final rule incorporated the provisions of section 1877(e)(7), as they relate to clinical laboratory services, into our regulations at § 411.357(h), without imposing any additional requirements. This proposed rule would revise § 411.357(h) to apply the provisions to the designated health services, and would make certain minor changes described in section III.

i. Exception—payments by a physician for items and services

Section 1877(e)(8) provides that the following do not constitute compensation arrangements for purposes of the prohibition on referrals:

- Payments made by a physician to a laboratory in exchange for the provision of clinical laboratory services.
- Payments made by a physician to an entity as compensation for items or services other than clinical laboratory services if the items or services are furnished at fair market value.

The August 1995 final rule incorporated the provisions of section 1877(e)(8) into our regulations at § 411.357(i). This proposed rule would retain § 411.357(i), but clarify that ''services'' as used in the provision means services of any kind (not just those defined as ''services'' for purposes of the Medicare program in § 400.202).

6. Requirements Related to the ''Substantially All'' Test

As mentioned earlier, the definition of ''group practice'' in section 1877(h)(4) contains a requirement that substantially all of the services of the physicians who are members of the group be furnished through the group. In the August 1995 final rule, we interpreted ''substantially all'' to mean at least 75 percent of the total patient care services of the group practice members. Further, we defined ''members of the group,'' at § 411.351, as physician partners and full-time and part-time physician contractors and employees during the time they furnish services to patients of the group practice that are furnished through the group and are billed in the name of the group. This proposed rule would revise the definition of ''members of the group'' to exclude independent contractors, to count physician owners other than partners, and to count physicians as members during the time they furnish ''patient care services'' to the group. We discuss these changes in section III of this preamble.

The August 1995 final rule defined ''patient care services,'' at § 411.351, as any tasks performed by a group practice member that address the medical needs of specific patients, regardless of whether they involve direct patient encounters. We included, as examples, the services of physicians who do not directly treat patients, time spent by a physician consulting with other physicians, and time spent reviewing laboratory tests. Under § 411.351, ''patient care services'' are measured by the total patient care time each member spends on these services.

This proposed rule would retain the definition of patient care services, but would broaden the definition to include tasks that benefit patients in general or the group practice. We are also proposing minor changes that we believe are necessary to clarify what tasks qualify under the definition. We describe these changes in section III of this preamble.

The August 1995 final rule also required, at § 411.360, that a group practice submit a written statement to its carrier annually to attest that, during the most recent 12-month period (calendar year, fiscal year, or immediately preceding 12-month period) 75 percent of the total patient care services of group practice members was furnished through the group, was billed under a billing number assigned to the group, and the amounts so received were treated as receipts of the group.

Section 411.360 also provides that a newly-formed group practice (one in which physicians have recently begun to practice together) or any group practice that has been unable in the past to meet the definition of a group practice as set forth at section 1877(h)(4) must—

- Submit a written statement to attest that, during the next 12-month period (calendar year, fiscal year, or next 12 months), it expects to meet the 75 percent standard and will take measures to ensure the standard is met; and
- At the end of the 12-month period, submit a written statement to attest that it met the 75 percent standard during that period, billed for those services under a billing number assigned to the group, and treated amounts received for those services as receipts of the group. If the group did not meet the standard, any Medicare payments made to the group during the 12-month period that were conditioned on the group meeting the standard are overpayments.

In addition, § 411.360 specifies that—

- Once any group has chosen to use its fiscal year, the calendar year, or some other 12-month period, the group practice must adhere to this choice.
- The attestation must contain a statement that the information furnished in the attestation is true and accurate and must be signed by a group representative.
- Any group that intends to meet the definition of a group practice in order to qualify for one of the exceptions provided in the regulations must submit the required attestation to its carrier by December 12, 1995.

The August 1995 final rule contains a discussion of the rationale for the above provisions. On December 11, 1995, we published in the **Federal Register**, at 60 FR 63438, a final rule that delays the date by which a group of physicians must file an attestation statement. The December final rule amended § 411.360 to require that a group that intends to meet the definition of a group practice must submit an attestation statement to its carrier no later than 60 days after the group receives attestation instructions from its carrier. The preamble to the December rule points out that a group can regard itself as a group practice in the interim period before it receives attestation instructions, provided the group believes that it meets the

definition of a group practice under § 411.351.

This proposed rule would retain § 411.360, as amended by the December 1995 final rule. We propose to make several minor changes to clarify that a group is only required to complete an attestation if it wishes to qualify as a group practice for purposes of meeting an exception that requires group status. We are also changing the provision to require that the attestation be signed by an authorized representative of the group practice who is knowledgeable about the group, and to contain a statement that the information furnished in the attestation is true and accurate to the best of the representative's knowledge and belief. The proposed provision also states that any person filing a false statement will be subject to applicable criminal and civil penalties.

7. Reporting Requirements

Prior to SSA '94, section 1877(f) included the requirement that each entity furnishing Medicare covered items or services must provide us with certain information concerning its ownership or investment arrangements. In our December 3, 1991 interim final rule with comment period, published in the **Federal Register** at 56 FR 61374, we extended the rule to include certain information concerning an entity's compensation arrangements for the reasons discussed in the preamble of that rule.

Section 1877(f) also gave the Secretary the option of waiving the reporting requirements, for certain entities that do not furnish clinical laboratory services, in all but 10 States. The interim final rule discussed our decision to waive the reporting requirements for all entities (other than those providing clinical laboratory services) in States other than the minimum 10 States specified in the statute. In the 10 States, we were required to obtain data from at least six specific types of entities. We gathered data from these providers in the fall of 1991.

Section 152 of SSA '94 amended section 1877(f) extensively. It extended the reporting requirements to specifically cover information not only about an entity's ownership or investment interests, but about compensation arrangements as well. SSA '94 also eliminated the Secretary's authority to waive the reporting requirements for certain States or services, although the Secretary continues to have the right to determine that an entity is not subject to the reporting requirements because it provides services covered under Medicare very infrequently. In addition, the requirements continue to not apply to designated health services furnished outside of the United States. Section 1877(f) allows the Secretary to gather the information in such form, manner, and at such times as she specifies.

We discussed the provisions of section 1877(f), as they relate to clinical laboratories and as they read under OBRA '90, in detail in the December 1991 interim final rule. The August 1995 final rule adopted the provisions of the interim final rule with revisions that reflect the changes made by SSA '94. While the August 1995 final rule reflects the amendments made to section 1877(f), it did not interpret these amendments. This proposed rule retains the reporting requirements as they appear in the August 1995 final rule, subject to certain interpretations we have added in section III of this preamble. These requirements are set forth at existing § 411.361, and we would apply them to any future reporting we may require.

8. Sanctions

Prior to OBRA '93, section 1877(g)(1) required a denial of payment for a clinical laboratory service that was provided in violation of the referral prohibition. Paragraph (g)(2) of section 1877 required the timely refund of amounts collected in violation of the prohibition. OBRA '93 extended these provisions to apply to all of the designated health services, effective January 1, 1995. The August 1995 final rule incorporated these provisions as they relate to clinical laboratory services into our regulations at §§ 411.353(c) and (d), respectively. This proposed rule would revise §§ 411.353(c) and (d) to extend their application to the other designated health services.

Paragraph (g)(3) of section 1877 provides for the imposition of a civil money penalty of $15,000 per service and exclusion from Medicare and any State health care program, including Medicaid, for any person who presents or causes to be presented a bill or claim the person knows or should know is for a service for which payment may not be made under § 1877(a). The same penalty applies for a service for which a person has not made a refund as described in paragraph (g)(2).

Paragraph (g)(4) provides for a $100,000 civil money penalty and the same exclusion penalty for any physician or other entity that enters into a circumvention scheme that the physician or entity knows or should know has a principal purpose of assuring referrals by the physician to a particular entity which, if the physician made the referrals directly, would be in violation of section 1877. A proposed rule published by the Office of Inspector General on October 20, 1993 (58 FR 54096) addresses sections 1877(g)(3) and (g)(4). That rule became final on March 31, 1995 (60 FR 16580).

Paragraph (g)(5) of section 1877 provides for possible exclusion and a civil money penalty of not more than $10,000 per day for each day in which a person has failed to meet a reporting requirement in section 1877(f). The December 1991 interim final rule covering the reporting requirements incorporated this provision into our regulations at § 411.361(g), and the August 1995 final rule redesignated § 411.361(g) as § 411.361(f). This proposed rule would retain § 411.361(f).

9. Additional Definitions

In implementing provisions of section 1877 as they were effective on January 1, 1992, the August 1995 final rule established definitions of the following terms (which were not discussed above) at § 411.351:

a. *Clinical laboratory services* means the biological, microbiological, serological, chemical, immunohematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. These examinations also include procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body.

b. *Entity* means a sole proprietorship, trust, corporation, partnership, foundation, not-for-profit corporation, or unincorporated association. For reasons discussed in section III of this preamble, this proposed rule would revise the definition of ''entity'' to include a physician's sole proprietorship and any practice of multiple physicians that provides for the furnishing of a designated health service.

c. *Hospital* means any separate legally-organized operating entity plus any subsidiary, related, or other entities that perform services for the hospital's patients and for which the hospital bills. However, we have excluded from this definition entities that perform services for hospital patients ''under arrangements'' with the hospital. We propose to amend this definition to make it clear that ''hospitals'' include regular hospitals, psychiatric hospitals, and rural primary care hospitals.

d. *HPSA* means, for purposes of the August 1995 final rule, an area designated as a health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act for primary medical care professionals (in accordance with the criteria specified in 42 CFR part 5, Appendix A, Part I—Geographic Areas). In addition, with respect to dental, mental health, vision care, podiatric, and pharmacy services, an HPSA means an area designated as a health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act for dental professionals, mental health professionals, vision care professionals, podiatric professionals, and pharmacy professionals, respectively.

e. *Immediate family member* or ''member of a physician's immediate family'' means husband or wife; natural or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

f. *Laboratory* means an entity furnishing biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. These examinations also include procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body. Entities only collecting or preparing specimens (or both) or only serving as a mailing service and not performing testing are not considered laboratories.

g. The August 1995 final rule defined a ''plan of care'' as the establishment by a physician of a course of diagnosis or treatment (or both) for a particular patient, including the ordering of items or services. For reasons discussed earlier, this proposed rule would remove the words ''items or'' from this definition.

(We explain our rationale for some of these definitions in the March 1992 proposed rule, and we explain the remainder in the August 1995 final rule.) We would extend these definitions to apply to referrals involving any of the designated health services.

We have made some changes to the definitions in addition to those noted above. Any changes in definitions that we have included in this proposed rule do not result from changes in the legislation, but reflect our most recent interpretations of the statute. In section III of this preamble, we discuss in detail how we propose to interpret provisions in section 1877 and in section 1903(s) that we have either not interpreted in the August 1995 final rule or that we believe we must reconsider in the context of the designated health services. In section III, we also define or interpret terms that are present in the statute (such as each of the designated health services) as well as include new definitions that we propose to add to the rule to enable us to implement other parts of the statute.

10. Conforming Changes

We propose to revise existing §§ 411.1(a) and 411.350(a), which set forth the statutory basis for the provisions in part 411, subpart A, and part 411, subpart J, respectively, by changing the reference to ''clinical laboratory services'' to ''designated health services.''

11. Editorial Changes

In addition to the proposed changes discussed above, we would also make a number of editorial changes to subpart J of part 411. These changes would not affect the substance of the provisions. As an example of the type of change we would make, in § 411.355(a), we would add the words ''of this chapter'' after the reference to § 410.20(a).

B. Applying The Referral Prohibition to the Medicaid Program: Section 1903(s) of the Act and the Provisions of This Proposed Rule

Title XIX of the Act authorizes Federal grants to States to establish Medicaid programs to provide medical assistance to needy individuals. Medicaid programs are administered by the States in accordance with Federal laws and regulations. State Medicaid agencies operate their programs in accordance with a Medicaid State plan that is approved by us.

While Medicaid programs are administered by the States, they are jointly financed by the Federal and State governments. The Federal government pays its share of medical assistance expenditures to the State on a quarterly basis according to a formula described in sections 1903 and 1905(b). The amount of the Federal share for medical assistance is called Federal financial participation (FFP). Before the enactment of OBRA '93, there were no statutory or regulatory requirements concerning the availability of FFP for Medicaid services resulting from physician referrals.

Section 13624 of OBRA '93, entitled ''Application of Medicare Rules Limiting Certain Physician Referrals,'' added a new paragraph (s) to section 1903 of the Act. This new provision extends aspects of the Medicare prohibition on physician referrals to Medicaid. Specifically, this provision restricts FFP for expenditures for medical assistance under the State plan consisting of designated health services, as defined under section 1877(h)(6), that are furnished to an individual on the basis of a physician referral that would result in the denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same terms and conditions as under a State's Medicaid plan.

This proposed rule would revise § 435.1002, ''FFP for services,'' to reflect section 1903(s). We would specify in § 435.1002(a) that the availability of FFP for expenditures for Medicaid services is subject to the limitations set forth in new § 435.1012. We would entitle § 435.1012 as ''Limitation on FFP Related to Prohibited Referrals.'' The proposed new provision states that we will deny FFP for designated health services (as defined in § 431.351) furnished under the State plan to an individual on the basis of a physician referral that would result in the denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same terms and conditions as under the State plan. We believe that certain aspects of section 1903(s) require our interpretation, and we discuss these aspects in section III of this preamble.

Section 4314 of the Balanced Budget Act of 1997 established section 1877(g)(6) of the Act. It requires that the Secretary issue written advisory opinions to outside parties concerning whether the referral of a Medicare patient by a physician for designated health services (other than clinical laboratory services) is prohibited under the physician referral provisions in section 1877. Because the Medicare rules can affect whether a State will receive FFP for certain services, States, as well as individuals and entities that provide services under the Medicaid program, may be interested in the advisory opinion process. As a result, we have included in § 435.1012(c) a cross reference to the Medicare regulations that set forth the specific procedures we will use in issuing advisory opinions.

Section 1903(s) also specifies that the reporting requirements of section

1877(f) and the penalties for failing to report in section 1877(g)(5) apply to a provider of a designated health service for which payment may be made under Medicaid in the same manner as they apply to a provider that furnishes a designated health service for which payment may be made under Medicare.

This proposed rule would incorporate the provisions of sections 1877(f) and (g)(5) into our Medicaid regulations by adding new §§ 455.108 and 455.109 to part 455 (''Program Integrity: Medicaid''). These two provisions would appear under a new subpart C entitled ''Disclosure of Information by Providers for Purposes of the Prohibition on Certain Physician Referrals.'' Section 455.108, ''Purpose,'' would specify that subpart C implements section 1903(s) of the Act. Section 455.109, ''Disclosure of ownership, investment, and compensation arrangements,'' would list the specific disclosure requirements, and the sanctions for failing to comply. We interpret these disclosure requirements, as we believe they apply to Medicaid providers, in section III of this preamble.

III. Interpretations of Sections 1877 and 1903(s) of the Act

In this section of the preamble, we discuss in detail how we propose to interpret provisions in section 1877 and in section 1903(s) that we either did not interpret in the August 1995 final rule or that we interpreted in the context of referrals for clinical laboratory services, but must reconsider in the context of the additional designated health services. We propose to define or interpret terms that are present in the statute (such as each of the designated health services) or to reinterpret or clarify certain statutory terms that we interpreted in the past. We also propose to add certain new terms and definitions to the rule that we believe are necessary for us to implement parts of the statute. This section is structured in the order we used to present the statutory provisions and our interpretations in the August 1995 final rule. We would like to point out that, in these proposed regulations, we intend to interpret only the provisions of section 1877 of the Act, and not the provisions of any other State or Federal laws, such as the antitrust laws, the anti-kickback statute, or the Internal Revenue Code.

A. Definitions

1. Designated Health Services

As we noted above, OBRA '93 expanded the physician referral prohibition to apply to ten designated health services in addition to clinical laboratory services. Section 1877(h)(6) lists these services, but does not define them. Because the designated health services are not defined in section 1877, we would define them in § 411.351.

Designated health services as components of other services. We believe that a designated health service remains one, even if it is billed as something else or is subsumed within another service category by being bundled with other services for billing purposes. For example, most services provided by a skilled nursing facility (SNF) are considered SNF services, which are not themselves designated health services. Nonetheless, SNF services can encompass a variety of designated health services, such as physical therapy services or laboratory services.

Similarly under Medicaid, services provided by a clinic are considered ''clinic services'' under section 1905(a)(9) of the Act, but could encompass a variety of designated health services, such as occupational therapy, physical therapy, or radiology services.

We base our interpretation on the fact that Congress compiled its list of designated health services based on abuses or potential abuses it perceived in regard to a variety of specific kinds of services. The list in section 1877(h)(6), in fact, does not exactly track the service categories as they are defined under either Medicare or Medicaid. In short, we regard the services designated in section 1877 as subject to the requirements of that section regardless of the setting in which they are provided or the payment category under which they are billed.

On the other hand, we are also aware that designated health services are sometimes provided as merely peripheral parts of some other major service that a physician has prescribed. For example, physicians often employ echocardiography (to obtain ultrasound signals from the heart) as a mechanism to intraoperatively view the results of bypass surgery. We do not believe that a physician using echocardiography this way has made a specific referral for a designated health service; instead, we regard the physician as prescribing a physician service that happens to incidentally include echocardiography. In other words, it is our view that a physician is unlikely to over-prescribe bypass surgery in order to enhance his or her investment in an echocardiography machine. Because we believe that Congress meant to include under designated health services specific services that are or could be subject to abuse, we are proposing to define those services accordingly. Thus, we propose to deviate from standard Medicare or Medicaid definitions of certain services in order to meet the intent of the statute.

How we define designated health services. We have chosen, in general, to base the definitions for the designated health services on existing definitions in the Medicare program. Except for inpatient hospital services and home health services, our definitions are based on how Medicare covers a service under Part B. As noted above, we have chosen to deviate from these definitions when we believe it is appropriate to fulfill the purpose of the statute.

These definitions would apply for purposes of physician referrals that are made for services covered under Medicare and for analogous services covered under the Medicaid program. However, section 1903(s) precludes FFP for medical assistance under a State plan consisting of a designated health service furnished to an individual on the basis of a referral that would result in a denial of payment under Medicare *if Medicare provided for coverage of the service to the same extent and under the same terms and conditions as under the State plan.* We believe that in enacting section 1903(s), Congress was clearly concerned that financial relationships of the kind that would prohibit a referral for services under Medicare may also lead to improper utilization of Medicaid services. However, because Medicaid has its own unique set of coverage requirements, a State can cover and reimburse designated health services very differently from the way these services are covered and reimbursed under the Medicare program. We believe that Congress was aware of these program differences and specifically meant to provide us with some flexibility in applying the Medicare physician referral rules in the Medicaid context. Therefore, we intend to apply this flexibility in the following manner, which we believe will further the goals of the statute:

When the definition of a designated health service is the same under both programs, we intend to use the same definition, as described in this preamble, for both programs. However, when the definition of a designated health service differs under a State's plan from the definition under Medicare, we will assume that the services under the State's plan take precedence, even if the definition will encompass services that are not covered by Medicare. However, we propose not to include Medicaid services as designated health services in situations

in which including those services appears to run counter to the underlying purpose of the legislation. Because Medicaid is administered by the States, we do not believe that we are in the best position to determine when including particular services will have this effect. As a result, we are specifically soliciting comments on how to implement our policy in a manner that will achieve the goals of the statute.

We have received a number of inquiries from individuals who were confused about whether a particular service falls under one of the designated service categories listed in section 1877(h)(6). In order to remedy this problem, we have included below general explanations of each of the designated health services, including explanations of how we interpret similar or parallel services under Medicare. In the text of the proposed regulation, however, we have defined designated health services whenever we could by simply cross-referencing existing definitions in the Medicare statute, regulations, or manuals or by including specific language whenever we believe the definitions should deviate from standard Medicare definitions.

a. Clinical laboratory services

We would retain the definition that was incorporated into our regulations at § 411.351 by the August 1995 rule.

b. Physical therapy services (including speech-language pathology services)

Physical therapy services. Sections 1861(s)(2)(D) and 1832 provide for coverage of outpatient physical therapy services under Part B, which are defined in section 1861(p). Under section 1861(p), outpatient physical therapy services may be furnished by a provider of services, a clinic, rehabilitation agency, or public health agency, or by others under arrangements with and under the supervision of one of these entities. The services must be furnished to an outpatient who is under the care of a doctor of medicine or osteopathy, or a doctor of podiatric medicine, under a plan of care established by one of these physicians or by a qualified physical therapist. The plan must be periodically reviewed by the physician and must include the type, amount, and duration of physical therapy services to be furnished. No service is included as outpatient physical therapy if it would not be included as an inpatient hospital service if furnished to an inpatient of a hospital. Outpatient physical therapy may be furnished by a provider to an individual as an inpatient of a hospital or extended care facility if the individual has exhausted or is otherwise ineligible for benefit days under Medicare Part A.

Outpatient physical therapy services may be furnished by an independent physical therapist in his or her office or in an individual's home. The physical therapist must meet any standards created by the Secretary in regulations, including health and safety standards. Special provisions concerning services furnished by a physical therapist in independent practice are set forth at § 410.60(c).

Under section 1861(p), the term ''outpatient physical therapy services'' also includes speech-language pathology services. Medicare covers speech-language pathology services if furnished to an outpatient by a provider of services, a clinic, rehabilitation agency, or public health agency, or by others under arrangements with and under the supervision of one of these entities. However, the statute does not provide for coverage of services furnished by speech-language pathologists in independent practice.

Plan of treatment requirements for outpatient physical therapy and speech-language pathology services are set forth in § 410.61. Conditions for outpatient physical therapy services are set forth in § 410.60(a) and (b), and conditions and exclusions for outpatient speech-language pathology services are set forth in § 410.62.

Basically, covered outpatient physical therapy services include three types of services, which are best described in § 410.100(b) (which specifically concerns services provided by a comprehensive outpatient rehabilitation facility). Section 410.100(b) provides that the following are physical therapy services:

- Testing and measurement of the function or dysfunction of the neuromuscular, musculoskeletal, cardiovascular, and respiratory systems.
- Assessment and treatment related to dysfunction caused by illness or injury and aimed at preventing or reducing disability or pain and restoring lost function.
- The establishment of a maintenance therapy program for an individual whose restoration has been reached. (However, maintenance therapy itself is not covered as part of these services. Sections 3101.8 of the Medicare Intermediary Manual (HCFA Pub. 13, Part 3) and 2210 of the Medicare Carriers Manual provide guidelines for coverage of restorative therapy and maintenance programs.)

Speech-language pathology services. These services are defined in section 1861(ll)(1) as such speech, language, and related function assessment and rehabilitation services furnished by a qualified speech-language pathologist as this pathologist is legally authorized to perform under State law (or the State regulatory mechanism) as would otherwise be covered if furnished by a physician. Section 1877(ll)(3) defines a ''qualified speech-language pathologist.''

Speech-language pathology services are briefly described in § 410.100(d) as those necessary for the diagnosis and treatment of speech and language disorders that create difficulties in communication. Section 2216 of the Medicare Carriers Manual provides that speech-language pathology services are also services necessary for the diagnosis and treatment of swallowing disorders (dysphagia), regardless of the presence of a communication disability. This section of the manual also discusses restorative therapy and maintenance programs and group speech pathology services under the two main categories of diagnostic or evaluation services and therapeutic services.

Services that are essentially the same as ''outpatient physical therapy services'' and ''outpatient speech pathology services'' are also covered by Medicare in other contexts and in different settings, and may be billed under different categories. For example, section 1861(b)(3) lists as ''inpatient hospital services'' other diagnostic or therapeutic items or services furnished by a hospital or by others under arrangements with the hospital, as are ordinarily furnished to inpatients. We have a longstanding policy of covering physical therapy and occupational therapy as diagnostic or therapeutic ''inpatient hospital services.'' The Medicare regulations in § 482.56, in fact, include conditions of participation for hospitals that provide physical therapy, occupational therapy, or speech pathology services.

Similarly, these services can also be covered as SNF services. Section 1861(h)(3) includes as ''extended care services'' physical or occupational therapy or speech-language pathology services furnished by the SNF (or by others under arrangements made by the facility), to an inpatient of the facility. These services can also be furnished as ''incident to'' a physician's services under section 1861(b)(2)(A). This provision covers services and supplies furnished as an incident to a physician's professional service, of kinds that are commonly furnished in physicians' offices and are commonly either furnished without charge or included in the physicians' bills. Physical and occupational therapy can qualify as

''incident to'' services, as reflected in section 2050.2 of the Carriers Manual, if the physician directly supervises auxiliary personnel who furnish these services and if these personnel are employed by the physician.

Section 1877(h)(6)(B) lists as a designated health service ''physical therapy services,'' rather than the more limited category of ''*outpatient* physical therapy services.'' Therefore, we believe that we can include within our definition of these services any physical therapy or speech-language pathology services that are covered under Medicare, regardless of where they are furnished and by whom, or how they are billed.

For purposes of section 1877, we would define ''physical therapy services'' as those outpatient physical therapy services (including speech-language pathology services) described at section 1861(p) of the Act and at § 410.100(b) and (d). Physical therapy services also include any other services with the characteristics described in § 410.100(b) and (d) that are covered under Medicare Part A or B, regardless of who provides them, the location in which they are provided, or how they are billed.

c. Occupational therapy services

Sections 1861(s)(2)(D) and 1832 of the Act provide for coverage of outpatient occupational therapy services under Part B. Section 1861(g) defines ''outpatient occupational therapy services'' by substituting the word ''occupational'' for the word ''physical'' each place that it appears in the definition of outpatient physical therapy services in section 1861(p).

Under section 1861(g), outpatient occupational therapy services may be furnished by a provider of services, a clinic, rehabilitation agency, or public health agency, or by others under arrangements with and under the supervision of one of these entities. The services must be furnished to an outpatient who is under the care of a doctor of medicine or osteopathy, or a doctor of podiatric medicine, under a plan of care established by one of these physicians or by a qualified occupational therapist. The plan must be periodically reviewed by the physician and must include the type, amount, and duration of occupational therapy services to be furnished. No service is included as outpatient occupational therapy if it would not be included as an inpatient hospital service if furnished to an inpatient of a hospital. Outpatient occupational therapy may be furnished by a provider to an individual as an inpatient of a hospital or extended care facility if the individual has exhausted or is otherwise ineligible for benefit days under Medicare Part A.

Outpatient occupational therapy services may be furnished by an independent occupational therapist in his or her office or in an individual's home. The occupational therapist must meet any standards created by the Secretary in regulations, including health and safety standards.

Coverage guidelines for occupational therapy services are set forth in sections 3101.9 of the Medicare Intermediary Manual (HCFA Pub. 13, Part 3) and 2217 of the Medicare Carriers Manual. The purpose of occupational therapy services is described generally in section 3101.9 of the Intermediary Manual as follows: ''Occupational therapy is a medically prescribed treatment concerned with improving or restoring functions which have been impaired by illness or injury or, where function has been permanently lost or reduced by illness or injury, to improve the individual's ability to perform those tasks required for independent functioning.''

Basically, covered outpatient occupational therapy services include the following types of services, which are best described in section 410.100(c), a section that specifically concerns services provided by a comprehensive outpatient rehabilitation facility. For purposes of section 1877, we would use the same services that are described in section 410.100(c). In § 411.351, occupational therapy services would include the following:

- Teaching of compensatory techniques to permit an individual with a physical impairment or limitation to engage in daily activities.
- Evaluation of an individual's level of independent functioning.
- Selection and teaching of task-oriented therapeutic activities to restore sensory-integrative function.
- Assessment of an individual's vocational potential, except when the assessment is related solely to vocational rehabilitation.

As we pointed out in the section covering physical therapy services, services that are essentially the same as ''outpatient occupational therapy services'' are also covered by Medicare in other contexts and in different settings, and may be billed under different categories. For example, they might be covered as ''inpatient hospital services'' under section 1861(b)(3) as ''other diagnostic or therapeutic items or services'' furnished by a hospital or by others under arrangements with the hospital; they might be covered as SNF services under section 1861(h)(3) as part of a patient's ''extended care services''; or they might be furnished in a physician's office as services ''incident to'' the physician's services under section 1861(b)(2)(A).

Section 1877(h)(6)(C) lists as a designated health service ''occupational therapy services,'' rather than the more limited category of ''*outpatient* occupational therapy services.'' Therefore, we believe that we can include within our definition of these services any occupational therapy services which are covered under Medicare, regardless of where they are furnished and by whom, or how they are billed.

For purposes of section 1877, we would define ''occupational therapy services'' as those outpatient occupational therapy services described at section 1861(g) of the Act and at 42 CFR 410.100(c). Occupational therapy services also include any other services with the characteristics described in § 410.100(c) that are covered under Medicare Part A or B, regardless of who furnishes them, the location in which they are furnished, or how they are billed.

d. Radiology services, including magnetic resonance imaging, computerized axial tomography scans, ultrasound services, and radiation therapy services and supplies

Section 1877(h)(6)(D) identifies ''radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound'' as a designated health service. Section 1877(h)(6)(E) identifies ''radiation therapy services and supplies'' as a designated health service.

Sections 1861(s)(3) and 1832 establish that ''diagnostic X-ray tests,'' including diagnostic mammography services under certain conditions, are considered medical or other health services under Part B. Similarly, section 1861(s)(4) establishes that ''X-ray, radium, and radioactive isotope therapy, including materials and services of technicians'' are considered medical or other health services under Part B. Even though the statute does not define these terms, the payment provisions in section 1833(a)(2)(E) prescribe rules for paying for outpatient hospital radiology services. These include diagnostic and therapeutic radiology, nuclear medicine, computer assisted tomography (CAT scan) procedures, magnetic resonance imaging, and ultrasound and other imaging services (but excluding screening mammography). We cover these services under the conditions described in §§ 410.32(a) and 410.35 of the regulations and in the Coverage

Issues Manual (HCFA Pub. 6) and in other manuals.

Section 1861(s)(13) includes as medical or other health services screening mammography services, which are defined in section 1861(jj) as a ''radiologic procedure'' provided to a woman for the purpose of early detection of breast cancer. We believe that screening mammography could qualify as one of the ''radiology services'' listed in section 1877(h)(6)(D) as a designated health service. However, as we have stated elsewhere, we believe that Congress enacted the physician referral prohibition to limit the tendency for referring physicians to overutilize services because they have a financial incentive to do so. It is our view that screening mammography services cannot be subject to overutilization. We base this conclusion on the fact that the statute specifically limits the frequency with which the Medicare program will cover these services. That is, section 1834(c)(2) specifically prescribes how frequently the screenings will be covered for different age groups. In addition, we never consider the covered level of screenings to be unnecessary services—we believe that all women should receive the screenings that are covered for them under the statute. (We cover these screening services under the conditions described in § 410.34 and in the Coverage Issues Manual.)

We wish to make it clear that the only type of mammography that we would exclude from the definition of ''radiology services'' listed under section 1877(h)(6)(D) would be screening mammography as covered under section 1861(s)(13) and as defined in section 1861(jj). It is our view that ''radiology services'' does include diagnostic mammography, which is not subject to the same limits. (Diagnostic mammography services are defined in § 410.34(a) as mammography furnished to a symptomatic patient for the purpose of detecting breast disease, while screening mammography is furnished to asymptomatic patients.)

Although Congress did not set up section 1877(h)(6)(D) and (E) in a manner that parallels section 1861(s)(3) and (4), we believe that paragraphs (D) and (E) of section 1877(h)(6), taken together, cover the same services that are covered as Part B services under section 1861(s)(3) and (4). Therefore, throughout this document the terms ''radiology'' and ''imaging'' mean any diagnostic test or therapeutic procedure using X-rays, ultrasound and other imaging services, CT scans, MRIs, radiation, or nuclear medicine, including diagnostic mammography services, except for the distinctions that follow.

The physician's professional component—Medicare has traditionally considered a physician's professional services related to radiology to in general be covered as physician services under section 1861(s)(1) rather than as radiology services under either paragraph (3) or (4) of section 1861(s). However, we believe that it is appropriate for purposes of section 1877 to consider radiology services as including these physician services. We are proposing to include the professional component because radiology always consists of a technical service combined with a physician's professional service. Whenever a technical radiological service is overutilized, it follows that a physician's radiological service will also be overutilized.

Several studies have found that nonradiologists with imaging facilities in their own offices order imaging tests far more frequently than physicians who refer their patients to imaging facilities outside their practices. We mentioned several of these studies in section I.A of this preamble in the general discussion concerning studies that have raised serious concerns about physicians who make self-referrals. For example, one GAO study found that Florida nonradiologists who were sole practitioners or in group practices or other practice affiliations with imaging facilities in their own offices, when compared to physicians who referred outside their practices, had imaging rates about 3 times higher for MRIs; about 2 times higher for CT scans; 4.5 to 5.1 times higher for ultrasound, echocardiography, and diagnostic nuclear medicine imaging; and about 2 times higher for complex and simple X-rays. (GAO Report, ''Medicare: Referrals to Physician-owned Imaging Facilities Warrant HCFA's Scrutiny,'' No. B–253835, pages 2, 3, and 10 (October 1994).)

Similarly, a study appearing in the New England Journal of Medicine compared the frequency and costs of diagnostic imaging furnished by self-referring physicians to the frequency and costs of these same services when physicians refer patients to an unrelated radiologist. The study covered referrals for four medical conditions. The study determined that the self-referring physicians obtained imaging examinations 4.0 to 4.5 times more often than the physicians who referred to unrelated radiologists. In addition, with respect to three of the four medical conditions, the self-referring physicians charged significantly more than the radiologists for imaging examinations of similar complexity. The combination of more frequent imaging and higher charges resulted in mean imaging charges per episode of care that were 4.4 to 7.5 times higher for the self-referring physicians. (Bruce J. Hillman, M.D., and others, ''Frequency and Costs of Diagnostic Imaging In Office Practice—A Comparison of Self-Referring and Radiologist-Referring Physicians,'' The New England Journal of Medicine, Vol. 323, No. 23 (Dec. 6, 1990), pp. 1604–1608)

Exclusion for Invasive or Interventional Radiology

We would exclude from the meaning of radiology, for the purposes of section 1877, any ''invasive'' radiology (also commonly referred to as interventional radiology). Invasive radiology is any procedure in which the imaging modality is used to guide a needle, probe, or a catheter accurately. Examples include percutaneous transluminal angioplasty (PTA); the placement of catheters for therapeutic embolization of tumors, arteriovenous malformations, or bleeding sites; the placement of drainage catheters; removal of stones; balloon dilation of strictures; biopsies; arthrograms; and myelograms.

We are basing this exclusion on the theory that the radiology services in these procedures are merely incidental or secondary to another procedure that the physician has ordered. As we have stated earlier, we believe that Congress meant for the categories listed in the statute as designated health services to encompass services that tend to be subject to abuse. It is our view that physicians do not routinely refer patients for the main procedures listed in the last paragraph, such as angioplasty, in order to profit from unnecessary radiology services. As a result, we are proposing not to include these ''secondary'' radiology procedures as designated health services. We are also specifically soliciting comments on any other types of services that would qualify as designated health services, but which may actually be incidental to other procedures.

We would include the following definition at § 411.351:

Radiology services and radiation therapy and supplies means any diagnostic test or therapeutic procedure using X-rays, ultrasound or other imaging services, computerized axial tomography, magnetic resonance imaging, radiation, or nuclear medicine, and diagnostic mammography services, as covered under section 1861(s)(3) and (4) of the Act and §§ 410.32(a), 410.34, and 410.35, including the professional

component of these services, but excluding any invasive radiology procedure in which the imaging modality is used to guide a needle, probe, or a catheter accurately.

e. Durable medical equipment and supplies

Sections 1861(s)(6) and 1832 establish DME as one of the ''medical or other health services'' covered under Medicare Part B. Section 1861(n) defines DME as including iron lungs, oxygen tents, hospital beds, and wheelchairs (under certain conditions), used in a patient's home (including certain institutions that can qualify as the patient's home), whether furnished on a rental basis or purchased. The definition of DME is explained further in the Medicare regulations. Section 414.202 defines DME as equipment furnished by a supplier or a home health agency that meets the following conditions:

- Can withstand repeated use.
- Is primarily and customarily used to serve a medical purpose.
- Generally is not useful to an individual in the absence of an illness or injury.
- Is appropriate for use in the home.

Durable medical equipment includes equipment such as wheelchairs, hospital beds, nebulizers, and walkers. We also regard DME that is furnished to a patient under a home health plan under section 1861(m)(5) as DME for purposes of section 1877. The conditions under which we cover DME are described in § 410.38. For the purposes of this proposed rule, we would use the definition of DME set forth in section 1861(n) and in § 414.202.

We have received a number of inquiries concerning Medicare claims processed by the four Durable Medical Equipment Regional Carriers (DMERCs). Many people erroneously believe that all devices, items, or supplies processed by the DMERCs are items of DME. This is not so, because the DMERCs are also responsible for paying claims for other items, such as immunosuppressive drugs, orthotics, prosthetics, and prosthetic devices and related supplies.

We have received requests that we clearly identify in this regulation which items are considered DME and which are not. Because the number of items considered to be DME is so extensive, we cannot in this proposed rule identify each of them. However, in response to these requests, we have provided below the general categories of DME.

We have also listed below the types of supplies used with the DME. We are listing the supplies because when identifying DME as a designated health service, Congress also included the supplies necessary for the effective use of the DME as part of the designated health service. For example, supplies used with DME could include such items as test strips and lancets used with blood glucose monitoring equipment or drugs used with a nebulizer. In general, supplies are items that cannot be reused. We would also like to point out that, effective December 1, 1996, in order for drugs used in conjunction with DME to be covered by Medicare, the entity dispensing the drug must have a Medicare supplier number, must be licensed to dispense the drug in the State in which it will be dispensed, and must bill and receive payment in its own name.

An infusion pump may be covered as DME, in which case the supplies necessary for its effective use are covered as designated health services; these supplies include the drugs and biologicals that must be put directly into the infusion pump.

External infusion pumps—External infusion pumps may be covered as DME under Medicare if certain coverage requirements are met, including use in the home. The Medicare Coverage Issues Manual provides for the coverage of infusion pumps for certain indications and under certain circumstances, as described in sections 60–9 and 60–14. Other uses of external infusion pumps are covered if the DMERC's medical staff verifies the appropriateness of the therapy and of the prescribed pump for the individual patient. Payment may also be made for the drugs necessary for the effective use of an infusion pump as long as they are reasonable and necessary for the patient's treatment.

Section 1877(b)(2) provides an exception for in-office ancillary services ''other than durable medical equipment (excluding infusion pumps) and parenteral and enteral nutrients, equipment, and supplies.'' Section 1877(b)(2) has the effect of specifically excepting infusion pumps from the prohibition on a physician referring durable medical equipment furnished in the physician's own office. External infusion pumps may be used in a physician's office to administer drug therapy, including chemotherapy. However, external infusion pumps (or other drug delivery systems *used in the physician's office* (and not in the patient's home) are covered by Medicare under section 1861(s)(2)(A) as a service incident to the physician's service and not as DME. In addition, we do not believe that the *in-office* ancillary exception applies to external infusion pumps used outside a physician's office. That is, we do not believe that Congress intended for the in-office exception to apply to infusion pumps that are only picked up at a physician's office to be used in the home, or that are delivered to the home.

Implantable infusion pumps—Implantable infusion pumps may also be covered as DME in accordance with the policy described in the Medicare Coverage Issues Manual when they are used for certain indications. Coverage for other uses of implantable infusion pumps is allowed if the carrier's medical staff verifies that the drug and the infusion pump are reasonable and necessary. (Implantable devices are not billed to the DMERC carriers; rather, they are billed to the local carrier.)

If an implantable infusion pump is implanted in the physician's office, but will be used at home and elsewhere, we believe that it qualifies as DME that has been furnished in the physician's office. Hence, the in-office ancillary services exception could apply, since section 1877(b)(2) specifically includes infusion pumps, but not other DME.

End-Stage Renal Disease equipment and supplies—Section 1861(s)(2)(F) includes as covered medical and other health services home dialysis supplies, equipment, and self-care home dialysis support services, as well as institutional dialysis services and supplies provided to individuals with end-stage renal disease (ESRD). This ESRD benefit is separate from the DME benefit under section 1861(s)(6). Therefore, the equipment, services, and supplies covered under this section of the statute are not covered as DME under Medicare. Examples of home dialysis equipment and supplies include needles and syringes, blood pressure cuffs, dialysate solution, and intermittent peritoneal dialyzers.

Other items of equipment furnished in a physician's office—As mentioned above, Medicare does not cover equipment used in a physician's office as DME but may pay for the equipment under other provisions in the statute. For example, section 1861(s)(2)(A) covers services and supplies furnished incident to a physician's services, and can include the use of any equipment that is needed in order for a physician to provide a covered service.

In addition, we may cover diagnostic testing under the diagnostic services benefit under section 1861(s)(3), which would include equipment used in diagnostic testing irrespective of where the equipment is used. For example, dynamic electrocardiography (EKG), commonly known as Holter monitoring, is a diagnostic procedure that provides a continuous record of the electrocardiographic activity of a patient's heart while he or she is engaged in daily activities. Diagnostic services under section 1861(s)(3) are not themselves included as a designated health service and thus are not specifically covered by this rule.

General Categories of DME—Under certain circumstances (which include use in the patient's home), the following items may be covered as DME. (Readers should refer to section 60–9 of the Medicare Coverage Issues Manual for additional information.)

Alternating pressure pads and mattresses and miscellaneous support surfaces
Bed pans
Blood glucose monitors
Canes/crutches and walkers
Commodes
Continuous positive airway pressure
Cushion lift, power seat
Decubitus care equipment
Gel flotation pads and mattresses
Heating pads
Heat lamps
Hospital beds and accessories
Intermittent positive pressure breathing equipment
Infusion pumps, supplies and drugs
Lymphedema pumps
Manual wheelchair base
Motorized wheelchair/power wheel chair base
Nebulizers
Wheel chair options/accessories
Oxygen and related respiratory equipment
Pacemaker monitor
Patient lifts
Pneumatic compressor and appliances
Power operated vehicles
Restraints
Roll about chairs
Safety equipment
Support surfaces

Suction pumps
Traction equipment
Transcutaneous electric nerve simulators and supplies
Trapeze equipment, fracture frame, and other orthopaedic devices
Ultraviolet cabinets

We would include the following definition at § 411.351:

Durable medical equipment has the meaning given in section 1861(n) of the Act and § 414.202.

f. Parenteral and enteral nutrients, equipment, and supplies

Coverage of enteral and parenteral therapy as a Medicare Part B benefit is provided under the prosthetic device benefit provision in section 1861(s)(8). The regulations cover prosthetic devices in § 410.36(a)(2). Details for enteral and parenteral therapy are set forth in the Medicare Coverage Issues Manual at section 65–10. When the coverage requirements for enteral or parenteral nutritional therapy are met, Medicare also covers related supplies, equipment and nutrients.

Enteral nutrients, equipment, and supplies—Enteral nutrition therapy provides nutrients to an individual with a functioning gastrointestinal tract who, due to pathology to or nonfunction of the structures that normally permit food to reach the digestive tract, cannot maintain weight and strength commensurate with his or her general condition. Enteral nutritional therapy may be administered by nasogastric, jejunostomy, or gastrostomy tubes. This benefit also includes supplies appropriate for the method of administration.

Therefore, at § 411.351, we would define ''enteral nutrients, equipment, and supplies'' as ''items and supplies needed to provide enteral nutrition to a patient with a functioning gastrointestinal tract who, due to pathology to or nonfunction of the structures that normally permit food to reach the digestive tract, cannot maintain weight and strength commensurate with his or her general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (HCFA Pub. 6).''

Parenteral nutrients, equipment, and supplies—Parenteral nutrition therapy provides nutrients to an individual with severe pathology of the alimentary tract that does not allow adequate absorption of sufficient nutrients to maintain weight and strength commensurate with the patient's general condition. Since the alimentary tract of such a patient does not function adequately, parenteral nutrition may be provided through an indwelling catheter placed percutaneously in the subclavian vein and then advanced into the superior vena cava. An example of a condition that may typically qualify for coverage is a massive small bowel resection resulting in a severe inability to absorb nutrition in spite of oral intake.

Parenteral nutritional therapy would include the equipment and supplies necessary to furnish the parenteral nutrition therapy. (Parenteral nutrients are commonly considered as prescription drugs. Effective December 1, 1996, any entity dispensing drugs that are used in conjunction with a prosthetic device, including parenteral equipment, must meet certain conditions in order for the drugs to be covered under Medicare. These conditions are described in the section covering DME and the supplies used in conjunction with DME.)

At § 411.351, we would define ''parenteral nutrients, equipment, and supplies'' as ''items and supplies needed to provide nutriment to a patient with permanent, severe pathology of the alimentary tract that does not allow absorption of sufficient nutrients to maintain strength commensurate with the patient's general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (HCFA Pub. 6).''

We wish to point out that section 1877(b)(2) specifically excludes parenteral and enteral nutrients, equipment, and supplies as a service that can qualify for the in-office ancillary services exception.

g. Prosthetics, orthotics, and prosthetic devices

Prosthetics—Section 1861(s)(9) provides for inclusion as medical and other health services artificial legs, arms, and eyes, including replacements if required because of a change in a patient's physical condition. Prosthetics are covered in the regulations in §§ 410.36(a)(3) and 414.202. As described in section 2133 of the Medicare Carriers Manual, these appliances are covered when furnished under a physician's order. We also cover adjustments to artificial limbs or other appliances required by wear or by a change in the patient's condition when ordered by a physician.

We would define ''prosthetics,'' at § 411.351, as artificial legs, arms, and eyes, as described in section 1861(s)(9) of the Act.

Orthotics—Orthotics are included as a medical service under section 1861(s)(9) as leg, arm, back, and neck braces. The regulations at § 410.36(a)(3) allow payment for these services to include replacements if required because of a change in the individual's condition. We have interpreted the statute in section 2133 of the Medicare Carriers Manual to cover these items when used for the purpose of supporting a weak or deformed body member or restricting or eliminating motion in a diseased or injured part of the body. In the Carriers Manual, orthotics are covered only when furnished under a physician's order.

Under section 2133D of the Medicare Carriers Manual, orthopedic footwear is covered under the orthotic benefit if the footwear is an integral part of a leg brace. Diabetic shoes are covered under section 1861(s)(12) of the Act in a separate benefit category. Splints, casts, and other devices used for the reduction of fractures and dislocations are covered under section 1861(s)(5). We do not consider diabetic shoes, casts, splints, or these other devices to be included under orthotics, prosthetics, or prosthetic devices.

At § 411.351, we would define ''orthotics'' as ''leg, arm, back, and neck braces, as listed in section 1861(s)(9) of the Act.''

Prosthetic devices—Section 1861(s)(8) provides for inclusion as medical and other health services ''prosthetic devices (other than dental) which replace all or part of an internal body organ (including colostomy bags and supplies directly related to colostomy care), including replacement of such devices, and including one pair of conventional eyeglasses or contact lenses furnished subsequent to each cataract surgery with insertion of an intraocular lens.'' This definition is reflected in the regulations at §§ 410.36(a)(2) and 414.202. The statute specifically excludes dental devices from Medicare coverage as prosthetic devices. (In addition, renal dialysis machines are covered under the end stage renal disease benefit and are discussed elsewhere in this section.)

Under the prosthetic device benefit, Medicare also includes supplies that are necessary for the effective use of a prosthetic device, for example, tape to secure an indwelling catheter. Section 1877(h)(6)(H) includes prosthetic devices as a designated health service and also specifically includes the supplies associated with these devices. (Effective December 1, 1996, any entity dispensing drugs that are used in conjunction with a prosthetic device must meet certain conditions in order for the drugs to be covered under Medicare. These conditions are described in the section covering DME and drugs used in conjunction with DME.) Section 410.100(f)(2) provides that services necessary to design the device, select materials and components, measure, fit, and align the device, and instructions to the patient are also included in this benefit. Examples of prosthetic devices include cochlear implants, cardiac pacemakers, and incontinence control appliances.

We have received many questions concerning whether Medicare considers an intraocular lens to be a prosthetic device. The answer is yes. We have also been asked, for purposes of the designated health services listed in section 1877(h)(6), to define a prosthetic device to exclude any device that is implanted by a physician as part of a surgical procedure. The theory behind this exclusion is that such devices are only a small component of a central procedure, which is the surgery needed to implant them. Physicians would not unnecessarily subject patients to a surgical procedure just to boost profits on intraocular lenses or other implantable devices, and are thus not the kind of services Congress meant to cover. In addition, some physicians believe that it is critical in many cases that they have the freedom to prescribe their own choice of an implantable device because they have particularized the design or find the device better to work with than others.

On the other hand, we have also been advised that only a very small percentage of surgeons ''customize'' prosthetic devices by developing their own, or by modifying existing devices. In addition, it is not uncommon for physicians to receive compensation from companies that manufacture or supply these devices, sometimes in the form of ''consulting fees,'' perhaps in exchange for the physician's agreement to use that company's device exclusively. Physicians might also have an ownership interest in a supplier or manufacturer, thus realizing a profit every time the device is used.

It has also come to our attention that physicians who have some relationship with a manufacturer or supplier are in a position to manipulate a hospital's or an ASC's choice of a prosthetic device in exchange for the physicians' referrals. Although these practices might not lead to the overutilization of services, we believe that they can drive up the cost of certain services that are not subject to a fee schedule, which we would regard as a form of potential program abuse. Such an arrangement might also result in patient abuse, since a physician may choose a prosthetic device based on financial incentives rather than on the best interest of the patient. Because of the controversy surrounding surgically implanted devices, we have not excluded them from the definition of ''prosthetic devices,'' but specifically solicit comments on this issue.

We would also like to point out that intraocular lenses that are implanted in an ambulatory surgical center (ASC) would be covered under the ASC payment rate. We have excluded any services covered under the ASC rate from the referral prohibition under an exception we created in § 411.355(d).

We have also been asked whether, if an ophthalmologist has an optical shop as part of his or her office, he or she can refer Medicare patients to the optical shop for eyeglasses. Medicare coverage of eyeglasses and contact lenses is very limited, covering only those that qualify as ''prosthetic devices'' used after intraocular lenses are implanted during cataract surgery. Thus, a physician would not be prohibited from referring a Medicare patient to the optical shop for any conventional eyewear that is not covered under the Medicare program. For eyeglasses that are covered by Medicare, the physician could prescribe and fill the eyeglass prescription if an exception applies. For example, the services might meet the in-office ancillary services exception if the optical shop is located in the physician's office suite. Alternatively, the optical shop might qualify as a rural provider so that the exception for rural ownership in section 1877(d)(2) of the Act could apply.

At § 411.351, we would define a ''prosthetic device'' as a device (other than a dental device) listed in section 1861(s)(8) that replaces all or part of an internal body organ, including colostomy bags and including one pair of conventional eyeglasses or contact lenses furnished subsequent to each cataract surgery with insertion of an intraocular lens. We would define ''prosthetic supplies'' as ''supplies that are necessary for the effective use of a prosthetic device (including supplies directly related to colostomy care).''

h. Home health services

How we will define home health services. Medicare-covered home health services are defined in section 1861(m), and requirements for payment for home health services furnished to eligible beneficiaries are set forth in part 409, subpart E (''Home Health Services Under Hospital Insurance'') of our regulations. For purposes of the physician referral prohibition, ''home health services'' would have the same meaning as the appropriate provisions described in part 409, subpart E. A brief explanation of the home health benefit follows:

Home health services are items and services furnished to an individual who is confined to the home, under the care of a physician, and in need of at least one of the following skilled services: intermittent skilled nursing services, physical therapy services, speech-language pathology services, or continuing occupational therapy services.

To receive covered home health services, a beneficiary must be under a plan of care established and periodically reviewed by a physician. Home health services are furnished by, or under arrangements made by, a participating home health agency. Home health services are furnished on a visiting basis in a place of residence used as an individual's home. (A patient may not receive home health services in a physician's office.) An individual's home is wherever the individual makes his or her home. This may be his or her own dwelling, an apartment, a relative's home, a home for the aged, or some other type of institution. However, an institution is not considered a patient's home if the institution meets the basic requirements in the definition of a hospital (as defined in section 1861(e)(1)), an SNF (as defined in section 1819(a)(1)), or a nursing facility (as defined in section 1919(a)(1)).

- The following services may be furnished under the home health services benefit if appropriate requirements are met:
- Part-time or intermittent nursing care furnished by or under the supervision of a registered professional nurse.
- Physical therapy, occupational therapy, and speech-language pathology services.
- Medical social services furnished under the direction of a physician.
- Part-time or intermittent services of a home health aide.
- Medical supplies (including catheters, catheter supplies, ostomy bags, and supplies related to ostomy care, and a covered osteoporosis drug, but excluding biologicals and other drugs), the use of durable medical equipment, and appliances suitable for home use.
- The medical services of an intern or resident in training under an approved hospital teaching program if a home health agency is affiliated with or under the common control of the hospital furnishing the medical services.

A beneficiary may also receive home health services on an outpatient basis at a hospital, SNF, or a rehabilitation center under arrangements made by the home health agency if equipment is required that cannot be made available at the beneficiary's home or the services are furnished while the beneficiary is at the facility to receive services requiring equipment that cannot be made available at the beneficiary's home. Home health services do not include transportation of the beneficiary to the facility for these home health services.

Existing § 409.49 identifies services that are excluded from payment under the Medicare home health benefit. Note that included among those services is any service that would not be covered as inpatient hospital services.

Also note that under the Medicare statute, home health services can be provided only by an HHA. That is, under section 1814(a), payments for services furnished to an individual may be made only to providers of services that are eligible for that payment. To be eligible, an HHA must, among other things, have in effect its own provider agreement with Medicare, as described in section 1866, and meet the specific conditions of participation for HHAs, as described in section 1891. As a result, we regard home health services as services ''provided by an HHA'' and not as services provided by any other entity, even if the HHA is owned by the other entity or is otherwise financially related to it. (We regard hospital services the same way; that is, they can be provided only by an entity that meets the requirements for participation as a hospital.) Therefore, even if a hospital owns an HHA, the exception for hospital ownership in section 1877(d)(3), which applies to designated health services ''provided by a hospital,'' would not apply to home health services provided by a hospital-based HHA.

At § 411.351, we would include the following definition: ''Home health services'' means the services described in section 1861(m) of the Act and part 409, subpart E of this chapter.''

How We Propose to Reconcile Section 1877 and the Physician Certification Requirements for Home Health Services Under 42 CFR 424.22(d)

Section 903 of the Omnibus Reconciliation Act of 1980 amended sections 1814(a) and 1835(a) of the Act to prohibit the certification of need for home health services, and the establishment and review of a home health plan of care for those services, by a physician who has a significant ownership interest in, or a significant contractual or financial relationship with, the home health agency that provides those services. These amendments were incorporated into the regulations at 42 CFR 405.1633(d) (which was redesignated as section 424.22(d)), by an interim final rule with comment period that we published in the **Federal Register** on October 26, 1982, at 42 FR 47388, and that became effective on November 26, 1982.

On June 30, 1986, we published a final rule in the **Federal Register** at 51 FR 23541 that confirmed the provisions of the October 26, 1982 rule and clarified that under the term, ''significant ownership interest in or a significant financial or contractual relationship with'' the home health agency, we intended to include salaried employment. This clarification was made effective on August 29, 1986.

The only exceptions to the home health regulations were uncompensated officers or directors of an HHA, HHAs operated by Federal, State, or local governmental authority, and sole community HHAs. The home health certification restrictions of sections 1814(a) and 1835(a) and § 424.22(d) have not been significantly updated since 1986.

On November 5, 1997, we published a notice with comment period in the **Federal Register** (62 FR 59818) that announced our intention to reconcile the statutory prohibitions in sections 1814(a) and 1835(a) concerning physician certification for home health services with the related section 1877 prohibition. In that notice we stated that we had decided to reexamine appropriate provisions of section 1877 and the home health regulations as they pertain to indirect compensation arrangements involving physicians who are compensated by entities that own HHAs. We announced that, pending that evaluation, we had decided to withdraw certain recent interpretations of § 424.22(d), as it applies to certification and recertification or establishment and review of plans of care by physicians who are salaried employees of, or have a contractual arrangement to provide services to, an entity that also owns the HHA. In addition, we stated that we would address the issue of indirect compensation, applicable to the health services designated in section 1877, in this proposed rule.

We believe that sections 1814(a), 1835(a), and 1877 address the same behaviors and are identical in purpose: they each prohibit a physician who has a significant ownership interest in, or a significant financial relationship with, a home health agency from certifying or recertifying a patient's need for home health services. We have defined the concepts of ''significant ownership interests and significant financial relationships'' in the home health context in § 424.22(d)(1) through (d)(3), based on a fixed percentage of ownership and, for financial or contractual relationships, based on a specific dollar amount of compensation (or, if less, a percent of the agency's operating expenses).

Under section 1877, in contrast, any level of ownership or compensation amounts to a financial relationship unless the arrangement meets any of a number of exceptions. We believe that the provisions we are developing under section 1877 are more effective than the current provisions in § 424.22(d) in accommodating Congress' desire to discourage physicians from overutilizing certain services. Furthermore, section 1877 relates more specifically and in greater detail to the issue of referrals for home health services by physicians who have a financial relationship with the entity providing those services, and reflects Congress' most recent thoughts on that issue.

We believe that it is confusing to have in effect two provisions that address prohibited referrals, each of which includes different criteria, and can lead to different results.

We are therefore proposing to use the section 1877 definition of a ''financial relationship,'' and our interpretations of this definition, for the concept of a ''significant ownership interest in, or a significant financial or contractual relationship with, a home health agency'' in sections 1814(a) and 1835(a). In order to do this, we are proposing to amend § 424.22(d) to state that a physician cannot certify or recertify a patient's need to receive home health services from an agency if the physician has a ''financial relationship'' with that agency, as defined in § 411.351, unless the financial relationship meets one of the exceptions in §§ 411.355 through 411.357. In addition, we will list sections 1814(a) and 1835(a) in § 411.1 as part of the statutory basis for this proposed regulation.

Section 424.22, paragraphs (d)(4), (e), (f), and (g) relate to certain specific exceptions to the prohibition on certification in sections 1814(a) and 1835(a). These paragraphs except physicians who serve as uncompensated officers or directors of an HHA, HHAs that are operated by a Federal, State, or local governmental authority, or HHAs that are classified as sole community HHAs in accordance with our regulations. Even if a physician and an HHA are involved in an arrangement that meets one of these exceptions, the arrangement simultaneously remains subject to the requirements in section 1877. That is, if an exception in § 424.22 is subsumed within the exceptions in section 1877, a physician will be able to refer; if it is not, the arrangement will disqualify the physician from referring in spite of § 424.22. Thus, we believe the exceptions listed in § 424.22 have been superseded by section 1877 and should not be separately listed; we are therefore proposing to eliminate them. We are particularly interested in hearing from the public about these proposed changes.

i. Outpatient prescription drugs

Medicare does not cover a category of services called ''outpatient prescription drugs.'' Without additional direction from Congress on what constitutes ''outpatient prescription drugs'' for the purposes of section 1877, we believe that it is reasonable to assume that Congress intended to include only drugs furnished to individuals under the Medicare Part B benefit and to exclude drugs furnished by providers under Medicare Part A. We also propose to limit ''outpatient prescription drugs'' to drugs that a patient would be able to obtain from a pharmacy with a prescription. We consider that this category includes any drugs that a patient could get with a prescription, even if patients generally do not do so. For example, we would include such drugs as oncology drugs that are routinely furnished in a physician's office, under the physician's direct supervision, provided the drugs could be obtained by prescription from a pharmacy.

Coverage for prescription drugs furnished outside of a provider setting is very limited under Medicare Part B. ''Drugs and biologicals'' are defined in the Medicare statute in section 1861(t) and the coverage of drugs and biologicals is explained in part 410 of our regulations. We consider a ''biological'' to be a drug product that is derived from a living organism or its products, including, but not limited to, serums, vaccines, antigens, and antitoxins. We apply to biologicals the same rules that we apply to any drugs. Therefore, for purposes of section 1877, we propose to define outpatient prescription drugs to include biologicals.

An explanation of the drug and biological benefit is set forth in section 2049 of the Medicare Carriers Manual. This section of the manual provides general requirements for drugs and biologicals that are covered under Medicare Part B. (These requirements do not apply to certain kinds of drugs that are covered under specific provisions of the statute. We discuss these other provisions below, following the general requirements.) In general, drugs are covered only if all of the following requirements are met:

- The drug or biological is included, or approved for inclusion, in the latest official edition of the *United States Pharmacopoeia,* the *National Formulary,* or the *United States Homeopathic Pharmacopoeia,* unless unfavorably evaluated in *AMA Drug Evaluations* or *Accepted Dental Therapeutics.*
- The drug or biological is furnished incident to a physician's services.
- The drug or biological is reasonable and necessary for the diagnosis or treatment of the illness for which it is administered according to accepted standards of medical practice.
- The drug or biological is not excluded as a preventive immunization.
- The drug or biological has not been determined by the Food and Drug Administration (FDA) to be less than effective. Drugs or biologicals must be approved for marketing by the FDA to be considered safe and effective, for purposes of the Medicare program, when used for indications specified on the labeling.
- Based on the usual method of administration of the form of a drug or biological as furnished by a physician, the drug or biological is of a type that cannot be self-administered.

Drugs and biologicals that are specifically covered under Part B would include those furnished in a physician's office incident to the physician's professional services under section 1861(s)(2)(A); as part of outpatient hospital services under section 1861(s)(2)(B); and, even though they are preventive immunizations, pneumococcal vaccine, influenza vaccine, and hepatitis B vaccine under section 1861(s)(10); and antigens under section 1861(s)(2)(G).

Drugs that are or can be self-administered, such as those in pill form or in a self-injectable form, are not covered by Medicare Part B unless the statute specifically provides this coverage. The statute currently provides for the coverage of the following self-administered drugs under limited conditions: blood clotting factors under section 1861(s)(2)(I), drugs used in

immunosuppressive therapy under section 1861(s)(2)(J), erythropoietin (EPO) for dialysis patients under section 1861(s)(2)(O), and certain oral cancer drugs under section 1861(s)(2)(Q). (The statute provides under section 1861(m) for the coverage of certain osteoporosis drugs, defined in section 1861(kk), that can be self-administered but are furnished to a home health patient who is unable to self-administer the drugs. However, these drugs are covered under section 1861(m) as part of the Medicare Part A home health services benefit.)

After much consideration, we believe it would be inappropriate to include as outpatient prescription drugs, for purposes of section 1877, EPO and other drugs furnished as part of dialysis treatment for ESRD patients who dialyze at home or in a dialysis center, even though these drugs are not included in the end stage renal disease composite payment rate, but are billed separately. We base this policy on our perception that what the patient is primarily receiving is the dialysis treatment. EPO and several other drugs are a relatively minor (although important) part of a much larger and more complicated treatment and are inextricably linked to the dialysis service. That is, it would not be possible to provide dialysis safely and effectively without these drugs because they are critical to the overall effectiveness of the treatment and well-being of the patient. In addition, although many dialysis patients self-administer EPO, we believe that the opportunity for program abuse involving EPO is extremely unlikely. That is because section 1881(b)(11)(B)(ii)(I) establishes the payment rate for EPO, regardless of whether the beneficiary purchases the drug for self-administration or it is administered by the dialysis facility. Also, we have recently implemented a claims processing mechanism to ensure that payment is not made for excessive administration. That is, payment will not be made for EPO when a patient's hematocrit reading over a 3-month average exceeds 36.5, the upper limit of the drug labeling indication.

We would define ''outpatient prescription drugs'' at § 411.351 as ''those drugs (including biologicals) defined or listed under section 1861(t) and (s) of the Act and part 410 of this chapter, that a patient can obtain from a pharmacy with a prescription (even if patients can only receive the drug under medical supervision), and that are furnished to an individual under Medicare Part B, but excluding EPO and other drugs furnished as part of a dialysis treatment for an individual who dialyzes at home or in a facility.''

j. Inpatient hospital services

Services generally regarded as inpatient hospital services. Inpatient hospital services are a Part A benefit defined under section 1861(b). The definition of these services in section 1861(b) is reflected in § 409.10(a) of our regulations. As defined at § 409.10(a), inpatient hospital services include the following services when furnished to an inpatient of a participating hospital or, in the case of emergency services or services in foreign hospitals, to an inpatient of a qualified hospital (as described below).

- Bed and board.
- Nursing services and other related services.
- Use of hospital facilities.
- Medical social services.
- Drugs, biologicals, supplies, appliances, and equipment.
- Certain other diagnostic or therapeutic services.
- Medical or surgical services provided by certain interns or residents-in-training.

We propose to use the definition in section 1861(b) and § 409.10(a). As a clarification, we would state in the definition that inpatient hospital services include services that a hospital provides for its patients that are furnished either by the hospital or by others under arrangements with the hospital; that is, the hospital bills for these services on behalf of its patients. We would specify that the definition does not encompass the services of other physicians, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists and qualified psychologists who bill independently. Also, we would refer to existing § 409.10(b), which states that ''inpatient hospital services'' do not include SNF-type care furnished by a hospital or an RPCH that has a swing-bed approval, or any nursing facility-type care that may be furnished as a Medicaid service.

Psychiatric hospital and RPCH services. We propose to also include as inpatient hospital services inpatient psychiatric hospital services, which are defined in section 1861(c). These services are defined as ''inpatient hospital services'' furnished to an inpatient of a psychiatric hospital (defined in section 1861(ff)), which means that they are essentially the same services as those furnished to an inpatient of a regular hospital. In addition, we believe that a psychiatric hospital qualifies as a hospital, for all practical purposes, except that it is primarily engaged in providing psychiatric services for the diagnosis and treatment of mentally ill persons rather than the more general care and treatment that a regular hospital provides to injured, disabled, or sick persons. Also, a psychiatric hospital must meet all of the nine basic requirements that a regular hospital must meet in order to qualify as a hospital, except that for two of the requirements, it must meet analogous standards that relate particularly to psychiatric care.

We also propose to regard as ''inpatient hospital services,'' for purposes of section 1877, inpatient services provided by a participating rural primary care hospital (RPCH). This term refers to facilities designated as RPCHs by the Secretary under section 1820(i)(2). ''Inpatient rural primary care hospital services'' are defined in section 1861(mm)(2) as items and services, furnished to an inpatient of an RPCH by such a hospital, that would be inpatient hospital services if furnished to an inpatient of a hospital by a hospital.

Section 1861(e) of the Act states that ''the term 'hospital' does not include, unless the context otherwise requires, a rural primary care hospital * * *.'' While it seems clear from this provision that RPCHs are not to be considered hospitals under the Medicare law for most purposes, we also believe the reference to context in this provision indicates that RPCHs may be classified as hospitals where, in specific contexts, it is consistent with the purpose of the legislation to do so. We base the policy to include inpatient RPCH services as ''inpatient hospital services'' on our belief that a physician who has a financial relationship with an RPCH is in as much of a position to profit from overutilizing referrals to the RPCH as he or she would be if the financial relationship were with an ordinary hospital. In addition, the RPCH provides services that are very similar to inpatient hospital services.

Because we propose to consider RPCH and psychiatric hospital services as inpatient hospital services, the exception for hospital services included in section 1877(d)(3) could apply. This exception applies to services furnished by a hospital if a physician refers to a hospital in which he or she is authorized to perform services and if the physician has an ownership or investment interest in the hospital as a whole, and not in a subdivision of the hospital.

Emergency hospital services. We propose to not include within the definition of ''inpatient hospital services'' emergency inpatient services provided by a hospital located outside

the United States and covered under the authority in section 1814(f)(2) of the Act and part 424, subpart H. We also propose to exclude inpatient hospital services provided by a nonparticipating hospital within the United States under emergency conditions, as authorized by section 1814(d) and described in part 424, subpart G. We are excluding these services because Medicare covers them infrequently and only when they result from an emergency situation.

The regulations define ''emergency services'' in § 424.101 as only those services necessary to prevent death or serious impairment of health and, because of the danger to life or health, require use of the most accessible hospital available and equipped to furnish the services. In order to receive payment, a physician or the hospital must submit medical information that describes the nature of the emergency and specifies why it required that the beneficiary be treated in the most accessible hospital. Because Medicare covers these services only if they involve a documented emergency situation, we do not believe that physicians have the opportunity or incentive to overutilize them.

For the reasons cited above, we are also proposing to exclude from the definition of ''designated health services'' any physician services that otherwise qualify as designated health services but are furnished to an individual in conjunction with emergency inpatient hospital services furnished outside of the United States. These physician services are covered by Medicare under the authority in section 1862(a)(4), which permits coverage of inpatient hospital services, accompanying physician services, and ambulance services (which are not designated health services) furnished outside of the United States under certain limited conditions. To reflect this proposal, we are defining ''designated health services'' for purposes of the referral prohibition to exclude emergency physician services furnished outside of the United States.

Certain dialysis services. We are aware that there are situations in which a physician might own a dialysis machine, rent it to a hospital, and provide the hospital with a technician to run the machine. This arrangement might fail to meet an exception if the physician refers patients for dialysis services, and also receives rental payments based on the volume or value of those referrals. The physician might also fail to meet an exception if he or she owns a part of the dialysis unit in the hospital (rather than owning part of the hospital as a whole, as required under the ''hospital exception'' in section 1877(d)(3)).

We believe there are certain unique situations involving dialysis in which there would be no risk of overutilization. We intend to exclude from the definition of ''inpatient hospital services'' dialysis furnished by a hospital that is not certified to provide end stage renal dialysis (ESRD) services under subpart U of 42 CFR 405. In these circumstances, we do not believe there would be a risk of program or patient abuse because dialysis would be provided only under the following emergency circumstances, when there is no other appropriate treatment:

- A non-ESRD patient needs dialysis because of renal dysfunction or for augmenting clearance of toxins. For example, a patient with acute tubular necrosis or a patient with theophylline overdose requires dialysis.
- The primary reason for a hospital admission for an ESRD patient is not maintenance dialysis. For example, an ESRD patient needs surgery unrelated to his or her kidney condition, and the surgeon has operating privileges only at a participating Medicare, but non-ESRD, certified hospital and the individual receives maintenance dialysis while he or she is an inpatient.

Certain lithotripsy services. We have been asked to consider excluding from the definition of ''inpatient hospital services'' services involving certain lithotriptors. Specifically, we are referring to services involving lithotriptors that employ extracorporeal shock wave lithotripsy (ESWL) when used to break up upper urinary tract kidney stones. ESWL focuses shock waves generated outside of the body specifically on stones under X-ray visualization, pulverizing them by repeated shocks. (The use of lithotripsy for breaking up kidney stones is discussed in section 35–81 of the Medicare Coverage Issues Manual.)

The theory behind excluding from ''inpatient hospital services'' services involving ESWL is that there is no risk of overutilization of these services. In general, severe obstruction, infection, intractable pain, or serious bleeding are indications of the need for surgical removal of a stone. Only when a patient requires surgical treatment would a physician prescribe ESWL. When a patient needs additional treatment, there is no alternative available that is less invasive or less expensive than ESWL. In addition, the procedure itself apparently documents the medical necessity to prescribe it. As we understand ESWL, the kidney stone is located, identified, and the progress of the therapy is recorded as part of the visualization process.

While we agree that it might be unlikely that physicians would overutilize ESWL, we wish to raise some of the same concerns that we raised under our discussion on surgically-implanted prosthetic devices. That is, we believe that these arrangements can potentially lead to patient abuse, with physicians requiring the use of certain equipment based on financial incentives, rather than on the best interests of the patient. Because of the controversial nature of lithotripsy, we have not excluded it from the definition, but specifically solicit comments on this issue.

Inpatient hospital services and the definition of a ''hospital.'' Note that our proposed definition of ''inpatient hospital services'' would affect in only a limited way the definition of the term ''hospital'' that we included in the August 1995 final rule. We included the definition of a ''hospital'' in § 411.351 solely for the purpose of determining ownership of a hospital as an entity, and we did not include as part of the hospital any entities furnishing services under arrangements. However, we would amend the definition of a hospital to make it clear that the entities covered by that definition are those that qualify as a ''hospital'' under section 1861(e), as a ''psychiatric hospital'' under section 1861(f), or as a ''rural primary care hospital'' under section 1861(mm)(1).

We would include the following definition at § 411.351: ''Inpatient hospital services'' are those services defined in section 1861(b) of the Act and § 409.10(a) and (b) and include inpatient psychiatric hospital services listed in section 1861(c) of the Act and inpatient rural primary care hospital services, as defined in section 1861(mm)(2). ''Inpatient hospital services'' do not include emergency inpatient services provided by a hospital located outside the United States and covered under the authority in section 1814(f)(2) and 42 CFR part 424, subpart H and emergency impatient services provided by a nonparticipating hospital within the United States, as authorized by section 1814(d) and described in 42 CFR part 424, subpart G. These services also do not include dialysis furnished by a hospital that is not certified to provide end stage renal dialysis (ESRD) services under subpart U of 42 CFR 405.

Inpatient hospital services include services that a hospital provides for its patients that are furnished either by the hospital or by others under arrangements with the hospital. They do

not encompass the services of other physicians, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists and qualified psychologists who bill independently.

k. Outpatient hospital services

Sections 1861(s)(2)(B) and (C) and 1832 provide for coverage of outpatient hospital services under Part B. Section 1861(s)(2)(B) provides for coverage of hospital services (including drugs and biologicals that cannot, as determined in accordance with regulations, be self-administered) incident to physician services furnished to outpatients (we consider these ''therapeutic services'') and partial hospitalization services incident to these services. Section 1861(s)(2)(C) provides for coverage of ''diagnostic services which are—(i) furnished to an individual as an outpatient by a hospital or by others under arrangements with them made by a hospital; and (ii) ordinarily furnished by such hospital (or by others under such arrangements) to its outpatients for the purpose of diagnostic study.'' We describe below the coverage provisions concerning outpatient hospital services under the categories of therapeutic and diagnostic services, and partial hospitalization services. We also discuss briefly the special rules for physical therapy, occupational therapy, and speech pathology services furnished to a hospital outpatient.

We would consider all covered services (either diagnostic or therapeutic) performed on hospital outpatients that are billed by the hospital to Medicare (including arranged for services) as outpatient hospital services. In addition, it should be noted that outpatient hospital emergency services may be therapeutic (furnished incident to a physician's service) or may be diagnostic in nature. Unlike other outpatient hospital services, emergency services may be covered in nonparticipating hospitals subject to the conditions described in section 1835(b) and 42 CFR part 424, subpart G. We propose to exclude these emergency services from the definition of ''outpatient hospital services'' for the same reasons that we cited above in excluding them from the definition of ''inpatient hospital services.''

We have also been asked to exclude services involving lithotriptors that employ ESWL when used to break up upper urinary tract kidney stones. We have the same concerns in the outpatient context about the potential for patient abuse that we raised in our discussion about excluding these services from the definition of ''inpatient hospital services.'' In addition, we have learned of situations in which urologists in a particular geographic area invest in lithotriptors, then require that outpatient departments use the physicians' equipment if they want to receive any urology referrals. Because this kind of manipulation can lead to increases in the cost of services, we regard it as creating the potential for program abuse. Because of the controversial nature of lithotripsy, we have not excluded it as an outpatient hospital service, but specifically solicit comments on this issue.

However, we are proposing to include under the definition of ''outpatient hospital services'' outpatient services furnished by a psychiatric hospital (as defined in section 1861(f)) and RPCH services, which are included under Medicare Part B by section 1832(a)(2)(H). ''Outpatient rural primary care hospital services'' are defined in section 1861(mm)(3) as medical and other health services furnished by an RPCH. We are including both of these kinds of services as ''outpatient hospital services'' for the same reasons that we have included them as ''inpatient hospital services,'' as described in the section above covering inpatient hospital services.

Outpatient hospital services incident to physician services (therapeutic services)—Under sections 1861(s)(2)(B) of the Act and 42 CFR 410.27, these ''incident to'' services specifically include drugs and biologicals that cannot be self-administered. ''Incident to'' services must be furnished by or under arrangements made by a participating hospital and as an integral though incidental part of a physician's services. We consider these services as therapeutic services that aid the physician in the treatment of the patient. Under section 230.4 of the Medicare Hospital Manual (HCFA Pub. 10), therapeutic services that hospitals furnish on an outpatient basis are those services and supplies (including the use of hospital facilities) that are incident to the services of physicians in the treatment of patients. These services include clinic services and emergency room services. To be covered as ''incident to'' a physician's services, the services and supplies must be furnished on a physician's order by hospital personnel under hospital medical staff supervision in the hospital or, if outside the hospital, by hospital-affiliated personnel who are under the direct personal supervision of a physician who is treating the patient.

Diagnostic outpatient hospital services—Under § 410.28, diagnostic services furnished in a hospital to outpatients, including certain drugs and biologicals required to perform the services (even if those drugs or biologicals are self-administered), are covered if the services meet the following conditions:

- They are furnished by or under arrangements made by a participating hospital.
- They are ordinarily furnished by, or under arrangements made by, the hospital to its outpatients for the purpose of diagnostic study.
- They would be covered as inpatient hospital services if furnished to an inpatient.
- If furnished under arrangements, they are furnished in the hospital or in other facilities operated by or under the supervision of the hospital or its organized medical staff.

Section 230.3 of the Medicare Hospital Manual explains that a service is diagnostic if it is an examination or procedure to which the patient is subjected, or which is performed on materials derived from a hospital outpatient, to obtain information to aid in the assessment of a medical condition or the identification of a disease. Among these examinations and tests are diagnostic laboratory services such as hematology and chemistry; diagnostic x-rays; isotope studies; EKGs; pulmonary function tests; and other tests given to determine the nature and severity of an ailment or injury. Hospital personnel may furnish diagnostic services outside the hospital premises without the direct personal supervision of a physician.

Partial hospitalization services—Partial hospitalization services are included as ''medical or other health services'' covered by Medicare Part B under section 1861(s)(2)(B) and must be provided ''incident to'' a physician's services. Partial hospitalization services are defined in section 1861(ff). This definition is reflected in §§ 410.27(d) and 410.43, which provide that partial hospitalization services consist of a variety of outpatient psychiatric services. These services must be prescribed by a physician, who certifies and recertifies the need for the services, and the services must be furnished under a plan of treatment, all in accordance with provisions in subpart B of part 424. Section 424.24(e)(1) requires that a physician certify that an individual would require inpatient psychiatric care if the partial hospitalization services were not provided.

Section 230.5 of the Medicare Hospital Manual further explains the partial hospitalization services benefit. It points out that there is a wide range

of services and programs that a hospital may provide to its outpatients who need psychiatric care, ranging from a few individual services to comprehensive, full-day programs. However, payment may be made only for services meeting the requirements of the outpatient hospital benefit. That is, the services must be incident to a physician's service and be reasonable and necessary for the diagnosis or treatment of the patient's condition. This means the services must be for the purpose of diagnostic study or the services must reasonably be expected to improve the patient's condition.

Special rules that apply to physical therapy, occupational therapy, and speech pathology services furnished to a hospital outpatient covered under Part B—The rules for these services appear in sections 241 and 242 of the Medicare Hospital Manual. Sections 210.8, 210.9, and 210.11 of the Medicare Hospital Manual describe these therapies (which do not require direct physician supervision) and set forth the conditions that must be met for the services to be covered as outpatient hospital services.

We would include the following definition at § 411.351: ''Outpatient hospital services'' means the therapeutic, diagnostic, and partial hospitalization services listed under section 1861(s)(2)(B) and (C); outpatient services furnished by a psychiatric hospital, as defined in section 1861(f); and outpatient rural primary care hospital services, as defined in section 1861(mm)(3); but excluding emergency services covered in nonparticipating hospitals under the conditions described in section 1835(b) and 42 CFR part 424, subpart G.

2. Direct Supervision

Section 1877(b)(2) provides an exception for in-office ancillary services. To qualify as in-office ancillary services, the services must, among other things, be furnished personally by a referring physician or another physician in the same group practice, or be furnished by individuals who are ''directly supervised'' by one of these physicians.

In the August 1995 final rule, we defined ''direct supervision'' as supervision by a physician who is present in the office suite and immediately available to provide assistance and direction throughout the time that clinical laboratory services are being performed. We are proposing to apply this definition to referrals for any of the other designated health services that can be excepted under section 1877(b)(2). We also propose to revise this definition to make it clear that ''present in the office suite'' means the physician must be present in the office suite in which the services are being furnished, at the time they are being furnished. We believe this clarification is necessary for situations in which a physician might be working in more than one suite in a building, such as when he or she provides services other than designated health services in one suite, while the designated health services are furnished in a separate suite in the same building.

We also wish to clarify that we believe the supervision requirement is meant to establish the services as those that are integral to the physician's own practice, and that are conducted within his or her own sphere of activity: hence the title *in-office ancillary* services. It is our view that Congress did not intend to except referrals made by a physician to a separate, profit-making enterprise in which the physician has invested or from which he or she receives payments. Hence, we do not believe the in-office ancillary exception applies to services that are performed in a location that is separate and distinct from one in which the physician conducts his or her own everyday activities.

Consistent with our interpretation that Congress intended this exception to apply to services that are closely attached to the activities of the referring physician, we used the definition of ''direct supervision'' that appears in section 2050 of the Medicare Carriers Manual, Part 3—Claims Processing, which describes services that are ''incident to'' a physician's professional services under section 1861(s)(2)(A). This provision requires that the physician be present in the office suite and immediately available to provide assistance and direction throughout the time the aide or technician is performing services. The very same definition appears in the regulations at § 410.32(a), which states, in general, that diagnostic x-ray tests are covered only if performed under the ''direct supervision'' of certain physicians or by certain radiology departments. As we stated in the preamble to the August 1995 final rule, we believe Congress was adopting and ratifying the Secretary's longstanding definition of this term.

Nonetheless, since the publication of the August 1995 final rule, we have become aware that many of the ancillary services that physicians and physician groups provide are subject to a range of supervision requirements for coverage purposes, some of which are more stringent than the current ''incident to'' supervision requirements, and some of which are less stringent. (The requirements for diagnostic services, for example, currently appear in § 410.32 of the regulations, in various places in the Medicare Carriers Manual, and as part of certain CPT codes. The requirements for physician supervision of diagnostic tests in all settings in which the technical component is payable under the physician fee schedule have been consolidated in a proposed regulation that was published on June 18, 1997 at 62 FR 33158.)

We recognize, in examining supervision requirements that include a physician's presence, that they each have some of the same and some separate purposes. The ''incident to'' rule is intended to ensure that the physician is at hand when the services are furnished because the law only covers them when they are ''incident to a physician's professional services,'' making the physician's presence essential, for both quality control and billing purposes, as a condition of coverage. In the case of the diagnostic services, the service is explicitly related to a medical need for the personal supervision or involvement of a physician in performing or monitoring the tests. These two sets of coverage-based ''supervision'' tests have their particular purposes and both remain a condition of coverage and payment for Medicare, in addition to any supervision requirements that appear in the section 1877 referral provisions.

The ''direct supervision'' requirement in the in-office ancillary services exception appears to us to share with the ''incident to'' test the need to tie the services directly to the activities of the physician, to ensure that they are part of his or her own medical practice. We continue to believe that Congress intended in including ''direct supervision'' in the law the concept of ''direct supervision'' that appears as part of the ''incident to'' requirements. However, in the context of physician referrals, we believe the physician's presence is necessary for ''management'' purposes (that is, to demonstrate that the physician is there, actively running the practice), rather than for coverage purposes. Thus, the requirement that the physician be on the premises the entire time that a designated health service is being furnished can have absurd and impractical results, preventing a physician from leaving the office suite for even brief periods when there may be no health and safety standards requiring his presence.

Accordingly, we propose to depart from our interpretation that the definition of ''direct supervision'' for purposes of the referral prohibition is identical to the definition in the ''incident to'' context. That is, we

propose to continue to require that the services in general be performed by aides or technicians only when the physician is present in the office suite so that they are tied to his or her activities, but allow very limited absences from the office. We propose to amend the definition as follows:

Direct supervision means supervision by a physician who is present in the office suite in which the services are being furnished, throughout the time they are being furnished, and immediately available to provide assistance and direction. ''Present in the office suite'' means that the physician is actually physically present. However, the physician is still considered ''present'' during brief unexpected absences as well as during routine absences of a short duration (such as during a lunch break), provided the absences occur during time periods in which the physician is otherwise scheduled and ordinarily expected to be present and the absences do not conflict with any other requirements in the Medicare program for a particular level of physician supervision.

Under this definition, a physician must actually be physically present in the office suite at the time designated health services are being furnished, or be absent only under the limited conditions described in the definition. We anticipate that the question of when an absence qualifies as ''brief and unexpected'' or as a ''routine absence of a short duration'' will be a determination that only the local carrier can make, based on individual circumstances.

A service will not qualify as an in-office ancillary service during any time period in which the physician is scheduled to be in the office, but in reality is specifically or routinely expected to be somewhere else or during any time period in which the physician is scheduled to be somewhere else. Therefore, laboratory services or other designated health services performed by technicians or aides would not qualify as in-office ancillary services if they are performed during time periods that occur before or after the physician's regularly scheduled office hours. (Aides or technicians can perform other tasks in the absence of the physician, such as setting up equipment or cleaning up, as long as the tasks are not components of designated health services provided to Medicare or Medicaid patients.) Also, a physician's absences to perform medical services outside the office would not be permissible under ''direct supervision,'' such as absences to do hospital rounds or provide care in an outpatient clinic. However, we would allow absences for unexpected medical emergencies.

While this definition for referral purposes would allow a physician to occasionally be absent for short periods, specific coverage requirements for services furnished and billed as ''incident to'' a physician's services, for diagnostic services, or for any other services with separate supervision requirements would continue to operate to determine whether a specific service is covered. We recognize that this approach will require a physician to pay close attention to the specific coverage requirements that apply to individual services, as well as the supervision requirement in section 1877(b). Nonetheless, most of the coverage rules have been in effect for many years, so physicians have had experience in complying with them. In coordinating the separate supervision requirements with the requirement in section 1877, physicians must only comply with the separate coverage requirement if it is more stringent than the requirement in section 1877, as interpreted in this proposed rule.

We believe that our proposed amendment to the definition of ''direct supervision'' addresses the concerns of physicians who feel that, as a practical matter, they cannot be in the office every single minute of every day. The amendment will allow physicians who must be called away briefly to avoid the sanctions that could arise from section 1877 if they are not present at the moment when a medical service is furnished, provided there are no health and safety reasons for them to be on the premises.

In line with the ''incident to'' manual provision, we are also proposing that a physician is directly supervising an individual outside the office suite (such as in an SNF) if the physician is in the room with the technician when the technician is performing services. (We derive this rule from section 2050, which states that direct supervision does not exist if a physician is only available by phone or is only physically present somewhere in the building.) Section 45–15 of the Coverage Issues Manual discusses situations in which a physician establishes an office within an SNF or other institution. Under this provision, a physician's office within an institution must be confined to a separately identified part of the facility that is used solely as the physician's office and cannot be construed to extend throughout the entire institution. (However, to qualify for the in-office ancillary exception in either of these ''out of office'' situations, the services must meet the additional statutory requirements for location and billing described in section 1877(b)(2).)

We are not proposing that there must be any particular configuration of rooms for an office to qualify as one office ''suite.'' However, direct supervision means that a physician must be in the office suite and immediately available to provide assistance and direction. Thus, a group of contiguous rooms should in most cases satisfy this requirement. We have been asked whether it would be possible for a physician to directly supervise a service furnished on a different floor. We think the answer would depend upon individual circumstances that demonstrate that the physician is close at hand. The question of physician proximity for physician referral purposes, as well as for incident to purposes, is a decision that only the local carrier could make based on the layout of each group of offices. For example, a carrier might decide that in certain circumstances it is appropriate for one room of an office suite to be located on a different floor, such as when a physician practices on two floors of a townhouse.

3. Entity

In-office referrals are referrals to an ''entity.'' Section 1877(a)(1) prohibits a physician from referring Medicare patients for the furnishing of designated health services to an entity with which the physician (or an immediate family member) has a financial relationship, unless an exception applies. The statute encompasses *any* entity that provides designated health services, without qualifications or limits. We attempted to reflect the breadth of the concept in the August 1995 final rule at § 411.351, where we defined an ''entity'' as a sole proprietorship, trust, corporation, partnership, foundation, not-for-profit corporation, or unincorporated association.

We wish to clarify that we regard an individual physician or group of physicians as referring to an ''entity'' when they refer to themselves, or among themselves. The concept of a ''referral'' under section 1877(h)(5)(A) and (B) covers the request by a physician for an item or service under Part B, or the request or establishment of a plan of care by a physician that includes the provision of a designated health service. This statutory definition does not exclude in-office referrals, nor does it specify that a referral occurs only when a physician refers to an outside entity.

In addition, the in-office ancillary services exception in section 1877(b)(2) would not be necessary if in-office referrals were free from the prohibition. Section 1877(b)(2) makes it clear that designated health services that are furnished personally by the referring physician who is a solo practitioner or, in the case of a group practice, by

another member of the physician's group practice, or by other individuals who are directly supervised by these physicians, are subject to the referral prohibition. Physicians who refer to or among themselves are excepted from the prohibition only if they meet the criteria specified in section 1877(b)(2). Similarly, physician services provided personally by (or under the personal supervision of) another physician in the same group practice as the referring physician are specifically excepted under section 1877(b)(1). To clarify our position on in-office referrals, we propose revising the definition of an ''entity'' in § 411.351 to include any physician's solo practice or any practice of multiple physicians that provides for the furnishing of a designated health service.

4. Fair Market Value

The term ''fair market value'' appears in most of the compensation related exceptions. These exceptions, among other things, require that compensation between physicians (or family members) and entities be based on the fair market value of the particular items or services that these parties are exchanging. We defined this term in the August 1995 final rule by using the definition in section 1877(h)(3). This provision defines fair market value as the value in arm's-length transactions, consistent with the general market value, with other specific terms for rentals or leases.

We have previously defined the term fair market value in our regulations in part 413, in the context of reasonable cost reimbursement in payments for end stage renal disease services. Section 413.134(b)(2) explains the circumstances under which an appropriate allowance for depreciation on buildings and equipment used in furnishing patient care can be an allowable cost. This provision defines ''fair market value'' for purposes of determining the costs incurred by a present owner in acquiring an asset. ''Fair market value'' is defined as ''the price that the asset would bring by bona fide bargaining between well-informed buyers and sellers at the date of acquisition. Usually the fair market price is the price that bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition.''

To be consistent, we are incorporating this definition of what constitutes ''fair market value'' into this proposed rule to explain, for purposes of those exceptions that involve compensation paid for assets, what we believe constitutes a value that is ''consistent with the general market value.'' However, we are modifying the definition as follows so that it also applies to any arrangements involving items or services, including employment relationships, personal services arrangements, and rental agreements:

General market value is the price that an asset would bring, as the result of bona fide bargaining between well-informed buyers and sellers, or the compensation that would be included in a service agreement, as the result of bona fide bargaining between well-informed parties to the agreement, on the date of acquisition of the asset or at the time of the service agreement. Usually the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement.

The definition of ''fair market value'' will continue to include the additional requirements in section 1877(h)(3) for rentals or leases. Among other things, the statute defines the fair market value of rental property as its value for general commercial purposes, not taking into account its intended use.

5. Financial Relationship

A referral alone is not a financial relationship. We wish to clarify that when a physician simply refers patients to an outside entity, he or she does not have a financial relationship with that entity. A financial relationship consists of an ownership or investment interest in the entity or a compensation arrangement with the entity. If the physician does not own any portion of the entity, and does not pay the entity or receive any kind of payment from the entity for the referral or for anything else, there is no financial relationship.

A financial relationship can involve more than the Medicare or Medicaid programs. In § 411.351 we defined a financial relationship as a direct or indirect relationship in which a physician or immediate family member has an ownership or investment interest in an entity or a compensation arrangement with the entity. We would like to emphasize that a financial relationship can exist between a physician and an entity even if that relationship does not involve designated health services or the Medicare or Medicaid programs. For example, a compensation arrangement is defined in § 411.351 as, in general, *any* arrangement involving *any* remuneration between a physician (or family member) and an entity. This remuneration can involve payments for anything, such as payments for rent, payments for nonmedical types of items or services, or for housing or travel expenses.

Ownership interests can be indirect. The statute and the August 1995 final regulation specify that an ownership or investment interest in an entity can exist through equity, debt, or other means and includes an interest in an entity that holds an ownership or investment interest in any entity providing designated health services. We do not regard the last part of this provision as a limiting factor, but rather as an indication that Congress wished to include, in the concept of ''ownership,'' an interest that is at least one level removed from direct ownership. We propose to interpret this provision to apply to interests that are removed by an unlimited number of levels.

This interpretation would cover situations involving multiple levels, such as when a physician has an interest in an entity that has an interest in another entity that in turn holds the ownership interest in the entity that provides designated health services. We believe that this interpretation fulfills the intent of the statute, which was meant to prevent physicians from evading the prohibition by establishing their ownership interests indirectly in ''holding companies'' rather than in the entities that furnish designated health services. It is our view that the number of layers of ownership is irrelevant, as long as a physician or family member has established an indirect interest. To reflect this interpretation, we would revise the description of ownership in § 411.351 (as part of the definition of ''financial relationship'') as follows: ''An ownership or investment interest in an entity that exists in the entity through equity, debt, or other means and includes any indirect ownership or investment interest, no matter how many levels removed from a direct interest; for example, ownership includes situations in which a physician or immediate family member has an interest in any entity that holds an ownership or investment interest in any entity providing designated health services.''

Payments that result from an ownership or investment interest are not compensation. We would like to emphasize a point that we discussed at length in the preamble to the August 1995 final regulation. We explained there that when a physician or family member has an ownership or investment interest in an entity, we will not count as compensation any returns on that investment. For example, if a physician has an investment interest in an entity in the form of stock or

securities, we will not count any of the dividends or other payments that derive from that ownership or investment interest as a compensation arrangement between the physician and the entity. (However, a physician or family member can receive an ownership interest from an entity in a manner than could constitute a compensation arrangement, such as when a physician receives stock as part of a salary payment or in exchange for the sale of his or her practice.)

6. Group Practice

The value of group practice status under the law. When a group of physicians qualifies as a ''group practice'' as defined under section 1877(h)(4), the group may qualify for several exceptions in the law that are specifically designed to accommodate groups. For example, section 1877(b)(1) excepts from the referral prohibition physician services provided personally by (or under the personal supervision of) another physician in the same group practice as the referring physician. Similarly, section 1877(b)(2) excepts in-office ancillary services that are furnished personally by or are directly supervised by either the referring physician or by another physician who is a member of the same group practice as the referring physician. However, a group of physicians does not have to meet the definition of a group practice in order to qualify for other exceptions under the law that are based on characteristics other than the referring physician's group practice status.

We wish to also point out that the definition of a group practice in section 1877(h)(4) is particular to the referral rules. That is, it was designed to allow physicians in specific kinds of groups to continue to refer patients for designated health services under certain circumstances. Therefore, the definition may have little or no bearing on which physicians qualify as a group practice for purposes of other Medicare or Medicaid provisions.

Who can organize and control a group practice. The statute defines a ''group practice'' as a group of two or more physicians legally organized into a partnership, professional corporation, foundation, not-for-profit corporation, faculty practice plan, or similar association. The statute requires that a group practice consist of a legal entity. Thus, a group that is not legally organized, but is instead only holding itself out as a group, would not qualify as a group practice under the statutory definition. Moreover, we believe that the statute specifically requires that a partnership consist of two or more physicians who are partners and that a professional corporation consist of two or more physicians who are incorporated together.

We believe that more complex business configurations may be involved when two or more physicians are ''legally organized'' into a foundation, not-for-profit corporation, or a faculty practice plan. As we pointed out in the preamble to the August 1995 final rule, the statute is silent about who must actually legally organize these kinds of associations. As a result, we interpreted this provision in the final rule to allow any individuals or entities to set up legal structures for these kinds of associations, provided two or more physicians have a role in providing services and the physicians meet all of the other specific requirements in section 1877(h)(4). In addition, the statute is silent about who must operate any of the group practice associations. We have interpreted the statute, in the August 1995 final rule, to allow any individuals or entities to do this. For example, a hospital could own and operate a group practice, provided there are no State laws to prevent this.

A group practice as one legal entity. In the August 1995 final rule we took the position that the statute contemplates a group practice that is composed of one single group of physicians who are organized into one legal entity. We stated that a group practice could not consist of two or more groups of physicians, each organized as separate legal entities, although we believed that a single group practice (that is, one single group of physicians) could own other legal entities (such as a billing entity) for the purpose of providing services to the group practice. We based this conclusion on the fact that section 1877(h)(4)(A) defines a group practice as a group of two or more physicians who are legally organized as a partnership, professional corporation, etc. However, we continue to receive numerous inquiries about whether a group can consist of several legal entities that are, in turn, legally organized into the one group.

We believe that Congress meant that a group must be one legal entity, and that it regarded this characteristic as a mark of a true group practice. It is our view that any other interpretation could pose the risk of multiple groups of physicians remaining in many ways separate, but joining together for the sole purpose of taking advantage of the exceptions in section 1877 that apply to group practices. Therefore, we propose to continue to require that a group consist of just one legal entity.

Nonetheless, we would like to clarify that we believe that a group practice is still ''one legal entity'' even if it is composed of owners who are actually individual professional corporations or is owned by physicians who are individually incorporated. It is our understanding that a group can contain physicians who are individually incorporated as professional corporations, and who provide services to group patients. This kind of configuration is apparently common in group situations and generally results when an individual physician wishes to qualify for certain tax and pension advantages. The physician is employed by the professional corporation, which in turn contracts with the group. We believe that such a group is not a conglomeration of multiple physician groups, but may instead be a true group practice, provided all the other criteria in section 1877(h)(4) are met.

We have also considered the issue of whether individuals who are separately incorporated as individual professional corporations and who contract with the group practice qualify as ''members'' of the group. We are proposing (in this section under the heading ''The requirement for physician-patient encounters'') to, in general, eliminate contractors from qualifying as ''members'' of a group practice, a proposal that a major group practice association asserted would be highly important to its membership. The association believes that many group practices would have difficulty meeting the ''substantially all'' requirement in the group practice definition if the groups have to consider as members the many specialists with whom they contract to furnish services through the group practice on a part-time basis. Thus, we are proposing to include only owner and employee physicians as ''members'' of a group practice. However, we are also proposing to consider as owner ''members'' physicians who belong to individual professional corporations that, in turn, own the group practice.

The ''full range of services'' test. A ''group practice'' is defined in some detail in section 1877(h)(4) of the statute. One of the criteria in the statutory definition is that each physician who is a member of the group must furnish substantially the full range of services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment through the joint use of shared office space, facilities, equipment, and personnel. We defined the term ''group practice'' in § 411.351 of the August 1995 final rule by using the statutory

definition and by adding certain interpretations. In one of these, we required physician members to furnish the full range of ''patient care services'' that they routinely furnish, rather than just ''services.'' Elsewhere in § 411.351, we defined ''patient care services'' as any tasks performed by a member that address the medical needs of specific patients, regardless of whether they involve direct patient encounters.

On considering this issue further, we propose revising the definition of ''patient care services'' to apply to any of a physician's tasks that address the medical needs of specific patients or patients in general, or that benefit the practice.

We believe that the ''full range of services'' provision, along with most of the other criteria in the group practice definition, was designed to ensure that, as part of the group, a physician is actually practicing medicine as he or she ordinarily would and has not simply joined the group in name only. We realize, however, that a physician member can legitimately furnish other kinds of services to the group, beyond services that benefit only specific patients. For example, a physician member might spend time training staff members, arranging for equipment, or performing administrative or management tasks. As long as these tasks actually benefit the operation of the group practice, we believe they should be counted as part of the test for gauging ''substantially the full range of'' a physician's services.

The ''substantially all'' test and the group billing number requirement. The ''Substantially All'' Test—Effective January 1, 1995, substantially all of the services of the group members must be furnished through the group and be billed under a billing number assigned to the group (the ''substantially all'' test). We discussed the substantially all test, as it was effective on January 1, 1992, at great length in the August 1995 final rule. We wish to clarify certain aspects of the test, which appears as part of the definition of a group practice in § 411.351.

Section 411.351 requires that substantially all of the ''patient care services'' of the physicians who are group members (at least 75 percent of the total patient care services of the members) be furnished through the group. The change we have described above in the section on the ''full range of services'' test, concerning our definition of ''patient care services,'' would affect this test as well. As a result, a group would count any of a physician's tasks that address the medical needs of specific group patients or group patients in general or that benefit the group practice. The group would not consider in the calculation any time during a physician's week that he or she spent on nonpatient care services, such as teaching in a medical school or doing outside research. For example, if a physician spends 3 days a week furnishing patient care services as part of a group practice and 2 days a week doing research outside the practice, the physician is providing 100 percent of his or her patient care services through the group practice.

The definition in § 411.351 also requires that patient care services be measured in terms of total patient care time that each member spends on patient care services. We wish to clarify that we expect a group practice to look at a physician's total patient care time during a week, furnished both inside and outside of the group practice, to determine what percentage of this time is furnished through the one group. For example, if a physician provides patient care services to a group practice 4 days a week and patient care services in an unrelated clinic 1 day a week, the physician is providing 80 percent of his or her patient care services through the group practice.

Some group practices have informed us that patient care time is not a common measurement of how groups keep track of a physician's contributions to the group. The time standard in the regulation, they claim, will create a whole separate, burdensome administrative process. In light of these comments, we explored alternative options that were suggested to us. These included counting a percentage of the physician's personal income, counting physician-patient encounters, or counting resource-based Relative Value Units (RVUs), a method of assigning resources to CPT codes ([Physicians'] Current Procedural Terminology, 4th edition, 1993 (copyrighted by the American Medical Association)). We found that there is no perfect measure; each of these methods has advantages and disadvantages.

The income option would require that a group determine what percentage of the physician's overall practice income is derived from the group practice. While this would be perhaps the easiest calculation to make, many physicians might consider the data involved to be intensely private. In addition, to the extent that a physician's billing practices differ among settings, an equivalent amount of income derived from within the practice may not account for the same amount of patient care activity that occurs outside the practice. For example, a physician who works at a clinic for low income patients while outside the group could receive considerably less income for patient care than he or she would receive for equivalent services furnished through the group practice.

We also explored the possibility of counting the number of a physician's patient encounters. However, encounters do not capture the level of intensity involved in any task. For example, a physician might complete one encounter in an entire day, if it involves complex surgery. Another physician could have 30 encounters in the same day, each of which took 15 minutes to complete. In addition, a group would need to gather information about the number of a physician's encounters outside of the group practice to determine the percentage of encounters furnished through the group. One problem with counting the number of patient care encounters and also with counting RVUs, which is discussed immediately below, is that neither method can take into account work that benefits the group in general but is not a service furnished to a patient, for example, time a physician spends training technical personnel.

We next explored the possibility of counting RVUs to determine the share of a physician's efforts furnished through a group practice, since RVUs capture the intensity level of different services. For Medicare purposes, a physician is paid based on the CPT code that is billed for a particular service. Each CPT code has assigned to it a certain intensity level (based on the content of the service and the time the physician has spent), and each intensity level translates into a specified number of RVUs. It is this associated RVU amount that determines a physician's payment for a service. The Medicare billing system can reveal all of the procedures for which a physician has billed, based on the CPT codes, and the value of all of the associated RVUs. There are thousands of CPT codes, many of which can be modified (for instance, to state that a physician acted as an assistant at surgery or co-surgeon, rather than as the surgeon). There is software available that can assign RVUs based on the CPT code and modifiers.

To use this method, it would be necessary for a group to collect all CPT and modifier billing data for the physician both inside and outside the practice, assign RVUs, and compare the totals. There is no ''full-time'' equivalent RVU amount that a group could use as a proxy to measure the inside RVUs against; therefore, the group would have to collect detailed data about outside practice time. We believe that the RVU method could

impose a burden on groups because of the high volume of codes that physicians are likely to submit, especially in large group practices. This method is further complicated by the fact that it is not clear that all insurers use CPT codes in all cases. For example, some HMOs provide a given payment for a particular kind of service and may not collect data on individual office visits or tests.

As a result of our assessment, we believe that measuring a physician's activities by using time spent doing work for the group, as required in the August 1995 final rule, may be the most straightforward and least burdensome method for measuring a physician's efforts, especially because we do not intend to require that physicians keep detailed time sheets to verify their time. Practices should already be able to track the amount of time spent by each member in activities related to the practice. While this data may not be present in billing records, it should be present in appointment databases, personal schedules, and other easily accessible sources. To simplify matters, a group can assume a physician works a standard 40 hour week unless he or she can present evidence of a shorter or longer work week. A practice should be able to maintain records in the form of general schedules that are sufficient to demonstrate its calculations in the event of an audit. Finally, we consulted several group practice associations about their preference for measuring the standard. They informed us that they favor using time in calculating the standard.

As a result of our investigation, we are therefore proposing to use the measure of physician time as the ''default'' standard. We believe that our carriers can evaluate the ''substantially all'' test only if we have one, or perhaps a few, standards. Therefore, we are soliciting comments on other possible methods that groups might use, provided these methods will provide verifiable data that demonstrates that a group meets the ''substantially all'' criteria. We will review all alternative methods, but only include those in the final rule that we believe are both verifiable and administratively feasible.

The Billing Number Requirement—We are interpreting the new billing number requirement in the ''substantially all'' test to mean that a single group can have more than one billing number, as long as the group bills under a billing number that has been assigned to the group. We do not believe there is anything in the statute to preclude a group practice from having more than one number. This interpretation will accommodate situations in which one group practice has multiple numbers because it has many locations or operates in more than one State.

It has also come to our attention that there are an increasing number of situations in which a group has another entity (not a wholly-owned entity) bill for it, such as a management services organization (MSO) or billing agent. We propose to allow a group to meet the requirement that services have been ''billed under a billing number assigned to the group'' if an agent bills for the group, under the group's name, using the group's billing number, provided the arrangement meets the requirements in § 424.80(b)(6). However, because of the specific terms of the statute, we do not believe a group can receive payments for its services through a separate entity (one that is not wholly owned) that bills in its own right, under its own billing number, even if the payments ultimately constitute group revenues.

The requirement for physician-patient encounters and the definition of group ''members''. Effective January 1, 1995, the group practice definition in section 1877(h)(4)(A)(v) requires that members of the group must personally conduct no less than 75 percent of the physician-patient encounters of the group practice. We believe this provision may have been designed to differentiate between legitimate group practices and those with ''member'' owners or investors who are members in name, but who treat few, if any, patients. In such a scenario, nonmember physician contractors could be hired to treat most of the group's patients. This arrangement would allow the nonpracticing ''outside'' physician owners to refer to the ''group'' for the furnishing of laboratory services or other ancillary types of services that are designated health services.

In § 411.351 of the August 1995 final rule, we defined ''members'' of a group practice broadly as physician partners and full-time and part-time physician contractors and employees during the time they furnish services to patients of the group practice that are furnished through the group and are billed in the name of the group. This definition would cover all of the physicians who are involved, in some capacity, in a group practice arrangement, while they are furnishing services to group patients. As a result, all group practice patients who have an encounter in the group setting with a physician would be treated by a member of the group practice. Our interpretation would thus render the encounter requirement in section 1877(h)(4)(A)(v) superfluous.

It has come to our attention that group practices generally do not regard independent contractors as members of the group. In addition, when a group practice contracts with a number of independent contractors, the group can experience difficulties in meeting the ''substantially all'' requirement, especially if the contractors work for the group only on a part-time basis. In order to remedy this problem, and to give meaning to the encounter requirement in section 1877(h)(4)(A)(v), we propose a change in the definition of a member of a group practice. We propose to exclude independent contractors from the definition. In addition, we propose to redefine ''members of the group'' to include not just physician partners, but physicians with any other form of ownership in the practice (including physicians whose ownership is held by their individual professional corporations). We also propose to count any of the physicians listed under the definition as ''members'' during the time they furnish ''patient care services'' to the group rather than just during the time they furnish services to patients of the group that are furnished through the group and are billed in the name of the group. This change reflects our belief that a physician can legitimately be participating as a group member while providing services to the group for which the practice cannot directly bill, such as certain administrative services. We are also proposing to extend this definition to group practices in the context of the additional designated health services.

Group practices should note that under the revised definition of a group ''member,'' independent contractors cannot supervise the provision of designated health services under the in-office ancillary services exception. Under section 1877(b)(2), services must be furnished personally by the referring physician, personally by a physician who is a member of the same group practice, or by individuals who are directly supervised by the referring physician or another physician in the group practice. We will no longer consider independent contractors as physicians who are ''in the group practice.'' An independent contractor may be able to refer to the group practice for the provision of designated health services, provided the physician qualifies for the personal services exception in section 1877(e)(3) of the Act, or the new general compensation exception in § 411.357. We would also like to point out that the definition of who qualifies as a ''member of a group practice'' in § 411.351 applies only in

the context of the referral provisions in section 1877 of the Act. The concept of group membership may be different for purposes of other provisions of the Medicare or Medicaid statutes.

As a result of our change in who constitutes a group practice member, at least 75 percent of all physician-patient encounters must occur between owner or employee physicians and patients. We regard an ''encounter'' as any appointment during which a group practice patient is actually examined or treated by a physician.

Methods for distributing group costs and revenues. The statute requires that a group distribute its income and overhead in accordance with methods that are ''previously determined.'' We regard this provision as ambiguous, since it is not clear prior to what event these methods must be in place. A method will always be in place just prior to a distribution, since a distribution can occur only if there is some method in place to carry it out.

It is our view that this provision was meant to require that a group have an established plan for its distributions, rather than making ad hoc decisions about distributions just before making them. Congress may have feared that ad hoc disbursements would be more likely to reflect a physician's referrals. To give meaning to this provision, we propose to interpret it so that a group must have in place methods for distribution determined prior to the time period the group has earned the income or incurred the costs. We believe these methods can be determined by any party, and not just members of the group practice. For example, if a hospital has established a group practice to run a hospital affiliated clinic, the hospital might be the party that determines how clinic income will be distributed.

We are also proposing that the overhead expenses of and the income from the practice be distributed according to methods that indicate that the practice is a unified business. That is, the methods must reflect centralized decision making, a pooling of expenses and revenues, and a distribution system that is not based on each satellite office operating as if it were a separate enterprise. We would impose this additional standard under our authority under section 1877(h)(4)(A)(vi) to add standards by regulation to the definition of a group practice.

Volume or value of referrals cannot be reflected in a physician member's compensation. Beginning on January 1, 1995, physicians who are group practice members cannot directly or indirectly receive compensation based on the volume or value of their own referrals. However, the statute qualifies this rule by allowing physicians to be paid a share of over-all profits of the group, or a productivity bonus, as described under the next two subheadings. (Groups should take note that the following discussion only describes what is appropriate under section 1877. You should be aware of and comply with other applicable statutes, including the anti-kickback statute, when entering into arrangements.)

We believe that the ''volume or value'' standard precludes a group practice from paying physician members for each referral they personally make or based on the value of the referred services. This standard applies to any of a physician's actions that constitute ''referrals,'' as these are defined in section 1877(h)(5)(A) and (B) of the Act. We include here a brief discussion of what constitutes a ''referral'' for purposes of the ''volume or value'' standard:

Section 1877(h)(5)(A) states that referrals include, subject to an exception for certain specialized services, the request by a physician for an item or service for which payment may be made under Part B, including the request for a consultation with another physician (and any test or procedure ordered by, or to be performed by (or under the supervision of) that other physician). We are interpreting this provision to apply not to a physician's requests for any Part B items or services, but only to a physician's requests for designated health services covered under Part B. We explain our rationale for this position in the next section, which discusses the definition of a ''referral.''

The second part of the statutory definition of ''referral'' in section 1877(h)(5)(B) covers (subject to an exception for certain specific services) the request or establishment of a plan of care by a physician that includes the provision of a designated health service. Although this second part is not drafted in Medicare-specific terms and could be interpreted to cover situations involving any designated health service, we are interpreting it as applying only to those designated health services covered under Medicare. We discuss this position, and our interpretation of referrals for Medicaid covered services, in more detail in the section dealing with what constitutes a ''referral.''

Because of our interpretation of what constitutes a ''referral,'' an entity wishing to be considered a group practice in order to use the in-office ancillary services exception cannot compensate its members based on the volume or value of referrals for designated health services for Medicare or Medicaid patients but could do so in the case of other patients. However, the most straightforward way for a group to demonstrate that it is meeting the requirements for the exception would be for the group to avoid a link between physician compensation and the volume or value of any referrals, regardless of whether the referrals involve Medicare or Medicaid patients. Alternatively, a group that wants to compensate its members on the basis of non-Medicare and non-Medicaid referrals would be required to separately account for revenues and distributions relating to referrals for designated health services for Medicare and Medicaid patients. If a group purports to be making payments to its physicians for nonprogram referrals, but these appear to us to be inordinately high or otherwise inconsistent with the fair market value of those referrals, we could determine that the physicians' compensation does not meet the fair market value standard, and thus may actually reflect additional compensation for Medicare or Medicaid referrals.

A physician member's compensation can reflect over-all profits. Although physician members cannot be compensated directly or indirectly based on their own referrals, under section 1877(h)(4)(A)(iv) and (B)(i), a physician can be paid a share of over-all profits of the group, as long as the share is not determined in a manner that is *directly* related to the volume or value of that physician's own referrals.

In the case of over-all profits, we are interpreting the statute as follows: First, we are taking the position that the statute does not affect a physician's compensation for services other than designated health services. Thus, for purposes of section 1877, a group practice can distribute profits from services other than designated health services in any way it sees fit. For example, a group can distribute profits from the physicians' own nondesignated health services under an even split, based on referrals, or according to the amount of a physician's investment in the group, seniority, hours spent devoted to the practice, or the number or difficulty of services the physician has furnished. The practice can also offer different types of sharing of profits or other kinds of compensation arrangements, or combinations of arrangements, to different physicians or groups of physicians. (Groups should be careful to comply with other statutes, including the anti-kickback statute, when creating compensation arrangements.)

However, when a physician makes a referral for a designated health service

for a Medicare or Medicaid patient (for example, orders a laboratory test or occupational therapy), we believe the statute requires a different scheme. That is, the referring physician can receive a portion of the group's overall pooled revenues from these services as long as the group does not share these profits in a manner that relates directly to who made the referrals for them. We believe, for example, that these profits can be shared according to most of the principles described above, such as an even split, a physician's investment in the group, the number of hours a physician in general devotes to the group, or the difficulty of a physician's work. However, each physician's personal compensation cannot include payments based directly on the number or value of the referrals he or she has made.

Since self-referrals are referrals under section 1877, profits should not be pooled and divided between group members so that they relate directly to the number of designated health services for Medicare or Medicaid patients physicians referred to themselves or the value of those self-referrals (such as a value based on the complexity of the service). Thus, a physician should not receive extra, specific compensation from the pooled profits for performing a designated health service he or she has self-referred. We believe that rewarding a physician each time he or she self-refers for a designated health service can constitute an incentive to overutilize services. Nor should a physician's compensation relate directly to the number of referrals for designated health services he or she has made to other group physicians, to the group's nonphysician staff, or to any other entity or individual.

We regard ''over-all profits of the group'' to mean all of the profits or revenues a group can distribute in any form to group members, even if the group is located in two different States or has many different locations within one State. We would not interpret the concept of ''overall profits'' as the profits that belong only to a particular specialty or subspecialty group. We believe that the narrower the pooling, the more likely it will be that a physician will receive compensation for his or her own referrals (for example, a subspecialty group or location could contain only one or two physicians).

A physician member's compensation can reflect productivity bonuses. Under section 1877(h)(4)(A)(iv) and (B)(i), a physician's compensation cannot directly or indirectly reflect the volume or value of his or her referrals, except that the physician can receive a productivity bonus, as long as the bonus is not determined in a manner that is *directly* related to the volume or value of that physician's own referrals. A productivity bonus must be based on services that are personally performed by a physician or incident to personally performed services.

As we have noted above for sharing of profits, we have interpreted section 1877 as imposing no restrictions on productivity bonuses based on revenues that have nothing to do with a physician's referrals for designated health services under Medicare or Medicaid. Thus, for all nondesignated health services, a physician can be compensated under any productivity scheme that a group derives. We understand that group practices use many different measures of a physician's productivity, such as counting patient encounters, charges or collections attributable to the physician, or hours of patient care services, or factoring in the degree of difficulty of a physician's procedures, ways in which the physician has improved his or her professional qualifications, or the amount of time the physician is willing to be on-call. In addition, a group can pay physicians based on a percentage of profits, straight salary, or any combination of base and incentive payments.

In terms of designated health services that a physician refers for Medicare or Medicaid patients, a physician's productivity bonus can only indirectly reflect those services that he or she personally performed or that are incident to those personally performed services. We regard services as ''personally performed'' by a physician when he or she participates directly in the delivery of the service. As we have noted elsewhere, we believe that a physician has made a ''referral'' if the physician refers a patient for a designated health service to him or herself, to other physicians in the group, or to the physician's own or the group practice's employees or contractors or to any other entity or individual. Unlike the over-all profit situation, in which amounts can be aggregated, the productivity bonus by its very nature will be based on a physician's individual referrals and performance, and will fluctuate accordingly. However, the statute precludes a productivity bonus for a physician that directly reflects the volume or value of that physician's own referrals.

Thus, we believe a physician's compensation can reflect a bonus for designated health services the physician personally performs or ''incident to'' services the physician directly supervises, provided the services result from the referral of a physician other than the one performing or supervising the service. A physician in this situation is not being compensated based on the volume or value of his or her own referrals. A physician can receive compensation for his or her own referrals for designated health services only through the aggregation that occurs as part of over-all sharing of profits.

We regard the reference in section 1877(h)(4)(B)(i) to services performed ''incident to a physician's personally performed services'' as a reference to the services defined in section 1861(s)(2)(A) of the Act. Here they are listed under ''Medical and Other Health Services'' as services and supplies (including drugs and biologicals that cannot, as determined in accordance with regulations, be self-administered) furnished as an incident to a physician's professional service, of kinds that are commonly furnished in physicians' offices and are commonly either furnished without charge or included in the physicians' bills.

Our longstanding interpretation of this provision appears in section 2050 of the Medicare Carriers Manual, Part 3—Claims Processing. This provision states that ''incident to'' services are those that are furnished as an integral, although incidental part, of the physician's personal professional services in the course of diagnosis or treatment of an illness or injury. The services of nonphysicians must be furnished under the physician's direct supervision by employees of the physician.

Because the provision in section 1877(h)(4)(B)(i) on productivity bonuses is a difficult one, and because physicians are now compensated in many ways, we directly solicit comments on our interpretation of this provision.

7. Referral

We have received a number of inquiries about what constitutes a ''referral'' for purposes of section 1877. The concept of a referral appears in several places: physicians are prohibited from making certain referrals and a number of the compensation-related exceptions require that any payment passing between a physician and an entity not reflect the volume or value of the physician's referrals. We believe that the concept of a ''referral'' in the statute is a broad one, and that prohibited referrals are a subset of these. Below we discuss our interpretation of what constitutes a ''referral.''

Under section 1877(h)(5)(A), referrals include, subject to an exception for

certain specialized services, the request by a physician for an item or service for which payment may be made under Part B, including the request for a consultation with another physician (and any test or procedure ordered by, or to be performed by (or under the supervision of) that other physician).

We believe that ''an item or service for which payment may be made under Part B'' means a Part B item or service that ordinarily ''may be'' covered under Medicare (that is, that could be a covered service under Medicare at the present time in the community in which the service has been furnished) for a Medicare-eligible individual, regardless of whether Medicare would actually pay for this particular service, at the time, for the particular eligible individual who has been referred. (For example, Medicare might not pay for a service if the individual has not yet met his or her deductible.)

The second part of the statutory definition of ''referral'' in section 1877(h)(5)(B) covers (subject to an exception for certain specialized services) the request or establishment of a plan of care by a physician that includes the provision of a designated health service. Although this second part is not drafted in Medicare-specific terms and could be interpreted to cover situations involving any designated health service, we are interpreting it as applying only to those designated health services that ''may be'' covered under Medicare. We base this position on the fact that the referral prohibition in section 1877(a)(1) applies only to designated health services covered under Medicare.

We are not aware of any rationale for the distinction between the definition for Part B services, in which a physician's request for any Part B item or service constitutes a referral, and the definition for other items or services, in which a referral consists of a physician's request for, or a plan of care providing for, only a designated health service. The broader definition for Part B services has no ramifications in terms of the actual referral prohibition, which encompasses only referrals for designated health services. However, it is significant in terms of the standard that appears in the ''group practice'' definition and in a number of the compensation-related exceptions that precludes compensation between parties that reflects the volume or value of a physician's referrals.

It is our understanding that section 1877 was designed to prevent physicians from overutilizing the specific health care services designated in the statute, a list Congress derived based on its sense of which services tend to be subject to abuse. We do not believe the statute was meant to preclude physicians from being compensated for their referrals for totally different Part B services. Thus, we are taking the position that, since the prohibition relates only to referrals for designated health services, the concept of a referral for a Part B service under section 1877(h)(5)(A) should be limited to just referrals for designated health services.

As we explained in the discussion on the definition of an ''entity,'' we believe that the concept of a ''referral'' covers situations in which physicians refer to themselves or among themselves. (As we noted in that discussion, a physician could be prohibited from referring to him or herself or to other group practice members if the services do not meet the in-office ancillary services exception in section 1877(b)(2) or the physician services exception in section 1877(b)(1) of the Act or some other exception.) We believe that a physician has made a referral under section 1877(h)(5) when he or she requests any designated health service covered under Part A or Part B or establishes a plan of care that includes a designated health service covered under Part A or B, even if the physician furnishes the service personally. We interpret this language to cover a physician's certifying or recertifying a patient's need for a designated health service. For Part B services, a referral can also include a consultation with another physician.

We are interpreting a physician's ''request'' for an item or service, or the establishment of a plan of care, as a step that occurs after a physician has initially examined a patient or furnished physician services that are not designated health services, or otherwise concluded that the patient needs a designated health service. (We describe our rationale for this interpretation in more detail in section III.C.2 of this preamble, where we discuss the in-office ancillary services exception.)

We are interpreting a ''request'' as occurring whenever a physician asks for a service in any way or indicates that he or she believes the service is necessary (for example, by verbally stating that the service is necessary, by entering description of the service into the patient's records or onto a medical chart or by writing a prescription).

What constitutes a ''referral'' for a Medicaid service. Section 1903(s) of the Act applies aspects of the referral prohibition to the Medicaid program for referrals that would result in a denial of payment for the service under Medicare, if Medicare covered the service to the same extent and under the same terms and conditions as under the State plan. We interpret this provision to mean that a State should apply the Medicare rules in section 1877 to a referral for a Medicaid service, even if the service is not covered under Medicare.

However, the definition of a referral in section 1877(h)(5)(A) and (B) is cast specifically in terms of a request for certain Part B Medicare services and for ''other items,'' which in the Medicare context we have interpreted to mean Part A services. Since Medicaid services are not categorized this way, we propose to interpret this provision by establishing an analogous definition. That is, (subject to an exception for certain specialized services, which we describe below) a physician has made a referral if he or she has requested a Medicaid covered designated health service that is comparable to a service covered under Part B of Medicare (including a request for a consultation with another physician). A physician has also made a referral for any other Medicaid covered item or service if the service is a designated health service and the physician has requested it or has established a plan of care that includes it.

We are also translating a ''referral'' from the Medicare context to mean a physician's requests for, or plan of care including, a designated health service that ordinarily ''may be'' covered under the particular State Medicaid program for an individual in the patient's eligibility category, regardless of whether the State Medicaid agency would actually pay for this particular service, at the time, for the particular Medicaid-eligible individual who has been referred.

Prohibited referrals only involve designated health services. It is important to keep in mind that the only referrals that are prohibited under section 1877 of the Act are those that involve the furnishing of a designated health service listed in section 1877(h)(6). As we note in section IV.A.5 of this preamble in our discussion on referrals to immediate family members, a physician is free to make a referral for a service that is not a designated health service (or a service that does not include a designated health service), such as certain physician services. For example, a physician can refer a patient to an obstetrician for general prenatal care. If the obstetrician prescribes ultrasound as part of this prenatal care, it is the obstetrician who has made a referral for a designated health service, and not the original physician.

The statutory exception to the definition of a ''referral.'' Before OBRA

'93, the definition of a ''referral'' under section 1877(h)(5)(A) was qualified by an exception in section 1877(h)(5)(C) for a request by a pathologist for certain clinical diagnostic laboratory tests and pathological examination services. These services had to be furnished by (or under the supervision of) the pathologist, as the result of a consultation requested by another physician. We incorporated this provision into the August 1995 final rule in § 411.351.

We are also proposing to interpret the level of supervision that a pathologist must provide if another individual, such as a technician, actually furnishes the services. The statute requires ''supervision,'' rather than the ''direct supervision'' that appears as part of the in-office ancillary services exception. We are interpreting ''supervision'' to mean the level of supervision ordinarily required under Medicare coverage and payment rules or, when they apply, the health and safety standards, for the particular services at issue in the particular locations in which the services will be furnished.

As the result of OBRA '93, beginning on January 1, 1995, the exception to what constitutes a ''referral'' in section 1877(h)(5)(C) was expanded to include a request by a radiologist for diagnostic radiology services and a request by a radiation oncologist for radiation therapy, if the services are furnished by (or under the supervision of) the radiologist or radiation oncologist as the result of a consultation requested by another physician. We are incorporating this amendment into the definition of a ''referral'' in § 411.351. Diagnostic radiology services and radiation therapy are also defined in § 411.351, where we have presented our proposed definitions of the different designated health services.

When a physician has requested a ''consultation.'' The services that are excepted from the ''referral definition'' under section 1877(h)(5)(C) must result from a consultation requested by a physician other than the pathologist, radiologist, or radiation oncologist who actually performs or supervises the performance of the services listed above. We discussed the concept of a consultation briefly in the preamble to the proposed rule covering referrals for clinical laboratory services at 57 FR 8595. We said that, for purposes of Medicare coverage, a ''consultation'' is—

> a professional service furnished to a patient by a physician (the consultant) at the request of the patient's attending physician. A consultation includes the history and examination of the patient as well as a written report that is transmitted to the attending physician for inclusion in the patient's permanent record ***. Other referrals, such as sending a patient to a specialist who assumes responsibility for furnishing the appropriate treatment, or providing a list of referrals for a second opinion, are not ''consultations'' or ''referrals'' that would trigger the laboratory services use prohibition.

We would like to clarify that a consultation occurs whenever a physician requests that a patient see another physician, such as a particular specialist, but the original physician retains control over the care of the patient, including any care related to the condition that prompted the consultation. Section 1877(h)(5)(A) implies that a ''consultation'' is still a consultation even if the consultant physician takes the initiative to order, perform, or supervise the performance of, tests for the patient. The consultant physician, as we noted in the preamble of the August 1995 rule, must provide the original physician with a report. Nonetheless, we regard this as a consultation as long as it is the original physician who gathers information from the consultant physician about his or her examination of the patient and any test results and then makes a decision about how to proceed with the patient's care.

Conversely, the original physician has not arranged for a consultation, but instead has made a referral, in situations in which the specialist takes over the patient's care for purposes of the condition that prompted the referral. For example, a physician might send a patient to a specific cardiologist, who examines the patient thoroughly, sends a report to the attending physician but is the only one who sees the patient thereafter for the purpose of treating a heart problem.

8. Remuneration

Remuneration that does not result in a compensation arrangement. A compensation arrangement is defined in section 1877(h)(1) as any arrangement involving any remuneration between a physician (or family member) and an entity, *other than* an arrangement involving only remuneration described in section 1877(h)(1)(C). Section 1877(h)(1)(C) lists certain specific kinds of remuneration that do not result in a compensation arrangement, such as the forgiveness of amounts owed for inaccurate tests, mistakenly performed tests, or for the correction of minor billing errors.

We believe there is some ambiguity in section 1877(h)(1) concerning the requirement that excepted remuneration must result *from an arrangement involving only* the remuneration described in section 1877(h)(1)(C). This provision could be read to mean that the items in section 1877(h)(1)(C) are excepted when the arrangement that exists between the physician and entity involves nothing but the excepted forms of payment. As a practical matter, we realize that the kinds of remuneration listed in section 1877(h)(1)(C) seldom occur as isolated transactions, but are often subsets or components of other arrangements. For example, the forgiveness of minor billing errors suggests that the parties transact and exchange services or items for payment when there are no billing errors; those transactions that contain billing errors may be only a small fraction of the parties' overall business dealings.

To clarify this provision, we are interpreting it to mean that the portion of a business arrangement that consists of the remuneration listed in section 1877(h)(1)(C) alone does not constitute a compensation arrangement. Any other forms of remuneration that might accompany these payments are not excepted and could constitute a compensation arrangement, provided they do not otherwise meet one of the other exceptions in this proposed regulation.

Section 1877(h)(1)(C)(ii) excepts from the definition of ''remuneration'' the provision of items, devices, or supplies that are used *solely* to collect, transport, process, or store specimens for the entity providing the item, device, or supply, or order or communicate the results of tests or procedures for the entity. We believe that some pathology laboratories have been furnishing physicians with materials ranging from basic collection items and storage items (for example, jars for urine samples and vials for blood samples) to more specialized or sophisticated items, devices, or equipment (snares used to remove gastrointestinal polyps, needles used for biopsies or to draw bone marrow or samples of amniotic fluid for amniocentesis, and computers or fax machines used to transmit results).

In order for these items and devices to meet the statutory requirement, they must be used *solely* to collect, transport, process, or store specimens for the laboratory or other entity that provided the items and devices. We interpret ''solely'' in this context to mean that these items are used solely for the purposes listed in the statute, such as cups used for urine collection or vials used to hold and transport blood to the entity that supplied the items or devices.

We do not believe that an item or device meets this requirement if it is used for any purposes besides these. For example, we do not regard specialized equipment such as disposable or reusable aspiration and injection needles and snares as solely collection or storage devices. Instead, these items are also surgical tools that are routinely used as part of a surgical or medical procedure. For example, the Food and Drug Administration (FDA) regulations in 21 CFR 878.4800(a) define a ''manual surgical instrument for general use'' as a ''non-powered, hand-held, or hand-manipulated device, either reusable or disposable, intended to be used in various general surgical procedures.'' Surgical instruments listed in the regulation include disposable or reusable aspiration and injection needles, snares, and other similar devices. Snares are also listed in these regulations as components of various specialized surgical devices, such as ear, nose, and throat manual surgical instruments, endoscopic electrosurgical units, and manual gastroenterology-urology surgical instruments and accessories.

In addition, to ensure that items or devices that could qualify for this exception are used solely for the entity that supplied them, the number or amount of these items should be consistent with the number or amount that is used for specimens that are actually sent to this entity for processing. That is, if a physician tends to annually perform 400 blood tests that are sent to a particular laboratory for analysis, we would not expect the physician to accept from that laboratory items, devices, or supplies in excess of an amount that is reasonable for the projected tests. In determining the amount of goods that are reasonable, we would consider not just quantity, but such facts as whether the laboratory packages together a set of items to be used for just *one* tissue collection or one use, or whether an item can be used multiple times, for multiple entities.

If, on the other hand, a physician keeps a particular item or device and uses it repeatedly or could use it repeatedly for any patients or for other uses, we would presume that the item or device is not one that meets the requirement, unless the physician can demonstrate otherwise. For example, if computer equipment or fax machines can be used for a number of purposes in addition to ordering or receiving results from an entity, we would presume that the ''solely'' requirement is not met, unless the physician can demonstrate that the equipment is integral to, and used exclusively for, performing the outside entity's work. Detailed records concerning the use of the machine would be necessary to overcome this presumption.

Section 1877(h)(1)(C)(iii) ''excepts'' from a compensation arrangement situations involving certain payments made by an insurer or a self-insured plan to a physician. The payments must be those that satisfy a claim, submitted on a fee-for-service basis, for the furnishing of health services by that physician to an individual who is covered by a policy with the insurer or by the self-insured plan. The payments must meet certain specified conditions.

We believe that this provision was designed for situations in which an insurer is involved in the delivery of health care services. If the insurer owns a health care facility, a physician might otherwise be precluded from referring to that facility just because the physician receives compensation from the insurer in the form of payments that satisfy claims the physician has submitted. If the physician is seeking fee-for-service payments from an insurer, he or she may not have an arrangement with the insurer that could qualify as a personal services arrangement, or otherwise qualify under any of the other statutory exceptions.

Discounts can be a form of remuneration for some of the designated health services. In the August 1995 final rule, we defined remuneration to include discounts. In the preamble to that rule, we explained that we believe that, for most items or services that a physician might purchase, the statute dictates this result. Section 1877(e)(8)(B) excepts from a compensation arrangement payments made by a physician to an entity as compensation for items or services (other than clinical laboratory services) if the items or services are furnished at fair market value. As a result, any amounts that a physician pays for items or services that do not reflect fair market value, such as certain discounted items or services, would not meet the exception.

We may have implied in the August 1995 final rule that all discounts would fail to meet the fair market value standard. We wish to clarify here that we believe a discount does meet the fair market value standard if it is an arm's-length transaction; an entity offers it to all similarly situated individuals, regardless of whether they make referrals to the entity; the discount does not reflect the volume or value of any referrals the physician has made or will make to the entity; and the discount is passed on to Medicare or other insurers. We are aware of situations in which discounts enure to the benefit of referring physicians. For example, physicians will sometimes purchase oncology drugs from manufacturers at a discount, yet mark the drugs up to eliminate the discount when billing Medicare. Such arrangements would not meet the standard.

We are also creating a new exception under our authority in section 1877(b)(4), which allows us to except any other financial relationship that we determine does not pose a risk of program or patient abuse. The new exception would allow physicians to receive a discount based on the volume of their referrals to an entity, provided the discount is passed on in full to the patients or their insurers (including Medicare), and does not enure to the benefit of the physicians in any way.

The statute provides a different exception for laboratory services. Section 1877(e)(8)(A) states that there is no compensation arrangement when a physician makes payments to a laboratory in exchange for the laboratory providing clinical laboratory services. This exception does not include a fair market value standard. Congress may not have included this standard based on its belief that, under the Medicare program, physicians cannot purchase laboratory services at a discount, and then bill the Medicare program for them at a marked up rate.

We agree that physicians are precluded from purchasing and marking up laboratory services covered under Medicare under section 1833(h)(5)(A) of the Act. This provision states that, in general, Medicare payment for a clinical diagnostic laboratory test may be made only to the person or entity that performed or supervised the performance of the test. In addition, payment for laboratory tests is made on the basis of a fee schedule.

B. General Prohibition on Referrals

Which designated health services are covered by the prohibition. Section 1877(a)(1)(A) prohibits referrals to an entity for the furnishing of designated health services ''for which payment otherwise may be made under [Medicare], * * *.'' We believe that this means any designated health service that ordinarily ''may be'' covered under Medicare (that is, that could be a covered service under Medicare in the community in which the service has been provided) for a Medicare-eligible individual, regardless of whether Medicare would actually pay for this particular service, at the time, for that particular individual (for example, the individual may not have met his or her deductible).

We believe that the same principles apply for designated health services under the Medicaid program. Section 1903(s) says that the Secretary cannot make Federal financial participation payments to a State for designated health services, as they are defined under section 1877(h)(6), furnished to an individual on the basis of a referral that would result in a denial of payment under Medicare, if Medicare covered the services to the same extent and under the same terms and conditions as under the State plan. We interpret this provision to mean that the Medicare rules in section 1877 apply to Medicaid services, as if Medicare covered the same items and services as a State's Medicaid program.

As a result, a referral could affect a State's FFP if the designated health service is one ''for which payment otherwise may be made'' under a State's Medicaid program, regardless of whether a State agency would actually pay for this particular service, at the time, for that particular individual. Therefore, if a State plan could cover the service for a Medicaid eligible individual in the individual's eligibility group, we believe it is a service that is covered by the referral prohibition.

Limitations on billing and refunds on a timely basis. As part of the prohibition on referrals in section 1877(a), the statute also provides that an entity may not present or cause to be presented a Medicare claim or a bill to any individual, third party payor, or other entity for designated health services furnished under a prohibited referral. In the August 1995 final rule, we included in § 411.353(d) the requirement that an entity that collects payment for a laboratory service that was performed under a prohibited referral must refund all collected amounts on a timely basis. We are proposing to apply this provision to such amounts collected for any of the designated health services. We are also proposing to define ''timely basis'' by cross referring to § 1003.101 in the OIG civil money penalty regulations. While § 1003.101 currently defines this term as ''the 60-day period from the time the prohibited amounts are collected by the individual or entity,'' the OIG is planning to issue shortly revised final regulations that will amend this term. Under the amended version, the 60-day timeframe for a refund will begin when the individual or entity knew or should have known that the amount collected was related to a prohibited referral. We plan to adopt this revised definition as well.

C. General Exceptions That Apply to Ownership or Investment Interests and to Compensation Arrangements

1. Exception for Physician Services

The statute provides that the referral prohibition does not apply in cases involving physician services (as defined in section 1861(q)) provided personally by (or under the personal supervision of) another physician in the same group practice as the referring physician. Physician services are generally defined in section 1861(q) as professional services *performed by* physicians, including surgery, consultation, and home, office, and institutional calls. The Medicare regulations have interpreted this provision in § 410.20(a) to include diagnosis, therapy, surgery, consultations, and home, office, and institutional calls, provided the services are furnished by one of the types of doctors listed in § 410.20(b).

Note that this exception applies to physician services that constitute designated health services, as we would define designated health services in § 411.351. The exception in the Medicare context does not cover services that are performed by nonphysicians but are furnished under a physician's supervision, such as ancillary or ''incident-to'' services. Under Medicare, physician services can only be performed by a physician. Thus, we believe the exception applies only to services that are provided personally by a physician who is a member of the same group practice as the referring physician or that are provided by a nonmember physician who is personally supervised by a group practice physician. We would interpret ''personal supervision'' to mean that the group practice physician is legally responsible for monitoring the results of any test or other designated health service and is available to assist the individual who is furnishing the service, even though the member physician need not be present while the service is being furnished.

2. Exception for In-office Ancillary Services

This exception applies to services other than parenteral and enteral nutrients, equipment and supplies and durable medical equipment (although it does apply to infusion pumps) that are referred by a solo practitioner or group practice member within his or her own practice. The exception requires that the services be performed by the referring physician or group practice member, or by another member of the same group practice as the referring physician, or be directly supervised by one of these physicians (we discussed the direct supervision requirement in section III.A.2 of this preamble), that the services be furnished in certain locations, and that the services be billed in a particular way. We discuss these last two requirements below.

a. The site requirement

Where a service is actually ''furnished.'' Section 1877(b)(2)(A)(ii)(I) requires, for a solo or group practice, that the services be furnished in a building in which the referring physician or another member of the group practice furnishes physician services unrelated to the furnishing of designated health services. It is our view that a service is furnished wherever a procedure is actually performed upon a patient or in the location in which a patient receives and begins using an item.

For example, if a patient receives an MRI (magnetic resonance image) in a physician's office, the service has been furnished there. If a patient is fitted for and receives a brace in the physician's office, the brace has been furnished there. The same rule would apply to a prosthetic device that is implanted in a physician's office. However, any item that is given to a patient but is meant to be used at home or outside the physician's office, or any item that is delivered to the patient's home, has not been ''furnished'' in the physician's office.

What constitutes the ''same building'' in which the physician is practicing. We are interpreting ''the same building'' to mean one physical structure, with one address, and not multiple structures that are connected by tunnels or walkways. In addition, we believe ''the building'' consists of parts of the physical structure that are used as office or other commercial space. For example, a mobile X-ray van that is pulled into the garage of a building would not be part of that building.

When a physician is furnishing physician services ''unrelated to the furnishing of designated health services.'' To meet this criterion, we believe that a physician must be providing in the same building any amount of physician services (as defined in § 410.20(a)) other than those listed as designated health services as we have defined them in § 411.351. Thus, we would regard as ''unrelated to designated health services'' a physician's examination of a patient and diagnosis, even if these lead to the physician requesting a designated health service, such as an X-ray or laboratory test.

The location test for group practices. In the case of a group practice, the group has the option of meeting a location test other than the one requiring that the designated health services be provided in the same building in which a group member provides physician services. The group can provide clinical laboratory services in any other building that is used by the group for the provision of some or all of the group's clinical laboratory services.

A group can furnish the other designated health services in another building that is used by the group for the centralized provision of the group's designated health services. We believe that a location meets this ''centralized'' requirement if it services more than one of a group's offices, and if it furnishes one or any combination of designated health services. It is also our view that a group can have more than one of these centralized locations. To meet the in-office ancillary exception, a group would be required to have a physician member present in the ''centralized'' location to perform or directly supervise the performance of designated health services, but the physician would not be required to perform physician services that are unrelated to the designated health services in this location.

b. The billing requirement

Section 1877(b)(2)(B) requires that in-office ancillary services be billed by the physician performing or supervising the services, by the referring or supervising physician's group practice under a billing number assigned to the group, or by an entity that is wholly owned by the physician or group practice. For a group practice that bills, we discussed a similar requirement for a group billing number in section III.A.6 of this preamble, where we covered the definition of a group practice. There, as here, we are interpreting this provision to allow a single group to bill under any billing number that has been assigned to the group in situations in which a group has more than one number, and to allow an agent to bill for the group in the group's name, using the group's number, provided the arrangement meets the requirements in § 424.80(b)(6).

In situations in which a ''wholly-owned'' entity bills for a group, we do not believe the statute requires that the service be billed under the group number, if the wholly owned entity can bill under its own provider number. Also, we are interpreting ''a wholly-owned'' entity that bills to cover an entity that provides billing or administrative services to a physician or group practice. Alternatively, this entity can be a wholly-owned provider of designated health services, such as a laboratory or radiology facility that is wholly owned by a physician or group, but bills for its own services. However, because the provision refers to an entity that is ''wholly owned,'' we do not believe that it covers billing entities that are owned jointly by a physician or group practice with any other individuals or entities.

We also believe that a group practice member cannot use the in-office ancillary services exception to refer to other group practice members for services he or she intends to bill independently. Section 1877(b)(2)(B) states that the services must be billed *by the physician performing or supervising the services* or by a group practice of which the physician is a member, or by entities wholly owned by the physician or the group. Nonetheless, under the definition of who qualifies as a ''member'' of a group practice in § 411.351, a group practice physician billing under his or her own provider status would be considered a solo practicing physician for purposes of the in-office ancillary exception.

In § 411.351, we defined who can qualify as a ''member'' of a group practice broadly in order to accommodate the many part-time and contract physicians who often participate in one or more group practices. The definition of a ''member'' covered physician partners and full and part-time physician contractors and employees. Physicians under the definition qualify as ''members'' only *during the time they furnish services to patients of the group practice* that are furnished through the group and *are billed in the name of the group.* Therefore, whenever a physician bills separately for a lab service the physician has personally performed or supervised, he or she is functioning as a solo practitioner and not as a group member. (We are currently proposing to amend the definition of a ''member'' to exclude independent contractors and to regard a physician as a member during the time he or she furnishes ''patient care services'' to the group. These changes would not affect our interpretation.)

If a physician bills for a service independently, other group members cannot directly supervise those services for the referring physician. In addition, if a group member bills for too many services independently, the group practice may fail to meet the ''substantially all'' test under the definition of a group practice in section 1877(h)(4)(A)(ii). That provision requires that substantially all of the services provided by group members be billed under a billing number assigned to the group.

c. Designated health services that do not trigger the in-office exception

The location requirements for this exception specify that designated health services must be provided in a building in which a solo practitioner or a group practice physician also provides physician services unrelated to the furnishing of designated health services or, for group practices, in a building that serves as a centralized location in which a group provides designated health services. Thus, this exception would not cover services provided elsewhere, such as home health services.

If services are furnished in a hospital or skilled nursing facility, we believe they can be covered under this exception if these locations serve as a centralized location in which a group provides designated health services or if the referring physician or a member of the same group practice furnishes unrelated physician services in the building, and the physicians can meet the requirement for direct supervision and billing.

3. Exception for Services Provided Under Prepaid Health Plans

We are aware that the health care world is evolving rapidly, consisting of a broad spectrum that ranges from traditional practices using fee-for-service billing all the way to fully capitated managed care systems, many of which are excepted under the ''prepaid'' provision in the statute. In between these extremes exist a host of ''hybrid'' systems that display a mixture of fee-for-service and managed care characteristics. Section 1877 addresses some of these systems directly; most others we believe can continue to function by meeting the exceptions in the statute and in this proposed regulation. We specifically solicit comments on whether our assessment is accurate.

In this section we describe how we propose to interpret the law in a manner that we believe will help to safeguard the Medicare and Medicaid programs from abuse, while facilitating the evolution of integrated delivery and other health care delivery systems. We also discuss how we believe the law affects referrals for designated health services provided under demonstration projects and waivers.

a. Physicians, suppliers, and providers that contract with prepaid organizations

The ''prepaid plan'' exception covers services furnished by certain specified organizations to their enrollees. Under

section 1877(b)(3), these include health maintenance organizations and competitive medical plans that have a contract with Medicare, certain prepaid organizations functioning under a demonstration project, and Federally qualified health maintenance organizations. We have incorporated this exception into the regulations at § 411.355(c). We are aware that a number of these organizations do not furnish services directly but often contract with outside physicians, providers, or suppliers to furnish items or services to their enrollees, for which the organizations bill. The outside physicians, providers, or suppliers may, in turn, contract with other physicians or entities for certain supplies or services. In order to accommodate these situations, we are interpreting this exception broadly to cover not only services furnished by the organizations themselves, but also those furnished to the organization's enrollees by outside physicians, providers, or suppliers under contract with these organizations. The exception would also cover services furnished to enrollees by those with whom the outside physicians, providers, or suppliers have contracted.

b. Managed care organizations under the Medicaid program

We propose to add to the regulation a new exception in § 435.1012(b) for designated health services provided by managed care entities analogous to those listed in section 1877(b)(3) that provide services to Medicaid eligible enrollees under contracts with State Medicaid agencies. We are basing this addition on our analysis of section 1903(s) of the Act. Under section 1903(s), a State can receive no FFP for expenditures for medical assistance under the State plan consisting of a designated health service furnished to an individual on the basis of a referral that would result in a denial of payment for the service under Medicare if Medicare covered the service to the same extent and under the same terms and conditions as under the State plan. We read this provision to mean that the Medicare-based rules in section 1877 must be applied to services furnished under a State's Medicaid program to determine when a referral is a ''prohibited'' one.

Section 1877(b)(3) excepts from the referral prohibition services furnished to enrollees of certain ''prepaid'' plans; however, all of the entities listed in that exception provide services to Medicare patients. As a result, the exception for prepaid arrangements has no meaning for physicians who wish to refer in the context of the Medicaid program. In order to give some meaning to this provision in the Medicaid context, when it is read in conjunction with section 1903(s), we are adding an exception for services furnished by the Medicaid counterparts of the Medicare managed care contracts expressly referenced in section 1877(b).

In section 1877(b)(3), Congress exempted all types of Medicare contracts with prepaid managed care health plans. We propose to extend this exemption to the categories of Medicaid-contracting managed care plans analogous to those exempted for Medicare in section 1877(b)(3). Like the section 1876 Medicare contracts exempted under section 1877(b)(3)(A), section 1903(m) governs Medicaid HMO contracts (specifically, comprehensive risk contracts), and requires that contracting HMOs comply with the physician incentive plan requirements in section 1876(i)(8).

The type of Medicare prepaid health plan exempted under section 1877(b)(3)(B) is an entity with a less than comprehensive contract (involving only Part B, or outpatient, services) under section 1833(a)(1)(A) of the Act and regulations at 42 CFR Part 417, Subpart U. These entities are known as ''health care prepayment plans'' (HCPPs). The Medicaid equivalent of a Medicare HCPP is a ''prepaid health plan,'' or PHP. Like an HCPP, PHPs generally contract for less than a comprehensive range of services (a PHP can also be a nonrisk comprehensive contract, since section 1903(m) only governs comprehensive risk contracts). Like HCPPs, PHPs are not subject to the full range of requirements that HMOs must satisfy under section 1876 or section 1903(m).

Section 1877(b)(3)(C) exempts entities receiving payment on a prepaid basis under a demonstration project under section 402(a) of the Social Security Amendments of 1967 or section 222(a) of the Social Security Amendments of 1972. The Medicaid counterpart of section 402(a) is section 1115(a) of the Social Security Act. Indeed, several demonstration projects under section 402(a) involving Medicaid-eligible Medicare beneficiaries also involve Medicaid capitation payments under the authority in section 1115(a). We accordingly are proposing to exempt entities receiving payments on a prepaid capitation basis under a demonstration project under section 1115(a) of the Act.

Finally, in order to cover the full range of Medicaid managed care contractors paid on a prepaid basis, as Congress did for Medicare, it is also necessary to exempt ''Health Insuring Organizations'' (HIOs) if they furnish or arrange for services as a managed care contractor. We are accordingly proposing to exempt these entities as well.

c. Evolving structures of integrated delivery and other health care delivery systems

As described above, the statute directly excepts from the referral prohibition all of the services provided by ''prepaid'' entities described in section 1877(b)(3) to the entities' enrollees. We realize that a host of organizations and integrated systems are not specifically excepted under the statute, so the services they provide to Medicare and Medicaid patients may be subject to the referral prohibition. For example, Medicare may provide secondary coverage to patients who participate in employer group health plans and are treated by HMOs that do not have contracts with Medicare or are not Federally qualified. Also, there are nontraditional systems that use both fee-for-service and capitated billing and are not specifically excepted under the law. We can find no grounds to create a blanket exception for these arrangements; we see no guarantee that these ''hybrid'' structures will all be free from any risk of patient or program abuse.

It is our view that a large percentage of the new and evolving structures will continue to thrive by meeting the exceptions in the statute and in this proposed regulation. For example, entities such as preferred provider organizations (PPOs) and physician hospital organizations (PHOs) that are not excepted under section 1877(b)(3) normally contract with physicians to provide services to the organization's patients, including Medicare or Medicaid patients. These physicians can continue to refer Medicare and Medicaid patients to the organization for designated health services, provided the physicians' arrangements with the organization qualify for the personal services exception in section 1877(e)(3) (and in § 411.357(d) of this proposed regulation).

This exception provides, among other things, that the arrangement must be for at least 1 year, the physician's compensation must be based on fair market value and cannot reflect the volume or value of the physician's referrals, except as allowed under certain physician incentive plans. We have defined ''fair market value'' in § 411.351 to allow payment that is consistent with the general market value of the services; that is, the compensation that would be included in a comparable service agreement, as the result of bona

fide bargaining between well-informed parties, at the time the agreement takes place.

If a physician has contracted with an organization for less than 1 year, the arrangement could meet the new general exception for compensation arrangements that we have added in § 411.357(l). We have added this new exception to accommodate the many complex arrangements that we believe exist between physicians and entities, as described below in section II.E.1. Also, as described in section II.E.3, we have interpreted the ''volume or value of referrals'' standard (one of the standards in the personal services exception and in many of the compensation-related exceptions) in a manner that we believe will not obstruct physicians who are required to refer for certain services within a network when the entity furnishing the services is at substantial financial risk for their cost. In section IV, in which we answer questions about the law, we present a discussion about physicians who have contracted with HMOs or other prepaid organizations, but who wish to refer fee-for-service patients to the HMO or to other physicians or providers who are affiliated with the HMO.

d. Designated health services furnished under a demonstration project or waiver

We propose to interpret section 1877 in a manner that we believe will allow most Medicare or Medicaid patients to continue to receive designated health services under demonstration projects or waivers. Our analysis of this issue depends upon whether the organization is paid on a prepaid basis under section 1115(a) of the Social Security Act or under one of the demonstration authorities specified in section 1877(b)(3)(C).

Prepaid demonstration contracts. Entities receiving payment on a prepaid basis under section 402(a) of the Social Security Amendments of 1967 or section 222 of the Social Security Amendments of 1972, have been exempted from the referral prohibition by section 1877(b)(3)(C). Entities receiving payment on a prepaid basis under a Medicaid demonstration project under section 1115(a) of the Social Security Act would be exempt under the proposed Medicaid analogue, as discussed earlier in this section.

We would note that the exemption for Medicare prepaid demonstration contractors extends not only to demonstration projects initiated by the Secretary under her discretionary authority in sections 402(a) and 222, but to all demonstrations that incorporate or rely upon section 402 authority, including such congressionally-mandated demonstrations as the PACE (''Program for All-inclusive Care for the Elderly'') demonstration projects, under which a public or non-profit entity contracts to provide comprehensive care to frail elderly Medicare beneficiaries, including dual eligibles who have been certified for skilled nursing facility level care, and the ''Social HMO'' (SHMO) demonstration projects, including the ESRD SHMO demonstration.

Demonstration projects that are not prepaid. If a demonstration project does not involve an organization receiving payments on a prepaid basis, the Medicare ''prepaid'' exception in section 1877(b)(3)(C) and the Medicaid analogue we are proposing in this rule would not apply.

We believe that the referral prohibition applies to services furnished under a demonstration project or waiver that does not qualify under section 1877(b)(3)(C) or the Medicaid prepaid demonstration exception proposed in this rule; however, the Secretary can exercise authority to waive or otherwise alter the requirements in sections 1877 or 1903(s). For example, section 402(a) of the Social Security Amendments of 1967 permits the Secretary to conduct demonstrations for a variety of purposes specified in section 402(a)(1)(A) through (K) (for example, to test whether changes in methods of reimbursement and payment for services, or covering additional services, would have the effect of increasing efficiency and economy without adversely affecting quality). Section 402(b) of these amendments permits the Secretary to waive compliance with the requirements of the Medicare statute for such research, insofar as these requirements are related to reimbursement or payment. We have determined that the requirements in section 1877 constitute requirements related to reimbursement and payment and thus may be waived for the kind of demonstration project described above, when there are no prepaid payments.

In the Medicaid context, where a demonstration project does not fall within the general exception proposed in this rule, the Secretary has the authority under section 1115(a)(2) to consider as expenditures under the State plan costs of the demonstration project that would not otherwise be included as expenditures under section 1903, to the extent and for the period prescribed by the Secretary. Hence, section 1115 could allow the Secretary to provide to a State the FFP that would otherwise be precluded under section 1903(s).

D. Exceptions That Apply Only to Ownership or Investment Interests

1. Exception for Ownership in Publicly Traded Securities

To qualify for the securities exception under section 1877(c)(1), the statute originally required that a physician's or family member's investment had to be in securities ''which *were* purchased on terms generally available to the public * * *.'' (Emphasis added.) OBRA '93 amended this provision to require that the securities be those ''which *may be* purchased on terms generally available to the public.'' (Emphasis added.) This amendment went into effect retroactively to January 1, 1992, and is reflected in the August 1995 final rule. We did not, however, interpret this change in the final rule.

We believe the purpose of this exception is to allow physicians or family members to acquire stock in large companies if the transaction does not particularly favor the physicians over other purchasers. In keeping with this purpose, we propose to interpret ''may be purchased'' to mean that, at the time the physician or family member obtained the securities, they *could* be purchased on the open market, even if the physician or family member did not actually purchase the securities on those terms. For example, the physician or family member may have inherited the securities or otherwise acquired them without actually purchasing them. We have reflected this interpretation in § 411.356(a).

Section 1877(c)(1) also requires that the securities be in a corporation that had, at the end of the corporation's most recent fiscal year, or on average during the previous 3 fiscal years, stockholder equity exceeding $75,000,000. In proposed 411.356(a)(2), we define stockholder equity as the difference in value between a corporation's total assets and total liabilities.

2. Exception for Hospital Ownership

Section 1877(d)(3) excepts designated health services ''provided by a hospital'' (other than a hospital located in Puerto Rico) if the referring physician is authorized to perform services at the hospital, and the ownership or investment interest is in the hospital itself (and not merely in a subdivision of the hospital). We believe that this exception applies only to designated health services that are furnished by a hospital, and not to services furnished by any other health care providers the hospital owns, such as a hospital-owned home health agency or SNF. It is our view that services ''provided by a hospital'' corresponds only to those

services provided by an entity that qualifies as a ''hospital'' under the Medicare conditions of participation. We further believe that section 1877(d)(3) covers any ''designated health services'' provided by a hospital, rather than just ''inpatient or outpatient hospital services,'' because hospitals can provide services to individuals who are neither inpatients nor outpatients (for example, they provide laboratory services to outside patients).

E. Exceptions That Apply Only to Compensation Arrangements

1. A new exception for all compensation arrangements that meet certain standards

Section 1877 of the Act contains a number of exceptions to the referral prohibition that apply only to compensation arrangements. Section 1877(e) contains eight exceptions to the referral prohibition based specifically on various kinds of compensation arrangements, and these are reflected in § 411.357 of the August 1995 final rule. If a physician's (or family member's) arrangement with an entity falls within one of the categories covered by these exceptions, and the arrangement meets the specific criteria listed for that category, the physician is not prohibited from making referrals to the entity.

It has come to our attention that the statutory categories, because of their specificity, do not encompass some compensation arrangements even though they may be common in the provider community, are based on fair market value or are otherwise commercially reasonable, and do not reflect the volume or value of a physician's referrals. For example, a physician can continue to make referrals to an entity under section 1877(e)(8)(B) even if the physician purchases items from the entity, provided the items are furnished at fair market value. On the other hand, the law does not exempt from the referral prohibition situations in which entities purchase items from a physician, even if the purchase price is comparably fair.

In light of the increase in recent years of integrated delivery systems, and the complex nature of financial arrangements between physicians and entities, it is our view that any compensation arrangements that are based on fair value, and that meet certain other criteria, should be excepted. Therefore, we are proposing to establish a new paragraph (l) in § 431.357 to provide an additional exception for compensation arrangements under the authority of section 1877(b)(4). This provision allows the Secretary to establish exceptions for any other financial relationship that she determines, and specifies in regulations, does not pose a risk of program or patient abuse. To meet this requirement, we are proposing an exception for any compensation arrangement between a physician (or immediate family member), or any group of physicians (even if the group does not qualify as a group practice) and an entity, provided the arrangement meets the following criteria, which we believe by their terms will prevent program or patient abuse. The arrangement must—

- Be in writing, be signed by the parties, and cover only identifiable items or services, all of which are specified in the agreement;
- Cover all of the items and services to be provided by the physician or immediate family member to the entity or, alternatively, cross refer to any other agreements for items or services between any of these parties.
- Specify the timeframe for the arrangement, which can be for any period of time and contain a termination clause, provided the parties enter into only one arrangement covering the same items or services during the course of a year. An arrangement made for less than 1 year may be renewed any number of times if the terms of the arrangement and the compensation for the same items or services do not change;
- Specify the compensation that will be provided under the arrangement, which has been set in advance. The compensation must be consistent with fair market value and not be determined in a manner that takes into account the volume or value of any referrals (as defined in § 411.351), payments for referrals for medical services that are not covered under Medicare or Medicaid, or other business generated between the parties;
- Involve a transaction that is commercially reasonable and furthers the legitimate business purposes of the parties; and
- Meet a safe harbor under the anti-kickback statute or otherwise be in compliance with the anti-kickback provisions in section 1128B(b) of the Act.

We would advise the parties involved in a compensation arrangement to use this exception if they have any doubts about whether they meet the requirements in the other exceptions listed in § 411.357.

2. A new exception for certain forms of ''de minimis'' compensation

We are aware that there are a number of situations in which physicians or their immediate family members receive compensation in the form of incidental benefits that are not part of a formal, written agreement. For example, a physician might receive free samples of certain drugs or chemicals from a laboratory, training sessions for his or her staff before entering into an agreement with a facility that furnishes a designated health service, or training sessions that are not considered part of the agreement. Also, a provider might furnish a physician with free coffee mugs or note pads. We are exercising our authority under section 1877(b)(4) to create a new exception that we believe will allow physicians or their family members to receive de minimis amounts of compensation, without a risk that the compensation will result in any Medicare program or patient abuse.

We have drafted the exception, which would appear at § 411.357(k), to apply to noncash items or services. Items cannot include cash equivalents, such as gift certificates, stocks or bonds, or airline frequent flier miles. We propose to limit the exception to a value of $50 per gift, with a $300 per year aggregate. This exception would apply only in situations in which the entity providing the compensation makes it available to all similarly situated individuals, regardless of whether these individuals refer patients to the entity for services. In addition, any compensation a physician or family member receives from an entity cannot be based in any way on the volume or value of the physician's referrals. We believe the criteria for this exception, by their terms, will prevent patient or program abuse.

3. The ''volume or value of referrals'' standard

Most of the exceptions in the law covering specific kinds of compensation arrangements state that the compensation involved cannot reflect the volume or value of any referrals. (We have included a similar standard in the two new compensation exceptions described above.) We are applying our interpretation of that standard as it appears in section III.A.6 under our discussion of the criteria a group of physicians must meet to qualify as a ''group practice.'' In that section, we describe what constitutes a ''referral'' for purposes of the ''volume or value'' standard.

The volume or value of referrals standard appears in the exceptions for the rental of space or equipment, bona fide employment relationships, personal services arrangements, physician recruitment, isolated transactions, and group practice arrangements with a

hospital. It also appears in the definition of ''remuneration,'' which excepts certain payments made by an insurer or self-insured plan to a physician to satisfy a claim, and in the definition of a group practice. The exceptions for the rental of office space, rental of equipment, personal service arrangements, and group practice arrangements with a hospital also state that the compensation cannot reflect, directly or indirectly, the volume or value of referrals *or any other business generated between the parties*.

It is our view that Congress intended to except arrangements in which a physician or family member receives fair market compensation for providing a particular item or service. We believe Congress may not have wished to except arrangements that include additional compensation for other business dealings. We also believe that it would be administratively difficult for us to sort out, from a particular business arrangement, different strands of payment that are meant to compensate an individual for things other than the items or services that qualify for the exception. In sum, we believe that the ''or other business generated between the parties'' merely clarifies this concept.

As a result of this analysis, we are proposing to interpret the ''volume or value'' standard that appears in the compensation exceptions and elsewhere as a standard that uniformly is meant to cover (and thus exclude from an exception) other business generated between the parties. We are doing so under our authority, in each of the compensation exceptions and under the definitions, to add other requirements that we may impose by regulation as needed to protect against patient and program abuse. If a party's compensation contains payment for other business generated between the parties, we would expect the parties to separately determine if this extra payment falls within one of the exceptions.

The volume or value standard also varies from exception to exception in terms of simply precluding compensation that takes into account the volume or value of referrals, as opposed to not taking into account, *directly or indirectly*, the volume or value of referrals. We regard these provisions as essentially equivalent, since we believe not accounting for referrals can be interpreted as not accounting for them in any way.

We have been asked whether an arrangement fails to meet the ''volume or value'' of referrals standard only in situations in which a physician's payments from an entity fluctuate in a manner that reflects referrals. It is our view that an arrangement can also fail to meet this standard in some cases when a physician's payments from an entity are stable, but predicated, either expressly or otherwise, on the physician making referrals to a particular provider. For example, a hospital might include as a condition of a physician's employment the requirement that the physician refer only within the hospital's own network of ancillary service providers, such as to the hospital's own home health agency. We believe that in these situations, a physician's compensation reflects the volume or value of his or her referrals in the sense that the physician will receive no future compensation if he or she fails to refer as required.

However, we do not intend to include, in this interpretation, situations in which physicians are not required to refer within the entity's network, but choose to on their own. Nor do we believe the volume or value standard is violated in those situations in which physicians refer patients within a network at the patients' own request, rather than under an entity's mandate, even if the entity has encouraged patients to remain within the network through various incentives.

In addition, we do not believe that an arrangement affects the volume or value standard for any designated health services a physician is required to refer within a network, provided the entity itself is, through a risk sharing arrangement, at substantial financial risk for the cost or utilization of items or services that the entity is obligated to provide. In these situations, we believe the requirement that a physician refer within the network addresses the issue of where a physician must refer, rather than whether the physician is encouraged or discouraged from making a referral (resulting in under or overutilization).

4. The commercial reasonableness standard

A number of the compensation-related exceptions in section 1877(e) include the requirement that remuneration provided under an agreement ''would be commercially reasonable'' even if no referrals were made between the parties. We are interpreting ''commercially reasonable'' to mean that an arrangement appears to be a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of any potential referrals.

5. The Secretary's authority to create additional requirements

Several of the statutory exceptions (particularly the compensation-related exceptions) permit the Secretary to impose additional conditions if the conditions are needed to protect against program or patient abuse. In promulgating these regulations, the Secretary has taken into account the fact that many of the excepted arrangements are also subject to the Medicare and Medicaid anti-kickback statute. The Secretary believes that the proposed regulatory exceptions, in conjunction with the independent requirements of the anti-kickback statute, are such that in most cases no additional conditions are necessary at this time to protect against program or patient abuse (we have included in this proposed regulation several specific new requirements that we believe are necessary). However, with respect to those exceptions for which the Secretary has authority to impose additional requirements, the Secretary invites comments from interested parties on whether additional conditions are necessary and if so, what conditions would be appropriate.

6. Exception for bona fide employment relationships

Section 1877(e)(2) excepts from a ''compensation arrangement'' any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship for the provision of services if the employment arrangement meets certain standards (these appear in § 411.357(c)). One standard specifies that remuneration under the employment cannot be determined in a manner that takes into account (directly or indirectly) the volume or value of referrals by the referring physician. Nonetheless, this exception specifically allows remuneration in the form of a productivity bonus based on services performed personally by the physician or an immediate family member. Thus, under the terms of the statute, physician or family member employees can receive payments based on any work they actually personally perform, including designated health services that a physician refers to him or herself. Under such a scheme, the more a physician self-refers, the more profit he or she will make.

Because we regard this provision as an open-ended invitation for physicians to generate self-referrals for designated health services, we are proposing to equalize this provision with the one

allowing productivity bonuses under the definition of a group practice in section 1877(h)(4)(B)(i). This provision allows group practices to pay members a productivity bonus only if the bonus is not directly related to the volume or value of a physician's own referrals. We are equalizing the provisions in this regard under the authority in section 1877(e)(2)(D), which allows the Secretary to impose by regulation other requirements as are needed to protect against patient or program abuse. Without this change, we believe that physicians have an incentive to overutilize designated health services, since they can be compensated directly for every self referral they make.

We would like to point out that because we have interpreted the concept of a ''referral'' to involve only a physician's requests for designated health services covered under Medicare or Medicaid, the new requirement will in no way affect a physician's ability to receive a productivity bonus for any nondesignated health services or noncovered services he or she refers or performs, or designated health services referred by another physician.

The bona fide employment exception does not, by its terms, allow for indirect compensation based on profit sharing and productivity bonuses for a physician's ''incident to'' services. The group practice definition does allow for such compensation. We do not believe that we can equalize the provisions in this regard, since it is our view that there are situations in which compensating a physician even indirectly for his or her self referrals could encourage overutilization and abuse.

7. Exception for personal services arrangements

Section 1877(e)(3) excepts from the referral prohibition situations involving remuneration from an entity under a personal services arrangement if certain criteria are met. The statute does not specify to whom the remuneration must be paid or for what kinds of services, although we believe the services must be ''personal services.''

One of the criteria for this exception requires that the arrangement cover all of the services to be furnished to the entity by the referring physician or an immediate family member of the physician. Therefore, we are interpreting this exception as covering services furnished by these individuals. We believe there is nothing in the statute to preclude a physician or family member from having personal services arrangements with several entities. (For example, a physician might have a contract to serve as a hospital's medical director and another contract with an unrelated group practice to perform surgery.) However, the statute does appear to require, in section 1877(e)(3)(A)(ii), that an excepted arrangement with one entity cover all of the services to be provided by the physician (or family member) to that entity.

We are aware that at times it will not be logical for all of a physician's or family member's contracts for personal services to be in one agreement. However, we are also aware that entities have used multiple contracts, at times, in devising schemes to reward physicians for their referrals. In order to provide physicians and entities with more flexibility than the statutory requirement that all services appear in one agreement, we propose to allow multiple agreements, provided that the agreements each meet all of the requirements described in section 1877(e)(3) and all separate agreements between the entity and the physician and the entity and any family members incorporate each other by reference. We base our proposal on section 1877(b)(4), which allows the Secretary to specify, in regulations, an exception for any other financial relationship that she determines does not pose a risk of patient or program abuse. In this case, because all excepted agreements will be subject to the fair market value and other standards, and because each agreement will make us aware of all other agreements, we see no potential risk for abuse.

It is our view that ''personal services'' are not simply the generic Medicare services (which are defined in § 400.202 to include ''items'') but are services of any kind performed personally by an individual for an entity (but *not* including any items or equipment). We are using the broader, more common notion of what constitutes a ''service'' based on the fact that all kinds of business relationships can trigger the referral prohibition; hence, the exception should be read to apply to business-oriented services in general.

We are also interpreting the exception to mean that the physician or family member can actually perform the services, or that these individuals can enter into an agreement to provide the services through technicians or others whom they employ. A physician or family member cannot, though, include equipment or other items as part of an excepted personal services arrangement. For example, if a hospital contracts with a nephrologist to provide dialysis services to its patients, the physician could have a personal services arrangement with the hospital even if the dialysis services are actually furnished by technicians whom the physician employs. However, if the physician also provides dialysis equipment to the hospital, this arrangement would have to separately meet the exception for the rental of equipment in section 1877(e)(1), since we do not regard items or equipment as ''personal services.''

The personal services exception specifies that compensation under an arrangement cannot be determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties. However, this requirement is qualified to allow compensation to reflect these under certain situations in which there is a physician incentive plan between a physician and an entity. We would like to emphasize that the physician incentive plan aspect of section 1877(e)(3) applies only in the context of personal services arrangements, and not to any other compensation arrangements.

''Physician incentive plans'' are defined in section 1877(e)(3)(B)(ii) as certain compensation arrangements between an entity and a physician or physician group. We have defined a physician group for purposes of the physician incentive rules more broadly than a group practice under section 1877, so that a group practice is a subset of physician groups. (A final rule with comment period governing physician incentive plans was published on March 27, 1996, at 61 FR 13430. This rule was amended on December 31, 1996, at 61 FR 69034.)

A physician incentive plan is any compensation arrangement between an entity and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services provided with respect to individuals enrolled with the entity. We believe that the incentive plan qualification applies only when the entity paying the physician or physician group is the kind of entity that enrolls its patients, such as a health maintenance organization. Section 1877(b)(3), the exception for prepaid plans, does exempt from the referral prohibition almost all designated health services provided by these entities to Medicare patients who are enrollees. In addition, this regulation proposes to exempt services provided to Medicaid patients by analogous kinds of entities (see our discussion of this issue earlier in this preamble). Nonetheless, the personal services exception, with its physician incentive aspect, is still a viable exception. This exception could

apply, for example, to situations in which a physician refers a fee for service patient covered under Medicare to an HMO when he or she also has a contract to provide services to the HMO's enrollees. The physician's contract with the HMO is an underlying financial relationship and, in order for the physician to refer fee-for-service patients to the HMO, the financial relationship must meet an exception. In order to qualify for the personal services exception, the physician's payments from the HMO for treating HMO enrollees cannot vary with the volume or value of his or her referrals, except under a physician incentive plan, as described in section 1877(e)(3)(B).

The personal services exception in section 1877(e)(3) as a whole is silent about to whom an entity must be paying remuneration or with whom it must have an arrangement. As a result, we are interpreting the personal services exception to apply to situations in which an entity has an arrangement with either an individual physician (or family member) or a group practice to provide personal services. For example, a hospital could use the exception if it contracts with a group practice for purposes of having group members serve as the hospital's staff.

8. Exception for remuneration unrelated to the provision of designated health services

Section 1877(e)(4) provides for an exception for remuneration that is provided by a hospital to a physician if the remuneration does not relate to the provision of designated health services. (As we have noted earlier in this preamble, this exception does not apply to remuneration from entities other than hospitals, nor does it apply to payments to a physician's family members.) We are interpreting this provision to except any remuneration that is completely unrelated to the furnishing of designated health services. By this we mean that the parties must be able to demonstrate that the remuneration does not in any direct or indirect way involve these services, and that the remuneration in no way reflects the volume or value of a physician's referrals for designated health services. If a physician is receiving payments from a hospital that appear to be inordinately high for an ''unrelated'' item or service and is also making referrals to the hospital for designated health services, we will presume that the overpayments relate to the designated health services because they reflect the volume or value of the physician's referrals.

On the other hand, we realize there can be situations in which a hospital's payments are completely unrelated to the provision of designated health services. For example, a teaching hospital might pay a physician rental payments for his or her house in order to use the house as a residence for a visiting faculty member. If the parties involved can demonstrate that the rental payments are based on fair market value and in no way reflect the physician owner's referrals to the hospital, we believe this exception would apply. Similarly a physician might receive compensation for teaching or for providing an entity with general utilization review or administrative services.

We do not intend to apply this exception in any situation involving remuneration that might have a nexus with the provision of, or referrals for, a designated health service. For example, if a hospital pays a physician to supply a heart valve that the physician has perfected, we believe that the exception does not apply. It is our position that the physician is receiving payment for an item that will likely be used by the hospital in furnishing inpatient hospital services, which are a designated health service. Similarly, if a hospital pays for a physician's malpractice insurance or other general costs to enable the physician to provide a designated health service, such as radiology, the payments are related to furnishing a designated health service. Nonetheless, these financial relationships could still be excepted under one of the statutory exceptions or under the new exception we would include in § 431.357(l), which covers any compensation arrangement that meets certain criteria.

9. Exception for a hospital's payments for physician recruitment

Section 1877(e)(5) includes an exception for remuneration provided by a hospital to an individual physician to induce the physician to relocate to the geographic area served by the hospital in order to be a member of the medical staff of the hospital. We believe that the terms of the statute dictate that this exception applies just to those situations in which a physician resides outside the geographic area and must actually relocate in order to join the hospital's staff.

We considered a number of ways to define the concept of a hospital's ''geographic area,'' including mileage requirements or the likelihood that the physician would be able to bring patients along when he or she relocates. Because we believe that what constitutes a hospital's ''geographic area'' may depend on a variety of circumstances, we are specifically soliciting comments on how to define this term.

If a hospital makes recruitment payments to physicians who are living in the hospital's geographic area (for example, to retain residents) or to a group practice that intends to employ the physician and contracts with the hospital, these payments might be excepted under the new compensation-related exception that we have included in § 431.357(l).

10. Exception for certain group practice arrangements with a hospital

Under section 1877(e)(7), this exception applies to only a limited number of arrangements; that is, arrangements that began before December 19, 1989, and have continued in effect without interruption since that date. We are interpreting this provision to mean that the arrangement between the hospital and the specific group practice must have been in effect within the timeframe specified in the statute. However, we realize that most agreements do not remain static over time. As a result, it is our view that this criterion may still be met, even if the agreement between the parties has changed over time so that it covers different services or so that the services are provided by different individuals within the same group practice.

We also intend in this provision to make an editorial change that we believe removes an ambiguity in the statutory language. Existing § 411.357(h)(2) states ''[t]he arrangement began before December 19, 1989, and has continued in effect without interruption since then.'' Upon closer consideration, we believe that ''since then'' is ambiguous. (Does it mean since the actual date before December 19, 1989 on which the arrangement began, or does it mean since December 19, 1989?) We believe that by revising this provision to read ''[t]he arrangement began before, and has continued in effect without interruption since, December 19, 1989,'' we have provided a reasonable interpretation that removes this ambiguity.

Section 1877(e)(7)(A)(ii) requires that, with respect to the designated health services covered under the arrangement, substantially all of the services furnished to patients of the hospital are furnished by the group under the arrangement. We believe this standard means that whatever portion of a particular designated health service the agreement covers, the group must actually provide ''substantially all'' of that portion. For example, if the group

has agreed to provide 35 percent of a hospital's laboratory services, the group must actually provide a substantial part of this percentage.

In keeping with our interpretation of the term ''substantially all'' in other parts of section 1877, we are interpreting that term here as being 75 percent of all the services at issue.

11. Exception for payments by a physician for items and services

Section 1877(e)(8) excepts payments that a physician makes to a laboratory in exchange for clinical laboratory services (we have discussed this provision in some detail in section III.A.8 of this preamble). In addition, the statute excepts payments that a physician makes to any entity for other items or services if these are furnished at fair market value. We are proposing to interpret ''other items or services'' to mean any kinds of items or services that a physician might purchase, but not including clinical laboratory services or those specifically listed under the other compensation exceptions. For example, we do not believe that Congress meant for the ''items or services'' exception to cover a rental agreement as a service that a physician might purchase, when it has already included in the statute a specific rental exception, with specific standards, in section 1877(e)(1).

F. The Reporting Requirements

1. Which financial relationships must be reported

Under section 1877(f), each entity providing Medicare-covered services must provide the Secretary with information concerning the entity's ownership, investment, and compensation arrangements, including the names and UPINs (unique physician identification numbers) of all physicians with an ownership or investment interest (as described in section 1877(a)(2)(A)) in the entity or with a compensation arrangement (as described in section 1877(a)(2)(B)) with the entity, or whose immediate relatives have such a relationship. The information must be provided in such form, manner, and at such times as the Secretary specifies.

Section 411.361 currently states that entities must submit the required information on a HCFA-prescribed form within the time period specified by the servicing carrier or intermediary. Entities are given at least 30 days from the date of the request to provide the information. Thereafter, entities must provide updated information within 60 days from the date of any change in the submitted information.

At this time, we are still developing a procedure for implementing the reporting requirements and plan to notify affected parties about the procedure at a later date. Until that time, physicians and entities are not required to report to us. In addition, we are aware that the 60 day timeframe for updated information could be onerous, especially for large entities that must collect information about their employees, owners, and contractors and who would then have to update that information approximately every two months. As a result, we are proposing to modify § 411.361 to require that entities report to us once a year on all of the changes that have occurred in the previous 12 months.

Under the reporting regulation in § 411.361(d), a ''reportable financial relationship'' is any ownership or investment interest or any compensation arrangement, as described in section 1877 of the Act. Under section 1877(a)(2), a financial relationship of a physician (or family member) with an entity is defined as an ownership or investment interest in the entity, *except as provided in subsections (c) and (d),* or a compensation arrangement between the physician (or family member) and the entity, *except as provided in subsection (e).* Subsections (c) and (d) contain lists of ownership interests that ''shall not be considered to be an ownership or investment interest described in subsection (a)(2)(A).'' Subsection (e) contains a list of arrangements that are not to be considered as ''compensation arrangements described in (a)(2)(B).'' Thus, entities must only report their ownership or investment interests, or compensation arrangements, if these relationships do not meet the exceptions in subsections (c), (d), or (e) of section 1877. However, if an entity's financial relationship is excepted under subsection (b) of section 1877 (which contains exceptions for physician services, in-office ancillary services, services furnished under certain prepaid plans, or other new exceptions included by the Secretary) the entity must still report.

As the rule reads now, an entity can decide that it is excepted under (c), (d), or (e) and not report any data. As a result, we will have no opportunity to scrutinize the entity's arrangements to see if its assessment is correct. We believe that the statute allows us to gather a broader scope of data. We base this interpretation on the opening paragraph in section 1877(f), which states that each entity providing any covered items or services for which payment may be made under Medicare shall provide the Secretary ''with the information'' concerning the entity's ownership, investment, and compensation arrangements, *including* the names and UPINs of all physicians with an ownership interest (as described in (a)(2)(A)), or with a compensation arrangement (as described in (a)(2)(B)). Thus, we believe the statute allows us to gather any data on financial relationships, *including,* but not necessarily limited to, relationships for which there are no exceptions under (a)(2)(A) or (B). Therefore, we are proposing to amend the rule, at § 411.361(d), to reflect our authority to ask for a broader scope of information than the regulation currently allows.

A number of entities have pointed out to us that the amounts of data they are required to report under the statute will, in some circumstances, be overwhelming and perhaps almost impossible to acquire. In addition, if we require every entity that is subject to the referral rules to report on every financial relationship, excepted or not, the administrative burden could be enormous. For example, a large publicly-held enterprise would be required to report (and hence retain records documenting) all of its owners who are physicians, all owners who are relatives of physicians, all physicians with whom it has compensation arrangements of any kind, and all relatives of physicians with whom it has compensation arrangements.

A publicly traded corporation with thousands of stockholders may find it extremely difficult to identify all of its owners and their relatives, and to identify which of these owners and relatives are physicians. In addition, such a corporation could be owned by mutual funds which in turn have hundreds of thousands of additional owners, some of whom may be physicians or have relatives who are physicians. In order to make the reporting requirements more manageable, we intend to develop a streamlined ''reporting'' system that does not require entities to retain and submit large quantities of data. However, we believe that entities should retain enough records to demonstrate, in the event of an audit, that they have correctly determined that particular relationships are excepted under the law.

We are proposing to limit the information that an entity must acquire, retain and, at some later point, possibly submit to us. We would include only those records covering information that the entity knows or should know about, in the course of prudently conducting business, including records that the

entity is already required to retain to meet Internal Revenue Service and Securities and Exchange Commission rules, and other rules under the Medicare or Medicaid programs. We are circumscribing these records under the Secretary's discretion in section 1877(f) to ask entities to provide information in such form, manner, and at such times as the Secretary specifies. When we develop a form for reporting information to us, we plan to first publish it as a proposed notice in order to receive public comment. If we later find that this plan is inadequate and elect to change the scope of the requirement, we will provide entities with adequate notice to comply. We specifically solicit comments on this proposal.

2. What entities outside the United States must report

Section 1877(f) states that the reporting requirements do not apply to designated health services furnished outside the United States. The reporting requirements in general apply to each entity furnishing services covered under Medicare, and not just to those furnishing designated health services. Arguably, then, the statute relieves an entity from the reporting requirements involved when it furnishes designated health services, but not when it furnishes other covered services. Because we believe that referrals for designated health services are the focus of section 1877, and because Medicare covers only a limited number of services when they are furnished outside of the United States, we are interpreting section 1877(f) to relieve an entity from reporting any Medicare services it has furnished outside of the United States.

G. How the Referral Prohibition Applies to the Medicaid Program

1. Who qualifies as a ''physician'' for purposes of section 1903(s)

Under the Medicare definition of ''physician'' in section 1861(r), paragraphs (r)(1) through (r)(5) cover a doctor of medicine or osteopathy, a doctor of dental surgery or of dental medicine, a doctor of podiatric medicine, a doctor of optometry, and a chiropractor. Under the Medicaid statute in section 1905(a)(5)(A), physician services are those furnished by a physician as defined in section 1861(r)(1), which covers only a doctor of medicine or osteopathy.

In determining whether an individual is a ''physician'' for purposes of section 1903(s), we believe that it is the Medicare definition that would apply. That is because this provision prohibits the Secretary from paying FFP to a State for services that result from a referral for a designated health service that would be prohibited under Medicare if Medicare covered the service in the same way (to the same extent and under the same terms and conditions) as under the State plan. A referral by any of the ''physicians'' listed in section 1861(r) could result in a prohibited referral under Medicare.

We believe that a physician is still a physician for purposes of section 1903(s), even if he or she does not participate in the Medicaid program. For example, a provider of designated health services may participate in and bill Medicaid when the referring physician, who has an interest in the entity, does not participate. The rules in section 1877 apply to services furnished under Medicaid in the same manner as they would apply if furnished under Medicare. As a general rule under section 1877(a)(1), if a physician (or immediate family member) has a financial relationship with an entity, then the physician may not make a referral to the entity to furnish designated health services for which payment may otherwise be made under Medicare. This provision appears to apply to all physicians, regardless of whether they participate in either the Medicare or Medicaid programs, as long as the services involved are covered services under Medicare or Medicaid.

2. How the referral prohibition and sanctions affect Medicaid providers

Absent an exception, section 1877(a)(1) in general prohibits a physician from making a referral to an entity with which he or she has a financial relationship for the furnishing of a designated health service covered under Medicare. The entity, in turn, may not present a claim to Medicare or bill any other individual or entity for the service furnished as the result of a prohibited referral. If physicians or entities violate these rules, they are subject to certain sanctions under section 1877(g). However, we do not believe these rules and sanctions apply to physicians and providers when the referral involves Medicaid services. The first part of section 1903(s) prohibits the Secretary from paying FFP to a State for designated health services furnished on the basis of a referral *that would result* in a denial of payment under Medicare *if* Medicare covered the services in the same way as the State plan. This part of the provision is strictly an FFP provision. It imposes a requirement on the Secretary to review a Medicaid claim, *as if* it were under Medicare, and deny FFP *if* a referral would result in the denial of payment under Medicare. Section 1903(s) does not, for the most part, make the provisions in section 1877 that govern the actions of Medicare physicians and providers of designated health services apply directly to Medicaid physicians and providers. As such, these individuals and entities are not precluded from referring Medicaid patients or from billing for designated health services. A State may pay for these services, but cannot receive FFP for them. However, States are free to establish their own sanctions for situations in which physicians refer to related entities.

3. How the referral rules apply when Medicaid-covered designated health services differ from the services covered under Medicare

The statute specifically provides that a State cannot receive FFP for a designated health service if it is furnished to an individual on the basis of a referral that would result in a denial of payment for the service under Medicare *if Medicare* covered the services to the same extent and under the same terms and conditions as under the State plan. We believe this means that Congress was aware of differences in the two programs and specifically intended to cover under section 1877 designated health services as they are covered under a State's Medicaid plan whenever this coverage differs from coverage under Medicare.

4. How the reporting requirements apply under the Medicaid program

Section 1903(s) states that subsections (f) and (g)(5) of section 1877 shall apply to a provider of Medicaid-covered designated health services in the same manner as these subsections apply to a provider of Medicare-covered designated health services. Section 1877(f) requires that each entity providing Medicare-covered items or services must provide the Secretary with certain information about the entity's ownership, investment, and compensation arrangements. The information must include the covered items and services the entity provides, and the names and UPINs of all physicians who have (or whose immediate relatives have) an ownership or investment interest in or compensation arrangement with the entity. These requirements do not apply to designated health services furnished outside of the United States, or to entities the Secretary determines furnish Medicare-covered services infrequently.

Section 1903(s) could be read to mean that section 1877(f) must apply identically to Medicare and Medicaid providers, so that Medicaid entities

must furnish information to the Secretary (that is, to HCFA). However, we are taking the position that the provision allows us to require that entities report directly to the States. Section 1903(s) provides that section 1877(f) applies ''in the same manner'' in the Medicaid program as it does in Medicare. In Medicare, the reports are made to the Secretary, the official who is responsible for making payment under Medicare. ''In the same manner,'' in the context of the Medicaid program, would mean that the reports would be made to the entity that makes payment; that is, the State, thus maintaining a symmetry between reporting in the two programs.

We have taken this position because, under section 1903(s), it is the States that are at risk of losing FFP for paying improper claims for designated health services submitted by entities that have financial relationships with physicians. Therefore, in order to ensure that FFP will be available, States must determine whether a physician has a financial relationship with an entity that would prohibit referrals under Medicare. Our interpretation will allow States to protect themselves and to avoid any duplication of effort with HCFA.

We are amending the regulations to create a new Subpart C, ''Disclosure of Information by Providers for Purposes of the Prohibition on Certain Physician Referrals.'' In § 455.108, ''Basis,'' we state that, based on section 1903(s), we are applying the reporting requirements of section 1877(f) and (g) to Medicaid providers of designated health services. Section 455.109(a) would state that the Medicaid agency must require that each entity that furnishes designated health services submit information to the Medicaid agency concerning its financial relationships, in such form, manner, and at such times as the agency specifies. Although the statute requires that entities submit information to the Secretary, we believe that the State should receive this information in the Medicaid context, in order to help States ensure that they will receive FFP.

Section 455.109(b) would specify that the requirements of § 455.109(a) do not apply to entities that provide 20 or fewer designated health services under the State plan during a calendar year, or to any entity for items or services provided outside the United States. We have derived the limit of 20 or fewer designated health services from the Medicare regulation interpreting section 1877(f) (§ 411.361).

Section 455.109(c) would specify that the information submitted to the Medicaid agency under § 455.109(a) must include at least the following:

- The name and Medicaid State Specific Identifier (MSSI) of each physician who has a financial relationship with the entity that provides services.
- The name and MSSI of each physician who has an immediate relative (as defined in § 411.351) who has a financial relationship with the entity.
- The covered items and services furnished by the entity.
- With respect to each physician identified above, the nature of the financial relationship (including the extent and/or value of the ownership or investment interest or the compensation arrangement), if requested by the Medicaid agency.

Section 455.109(d) would define a reportable financial relationship as an ownership or investment interest or any compensation arrangement, as defined in § 411.351, including relationships that qualify for an exception described in §§ 411.355 through 411.357.

Section 455.109(e) would specify that—

- Entities that are subject to the reporting requirements must submit the required information on a prescribed form within the time period specified by the Medicaid agency. Similarly, entities must report to the Medicaid agency all changes in the submitted information within a timeframe specified by the State. We believe that States have the discretion to determine these deadlines in line with § 455.109(a), which requires that the Medicaid agency gather information on financial relationships in such form, manner, and at such times as the agency specifies.
- Entities must retain documentation sufficient to verify the information provided on the forms and, upon request, must make that documentation available to the Medicaid State agency, HCFA, or the OIG.

Section 455.109(f) would reflect section 1877(g)(5), specifying that any entity that is required, but has failed, to meet the reporting requirements of § 455.109(a), is subject to a civil money penalty of not more than $10,000 for each day of the period beginning on the day following the applicable deadline until the information is submitted. It would further specify that assessment of the penalty will comply with the applicable provisions of 42 CFR part 1003.

IV. Our Responses to Questions About the Law

In this section of the preamble, we have included some of the most common questions concerning physician referrals that we have received from physicians, providers, and others in the health care community. (Note that, in this section, we are using the term ''provider'' in the generic sense to include all providers of health care services. That is, we are not using the term with the special meaning given in our regulations at § 400.202.) We summarize these questions below and present our interpretation of how we believe the law applies in the situations that have been described to us. We have organized this section so that the issues raised by the questions appear in the order in which they appear in the regulation.

A. Definitions

1. Compensation Arrangement

What is an ''indirect'' compensation arrangement? We defined a ''compensation arrangement'' in the August 1995 final rule, in line with the statute, as any arrangement involving any remuneration, *direct or indirect,* between a physician (or family member) and an entity. This means that a compensation arrangement can result when remuneration flows from an entity to a physician or family member, or from a physician or family member to an entity. We have received a number of inquiries on what constitutes an ''indirect'' compensation arrangement. We believe that a physician or family member can receive compensation from an entity, even if the payment is ''funneled through'' a business or other entity or association and even if the payment changes form before the physician actually receives it.

For example, suppose that a hospital has contracted with a group practice for the group to furnish physician services and to otherwise staff the hospital. The hospital pays the group practice, which might be a professional corporation or a similar association or entity, for the physician services under a personal services arrangement, rather than directly compensating the individual physicians. The group practice, in turn, pays the individual physicians a salary that in some way reflects the hospital's payments.

It is our position that, in such a scenario, each physician has been indirectly compensated by the hospital for his or her own services. As a result, the physicians have a compensation arrangement with the hospital. In the absence of an exception, the physicians would be prohibited from referring to the hospital for the furnishing of designated health services.

We believe that a physician has received indirect compensation whether the ''intervening'' professional

association, corporation, or other entity directly receiving payment is a group practice or any other type of physician or nonphysician owned entity. We also believe a physician can receive indirect compensation through a nonprofit enterprise if that enterprise is controlled by an individual who is in a position to influence the physician's referrals. For example, the owner of a clinical laboratory who also serves as the director of a nonprofit research facility could provide a physician with research grants in exchange for referrals to the laboratory. We are considering regarding as indirect compensation any payment to a physician that passes from an entity that provides for the furnishing of designated health services, no matter how many intervening ''levels'' the payment passes through or how often it changes form. We directly solicit comments on this approach.

We would also like to reiterate a point that we made in the preamble to the August 1995 final rule. Just because a hospital or similar entity is affiliated with a physician or group of physicians does not automatically mean that the hospital or similar entity is compensating the physicians. Physicians and entities can have joint ventures and similar relationships in which the hospital or similar entity and the physicians share profits, but do not compensate each other.

Which exceptions apply in indirect situations? We have also received questions about which exception applies when an indirect payment changes form. For example, in the situation described above, a hospital makes payments to a group practice under a personal services arrangement. The group practice, in turn, passes the payments on in the form of salary payments to its physician employees. We believe that the compensation at issue involves a personal services arrangement between the hospital and the group practice (see the discussion in III.E.6 of this preamble about personal services arrangements between entities and group practices, rather than between entities and individual physicians).

We are interpreting the statute to focus on the payment the entity furnishing designated health services initially makes to determine the appropriate exception. In this case, the hospital is making a payment under a personal services arrangement, and is not in any way making a salary payment to its own employees. Thus, we believe the physicians could make referrals to the hospital if the group practice's personal services arrangement with the hospital meets the criteria under the personal services exception.

It is our view that the salary payment from the group practice to its physician employees is a payment separate from the remuneration flowing indirectly from the hospital to the physicians. As a result, this payment, as a payment from the group practice, should itself have no additional effect on a physician's ability to refer to the hospital. (The nature of the payment might, however, affect whether the physicians qualify as a group practice. See the discussion in section III.A.6 of this preamble covering the characteristics of a group practice.)

2. Entity

What are the characteristics of an ''entity'' that provides for the furnishing of designated health services? We have received a number of questions about what constitutes an ''entity'' involved in the furnishing of designated health services and who owns that entity. For example, a group of individuals asked us whether they own a hospital based solely on the fact that they own the building that houses the hospital. We believe that an ''entity'' for purposes of section 1877 is the business, organization, or other association that actually furnishes, or provides for the furnishing of, a service to a Medicare or Medicaid patient and bills for that service (or receives payment for the service from the billing entity as part of an ''under arrangements'' or similar agreement).

An ''entity,'' therefore, does not include any person, business, or other organization or association that owns the components of the operation—such as owning the building that houses the entity or the equipment the entity uses—without owning the operation itself. For example, a physician might own and operate an MRI machine in his or her office. If this physician enters into a lease arrangement for the use of the MRI machine every Tuesday by the physician down the hall, who bills for the services, we believe that the physician down the hall is the entity providing MRI services to his or her patients on Tuesday. This physician could refer patients for MRI services if he or she qualifies for an exception, such as the in-office ancillary services exception.

When is an entity furnishing, or providing for the furnishing of, designated health services? Section 1877(a)(1)(A) prohibits a physician from making a referral to an entity ''for the furnishing of designated health services'' if the physician or a family member has a financial relationship with that entity. The health care community has expressed some confusion about when an entity is one involved in the ''furnishing of'' designated health services.

We have, for example, received questions about which entities are the relevant ones when some entities only bill for services, while others actually directly ''furnish'' the services. For example in an ''under arrangements'' situation, a hospital, rural primary care hospital, skilled nursing facility (SNF), home health agency, or hospice program contracts with a separate provider to furnish services to the hospital's, SNF's, or other contracting entity's patients, for which the hospital, SNF or other contracting entity ultimately bills.

The statutory provisions that mention ''under arrangements'' draw a distinction between services that are actually furnished by the hospital or SNF and those that are actually furnished by the separate, outside entity. (Under section 1861(w)(1), HCFA's payment to the hospital, SNF, or other contracting entity discharges the beneficiary's liability. ''Under arrangements'' situations are further referenced in sections 1861(b)(3) and 1862(a)(14).) We are aware that there are comparable agreements in the community between entities other than hospitals, SNFs, and the other contracting entities listed above, such as agreements between group practices that furnish services to HMO patients, with the HMO billing for the services.

We believe that, absent an exception, the referral prohibition applies to a physician's referrals to any entity that directly furnishes designated health services to Medicare or Medicaid patients. We believe the prohibition also applies to referrals to any entities that arrange ''for the furnishing of'' these services to Medicare or Medicaid patients by contracting with other providers, whenever it is the arranging entity that bills for the services.

This interpretation is consistent with the intent of the statute. Congress intended, in enacting section 1877, to prohibit referrals in situations in which a physician has a financial incentive to overutilize the various designated health services and to steer patients toward certain providers of these services. For example, a physician might routinely refer patients to a SNF in which he has a financial interest and prescribe occupational therapy (OT) services. The SNF, in turn, might contract with a separate, unrelated entity to furnish SNF patients with the OT, for which the SNF bills. Even if the physician has no relationship with the separate OT provider, he does have a

financial relationship with the SNF that is providing for ''the furnishing of'' OT to referred patients. As a result, the physician can potentially profit from each referral he or she makes for OT, even if the SNF must first purchase those services from an outside source before passing on the cost to its patients.

If, however, the unrelated OT entity itself bills for the services under Part B, so that the SNF only helps to make these services available to its patients, our conclusion would be different. In this situation, we do not believe that the physician has a financial incentive to overutilize OT services. As a result, we would not regard the SNF as an entity involved in ''the furnishing of'' a designated health service.

We also believe that a physician can have an incentive to overutilize services if he or she has a financial relationship with the entity that directly furnishes designated health services, even if this is not the entity ultimately billing for the services. In these situations, the physician can potentially recognize a profit from each referral based on the fact that the designated health services will, in essence, be sold to the entity that bills.

For example, a physician who is a member of a group practice might work in a hospital as a staff physician and refer patients to the group's own outside laboratory in which the physician has an ownership interest. The laboratory, in turn, furnishes services to hospital patients under arrangements. The hospital will therefore be billing Medicare for laboratory services furnished by the physician's own laboratory. In this case, the physician is in a position to influence how many services the laboratory will be able to ''sell'' to the hospital. Thus, the physician should be prohibited from making these referrals, unless one of the exceptions applies.

We believe our policy of including entities that contract for services as those that provide for ''the furnishing of'' designated health services is consistent with the structure of section 1877 and the way the exceptions are drafted. For example, under section 1877(b)(3), services are excepted if furnished by an organization that functions under a prepaid plan, such as an HMO. It is our understanding that such services are very often made available in a manner that is comparable to ''under arrangements'' situations; that is, the prepaid organization contracts with a broad range of independent suppliers and providers to furnish services to its enrollees. This exception makes no distinction between services that are furnished directly by the HMO and those that are furnished under contract by outside providers: all such services appear to be considered as furnished by the HMO, and would be excepted.

Similarly, section 1877(d)(3) excepts certain ''designated health services provided by a hospital,'' but makes no distinctions between services the hospital itself furnishes and those furnished by the hospital under arrangements.

3. Financial Relationship

How do equity and debt qualify as ownership? The statute states that an ownership interest can be through equity or debt. We have received a number of inquiries about what this provision means and what kinds of debt situations constitute a form of ownership. We believe that ''ownership through equity'' refers to a direct ownership interest that does not involve debt; for example, one in which the physician or family member has actually purchased assets of a business entity with cash or other property. This interest could be in the form of stock in a publicly-held entity or an investment (such as a capital contribution) in a partnership.

We believe that a physician or family member holds an ownership interest in an entity ''through debt'' anytime the physician or family member has lent money or given other valuable consideration to the entity and the debt is secured (in whole or in part) by the entity or by the entity's assets or property. For example, the physician could hold such an interest by providing the entity with a note, a mortgage or by purchasing bonds. This interpretation is consistent with the definition of an ownership or control interest in section 1124(a)(3) of the Act, which governs which suppliers and providers must disclose these interests to us for purposes other than the referral prohibition. Section 1124(a)(3)(A)(ii) defines a person with an ownership or control interest as a person who is the owner of a whole or part interest in any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by the entity or any of the entity's property or assets, if the interest is worth a certain amount.

We also believe that ownership through debt can exist in any other debtor-creditor relationships that have some indicia of ownership. For example, such indicia could include the creditor's participation in revenue or profits, subordinated payment terms, low or no interest terms, or ownership of convertible debentures (bonds that a physician or family member can convert into the common stock of the issuer or an affiliate until the convertible feature expires).

However, if a physician or family member has made an unsecured or nonconvertible loan to an entity, or a loan with no other indicia of ownership, we do not believe the loan is an ownership interest. The loan would likely qualify as a compensation arrangement, to which an exception might apply.

We do not believe that a physician or family member has ''ownership through debt'' when either of them has received a loan *from* an entity. In ordinary business transactions, when a debtor receives a loan, this transaction in no way establishes for the debtor an ownership interest in the creditor. We also assume that in providing the loan, the creditor entity has provided remuneration to the physician or family member, resulting in a compensation arrangement. This kind of compensation arrangement could meet one of the exceptions to the prohibition. For example, the loan might be one form of payment an entity makes to a physician to recruit the physician or as part of the physician's employment contract. The loan would be an excepted arrangement if it met the fair market value and other standards in these exceptions.

Is membership in a nonprofit corporation an ownership or investment interest? We have received a number of inquiries concerning whether membership in a nonprofit corporation constitutes an ownership or investment interest in that corporation. (We are assuming that a ''member'' is someone who establishes, sponsors, directs, or controls a nonprofit corporation.) Most nonprofit health care corporations that are exempt from Federal income taxation are exempt under section 501(c)(3) or (4) of the Internal Revenue Code. These provisions state that the net earnings of such a corporation cannot inure to the benefit of any private shareholder or individual. Therefore, while members of such a nonprofit corporation may exercise control over the activities of the corporation, they do not have the pecuniary incentive that for-profit investors have to enhance their investment interests. As such, we do not regard being a member of these kinds of nonprofit corporations as an ownership or investment interest analogous to being a shareholder in a for-profit corporation. However, any remuneration that the physician or family member receives from the corporation, such as a salary, would be compensation and must meet an exception.

Do stock options and nonvested interests constitute ownership? We have been asked whether a physician or family member has an ownership interest in an entity if he or she receives an option to purchase the stock of the entity or an affiliate, such as when an employee has a stock option that constitutes part of his or her pay. We have also received questions about retirement funds or similar options that do not vest until a future date. For example, a physician might hold an option to purchase stock at a particular price, but not be able to exercise that option until he or she retires. Similarly, a physician might be entitled to certain retirement funds only after he or she has retired after having worked a specified number of years.

The statute defines an ownership interest in section 1877(a)(2) as an interest held through equity, debt, or other means. It is our view that options and nonvested interests are inchoate or partial ownership interests that qualify as ''ownership'' for purposes of this law. We base our interpretation on the fact that a physician has a tremendous incentive to refer to an entity in which he or she is invested, whether the interest is a present or future one. For example, if a physician has an option to buy stock at a certain price in a clinical laboratory, the physician will have an interest in generating business for the entity in order to enhance the value of that stock.

4. Group practice

What is the ''full range of services'' test? One of the criteria in the statutory definition of a group practice is that each member must furnish substantially the full range of services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment through the joint use of shared office space, facilities, equipment, and personnel. We have been asked about the meaning and purpose of this provision, and how it will affect a physician's normal practice patterns. only token tasks, for the group. It is our view that this standard should not alter a physician's ordinary schedule or practice habits. For example, one physician described himself as having two specialty areas, which resulted in his providing dermatology services to one group one day a week, and another kind of service to another group on a different day. We believe that different kinds of services such as these on different days can reflect a physician's normal ''routine of services.'' That is, a physician can furnish one type of service that is that physician's ''full range of services'' on a particular day, as long as the physician is legitimately practicing medicine for the group practice on that day.

5. Immediate family member or member of a physician's immediate family

How does the prohibition affect a physician's referrals to immediate family members? The referral prohibition in section 1877(a) states that if a physician, or immediate family member, has a financial relationship with an entity, the physician cannot refer a Medicare patient to that entity for the furnishing of designated health services, unless an exception applies. In § 411.351 of the August 1995 final rule, we listed the individuals who qualify as a physician's ''immediate'' family members. These individuals include, among others, spouses and children of a referring physician.

We have received a number of inquiries from physicians about whether the statute precludes a physician from referring patients to a family member to receive designated health services, if the referring physician has no financial relationship with the entity furnishing the services. We believe the answer to this question depends upon the nature of the family member's financial relationship with the furnishing entity.

If a family member has a compensation arrangement with the entity furnishing the designated health services, the physician cannot refer to the entity, unless the arrangement meets one of the exceptions under the statute. For example, a physician might wish to refer a patient to her husband for occupational therapy services. The husband furnishes OT services as an employee of an occupational therapy facility. The husband, who is an immediate family member of the referring physician, has a compensation arrangement with an entity that furnishes a designated health service (the OT facility pays him a salary). However, the referral would be acceptable if the arrangement meets the requirements in section 1877(e)(2), which excepts bona fide employment relationships between employers and physicians or immediate family members if the relationship meets fair market value and other standards.

The situation is similar if a physician refers a patient to an immediate family member who has an ownership or investment interest in the facility that furnishes the designated health services. For example, the physician may wish to refer a patient to his wife, who is a solo practicing physician who herself furnishes OT. If the wife owns the practice, she would have a financial relationship with the entity that furnishes the designated health services. The husband's referral would not be prohibited if the wife's relationship qualifies for one of the exceptions under the statute. For example, the wife's practice might qualify as a rural entity, the ownership of which is excepted under section 1877(d)(2) of the Act. However, if an exception does not apply, the referring physician would be precluded from referring to his spouse.

Physicians have also asked us whether the in-office ancillary services exception in section 1877(b)(2) applies to those situations in which a physician refers a patient to an immediate family member who furnishes designated health services outside of the referring physician's practice. The ancillary services exception applies when a physician refers a patient for a service that the referring physician either will personally perform or directly supervise, or that will be personally performed or directly supervised by another member of the referring physician's group practice. As a result, referring physicians can refer patients to and among themselves, within their own practices, if they meet the section 1877(b)(2) requirements. However, the exception does not apply when physicians refer to their spouses or to other close relatives who furnish services outside of the practice.

In creating the in-office ancillary services exception, we believe that Congress made a policy decision not to restrict certain referrals that occur within the confines of one practice. We are not aware of any rationale for extending this ''single practice'' exception to any outside entities, whether or not those entities have a financial relationship with an immediate family member.

We would also like to point out that a physician may send a patient to an immediate relative without actually ''referring'' that patient for a designated health service. A referral is defined in section 1877 for purposes of Part B services as, with an exception for certain specialized services, the request by a physician for an item or service, including the request for a consultation with another physician (including any test or procedure ordered by, or to be performed by (or under the supervision of) that other physician). We have interpreted this provision in section III.A.7 of this preamble to apply to just requests by the physician for designated health services covered under Part B, rather than any Part B item or service. For other kinds of items and services, a referral is, with an exception for certain specialized services, the request or establishment of a plan of care by a

physician, which includes the provision of a designated health service.

We believe a referral would be acceptable where the referral is not for a designated health service. For example, a physician who is a general practitioner might believe that a patient has a neurological problem, but be unsure of a diagnosis. This physician could refer the patient to his or her neurologist spouse, if the referral is not a ''consultation'' (see our discussion of ''consultations'' in section III.A.7 of this preamble). That is because the referring physician has not requested a designated health service or established a plan of care including one, nor has he or she requested a consultation. We believe the referral, in this case, is for physician services, which are generally not designated health services. If the spouse, in turn, determines that the patient requires an MRI, the spouse would be the one making the referral for this designated health service.

If one member of a group practice cannot make a referral to an entity, are all other group practice physicians also precluded? Group practices have informed us that they are concerned about the definition of a ''referring physician'' in § 411.351, and how it affects a group when one member is precluded from referring to a particular entity that furnishes designated health services. In particular, several groups wondered whether having a physician member whose immediate relative has an unexcepted ownership interest in an entity would preclude all group practice members from referring to that entity. Groups believe that the preamble to the final rule covering referrals to clinical laboratories implied that the referral prohibition would be imputed to all physician members.

Section 411.351 defines a ''referring physician'' as a physician (or group practice) who makes a referral (as defined elsewhere in the regulations). We interpreted this definition to mean that when an individual group member refers, the entire group has referred. As a result, any member of a group who has an unexcepted financial relationship (or whose relative has such a relationship) with an entity could ''taint'' the referrals of the entire group.

We have reconsidered this issue and now propose to amend the definition to exclude any reference to the entire group practice. We believe that the statute was drafted to cover the referral behavior of individual physicians and to regulate the entities to which they refer. There does not appear to us to be any clear reason to extend the effects of one physician's relationships and behaviors to other physicians, just because they are all members of the same group practice. As several practices have pointed out to us, being members of the same group practice does not mean that physicians automatically have the opportunity, power, or incentive to exert pressure on each other to refer to their related entities.

However, in any instance in which a group member is in a position to exert influence or control over the referrals of other group physicians, the prohibition could still apply. For example, group members could be subject to sanctions if their referral patterns reveal a circumvention scheme between them. Similarly, if a group practice owner conditions payment to his or her employee members on referrals to the owner's laboratory, the employment could be a compensation arrangement that triggers the prohibition.

6. Remuneration

Do payments qualify as remuneration only if they result in a net benefit? Certain members of the provider community have requested that we interpret a payment as remuneration only if it is made in exchange for identifiable property or services. Under this theory, if the physician or entity making the payment has no expectation of or entitlement to something of value in return for the payment, there would be no compensation arrangement, even if other physicians or entities might benefit from the exchange.

In the August 1995 final regulation, we defined remuneration as ''any payment, discount, forgiveness of debt, or other benefit made directly or indirectly, overtly or covertly, in cash or in kind,'' except for a narrow list of remuneration excluded from the definition by section 1877(h)(1)(C). We believe that remuneration generally involves any payment of cash, property, or services, whether or not either or both parties receive a net benefit. For example, we would regard as remuneration the repayment of a loan, even if there are no accompanying interest payments.

We base this interpretation on the statute, which excepts from compensation arrangements under section 1877(h)(1)(C) only very limited and specific types of remuneration. Among the list is the forgiveness of amounts for the correction of minor billing errors; that is, small amounts that are excused by one party in order to even out the parties' accounts. However, the statute does not except amounts that are forgiven to even out larger billing errors, nor does it contain a general exception for remuneration that does not result in a net benefit for one or both of the parties. (The correction of a large billing error might, however, qualify as an ''isolated transaction'' or qualify for the new exception in § 411.357(l) as part of a fair market value exchange.)

We believe that the statute is designed to prohibit referrals whenever a physician makes a payment to an entity or an entity makes a payment to a physician, regardless of who profits or gains. The statute, in our view, contains a presumption that if there has been a payment of any kind, a physician should not refer. As a result, the agency need not ''look behind'' each transaction to ascertain whether the physician has gained some benefit as a result of the transaction, has realized little or no net benefit, or has benefitted too much. The law does, however, designate certain very specific compensation arrangements that require that the Secretary ''look behind'' them and except them if the exchanges of payment meet fair market value and certain other standards.

It is our view that the one-way payments described by the providers are remuneration. If a payment does not reflect an actual fair market value exchange, it could easily serve as the vehicle for referral payments. We believe the law was meant to prevent a physician from referring to an entity if that physician (or a family member) is receiving payments of any kind that cannot be accounted for as part of a fair exchange.

B. General Prohibition—What Constitutes a Prohibited Referral

Does the prohibition apply only if a physician refers directly to a particular related entity? As we mentioned in the section above covering the definition of ''entity,'' section 1877(a)(1) prohibits a physician from making a *referral to an entity* for the furnishing of designated health services if the physician or immediate family member of the physician *has a financial relationship* with that entity. Section 1877(h)(5) defines a referral very broadly: A referral is the request by a physician for a Part B item or service (including certain consultations). In addition, ''the request or establishment of a plan of care by a physician that includes the provision of [a] designated health service'' constitutes a ''referral'' by a ''referring physician.'' We have interpreted this provision in § 411.351 of the August 1995 final clinical laboratory rule to mean that a physician has made a referral if he or she has made a request for a Part B item or service or a request for other items or services that includes the provision of laboratory services or if he or she has

established a plan of care that includes the provision of laboratory services.

The ''referral'' provision requires that a physician only request an item or service or include it in a plan of care; it does not require that the physician directly send a patient to a particular entity or specifically indicate in a plan of care that the service must be provided by a particular entity. However, section 1877(h)(5) must be read in conjunction with the prohibition in section 1877(a)(1). The general prohibition applies only when a physician makes a referral *to an entity* for the furnishing of a designated health service if the physician or a family member has a financial relationship *with that entity.*

For example, a physician might have a small noncontrolling ownership interest in a provider of a designated health service, such as a physical therapy (PT) facility. The physician does not directly refer patients to this provider. However, the physician does establish plans of care for patients in a hospital setting, which include PT services. When a particular patient leaves the hospital, the physician may refer the patient to an unrelated skilled nursing facility (SNF) that, in turn, refers the patient to the related PT provider. The PT facility bills the patient separately. As a result, the patient may receive services prescribed by the physician from an entity with which the physician has a financial relationship.

In situations such as this one, the physician has prescribed a plan of care that includes designated health services, an action that constitutes a referral. However, the physician has not made the referral to an entity with which he or she has a financial relationship. Instead, the physician has made the referral to an SNF with which he or she has no financial relationship. As such, the referral prohibition would generally not apply. Nonetheless, if there was any evidence that the physician has an agreement with the SNF that involves the SNF systematically referring the physician's Medicare patients to the physician's PT facility, we would likely investigate the situation as a possible circumvention scheme.

When is the owner of a designated health services provider considered as equivalent to that provider? We have received several comments about when a physician who has an ownership interest in an entity that furnishes designated health services should be equated with that entity. For example, suppose that a physician regularly refers patients to an SNF in which the physician has no investment interest. The SNF, in turn, buys PT services from a PT facility that also provides other noncovered items and services to the SNF and is owned solely by the physician. Arguably the referring physician, as sole proprietor of the PT facility, is related to the SNF because the physician's PT facility sells PT and other, noncovered services to the SNF. We believe that it is likely, in this situation, that the physician is in a position to negotiate or influence the terms of the arrangement, as well as to initiate patient referrals to the SNF.

We believe that there is a potential for abuse in such situations. For example, the physician may be referring as many patients as possible to the SNF in exchange for inflated rates from the SNF for the variety of noncovered items and services that the PT facility furnishes, or for any covered services that are not subject to a fee schedule. Although the SNF may be negotiating with the PT facility as a corporate or other business entity, we would equate the referring physician and the PT facility with each other when the referring physician (or a family member) has a significant ownership or controlling interest that allows him or her to determine how the PT facility conducts its business and with whom. We will consider a number of factors in these situations, such as whether the physician or the physician in combination with his or her immediate family members owns all or a controlling amount of the stock of an entity, and whether the physician and/or the family members are making decisions for the entity, particularly on a day-to-day basis. Our analysis will depend upon the entire record of the interrelationship between the physician and/or immediate family members and the entity, whether the relationships are direct or indirect, and the totality of the circumstances.

We believe the analysis is similar when a referring physician receives compensation from an entity that is owned or controlled by a party that also owns a designated health services provider. For example, suppose that a physician owns a controlling interest in a general practice clinic, and also independently owns a controlling interest in an outside laboratory in which the clinic itself has no interest. The clinic also employs a number of physicians who receive salaries from the clinic corporation.

Arguably, the employee physicians in this situation have no financial relationship with the outside laboratory. That is, they do not themselves own any part of the laboratory, nor do they receive compensation from or pay compensation to the laboratory entity. However, if we were to take the position that there is no financial relationship, and hence no referral prohibition, the physician owner of the laboratory, by controlling the clinic, could arrange to compensate the employee physicians with inflated salaries based directly on the number of referrals they make to the outside laboratory.

In order to avoid this result, we propose to equate the owner physician with the outside laboratory and with the clinic when he or she owns or controls them. Under this interpretation, we would regard the employee physicians as receiving compensation from the laboratory. Although this compensation is indirect, we believe it is covered by the statute. Section 1877(h)(1) defines a ''compensation arrangement'' as any arrangement involving any remuneration (with certain narrow exceptions). ''Remuneration,'' in turn, is defined as any remuneration paid directly or indirectly.

If the physician, on the other hand, has a noncontrolling interest in the outside laboratory, we would not equate the owner physician with the laboratory. However, we would regard this situation as a potential circumvention scheme. That is, we would regard the physician owner in this situation as referring indirectly, through the employee physicians, to a designated health services provider to which the owner physician cannot personally refer. The inflated salaries of the employee physicians, in fact, could serve as evidence of the existence of such a circumvention scheme.

The analysis would vary somewhat if the referring physicians are compensated by an entity, rather than an individual physician. Suppose, for example, that a hospital hires physicians to serve on its staff. The hospital compensates the physicians for their services, but inflates their salaries to reflect all the referrals they make to a separate MRI subsidiary that is not part of the hospital but is owned by it. If the hospital owns a controlling share of the MRI entity, we would regard the hospital and the entity as equivalent.

The analysis would be different if the hospital owns less than a controlling interest in the MRI facility. Arguably, the physicians are compensated by an entity (the hospital) that is technically separate from the one providing the referred MRI services. The physicians do not own the MRI facility, nor do they receive payment from it. Nonetheless, if the physicians receive payments from the hospital that exceed fair market value for the services they are otherwise providing, we propose to presume that they are being indirectly compensated by the MRI facility, through the hospital, for their referrals.

Has a physician made a referral to a particular entity if another individual directs the patient there?

We have received inquiries about situations in which a physician requests a designated health service, but it is another individual, such as a discharge planner, who follows the physician's plan of care and refers the patient directly to a specific provider. We discussed this issue in the August 1995 final rule. In the preamble to that rule at 60 FR 41941, we stated that a physician who establishes a plan of care or requests an item or service is responsible for the referral, even if it is another individual or an institutional entity that carries out that plan of care for the physician. For example, we stated that we would not allow a hospital physician to avoid the referral prohibition by claiming that it is the hospital that actually makes the referral or selects the provider in his or her place. We took this position in order to prevent a physician from disavowing all referrals by having personnel or employers carry them out.

In light of our analysis in the responses to the last two questions, we would like to refine our position on this issue. That is, we want to qualify our position to ''impute'' a physician's referrals to others only in those situations in which the physician has the ability to control or influence the individuals who select an entity. We would also ''impute'' referrals if a physician is him or herself in a position to be compensated for the referrals by those who can control or influence the actions of the person who actually selects the entity.

For example, suppose that a physician works for a hospital and refers a patient to the hospital's discharge planner for laboratory tests. The discharge planner in turn refers the patient to the hospital's laboratory. We would regard the physician's request and referral to the discharge planner as a referral to an agent of the entity that owns the laboratory; that is, to an agent of the entity that furnishes designated health services. We believe that such a referral would be governed by the rules in section 1877. Suppose, on the other hand, that the discharge planner refers the patient to an outside laboratory that happens to be owned by the hospital. The physician in this situation may not be able to compensate the discharge planner or otherwise in any way influence that individual's actions. Nonetheless, if the hospital pays the physician to order as many laboratory tests as possible, and in turn pays the discharge planner to refer patients directly to a hospital-owned provider, we would impute the referral to the physician.

We can translate these rules into a group practice setting. For example, a group practice member might request a designated health service, but allow a nonphysician employee to direct the patient to a particular provider. If the nonphysician refers the patient to the group's own provider, we would regard the referral as the physician's own referral to an agent of a provider of designated health services. This arrangement, we believe, would be subject to the referral rules. For outside referrals, we would gauge whether the physician member is in any position to control the actions of the nonphysician. In order to gauge whether a physician is in a position to affect a nonphysician's actions, we propose to use the same ownership and control rules that we mentioned above. We would also impute the referral to the physician if the entity compensating the physician is in a position to both compensate the physician for his or her referrals and to control the actions of the individual who selects the provider.

How will HCFA interpret situations in which it is not clear whether a physician has referred to a particular entity?

A physician might request or order a designated health service for a patient without establishing a record of whether he or she referred the patient to a specific provider. If the patient receives the designated health service from an entity with which the physician (or a family member) has a financial relationship, as the result of the referral, we will presume that the service results from the physician referring to that specific entity. We will allow physicians to rebut that presumption by establishing that they mentioned no specific provider or supplier or that the patient was directly referred by some other independent individual or through an unrelated entity.

C. General Exceptions That Apply to Ownership or Investment Interests and to Compensation Arrangements

1. The in-office ancillary services exception

Can a physician supply crutches as in-office ancillary services? The in-office ancillary services exception in section 1877(b)(2) applies to services that meet the requirements for supervision, location, and billing, but not to any parenteral and enteral nutrients, equipment and supplies or to durable medical equipment (DME) (although the exception does apply to infusion pumps). Many physicians have brought to our attention the problems with excluding crutches from the exception. That is, an orthopaedist might diagnose a patient with a broken leg, set the leg, personally furnish the patient in his or her own office with crutches, and then bill for those crutches. If the patient will use the crutches at home, they qualify as DME. Physicians have pointed out that this exclusion will cause great inconvenience to such patients, who will have to obtain crutches or similar equipment elsewhere.

We agree that excluding crutches from the section 1877(b)(2) exception could cause great inconvenience to patients, and disrupt the efficient delivery of health care services. We regard crutches as different from other DME in that a patient very often needs them immediately after treatment for an injury that has resulted from an unexpected traumatic event. Thus, patients may often be precluded from arranging to receive crutches in advance from other, unrelated entities. Nonetheless, the Secretary does not have the authority to simply create a blanket exception for crutches. The Secretary only has the authority, under section 1877(b)(4), to create new exceptions in the case of any other financial relationship that the Secretary determines, and specifies in regulations, does not pose a risk of program or patient abuse. We have no evidence that allowing physicians a blanket exception to self-refer for crutches will be free from abuse. In the ownership context, for example, each referral will inherently increase a physician's or group practices' profits.

We are thus proposing to create an exception, at § 411.355(e), that we believe will remedy this problem, while meeting the statutory condition. That is, the exception would apply only to situations in which a physician furnishes crutches in a manner that meets the in-office ancillary services requirements in section 1877(b)(2) (and in § 411.355(b)), provided the physician realizes no direct or indirect profit from furnishing the crutches. In other words, Medicare will pay for the crutches if the physician bills only for the cost he or she incurred to acquire and supply the crutches or to create or manufacture the crutches. We believe that there is no threat of abuse in these situations, since physicians will have no incentive to overutilize crutches.

2. Exception for services furnished by organizations operating under prepaid plans

Can a physician refer non-enrollees to a related prepaid organization or to its physicians and providers?

We have been asked about situations in which a physician furnishes services to managed care patients under a personal services contract, but wishes to refer his or her own outside, fee-for-service Medicare patients for designated health services to the managed care entity, or to physicians, suppliers, or providers that are affiliated with the managed care entity. If the physician refers to an otherwise unrelated physician, provider, or supplier that is affiliated with the managed care entity, but is not part of it and accepts the fee-for-service patient independently, the referral prohibition should not apply. That is, the physician would not be referring to the managed care entity with which he or she has a financial relationship.

The analysis would be different, however, if the other physician, provider, or supplier is functioning as part of the managed care entity. For example, a physician might provide services to enrollees of a Federally qualified HMO under a contract arrangement. These services are excepted from the referral prohibition by section 1877(b)(3). However, when the physician wishes to refer a fee-for-service Medicare patient to the HMO's laboratory, the physician is making a referral to an entity with which the physician has a financial relationship. That is, the physician's personal services contract constitutes a compensation arrangement with the HMO.

In order for the physician in this situation to refer, the financial relationship must meet one of the compensation-related exceptions in section 1877 or in this proposed rule. For example, the physician could continue to refer if his or her arrangement meets the criteria in the personal services exception in section 1877(e)(3) and in § 411.357(d) of this proposed rule. The compensation the physician receives from the HMO would have to be, among other things, consistent with fair market value, and could not reflect the volume or value of the physician's referrals (except as allowed under a physician incentive plan). We have proposed to define the concept of a ''referral,'' for purposes of section 1877, as limited to a referral for a designated health service that may be covered under Medicare or Medicaid (see our discussion of the definition in section III.A.7 of this preamble). Thus, the ''volume or value'' standard would automatically be met if (in the context of the physician's HMO practice) the physician treated and referred only non-Medicare or non-Medicaid HMO enrollees (that is, the physician's HMO compensation would never reflect the volume or value of Medicare or Medicaid referrals).

If, on the other hand, the physician is compensated by the HMO for treating HMO enrollees who are covered by Medicare or Medicaid, the compensation would be subject to the ''volume or value'' standard. Hence, the arrangement could still meet the personal services exception if the physician's compensation does not reflect Medicare or Medicaid covered referrals or reflects them only as part of a physician incentive plan, as these plans are described in section 1877(e)(3)(B), and in § 411.351 of this proposed rule.

As noted earlier in this preamble, we believe that, for the most part, physicians working for managed care organizations or as part of an integrated delivery system will be able to refer Medicare and Medicaid patients within these systems, provided their arrangements with these entities meet certain standards. However, we anticipate that there may be some unusual situations in which an exception does not apply. One example of providers in a delivery system who may be adversely affected by the referral prohibition involves providers under Medicaid primary care case management (PCCM) programs.

We are aware that, under certain circumstances, some providers contracting under these managed fee-for-service programs may not be eligible for any of the existing exceptions written into the law or proposed in this rule. Because the Secretary can only create new exceptions for financial relationships which she determines pose no risk of program or patient abuse, we have not created a blanket exception for Medicaid PCCM programs. However, we do not wish, as an unintended consequence of this decision, to discourage the participation of Medicaid providers in PCCM programs, thereby threatening Medicaid beneficiaries' access to care. Therefore, we are soliciting comments from States and others on the potential impact of the referral prohibition on Medicaid PCCM programs and the providers who contract under them.

One example of a situation in which a PCCM provider might be prohibited from making a referral involves HMOs that contract as primary care case managers. While HMO participation in PCCM programs is relatively rare, HMOs in some States have contracted to serve as case managers to the disabled population. Such contracts allow the HMO to gain experience in serving the disabled without having to accept the financial risk that an HMO would normally accept under a capitation contract. As States move to enroll more of their disabled populations into capitated programs, involving HMOs in PCCM programs could serve as a transitionary method of developing a managed care provider network that is experienced in caring for the disabled.

If an HMO physician who is required by contract to refer within the HMO's network wishes to refer a PCCM patient within that network, his or her financial relationship with the HMO would have to meet one of the existing exceptions in the law or in this proposed rule. Because the HMO in the above example is paid on a fee-for-service basis under the PCCM program, none of the exceptions for services furnished by pre-paid risk plans would be appropriate.

The manner in which we have interpreted the volume or value of referrals standard in this proposed rule could prevent the financial relationship from qualifying for one of the compensation-related exceptions. Most of these exceptions can be satisfied only if a physician's compensation does not reflect the volume or value of his or her referrals. Certain provider contracts that require a physician to refer within a defined network of providers could violate that standard. (We discuss our interpretation of this standard in section III.E.3.) That is, regardless of whether the physician's income actually varies based on the volume or value of referrals, the physician's income reflects the referrals because it could be lost entirely if the physician repeatedly refers patients out-of-network. If the financial relationship does not qualify for an exception, there may be no Federal matching funds for any in-network referral of PCCM patients made by this physician.

3. Other permissible exceptions for financial relationships that do not pose a risk of program or patient abuse

Should situations that meet a safe harbor under the anti-kickback statute be automatically excepted? We have received inquiries about the Secretary's authority under section 1877(b)(4) to create additional exceptions for financial relationships which the Secretary determines, and specifies in regulations, do not pose a risk of program or patient abuse. We have had some requests that the Secretary create an exception for any financial relationship that meets a safe harbor under the anti-kickback statute. As we have stated elsewhere in this preamble, the anti-kickback statute in section 1128B(b) and section 1877 are totally independent laws, with separate

requirements. In order for a physician who has a financial relationship with an entity to refer to that entity, the arrangement must meet the requirements in both laws. However, we are willing to consider this option and specifically solicit comments on whether meeting a safe harbor would qualify an arrangement as one that involves no risk of program or patient abuse.

D. Exceptions That Apply Only to Ownership or Investment Interests

1. Exception for ownership in publicly traded securities or mutual funds

Does the exception for publicly traded securities apply to stock options? We have been asked whether ownership of an option to purchase stock in an entity that furnishes a designated health service constitutes an excepted ownership interest in the entity. As we stated in section IV.A.3 above, we regard the option to purchase stock in an entity as an inchoate ownership interest that could subject a physician to the referral prohibition. As such, all of the exceptions that ordinarily apply to ownership interests would apply. However, the exception for publicly traded securities would not apply if the stock option involves investment securities that may not be purchased on terms generally available to the public, as required by section 1877(c)(1).

2. Exception for services provided by a hospital in which a physician or family member has an interest

Can a physician or family member own an interest in a chain of hospitals? Section 1877(d)(3) contains an exception for designated health services provided by a hospital (other than a hospital in Puerto Rico) if the referring physician is authorized to perform services there, and the ownership or investment interest is in the hospital itself (and not merely in a subdivision of the hospital). We discussed at some length in the August 1995 final rule how we believe an individual can hold an interest in a subdivision of a hospital.

We have received inquiries about whether this exception applies if a physician or family member holds an interest in a company or network that owns a chain of hospitals, rather than an interest in the one hospital to which the physician makes referrals. It is our view that a physician can have an ownership or investment interest in a hospital that is part of a chain by virtue of holding an interest in the organization that owns the chain. We base our position on the language of the exception, which does not require that the physician have a direct interest in the hospital. In addition, we believe that the exception in section 1877(d)(3) must be read in conjunction with section 1877(a)(2), which states that a physician's or family member's ownership or investment interest in an entity that provides a designated health service constitutes a financial relationship with that entity. This provision further defines an ownership or investment interest in an entity to include an interest in an entity that holds an ownership or investment interest in any entity providing the designated health services. Thus, by definition, a physician who has an ownership interest in a health system that owns a hospital that provides designated health services has an ownership interest in that individual hospital. If that indirect interest is in the hospital as a whole, and not in a subdivision, then the exception should apply. In fact, we believe that it would be illogical to specifically apply the referral prohibition in section 1877(a)(1) to any indirect ownership interest, yet deny an exception in section 1877(d) that is based on ownership just because the interest is indirect, especially when the exception itself does not require a direct interest.

Nonetheless, in order to meet the hospital ownership exception, we believe the law requires that the physician be authorized to perform services at the hospital to which he or she wishes to refer. We do not believe that this last requirement is met if the physician has these privileges with any one of the other hospitals in the chain, but not with the referral hospital.

We also wish to make the point that any ownership interest a physician or family member has in a hospital could involve a separate compensation arrangement. For example, if a physician acquires an interest in a hospital from a health care network, this acquisition could constitute remuneration from an entity that provides designated health services. Consequently, for the physician to refer to the entity, the arrangement would have to meet a compensation-related exception.

E. Exceptions That Apply Only to Compensation Arrangements

1. Compensation arrangements in general

Can a lease or arrangement for items or services have a termination clause? The lease exceptions for space and equipment and a number of the other compensation exceptions require that, among other things, the arrangement be in writing and provide for a term of at least 1 year. We believe that this requirement has been met as long as the arrangement clearly establishes a business relationship that will last for at least 1 year. Nonetheless, it is our view that the arrangement can still qualify for the exception even if it also includes a clause allowing the parties to terminate sooner for good cause, provided the parties do not enter into a new arrangement within the originally established 1 year time period.

We believe that Congress included the 1 year requirement with the intention of excepting stable arrangements that cannot be renegotiated frequently to reflect the current volume or value of a physician's referrals. Nonetheless, we do not believe that Congress intended, in creating this requirement, to bind parties to an arrangement once that arrangement has become unsatisfactory to some or all of the parties. Therefore, we are interpreting all of the exceptions with the 1 year requirement to allow terminations for good cause, provided the parties do not, within the 1 year period, enter into a new arrangement. We also believe that a lease or arrangement must be renewed in at least 1 year increments, so that it is always an agreement that provides for a term of at least 1 year. That is, once the first year of an agreement expires, it cannot be converted into, for example, a month-by-month arrangement that could fluctuate with a physician's referrals.

Will a physician's referrals be prohibited if an entity pays for certain incidental benefits? Entities, such as hospitals, often provide physicians with certain incidental benefits, such as their malpractice insurance, or with reduced or free parking, meals, or other incidental benefits. We believe the answer to this question hinges on the nature of any other financial relationship the physician has with the entity. For example, if a physician receives free ''extras'' such as malpractice insurance, parking, or meals while he or she serves as the entity's employee, then these extras might qualify as part of the compensation that the physician receives under a bona fide employment relationship, provided they are specified in the employment agreement. If the physician or entity can demonstrate that the extras constitute part of the payment that such entities typically provide to physicians, regardless of whether they make referrals to the entity, the extras might constitute payment that is consistent with fair market value and that furthers the entity's legitimate business purposes. If an incidental benefit cannot meet the requirements under a statutory exception or the new general exception

for compensation arrangements we have included in § 411.357(l), it might still meet the de minimis exception we have added in § 411.357(k) if it has limited value. We have also been asked about parking spaces that a hospital provides to physicians who have privileges to treat their patients in the hospital. It is our view that, while a physician is making rounds, the parking benefits both the hospital and its patients, rather than providing the physician with any personal benefit. Thus, we do not intend to regard parking for this purpose as remuneration furnished by the hospital to the physician, but instead as part of the physician's privileges. However, if a hospital provides parking to a physician for periods of time that do not coincide with his or her rounds, that parking could constitute remuneration.

2. Exception for agreements involving the rental of office space or equipment

Can a lessee sublet office space or equipment? Section 1877(c)(1) and (2) excepts from compensation arrangements that trigger the referral prohibition, payments made by a lessee to a lessor for the use of premises or equipment if certain criteria are met. We have listed these requirements in the regulation at § 411.357(a) and (b). Among these is the requirement that the office space or equipment be ''used exclusively by the lessee when being used by the lessee.'' We believe Congress included this requirement to ensure that excepted rental agreements are valid ones, rather than ''paper'' leases that might involve payments passing between the lessor and lessee, when the lessee is not actually using or intending to use the space or the equipment. As a result, we believe that this requirement precludes the lessee from subletting the space or equipment during any portion of a lease during which the lessee is expected to be using them.

A sublease arrangement might nonetheless qualify under the new compensation exception that we are proposing under § 411.357(l). That exception requires, among other things, that the rental payments be consistent with fair market value and not take into account the volume or value of any referrals between the parties. In addition, the lease arrangement must be commercially reasonable and further the legitimate business purposes of the parties. We envision that there could be arrangements in which both the lease arrangement and the sublease would meet all of these criteria.

Does the lease exception apply to any kind of lease covering space or equipment? As we understand general accounting principles, there are differences between operational leases and capital leases that may be relevant to our application of section 1877. Operational leases are basic, simple leases in which the lessee makes rental payments to the lessor in order to use the lessor's property or space. These kinds of leases, we believe, could fall within the exceptions in section 1877(e)(1)(A) and (B) because they constitute payments made by the lessee for the use of space or equipment.

Capital leases, on the other hand, are very much like installment sales purchases. Upon entering into such a lease, the lessee receives all of the benefits and obligations of ownership of the property. That is, the lessee (and not the lessor) can depreciate the property and record it on its books as a capital asset and the long-term capital lease payments as a liability (very much like the way the lessee would record a loan). In most cases, the title to the property at issue will pass to the lessee at the end of the term of the lease. In other words, the property that is covered by capital leases is treated by accountants as property that a lessee has purchased or is in the process of purchasing. We believe that such leases go beyond the section 1877(e)(1) exceptions, which except only payments for *the use* of equipment or space.

Can a lease provide for payment based on how often the equipment is used? We have been asked about situations in which a physician rents equipment to an entity that furnishes a designated health service, such as a hospital that rents an MRI machine, with the physician receiving rental payments on a ''per click'' basis (that is, rental payments go up each time the machine is used). We believe that this arrangement will not prohibit the physician from otherwise referring to the entity, provided that these kinds of arrangements are typical and comply with the fair market value and other standards that are included under the rental exception. However, because a physician's compensation under this exception cannot reflect the volume or value of the physician's own referrals, the rental payments cannot reflect ''per click'' payments for patients who are referred for the service by the lessor physician.

3. Exception for personal services arrangements

How does the physician incentive plan exception apply when an enrolling entity contracts with a group practice? The exception for personal services arrangements includes the criteria that any compensation paid by an entity under the arrangement cannot reflect the volume or value of a physician's referrals, unless the compensation is paid under a physician incentive plan, as that term is defined in section 1877(e)(3)(B). A physician incentive plan is defined by this provision as any compensation arrangement between an entity and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services furnished with respect to individuals enrolled with the entity. We have defined ''physician group'' broadly in our March 27, 1996, final rule (61 FR 13430) interpreting physician incentive plans under section 1876(i)(8), of which group practices as defined under section 1877(h) are a subset.

Although an entity can compensate a physician group to reflect the volume or value of referrals under a physician incentive plan, the definition of a group practice under section 1877(h)(4)(A)(iv) precludes the group, with certain exceptions, from compensating its members based directly or indirectly on the volume or value of their referrals (it does not contain the exception for physician incentive plans). As we have described earlier in this preamble, we believe the volume or value standard applies only to a physician's own referrals for designated health services covered under Medicare or Medicaid.

Several interested parties have asked us whether these provisions contain contradictory standards, which could make it difficult for entities that enroll patients to continue their common practice of contracting with group practices to provide services to the entities' enrollees. We believe that the two provisions need not be read as contradictory. While the group practice definition in general precludes a group from compensating its physician members based on their referrals, it does allow groups to pay physicians a share of the overall profits of the group, or a productivity bonus based on services personally performed or services incident to such personally performed services, so long as the share or bonus is not determined in a manner that is directly related to the volume or value of a physician's own referrals. We have discussed our interpretation of these principles elsewhere in this preamble. In the context of a physician incentive plan, a physician group as a whole could be compensated more by an entity based on providing or referring for fewer services. We believe that the group practice could then pass any additional compensation it receives from a physician incentive plan on to the individual physician members via overall profit sharing, which would only

indirectly compensate them for the volume of their referrals. Also, the physicians could receive a productivity bonus for their decreased utilization of any services that are not designated health services covered under Medicare or Medicaid.

V. Regulatory Impact Statement

A. Background

We have examined the impacts of this proposed rule as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, most hospitals, and most other providers, physicians, and health care suppliers are small entities, either by nonprofit status or by having revenues of $5 million or less annually.

Section 202 of the Unfunded Mandates Reform Act provides for ''Regulatory Accountability and Reform.'' It requires the agency to engage in certain procedures, including a cost benefit analysis and consultation with affected State and local governments, for proposed and certain final rules that include ''Federal mandates'' that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more annually. Section 201 of the Unfunded Mandates Reform Act requires this assessment only to the extent that a regulation incorporates requirements other than those specifically set forth in the law.

Section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis for any proposed rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

Sections 1877 and 1903(s) of the Act were enacted in order to correct an abuse highlighted by a number of studies: The ordering by some physicians of unnecessary services because they have a financial incentive do so. (See section I.A. of this preamble for citations to the studies.) The legislation identified those types of services (referred to as ''designated health services'') where the existence of, or potential for, abuse appeared to be the greatest. The approach taken in the legislation was to assume that, in general, if a financial relationship exists between a physician or a physician's immediate family member and an entity that provides designated health services, an incentive to overutilize those services also exists. The statute defined a financial relationship as an ownership or investment interest in, or compensation arrangement with, an entity. Congress created a number of exceptions to the prohibition in recognition of certain existing business practices. In addition, the legislation provides the Secretary with authority to create new exceptions. However, we must first determine, and specify in regulations, that any new exception will not pose a risk of program or patient abuse.

Because of its exceptions, the current law is complicated. However, the essence of the prohibition in section 1877 is clear: If a physician or a physician's immediate family member has a financial relationship with an entity, the physician cannot refer patients to that entity for the furnishing of a designated health service for which payment otherwise may be made under Medicare. Unlike the anti-kickback statute discussed in the preamble, the law is triggered by the mere fact that a financial relationship exists; the intention of the referring physician is not taken into consideration.

Section 1903(s) denies Federal financial participation payment under the Medicaid program to a State for designated health services furnished to an individual on the basis of a physician referral that would result in a denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same terms and conditions as under the State Medicaid plan.

The goal of this proposed rule is to integrate section 1877 (as amended by OBRA '93 and SSA '94) into the Medicare regulations and section 1903(s) into the Medicaid regulations, and to interpret the statute in accordance with its language and intent.

B. Anticipated Effects and Alternatives Considered

For the reasons described below, we believe any estimate of the individual or aggregate economic impact of the provisions of this proposed rule would be purely speculative. Although the provisions proposed in this rule do not lend themselves to a quantitative impact estimate, for reasons discussed below and elsewhere in the preamble, we do not anticipate that they would have a significant economic impact on a substantial number of small entities. However, to the extent that our proposals may have significant effects on some health care practitioners or be viewed as controversial, we believe it is desirable to inform the public of what we view as the possible effects of the proposals. This analysis, together with the other sections of the preamble, constitutes a regulatory flexibility analysis and analysis for purposes of section 1102(b) of the Act.

We expect that some kinds of entities could be affected to varying degrees by this proposed rule. Following are the groups we believe are most likely to experience some economic impact:

1. Physicians

A physician can be financially related to an entity either through an ownership or investment interest in the entity, or through a compensation arrangement with the entity. We begin by first discussing ownership/investment interests.

Ownership or investment interests. A physician who has (or whose immediate family member has) an ownership or investment interest in an entity and does not qualify for an exception is prohibited from referring Medicare patients to that entity for the provision of designated health services. Also, when a physician with such an ownership or investment interest makes a prohibited referral, there is a risk that the entity will receive no Medicare payment for those designated health services. Under Medicaid, a State may receive no FFP for services that result from a referral that would be prohibited under Medicare, if Medicare covered the same designated health services as are covered under the State plan. The State may, in turn, choose not to pay the furnishing entity.

The American Medical Association's (AMA) Center for Health Policy Research (hereafter, the Center) reviewed three studies that analyze self-referral: (1) ''Financial Arrangements Between Physicians and Health Care Businesses: Report to Congress,'' Office of Inspector General, DHHS, pages 18 and 21 (May 1989); (2) ''Joint Ventures Among Health Care Providers in Florida,'' State of Florida Health Care Cost Containment Board (Sept. 1991); and (3) ''Frequency and Costs of Diagnostic Imagining in Office Practice—A Comparison of Self-Referring and Radiologist-Referring

Physicians,'' Bruce J. Hillman and others, The New England Journal of Medicine (December 1990; pp. 1604–1608). As reported in the Journal of the American Medical Association (JAMA, May 6, 1992, Vol 267. No. 17), the Center found that approximately 10 percent of physicians nationwide have ownership interests in health care entities that have been associated with potential self-referral issues. It pointed out, however, that not all of these physicians engage in self-referral. The Center also reported that there was no evidence in the studies they reviewed on the extent to which physicians may profit from self-referrals. Therefore, it concluded that the degree of conflict of interest presented by a physician's investment in entities to which he or she refers patients is unknown.

If we were to assume that the 10 percent figure cited above is currently true, this would mean, based on the number of active physicians in 1995, that approximately 79,000 physicians have an ownership interest in health care entities that furnish designated health services. Note, however, that others cite higher percentages. For example, the 1991 study issued by the Florida Health Care Cost Containment Board found that at least 40 percent of Florida physicians involved in direct patient care had an investment in a health care business to which they could—in the absence of prohibiting legislation—refer patients for services. We would also like to point out that ownership information or information on the investments of physicians and all of their immediate family members in the entities that furnish any of eleven designated health services constitutes an enormous amount of data that is continually subject to change.

In 1991, the AMA's Council on Ethical and Judicial Affairs had concluded that physicians should not refer patients to a health care facility outside their office at which they do not directly provide services if they have an investment interest in the facility. The Council stated that physicians have a special fiduciary responsibility to their patients and that there are some activities involving their patients that physicians should avoid whether or not there is evidence of abuse. In December 1992, the AMA voted to declare self-referral unethical, with a few exceptions. Exceptions are allowed if there is a demonstrated need in the community and alternative financing is not available.

As of October 1994, 27 States had enacted legislation that restricts or qualifies self-referral. There is great variation among the States. Some only require disclosure of the financial relationship to the patient, while others prohibit such referrals.

We believe that this increased examination of self-referral arrangements and enactment of both Federal and State laws prohibiting such arrangements has led to a decline in self-referral activity and financial relationships between physicians and entities. However, we lack the data necessary to either confirm or refute this supposition. We also lack data that would tell us how many of the financial relationships that physicians have with an entity that furnishes a designated health service would be exempted under the statute. We would welcome receiving current relevant data.

One exception that may have broad application is the in-office ancillary services exception. With regard to this exception, which applies to both ownership/investment interests and compensation arrangements, we offer the following discussion.

To qualify as in-office ancillary services, the services must, among other things, be furnished personally by the referring physician or another physician in the same group practice as the referring physician, or be furnished by individuals who are directly supervised by one of these physicians. How we interpret a number of elements in this provision would affect whether certain referrals qualify for the in-office ancillary services exception. These include how we define ''group practice,'' ''members of the group,'' and ''direct supervision.'' We discuss these definitions below.

The in-office ancillary services exception allows physicians who are members of a group practice to supervise designated health services referred by any group member. Paragraph (h)(4)(A) of section 1877 provides a definition of a ''group practice.'' That definition, however, consists of elements that require interpretation—for example, what qualifies a group of physicians as ''a legal entity,'' what is meant by the ''full range of a physician's services,'' which must be furnished through group arrangements, and what constitutes ''substantially all'' of a physician's services, which must also be furnished through the group. We discuss these elements in section III.A.6 of this preamble. As noted in that discussion, we propose to modify some of the interpretations that we made in the August 1995 final rule. We believe that these modifications, which recognize established business practices that do not pose the risk of program or patient abuse, will enable more physicians to meet the definition of a group practice than would the interpretations in the August 1995 rule. If a group of physicians qualifies as a group practice, services can be furnished by certain individuals other than the referring physician and still qualify for the in-office ancillary services exception. We are unable, however, to make an estimate of the economic impact of these modifications.

Also affecting the in-office ancillary services exception is how we would define ''members of the group.'' Again, this proposed rule would modify the definition we established in the August 1995 final rule. This modification, discussed in detail in section III.A.6 of this preamble, would not regard independent contractors as members of the group. This interpretation may make it easier for a group of physicians to meet the ''substantially all'' test to qualify as a group practice than would the interpretation in the August 1995 rule. On the other hand, independent contractors could not supervise the provision of designated health services. We are unable to estimate the impact of these opposing effects.

The in-office ancillary services exception provides both solo practitioners as well as group practice physicians with the ability to refer within their own practices. As we discussed in detail in the August 1995 final rule, this provision can except solo practitioners with certain shared arrangements who do not wish to become a group practice. For example, two solo practitioners who share one office and jointly own a laboratory can continue to refer to that laboratory, as long as each physician furnishes physician services unrelated to the designated health services in the office, directly supervises the laboratory services for his or her own Medicare and Medicaid patients while they are being furnished, and bills for the services. If only one of the solo practitioners owns the laboratory in a shared office, the non-owning physician can refer to the laboratory as long as he or she is not receiving compensation from the owner in exchange for referrals. We are aware, however, that this exception may not accommodate the variety of different arrangements physicians have entered into to share facilities or otherwise group together without losing their status as solo practitioners. We directly solicit comments on the effects of the referral prohibition on these arrangements.

The proposed regulation defines the statutory requirement for a physician's ''direct supervision'' of individuals furnishing designated health services

under the in-office ancillary services exception. Under the definition, ''direct supervision'' requires that a physician be present in the office suite and immediately available to provide assistance and direction during the time services are being performed.

One option for defining ''direct supervision'' would be to say that it means that the service is furnished under the physician's overall supervision and control but that the physician need not be physically present in the office suite in which the services are performed while they are being performed. This rule would not adopt such a definition, however. We believe that the supervision requirement is meant to establish as ''in-office ancillary'' services those services that are integral to the physician's own practice and that are conducted within his or her own sphere of activity. We believe Congress intended this exception to apply to services that are closely attached to the activities of the referring physician.

If we were to allow physicians to supervise the furnishing of designated health services from a distance, we believe that we would be creating an opportunity for physicians to refer to entities outside their own practices, for services which are not actually ''in-office ancillary'' in nature. Although our proposed definition may result in fewer referrals qualifying for the ''in-office'' exception than a more liberal definition, we believe our definition is necessary to achieve the purposes of the statute. We are not, however, proposing that there must be a particular configuration of rooms for an office to qualify as a ''suite,'' for example, that the rooms be contiguous. As stated in section III.A.2 of this preamble, the question of physician proximity for purposes of meeting the direct supervision requirement is a decision that would be made by the local carrier based on the circumstances. We have also proposed to liberalize the concept of ''present in the office suite,'' as we interpreted it in the August 1995 final rule, to allow brief absences from the office under certain conditions.

Because we do not have data on how many physicians have financial relationships that already qualify for the in-office exception, and how many would have to alter their practices, even given the modifications discussed immediately above, we cannot judge the economic impact of our definition. We specifically solicit information on this issue.

As already stated, we do not have current data on the number of physicians with ownership/investment interests in entities that furnish designated health services. Nor do we know how many of these physicians would qualify for an exception to the referral prohibition. However, even if we were to assume that a substantial number of physicians have nonexcepted ownership interests in entities that furnish a designated health service, we do not believe that, in general, the economic impact on these physicians necessarily has to be substantial, for the following reasons:

If a physician's ownership interest in an entity would lead to a prohibition on his or her referrals to that entity, the physician has three options: First, he or she can stop making referrals to that entity and make referrals to another unrelated entity. Second, the physician can divest him or herself of the interest. Third, the physician can, if possible, position him or herself to qualify for an exception. Below we discuss the economic impact of each of these options.

While the impact on an individual physician may be significant, we do not believe that physicians, in general, will be significantly affected if they have to stop making referrals to an entity in which they have an ownership interest. We come to this conclusion because we assume that the majority of physicians receive most of their income from the services they personally furnish, not from those they refer. In addition, we assume that unless the physician established the entity to serve only his or her own patients, the entity receives referrals from other sources. Thus, the physician may still receive a return on the investment. Further, it is possible that, if physician ownership of entities providing the particular designated health services is prevalent in the area, what may occur is a ''shifting'' of referrals; that is, the loss of a physician's own referrals to the entity might be offset by other physicians shifting referrals to unrelated entities. These shifts would be acceptable under section 1877, provided they do not result from circumvention schemes.

We do not believe the second option, divesting of the ownership interest, would necessarily have a significant economic effect. However, we assume, that, at least from an economic standpoint, most physicians invest in entities because they are income-producing. If an investment is successful, a physician may not have difficulty finding new investors willing to take over the physician's investment. The physician, in turn, can then invest the monies received in some other investment. We believe the cost of divesting will vary from situation to situation. (A search of the literature on this issue resulted in only anecdotal information that indicated that some physicians sustained a loss in divesting, while others did not.) We do see the possibility of a significant effect in the case of a physician who has, at considerable expense, established an entity to serve only his or her own patients, with the expectation of future return on that investment. We believe, however, that the exceptions in the statute and regulation allowing physicians to refer within their own practices (primarily the in-office ancillary services exception) will greatly reduce the number of physicians otherwise subject to the prohibition.

It is difficult to estimate how many physicians would select the third option of changing the circumstances of their practices in order to meet an exception to the referral prohibition. It is also difficult to estimate the extent of the changes that would be necessary or the potential economic impact of any modifications. As an example of one modification, a physician maintains with other independently-practicing physicians a nonrural facility for furnishing X-rays. The physicians share premises, equipment, employees, and overhead costs. If an individual physician does not meet the requirements for the in-office ancillary exception found in section 1877(b)(2), the physician's Medicare referrals to that entity would be prohibited. In such a situation, as an alternative to options 1 and 2 above (stopping referrals or divesting), the physician could choose to form a group practice with the other physicians in order to qualify for the in-office ancillary services exception. By forming a group practice, the referrals would not be prohibited if the services were furnished personally by the referring physician, personally by another physician who is a member of the same group practice as the referring physician, or if they are furnished personally by individuals who are directly supervised by any of these physicians and the billing and location requirements specified in the in-office ancillary exception are met.

Although we realize that a physician reorganizing his or her practice in this way may be subject to various economic and noneconomic effects, we believe those effects will differ widely from case to case. Some physicians may need to make major alterations in their practices, while others may need only minor changes, with minimal or no help from legal or financial advisors. It is possible that some physicians would profit from reorganizing, while others might suffer losses. Thus, we cannot

judge whether any particular physician, or physicians in general, will sustain a significant economic impact because they have reconfigured their practices.

Compensation arrangements: The statute defines a compensation arrangement very broadly as any arrangement involving any remuneration between a physician (or an immediate family member) and an entity, with certain narrowly defined exceptions. We believe that this definition involves almost every situation in which a physician or relative receives payment from an entity or makes payments to an entity, including payments under personal services contracts, employment agreements, sales contracts, and rentals or leases. The amount of data we would need to account for every compensation arrangement that might be affected by the law would likely be overwhelming, as well as subject to the constant changes inherent in the business world. As a result, it is difficult for us to assess how many physicians (or their relatives) are currently involved in compensation arrangements.

We believe that most physicians who have compensation, rather than ownership, arrangements with an entity and are receiving fair payments will qualify for one of the many compensation-related exceptions set forth in this proposed rule, especially since we propose to exercise our authority to create several additional exceptions related to compensation. We expect that those who do not will be few in number, and, thus, this rule would not have an impact on a substantial number of physicians whose financial relationships are based on compensation.

2. Entities, Including Hospitals

We lack the data to determine the number of entities that would be affected by this proposed rule. However, even if we were to assume that a substantial number of entities would be affected, we do not believe that, in general, the impact would be significant. In order for the effect on a substantial number of entities to be significant, this rule would have to result in a very significant decline in utilization of the designated health services. The statute was enacted to curb an abusive practice: the ordering by some physicians of unnecessary services because they have a financial incentive to do so. We do not believe, however, that the abuse is so prevalent that the survival of entities would be threatened because a physician's financial incentive to make referrals is removed. It is our view that most health care entities exist because they provide medically necessary services and that these services will continue to be furnished.

In addition, the statute contains a number of exceptions to the referral prohibition that will allow physicians to continue to refer to any entity furnishing designated health services if certain criteria are met. These exceptions are set forth in this proposed rule. For example, § 411.356(c) includes exceptions for ownership or investment interests in certain hospitals or in certain rural entities. Sections 411.357(c) and (d) include relevant exceptions related to compensation arrangements: Paragraph (c) provides an exception for bona fide employment relationships that meet certain conditions, and paragraph (d) provides an exception for remuneration for personal service arrangements that meet certain conditions. Also, this proposed rule would provide an additional exception for any compensation that is, among other things, based on fair market value. We believe many, if not most, of the financial relationships between physicians and entities, including hospitals, are covered by these exceptions.

C. Conclusion

For the reasons stated above, we have determined, and the Secretary certifies, that, based on the limited data currently available to us, this proposed rule would not result in a significant economic impact on a substantial number of small entities or on the operations of a substantial number of small rural hospitals. In addition, for purposes of the Unfunded Mandates Reform Act, we believe that any significant economic results of this proposed rule originate from the general referral prohibition in the statute and not from an agency mandate. We have, in fact, liberalized the requirements in the law by adding new exceptions. In the relatively few instances in which we have added additional requirements, as authorized by the statute, our data is too limited for us to ascertain whether these new provisions alone may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. In terms of requirements on State governments, it is the statute that applies aspects of the referral prohibition to State Medicaid agencies. This proposed rule does interpret the statute to apply the reporting requirements in section 1877(f) of the Act to States, but does not mandate any action. The proposed rule allows States to collect financial information from Medicaid providers in any form, manner, and at whatever times they choose.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Sections 411.360 and 411.361 of this proposed rule contain information collection requirements that are subject to the Paperwork Reduction Act of 1995. However, we are not requiring the public to comply with these reporting requirements at this time. Instead we are seeking public comment to determine possible methods of implementing these information collection and recordkeeping requirements. Once we have determined how to impose these requirements in the least burdensome method, while meeting program requirements, we will publish a separate 60-day notice in the **Federal Register** seeking comments on the proposed information collection before it is submitted to OMB for review.

Below is a discussion of the information collection requirements referenced in §§ 411.360 and 411.361.

As stated earlier in this preamble, a number of entities have pointed out to us that the amounts of data they are required to report under the statute as reflected in our current regulations will, in some circumstances, be overwhelming and perhaps almost impossible to acquire. Therefore, in order to make the reporting requirements more manageable, we intend to develop a streamlined ''reporting'' system that does not require entities to retain and submit large

quantities of data. We believe, however, that entities should retain enough records to demonstrate, in the event of an audit, that they have correctly determined that particular relationships are excepted under the law.

We are proposing to limit the information that an entity must acquire, retain and, at some later point, possibly submit to us. We would include only those records covering information that the entity knows or should know about, in the course of prudently conducting business, including records that the entity is already required to retain to meet Internal Revenue Service and Security Exchange Commission rules, and other rules under the Medicare or Medicaid programs. We are circumscribing these records under the Secretary's discretion in section 1877(f) to ask entities to provide information in such form, manner, and at such times as the Secretary specifies. As stated above, when we develop a form for reporting information to us, we plan to first publish it as a proposed notice in order to receive public comment. If we later find that this plan is inadequate and elect to change the scope of the requirement, we will provide entities with adequate notice to comply.

While we are not at this time proposing to impose reporting requirements, we do propose to make modifications to the existing information collection requirements referenced in this proposed rule. Existing § 411.361 reflects the reporting requirements in section 1877(f) of the Act. Specifically, § 411.361 requires, with certain exceptions, that all entities furnishing services for which payment may be made under Medicare submit information to us concerning their financial relationships (as described in § 411.361(d)). The requirement does not apply to entities that furnish 20 or fewer Part A and Part B services during a calendar year, or to designated health services furnished outside the United States. Paragraph (a) of § 411.361 requires that all entities furnishing services for which payment may be made under Medicare submit information to us concerning their financial relationships in the form, manner, and at the times we specify. We would revise this to add that this information must be submitted on a HCFA-prescribed form. As stated above, this form would first be published as a proposed notice in order to receive public comment.

Paragraph (c) of § 411.361 requires that the entity submit information that includes at least the following with regard to each physician who has, or whose immediate family member has, a financial relationship with the entity: The name and unique physician identification number (UPIN) of the physician, the covered services furnished by the entity, and the nature of the financial relationship. We now propose to specify that the entity submit information that may include the information described above depending upon the process we select.

Existing § 411.361(d) provides that a reportable financial relationship is any ownership or investment interest or any compensation arrangement, as described in section 1877 of the Act. This proposed, would revise this section to specify that a financial relationship is any ownership or investment interest or any compensation arrangement, as defined in § 411.351, including those relationships excepted under §§ 411.355 through 411.357.

We would also revise existing § 411.361(e) as follows. Currently that paragraph requires that an entity provide updated information within 60 days from the date of any change in the submitted information. We propose to require instead that an entity report to HCFA once a year all changes in the submitted information that occurred in the previous 12 months.

OBRA '93 amended section 1903 of the Act by adding a new paragraph(s) that, among other things, applied the reporting requirements of 1877(f) to a provider of a designated health service for which payment may be made under Medicaid in the same manner as those requirements apply to a Medicare provider. Therefore, at § 455.109(a) of this proposed rule, we would specify that the Medicaid agency must require that each provider of services that furnishes designated health services that are covered by Medicaid submit information to the Medicaid agency concerning its financial relationships in such form, manner, and at such times as the agency specifies. Paragraph (c) of § 445.109 would specify that the entity submit the same information identified with regard to Medicare providers/suppliers except that, instead of the UPIN, the entity would report the Medicaid State Specific Identifier of each physician who has, or whose immediate relative has, a financial relationship with the entity. Paragraph (d) of § 445.109 would establish the same definition of what constitutes a reportable financial relationship as under Medicare, and paragraph (e) would give States the discretion to establish the timeframes within which providers must submit and update information. We solicit comments on these proposed changes to the existing reporting requirements.

This proposed rule would also retain existing § 411.360, which requires that a group practice that wants to be identified as such submit a written statement to its carrier annually to attest that it meets the ''substantially all'' test, one of the criteria that qualifies a group of physicians as a group practice (the criteria are set forth under the definition of a group practice in § 411.351). This provision would now apply to any group of physicians who refer for or furnish designated health services and who wish to qualify as a group practice. We believe that, since this requirement has already been established by the August 1995 final rule, a significant number of physician groups may already be subject to the reporting requirements. We base this conclusion on the fact that many groups have their own clinical laboratories and will already be prepared to attest for purposes of complying with the final regulation covering referrals for clinical laboratory services. Once a group is identified as a group practice for purposes of laboratory services, it is identified as a group practice for all services. Thus it was the August 1995 final rule that established the burden for those groups. However, we have no way of estimating how many other groups of physicians will want to try to qualify as group practices exclusively for purposes of referring for some or all of the other designated health services. We specifically solicit information on this issue. A group of physicians must submit the attestation required by § 411.360 within 60 days after receiving attestation instructions from its carrier.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Health Care Financing Administration, Office of Financial and Human Resources, Management Planning and Analysis Staff, Attention: HCFA–1809–P, Room C2–26–17, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer.

VII. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. We will, however, consider all comments that we receive by the date specified in the DATES section of this preamble and, if we

proceed with a final rule, we will respond to the comments in the preamble of the final rule. We will also respond, in that final rule, to comments that we received on the August 1995 final rule with comment covering referrals for clinical laboratory services.

List of Subjects

42 CFR Part 411

Kidney diseases, Medicare, Physician referral, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare.

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs-health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 455

Fraud, Grant programs-health, Health facilities, Health professions, Investigations, Medicaid, Reporting and recordkeeping requirements.

42 CFR chapter IV would be amended as set forth below:

PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

A. Part 411 is amended as follows:

1. The authority citation for part 411 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. In § 411.1, paragraph (a) is revised to read as follows:

§ 411.1 Basis and scope.

(a) *Statutory basis.* Sections 1814(a) and 1835(a) of the Act require that a physician certify or recertify a patient's need for home health services, but in general, prohibit a physician from certifying or recertifying the need for services if the services will be furnished by a home health agency in which the physician has a significant ownership interest, or with which the physician has a significant financial or contractual relationship. Sections 1814(c), 1835(d), and 1862 of the Act exclude from Medicare payment certain specified services. The Act provides special rules for payment of services furnished by Federal providers or agencies (sections 1814(c) and 1835(d)), by hospitals and physicians outside the United States (sections 1814(f) and 1862(a)(4)), and by hospitals and SNFs of the Indian Health Service (section 1880). Section 1877 sets forth limitations on referrals and payment for designated health services furnished by entities with which the referring physician (or an immediate family member of the referring physician) has a financial relationship.

* * * * *

3. In § 411.350, paragraphs (a) and (c) are revised, and paragraph (b) is republished, to read as follows:

§ 411.350 Scope of subpart.

(a) This subpart implements section 1877 of the Act, which generally prohibits a physician from making a referral under Medicare for designated health services to an entity with which the physician or a member of the physician's immediate family has a financial relationship.

(b) This subpart does not provide for exceptions or immunity from civil or criminal prosecution or other sanctions applicable under any State laws or under Federal law other than section 1877 of the Act. For example, although a particular arrangement involving a physician's financial relationship with an entity may not prohibit the physician from making referrals to the entity under this subpart, the arrangement may nevertheless violate another provision of the Act or other laws administered by HHS, the Federal Trade Commission, the Securities and Exchange Commission, the Internal Revenue Service, or any other Federal or State agency.

(c) This subpart requires, with some exceptions, that certain entities furnishing covered services under Part A or Part B report information concerning their ownership, investment, or compensation arrangements in the form, manner, and at the times specified by HCFA.

4. Section 411.351 is revised to read as follows:

§ 411.351 Definitions.

As used in this subpart, unless the context indicates otherwise:

Clinical laboratory services means the biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. These examinations also include procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body.

Compensation arrangement means any arrangement involving any remuneration, direct or indirect, between a physician (or a member of a physician's immediate family) and an entity.

Designated health services means any of the following services (other than those provided as emergency physician services furnished outside of the United States), as they are defined in this section:

(1) Clinical laboratory services.
(2) Physical therapy services.
(3) Occupational therapy services.
(4) Radiology services and radiation therapy services and supplies.
(5) Durable medical equipment and supplies.
(6) Parenteral and enteral nutrients, equipment, and supplies.
(7) Prosthetics, orthotics, and prosthetic devices and supplies.
(8) Home health services.
(9) Outpatient prescription drugs.
(10) Inpatient and outpatient hospital services.

Direct supervision means supervision by a physician who is present in the office suite in which the services are being furnished, throughout the time they are being furnished, and immediately available to provide assistance and direction. ''Present in the office suite'' means that the physician is actually physically present. However, the physician is still considered ''present'' during brief unexpected absences as well as during routine absences of a short duration (such as during a lunch break), provided the absences occur during time periods in which the physician is otherwise scheduled and ordinarily expected to be present and the absences do not conflict with any other requirements in the Medicare program for a particular level of physician supervision.

Durable medical equipment has the meaning given in section 1861(n) of the Act and § 414.202 of this chapter.

Employee means any individual who, under the usual common law rules that apply in determining the employer-employee relationship (as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986), is considered to be employed by, or an employee of, an entity. (Application of these common law rules is discussed at 20 CFR 404.1007 and 26 CFR 31.3121(d)–1(c).)

Enteral nutrients, equipment, and supplies means items and supplies needed to provide enteral nutrition to a patient with a functioning gastrointestinal tract who, due to pathology to or nonfunction of the structures that normally permit food to reach the digestive tract, cannot maintain weight and strength

commensurate with his or her general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (HCFA Pub. 6).

Entity means a physician's sole practice or a practice of multiple physicians that provides for the furnishing of designated health services, or any other sole proprietorship, trust, corporation, partnership, foundation, not-for-profit corporation, or unincorporated association.

Fair market value means the value in arm's-length transactions, consistent with the general market value. ''General market value'' means the price that an asset would bring, as the result of bona fide bargaining between well-informed buyers and sellers, or the compensation that would be included in a service agreement, as the result of bona fide bargaining between well-informed parties to the agreement, on the date of acquisition of the asset or at the time of the service agreement. Usually the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement. With respect to the rentals and leases described in § 411.357(a) and (b), *fair market value* means the value of rental property for general commercial purposes (not taking into account its intended use). In the case of a lease of space, this value may not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor when the lessor is a potential source of patient referrals to the lessee.

Financial relationship means a direct or indirect ownership or investment interest (including an option or nonvested interest) in any entity that exists through equity, debt, or other means and includes any indirect ownership or investment interest no matter how many levels removed from a direct interest (for example, a financial relationship in an entity furnishing designated health services exists if the individual has an ownership or investment interest in an entity that holds an ownership or investment interest in an entity that furnishes designated health services), or a compensation arrangement with an entity.

Group practice means a group of two or more physicians, legally organized as a single partnership, professional corporation, foundation, not-for-profit corporation, faculty practice plan, or similar association, with the exception that a group can consist of physicians who are also individually incorporated as professional corporations. To qualify as a group practice, a group must meet the following conditions:

(1) Each physician who is a *member of the group*, as defined in this section, furnishes substantially the full range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of shared office space, facilities, equipment, and personnel.

(2) Except as provided in paragraphs (2)(i) and (2)(ii) of this definition, substantially all of the patient care services of the physicians who are members of the group (that is, at least 75 percent of the total patient care services of the group practice members) are furnished through the group and billed under a billing number assigned to the group and the amounts received are treated as receipts of the group. ''Patient care services'' are measured by the total patient care time each member spends on these services (for example, if a physician practices 40 hours a week and spends 30 hours on patient care services for a group practice, the physician has spent 75 percent of his or her time providing countable patient care services).

(i) The ''substantially all'' test does not apply to any group practice that is located solely in an HPSA, as defined in this section.

(ii) For group practices located outside of an HPSA (as defined in this section) any time spent by group practice members providing services in an HPSA should not be used to calculate whether the group practice located outside the HPSA has met the ''substantially all'' test, regardless of whether the members' time in the HPSA is spent in a group practice, clinic, or office setting.

(3) The overhead expenses of and income from the practice are distributed according to methods that are determined prior to the time period during which the group has earned the income or incurred the costs.

(4) The overhead expenses of and the income from the practice are distributed according to methods that indicate that the practice is a unified business. That is, the methods must reflect centralized decision making, a pooling of expenses and revenues, and a distribution system that is not based on each satellite office operating as if it were a separate enterprise.

(5) No physician who is a member of the group directly or indirectly receives compensation based on the volume or value of referrals by the physician, except that a physician in a group practice may be paid a share of overall profits of the group or a productivity bonus based on services he or she has personally performed or services incident to these personally performed services, as long as the share or bonus is not determined in any manner that is directly related to the volume or value of referrals by the physician.

(6) Members of the group personally conduct no less that 75 percent of the physician-patient encounters of the group practice.

(7) In the case of faculty practice plans associated with a hospital, institution of higher education, or medical school that has an approved medical residency training program in which faculty practice plan physicians perform specialty and professional services, both within and outside the faculty practice, as well as perform other tasks such as research, this definition applies only to those services that are furnished within the faculty practice plan.

Home health services means the services described in section 1861(m) of the Act and part 409, subpart E of this chapter.

Hospital means any entity that qualifies as a ''hospital'' under section 1861(e) of the Act, as a ''psychiatric hospital'' under section 1861(f) of the Act, or as a ''rural primary care hospital'' under section 1861(mm)(1) of the Act, and refers to any separate legally-organized operating entity plus any subsidiary, related entity, or other entities that perform services for the hospital's patients and for which the hospital bills. However, a ''hospital'' does not include entities that perform services for hospital patients ''under arrangements'' with the hospital.

HPSA means, for purposes of this subpart, an area designated as a health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act for primary medical care professionals (in accordance with the criteria specified in 42 CFR part 5, appendix A, Part I-Geographic Areas). In addition, with respect to dental, mental health, vision care, podiatric, and pharmacy services, an HPSA means an area designated as a health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act for dental professionals, mental health professionals, vision care professionals, podiatric professionals, and pharmacy professionals, respectively.

Immediate family member or member of a physician's immediate family means husband or wife; natural or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or

stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

Inpatient hospital services are those services defined in section 1861(b) of the Act and § 409.10(a) and (b) of this chapter, and include inpatient psychiatric hospital services listed in section 1861(c) of the Act and inpatient rural primary care hospital services, as defined in section 1861(mm)(2) of the Act. ''Inpatient hospital services'' do not include emergency inpatient services provided by a hospital located outside the United States and covered under the authority in section 1814(f)(2) of the Act and part 424, subpart H of this chapter and emergency inpatient services provided by a nonparticipating hospital within the United States, as authorized by section 1814(d) of the Act and described in part 424, subpart G of this chapter. These services also do not include dialysis furnished by a hospital that is not certified to provide end stage renal dialysis (ESRD) services under subpart U of 42 CFR 405.

Inpatient hospital services include services that a hospital provides for its patients that are furnished either by the hospital or by others under arrangements with the hospital. They do not encompass the services of other physicians, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists and qualified psychologists who bill independently.

Laboratory means an entity furnishing biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. These examinations also include procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body. Entities only collecting or preparing specimens (or both) or only serving as a mailing service and not performing testing are not considered laboratories.

Members of the group means physician partners and other physician owners (including physicians whose interest is held by an individual professional corporation), and full-time and part-time physician employees. These physicians are ''members'' during the time they furnish ''patient care services'' to the group.

Occupational therapy services means those services described at section 1861(g) of the Act and § 410.100(c) of this chapter. Occupational therapy services also include any other services with the characteristics described in § 410.100(c) that are covered under Medicare Part A or B, regardless of who furnishes them, the location in which they are furnished, or how they are billed.

Orthotics means leg, arm, back, and neck braces, as listed in section 1861(s)(9) of the Act.

Outpatient hospital services means the therapeutic, diagnostic, and partial hospitalization services listed under section 1861(s)(2)(B) and (C) of the Act; outpatient services furnished by a psychiatric hospital, as defined in section 1861(f); and outpatient rural primary care hospital services, as defined in section 1861(mm)(3); but excluding emergency services covered in nonparticipating hospitals under the conditions described in section 1835(b) of the Act and subpart G of part 424 of this chapter.

Outpatient prescription drugs means those drugs (including biologicals) defined or listed under section 1861(t) and (s) of the Act and part 410 of this chapter, that a patient can obtain from a pharmacy with a prescription (even if the patient can only receive the drug under medical supervision), and that are furnished to an individual under Medicare Part B, but excluding erythropoietin and other drugs furnished as part of a dialysis treatment for an individual who dialyzes at home or in a facility.

Parenteral nutrients, equipment, and supplies means those items and supplies needed to provide nutriment to a patient with permanent, severe pathology of the alimentary tract that does not allow absorption of sufficient nutrients to maintain strength commensurate with the patient's general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (HCFA Pub. 6).

Patient care services means any tasks performed by a group practice member that address the medical needs of specific patients or patients in general, regardless of whether they involve direct patient encounters, or tasks that generally benefit a particular practice. They can include, for example, the services of physicians who do not directly treat patients, such as time spent by a physician consulting with other physicians or reviewing laboratory tests, or time spent training staff members, arranging for equipment, or performing administrative or management tasks.

Physical therapy services means those outpatient physical therapy services (including speech-language pathology services) described at section 1861(p) of the Act and at § 410.100(b) and (d) of this chapter. Physical therapy services also include any other services with the characteristics described in § 400.100(b) and (d) that are covered under Medicare Part A or B, regardless of who provides them, the location in which they are provided, or how they are billed.

Physician incentive plan means any compensation arrangement between an entity and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services furnished with respect to individuals enrolled with the entity.

Plan of care means the establishment by a physician of a course of diagnosis or treatment (or both) for a particular patient, including the ordering of services.

Prosthetic device and supplies: *Prosthetic device* means a device (other than a dental device) listed in section 1861(s)(8) that replaces all or part of an internal body organ, including colostomy bags and including one pair of conventional eyeglasses or contact lenses furnished subsequent to each cataract surgery with insertion of an intraocular lens. *Prosthetic supplies* are supplies that are necessary for the effective use of a prosthetic device (including supplies directly related to colostomy care).

Prosthetics means artificial legs, arms, and eyes, as described in section 1861(s)(9) of the Act.

Radiology services and radiation therapy and supplies means any diagnostic test or therapeutic procedure using X-rays, ultrasound or other imaging services, computerized axial tomography, magnetic resonance imaging, radiation, or nuclear medicine, and diagnostic mammography services, as covered under section 1861(s)(3) and (4) of the Act and §§ 410.32(a), 410.34, and 410.35 of this chapter, including the professional component of these services, but excluding any invasive radiology procedure in which the imagingmodality is used to guide a needle, probe, or a catheter accurately.

Referral—

(1) Means either of the following:

(i) Except as provided in paragraph (2) of this definition, the request by a physician for, or ordering of, or the certifying or recertifying of the need for, any designated health service for which payment may be made under Medicare Part B (or, for purposes of the Medicaid program, a comparable service covered under the Medicaid State plan), including a request for a consultation

with another physician and any test or procedure ordered by or to be performed by (or under the supervision of) that other physician.

(ii) Except as provided in paragraph (2) of this definition, a request by a physician that includes the provision of any other designated health service for which payment may be made under Medicare (or, for purposes of the Medicaid program, a comparable service covered under the Medicaid State plan) the establishment of a plan of care by a physician that includes the provision of such a designated health service, or the certifying or recertifying of the need for such a designated health service.

(2) Does not include a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, by a radiologist for diagnostic radiology services, and by a radiation oncologist for radiation therapy, if—

(i) The request results from a consultation initiated by another physician; and

(ii) The tests or services are furnished by or under the supervision of the pathologist, radiologist, or radiation oncologist.

Referring physician means a physician who makes a referral as defined in this section.

Remuneration means any payment, discount, forgiveness of debt, or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, except that the following are not considered remuneration:

(1) The forgiveness of amounts owed for inaccurate tests or procedures, mistakenly performed tests or procedures, or the correction of minor billing errors.

(2) The furnishing of items, devices, or supplies that are used solely to collect, transport, process, or store specimens for the entity furnishing the items, devices, or supplies or are used solely to order or communicate the results of tests or procedures for the entity.

(3) A payment made by an insurer or a self-insured plan to a physician to satisfy a claim, submitted on a fee-for-service basis, for the furnishing of health services by that physician to an individual who is covered by a policy with the insurer or by the self-insured plan, if—

(i) The health services are not furnished, and the payment is not made, under a contract or other arrangement between the insurer or the plan and the physician;

(ii) The payment is made to the physician on behalf of the covered individual and would otherwise be made directly to the individual; and

(iii) The amount of the payment is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account directly or indirectly the volume or value of any referrals or other business generated between the parties.

Transaction: A *transaction* is an instance or process of two or more persons or entities doing business. An *isolated transaction* is one involving a single payment between two or more persons or entities. A transaction that involves long-term or installment payments is not considered an isolated transaction.

5. Section 411.353 is revised to read as follows:

§ 411.353 Prohibition on certain referrals by physicians and limitations on billing.

(a) *Prohibition on referrals.* Except as provided in this subpart, a physician who has a financial relationship with an entity, or who has an immediate family member who has a financial relationship with the entity, may not make a referral to that entity for the furnishing of designated health services for which payment otherwise may be made under Medicare.

(b) *Limitations on billing.* An entity that furnishes designated health services under a referral that is prohibited by paragraph (a) of this section may not present or cause to be presented a claim or bill to the Medicare program or to any individual, third party payer, or other entity for the designated health services performed under that referral.

(c) *Denial of payment.* No Medicare payment may be made for a designated health service that is furnished under a prohibited referral.

(d) *Refunds.* An entity that collects payment for a designated health service that was performed under a prohibited referral must refund all collected amounts on a timely basis, as defined in § 1003.101 of Chapter V.

6. Section 411.355 is revised to read as follows:

§ 411.355 General exceptions to the referral prohibition related to both ownership/investment and compensation.

The prohibition on referrals set forth in § 411.353 does not apply to the following types of services:

(a) *Physician services,* as defined in § 410.20(a), that are furnished personally by (or under the personal supervision of) another physician in the same group practice as the referring physician.

(b) *In-office ancillary services.* Services (including infusion pumps and crutches, but excluding all other durable medical equipment and parenteral and enteral nutrients, equipment, and supplies), that meet the following conditions:

(1) They are furnished personally by one of the following individuals:

(i) The referring physician.

(ii) A physician who is a member of the same group practice as the referring physician.

(iii) Individuals who are directly supervised by the referring physician or, in the case of group practices, by another physician member of the same group practice as the referring physician.

(2) They are furnished in one of the following locations:

(i) The same building in which the referring physician (or another physician who is a member of the same group practice) furnishes physician services unrelated to the furnishing of designated health services. The ''same building'' means the same physical structure, with one address, and not multiple structures connected by tunnels or walkways.

(ii) A building that is used by the group practice for the provision of some or all of the group's clinical laboratory services.

(iii) A building that is used by the group practice for the centralized provision of the group's designated health services (other than clinical laboratory services).

(3) They are billed by one of the following:

(i) The physician performing or supervising the service.

(ii) The group practice of which the performing or supervising physician is a member under a billing number assigned to the group practice.

(iii) An entity that is wholly owned by the physician or the physician's group practice.

(4) In the case of crutches, the physician realizes no direct or indirect profit from furnishing the crutches.

(c) *Services furnished to prepaid health plan enrollees* by one of the following organizations:

(1) An HMO or a CMP in accordance with a contract with HCFA under section 1876 of the Act and part 417, subparts J through M of this chapter.

(2) A health care prepayment plan in accordance with an agreement with HCFA under section 1833(a)(1)(A) of the Act and part 417, subpart U of this chapter.

(3) An organization that is receiving payments on a prepaid basis for Medicare enrollees through a demonstration project under section 402(a) of the Social Security

Amendments of 1967 (42 U.S.C. 1395b-1) or under section 222(a) of the Social Security Amendments of 1972 (42 U.S.C. 1395b-1 note).

(4) A qualified health maintenance organization (within the meaning of section 1310(d) of the Public Health Service Act).

(d) *Services furnished under certain payment rates.* (1) Services furnished in an ambulatory surgical center (ASC) or ESRD facility or by a hospice if payment for those services is included in the ASC payment rate, the ESRD composite payment rate, or as part of the hospice payment rate, respectively; and

(2) Services furnished under other payment rates that the Secretary determines provide no financial incentive for under or overutilization, or any other risk of program or patient abuse.

7. Section 411.356 is revised to read as follows:

§ 411.356 Exceptions to the referral prohibition related to ownership or investment interests.

For purposes of § 411.353, the following ownership or investment interests do not constitute a financial relationship:

(a) *Publicly-traded securities.* Ownership of investment securities (including shares or bonds, debentures, notes, or other debt instruments) that at the time they were obtained could be purchased on the open market and that meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(1) They are either—

(i) Listed for trading on the New York Stock Exchange, the American Stock Exchange, or any regional exchange in which quotations are published on a daily basis, or foreign securities listed on a recognized foreign, national, or regional exchange in which quotations are published on a daily basis, or

(ii) Traded under an automated interdealer quotation system operated by the National Association of Securities Dealers.

(2) They are in a corporation that had stockholder equity exceeding $75 million at the end of the corporation's most recent fiscal year or on average during the previous 3 fiscal years. ''Stockholder equity'' is the difference in value between a corporation's total assets and total liabilities.

(b) *Mutual funds.* Ownership of shares in a regulated investment company as defined in section 851(a) of the Internal Revenue Code of 1986, if the company had, at the end of its most recent fiscal year, or on average during the previous 3 fiscal years, total assets exceeding $75 million.

(c) *Specific providers.* Ownership or investment interest in the following entities, for purposes of the services specified:

(1) A rural provider, in the case of designated health services furnished in a rural area by the provider. A ''rural provider'' is an entity that furnishes substantially all (not less than 75 percent) of the designated health services that it furnishes to residents of a rural area (that is, an area that is not an urban area as defined in § 412.62(f)(1)(ii) of this chapter).

(2) A hospital that is located in Puerto Rico, in the case of designated health services furnished by such a hospital.

(3) A hospital that is located outside of Puerto Rico, in the case of designated health services furnished by such a hospital, if the referring physician is authorized to perform services at the hospital, and the physician's ownership or investment interest is in the entire hospital and not merely in a distinct part or department of the hospital.

8. Section 411.357 is revised to read as follows:

§ 411.357 Exceptions to the referral prohibition related to compensation arrangements.

For purposes of § 411.353, the following compensation arrangements do not constitute a financial relationship:

(a) *Rental of office space.* Payments for the use of office space made by a lessee to a lessor if there is a rental or lease agreement that meets the following requirements:

(1) The agreement is set out in writing, is signed by the parties, and specifies the premises it covers.

(2) The term of the agreement is at least 1 year.

(3) The space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee, except that the lessee may make payments for the use of space consisting of common areas if the payments do not exceed the lessee's pro rata share of expenses for the space based upon the ratio of the space used exclusively by the lessee to the total amount of space (other than common areas) occupied by all persons using the common areas.

(4) The rental charges over the term of the agreement are set in advance and are consistent with fair market value.

(5) The charges are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(6) The agreement would be commercially reasonable even if no referrals were made between the lessee and the lessor.

(b) *Rental of equipment.* Payments made by a lessee to a lessor for the use of equipment under the following conditions:

(1) A rental or lease agreement is set out in writing, is signed by the parties, and specifies the equipment it covers.

(2) The equipment rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee.

(3) The agreement provides for a term of rental or lease of at least 1 year.

(4) The rental charges over the term of the agreement are set in advance, are consistent with fair market value, and are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(5) The agreement would be commercially reasonable even if no referrals were made between the parties.

(c) *Bona fide employment relationships.* Any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer for the provision of services if the following conditions are met:

(1) The employment is for identifiable services.

(2) The amount of the remuneration under the employment is—

(i) Consistent with the fair market value of the services; and

(ii) Except as provided in paragraph (c)(4) of this section, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician or other business generated between the parties.

(3) The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer.

(4) Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician) if the bonus is not directly related to the volume or value of a physician's own referrals.

(d) *Personal service arrangements*—(1) *General.* Remuneration from an entity under an arrangement or multiple arrangements to a physician, an immediate family member of the physician, or to a group practice, including remuneration for specific physician services furnished to a

nonprofit blood center, if the following conditions are met:

(i) Each arrangement is set out in writing, is signed by the parties, and specifies the services covered by the arrangement.

(ii) The arrangement(s) covers all of the services to be furnished by the physician (or an immediate family member of the physician) to the entity, and all separate arrangements between the entity and the physician and the entity and any family members incorporate each other by reference. A physician or family member can ''furnish'' services through employees whom they have hired for the purpose of performing the services.

(iii) The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement(s).

(iv) The term of each arrangement is for at least 1 year.

(v) The compensation to be paid over the term of each arrangement is set in advance, does not exceed fair market value, and, except in the case of a physician incentive plan, is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(vi) The services to be furnished under each arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any State or Federal law.

(2) *Physician incentive plan exception.* In the case of a physician incentive plan between a physician and an entity, the compensation may be determined in a manner (through a withhold, capitation, bonus, or otherwise) that takes into account directly or indirectly the volume or value of any referrals or other business generated between the parties, if the plan meets the following requirements:

(i) No specific payment is made directly or indirectly under the plan to a physician or a physician group as an inducement to reduce or limit medically necessary services furnished with respect to a specific individual enrolled with the entity.

(ii) Upon request by the Secretary, the entity provides the Secretary with access to the information about the plan specified in 417.479(h) of this chapter.

(iii) In the case of a plan that places a physician or a physician group at substantial financial risk as determined by the Secretary under § 417.479(e) and (f) of this chapter, the entity complies with the requirements concerning physician incentive plans set forth at § 417.479(g) and (i).

(e) *Physician recruitment.* Remuneration provided by a hospital to recruit a physician that is intended to induce the physician to relocate to the geographic area served by the hospital in order to become a member of the hospital's medical staff, if all of the following conditions are met:

(1) The arrangement is set out in writing and signed by both parties.

(2) The arrangement is not conditioned on the physician's referral of patients to the hospital.

(3) The hospital does not determine (directly or indirectly) the amount of the remuneration to the physician based on the volume or value of any referrals by the physician or other business generated between the parties.

(4) The physician is not precluded from establishing staff privileges at another hospital or referring business to another entity.

(f) *Isolated transactions.* Isolated financial transactions, such as a one-time sale of property or a practice, if all of the following conditions are met:

(1) The amount of remuneration under the transaction is—

(i) Consistent with the fair market value of the transaction; and

(ii) Not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician or other business generated between the parties.

(2) The remuneration is provided under an agreement that would be commercially reasonable even if the physician made no referrals.

(3) There are no additional transactions between the parties for 6 months after the isolated transaction, except for transactions that are specifically excepted under the other provisions in §§ 411.355 through 411.357.

(g) *Arrangements with hospitals.* Remuneration provided by a hospital to a physician if the remuneration does not relate, directly or indirectly, to the furnishing of designated health services. To qualify as ''unrelated,'' remuneration must not in any way reflect the volume or value of a physician's referrals.

(h) *Group practice arrangements with a hospital.* An arrangement between a hospital and a group practice under which designated health services are furnished by the group but are billed by the hospital if the following conditions are met:

(1) With respect to services furnished to an inpatient of the hospital, the arrangement is pursuant to the provision of inpatient hospital services under section 1861(b)(3) of the Act.

(2) The arrangement began before, and has continued in effect without interruption since, December 19, 1989.

(3) With respect to the designated health services covered under the arrangement, at least 75 percent of these services furnished to patients of the hospital are furnished by the group under the arrangement.

(4) The arrangement is in accordance with a written agreement that specifies the services to be furnished by the parties and the compensation for services furnished under the agreement.

(5) The compensation paid over the term of the agreement is consistent with fair market value, and the compensation per unit of services is fixed in advance and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(6) The compensation is provided in accordance with an agreement that would be commercially reasonable even if no referrals were made to the entity.

(i) *Payments by a physician.* Payments made by a physician—

(1) To a laboratory in exchange for the provision of clinical laboratory services, or

(2) To an entity as compensation for any other items or services that are furnished at a price that is consistent with fair market value, and that are not specifically excepted under another provision in §§ 411.355 through 411.357. ''Services'' in this context means services of any kind (not just those defined as ''services'' for purposes of the Medicare program in § 400.202).

(j) *Discounts.* Any discount made to a physician that is passed on in full to either the patient or the patient's insurers (including Medicare) and that does not enure to the benefit of the referring physician.

(k) *De minimis compensation.* Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed $50 per gift and an aggregate of $300 per year if—

(1) The entity providing the compensation makes it available to all similarly situated individuals, regardless of whether these individuals refer patients to the entity for services; and

(2) The compensation is not determined in any way that takes into account the volume or value of the physician's referrals to the entity.

(l) *Fair market value compensation.* Compensation resulting from an arrangement between an entity and a physician (or immediate family member) or any group of physicians (regardless of whether the group meets

the definition of a group practice set forth at § 411.351) if the arrangement is set forth in an agreement that meets the following conditions:

(1) It is in writing, signed by the parties, and covers only identifiable items or services, all of which are specified in the agreement. The agreement covers all of the items and services to be provided by the physician and any immediate family member to the entity or, alternatively, cross refers to any other agreements for items or services between these parties.

(2) It specifies the timeframe for the arrangement, which can be for any period of time and contain a termination clause, provided the parties enter into only one arrangement for the same items or services during the course of a year. An arrangement made for less than 1 year may be renewed any number of times if the terms of the arrangement and the compensation for the same items or services do not change.

(3) It specifies the compensation that will be provided under the arrangement. The compensation, or the method for determining the compensation, must be set in advance, be consistent with fair market value, and not be determined in a manner that takes into account the volume or value of any referrals (as defined in § 411.351), payment for referrals for medical services that are not covered under Medicare or Medicaid, or any other business generated between the parties.

(4) It involves a transaction that is commercially reasonable and furthers the legitimate business purposes of the parties.

(5) It meets a safe harbor under the anti-kickback statute or otherwise is in compliance with the anti-kickback provisions in section 1128B(b) of the Act.

9. In § 411.360, paragraphs (a), (b), and (d) are revised to read as set forth below, and paragraphs (c) and (e) are republished.

§ 411.360 Group practice attestation.

(a) Except as provided in paragraph (b) of this section, a group of physicians that wishes to qualify as a group practice (as defined in § 411.351) must submit a written statement to its carrier annually to attest that, during the most recent 12-month period (calendar year, fiscal year, or immediately preceding 12-month period) 75 percent of the total patient care services of group practice members was furnished through the group, was billed under a billing number assigned to the group, and the amounts so received were treated as receipts of the group.

(b) A newly-formed group (one in which physicians have recently begun to practice together) or any group practice that has been unable in the past to meet the requirements of section 1877(h)(4) of the Act or § 411.351, that wishes to qualify as a group practice, must—

(1) Submit a written statement to attest that, during the next 12-month period (calendar year, fiscal year, or next 12 months), it expects to meet the 75 percent standard and will take measures to ensure that the standard is met; and

(2) At the end of the 12-month period, submit a written statement to attest that it met the 75 percent standard during that period, billed for those services under a billing number assigned to the group, and treated amounts received for those services as receipts of the group. If the group did not meet the standard, any Medicare payments made for designated health services furnished by the group during the 12-month period that were conditioned upon the standard being met are overpayments.

(c) Once any group has chosen whether to use its fiscal year, the calendar year, or some other 12-month period, the group practice must adhere to this choice.

(d) The attestation must be signed by an authorized representative of the group practice who is knowledgeable about the group, and must contain a statement that the information furnished in the attestation is true and accurate to the best of the representative's knowledge and belief. Any person filing a false statement will be subject to applicable criminal and/or civil penalties.

(e) A group that intends to meet the definition of a group practice in order to qualify for an exception described in §§ 411.355 through 411.357, must submit the attestation required by paragraph (a) or (b)(1) of this section, as applicable, to its carrier no later than 60 days after receipt of the attestation instructions from its carrier.

10. In § 411.361, paragraphs (a) through (e) are revised to read as set forth below, and paragraphs (f) and (g) are republished.

§ 411.361 Reporting requirements.

(a) *Basic rule.* Except as provided in paragraph (b) of this section, all entities furnishing services for which payment may be made under Medicare must submit information to HCFA concerning their financial relationships (as defined in paragraph (d) of this section), in the form, manner, and at the times that HCFA specifies using an HCFA-prescribed form.

(b) *Exception.* The requirements of paragraph (a) of this section do not apply to entities that furnish 20 or fewer Part A and Part B services during a calendar year, or to any Medicare covered services furnished outside the United States.

(c) *Required information.* The information requested by HCFA can include the following:

(1) The name and unique physician identification number (UPIN) of each physician who has a financial relationship with the entity.

(2) The name and UPIN of each physician who has an immediate relative (as defined in § 411.351) who has a financial relationship with the entity.

(3) The covered services furnished by the entity.

(4) With respect to each physician identified under paragraphs (c)(1) and (c)(2) of this section, the nature of the financial relationship (including the extent and/or value of the ownership or investment interest or the compensation arrangement, if requested by HCFA).

(d) *Reportable financial relationships.* For purposes of this section, a financial relationship is any ownership or investment interest or any compensation arrangement, as defined in § 411.351, including those relationships excepted under §§ 411.355 through 411.357.

(e) *Form and timing of reports.* Entities that are subject to the requirements of this section must submit the required information on a HCFA-prescribed form within the time period specified by the servicing carrier or intermediary. Entities are given at least 30 days from the date of the carrier's or intermediary's request to provide the initial information. Thereafter, an entity must report to HCFA once a year all changes in the submitted information that occurred in the previous 12 months. Entities must retain documentation sufficient to verify the information provided on the forms and, upon request, must make that documentation available to HCFA or the OIG.

(f) *Consequences of failure to report.* Any person who is required, but fails, to submit information concerning his or her financial relationships in accordance with this section is subject to a civil money penalty of up to $10,000 for each day of the period beginning on the day following the applicable deadline established under paragraph (e) of this section until the information is submitted. Assessment of these penalties will comply with the applicable provisions of part 1003 of this title.

(g) *Public disclosure.* Information furnished to HCFA under this section is subject to public disclosure in accordance with the provisions of part 401 of this chapter.

PART 424—CONDITIONS FOR MEDICARE PAYMENT

B. Part 424 is amended as follows:

1. The authority citation for part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. In § 424.22, paragraph (d) is revised to read as set forth below, and paragraphs (e), (f), and (g) are removed.

§ 424.22 Requirements for home health services.

* * * * *

(d) *Limitation on the performance of certification and plan of treatment functions.* The need for home health services to be provided by an HHA may not be certified or recertified, and a plan of treatment may not be established and reviewed, by any physician who has a financial relationship, as defined in § 411.351 of this chapter, with that HHA, unless the physician's relationship meets one of the exceptions in §§ 411.355 through 411.357 of this chapter.

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

C. Part 435 is amended as follows:

1. The authority citation for part 435 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 435.1002, paragraph (a) is revised to read as follows:

§ 435.1002 FFP for services.

(a) Except for the limitations and conditions specified in §§ 435.1007, 435.1008, and 435.1012, FFP is available in expenditures for Medicaid services for all recipients whose coverage is required or allowed under this part.

* * * * *

3. Section 435.1012 is added to subpart K, under an undesignated centered heading, to read as follows:

Limitation on FFP Related to Prohibited Referrals

§ 435.1012 Limitation on FFP related to prohibited referrals.

(a) *Basic rule.* Except as specified in paragraph (b) of this section, no FFP in the State's expenditures for services is available for expenditures for designated health services (as defined in § 411.351 of this chapter) furnished under the State plan to an individual on the basis of a physician referral that would, if Medicare provided for coverage of the services to the same extent and under the same terms and conditions as under the State plan, result in the denial of Medicare payment for the services under §§ 411.351 through 411.360 of this chapter. (Section 411.353 provides that if a physician (or an immediate family member) has a financial relationship with an entity, the physician may not make a referral to that entity for the furnishing of designated health services for which payment otherwise may be made under Medicare and denies payment for any service furnished under a prohibited referral. Section 411.351 contains definitions, and §§ 411.355 through 411.357 provide exceptions to the prohibition on referrals.) The provisions of this section are based on section 1903(s) of the Act, which applies to Medicaid aspects of the Medicare rules limiting physician referrals.

(b) *Exception for services furnished to enrollees on a predetermined, capitated basis.* The limitation on FFP in paragraph (a) does not apply to services furnished to, or arranged for, an enrollee by an entity with an HMO contract with a State under section 1903(m); a prepaid health plan (PHP) contract with a State under part 434, subpart C; or a health insuring organization (HIO) contract under part 434, subpart D.

(c) *Advisory opinions relating to physician referrals.* Sections 411.370 through 411.389 cover the procedures for obtaining an advisory opinion from HCFA on whether a physician's referrals relating to designated health services (other than clinical laboratory services) are prohibited under section 1877.

PART 455—PROGRAM INTEGRITY: MEDICAID

D. Part 455 is amended as follows:

1. The authority citation for part 455 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 455.100 is revised to read as follows:

§ 455.100 Basis and Purpose.

(a) *Basis.* This subpart implements sections 1124, 1126, 1902(a)(38), 1903(i)(2), 1903(n), and 1903(s) of the Act.

(b) *Purpose.* This subpart does the following:

(1) Sets forth State plan requirements regarding—

(i) Disclosure by providers and fiscal agents of information concerning ownership and control, investment arrangements, and compensation arrangements; and

(ii) Disclosure of information on a provider's owners and other persons convicted of criminal offenses against Medicare, Medicaid, or the title XX services program.

(2) Specifies conditions under which the Administrator will deny Federal financial participation for services furnished by providers or fiscal agents that fail to comply with the disclosure requirements.

(3) Provides for a civil money penalty for failure to meet certain reporting requirements.

3. Section 455.103 is revised to read as follows:

§ 455.103 State plan requirement.

A State plan must provide that the requirements of §§ 445.104 through 455.109 are met.

4. A new subpart C, consisting of section §§ 455.108 and 455.109, is added to read as follows:

Subpart C—Disclosure of Information by Providers for Purposes of the Prohibition on Certain Physician Referrals

§ 455.108 Basis.

This subpart is based on section 1903(s) of the Act, which, in part, applies the reporting requirements of section 1877(f) and (g) of the Act to Medicaid providers of designated health services (as these services are defined in § 411.351).

§ 455.109 Disclosure of ownership, investment, and compensation arrangements.

(a) The Medicaid agency must require that each provider of services that furnishes designated health services covered by the State plan submit information to the Medicaid agency concerning its financial relationships (as defined in paragraph (d) of this section), in the form, manner, and at the times the agency specifies. The term ''designated health services,'' for purposes of this section, refers to the services listed in § 411.351 of this chapter, as they are defined in that section, or as those services are otherwise defined under the State plan.

(b) *Exception.* The requirements of paragraph (a) of this section do not apply to providers of services that provide 20 or fewer designated health services covered under the State plan during a calendar year, or to designated

health services furnished outside the United States.

(c) *Required information*. The information requested by the Medicaid agency can include the following:

(1) The name and Medicaid State Specific Identifier (MSSI) of each physician who has a financial relationship with the provider of services.

(2) The name and MSSI of each physician who has an immediate relative (as defined in § 411.351 of this chapter) who has a financial relationship with the provider of services.

(3) The covered items and services furnished by the provider of services.

(4) With respect to each physician identified under paragraphs (c)(1) and (c)(2) of this section, the nature of the financial relationship (including the extent and/or value of the ownership or investment interest or the compensation arrangement, if requested by the Medicaid agency).

(d) *Reportable financial relationships.* For purposes of this section, a financial relationship is any ownership or investment interest or any compensation arrangement, as defined in § 411.351, including those relationships excepted under §§ 411.355 through 411.357.

(e) *Form and timing of reports.* Providers of services that are subject to the requirements of this section must submit the required information on a prescribed form within the time period specified by the Medicaid agency. Thereafter, a provider must report to the Medicaid agency all changes in the submitted information within a timeframe specified by the Medicaid agency. Providers of services must retain documentation sufficient to verify the information provided on the forms and, upon request, must make that documentation available to the Medicaid State agency, HCFA, or the OIG.

(f) *Consequences of failure to report.* Any provider of services that is required, but failed, to meet the reporting requirements of paragraph (a) of this section is subject to a civil money penalty of not more than $10,000 for each day of the period beginning on the day following the applicable deadline until the information is submitted. Assessment of the penalty will comply with the applicable provisions of part 1003 of this title.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774, Medicare—Supplementary Medical Insurance Program; and Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: November 10, 1997.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Dated: December 17, 1997.

Donna E. Shalala,

Secretary.

[FR Doc. 98–282 Filed 1–5–98; 8:45 am]

BILLING CODE 4120–03–P

Federal Register

Friday
January 9, 1998

Part IV

Department of Health and Human Services

Centers for Disease Control and Prevention

Revised Diphtheria, Tetanus, and Pertussis (DTP/DTaP/DT) Vaccine Information Materials; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Revised Diphtheria, Tetanus, and Pertussis (DTP/DTaP/DT) Vaccine Information Materials

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: Under the National Childhood Vaccine Injury Act (42 U.S.C. § 300aa–26), the CDC must develop vaccine information materials that health care providers, either public or private, are required to distribute to patients/parents prior to administration of each dose of specific vaccines. On September 13, 1996, CDC published a notice in the **Federal Register** (61 FR 48597) seeking public comment on proposed revision of the diphtheria, tetanus, and pertussis vaccine information materials to reflect Food and Drug Administration (FDA) licensure of acellular pertussis vaccine combined with diphtheria and tetanus toxoids (DTaP) for administration to infants as young as two months of age. The 60-day comment period ended on November 12, 1996. Following review of the comments submitted and consultation as required under the law, CDC has finalized the revised diphtheria, tetanus, and pertussis vaccine information materials. Those final materials are contained in this notice.

DATES: Effective January 9, 1998. Beginning as soon as practicable, each health care provider who administers any vaccine that contains diphtheria, tetanus, or pertussis vaccine (except Td vaccine), shall, prior to administration of each dose of the vaccine, provide a copy of the vaccine information materials contained in this notice to the parent or legal representative of any child to whom such provider intends to administer the vaccine. (See below, for information regarding the Td (tetanus, diphtheria vaccine formulated for administration to individuals seven years of age and older) vaccine information materials.)

FOR FURTHER INFORMATION CONTACT: José Cordero, M.D., Acting Director, National Immunization Program, Centers for Disease Control and Prevention, Mailstop E–05, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone (404) 639–8200.

SUPPLEMENTARY INFORMATION: The National Childhood Vaccine Injury Act of 1986 (Pub. L. 99–660), as amended by section 708 of Public Law 103–183, added section 2126 to the Public Health Service Act. Section 2126, codified at 42 U.S.C. § 300aa–26, requires the Secretary of Health and Human Services to develop and disseminate vaccine information materials for distribution by health care providers to any patient (or to the parent or legal representative in the case of a child) receiving vaccines covered under the National Vaccine Injury Compensation Program.

Development and revision of the vaccine information materials have been delegated by the Secretary to the Centers for Disease Control and Prevention (CDC). Section 2126 requires that the materials be developed, or revised, after notice to the public with a 60-day comment period, and in consultation with the Advisory Commission on Childhood Vaccines, appropriate health care provider and parent organizations, and the Food and Drug Administration. The law also requires that information contained in the materials be based on available data and information, be presented in understandable terms, and include:

(1) A concise description of the benefits of the vaccine,

(2) A concise description of the risks associated with the vaccine,

(3) A statement of the availability of the National Vaccine Injury Compensation Program, and

(4) Such other relevant information as may be determined by the Secretary.

The vaccines originally covered under the National Vaccine Injury Compensation Program are diphtheria, tetanus, pertussis, measles, mumps, rubella, and poliomyelitis vaccines. Since April 15, 1992, any health care provider who intends to administer one of these vaccines is required to provide copies of the vaccine information materials prior to administration of any of these vaccines. The materials currently in use for measles, mumps, and rubella vaccines and the Td tetanus diphtheria vaccine are dated June 10, 1994, and were published in a **Federal Register** notice on June 20, 1994, (59 FR 31888). The current materials for polio vaccine are dated February 6, 1997, and were published in a **Federal Register** notice on February 6, 1997, (62 FR 5696). Single camera-ready copies of the vaccine information materials are available from State health departments. A list of contact telephone numbers for obtaining camera-ready copies is included in this notice. Copies are available in English and other languages.

(Effective August 6, 1997, hepatitis B, haemophilus influenzae type b, and varicella (chicken pox) vaccines were added for coverage under the National Vaccine Injury Compensation Program. Development of vaccine information materials for these vaccines is underway. As part of the process for developing these new materials, CDC will publish draft materials for public comment and will consult with affected parties as required by the statute. Distribution of the vaccine information materials for these newly covered vaccines will be required following publication of the final version of each vaccine's materials in the **Federal Register**. We anticipate that they will be published in the second quarter of 1998.)

Revised Diphtheria, Tetanus, and Pertussis (DTP, DTaP, DT) Vaccine Information Materials

Prior to July 31, 1996, all combined diphtheria and tetanus toxoids and acellular pertussis vaccines (DTaP) were licensed only for administration as the fourth or fifth doses of the DTP series. On that date, the FDA licensed a DTaP vaccine for administration to infants as young as two months of age (i.e., to include the first three doses of the DTP series). Since that date, the FDA has licensed additional DTaP vaccines to cover all five doses. Licensure of these vaccines requires revision of the vaccine information statement entitled, ''Diphtheria, Tetanus, and Pertussis Vaccine: What you need to know before your child gets the vaccine.''

On September 13, 1996, CDC published a notice in the **Federal Register** (61 FR 48597) seeking public comment on proposed diphtheria, tetanus, and pertussis vaccine information materials that were revised to reflect the FDA licensure of acellular pertussis vaccine combined with diphtheria and tetanus toxoids (DTaP) for administration to infants as young as two months of age. (In addition, interim vaccine information materials pertaining to acellular pertussis vaccine combined with diphtheria and tetanus toxoids (DTaP) were published in the **Federal Register** on September 13, 1996, (61 FR 48596) for use by health care providers pending completion of this formal revision process.)

The 60-day comment period ended on November 12, 1996. Comments were submitted by a few individuals and organizations in response to the September 13, 1996, notice. As required by the statute, CDC has also consulted with various groups, including the Advisory Commission on Childhood Vaccines, Food and Drug Administration, American Academy of Family Practitioners, American Academy of Pediatrics, American College of Osteopathic Pediatricians, American Nurses Association, Association of Maternal and Child

Health Programs, Association of State and Territorial Health Officials, Council of State and Territorial Epidemiologists, Dissatisfied Parents Together, Immunization Education and Action Committee: Healthy Mothers/Healthy Babies Coalition, National Association of County Health Officials, National Association of Hispanic Nurses, National Black Nurses' Association, National Coalition of Hispanic Health and Human Services Organizations (COSSMHO), National Council of La Raza, National Medical Association, and Ohio Parents for Vaccine Safety. Comments from the consultants, along with the comments submitted in response to the **Federal Register** notice, were fully considered in revising the vaccine information materials.

Following consultation and review of comments submitted, revised diphtheria, tetanus, and pertussis (DTP, DTaP, DT) vaccine information materials that comply with the provisions of the National Childhood Vaccine Injury Act have been finalized and are contained in this notice. They are entitled ''Diphtheria, Tetanus, and Pertussis Vaccines: What You Need to Know.''

* * * * *

Instructions for Use of Vaccine Information Materials (Vaccine Information Statements)

Required Use

As required under the National Childhood Vaccine Injury Act (42 U.S.C. 300aa–26), all health care providers in the United States who administer any vaccine containing diphtheria, tetanus, pertussis, measles, mumps, rubella, or polio vaccine shall, prior to administration of *each dose* of the vaccine, provide a copy of the relevant vaccine information materials that have been produced by the Centers for Disease Control and Prevention (CDC):

(a) To the parent or legal representative of any child to whom the provider intends to administer such vaccine, and

(b) To any adult to whom the provider intends to administer such vaccine.

The materials shall be supplemented with visual presentations or oral explanations, in appropriate cases.

''Legal representative'' is defined as a parent or other individual who is qualified under State law to consent to the immunization of a minor.

Additional Recommended Use of Materials

Health care providers may also want to give parents copies of all vaccine information materials prior to the first visit for immunization, such as at the first well baby visit.

Use of Revised Diphtheria, Tetanus, and Pertussis (DTP/DTaP/DT) Vaccine Information Materials

Beginning as soon as practicable after January 9, 1998, health care providers shall distribute copies of the August 15, 1997, version of the diphtheria, tetanus, and pertussis (DTP/DTaP/DT) vaccine information materials to replace the June 10, 1994, version or the September 13, 1996, interim version of the diphtheria, tetanus, and pertussis materials.

Use of Revised Polio Vaccine Information Materials

Beginning as soon as practicable after February 6, 1997, health care providers shall distribute copies of the February 6, 1997, version of the polio vaccine information materials to replace the June 10, 1994, version of the polio materials.

Current Editions of Vaccine Information Materials for Other Covered Vaccines

The June 10, 1994, version of the following vaccine information materials shall be distributed prior to administration of the vaccines (whether combined or single antigen vaccines are used): measles, mumps, and rubella (MMR) vaccine information materials, and tetanus, diphtheria (Td) vaccine information materials.

Recordkeeping

Health care providers shall make a notation in each patient's permanent medical record at the time vaccine information materials are provided indicating the edition (date of publication) of the materials distributed and the date these materials were provided. This recordkeeping requirement supplements the requirement of 42 U.S.C. 300aa–25 that all health care providers administering these vaccines must record in the patient's permanent medical record (or in a permanent office log) the name, address, and title of the individual who administers the vaccine, the date of administration, and the vaccine manufacturer and lot number of the vaccine used.

Applicability of State Law

Health care providers should consult their legal counsel to determine additional State requirements pertaining to immunization. The Federal requirement to provide the vaccine information materials supplements any applicable State law.

Availability of Copies

Single camera-ready copies of the vaccine information materials are available from State health departments. Copies are available in English and in other languages.

Dated: January 9, 1998.

* * * * *

List of Contact Telephone Numbers for Copies of Vaccine Information Materials

Single camera-ready copies of the vaccine information materials are available by calling the telephone number listed below for your location:

Alabama (334) 242–5023
Alaska (907) 561–4406
American Samoa 011–684–633–4606
Arizona (602) 230–5845
Arkansas (501) 661–2723
California (510) 540–2065
Chicago (312) 746–5380
Colorado (303) 692–2669
Connecticut (860) 509–7929
Delaware (302) 739–4746
Detroit (313) 876–4606
Florida (904) 487–2755
Georgia (404) 657–3158
Guam 011–671–734–7135
Hawaii (808) 973–9678
Houston (713) 794–9267
Idaho (208) 334–5942
Illinois (217) 785–1455
Indian Health Service (505) 248–4226
Indiana (317) 233–7010
Iowa (515) 281–4917
Kansas (913) 296–5593
Kentucky (502) 564–4478
Los Angeles (213) 580–9800
Louisiana (504) 483–1900
Maine (207) 287–3746
Mariana Islands 011–670–234–8950, x2001
Marshall Islands 011–692–625–3480
Maryland (410) 767–6679
Massachusetts (617) 983–6807
Michigan (517) 335–8159
Micronesia 011–691–320–2619
Minnesota (612) 623–5237
Mississippi (601) 960–7751
Missouri (573) 751–6133
Montana (406) 444–0065
Nebraska (402) 471–2937
Nevada (702) 687–4800
New Jersey (609) 588–7520
New York City (212) 676–2339
New Hampshire (603) 271–4485
New Mexico (505) 827–2369
New York State (518) 473–4437
North Carolina (919) 733–7752
North Dakota (701) 328–2378
Ohio (614) 466–4643
Oklahoma (405) 271–4073
Oregon (503) 731–4020
Palau 011–160–680–1757
Pennsylvania (717) 787–5681
Philadelphia (215) 685–6749

Puerto Rico (787) 274–5612
Rhode Island (401) 277–1185, ext. 188
San Antonio (210) 207–8794
South Carolina (803) 737–4160
South Dakota (605) 773–3737
Tennessee (615) 741–7343
Texas (512) 458–7284
Utah (801) 538–9450
Vermont (802) 863–7638
Virgin Islands (809) 776–8311, ext. 2148
Virginia (804) 786–6246 or 6247
Washington, DC (202) 576–7130
Washington (360) 753–3495
West Virginia (304) 558–2188
Wisconsin (608) 266–1339
Wyoming (307) 777–7952

Diphtheria, Tetanus, & Pertussis Vaccines; What You Need to Know

1. Why get vaccinated?

Diphtheria, pertussis and tetanus are serious diseases.

Diphtheria

- Diphtheria causes a thick covering in the back of the throat.
- It can lead to breathing problems, paralysis, heart failure, and even death.

Tetanus (Lockjaw)

- Tetanus causes painful tightening of the muscles, usually all over the body.
- It can lead to ''locking'' of the jaw so the person cannot open his mouth or swallow. Tetanus can lead to death.

Pertussis (Whooping Cough)

- Pertussis causes coughing spells so bad that it is hard for infants to eat, drink, or breathe. These can last for weeks.
- It can lead to pneumonia, seizures (jerking and staring spells), brain damage, and death.

Diphtheria, tetanus, and pertussis vaccines prevent these diseases.

Most children who get all their shots will be protected during childhood.

Many more children would get these diseases if we stopped vaccinating.

2. Diphtheria, Tetanus, and Pertussis Vaccines

DTP Vaccine

- Protects against diphtheria, tetanus, and pertussis.
- Used for many years.

DTaP Vaccine

- Protects against diphtheria, tetanus, and pertussis.
- Newer than DTP.

The Centers for Disease Control and Prevention (CDC) recommends DTaP over DTP. This is because DTaP is less likely to cause reactions than DTP.

Related Vaccines

- *Combinations:* To reduce the number of shots a child must get, DTP or DTaP may be available in combination with other vaccines.
- *DT* protects against diphtheria and tetanus, *but not pertussis.* It only is recommended for children who should not get pertussis vaccine.

3. What Are the Risks From These Vaccines?

- As with any medicine, vaccines carry a small risk of serious harm, such as a severe allergic reaction or even death.
- If there are reactions, they usually start within 3 days and don't last long.
- Most people have no serious reactions from these vaccines.

Possible Reactions to These Vaccines

Mild Reactions (common).
- Sore arm or leg.
- Fever.
- Fussy.
- Less appetite.
- Tired.
- Vomiting.

Mild reactions are much less likely after DTaP than after DTP. *Moderate to Serious Reactions (uncommon)*

Moderate to serious reactions have been uncommon with DTP vaccine:

- Non-stop crying (3 hours or more)—100 of every 10,000 doses.
- Fever of 105° or higher—30 of every 10,000 doses.
- Seizure (jerking or staring)—6 of every 10,000 doses.
- Child becomes limp, pale, less alert—6 of every 10,000 doses.

With DTaP vaccine, these reactions are much less likely to happen.

Severe Reactions (very rare).

There are two kinds of serious reactions:

- Severe allergic reaction (breathing difficulty, shock).
- Severe brain reaction (long seizure, coma or lowered consciousness).

Is there lasting damage?

- Experts disagree on whether pertussis vaccines cause lasting brain damage.
- If they do, it is very rare.

Most experts believe serious reactions will be more rare after DTaP than after DTP.

4. When Should my Child get Vaccinated?

Most children should get a dose at these ages: 2 Months, 4 Months, 6 Months, 12–18 Months, 4–6 Years.

At 11–12 years of age and every 10 years after that you should get a booster to prevent diphtheria and tetanus.

5. What Can Be Done To Reduce Possible Fever and Pain After This Vaccine?

Give your child an *aspirin-free* pain reliever for 24 hours after the shot.

This is important if your child has had a seizure or has a parent, brother, or sister who has had a seizure.

6. Some Children Should Not get These Vaccines or Should Wait

Tell your doctor or nurse if your child:

- Ever had a moderate or serious problem after getting vaccinated.
- Ever had a seizure.
- Has a parent, brother, or sister who has had a seizure.
- Has a brain problem that is getting worse.
- Now has a moderate or severe illness.

Your doctor or nurse has information on what to do in this case (for example, give one of these vaccines, wait, give medicine to prevent fever).

7. What if There Is a Moderate to Severe Reaction?

What should I look for?

- Any unusual conditions, such as those in item 3.

What should I do?

- Call a doctor or get the child to a doctor right away.
- Tell your doctor what happened, the date and time it happened, and when the vaccination was given.
- Ask your doctor, nurse, or health department to file a Vaccine Adverse Event Report (VAERS) form, or call VAERS yourself at: 1–800–822–7967.

8. The National Vaccine Injury Compensation Program

The National Vaccine Injury Compensation Program is a Federal program that helps pay for the care of those seriously injured by vaccines.

For details, call 1–800–338–2382 or visit the program's website at http://www.hrsa.dhhs.gov/bhpr/vicp/new.htm

9. How Can I Learn More?

- Ask your doctor or nurse. They can give you the vaccine package insert or suggest other sources of information.
- Call your local or state health department. They can give you the *Parents Guide to Childhood Immunization* or other information.
- Contact the Centers for Disease Control and Prevention (CDC):

Call 1–800–232–2522 (English)
or
Call 1–800–232–0233 (Spanish)
or
Visit the CDC website at http://www.cdc.gov/nip.

DTP/DTaP/DT (8/15/97), Vaccine Information Statement, 42 U.S.C. § 300aa–26.

Dated: January 5, 1998.

Arthur C. Jackson,

Associate Director for Management and Operations, Centers for Disease Control and Prevention (CDC).

[FR Doc. 98–525 Filed 1–8–98; 8:45 am]

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The List of Public Laws for the 105th Congress, First Session, has been completed. It will resume when bills are enacted into Public Law during the second session of the 105th Congress, which convenes on January 27, 1998.

Note: A Cumulative List of Public Laws was published in the **Federal Register** on December 31, 1997.

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