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Thursday
March 8, 1990

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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
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2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

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WHEN: March 20, at 9:30 a.m.
WHERE: Duke University,
Von Cannon Hall, Bryan Center,
Durham, NC.
RESERVATIONS: 919-684-3030.

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WHEN: March 29, at 9:00 a.m.
WHERE: State Office Building Auditorium,
Capitol Hill,
Salt Lake City, UT.
RESERVATIONS: Call the Utah Department of Administrative Services, 801-538-3010.

WASHINGTON, DC

WHEN: March 29, at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC.
RESERVATIONS: 202-523-5240.

Contents

Federal Register
Vol. 55, No. 46
Thursday, March 8, 1990

Agency for International Development
RULES
Acquisition regulations:
Disadvantaged enterprises; contracting and subcontracting requirements, 8469

Agricultural Marketing Service
RULES
Oranges, grapefruit, tangerines, and tangelos grown in Florida, 8441
Potatoes (Irish) grown in—
Colorado, 8443
PROPOSED RULES
Milk marketing orders:
Upper Midwest, 8472
NOTICES
Beef promotion and research:
Cattlemen's Beef Promotion and Research Board; certification and nomination, 8498

Agriculture Department
See also Agricultural Marketing Service; Animal and Plant Health Inspection Service; Commodity Credit Corporation; Forest Service; Soil Conservation Service
NOTICES
Agency information collection activities under OMB review, 8498

Alcohol, Drug Abuse, and Mental Health Administration
NOTICES
Federal agency urine drug testing; certified laboratories meeting minimum standards, list, 8896
Grants and cooperative agreements; availability, etc.:
Community partnership program; drug abuse and alcohol abuse prevention demonstration program, 8539

Animal and Plant Health Inspection Service
NOTICES
Veterinary biological products; production and establishment licenses; correction, 8499

Antitrust Division
NOTICES
National cooperative research notifications:
International Partners in Glass Research, 8612
Microelectronics & Computer Technology Corp.; correction, 8612

Army Department
NOTICES
Military traffic management:
International Government bill of lading program; annual performance bonds submission method and bond text; proposed changes, 8513
International household goods shipments; intermodel containers use feasibility, 8514
International through government bill of lading shipments; 1-year rates requirement, 8515

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Child Support Enforcement Office
RULES
Audit and penalties:
State child support enforcement (IV-D) programs, 8465

Commerce Department
See also Export Administration Bureau; International Trade Administration; National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities under OMB review, 8503

Commodity Credit Corporation
NOTICES
Loan and purchase programs:
Feed grains price support and production adjustment and farmer-owned reserve programs—
1990 crops, 8500
Targeted export assistance program, 8502

Customs Service
NOTICES
IRS interest rate used in calculating interest on overdue accounts and refunds, 8633

Defense Department
See also Army Department
NOTICES
Agency information collection activities under OMB review, 8512
(2 documents)
Meetings:
DIA Advisory Board, 8513
Science Board task forces, 8513
(3 documents)

Education Department
NOTICES
Grants and cooperative agreements; availability, etc.:
Comprehensive school health education national program, 8880
Computer-based instruction program, 8881
Educational research and development centers program, 8876
Innovation in education program, 8880
Native Hawaiian family-based education centers, 8515
Technology education program, 8881

Employment and Training Administration
NOTICES
Adjustment assistance:
Abitibi-Price Corp. et al., 8613
American Carco, 8616
Circuline Fabrics, Inc., 8614
Picker International et al., 8615
Republic Hose, 8617
S. Goldfeder, Inc., et al., 8617
Woods Petroleum Corp. et al., 8615

Energy Department
See also Federal Energy Regulatory Commission; Hearings and Appeals Office, Energy Department
NOTICES
Natural gas exportation and importation:
Westcoast Resources, Inc., 8518

Environmental Protection Agency
RULES
Superfund program:
National oil and hazardous substances contingency plan—
Revisions, 8636
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
Wisconsin, 8489
NOTICES
Chesapeake Bay program:
1987 agreement; proposals for review, 8527
Grants, State and local assistance:
Financial assistance programs—
Shallow injection well initiatives program, 8534
Hazardous waste:
Land disposal restrictions; exemptions—
Bethlehem Steel Corp., 8527

Executive Office of the President
See Presidential Documents

Export Administration Bureau
NOTICES
Export privileges, actions affecting:
Ahlberg, George B., et al., 8504
Grossauer, Michael, et al., 8505
Perovuo, Rainer Peter, et al., 8508
Meetings:
Computer Systems Technical Advisory Committee, 8510, 8511
(5 documents)
Semiconductor Technical Advisory Committee, 8511

Family Support Administration
See Child Support Enforcement Office

Farm Credit Administration
NOTICES
Nondiscrimination on basis of handicap in federally-conducted programs and activities, 8534

Federal Aviation Administration
RULES
Airworthiness directives:
Boeing, 8445
McDonnell Douglas, 8446
Control zones, 8448
PROPOSED RULES
Airworthiness directives:
Beech et al., 8474
Airworthiness standards:
Rotorcraft; normal and transport category—
Turboshaft engine rotor burst protection, 8474
NOTICES
Airport noise compatibility program:
Santa Maria Public Airport, CA, 8630
Environmental statements; availability, etc.:
Houston West Side Airport, TX, 8630
Exemption petitions; summary and disposition, 8631
Organization, functions, and authority delegations:
Scottsbluff, NE, 8631

Federal Communications Commission
RULES
Radio stations; table of assignments:
Idaho, 8468
Illinois, 8468
Texas, 8468
NOTICES
Agency information collection activities under OMB review, 8535, 8537
(2 documents)

Federal Deposit Insurance Corporation
NOTICES
Agency information collection activities under OMB review, 8538

Federal Energy Regulatory Commission
NOTICES
Applications, hearings, determinations, etc.:
Alabama-Tennessee Natural Gas Co., 8515
ANR Pipeline Co., 8516
Equitrans, Inc., 8517
MIGC, Inc., 8517
Ringwood Gathering Co., 8517
Texas Eastern Transmission Corp., 8517

Federal Highway Administration
NOTICES
Environmental statements; notice of intent:
Weber County, UT, 8631

Federal Maritime Commission
NOTICES
Agreements filed, etc., 8538, 8539
(2 documents)

Food and Drug Administration
RULES
Animal drugs, feeds, and related products:
Sponsor name and address changes—
Sanofi Animal Health, Inc., 8461
Solvay Animal Health, Inc., 8459
Food for human consumption:
Lactose; identity standard, 8458
PROPOSED RULES
Food additives:
Polymers—
Acrylonitrile copolymers, 8476

Forest Service
NOTICES
Environmental statements; availability, etc.:
Santa Fe National Forest, NM, 8502

General Services Administration
RULES
Federal property management:
Public buildings and space—
Quality workplace environment program, 8465

Health and Human Services Department
See Alcohol, Drug Abuse, and Mental Health Administration; Child Support Enforcement Office; Food and Drug Administration; Health Care Financing Administration; Human Development Services Office; Social Security Administration

Health Care Financing Administration
PROPOSED RULES
Medicare:
Disabled active individuals; secondary payer, 8491
NOTICES
Medicare:
Adult liver transplants; coverage criteria, 8545

Hearings and Appeals Office, Energy Department
NOTICES
Special refund procedures; implementation, 8518, 8523 (2 documents)

Housing and Urban Development Department
RULES
Mortgage and loan insurance programs:
Maximum mortgage limits for high-cost areas; correction, 8464
Non-Federal governmental audit requirements; technical corrections, 8462
NOTICES
Grants and cooperative agreements; availability, etc.:
Rental rehabilitation program, 8868

Human Development Services Office
NOTICES
Grants and cooperative agreements; availability, etc.:
Coordinated discretionary funds program, 8553

Interior Department
See Land Management Bureau; Minerals Management Service; National Park Service

International Development Cooperation Agency
See Agency for International Development

International Trade Administration
NOTICES
Meetings:
Importers and Retailers' Textile Advisory Committee, 8512
Management-Labor Textile Advisory Committee, 8512

International Trade Commission
NOTICES
Import investigations:
Imported breast prostheses and manufacturing processes, 8611

Interstate Commerce Commission
NOTICES
Railroad operation, acquisition, construction, etc.:
Paducah & Louisville Railway, Inc., 8611

Justice Department
See also Antitrust Division
NOTICES
Pollution control; consent judgments:
Bell Petroleum Services, Inc., et al., 8611
Coleman Evans Wood Preserving Co. et al., 8611

Labor Department
See also Employment and Training Administration; Mine Safety and Health Administration; Occupational Safety and Health Administration; Veterans Employment and Training, Office of Assistant Secretary
NOTICES
Agency information collection activities under OMB review, 8612

Land Management Bureau
NOTICES
Closure of public lands:
Nevada, 8608
Conservation and recreation areas:
California Desert Conservation Area Plan; correction, 8608
Environmental statements; availability, etc.:
Western Colorado; 22-inch diameter natural gas pipeline, 8608
Meetings:
Susanville District Grazing Advisory Board, 8609
Oil and gas leases:
Wyoming, 8609 (2 documents)
Opening of public lands
South Dakota, 8609
Realty actions; sales, leases, etc.:
Arizona, 8610
California, 8610

Mine Safety and Health Administration
NOTICES
Safety standard petitions:
Bodie Mining, Inc., 8618
Clinchfield Coal Co., 8618
Green Power Inc., 8618
Old Ben Coal Co., 8619 (2 documents)
Shamrock Coal Co., 8619

Minerals Management Service
PROPOSED RULES
Outer Continental Shelf; oil, gas, and sulphur operations:
Revision; amendments, 8485

National Aeronautics and Space Administration
NOTICES
Environmental statements; availability, etc.:
Space Station Freedom Program, 8622

National Foundation on the Arts and the Humanities
NOTICES
Agency information collection activities under OMB review, 8622
Meetings:
Humanities Panel, 8623

National Highway Traffic Safety Administration
PROPOSED RULES
Motor vehicle safety standards:
Turn signal controls and displays, 8497
NOTICES
Motor vehicle safety standards; exemption petitions, etc.:
Budd Co., 8632

National Oceanic and Atmospheric Administration
NOTICES
Meetings:
New England Fishery Management Council, 8512

National Park Service
PROPOSED RULES
Special regulations:
Ozark National Scenic Riverways; motorized vessels restrictions, 8487

Occupational Safety and Health Administration
NOTICES
State plans; standards approval, etc.:
Washington, 8620

Pacific Northwest Electric Power and Conservation Planning Council
NOTICES
Power plan amendments:
Columbia River Basin fish and wildlife program, 8623
Columbia River Basin fish and wildlife program and Northwest conservation and electric power plan, 8624

Presidential Documents
PROCLAMATIONS
Special observances:
Prayer, National Day of (Proc. 6104), 8439

Public Health Service
See Alcohol, Drug Abuse, and Mental Health Administration; Food and Drug Administration

Research and Special Programs Administration
NOTICES
Hazardous materials:
Inconsistency rulings, etc.—
San Jose, CA, 8894

Saint Lawrence Seaway Development Corporation
NOTICES
Meetings:
Advisory Board, 8633

Securities and Exchange Commission
NOTICES
Self-regulatory organizations; proposed rule changes:
American Stock Exchange, Inc., 8624
National Association of Securities Dealers, Inc., 8626
Applications, hearings, determinations, etc.:
Public utility holding company filings, 8628

Social Security Administration
RULES
Social security benefits and supplemental security income:
Vocational rehabilitation services payments, 8449

Soil Conservation Service
NOTICES
Environmental statements; availability, etc.:
East Walker Watershed Project, NV, 8503

Transportation Department
See also Federal Aviation Administration; Federal Highway Administration; National Highway Traffic Safety Administration; Research and Special Programs Administration; Saint Lawrence Seaway Development Corporation
NOTICES
Aviation proceedings:
Hearings, etc.—
Discovery Airways, Inc., et al., 8630

Treasury Department
See also Customs Service
NOTICES
Agency information collection activities under OMB review, 8633

United States Information Agency
NOTICES
Meetings:
Voice of America Broadcast Advisory Committee, 8634

Veterans Affairs Department
NOTICES
Agency information collection activities under OMB review, 8634

Veterans Employment and Training, Office of Assistant Secretary
NOTICES
Grants and cooperative agreements; availability, etc.:
Job Training Partnership Act—
Employment and training programs operation, 8621

Separate Parts In This Issue

Part II
Environmental Protection Agency, 8666

Part III
Department of Housing and Urban Development, 8868

Part IV
Department of Education, 8876

Part V
Department of Education, 8879

Part VI
Department of Transportation, Research and Special Programs Administration, 8894

Part VII
Department of Health and Human Services, Alcohol, Drug Abuse, and Mental Health Administration, 8896

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR
Proclamations:
6104 8439

7 CFR
905 8441
948 8443
Proposed Rules:
1068 8472

14 CFR
39 (2 documents) 8445, 8446
71 8448
Proposed Rules:
29 8474
39 8474

20 CFR
404 8449
416 8449

21 CFR
168 8458
510 (2 documents) 8459, 8461
520 (2 documents) 8459, 8461
522 8461
524 8461
540 (2 documents) 8459, 8461
555 8461
558 (2 documents) 8459 8461
Proposed Rules:
173 8476
175 8476
176 8476
177 8476
178 8476
179 8476
180 8476
181 8476

24 CFR
44 8462
201 8464
203 8464
234 8464

30 CFR
Proposed Rules:
250 8485

36 CFR
Proposed Rules:
7 8487

40 CFR
300 8666
Proposed Rules:
52 8489

41 CFR
101-17 8465

42 CFR
Proposed Rules:
411 8491

45 CFR
305 8465

47 CFR
73 (3 documents) 8468

48 CFR
705 8469
706 8469
719 8469
726 8469
752 8469

49 CFR
Proposed Rules:
571 8497

Federal Register
Vol. 55, No. 46
Thursday, March 8, 1990

Presidential Documents

Title 3—

The President

Proclamation 6104 of March 6, 1990

National Day of Prayer, 1990

By the President of the United States of America

A Proclamation

"More things are wrought by prayer than this world dreams of," wrote Lord Tennyson more than a century ago. Today, we are deeply mindful of the truth of his words. Our Nation's history and the lives of millions of men and women around the world provide compelling evidence of the power of faith and the efficacy of prayer.

The Bible tells us what we have often seen for ourselves: that God answers the prayers of those who place their trust in Him. In the Old Testament story of Hannah and Samuel and the New Testament parable of the Prodigal Son, we find a universal experience of parenthood: long hours spent in waiting for a child and in prayer for his well-being. What mother or father has not, in unspoken thought, asked the Almighty to protect his or her little ones and thanked Him for their safekeeping?

Our ancestors believed that, in the lives of nations as well as individuals, the love of God is a great parental love like this. They saw history as the place where our Creator looks for His children, longing for them to come to Him and to do His will. As they fashioned a system of government that would carry the United States into an uncharted future, as they fled oppressed and war-torn nations to build new lives in this land of opportunity, as they shielded the spark of hope from the cold winds of tyranny and world war, time and again they came, thankful and contrite, to the inextinguishable light of the Father's house.

So great was the faith of our Founding Fathers, and so firm was their belief in the need for God's blessing upon their bold experiment in self-government, that they frequently turned to Him in prayer both as individuals and as a community. Indeed, the first act of the Continental Congress, the same body that declared America's independence, was a prayer. Thomas Jefferson and other Founders believed that the God Who gives us life gives us liberty as well, and if the American people are to keep a truly free and democratic government, they must acknowledge their dependence on His mercy and guidance. Thus, when they pledged to each other their lives, fortunes, and sacred honor in support of the Declaration of Independence, they did so "with a firm Reliance on the Protection of Divine Providence." When the Framers of our Constitution heeded Ben Franklin's call for daily prayer at the Federal Convention in 1787, it is as if they were profoundly aware of the gentle admonition found in the 127th Psalm: "Except the Lord build the house, they labor in vain that build it; except the Lord keep the city, the watchman waketh but in vain."

Today, we do well to place in God's hands our hopes and concerns for our families and our communities, just as our Nation's Founders entrusted their labors to Him. The childhood of our liberty was guarded by the love of God, and the "new birth of freedom" of which President Lincoln spoke was possible only because that love was faithful to a people bitterly divided by civil war. Today, our liberty is older and our Republic has entered its third century, but we are still, as a people, in the infancy of our journey. So much greater is our

need now to turn to God in prayer once again, seeking His blessing for the way that lies ahead.

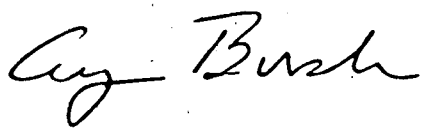
On this National Day of Prayer, observed more than 200 years after the Continental Congress asked for God's blessing upon our young country, our prayers could have no better object than the safety and well-being of our children. It is for them that we labor and sacrifice, and it is for them that we struggle to uphold the noble ideals affirmed at our Nation's birth. Today, amidst our many blessings, we see the destruction of too many lives in their earliest flower—too many young minds lost to drugs, delinquency, and despair. The suffering or loss of even one of these children is more than any parent can bear, and it is more than our Nation can afford to tolerate.

I therefore ask my fellow Americans to join with me in prayer for our children. Let us strive to help each of them sink their roots into the rich soil of God's love for the beings He has made in His own image. Let us show them through prayer that we, too, like our Nation's Founders, seek our shelter—our rock and our salvation—in the arms of God. Finally, let us dedicate this Nation once more to the protection of Divine Providence, remembering the words of the Psalmist: "How excellent is thy loving kindness O God! Therefore the children of men put their trust under the shadow of thy wings."

Since the approval of the joint resolution of the Congress on April 17, 1952, calling for the designation of a specific day to be set aside each year as a National Day of Prayer, recognition of such a day has become a cherished annual event. Each President since then has proclaimed a National Day of Prayer annually under the authority of that resolution, continuing a tradition that actually dates back to the Continental Congress, which issued the first official proclamation for a National Day of Prayer on July 12, 1775. By Public Law 100-307, the first Thursday in May of each year has been set aside as a National Day of Prayer.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim May 3, 1990, as a National Day of Prayer. I invite the people of the United States to gather together on that day in homes and places of worship to pray, each after his or her own manner, for the renewal of our Nation's moral heritage and for God's blessing upon each of us, especially our children.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of March, in the year of our Lord nineteen hundred and ninety, and of the Independence of the United States of America the two hundred and fourteenth.



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Rules and Regulations

Federal Register
Vol. 55, No. 46
Thursday, March 8, 1990

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Docket No. FV-90-135FR]

Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Relaxation of Grade Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule relaxes current grade requirements for domestic and export shipments of Valencia and other late type oranges and grapefruit grown in Florida and imported grapefruit for the remainder of the 1989–90 season. A severe freeze in late December 1989 damaged much of the remaining Florida citrus crop available for fresh market use. The Citrus Administrative Committee (committee) unanimously recommended these relaxations to allow handlers to maximize utilization of the remaining supplies of marketable fruit. This action is based on an analysis of the 1989–90 season Florida citrus crop and current and prospective market conditions.

EFFECTIVE DATE: March 5, 1990.

FOR FURTHER INFORMATION CONTACT: Gary D. Rasmussen, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone: (202) 475-3918.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Marketing Order No. 905, both as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are about 100 Florida citrus handlers subject to regulation under the marketing order covering oranges, grapefruit, tangerines, and tangelos grown in Florida. In addition, there are about 13,000 producers of these citrus fruits in Florida and about 26 importers who import grapefruit into United States. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. A minority of these handlers and a majority of the producers and importers may be classified as small entities.

Section 905.306 of the rules and regulations (7 CFR 905.306) specifies minimum grade requirements for most varieties of Florida oranges, grapefruit, and tangerines for both domestic and export markets. Minimum grade requirements for domestic shipments of Florida citrus are specified in that section in Table I of paragraph (a) and for export markets in Table II of paragraph (b). The domestic market was redefined as the 48 contiguous States and the District of Columbia of the United States and export markets as any destination other than the 48 contiguous States and the District of Columbia of the United States by an amendment to the marketing order [54 FR 37290, September 8, 1989], which revised §§ 905.9 and 905.52. Section 905.306 has been amended to reflect these changes to the order.

To allow handlers to maximize utilization of the remaining supplies of marketable fruit, the committee unanimously recommended the following relaxations:

1. Reduce the minimum internal quality requirement for domestic and export shipments of Valencia and other late type oranges to U.S. No. 2 grade from U.S. No. 1 quality. The current requirement for such oranges is U.S. No. 1 Golden, which requires a U.S. No. 1 internal quality.

2. Reduce for white seedless grapefruit the minimum internal quality requirements for domestic shipments to U.S. No. 2 grade from U.S. No. 1 grade.

3. Reduce for pink seedless grapefruit the minimum internal quality requirements for export shipments to U.S. No. 2 grade from U.S. No. 1 grade.

These relaxations need to be made effective immediately and are to remain in effect through August 19, 1990, for grapefruit, and through September 23, 1990, for Valencia and other late type oranges. The minimum grade requirements for these fruits will revert to the tighter requirements specified in § 905.306 immediately following the relaxation periods for each of these fruits.

The committee, which administers the program locally, unanimously recommended these relaxations on February 27, 1990. The grade relaxations are based on the committee's assessment of the current crop conditions and the remaining available supply of marketable fruit. The committee meets prior to and during each season to review the handling requirements, effective on a continuous basis, for each regulated citrus fruit. Committee meetings generally are open to the public, and interested persons may express their views at these meetings. The U.S. Department of Agriculture (Department) reviews committee recommendations and information submitted by the committee and other available information and determines whether modifications, suspension, or termination of the handling requirements would tend to effectuate the declared policy of the Act.

A severe freeze in late December 1989 damaged much of the Florida citrus crop available for fresh market use. According to the February 9 crop report issued by the National Agricultural Statistics Service, the Florida citrus production estimate is 23 percent lower than in December 1989. Florida's Valencia orange crop is estimated to be 45 percent below the December estimate of 58,000,000 boxes, and the grapefruit crop is estimated at 23 percent below the December estimate of 44,000,000 boxes. The surveys for the February forecast were completed in early February.

Because supplies of Valencia and other late type oranges and grapefruit for fresh use were substantially reduced by the freeze, the industry desires to utilize as much of the crop in the fresh market as possible. After evaluating the current crop conditions, the committee has recommended that these grade reductions be implemented as soon as possible. These reductions will allow dryer but acceptable fruit to be shipped to the fresh market. Temperatures in Florida since the freeze have been above normal. As temperatures rise following a freeze, fruit tends to dry out rapidly. This action will increase the amount of fruit which may be shipped fresh, and is needed immediately to keep some packing facilities operating. These reductions will help the Florida citrus industry market its remaining crop, help satisfy consumer demand for fresh citrus fruits, and should improve producer returns.

After evaluating crop conditions, the committee has determined that the recommended reductions in the grade requirements for Valencia and other late type oranges and grapefruit are in the best interest of the industry at this time to market remaining supplies of merchantable fruit. These grade relaxations will help satisfy consumer demand for fresh citrus fruits while maximizing returns to producers and handlers.

Some Florida citrus fruit shipments are exempt from the handling requirements effective under the marketing order. Handlers may ship up to 15 standard packed cartons (12 bushels) of fruit per day under a minimum quantity exemption provision. Also, handlers may ship up to two standard packed cartons of fruit per day in gift packages which are individually addressed and not for resale, under the current exemption provisions. Fruit shipped for animal feed is also exempt under specific conditions. In addition, fruit shipped to commercial processors for conversion into canned or frozen products or into a beverage base are not subject to the handling requirements.

Section 8e of the Act (7 U.S.C. 608e-1) provides that whenever specified commodities, including oranges and grapefruit, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities. Section 8e also provides that whenever two or more marketing orders regulate the same commodity produced in different areas of the United States, the Secretary shall determine which area the imported commodity is in most direct competition with and apply the regulations for that area to the imported commodity.

Grapefruit import requirements are specified in § 944.106 (7 CFR part 944), and are effective under section 8e of the Act. That section requires that grapefruit imported into the United States must meet the same minimum grade and size requirements as those specified for the various varieties of Florida grapefruit in Table I of paragraph (a) in § 905.306. Since this action reduces minimum grade requirements for domestically produced Florida white seedless grapefruit, the reduced grade requirements also apply to imported white seedless grapefruit. Since revising Table I automatically changes the import requirements, no change is necessary in § 944.106. An exemption provision in the grapefruit import regulation permits persons to import up to 10 standard packed 4/5-bushel cartons exempt from the import requirements.

Orange import requirements are specified in § 944.312 (7 CFR part 944), and are effective under section 8e of the Act. That section requires that oranges imported into the United States must meet the same minimum grade and size requirements as those specified for Texas oranges in paragraphs (a)(1) and (a)(2) of § 906.365 Texas Orange and Grapefruit Regulation 34 (54 FR 51737, December 18, 1989). Accordingly, the findings and determinations for imported oranges in part 944 would not be changed by this action, and no change in the provisions of § 944.312 is necessary. Thus, import requirements for oranges would continue to be based upon the requirements for Texas oranges under M.O. 906.

This action reflects the committee's and the Department's appraisal of the need to make the grade relaxations hereinafter set forth. The Department's view is that this action will have a beneficial impact on producers and handlers since it would allow Florida citrus handlers to ship those grades of fruit available to meet consumer needs consistent with this season's crop and market conditions.

Based on the above, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, the information and recommendations submitted by the committee, and other information, it is found that the relaxations set forth below will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impracticable, unnecessary and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action relaxes the grade requirements currently in effect for Valencia and other late type oranges and grapefruit; (2) handlers of these fruits will need no additional time to comply with the relaxed requirements; and (3) prompt implementation of these relaxations is needed so that the industry can ship the fruits as soon as possible so as to lessen grower and handler losses from the December 1989 freeze.

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, 7 CFR part 905 is amended as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

1. The authority citation for 7 CFR part 905 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. The provisions of § 905.306 are amended as follows:

Note: This action will be published in the Code of Federal Regulations.

A. In paragraph (a), Table I, the entries for oranges and grapefruit are revised to read as set forth below.

B. In paragraph (b), Table II, the entries for oranges and grapefruit are revised to read as follows:

§ 905.306 Orange, grapefruit, tangerine, and tangelo regulation 6.

(a) * * *

TABLE I

Variety	Regulation Period	Minimum Grade	Minimum Diameter (Inches)
(1)	(2)	(3)	(4)
* * *	* * *	* * *	* * *
ORANGES			
Valencia and other late type	03/05/90–09/23/90	U.S. No. 1 Golden (External) U.S. No. 2 (Internal).	2–4/16
	On and after 09/24/90	U.S. No. 1	2–8/16
* * *	* * *	* * *	* * *
GRAPEFRUIT			
* * *	* * *	* * *	* * *
Seedless, except pink	03/05/90–08/19/90	U.S. No. 2 (External) U.S. No. 2 (Internal)	3–5/16
	On and after 08/20/90	Improved No. 2 (External) U.S. No. 1 (Internal)	3–9/16
* * *	* * *	* * *	* * *

(b) * * *

TABLE II

Variety	Regulation Period	Minimum Grade	Minimum Diameter (Inches)
(1)	(2)	(3)	(4)
* * *	* * *	* * *	* * *
ORANGES			
Valencia and other late type	03/05/90–09/23/90	U.S. No. 1 Golden (External) U.S. No. 2 (Internal).	2–4/16
	On and after 09/24/90	U.S. No. 1	2–8/16
* * *	* * *	* * *	* * *
GRAPEFRUIT			
* * *	* * *	* * *	* * *
Seedless, pink	03/05/90–08/19/90	U.S. No. 2 (External) U.S. No. 2 (Internal)	3–5/16
	On and after 08/20/90	Improved No. 2 (External) U.S. No. 1 (Internal)	3–5/16
* * *	* * *	* * *	* * *

Dated: March 5, 1990.

Robert C. Keene,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90–5334 Filed 3–7–90; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 948

[Docket No. FV–90–113]

Irish Potatoes Grown in Colorado—Area No. 2; Reapportionment of Committee Membership

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule reapportions handler membership on the Colorado Potato Administrative Committee, San Luis Valley Office, Area No. 2 (committee). The change is intended to provide more equitable handler representation on the committee in recognition of recent changes that have occurred in the relative importance of the various handler groups in Colorado Area No. 2.

EFFECTIVE DATE: March 8, 1990.

FOR FURTHER INFORMATION CONTACT: Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456, telephone (202) 447–5331.

SUPPLEMENTARY INFORMATION:

This rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948 (7 CFR part 948), both as amended, regulating the handling of Irish potatoes grown in Colorado. The marketing agreement and order are authorized by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 100 handlers of Colorado Area No. 2 potatoes under this marketing order, and approximately 290 potato producers. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of the handlers and producers of Colorado Area No. 2

potatoes may be classified as small entities.

The Colorado Potato Administrative Committee, San Luis Valley Office, Area No. 2 (committee) is established under the terms of the marketing order to work with the Department in administering the program. The committee consists of 12 members, of which 7 are producers and 5 are handlers. Producer membership is allocated geographically among the counties comprising the production area. Handler membership is currently allocated among three defined categories. Handlers that are qualified as producers' cooperative marketing associations are entitled to one member on the committee. Bulk handlers, defined as those whose primary business is shipping bulk loads of potatoes for seed or to repackers, are entitled to one member. Three members are selected to represent handlers that do not fall into the two previous categories. Areas, subdivisions of areas, the distribution of representation among the subdivision of areas, or among marketing organizations within the respective areas may be reestablished by the Secretary upon area committee recommendation pursuant to § 948.53.

The committee met on November 16, 1989, and unanimously recommended that membership on the Area No. 2 committee be reestablished and that handler membership be reapportioned by eliminating the producers' cooperative marketing association category and increasing the number of members allocated to the bulk handler category from one to two. Until recently, between 10 and 15 percent of the Colorado Area No. 2 potato crop was handled by producers' cooperative marketing associations. Changes in handler affiliations over the past year have reduced this category's share of the total volume handled to less than five percent. The committee believes that it is no longer equitable to provide this handler category with one of the five handler member positions on the committee. By eliminating this category, only two will remain—bulk handlers and all other handlers. Those handlers previously classified as producers' cooperative marketing associations will now be considered in the "all other handlers" category.

While the proportion of the crop handled by producers' cooperative marketing associations has declined, that handled by bulk shippers has increased. The committee estimates that bulk shippers now account for approximately 35 percent of the total volume of potatoes handled. The committee therefore recommended that this handler group be allocated 2 of 5, or 40 percent, of the total number of handler member positions. The committee believes that this will provide adequate and equitable industry representation in view of the current distribution of shipments among the handler groups.

Committee members serve 2-year terms of office beginning May 1 with one-half of the membership selected each year. Of the current handler members, the one representing producers' cooperative marketing associations is serving a term that expires on April 30, 1990. This member will continue to serve the remainder of this term, and this change in apportionment will be effective for nominations for members to serve the term beginning May 1, 1990.

Notice of this action was given in the January 4, 1990, **Federal Register** (55 FR 299) providing interested persons until February 5, 1990, to file written comments. One comment was submitted by Daniel G. Wisotzkey, Executive Director, Child Nutrition/Transportation, Colorado Department of Education. Mr. Wisotzkey suggested that consumers, as final handlers of Colorado potatoes, be represented on the committee, and recommended that John Raftery of the State Department of Education in Boston, Massachusetts be appointed to serve as a consumer representative on the committee.

The marketing order provides that committee members and alternates shall be producers or handlers of potatoes as defined in the order, subject to the eligibility requirements contained in the order. Thus, a consumer who is not otherwise a producer or handler as defined in the order may not serve as a member or an alternate on the committee.

Further, the marketing order covers the entire state of Colorado, but divides the state into three geographic areas for administrative and regulatory purposes. Section 948.54 of the order requires that area committee members and alternates shall be residents of, and producers or handlers in, the respective area. Area No. 2 is defined as the San Luis Valley, and consists of the counties of Saguache, Huerfano, Las Animas, Mineral and Archuleta in the State of Colorado, and all counties in Colorado south of those counties. In addition, procedures for nomination of committee members appear in § 948.56 of the order.

Since Mr. Raftery is not a producer or handler as defined in the order and is not a resident of Colorado Area No. 2, he is not eligible to serve on the committee. Since Mr. Wisotzkey's recommendation is not consistent with the committee member eligibility requirements specified in the order, it is hereby denied.

Based on the above, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented including the information and recommendation submitted by the committee, and other available information, it is hereby found that the rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because nominations for committee members to serve for a term of office beginning May 1, 1990, will be conducted soon, and this action should be applicable to such nominations.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR part 948 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 948.150 is amended by revising paragraph (a) to read as follows:

Note: This section will appear in the Annual Code of Federal Regulations.

§ 948.150 Reestablishment of committee membership.

* * * * *

(a) Area No. 2 (San Luis Valley): Seven producers and five handlers selected as follows:

Three (3) producers from Rio Grande County;

One (1) producer from Saguache County;

One (1) producer from Conejos County;

One (1) producer from Alamosa County;

One (1) producer from all other counties in Area No. 2;

Two (2) handlers representing bulk handlers in Area No. 2;

Three (3) handlers representing handlers in Area No. 2 other than bulk handlers.

* * * * *

Dated: March 2, 1990.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90-5331 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-195-AD; Amdt. 39-6531]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, which requires modification of the body station 1241 bulkhead and the wing rear spar kick fitting joint, and repair of the bulkhead splice strap, if necessary. This amendment is prompted by a report of a cracked splice strap at the kick fitting location on one airplane. This condition, if not corrected, could lead to bulkhead forging cracks and result in the inability of the remaining structure to withstand fail-safe loads.

EFFECTIVE DATE: April 13, 1990.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Satish Pahuja, Airframe Branch, ANM-120S; telephone (206) 431-1997. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive, applicable to Boeing Model 747 series airplanes, which requires modification of the body station 1241 bulkhead and wing rear spar kick fitting joint, was published in the **Federal Register** on October 27, 1987 (54 FR 43824).

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

The Air Transport Association (ATA) of America has indicated that one of its members plans to accomplish the permanent modification within 1,000 flight cycles after the effective date of this AD and, therefore, the interim modification should not be required for this member. The FAA concurs with the commenter and a new paragraph C. has been added to the final rule to that effect.

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 with the change previously described. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of this AD.

There are approximately 13 Model 747 series airplanes of the affected design in the worldwide fleet. It is estimated that 1 airplane of U.S. registry will be affected by this AD, that it will take approximately 91 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operator is estimated to be $3,640.

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 "major rule" under Executive Order 12291; (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 is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 747 series airplanes, line position 676, 679, 685, and 690 through 699, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent cracking of the bulkhead splice strap, accomplish the following:

A. Within the next 1,000 flight cycles after the effective date of this AD, perform an interim modification of the body station 1241 bulkhead in accordance with Boeing Service Bulletin 747-53-2299, Revision 1, dated June 29, 1989.

B. Within the next 5,000 flight cycles after the effective date of this AD, perform an eddy current inspection for cracks of the splice strap in accordance with Boeing Service Bulletin 747-53-2299, Revision 1, dated June 29, 1989.

1. If no cracking is found, prior to further flight, perform permanent modification in accordance with Boeing Service Bulletin 747-53-2299, Revision 1, dated June 29, 1989.

2. If cracking is found, prior to further flight, repair in accordance with method approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

C. Accomplishment of paragraph B., above, within the next 1,000 flight cycles after the effective date of this AD, is an acceptable alternative to the interim modification required by paragraph A., above.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment, and then send it to the Manager, Seattle Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA,

Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective April 13, 1990.

Issued in Seattle, Washington, on February 27, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-5277 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 89-NM-183-AD; Amdt. 39-6521]

Airworthiness Directives; McDonnell Douglas Model DC-8F-54, -55, DC-8-61F, -62F, -63F, -71F, -72F, and -73F Series Airplanes; Model DC-8-33 Airplanes With STC Number SA3403WE Incorporated; and Model DC-8-43 Airplanes with STC Number SA3749WE Incorporated

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revises an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC-8 series airplanes, which currently requires certain inspections and modifications of the main cargo door assembly to prevent inadvertent opening of the main cargo door in flight. This amendment requires installation of a main cargo door hydraulic isolation valve; installation of an additional, and modification of the existing, door-open indicating system; installation of a main cargo door lock pin viewing window; installation of a main cargo door vent system; installation of a vent door-open indicating circuit; installation of a main cargo door hinge pin retainer; and modification to the main cargo door latch operating mechanism. This amendment is prompted by further review of the main cargo door design and operation by the FAA and constitutes terminating action for the existing AD.

EFFECTIVE DATE: April 13, 1990.

ADDRESSES: The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California, Attention: Business Unit Manager, Technical Publications, C1-HCW (34-60). This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. George Y. Mabuni, Aerospace Engineer, Systems and Equipment Branch, ANM-132L, FAA, Northwest Mountain Region, 3229 East Spring Street, Long Beach, California, telephone (213) 988-5341.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations by revising AD 89-17-01, Amendment 39-6285 (54 FR 31806; August 2, 1989), applicable to certain Model DC-8 series airplanes, to require installation of a main cargo door hydraulic isolation valve; installation of an additional, and modification of the existing, door-open indicating system; installation of a main cargo door lock pin viewing window; installation of a main cargo door vent system; installation of a vent door-open indication circuit; installation of a main cargo door hinge retainer; and modification to the main cargo door latch operating mechanism; was published in the **Federal Register** on October 5, 1989 (54 FR 41106).

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

One commenter objected to the requirement to install a vent door-open indication system. The commenter stated that the closing of the vent door indicates a properly closed cargo door and also that the vent door-open indication system is redundant to the indicator switches installed in accordance with McDonnell Douglas Service Bulletin (S/B) 52-76. The FAA does not concur that closing the vent door is sufficient to indicate a properly closed cargo door, and has determined that the vent door position should be annunicated in the cockpit. Also, the FAA does not concur that the vent door-open indicating system is redundant to the cargo door-open indicating circuit installed in accordance with S/B 52-76. The vent door-open indication system is an added feature to the cargo door-open indication system to alleviate the possibility of the airplane taking off with the vent door open and, possibly, an improperly locked cargo door.

The same commenter indicated that he was unaware of any problems ever associated with an upper cargo door modified in accordance with existing Service Bulletins 52-71, 52-74, 52-75, 52-76, and 52-80. Therefore, the commenter requested a compliance period of two years after release of the service bulletin and parts, instead of the proposed six months, to install the vent door-open indication system. The FAA concurs in part with the commenter's request. As explained in detail below, the compliance time for the installation of this feature has been extended to 18 months. The FAA does not consider that delaying this action until two years after release of the manufacturer's related service bulletin is warranted, since sufficient technology currently exists to devise and install such a feature within the compliance time. However, paragraph J. of the final rule does provide affected operators the opportunity to apply for an adjustment of the compliance time if data is presented to justify such an adjustment.

Another commenter opposed incorporation of the cargo door vent door in accordance with S/B 52-80. The commenter felt that the design, which requires the door to be opened and closed manually, is outdated. The commenter proposed that the requirement to incorporate S/B 52-80 be dropped from the AD until an automatic vent door design is available from McDonnell Douglas. The FAA does not concur. The FAA has determined that the proposed modification is the only modification currently available to ensure that the door is properly locked before takeoff. If an automatic cargo door vent system design becomes available, operators who elect to install that system can request approval for use of it as an alternate means of compliance in accordance with paragraph J. of the final rule.

Two other comments were received regarding the availability of parts. One commenter stated that the solenoid-operated valve required to accomplish the proposed requirements of paragraph E. (S/B 52-74) is out of production, and was informed by McDonnell Douglas that the estimated minimum lead time to resume production of the valve is 10 months. Therefore, the commenter requested a 24-month compliance period to accomplish the installation of a main cargo door hydraulic isolation valve, as required by paragraph E. The FAA does not concur. McDonnell Douglas recently advised the FAA that ample parts for this installation will be available by March 5, 1990.

Another commenter stated that the parts availability schedules were unrealistic. The FAA requested an updated schedule from McDonnell Douglas on the availability of the two new service bulletins and availability of

the parts for all the modifications required by paragraphs F. and G. of this final rule (specified in six service bulletins). Contrary to information previously received, the FAA was informed that the service bulletins with necessary instructions required for the installation of the vent door-open indicating system (S/B 52-80R-1) and for the installation of the cargo door hinge pin retainer (S/B 52-84), and the parts necessary for the modifications described in all six service bulletins, will not be available as previously scheduled. To facilitate the installation of the vent door-open indicating system, McDonnell Douglas is revising S/B 52-80 to include procedures to install this system in conjunction with the installation of the cargo door vent system. In light of this situation, and also the requirement of paragraph A. of this final rule to visually inspect the main cargo door to ensure that the door is closed, latched, and locked prior to each take-off, the FAA has determined that extending the compliance periods by an increment of six months for each of the required actions will not adversely affect safety. The final rule has been changed accordingly.

A commenter requested that the compliance period be extended to 18 months for installation of the hydraulic isolation valve and the door lock mechanism view window. The commenter stated that if these modifications are not accomplished during the scheduled "C" check for the airplane, the commenter may suffer operational and economic setbacks. The FAA concurs in part with the commenter's request. For the reasons indicated above, the final rule has been revised to extend the compliance times for the installation of the hydraulic isolation valve to one year, and for the installation of door lock mechanism view window to 18 months. This change represents an extension of 6 months in the compliance time for accomplishment of each of these installations from the time specified in the proposal.

A commenter requested that the proposal be amended to require the installation of the hydraulic isolation valve only on aircraft without an independent or self-supporting main cargo door hydraulic system. The FAA concurs. The final rule has been revised to include a new paragraph E. to address these airplanes.

A commenter requested that a working group, including representatives of McDonnell Douglas, the FAA, and affected operators, meet to localize the problem areas, and issue only one service bulletin instead of reissuing five old service bulletins. The FAA does not concur. During the development of this rulemaking action, the FAA had several meetings with McDonnell Douglas to examine the main cargo door design, to review prior incidents of main cargo doors inadvertently opening in flight, to review maintenance practices on the door, and to review all existing service bulletins and airworthiness directives. The purpose of the meetings was to identify the problem areas and to determine which modifications must be incorporated to ensure that the main cargo door provides an acceptable level of safety. Technical data and information obtained from the meetings were reviewed and evaluated by the FAA prior to issuing the NPRM. Also, the FAA has determined that consolidating the five old service bulletins into one service bulletin is impractical.

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 with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

There are approximately 137 McDonnell Douglas Model DC-8 series airplanes of the affected design in the worldwide fleet. It is estimated that 71 airplanes of U.S. registry would be affected by this AD, that it would take approximately 180 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The required material cost is estimated to be $80,000 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $6,191,200.

The regulations proposed herein would 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 proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (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 is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by amending Amendment 39-6285 (54 FR 31806; August 2, 1989), AD 89-17-01, as follows:

McDonnell Douglas: Applies to Model DC-8F-54, -55, DC-8-61F, -62F, -63F, -71F, -72F, and -73F series airplanes, as listed in McDonnell Douglas DC-8 Service Bulletins 52-71, dated September 12, 1969; 52-74, Revision 2, dated November 19, 1975; 52-75, dated August 9, 1974; 52-76, Revision 3, dated January 29, 1986; 52-80, dated March 23, 1977; certificated in any category. Also applies to Model DC-8-33 airplanes with STC Number SA3403WE incorporated, and Model DC-8-43 airplanes with STC Number SA3749WE incorporated, certificated in any category. Compliance is required as indicated, unless previously accomplished.

To prevent inadvertent opening of the main cargo door in flight, a condition which could result in loss of pressurization and control of the aircraft, accomplish the following:

A. Within 14 days after August 18, 1989 (the effective date of Amendment 39-6285), ensure that the main cargo door is closed, latched, and locked prior to takeoff following each operation of the door, in accordance with the procedures specified below. The procedures required by this paragraph must be accomplished by qualified and trained personnel, and the training program must be approved by the FAA Principal Maintenance Inspector (PMI). The method for documentation of compliance must also be approved by the FAA PMI.

1. From the outside of the airplane perform a visual check of the exterior manuals latch controls, to ensure that the latch actuating shaft and the lock pin handle are in the LOCK position; or

2. Perform a visual check of the latches and lock pins, located on the inside of the main cargo door, to ensure that the latches are in

the closed position and the lock pins are in the locked position.

3. Prior to taxi, communicate to the flight crew that the main cargo door has been closed, latched, locked, and checked.

B. Unless the modifications described in paragraph F. of this AD have previously been accomplished, within the next 30 days after August 18, 1989 (the effective date of Amendment 39-6285), and thereafter at intervals not to exceed 45 days, conduct a main cargo door-open indicating system functional check in accordance with McDonnell Douglas All Operator's Letter (AOL) 8-669, dated April 19, 1974, paragraph 1. If the main cargo door-open indicating system functional check is not successfully accomplished, repair the main cargo door-open indicating system prior to further flight, in accordance with AOL 8-669.

C. For airplanes with a hydraulic cargo door latch system, accomplish the following:

1. Within 30 days after August 18, 1989 (the effective date of Amendment 39-6285), and thereafter at intervals not to exceed 45 days, inspect and modify the main cargo door control panel access door plate and "T" handle stowage clip in accordance with McDonnell Douglas AOL 8-669, dated April 19, 1974, paragraph 2. In addition, inspect the control panel access door to ensure the door can be secured in the down and locked position. If the control panel access door can not be secured in the down and locked position, repair prior to further flight.

2. Unless previously accomplished in accordance with paragraph (2) of AD 75-03-02, Amendment 39-2075, within 30 days after August 18, 1989 (the effective date of Amendment 39-6285), verify that the main cargo door hydraulic control valve shaft operates freely, without binding, between the operate neutral and neutral lock positions. This shall be accomplished by opening the main cargo door hydraulic control valve control panel access door; raising the "T" handle Douglas P/N 4777888-1, and pulling the "T" handle vertically upward to its maximum travel (operate neutral position). When the vertical force on the "T" handle is relieved, the main cargo door hydraulic control valve shaft should return to the neutral lock (down) position without binding. Replace the main cargo door hydraulic control valve, Douglas P/N 5777869-5001 or 5919985-5001, prior to further flight, if the valve shaft does not return freely to the neutral lock position.

D. Within 30 days after August 18, 1989 (the effective date of Amendment 39-6285), inspect the main cargo door exterior lock pin handle and latch actuating shaft markings in accordance with McDonnell Douglas AOL 8-669, dated April 19, 1974, paragraph 7, and with one of the following McDonnell Douglas Drawings: 7718621-59 and -61, Revision "AV"; or 5633828, Revision "E"; or 5633939, Revision "C"; or 5804421, Revision "A/H". If the exterior markings are not correct, mark in accordance with any of the above McDonnell Douglas drawings prior to further flight.

E. Except for airplanes with an independent or self-supporting main cargo door hydraulic system, within one year after the effective date of this amendment install a main cargo door hydraulic isolation valve in accordance with McDonnell Douglas Service Bulletin 52-74, Revision 2, dated November 19, 1975.

F. Within one year after the effective date of this amendment install a new main cargo door-open indicating circuit, revised the existing main cargo door-open indicating circuit, and install a main cargo door-open indicating system test circuit, in accordance with McDonnell Douglas Service Bulletin 52-76, Revision 3, dated January 29, 1986. Compliance with the requirements of paragraph B., above, may be terminated upon the accomplishment of the requirements of this paragraph.

G. Within the next 18 months after the effective date of this amendment, accomplish the following:

1. Install a main cargo door lock mechanism view window in accordance with McDonnell Douglas Service Bulletin 52-75, dated August 9, 1974; and

2. Install a main cargo door vent system in accordance with McDonnell Douglas Service Bulletin 52-80, dated March 23, 1977; and

3. Modify the main cargo door latch operating mechanism in accordance with McDonnell Douglas Service Bulletins 52-71 dated September 12, 1969; and

4. Install a main cargo door hinge pin retainer on each end of the hinge, in a manner approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region, that will retain the hinge pin in the event of a structural failure of the pin; and

5. Install a vent door—open indicating system, in a manner approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region, that will signal the appropriate flight crew member when the main cargo door vent door is not fully closed and latched.

H. Compliance with the requirements of paragraphs E., F., G.1., G.2., G.3., and G.5., constitute terminating action for the initial and repetitive inspections required by paragraphs A., B., and C.1. of this AD.

I. The checks and modifications specified in paragraphs A. through G. of this AD are not required on airplanes which have the main cargo door deactivated and secured in the closed and locked position, in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region, until that door is reactivated.

J. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Los Angeles Aircraft Certification Office.

K. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes unpressurized to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California, Attention: Business Unit Manager, Technical Publications, C1-HCW (54-60). This information may be examined at FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

This amendment amends amendment 39-6285, AD 89-17-01.

This amendment becomes effective April 13, 1990.

Issued in Seattle, Washington, on February 27, 1990.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-5276 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 89-AEA-26]

Alteration of Control Zone; Calverton, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action makes a minor change in the operating hours established at the Calverton, New York, Control Zone. In addition, a minor change in the geographic coordinates of the airport upon which the control zone is based is being made to reflect the actual geographic position of the airport. The Control Tower at the Calverton Naval Weapons Industrial Reserve Plant (Peconic Field) Airport, NY, is in operation outside of published operating hours and as a result, pilots are transitioning through the Control Zone with no knowledge of the additional irregular hours of operation. The FAA finds it necessary that the hours of operation be changed to reflect a provision of additional hours to be established in advance by a Notice to Airmen (NOTAM).

EFFECTIVE DATE: 0901 u.t.c. May 3, 1990

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Airspace Specialist, System Management Branch, AEA-530, Federal Aviation Administration, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 917-0857.

SUPPLEMENTARY INFORMATION:

The Rule

The purpose of this amendment to § 71.171 of part 71 of the Federal Aviation Regulations (14 CFR part 71) is to change the description of the Calverton, NY, Control Zone by adding a provision of activating the control zone by NOTAM issued in advance. The airport operator has requested that the control zone hours be modified to reflect operation of the tower outside of published operating hours. The actual hours of operation outside of those published will be issued by a Notice to Airmen (NOTAM) to the general aviation community.

This airport is currently restricted to the public and pilots are not aware of the operational requirements for the control zone activation outside of established operating hours. The FAA finds that no change in airspace configuration will result in this action. In addition, the geographic coordinates of the airport are being updated to reflect the actual geographic position of the airport upon which the control zone is based. Section 71.171 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6F dated January 2, 1990.

Under the circumstances presented, the FAA concludes that there is a need to avoid confusion on the part of the pilots operating in the vicinity of Calverton, NY. This notice provides for notification of the additional hours of operation of the Calverton, NY Control Zone. Since this regulation makes minor and nonsubstantive changes in the description of the Calverton, NY, Control Zone, and the public would not be particularly interested in commenting, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary and contrary to the public interest.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449), January 12, 1983); 14 CFR 11.69.

§ 71.171 [Amended]

2. Section 71.171 is amended as follows:

Calverton, NY [Amended]

Change "lat. 40°54'55" N., long. 72°47'43" W." to read "lat. 40°54'54" N., long. 72°47'33" W."

Change "Monday through Friday." to read "Monday through Friday, and other times by Notices to Airmen."

Issued in Jamaica, New York, on February 7, 1990.

Billy E. Commander,

Acting Manager, Air Traffic Division.

[FR Doc. 90–5276 Filed 3–7–90; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

RIN 0960–AB37

Social Security Benefits and Supplemental Security Income; Vocational Rehabilitation Services Payment

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: These final regulations implement section 11 of Pub. L. 98–460 (the Social Security Disability Benefits Reform Act of 1984). This legislation adds two new provisions under which the Social Security Administration (SSA) will pay vocational rehabilitation (VR) agencies (includes both State VR agencies and alternate participants) for the costs of VR services provided to disabled persons receiving benefits under title II of the Social Security Act (the Act) and disabled or blind persons receiving Supplemental Security Income (SSI) benefits under title XVI of the Act. Current regulations permit payment for VR services where the person completes a continuous 9-month period of substantial gainful activity (SGA).

Under the first new provision, SSA will pay VR agencies for the cost of VR services provided to individuals continuing to receive payment under section 225(b) or section 1631(a)(6) of the Act because they are participating in a VR program after their disability or blindness has ceased. The second new provision allows payment to VR agencies for the costs of VR services provided to certain beneficiaries or recipients who, without good cause, refuse to continue to accept VR services or fail to cooperate in a VR program in such a way as to preclude their successful rehabilitation.

DATES: These rules are effective March 8, 1990, but, with the exception of the inclusion of title XVI blind in these provisions, the statutory changes which the regulations reflect were effective beginning in November 1984.

FOR FURTHER INFORMATION CONTACT: Dave Smith, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, Telephone 301–965–1758.

SUPPLEMENTARY INFORMATION: These regulations were published as a Notice of Proposed Rulemaking in the **Federal Register** on October 10, 1986 (51 FR 36510) with a 60-day comment period. A number of comments were received and are discussed below under the heading titled Discussion of Comments.

Under the present regulations (§§ 404.2101 through 404.2127 and §§ 416.2201 through 416.2227) implementing section 222(d) and 1615(d) of the Act, as amended by Pub. L. 97–35, effective October 1, 1981, SSA will only pay VR agencies for the costs of rehabilitating disabled or blind beneficiaries or recipients who subsequently complete a continuous period of SGA of 9 months duration. The requirement must be met in every case and no other provision is made for making payment for VR services if this requirement is not met. If met, payment may be made for VR services provided after September 30, 1981, during any month for which an individual was entitled (including the waiting period) to title II disability benefits or receiving title XVI disability or blindness payments. However, no payment will be made for VR services provided in any month after the month in which the continuous 9-month period of SGA is

completed. Also, if certain other criteria are not met (e.g., there would be no savings to the trust funds or general fund, costs of a VR service are payable from some other source, or the VR services provided did not contribute to the completion of the continuous 9-month of SGA), payment for all or some of the VR costs cannot be made.

We are adding the two provisions created by section 11 of Pub. L. 98–460 to the existing provision for payment for VR services. Under the first new provision, SSA will pay VR agencies for the costs of VR services provided to individuals continuing to receive payment under section 225(b) or section 1631(a)(6) of the Act because they are participating in a VR program after the physical or mental impairment on which entitlement is based has ceased. For purposes of these regulations we call this the VR medical cessation provision. The second new provision allows payment to VR agencies for the costs of VR services provided to certain beneficiaries or recipients who, without good cause, refuse to continue to accept VR services or fail to cooperate in a VR program in such a way as to preclude their successful rehabilitation. We call this the VR refusal provision.

These final rules also reflect an amendment to section 1631(a)(6) of the Act made by section 9112 of Pub. L. 100–203. Prior to this amendment, section 1631(a)(6) provided for certain disabled but not blind title XVI recipients to continue to receive payments because they were participating in a VR program after their physical or mental impairment ceased. Section 9112 of Pub. L. 100–230 amended section 1631(a)(6) of the Act, effective April 1, 1988, to extend the provision for continued payment of benefits to cover a recipient of title XVI blindness payments who continues to participate in an approved VR after his or her blindness has ceased.

Under the new provisions as described above, a VR agency may be paid for services furnished to individuals after September 30, 1981. However, for a VR agency to receive payment for such services, the disabled or blind individual must be receiving payment under section 225(b) or section 1631(a)(6) of the Act, or the disabled or blind individual must be refusing VR services (including failing to cooperate), in or after November 1984, the effective date of the VR amendments described in section 11 of Pub. L. 98–460. A recipient of title XVI blindness payments, however, may receive payment under section 1631(a)(6) of the Act only for a month or months beginning on or after April 1, 1988, the effective date of the amendment made by section 9112 of Pub. L. 100–203. To receive payment under the new provisions, it will not be necessary that a continuous 9-month period of SGA be completed before payment can be made. However, in the event a continuous 9-month period of SGA is completed in a case where the person is receiving payments despite a medical cessation of disability because of participation in an approved VR plan, no payment can be made for VR services provided after the continous 9-month period of SGA ends or after the month entitlement ceases, whichever is earlier.

Identification of Potential Claims

The VR agency may not be able to readily identify those cases in which the individual's benefits have been continued under section 225(b) or 1631(a)(6) of the Act, or in which the individual's benefits have been suspended due to VR refusal (i.e., cases where we determine that the refusal to continue or failure to cooperate in the VR program is without good cause). Therefore, in an effort to limit the number of erroneous claims which might be filed by VR agencies under these new provisions, we decided that we would use our records to identify cases which might meet the requirements for VR payment under the new provisions. The VR agency would then be requested to file a claim for payment for each case identified as a potential allowance.

This decision was made after preliminary contacts with selected VR agencies revealed that estimated VR refusals processed by VR agencies annually, for example, numbered in the thousands, whereas actual suspensions for VR refusal after applying the good cause provision for refusal as required by this legislation, numbered less than 100 annually. Therefore, it was apparent that it would be much easier for all concerned if we identified the suspension actions resulting from VR refusal and requested claims in these cases rather than have the VR agencies file, and us process, a large number of inappropriate claims. Using the same approach for claims in cases involving the continuation of benefits under section 225(b) or 1631(a)(6) of the Act would have similar advantages.

We will identify cases involving a potential allowance under the new provisions in two ways. First, we will screen our existing records to identify previous title II and title XVI cases in which benefits were suspended for VR refusal, or in which benefits were continued under section 225(b) or 1631(a)(6) of the Act, for a month after October 1984. Second, as a regular day-to-day operating procedure we will identify, on an ongoing basis, current cases in which we suspend benefits for VR refusal or continue benefits under section 225(b) or 1631(a)(6) of the Act. When a case is so identified, we will send a written notice to the VR agency to file a claim for payment for VR services in that case. In addition, however, the VR agency may file claims for any cases which the VR agency believes were overlooked in the identification process or in which it appears to the VR agency that a VR refusal determination was never made. In the latter situation, we will review the case and will make a determination as to whether the individual refused VR services without good cause if the case folder indicates that no VR refusal determination was previously made.

Deadlines for Filing Claims Under the New Provisions

For accounting purposes and to expedite payments to VR agencies, the existing regulations (§§ 404.2108(a) and 416.2208(a)) require that a claim for payment for VR services must be filed within 12 months after the individual's completion of a continuous 9-month period of SGA. Because the completion of a continuous 9-month period of SGA is not required for payment under the new provisions, different starting dates for time periods for filing claims under the two new provisions had to be established: (1) For cases in which we send a written notice to the VR agency requesting that a VR claim be filed with us; and (2) for cases in which we do not send the VR agency a notice requesting that a claim be filed, but the VR agency files a claim because its records show a claim is warranted. In addition, because we will generally be sending a written notice to the VR agency advising the agency of a potential claim, we believe that a shorter time period for filing the claim in such cases is appropriate. Therefore, these regulations provide that, in cases where we send a written notice to the VR agency requesting that a claim be filed under the new provisions the VR agency will have a 90-day time period within which to file the claim. This 90-day period should allow the VR agencies ample time to compile complete cost data necessary to file their claim and at the same time allow us to pay the claim and close our records for accounting purposes within a reasonable time. In cases where we do not send the VR agency a written notice advising the agency of a potential claim, we recognize that the VR agency should have a longer time period (i.e., 12

months) within which to file a claim under either of the two new provisions.

Under these regulations, §§ 404.2116 and 416.2216, if we send a state VR agency or alternate participant a written notice requesting that a claim be filed under the new provisions, the VR agency or alternate participant must file the claim—

1. Under the VR refusal provision, within 90 days after the date the VR agency receives our written notice; or

2. Under the VR medical cessation provision, within 90 days following the month in which VR services end or, if later, within 90 days after receipt of our written notice.

In cases where we do not send the VR agency a written notice requesting that a claim be filed, but the VR agency, on the basis of its own records, chooses to file a claim under the new provisions, the VR agency must file the claim—

1. Under the VR refusal provision, within 12 months after the month for which payment is suspended because of VR refusal; or

2. Under the VR medical cessation provision, within 12 months after the month in which VR services end.

In addition to the filing periods described above, a VR agency will also be allowed to file a claim within 12 months after the publication date of these final regulations if this date is later than the filing deadlines described above in cases where a written notice to file a claim was not sent to the VR agency.

Resolution of Disputes

We also provide that if a VR claim is denied because the individual involved is not receiving payment under section 225(b) or section 1631(a)(6) of the Act or is not in a nonpay status for VR refusal, then that denial cannot be appealed by a VR agency. This is similar to the provision in current §§ 404.2127(c) and 416.2227(c) applicable to appeals by VR agencies of decisions made on title II and title XVI cases which affect a beneficiary's or recipient's right to payment (i.e., medical cessations). The reason for this provision is that these decisions only apply to a beneficiary's or recipient's right to disability or blindness payments and, as such, can only be appealed by a beneficiary or recipient. However, in the event that a VR agency submits evidence that shows that our decision may be incorrect, then that evidence will be considered in reviewing our determination if it is appealed by the claimant or reopened by us.

Limitations on Payment

We have added §§ 404.2117(f) and 416.2217(f) to emphasize that payment cannot be made more than once for the same VR service or cost. We did this primarily because a VR agency that is paid under one of the new provisions may file a later claim based upon the completion of a continuous 9-month period of SGA. If this happens, it is possible that the same period or a portion thereof, could apply to both claims. For example, if an individual was placed in a nonpay status because of his or her refusal to continue in a VR program effective for the month of December 1984, a VR agency could be paid for services provided this individual during the period from October 1, 1981 through November 30, 1984 (the month before the month that payment was withheld due to VR refusal) under §§ 404.2113 and/or 416.2213. If the individual later resumed participation in a VR program, disability payments would then be reinstated. It is now possible, because of the VR services provided, that this individual could complete a continuous 9-month period of SGA and that the VR agency would again be eligible for payment for the VR services provided this individual. If this happened, the VR agency could request payment for its services during the period from October 1, 1981 through the month that the continuous 9-month period of SGA ended. However, because the VR agency was paid for its services, based on the VR refusal provision, for the period October 1, 1981 through November 30, 1984, payment for services provided during this period should not be included in computing the payment due the VR agency based upon the completion of a continuous 9-month period of SGA.

Payment in VR Refusal Situations

Finally, in dealing with the VR refusal provision, these regulations (§§ 404.2113 and 416.2213) state that payment to a VR agency will only be made for services provided to those individuals who, without good cause, refuse to continue to participate in a VR program, or refuse to cooperate in such a manner as to preclude their successful rehabilitation. In order for VR services to be reimbursable under this provision, the individual (1) must be receiving title II or title XVI disability or blindness payments at the time he or she refuses to continue or fails to cooperate in the VR program, and (2) must have had his or her payments suspended or terminated due to such refusal or failure to cooperate. The regulations make clear that the individual must have at least filed an application for VR services before payment to a VR agency can be considered under this provision. Payment to a VR agency cannot be made when the only action taken by the VR agency was, for example, to request contact with the individual regarding the provision of VR services and the individual failed to respond. This provision does not change the existing law which requires that a social security disability beneficiary's or disabled or blind SSI recipient's payments be suspended for his or her refusal, without good cause, to accept VR services available. Therefore, there could be situations where an individual is not receiving payments from us because of VR refusal in which the VR agency cannot be paid under the VR payment provision.

Discussion of Comments

As previously indicated, we received a number of comments (from 9 State VR agencies and one private VR facility) on the notice of Proposed Rulemaking published in the **Federal Register** on October 10, 1986 (51 FR 36510). We mailed copies of the proposed rules to State VR agencies. Most of the comments were favorable and do not require responses. A summary of the other comments and our responses follow:

Comment: Frequently, many months elapse between the VR agency's initial notice to SSA of a "VR refusal" and SSA's subsequent action to suspend an individual's benefits for such refusal. Therefore, SSA's notice to VR agencies requesting that they file a claim for payment in such cases should show the period of time the individual actually received benefits (i.e., the period during which the VR agency may be paid by SSA for VR services).

Response: SSA's written notice to the VR agency in these cases will provide all the information necessary to file a claim which will be on the same form presently being used. In addition, VR agencies will receive instructions about the use of the form and other necessary details.

Comment: The proposed regulations establish time periods for VR agencies to file claims but do not establish time periods for SSA to process and pay the claims.

Response: Time limits for filing claims for payment were established with the initial rules providing payment for VR services (see existing §§ 404.2108(a) and 416.2208(a)). The time limits were established for accounting purposes and to expedite payments to VR agencies. It would not be feasible to add time limits

for SSA to process and pay the claims because payment depends on the establishment of certain factors, including factors pertaining to the disabled or blind individual's right to title II or title XVI benefit payments, which may require development and can be time consuming. Also, processing times for VR claims have shown significant improvement in recent months and it is expected that this improvement should continue.

Comment: The proposed regulations restrict payment in VR refusal claims to cases where an application for VR services has been made. In many cases, a disabled or blind individual will not file such an application despite considerable time and effort spent by a VR agency in attempting to secure his or her participation in a VR program. In these circumstances, the refusal issue may be established, and the VR agency should be compensated for its efforts.

Response: The law authorizes payment only in cases in which the individual, without good cause, refuses to continue in a VR program or fails to cooperate in a program in such a manner as to preclude his or her successful rehabilitation. The statute applies to individuals who have begun participation in a VR program. To establish participation in a VR program, we adopted the requirement that the individual must have at least signed an application for VR services in order to be considered actively participating in such a program. While we realize that there may be cases where considerable time and effort may be spent in attempting to have a potential client participate in a VR program, these cases should be relatively few. In addition, if benefit payments are suspended for these individuals for VR refusal, this action may serve as the incentive necessary to gain their participation and eventual completion of a continuous period of SGA.

Comment: The proposal appears to create financial incentives for VR agency personnel to find lack of good cause for VR service refusal in order to receive payment from SSA. Without some sort of due process remedy prior to benefit termination, the disabled individual's well-being may be jeopardized by the VR counselor.

Response: SSA, not the VR agency, is responsible for making the good cause determination. The determination (which may be appealed by the individual) is only made after contact with the individual. Therefore, the situation as described would not occur.

Comment: The criteria for good cause for failure to cooperate in a VR program do not appear in the proposed regulation but are incorporated by cross-reference. Basic fairness and practical use of regulations by field personnel necessities that the good cause criteria be spelled out rather than cross-referenced.

Response: As stated in the preceding response, the VR agency is not responsible for making good cause determinations. The good cause criteria for VR refusal pertain directly to the suspension of an individual's title II or title XVI benefits and, therefore, are set out in the sections of the regulations which cover suspension of benefits for VR refusal (§§ 404.422 and 416.1715).

Comment: More weight needs to be given to the State VR agency's input when the determination is made as to whether to continue disability payments to an individual who has medically recovered but is continuing to participate in a VR program. Because of this lack of input, many individuals are terminated due to medical recovery without consideration being given to whether he or she was continuing to participate in a VR program under section 225(b) or section 1631(a)(6) of the Act, thus depriving the VR agency of payment for any VR services provided in accordance with these regulations.

Response: Because this comment deals primarily with the disability payment provisions of the Act and only indirectly with the VR payment provisions of these regulations, we are considering the comment apart from the regulations. However, there is a provision in these regulations (§§ 404.2127(c) and 416.2227(c)) which allows a VR agency to submit evidence of VR services to SSA whenever they have reason to believe that an individual's disability payments were ceased due to medical recovery without SSA giving consideration to VR program participation.

Comment: We agree with the VR refusal provision provided that: (1) SSA will provide adequate guidelines; (2) SSA will support the VR counselor's claim of refusal to cooperate; (3) an inordinate amount of time should not be required of the counselors to report failure to cooperate; and (4) the local SSA offices are required to respond to each report of failure to cooperate within a reasonable length of time.

Response: We are developing guidelines whereby SSA will request the VR agency to file a claim at the time the individual's disability or blindness payments are suspended for VR refusal. Generally, the VR agency's notice of refusal provides a basis for a finding of VR refusal. However, the beneficiary/recipient has the opportunity to submit pertinent evidence as well as to establish good cause for refusing VR services prior to any suspension of benefits.

Comment: The Summary of the proposed regulations states: "To receive payment under the new provisions, it will not be necessary that a continuous 9-month period of SGA be completed before payment can be made." Is this statement intended to allow reimbursement at the end of 9 SGA months even if they were not continuous? If the statement is referring to §§ 404.2111 and 416.2211 which provide for payment if VR medical services resulted in a cessation even though the individual is still unemployed, then the concept is not being carried to other circumstances wherein benefits can be ceased without SGA.

Response: The statement in the preamble to the proposed regulations, quoted above, pertains only to the two new provisions for VR payment which were added by section 11 of Pub. L. 98-460 and which are being incorporated in these regulations. The new provisions allow payment for VR services furnished individuals in VR medical cessation cases (§§ 404.2112 and 416.2212) and VR refusal cases (§§ 404.2113 and 416.2213), regardless of whether such services contribute to the individual's completion of a continuous 9-month period of SGA (e.g., result in successful rehabilitation). The regulations, however, continue to permit payment for successful rehabilitation services (§§ 404.2101(a) and 416.2201(a)), and the requirement of a continuous 9-month period of SGA must still be met in such cases (§§ 404.2110 and 416.2210). Sections 404.2111 and 416.2211 do not provide for payment of VR services in a different category of cases, but merely explain the circumstances in which VR services (including services resulting in the individual's medical recovery) will be considered to have contributed to the individual's completion of a 9-month period of SGA. Payment under the two new provisions will be made for the costs of VR services provided during the periods specified in §§ 404.2115 and 416.2215. There is no requirement that a continuous period of SGA be completed (§§ 404.2110 and 416.2210) before a VR claim can be allowed under the new provisions. However, payment cannot be made under any circumstances for the costs of VR services provided after a continuous period of SGA is completed because such services would be outside the payment period as specified in §§ 404.2115 and 416.2215.

Comment: Sections §§ 404.2113 and 416.2213 provide for reimbursement

when the individual fails to cooperate. The VR agencies have a 10 year history of seeing very few benefit suspensions following a report of failure to cooperate. From a VR vantage point it appears that SSA seldom takes any action.

Response: The point made by this commenter is a valid one. In the past SSA may not have been as diligent as it could have been in suspending individuals for refusal to accept VR services. With the implementation of this legislation, VR agencies can expect increased attention by SSA in this area. For example, cases in which a VR agency files a claim for payment because it has identified an individual as having refused VR services, will be referred to our field offices for a determination (if one has not been made previously) as to whether the individual refused VR services without good cause. This determination will be made following the existing procedures. However, these referrals will be monitored in SSA's central office to ensure a timely and complete response. Also, a copy of each determination, whether favorable or unfavorable to the beneficiary, and supporting documentation will be sent to the central office to ensure proper procedures were followed and for review to determine what revisions or clarification of existing VR refusal policy may be needed.

Comment: There are cases where a VR agency achieves a "successful" rehabilitation in that the individual completes the VR program in preparation for a job. For example, a client may have obtained a college degree through assistance provided by a VR agency, but stopped short of going to work in order to retain his or her disability payments. While the individual has not completed a continuous period of SGA, the completion of the VR program may have caused a change in vocational factors (e.g., education) which could result in a cessation of his or her disability benefits. If a cessation results from the VR services provided, the VR agency should be paid for such services.

Response: Under the current law, we do not have the authority to make payment for VR services solely on the basis that the completion of a VR program has resulted in the cessation of disability benefits. Apart from the two new VR payment provisions included in these regulations, the statute only allows us to pay for VR services which result in an individual's completion of a continuous 9-month period of SGA. However, if an individual's entitlement to disability benefits is terminated due to a change in vocational factors resulting from the completion of a VR program, it is possible that such action will serve as an incentive for the individual to return to work and complete a continuous 9-month period of SGA. If this occurs, we will pay the VR agency for services which contributed to the completion of the continuous 9-month period of SGA.

Some minor technical corrections were made in 404.2102 (e) and (j), §§ 404.2112, 416.2202 (e) and (j) and 416.2227(c) since publication as a Notice of Proposed Rulemaking.

Regulatory Procedures

Justification for Dispensing with Rulemaking Procedures

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its notice and comment procedures when an agency finds there is good cause for dispensing with such procedures. Section 553(b)(3)(B) of the APA exempts application of notice and comment rulemaking procedures "when the agency for good cause finds * * * that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." We are dispensing with notice and comment rulemaking with regard to the inclusion of title XVI blind recipients in these provisions because such rulemaking is unnecessary. With respect to the inclusion of title XVI blind recipients, this rule merely reflects the provisions of section 1631(a)(6) of the Social Security Act, as added by section 9112 of Pub. L. 100–203, and does not involve any exercise of discretion by the Secretary.

Executive Order No. 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because these regulations will not have an annual effect on the economy of $100 million or more, or otherwise meet any of the criteria for a major regulation. The annual costs associated with this regulation range from $1.4 million to $2.4 million over the 5-year period 1989 through 1993. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act of 1980

These regulations impose no new reporting or recordkeeping requirements requiring Office of Management and Budget clearance.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they presently apply only to States and their VR agencies. There are presently no alternate participants. We would not except a substantial number of alternate participants, if any, in the foreseeable future. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program Nos. 13.802 Social Security-Disability Insurance; 13.807 Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disabled, Old-Age, Survivors and Disability Insurance.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disabled, Public assistance programs, Supplemental Security Income (SSI).

Dated: November 7, 1989.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: December 12, 1989.

Louis W. Sullivan,

Secretary of Health and Human Services.

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE

Part 404 of chapter III of title 20 of the Code of Federal Regulations is amended as follows:

1. The title and authority citation for subpart V are revised to read as follows:

Subpart V—Payments for Vocational Rehabilitation Services

Authority: Secs. 205(a), 222, and 1102 of the Social Security Act; 42 U.S.C. 405(a), 422, and 1302.

2. Section 404.2101 is revised to read as follows:

404.2101 General.

Section 222(d) of the Social Security Act authorizes the transfer from the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund of such sums as may be necessary to pay for the reasonable and necessary costs of

vocational rehabilitation (VR) services provided certain disabled individuals entitled under section 223, 225(b), 202(d), 202(e) or 202(f) of the Social Security Act. The purpose of this provision is to make VR services more readily available to disabled individuals, help State VR agencies and alternate participants to recover some of their costs in VR refusal situations as described in § 404.2113, and ensure that savings accrue to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund. Payment will be made for VR services provided on behalf of such an individual in cases where—

(a) The furnishing of the VR services results in the individual's completion of a continuous 9-month period of substantial gainful activity (SGA) as specified in §§ 404.2110 through 404.2111;

(b) The individual continues to receive disability payments from us, even though his or her disability has ceased, because of his or her continued participation in an approved VR program which we have determined will increase the likelihood that he or she will not return to the disability rolls (see § 404.2112); or

(c) The individual refuses, without good cause, to continue or to cooperate in a VR program in such a manner as to preclude his or her successful rehabilitation (see § 404.2113).

3. In § 404.2102, the introductory text is revised, paragraphs (e), (f), (g), (h), (i), (j), (k), and (l) are redesignated as (f), (h), (i), (j), (k), (l), (m), and (n), respectively, paragraphs (f), (h), (i), and (j) as redesignated are revised, and new paragraphs (e) and (g) are added to read as follows:

§ 404.2102 Purpose and scope.

This subpart describes the rules under which the Secretary will pay the State VR agencies or alternate participants for VR services. Payment will be provided for VR services provided on behalf of disabled individuals under one or more of the three provisions discussed in § 404.2101..

* * * * *

(e) Sections 404.2112 and 404.2113 describe when payment will be made to a VR agency or alternate participant because an individual's disability benefits are continued based on his or her participation in a VR program which we have determined will increase the likelihood that he or she will not return to the disability rolls; and when payment will be made to a VR agency or alternate participant when an individual, without good cause, refuses to continue to participate in a VR program or fails to cooperate in such a manner as to preclude his or her successful rehabilitation.

(f) Sections 404.2114 through 404.2115 describe services for which payment will be made.

(g) Section 404.2116 describes the filing deadlines for claims for payment for VR services.

(h) Section 404.2117 describes the payment conditions.

(i) Section 404.2118 describes the applicability of these regulations to alternate participants.

(j) Section 404.2119 describes how we will make payment to State VR agencies or alternate participants for rehabilitation services.

* * * * *

4. Within § 404.2103, the definition of "Disability beneficiary" is revised and a definition of "Good cause" is added thereafter to read as follows:

§ 404.2103 Definitions.

* * * * *

Disability beneficiary means a disabled individual who is entitled to benefits under section 223, 202(d), 202(e) or 202(f) of the act or is continuing to receive payment under section 225(b) of the Act after his or her disabling physical or mental impairments have ceased.

Good cause for VR refusal (as described in § 404.2113) is defined in § 404.422(e) of this part.

* * * * *

5. In § 404.2108, paragraphs (a), (b) and (d) are revised, paragraph (e) is removed, and paragraphs (f) and (g) are redesignated as (e) and (f), respectively, and paragraph (f), as redesignated, is revised to read as follows:

§ 404.2108 Requirements for payment.

(a) The State VR agency or alternate participant must file a claim for payment in each individual case within the time periods specified in § 404.2116;

(b) The VR services for which payment is being requested must have been provided during the period specified in § 404.2115;

* * * * *

(d) The individual must meet one of the VR payment provisions specified in § 404.2101;

* * * * *

(f) The amount to be paid must be reasonable and necessary and be in compliance with the cost guidelines specified in § 404.2117.

6. Section 404.2109 is revised to read as follows:

§ 404.2109 Responsibility for making payment decisions.

The Commissioner will decide—

(a) Whether a continuous period of 9 months of SGA has been completed;

(b) Whether a disability beneficiary whose disability has ceased should continue to receive benefits under § 404.316(c), 404.337(c), or 404.352(c) for a month after October 1984, based on his or her continued participation in a VR program;

(c) Whether suspension of a disability beneficiary's benefits for a month after October 1984, was due to the beneficiary's refusal, without good cause, to continue to accept VR services or to cooperate in such a manner as to preclude his or her successful rehabilitation;

(d) If and when medical recovery has occurred;

(e) Whether documentation of VR services and expenditures is adequate;

(f) If payment is to be based on completion of a continuous 9-month period of SGA, whether the VR services contributed to the continuous period of SGA; and

(g) What VR costs were reasonable and necessary and will be paid.

§ 404.2110 [Amended]

7. In § 404.2110, paragraph (c) is amended by changing "§ 404.2113 of" to "§ 404.2115 for".

8. Section 404.2111 introductory text is revised to read as follows:

§ 404.2111 Criteria for determining when VR services will be considered to have contributed to a continuous period of 9 months.

The State VR agency or alternate participant may be reimbursed for VR services if such services contribute to the individual's performance of a continuous 9-month period of SGA. The following criteria apply to individuals who received more than just evaluation services. If a State VR agency or alternate participant claims payment for services to an individual who received only evaluation services, it must establish that the individual's continuous period or medical recovery (if medical recovery occurred before completion of a continuous period) would not have occurred without the services provided. In applying the criteria below, we will consider all services initiated, coordinated or provided, including services before October 1, 1981.

* * * * *

[§§ 404.2112, 404.2113, 404.2116, 404.2117 and 404.2118 Redesignated as §§ 404.2114, 404.2115, 404.2118, 404.2117, and 404.2119 Respectively]

9. Section 404.2112 is redesignated as § 404.2114, § 404.2113 is redesignated as § 404.2115, § 404.2118 is redesignated as § 404.2119, § 404.2117 is redesignated as

§ 404.2118, and § 404.2116 is redesignated as § 404.2117.

10. A new § 404.2112 is added to read as follows:

§ 404.2112 Payment for VR services in a case where an individual continues to receive disability payments based on participation in an approved VR program.

Sections 404.1586(g), 404.316(c), 404.337(c), and 404.352(c) explain the criteria we will use in determining if an individual whose disability has ceased should continue to receive disability benefits from us because of his or her continued participation in a VR program. A VR agency or alternate participant can be paid for the cost of VR services provided to an individual if the individual was receiving benefits in a month or months, after October 1984, based on § 404.316(c), 404.337(c), or 404.352(c). If this requirement is met, a VR agency or alternate participant can be paid for the costs of VR services provided within the period specified in § 404.2115, subject to the other payment and administrative provisions of this subpart.

11. A new § 404.2113 is added to read as follows:

§ 404.2113 Payment for VR services in a case where an individual refuses to continue or fails to cooperate in a VR program.

Payment can be made to a VR agency or alternate participant for the costs of VR services provided to an individual who, after filing an application with a VR agency for rehabilitation services, without good cause, refuses to continue to accept VR services or fails to cooperate in such a manner as to preclude the individual's successful rehabilitation. A VR agency or alternate participant may be paid, subject to the provisions of this subpart, for the costs of services provided an individual if the individual's monthly disability payment has been suspended for a month or months after October 1984, because of VR refusal. VR refusal means refusal to continue to accept VR services or failure to cooperate in such a manner as to preclude the individual's successful rehabilitation.

12. Section 404.2115, as redesignated, is revised to read as follows:

§ 404.2115 When services must have been provided.

(a) In order for the VR agency or alternate participant to be paid, the services must have been provided—

(1) After September 30, 1981;

(2) No earlier than the beginning of the waiting period or the first month of entitlement, if no waiting period is required; and

(3) Before completion of a continuous 9-month period of SGA or termination (suspension of benefits in cases described in § 404.2113) of payments to the individual, whichever occurs first.

(b) Where disability or blindness payments are made simultaneously to an individual based on the provisions of both this part and part 416, the determination as to when services must have been provided may be made under this section or § 416.2215, whichever is advantageous to the State VR agency or alternate participant that is participating in both VR programs.

13. A new § 404.2116 is added to read as follows:

§ 404.2116 When claims for payment for VR services must be made (filing deadlines).

The State VR agency or alternate participant must file a claim for payment in each individual case within the following time periods:

(a) A claim for payment for VR services based on the individual's completion of a continuous 9-month period of SGA must be filed within 12 months after the month in which the continuous 9-month period of SGA is completed.

(b) A claim for payment for VR services provided to an individual whose disability benefits were continued after disability has ceased because of that individual's continued participation in a VR program must be filed as follows:

(1) If a written notice requesting that a claim be filed was sent to the State VR agency or alternate participant, a claim must be filed within 90 days following the month in which VR services end, or if later, within 90 days after receipt of the notice.

(2) If no written notice was sent to the State VR agency or alternate participant, a claim must be filed within 12 months after the month in which VR services end or, if later, within 12 months after the month of publication of this section.

(c) A claim for payment based on an individual's refusal, without good cause, to continue or cooperate in a VR program must be filed—

(1) Within 90 days after the VR agency or alternate participant receives our written request to file a claim for payment; or

(2) If no written notice was sent to the State VR agency or alternate participant, a claim must be filed within 12 months after the month for which disability benefit payments are suspended because of VR refusal, or if later, within 12 months after the month of publication of this section.

14. In § 404.2117, as redesignated, the introductory text is revised, paragraphs (d) and (e) are revised, paragraph (f) is redesignated as paragraph (g) and a new paragraph (f) is added to read as follows:

§ 404.2117 What costs will be paid.

In accordance with section 222(d) of the social security act, the Secretary will pay the State VR agency or alternate participant for all VR services performed during the period described in § 404.2115, but subject to the following limitations:

* * * * *

(d) The total payment in each case, including any prior payments related to earlier continuous 9-month periods of SGA made under this subpart, must not be so high as to preclude a "net saving" to the trust funds (a "net saving" is the difference between the estimated saving to the trust funds, if disability benefits eventually terminate, and the total amount we pay to the State VR agency or alternate participant);

(e) Any payment to the State VR agency for either direct or indirect VR expenses must be consistent with the cost principles described in OMB Circular No. A-87, published at 46 FR 9548 on January 28, 1981 (see § 404.2118(a) for cost principles applicable to alternate participants);

(f) Payment for VR services or costs may be made under more than one of the VR payment provisions described in §§ 404.2111 through 404.2113 of this subpart and similar provisions in §§ 416.2211 through 416.2213 of subpart V of part 416. However, payment will not be made more than once for the same VR service or cost. For example, payment to a VR agency based upon the completion of a continuous 9-month period of SGA which was made after an earlier payment based upon VR refusal, would only include payment for those VR costs incurred or services provided after the individual resumed VR services after refusal; and

* * * * *

15. Section 404.2119, as redesignated, is revised to read as follows:

§ 404.2119 Method of payment.

Payment to the State VR agencies or alternate participants pursuant to this subpart will be made either by advancement of funds or by payment for services provided (with necessary adjustments for any overpayments and underpayments), as decided by the Commissioner.

§ 404.2120 [Amended]

16. In § 404.2120, paragraph (c) is amended by changing the reference from § 404.2117(b) to § 404.2118(b).

17. In § 404.2127, paragraph (a) is amended by changing the reference from § 404.2117(b) to § 404.2118(b), and paragraph (c) is revised to read as follows:

§ 404.2127 Resolution of disputes.

* * * * *

(c) *Disputes on determinations made by the Secretary which affect a disability beneficiary's rights to benefits.* Determinations made by the Secretary which affect an individual's right to benefits (e.g., determinations that disability benefits should be terminated, denied, suspended, continued or begun at a different date than alleged) cannot be appealed by a State VR agency or alternate participant. Because these determinations are an integral part of the disability benefits claims process, they can only be appealed by the beneficiary or applicant whose rights are affected or by his or her authorized representative. However, if an appeal of an unfavorable determination is made by the individual and is successful, the new determination would also apply for purposes of this subpart. While a VR agency or alternate participant cannot appeal a determination made by the Secretary which affects a beneficiary's or applicant's rights, the VR agency can furnish any evidence it may have which would support a revision of a determination.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Part 416 of chapter III of title 20 of the Code of Federal Regulations is amended as follows:

1. The title and authority citation for subpart V are revised to read as follows:

Subpart V—Payments for Vocational Rehabilitation Services

Authority: Secs. 1102, 1615, and 1631 (d) (1) and (e) of the Social Security Act; 42 U.S.C. 1302, 1382d, and 1383 (d)(1) and (e); sec. 2344 of Pub. L. 97-35, 95 Stat. 867.

2. Section 416.2201 is revised to read as follows:

§ 416.2201 General.

Section 1615(d) of the Social Security Act authorizes payment from the general fund for the reasonable and necessary costs of vocational rehabilitation (VR) services provided certain disabled or blind individuals eligible under section 1614(a)(2), 1614(a)(3), 1619(a), or who continue to receive payment under 1631(a)(6) of the Social Security Act. The purpose of this provision is to make VR services more readily available to disabled or blind individuals, help State VR agencies and alternate participants to recover some of their costs in VR refusal situations, as described in § 416.2213, and ensure that savings accrue to the general fund. Payment will be made for VR services provided on behalf of such an individual, in cases where—

(a) The furnishing of the VR services results in the individual's completion of a continuous 9-month period of substantial gainful activity (SGA) as specified in §§ 416.2210 through 416.2211;

(b) The individual continues to receive disability or blindness payments from us, even though his or her disability or blindness has ceased, because of his or her continued participation in an approved VR program which we have determined will increase the likelihood that he or she will not return to the disability or blindness rolls (see § 416.2212); or

(c) The individual refuses, without good cause, to continue or to cooperate in a VR program in such a manner as to preclude his or her succesful rehabilitation (see § 416.2213).

3. In § 416.2202, the introductory text is revised, paragraphs (e), (f), (g), (h), (i), (j), (k), and (l) are redesignated as (f), (h), (i), (j), (k), (l), (m), and (n), respectively, paragraphs (f), (h), (i), and (j) as redesignated are revised, and new paragraphs (e) and (g) are added to read as follows:

§ 416.2202 Purpose and scope.

This subpart describes the rules under which the Secretary will pay the State VR agencies or alternate participants for VR services. Payment will be provided for VR services provided on behalf of disabled or blind individuals under one or more of the three provisions discussed in § 416.2201.

* * * * *

(e) Sections 416.2212 and 416.2213 describe when payment will be made to a VR agency or alternate participant because an individual's disability or blindness benefits are continued based on his or her participation in a VR program which we have determined will increase the likelihood that he or she will not return to the disability rolls; and when payment will be made to a VR agency or alternate participant when an individual, without good cause, refuses to continue to participate in a VR program or fails to cooperate in such a manner as to preclude his or her successful rehabilitation.

(f) Sections 416.2214 through 416.2215 describe services for which payment will be made.

(g) Section 416.2216 describes the filing deadlines for claims for payment for VR services.

(h) Section 416.2217 describes the payment conditions.

(i) Section 416.2218 describes the applicability of these regulations to alternate participants.

(j) Section 416.2219 describes how we will make payment to State VR agencies or alternate participants for rehabilitation services.

* * * * *

4. Within § 416.2203, the definition of "eligible" is revised and a definition of "good cause" is added immediately thereafter to read as follows:

§ 416.2203 Definitions.

* * * * *

Eligible means meets all the requirements for supplemental security income benefits under sections 1614(a)(2), 1614(a)(3), or 1691(a) and is receiving SSI payments or continues to receive benefits under section 1631(a)(6) of the Act.

Good cause for VR refusal (as described in § 416.2213) is defined in § 416.1715(b) of this part.

* * * * *

5. In § 416.2208, paragraphs (a), (b), and (d) are revised, paragraph (e) is removed, and paragraphs (f) and (g) are redesignated as (e) and (f), respectively, and paragraph (f), as redesignated, is revised to read as follows:

§ 416.2208 Requirements for payment.

(a) The State VR agency or alternate participant must file a claim for payment in each individual case within the time periods specified in § 416.2216;

(b) The VR services for which payment is being requested must have been provided during the period specified in § 416.2215;

* * * * *

(d) The individual must meet one of the VR payment provisions specified in § 416.2201;

* * * * *

(f) The amount to be paid must be reasonable and necessary and be in compliance with the cost guidelines specified in § 416.2217.

6. Section 416.2209 is revised to read as follows:

§ 416.2209 Responsibility for making payment decisions.

The Commissioner will decide:

(a) Whether a continuous period of 9 months of SGA has been completed;

(b) Whether a disability or blindness recipient whose disability or blindness has ceased should continue to receive payments under section 1631(a)(6) of the Social Security Act for a month after October 1984 or, in the case of a blindness recipient, for a month after March 1988, based on his or her continued participation in a VR program;

(c) Whether suspension of a disability or blindness payment for a month after October 1984, was due to the recipient's refusal, without good cause, to continue to accept VR services or to cooperate in such a manner as to preclude his or her successful rehabilitation;

(d) If and when medical recovery has occurred;

(e) Whether documentation of VR services and expenditures is adequate;

(f) If payment is to be based on completion of a continuous 9-month period of SGA, whether the VR services contributed to the continuous period of SGA; and

(g) What VR costs were reasonable and necessary and will be paid.

§ 416.2210 [Amended]

7. In § 416.2210, paragraph (c) is amended by changing the reference from § 416.2213 to § 416.2215.

8. Section 416.2211 introductory text is revised to read as follows:

§ 416.2211 Criteria for determining when VR services will be considered to have contributed to a continuous period of 9 months.

The State VR agency or alternate participate may be reimbursed for VR services if such services contribute to the individual's performance of a continuous 9-month period of SGA. The following criteria apply to individuals who received more than just evaluation services. If a State VR agency or alternate participant claims payment for services to an individual who received only evaluation services, it must establish that the individual's continuous period or medical recovery (if medical recovery occurred before completion of a continuous period) would not have occurred without the services provided. In applying the criteria below, we will consider all services initiated, coordinated or provided, including services before eligibility and before October 1, 1981.

* * * * *

[§§ 416.2212, 416.2213, 416.2216, 416.2217 and 416.2218 Redesignated as §§ 416.2214, 416.2215, 416.2217, 404.2218, and 404.2219 Respectively]

9. Section 416.2212 is redesignated as § 416.2214, § 416.2213 is redesignated as § 416.2215, § 416.2218 is redesignated as § 416.2219, § 416.2217 is redesignated as § 416.2218, and § 416.2216 is redesignated as § 416.2217.

10. A new § 416.2212 is added to read as follows:

§ 416.2212 Payment for VR services in a case where an individual continues to receive disability or blindness payment based on participation in an approved VR program.

Section 1631(a)(6) of the Social Security Act contains the criteria we will use in determining if an individual whose disability or blindness has ceased should continue to receive disability or blindness payments from us because of his or her continued participation in a VR program. A VR agency or alternate participant can be paid for the cost of VR services provided to an individual if the individual was receiving payments in a month or months after October 1984, or, in the case of blindness payments, in a month or months after March 1988, based on this provision. If this requirement is met, a VR agency or alternate participant can be paid for the costs of VR services provided within the period specified in § 416.2215, subject to the other payment and administrative provisions of this subpart.

11. A new § 416.2213 is added to read as follows:

§ 416.2213 Payment for VR services in a case where an individual refuses to continue or fails to cooperate in a VR program.

Payment can be made to a VR agency or alternate participant for the costs of VR services provided to an individual who, after filing an application with a VR agency for rehabilitation services, without good cause, refuses to continue to accept VR services or fails to cooperate in such a manner as to preclude the individual's successful rehabilitation. A VR agency or alternate participant may be paid, subject to the provisions of this subpart, for the costs of services provided an individual if the individual's monthly disability or blindness payment has been suspended or terminated for a month or months, after October 1984, because of VR refusal. Vocational rehabilitation refusal means refusal to continue to accept VR services or failure to cooperate in such a manner as to preclude the individual's successful rehabilitation.

12. Section 416.2215, as redesignated, is revised to read as follows:

§ 416.2215 When services must have been provided.

(a) In order for the VR agency or alternate participant to be paid the services must have been provided—

(1) After September 30, 1981;

(2) During months the individual is eligible for SSI disability or blindness payments; and

(3) Before completion of a continuous 9-month period of SGA.

(b) Where disability or blindness payments are made simultaneously to an individual based on the provisions of both this part and part 404, the determination as to when services must have been provided may be made under this section or § 404.2115, whichever is advantageous to the State VR agency or alternate participant that is participating in both VR programs.

13. A new § 416.2216 is added to read as follows:

§ 416.2216 When claims for payment for VR services must be made (filing deadlines).

The State VR agency or alternate participant must file a claim for payment in each individual case within the following time periods:

(a) A claim for payment for VR services based on the completion of a continuous 9-month period of SGA must be filed within 12 months after the month in which the continuous 9-month period of SGA is completed.

(b) A claim for payment for VR services provided to an individual whose disability or blindness benefits were continued after disability or blindness has ceased because of that individual's continued participation in a VR program must be filed as follows:

(1) If a written notice requesting that a claim be filed was sent to the State VR agency or alternate participant, a claim must be filed within 90 days following the month in which VR services end, or if later, within 90 days after receipt of the notice.

(2) If no written notice was sent to the State VR agency or alternate participant, a claim must be filed within 12 months after the month in which VR services end or, if later, within 12 months after the month of publication of this section.

(c) A claim for payment based on an individual's refusal, without good cause, to continue or cooperate in a VR program must be filed—

(1) Within 90 days after the VR agency or alternate participant receives our written request to file a claim for payment; or

(2) If no written notice was sent to the State VR agency or alternate participant, a claim must be filed within 12 months after the month for which disability or blindness benefit payments are suspended because of VR refusal, or if later, within 12 months after the month of publication of this section.

14. In § 416.2217 as redesignated, the introductory text is revised, paragraphs (d) and (e) are revised, paragraph (f) is redesignated as paragraph (g) and a new paragraph (f) is added to read as follows:

§ 416.2217 What costs will be paid.

In accordance with section 1615(d) of the Social Security Act, the Secretary will pay the State VR agency or alternate participant for all VR services performed during the period described in § 416.2215, but subject to the following limitations:

* * * * *

(d) The payment in each case, including any prior payments related to earlier continuous 9-month periods of SGA made under this subpart, must not be so high as to preclude a "net saving" to the general funds (a "net saving" is the difference between the estimated savings to the general fund, if payments for disability or blindness remain reduced or eventually terminate, and the total amount we pay to the State VR agency or alternate participant);

(e) Any payment to the State VR agency for either direct or indirect VR expenses must be consistent with the cost principles described in OMB Circular No. A-87, published at 46 FR 9548 on January 28, 1981 (see § 416.2218(a) for cost principles applicable to alternate participants);

(f) Payment for VR services or costs may be made under more than one of the VR payment provisions described in §§ 416.2211 through 416.2213 of this subpart and similar provisions in §§ 404.2111 through 404.2113 of subpart v of part 404. However, payment will not be made more than once for the same VR service or cost. For example, payment to a VR agency based upon the completion of a continuous 9-month period of SGA which was made after an earlier payment based upon VR refusal, would only include payment for those VR costs incurred or services provided after the individual resumed VR services after refusal; and

* * * * *

15. Section 416.2219, as redesignated, is revised to read as follows:

§ 416.2219 Method of payment.

Payment to the State VR agencies or alternate participants pursuant to this subpart will be made either by advancement of funds or by payment for services provided (with necessary adjustments for any overpayments and underpayments), as decided by the Commissioner.

§ 416.2220 [Amended]

16. In § 416.2220, paragraph (c) is amended by changing the reference from § 416.2217(b) to § 416.2218(b).

17. In § 416.2227, paragraph (a) is amended by changing the reference from § 416.2217(b) to § 416.2218(b), and paragraph (c) is revised to read as follows:

§ 416.2227 Resolution of disputes.

* * * * *

(c) *Disputes on determinations made by the Secretary which affect a disabled or blind beneficiary's rights to benefits.* Determinations made by the Secretary which affect an individual's right to benefits (e.g., determinations that disability or blindness benefits should be terminated, denied, suspended, continued or begun at a different date than alleged) cannot be appealed by a State VR agency or alternate participant. Because these determinations are an intergral part of the disability or blindness benefits claims process, they can only be appealed by the beneficiary or applicant whose rights are affected or by his or her authorized representative. However, if an appeal of an unfavorable determination is made by the individual and is successful, the new determination would also apply for purposes of this subpart. While a VR agency or alternate participant cannot appeal a determination made by the Secretary which affects a beneficiary's or applicant's rights, the VR agency can furnish any evidence it may have which would support a revision of a determination.

[FR Doc. 90-5343 Filed 3-7-90; 8:45 am]
BILLING CODE 4190-11-M

Food and Drug Administration

21 CFR Part 168

[Docket No. 86P-0101/CP]

Lactose; Amendment of the Standard of Identity

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the standard of identity for lactose to change the required lactose content and pH range, to provide for a new method of analysis for lactose content, and to make editorial changes. The amendments will, to the extent practicable, achieve consistency with current industry practice, and promote honesty and fair dealing in the interest of consumers.

DATES: Effective April 10, 1990; compliance may begin May 7, 1990; written objections and requests for a hearing by April 9, 1990. The Director of the Office of the Federal Register approves the incorporations by reference in accordance with 5 U.S.C. 552(a) of portions of certain publications in 21 CFR 168.122(d), effective April 10, 1990.

ADDRESSES: Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Arthur R. Johnson, Center for Food Safety and Applied Nutrition (HFF-414), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-485-0112.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 15, 1989 (54 FR 33582), FDA published a proposed rule to amend the standard of identity for lactose in 21 CFR 168.122. The proposal responded to a citizen petition submitted by the American Dairy Products Institute (ADPI), 130 North Franklin St., Chicago, IL 60606. ADPI requested that FDA amend the standard of identity for lactose to: (1) Reduce the required minimum lactose content from not less than 99.0 percent to not less than 98.0 percent, mass over mass (m/m), calculated on a dry basis; (2) change the pH range from not less than 4.5 nor more than 7.0 to not less than 5.0 nor more than 7.5; and (3) make editorial changes to cite the newly adopted "Official Methods of Analysis of the Association of Official Analytical Chemists" (AOAC), now preferred for the analysis of lactose content, and to update the referenced method for the determination of loss on drying at 120 °C. Interested persons were given until October 16, 1989, to submit comments.

The agency received four letters, each containing one or more comments, in response to the proposal. One letter was from petitioner ADPI, a second was from a trade association, and two were from dairy product processors. The comments unanimously supported the reduced minimum lactose requirement, the citing of the AOAC method for analysis of lactose content, and updating the reference method for the determination of loss on drying at 120 °C. However, one of the dairy product processors requested that the current lower pH limit of 4.5 be retained. In support of this position, the comment explained that its refining process, which removes nonlactose whey fractions, results in a highly pure lactose

that has little buffer capacity. The average pH of this lactose is closer to 5.0 than 6.0, with approximately one-third of this processor's products falling in the 4.5 to 5.0 pH range. ADPI, the petitioner, concurred with this comment and withdrew its request for the higher pH limit. ADPI noted that neither functionality nor quality of lactose is affected by the lower 4.5 pH minimum.

The agency believes that the grounds in support of the lower permitted pH limit are reasonable and is, therefore, retaining the lower pH limit of 4.5 currently permitted in 21 CFR 168.122(b)(3). The agency is amending 21 CFR 168.122(b)(1), (b)(3), and (d) as set forth below.

Economic Impact

In accordance with the Regulatory Flexibility Act, the agency previously considered the potential effects that this rule would have on small entities, including small businesses. In accordance with section 605(b) of the Regulatory Flexibility Act, the agency has determined that no significant impact on a substantial number of small entities would result from this action. FDA has not received any new information or comments that would alter its previous determination.

Objections

Any person who will be adversely affected by this regulation may at any time on or before April 9, 1990, file with the Dockets Mangement Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 168

Food grades and standards, Incorporation by reference, Sugar.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 168 is amended as follows:

PART 168—SWEETENERS AND TABLE SIRUPS

1. The authority citation for 21 CFR part 168 continues to read as follows:

Authority: Secs. 201, 401, 403, 409, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 343, 348, 371, 376).

2. Section 168.122 is amended by revising paragraphs (b)(1), (b)(3), and (d) to read as follows:

§ 168.122 Lactose.

* * * * *

(b) * * *

(1) The lactose content is not less than 98.0 percent, mass over mass (m/m), calculated on a dry basis.

* * * * *

(3) The pH of a 10.0-percent m/m solution is not less than 4.5 nor more than 7.5.

* * * * *

(d) The methods of analysis in paragraphs (d)(1), (d)(2), (d)(3), (d)(4), and (d)(5) of this section are to be used to determine whether the food meets the requirements of paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) of this section. The methods are contained in "Official Methods of Analysis of the Association of Official Analytical Chemists", 14th Ed. (1984), including the 4th Supp. (1988), which is incorporated by reference in accordance with 5 U.S.C. 552(a). Copies of the material incorporated by reference may be obtained from the Association of Official Analytical Chemists, 2200 Wilson Blvd., Suite 400, Arlington, VA 22201-3301, or may be examined at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

(1) Lactose content, sections 31.064 to 31.071, "Purity of Lactose, Liquid Chromatographic Method," First Action, 14th Ed. (1984), pp. 583 an 584.

(2) Lactose content, sections 31.064 to 31.071, "Purity of Lactose, Liquid Chromatographic Method," "Changes in Official Methods of Analysis," 14th Ed., 4th Supp. (1988), p. 212. This reference recognizes the change in status of the method from first action to final action.

(3) Sulfated ash content, section 31.014, "Ash of Sugars and Sirups," Final Action, Sulfated Ash, 14th Ed. (1984), p. 575.

(4) pH, section 14.022, "pH of Flour, Potentiometric Method," Final Action, except that a 10-percent m/m solution of lactose in water is used for the determination, 14th Ed. (1984), p. 252.

(5) Loss on drying at 120 °C, section 31.070, 14th Ed. (1984), p. 584.

Dated: February 12, 1990.

Ronald G. Chesemore,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 90-5292 Filed 3-7-90; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Parts 510, 520, 540 and 558

Animal Drugs, Feeds, and Related Products; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for several new animal drug applications (NADA's) from Salsbury Laboratories to Solvay Animal Health, Inc.

EFFECTIVE DATE: March 8, 1990.

FOR FURTHER INFORMATION CONTACT: John R. Markus, Center for Veterinary Medicine (HFV-142), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2871.

SUPPLEMENTARY INFORMATION: Solvay Animal Health, Inc., 1201 Northland Dr., Mendota Heights, MN 55120, advised FDA of a change of sponsor of several NADA's from its affiliate Salsbury Laboratories, 2000 Rockford Rd., Charles City, IA 50616. The affected NADA's are:

NADA	Drug(s)
005414	Roxarsone.
006707	Sulfaquinoxaline.
007285	Sulfaquinoxaline.
007616	Roxarsone.
007891	Roxarsone.
008274	Roxarsone.
008741	Dibutyltin Dilaurate.
010005	Piperazine Sulfate.
010335	Piperazine/Phenothiazine/Dibutyltin Dilaurate.
010447	Piperazine/Phenothiazine/Dibutyltin Dilaurate.
011141	Sulfanitran/Aklomide.
012680	Nystatin.
014250	Sulfanitran/Aklomide.
031553	Sodium Sulfachloropyrazine.
034536	Aklomide.
034537	Sulfanitran/Roxarsone/Aklomide.
035388	Sulfanitran/Aklomide.
039666	Sulfanitran/Roxarsone/Nitromide.
055060	Potassium Penicillin G.

NADA	Drug(s)
065410	Tetracycline Hydrochloride.
093025	Roxarsone.

The agency is amending the regulations in 21 CFR parts 520, 540, and 558 to reflect the sponsor changes. Where certain of the regulations stipulate a limitation as to source of an ingredient (i.e., Salsbury), that stipulation is also amended accordingly. In addition, the tables in 21 CFR 510.600(c)(1) and (c)(2) are amended to indicate that Salsbury Laboratories is no longer the sponsor of any approved NADA's by removing the entries "Salsbury Laboratories" and "017210".

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 520

Animal drugs.

21 CFR Part 540

Animal drugs, Antibiotics.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 520, 540, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

§ 510.600 [Amended]

2. Section 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications is amended in the table in paragraph (c)(1) by removing the entry "Salsbury Laboratories" and in the table in paragraph (c)(2) by removing the entry "017210".

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

3. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 520.2087 [Amended]

4. Section 520.2087 Roxarsone soluble powder is amended in paragraph (b) by removing "017210"; and replacing it with "053501".

§ 520.2088 [Amended]

5. Section 520.2088 Roxarsone tablets is amended in paragraphs (a)(2) and (b)(2) by removing "017210" and replacing it with "053501".

§ 520.2184 [Amended]

6. Section 520.2184 Sodium sulfachloropyrazine monohydrate is amended in paragraph (b) by removing "017210" and replacing it with "053501".

§ 520.2320 [Amended]

7. Section 520.2320 Sulfanitran and aklomide in combination is amended in paragraph (c) by removing "017210" and replacing it with "053501".

PART 540—PENICILLIN ANTIBIOTIC DRUGS FOR ANIMAL USE

8. The authority citation for 21 CFR part 540 continues to read as follows:

Authority: Secs. 507, 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357, 360b).

§ 540.181b [Amended]

9. Section 540.181b Potassium penicillin G in drinking water is amended in paragraph (c)(2) by removing "017210" and replacing it with "053501".

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

10. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: Secs. 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b, 371).

§ 558.15 [Amended]

11. Section 558.15 Antibiotic, nitrofuran, and sulfonamide drugs in the feed of animals is amended in the table in paragraph (g)(2) by removing the entry "Salsbury Laboratories" appearing under the "Drug sponsor" column and replacing it with the entry "Solvay Animal Health, Inc.".

§ 558.35 [Amended]

12. Section 558.35 Aklomide is amended in paragraph (a) by removing "017210" and replacing it with "053501".

§ 558.55 [Amended]

13. Section 558.55 Amprolium is amended in the table in paragraph (d)(2), in entry (iii), the second item under the "Limitations" column by removing "017210" and replacing it with "053501".

§ 558.58 [Amended]

14. Section 558.58 Amprolium and ethopabate is amended in the table in paragraph (d)(1), in entry (ii), in the 1st and 4th items under the "Limitations" column, and in entry (iii), in the 5th, 6th, 7th, and 10th items under the "Limitations" column by removing "017210" and replacing it with "053501".

§ 558.95 [Amended]

15. Section 558.95 Bambermycins is amended in paragraphs (b)(1)(iii)(*b*), (b)(1)(iv)(*b*), (b)(1)(v)(*b*), (b)(1)(vii)(*b*), (b)(1)(ix)(*b*), (b)(1)(x)(*b*), and (b)(1)(xi)(*b*) by removing "017210" and by replacing it with "053501".

§ 558.105 [Amended]

16. Section 558.105 Buquinolate is amended in paragraph (d)(1)(ix)(*b*) by removing "017210" and replacing it with "053501".

§ 558.195 [Amended]

17. Section 558.195 Decoquinate is amended in the table in paragraph (d), in the first entry, in the sixth item under the "Limitations" column by removing "017210" and replacing it with "053501".

§ 558.311 [Amended]

18. Section 558.311 Lasalocid is amended in the table in paragraph (e)(1), in entry (ii), in the first, second, third, fourth, and fifth items under the "Limitations" column by removing "017210" and replacing it with "053501".

§ 558.340 [Amended]

19. Section 558.340 Maduramicin ammonium is amended in paragraph (c)(4)(ii) by removing "017210" and replacing it with "053501".

§ 558.355 [Amended]

20. Section 558.355 Monensin is amended in paragraphs (f)(1)(x)(*b*), (f)(1)(xi)(*b*), (f)(1)(xii)(*b*), (f)(1)(xv)(*b*), (f)(1)(xvi)(*b*), (f)(1)(xviii)(*b*), (f)(1)(xix)(*b*), (f)(1)(xx)(*b*), and (f)(1)(xxiii)(*b*) by removing "017210" and replacing it with "053501".

§ 558.363 [Amended]

21. Section 558.363 Narasin is amended in paragraph (c)(1)(v)(B) by removing "017210" and replacing it with "053501".

§ 558.369 [Amended]

22. Section 558.369 Nitarsone is amended in paragraph (a) by removing "017210" and replacing it with "053501".

§ 558.376 [Amended]

23. Section 558.376 Nitromide and sulfanitran is amended in paragraph (a)

by removing "017210" and replacing it with "053501".

§ 558.430 [Amended]

24. Section 558.430 Nystatin is amended in paragraph (a) by removing "017210" and replacing it with "053501".

§ 558.515 [Amended]

25. Section 558.515 Robenidine hydrochloride is amended in paragraph (d)(1)(ii)(*b*) by removing "017210" and replacing it with "053501".

§ 558.530 [Amended]

26. Section 558.530 Roxarsone is amended in paragraph (a)(2) by removing "017210" and replacing it with "053501".

§ 558.550 [Amended]

27. Section 558.550 Salinomycin is amended in paragraphs (b)(1)(ii)(*c*), (b)(1)(iv)(*c*), (b)(1)(v)(*c*), (b)(1)(ix)(*c*), (b)(1)(xii)(*c*), (b)(1)(xiv)(*c*), and (b)(1)(xv)(*c*) by removing "017210" and replacing it with "053501".

§ 558.680 [Amended]

28. Section 558.680 Zoalene is amended in paragraph (a) by removing "017210" and replacing it with "053501".

Dated: February 26, 1990.

Robert C. Livingston,

Acting Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 90-5293 Filed 3-7-90; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Parts 510, 520, 522, 524, 540, 555, and 558

Animal Drugs, Feeds, and Related Products; Change of Sponsor

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor from Quality Plus Essar Corp. to Sanofi Animal Health, Inc. In the **Federal Register** of January 18, 1990 (55 FR 1673), the agency failed to change the firm name "CEVA Laboratories, Inc." to "Sanofi Animal Health, Inc." in 21 CFR 558.15(g)(1). This document also corrects that error.

EFFECTIVE DATE: March 8, 1990.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV-130), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1414.

SUPPLEMENTARY INFORMATION: Sanofi Animal Health, Inc., 7101 College Blvd., Suite 610, Overland Park, KS 66210, advised FDA of a corporate merger of CEVA Laboratories, Inc., 7101 College Blvd., Overland Park, KS 66210, and Quality Plus Essar Corp., P.O. Box 459, Fort Dodge, IA 50501, to form Sanofi Animal Health, Inc. The final rule amending the animal drug regulations to reflect a change in sponsor from CEVA Laboratories, Inc., to Sanofi Animal Health, Inc., was published in the **Federal Register** of January 18, 1990 (55 FR 1673). This document effects the change from Quality Plus Essar Corp. to Sanofi Animal Health, Inc. The approved NADA's affected are:

NADA number and product

044-756 Phenylbutazone Tablets
045-416 Phenylbutazone Injection
048-287 Oxytetracycline Injection
048-646 Phenylbutazone Injection
048-647 Phenylbutazone Tablets
055-002 Chloramphenicol Injection
055-059 Chloramphenicol Tablets
065-383 Penicillin G Procaine in Oil Mastitis Form
095-218 Dexamethasone Tablets
100-128 Tylosin Phosphate Type A Article
107-506 Diethylcarbamazine Citrate Tablets
118-032 Diethylcarbamazine Citrate Chewable Tablets
118-506 Nitrofurazone Ointment
118-979 Phenylbutazone Oral Gel
119-142 Iron Hydrogenated Dextran Injection
119-974 Nitrofurazone Solution
120-615 Sulfamethazine 3-Day Bolus
123-815 Dexamethasone Sodium Phosphate Injection
124-241 Oxytocin Injection
126-504 Nitrofurazone Ointment
128-089 Dexamethasone Injection
132-137 Nitrofurazone Injection

To reflect this change, the agency is amending the regulations in 21 CFR 510.600 (c)(1) and (c)(2) by removing the entries for "Quality Plus Essar Corp." and "053617", and amending the regulations in 21 CFR parts 520, 522, 524, 540, 555, and 558 by removing "053617" and replacing it with "050604".

In addition, in the January 18, 1990 publication, FDA inadvertently failed to change the firm name "CEVA Laboratories, Inc." to "Sanofi Animal Health, Inc." where it appears twice in 21 CFR 558.15(g)(1) in the table under the column "Drug Sponsor". This document also corrects that error.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 520

Animal drugs.

21 CFR Part 522

Animal drugs.

21 CFR Part 524

Animal drugs.

21 CFR Part 540

Animal drugs, Antibiotics.

21 CFR Part 555

Animal drugs, Antibiotics.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 520, 522, 524, 540, 555, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

§ 510.600 [Amended]

2. Section 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications is amended in the table in paragraph (c)(1) by removing the entry "Quality Plus Essar Corp." and in the table in paragraph (c)(2) by removing the entry "053617".

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

3. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 520.540b [Amended]

4. Section 520.540b Dexamethasone tablets and boluses is amended in paragraph (b)(2) by removing "053617" and replacing it with "050604".

§ 520.622a [Amended]

5. Section 520.622a Diethylcarbamazine citrate tablets is amended in paragraph (a)(3) by removing "053617" and replacing it with "050604".

§ 520.622c [Amended]

6. Section 520.622c Diethylcarbamazine citrate chewable tablets is amended in paragraph (b)(4) by removing "053617" and replacing it with "050604".

§ 520.1720a [Amended]

7. Section 520.1720a Phenylbutazone tablets and boluses is amended in paragraph (b)(3) by removing "053617" and replacing it with "050604".

§ 520.1720d [Amended]

8. Section 520.1720d Phenylbutazone gel is amended in paragraph (b) by removing "053617" and replacing it with "050604".

§ 520.2260b [Amended]

9. Section 520.2260b Sulfamethazine sustained-release boluses is amended in paragraphs (c)(1) and (e)(1) by removing "053617" and replacing it with "050604".

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

10. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 522.540 [Amended]

11. Section 522.540 Dexamethasone injection is amended in paragraphs (d)(2)(i) and (e)(2) by removing "053617" and replacing it with "050604".

§ 522.1183 [Amended]

12. Section 522.1183 Iron hydrogenated dextran injection is amended in paragraph (e)(1) by removing "053617" and replacing it with "050604".

§ 522.1662a [Amended]

13. Section 522.1662a Oxytetracycline hydrochloride injection is amended in paragraph (i)(2) by removing "053617" and replacing it with "050604".

§ 522.1680 [Amended]

14. Section 522.1680 Oxytocin injection is amended in paragraph (b) by removing "053617" and replacing it with "050604".

§ 522.1720 [Amended]

15. Section 522.1720 Phenylbutazone injecton is amended in paragraph (b)(1) by removing "053617" and replacing it with "050604".

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

16. The authority citation for 21 CFR part 52 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 524.1580b [Amended]

17. Section 524.1580b Nitrofurazone ointment is amended in paragraph (b) by removing "053617" and replacing it with "050604".

§ 524.1580d [Amended]

18. Section 524.1580d Nitrofurazone solution is amended in paragraph (b) by removing "053617" and replacing it with "050604".

PART 540—PENICILLIN ANTIBIOTIC DRUGS FOR ANIMAL USE

19. The authority citation for 21 CFR part 540 continues to read as follows:

Authority: Secs. 507, 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357, 360b).

§ 540.874a [Amended]

20. Section 540.874a Procaine penicillin G-in oil is amended in paragraphs (c)(3)(i) and (c)(4)(i) by removing "053617" and replacing it with "050604".

PART 555—CHLORAMPHENICOL DRUGS FOR ANIMAL USE

21. The authority citation for 21 CFR part 555 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 555.110a [Amended]

22. Section 555.110a Chloramphenicol tablets is amended in paragraph (c)(2)(ii) by removing "053617" and replacing it with "050604".

§ 555.210 [Amended]

23. Section 555.210 Chloramphenicol injection is amended in paragraph (c)(2) by removing "053617" and replacing it with "050604".

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

24. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: Secs. 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b, 371).

§ 558.15 [Amended]

25. Section 558.15 Antibiotic, nitrofuran, and sulfonamide drugs in the feed of animals is amended in the table in paragraph (g)(1) under the heading "Drug Sponsor" by removing the firm name "CEVA Laboratories, Inc." from the two places it appears and replacing it with "Sanofi Animal Health, Inc."

§ 558.625 [Amended]

26. Section 558.625 Tylosin is amended in paragraph (b)(39) by removing "053617" and replacing it with "050604".

Dated: February 26, 1990.

Robert C. Livingston,

Acting Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 90-5360 Filed 3-7-90; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 44

[Docket No. R-90-1473; FR-2664-F-01]

Non-Federal Governmental Audit Requirements—Technical Corrections

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule amends 25 CFR part 44 to clarify the auditing options available to State and local governments that receive between $25,000 and $100,000 of Federal financial assistance.

EFFECTIVE DATE: April 9, 1990.

FOR FURTHER INFORMATION CONTACT: John H. Greer, Assistant Inspector General for Audit, Office of Inspector General, Department of Housing and Urban Development, Room 8284, 451 Seventh Street, SW., Washington, DC 20410. Telephone (202) 755-6364. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: HUD's regulations at 24 CFR part 44 implement the general audit requirements for recipient organizations contained in OMB Circular A-128 "Audits of State and Local Governments". The OMB Circular was issued under the Single Audit Act of 1984 (31 U.S.C. 7501-07). Part 44 contains all substantive audit requirements of OMB Circular A-128.

Section 7502(a)(1)(B) of the Single Audit Act provides that State and local governments that receive at least $25,000, but less than $100,000, in Federal financial assistance shall: (1) Have an audit made for the fiscal year in accordance with the Single Audit Act requirements (i.e., a single audit performed on a government-, department-, agency- or establishment-wide basis); or (2) comply with an

applicable requirements concerning financial or compliance audits contained in Federal statutes and regulations governing the programs under which such Federal financial assistance is provided to that government. This provision has been interpreted to provide such State or local governments with the option of performing a single audit or a grant-specific audit.

HUD's regulations were intended to provide this option to State and local governments receiving this funding level. In describing the requirements for grant-specific audits however, § 44.1(c)(2) requires audits conducted in "accordance with Federal laws and regulations governing the program". This provision has caused some confusion, because many of the HUD program regulations either do not have program-specific audit requirements, or merely contain cross-references to part 44. As a result, some entities have asserted that § 44.1(c)(2) eliminates their right to elect to conduct a program-specific audit, and requires State and local governments receiving between $25,000 and $100,000 in Federal funds to conduct an audit in accordance with the Single Audit Act. Others have claimed that they would elect to perform a program specific audit, but since HUD has failed to impose any audit requirements, no audit is required.

This final rule amends § 44.1(c)(2) to clarify that State and local governments receiving between $25,000 and $100,000 may elect to perform a single audit or to perform an audit in accordance with the requirements in the statute, regulations and grant agreement under which the funding is provided. Such financial audits shall be performed in accordance with Government Auditing Standards for financial audits and include the compliance tests described in OMB's Compliance Supplement for Single Audits of State and Local Governments for the specific program involved. These required auditing standards are not a new requirement being imposed by the Department. For clarity reasons, reference to these standards is being made explicitly at 24 CFR 44.1 (c)(2). For those programs not covered by the Compliance Supplement, the financial audit shall, at a minimum, include all specific compliance tests established by HUD. (If no compliance tests have been established by HUD, the auditor should design appropriate compliance tests consistent with Government Auditing Standards.) All audits shall be conducted with the frequency described in § 44.4.

Other Matters

The Secretary has determined that notice and prior public comment on this rule is unnecessary and that good cause exists for making this rule effective as soon as possible after publication. This rule does not alter the audit responsibilities of State and local governments receiving Federal funds. Rather, this final rule merely makes technical corrections clarifying the auditing options that are available to such governments.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environment Policy Act of 1969.

The Finding of No Significant Impact is available for public inspection from 7:30 a.m. to 5:30 p.m., weekdays, in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-0500.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation issued by the President on February 17, 1981. The rule does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local agencies or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises in domestic or export markets.

In accordance with 5 U.S.C. 605(b), the Regulatory Flexibility Act, the Undersigned certifies that this notice does not have a significant impact on a substantial number of small entities. This rule implements a technical correction to part 44 which gives State and local governments the option of either performing a single audit or an audit in accordance with audit provision prescribed in the statute, regulations and grant agreement under which funding is provided. It does not impose additional audit requirements.

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this rule will not involve the preemption of State law by Federal statute or regulation, and will not have substantial direct effects on States or their political subdivisions, or on the relationship or distribution of power among the various levels of government. This rule, which is intended to give State and local governments flexibility with respect to the type of audit they perform, will not have a significant impact on the States.

The General Counsel, as the Designated Official under Executive Order 12606, the Family, has determined that this rule will not have a significant impact on family formation, maintenance and general well-being.

This rule was not listed on the Department's Semiannual Agenda of Regulations published on October 30, 1989 (54 FR 44702) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 44

Audit requirements-non-Federal governmental entities; Reporting and recordkeeping requirements.

Accordingly, title 24 is amended to read as follows:

PART 44—NON-FEDERAL GOVERNMENTAL AUDIT REQUIREMENTS

1. The authority citation for 24 CFR part 44 continues to read as follows:

Authority: Single Audit Act of 1984 (31 U.S.C. 7501-07); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In § 44.1, paragraph (c)(2) is revised to read as follows:

§ 44.1 Purpose.

* * * * *

(c) * * *

(2) State or local governments that receive between $25,000 and $100,000 a year shall have an audit conducted in accordance with the Act's requirements (Government-, Department-, agency- or establishment-wide audit), or a grant-specific financial audit. Such financial audits shall be performed in accordance with the Government Auditing Standards for financial audits issued by the Comptroller General of the United States and include the compliance tests described in OMB's Compliance Supplement for Single Audits of State and Local Governments for the specific Federal assistance programs involved. For those programs not covered by the Compliance Supplement, the financial audit shall include any specific compliance tests required by HUD.

If the Federal assistance program is not covered by the *Compliance Supplement* and if no compliance requirements have been established by HUD, the auditor shall design appropriate compliance tests in accordance with government auditing

standards. Audits shall be conducted with the frequency described at § 44.4.

* * * * *

Dated: February 26, 1990.

Jack Kemp,

Secretary.

[FR Doc. 90-5244 Filed 3-7-90; 8:45 am]

BILLING CODE 4210-32-M

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 201, 203, and 234

[Docket No. N-90-2091; FR-2727-N-2]

Mortgage Insurance; Changes to the Maximum Mortgage Limits for Single Family Residences, Condominiums, and Manufactured Homes and Lots: Correction

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of revisions to FHA maximum mortgage limits for high-cost areas; Correction.

SUMMARY: On January 12, 1990, the Department published in the **Federal Register**, a Notice of the annual complete listing of areas eligible for "high-cost" mortgage limits under certain of HUD's insuring authorities under the National Housing Act (12 U.S.C. 1702), and each area's applicable limits. The purpose of this document is to correct several technical errors and to add areas that were inadvertently omitted from the annual listing of areas eligible for high-cost mortgage limits.

EFFECTIVE DATE: March 8, 1990.

FOR FURTHER INFORMATION CONTACT: For single family: Morris Carter, Director, Single Family Development Division, Room 9270; telephone (202) 755-6720. For manufactured homes: Robert J. Coyle, Director, title I Insurance Division, Room 9260; telephone (202) 755-6880; 451 Seventh Street, SW., Washington, DC 20410. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The annual complete listing of areas eligible for "high-cost" mortgage limits under certain of HUD's insuring authorities under the National Housing Act (12 U.S.C. 1702), and each area's applicable limits was published in the **Federal Register** on January 12, 1990 (55 FR 1312). Mortgage limits are adjusted in an area when the Secretary determines that middle- and moderate-income persons have limited housing opportunities because of high prevailing housing sales prices.

Several technical errors and omissions were found in the January 12, 1990 annual listing of areas eligible for high cost mortgage limits and are being corrected by publication of this document.

Accordingly, the following corrections are being made to FR Doc. 90-703 published in the **Federal Register** on January 12, 1990 at 55 FR 1312, to read as follows:

1. On page 1317, at the bottom of the page, under the heading for "HUD Field Office: Richmond Office", York County, VA was inadvertently omitted from the list and is added in alphabetical order to the Norfolk-VA Beach-Newport News, VA MSA;

2. On page 1319, in the middle of the page, under the listing for "Other Areas:", the one-family amount for Hall County, GA is corrected to read $75,500;

3. On page 1319, in the middle of the page, under the listing for "Other Areas:", the mortgage limits for Clark County, GA are corrected to read, $75,500; $85,050; $103,350; and $119,250, respectively;

4. On page 1319, near the middle of the page, under the heading for the "HUD Field Office: Birmingham Office", the listing for Lauderville County, AL was inadvertently omitted from the Florence, AL MSA, and is added to the list;

5. On page 1320, in the middle of the page, under the heading for the "HUD Field Office: Greensboro Office", the limits for Monroe County, NC were inadvertently omitted from the listing, and are added in alphabetical order to read, $93,100; $104,850; $127,400; and $147,000, respectively;

6. On page 1320, in the middle of the page, under the heading for the "HUD Field Office: Greensboro Office", under the listing for "Other Areas:", the limits for Currituck County, NC are corrected to read $87,850; $98,950; $120,250; and $138,750, respectively;

7. On page 1327, near the bottom of the page, under the heading for the "HUD Field Office: Des Moines Office", the four-family limit for the Davenport-Rock Island-Moline, IA-IL MSA is corrected to read $114,850;

8. On page 1331, at the top of the page, under the heading for the "HUD Field Office: Tucson Office", the limits for Cochise County, AZ were inadvertently omitted from the listing and are added to the list in alphabetical order to read, $81,750; $92,050; $111,850; and $129,050, respectively;

9. On page 1331, in the middle of the page, under the heading for the "HUD Field Office: Portland Office", the limits for the Portland, OR MSA are corrected to read, $95,200; $107,200; $132,050; and $150,300, respectively.

Dated: March 1, 1990.

Grady J. Norris,

Assistant General Counsel for Regulations.

REGION III				
HUD Field Office: Richmond Office				
York County, VA	$13,050	$127,300	$154,700	$178,500
REGION IV				
HUD Field Office: Atlanta Office				
Hall County, GA				
Clark County	$75,500	$85,050	$103,350	$119,250
HUD Field Office: Birmingham Office				
Lauderville County, AL	$77,150	$86,850	$105,550	$121,800
HUD Field Office: Greensboro Office				
Monroe County, NC	$93,100	$104,850	$127,400	$147,000
Currituck County	$87,850	$98,950	$120,250	$138,750

REGION V HUD Field Office: Chicago Office				
Davenport—Rock Island—Moline, IA-IL MSA: Henry County, IL Rock Island County	$72,750	$81,900	$99,550	$114,850
REGION IX HUD Field Office: Tucson Office				
Cochise County, AZ	$81,750	$92,050	$111,850	$129,050
REGION X HUD Field Office: Portland Office				
Portland, OR PMSA: Clackamas County Multnomah County Washington County Yamhill County	$95,200	$107,200	$132,050	$150,300

[FR Doc. 90-5243 Filed 3-7-90; 8:45 am]

BILLING CODE 4210-27-M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-17

[FPMR Temp. Reg. D-73, Supp. 2]

Quality Workplace Environment Program

AGENCY: Public Buildings Service, General Services Administration.

ACTION: Temporary regulation.

SUMMARY: This supplement extends to September 30, 1990, the expiration date of FPMR Temporary Regulation D-73. D-73 provides procedures for the development and maintenance of the planning information, and reporting systems to ensure the efficient assignment and utilization of Federal work space. It also implements Executive Order 12411 signed by the President on March 29, 1983. The General Services Administration's authority for issuing this regulation is contained in Executive Order 12411 and in the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)).

DATES:

Effective date: March 8, 1990.

Expiration date: September 30, 1990, unless sooner revised or superseded.

ADDRESSES: Comments should be submitted to the General Services Administration, (PQ), Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Robert E. Ward, Director, Real Estate, Office of Real Property Development (202-566-1025).

SUPPLEMENTARY INFORMATION: The purpose of this regulation is to extend the Quality Workplace Environment Program and the related policies and procedures covering the improved assignment and utilization of space. Although it is anticipated that a permanent amendment replacing the Assignment and Utilization portion of D-73 will be issued within the next few months, it is necessary to extend the Temporary Regulation until that amendment, as well as a replacement for the Governmentwide Real Property Assest Management portion of D-73, can be published.

GSA has determined that this rule is not a major rule for the purposes of Executive Order 12291 if February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more, a major increase in costs to consumers or others, or significant adverse effects. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

List of Subjects in 41 CFR Part 101-17

Administrative practice and procedure, Federal buildings and facilities, Government property managment.

Authority: (Sec. 205(c), 63 Stat. 390 40 U.S.C. 486(c)).

In 41 CFR chapter 101, FPMR Temp. Reg. D-73, Supplement 2 is added to the appendix at the end of subchapter D to read as follows:

Federal Property Management Regulations Temporary Regulatory d-73 Supplement 2

February 23, 1990

To: Heads of Federal agencies

Subject: Quality Workplace Environment Program

1. *Purpose.* This supplement extends the expiration date of FPMR Temporary Regulation D-73.

2. *Effective date.* This regulation is effective March 8, 1990.

3. *Expiration of change.* This supplement expires September 30, 1990, unless sooner canceled or revised.

4. *Explanation of change.* The expiration in par. 4 of FPMR Temporary Regulation D-73 is revised to September 30, 1990.

Richard G. Austin,

Acting Administrator of General Services.

[FR Doc. 90-5155 Filed 3-7-90; 8:45 am]

BILLING CODE 6820-23-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Child Support Enforcement

45 CFR Part 305

RIN 0970-AA17

Child Support Enforcement Program; Revision of Child Support Enforcement Program Audit Regulations

AGENCY: Office of Child Support Enforcement (OCSE), HHS.

ACTION: Final rule.

SUMMARY: These final regulations revise the Child Support Enforcement program regulations governing the audit of State Child Support Enforcement (IV-D) programs and the imposition of financial penalties for failure to substantially comply with the requirements of title IV-D of the Social Security Act (the Act). In the Notice of Proposed Rule Making (NPRM) published in the **Federal Register** on January 31, 1989 (54 FR 4841), regulations were proposed to improve and expedite the current

process for auditing State and local IV-D programs by consolidating the criteria evaluated during the course of an audit and making other changes to the current requirements to allow flexibility in the audit approach. The final regulations only include changes regarding the period to be audited. For a detailed discussion regarding why most of the proposed changes were not included in the final regulations, see "Supplementary Information."

EFFECTIVE DATE: March 8, 1990.

FOR FURTHER INFORMATION CONTACT: Lourdes Henry (202) 252-5440.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

This rule does not require any information collection activities and, therefore, no approvals are necessary under the Paperwork Reduction Act.

Background

As a result of the enactment of Pub. L. 98-378, the "Child Support Enforcement Amendments of 1984," OCSE published final audit regulations on October 1, 1985, which affect the audits of State IV-D programs for FY 1984 and beyond. Section 9 of Public Law 98-378, and the implementing regulations, require that OCSE conduct an audit of the effectiveness of State Child Support Enforcement programs at least once every three years; require that OCSE use a substantial compliance standard to determine whether each State has an effective IV-D program; provide that any State found not to have an effective IV-D program in substantial compliance with the requirements of title IV-D of the Act be given an opportunity to take the corrective action necessary to achieve substantial compliance with those requirements; provide for the use of a graduated penalty of not less than 1 nor more than 5 percent of a State's Aid to Families with Dependent Children (AFDC) program funds if a State is not in substantial compliance; and specify the period of time during which a penalty is effective.

Experience gained by OCSE auditors clearly indicates that a more effective and expeditious approach to audits of State IV-D programs is necessary. The NPRM contained major changes to the current audit process. The preamble to the NPRM indicated that the proposed regulations were an interim step in improving the audit process. However, OCSE has determined that most of the changes to the audit and penalty regulations proposed should not be finalized at this time, for several reasons. First, as a result of the passage of Public Law 100-485, the Family Support Act of 1988, we published final regulations on August 4, 1989 (54 FR 32284) regarding standards for program operations which contain timeframes for case processing and distribution. These regulations, as well as other regulations necessary to implement the child support provisions of Public Law 100-485, will have a major impact on the audit of State IV-D programs. Many commenters suggested that we delay issuance of major changes to the audit regulations proposed in this rule until we have published final regulations on program standards. They urged that all major changes be made at one time.

We are issuing regulations regarding other child support provisions of Pub. L. 100-485, including mandatory use of guidelines to establish and modify support obligations, mandatory genetic testing in contested paternity establishment cases and clarifications with respect to the $50 pass-through payment in AFDC cases and paternity establishment until age 18. These regulations will not be issued until later in 1990.

Second, the NPRM contained a proposed performance indicator to measure the establishment of paternity that differs from the establishment of paternity standard set forth in section 111 of the Family Support Act. Accordingly, we believe that it would be confusing and unreasonable to finalize the proposal.

Therefore, we believe that it is better to make major changes to the audit regulations in a consolidated document. We intend to publish these major revisions in final form by October 1, 1990, when the program standards requirements published August 4, 1989, are effective. In preparing the comprehensive audit regulations, we will review any comments received in response to the January 31, 1989, NPRM related to proposed changes to the audit process. In addition, as indicated in the response to comments concerning the final program standards regulations published August 4, we will consider specific suggestions for assessing State compliance with the new program standards requirements when we propose revisions to the audit regulations. The new NPRM will also include a 60-day comment period.

Although we are not making any major substantive changes to the audit regulations in this document, we are finalizing one aspect of the proposed rule which revises § 305.11, audit period, to provide for a more flexible audit period. This change, discussed below, will result in audits being conducted more timely because audit periods will not be tied to fiscal years. We believe this one aspect of the proposed regulation should be finalized at this time to allow more flexibility in scheduling audits immediately. The audit process and requirements will remain unchanged in all other aspects until the proposed major audit revisions are published and finalized. OCSE will continue to use the scoring system in 45 CFR 305.98(c) until such time as a new scoring system is issued in final.

Statutory Authority

These final regulations are published under the authority of sections 1102, 402(a)(27), 452(a)(4) and 403(h) of the Act. Section 1102 authorizes the Secretary of HHS to publish regulations not inconsistent with the Act which may be necessary to efficiently administer the Secretary's functions under the Act. Section 402(a)(27) requires each State to operate a child support program in substantial compliance with the title IV-D State plan and section 452(a)(4) requires the audit of each State IV-D program to assure compliance with title IV-D requirements at least once every three years (or not less often than annually in the case of any State which is being penalized, or is operating under a corrective action plan). Finally, section 403(h) provides for the imposition of an audit penalty of not less than one nor more than five percent of a State's AFDC funding for any State which fails to substantially comply with title IV-D requirements, after an opportunity for a corrective action period.

Regulatory Provisions and Response to Comments

We received 37 comments from States on the proposed regulations. We will consider the majority of the comments on aspects of the proposed regulations which are not being finalized in this document when we draft revised audit regulations to comport with changes made to program regulations as a result of the Family Support Act of 1988. We are, however, responding to comments on the proposed revision to the audit period. The regulatory requirement and response to comments follow.

Audit Period

This final rule revises the current regulations governing the audit of State child support programs to provide flexibility in the timing of the audits. To provide greater flexibility in scheduling the audits and follow-up reviews, we are replacing the requirement that the audit cover the period of October 1 through September 30, of each fiscal year audited with a requirement that the audit cover a period comprised of any 12

consecutive months. In addition, we are replacing the requirement that the follow-up review conducted in States operating under corrective action plans with respect to State plan criteria cover the first full quarter after the corrective action period with a requirement that such audits cover the first three-month period beginning after the corrective action period. For States operating under corrective action plans with respect to the performance indicator, the follow-up review will cover the first full four quarters following the corrective action period.

We made a technical correction to the last sentence of § 305.11 by replacing the provision that the audit may cover a shorter period at State request when the State is being penalized under § 305.100 with the proviso that the audit may, at State request, be conducted prior to the end of the one-year period for the annual comprehensive audit prescribed under § 305.10(b).

1. *Comment:* States generally objected to the proposed audit period of between three and twelve months, arguing that it would provide too much flexibility and result in inequitable treatment of States. They indicated that State performance is affected by the volume of requests for services which is subject to seasonal variations. For example, commenters noted increased requests for services during the winter and when seasonal employment opportunities are reduced. States also argued that three months is too short a timeframe in which to determine accurately a State's performance with respect to some of the performance criteria evaluated, including location of the absent parent and paternity establishment.

Response: In light of these comments, we revised proposed § 305.11 to provide for an audit period of any 12 consecutive months. This gives auditors the flexibility to begin an audit at the beginning of any month and alleviates the States' concerns that a shorter review would result in inaccurate and inequitable audit results.

2. *Comment:* One State commented that the follow-up review with regard to performance indicators should cover the first twelve months following the expiration of the corrective action period rather than the first full fiscal year following the date on which a determination was made that performance was not in substantial compliance.

Response: We agree with the commentor that the follow-up review should begin after the expiration of the corrective action period. However, we believe that the follow-up review should cover the first full four quarters following the corrective action period rather than the first twelve months following the expiration of the corrective action period because States collect and report data used in computing the performance indicators on a quarterly basis. Therefore, we have revised §§ 305.11 and 305.99 to indicate that, when the State fails to meet audit criteria related to performance indicators, the review will cover the first full four quarters following the corrective action period.

Notice and Corrective Action Period

We made the following technical changes in § 305.99 to correspond to changes to § 305.11. We amended paragraph (d)(1) to make a correction by replacing the word "maintain" where it appears, with the word "maintained." For clarity, we added at the beginning of paragraph (d)(2), "during the corrective action period." Finally, in paragraph (d)(3), we replaced "quarter" with "three-month period," and revised the last sentence to read as follows: "For performance indicator-related criteria, this determination will be made as of the first full four quarters following the end of the corrective action period."

Penalty for Failure To Have an Effective Program

We made a technical correction to § 305.100(d) by replacing the word "and" where it appears after the word "notice" and before the word "maintain" with the word "or."

Regulatory Import Analysis

The Secretary has determined, in accordance with Executive Order 12291 that this rule does not constitute a "major" rule. A major rule is one that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Executive Order requires that, for major rules, we prepare a regulatory impact analysis which describes the potential benefits and costs of the rule, together with the potential benefits and costs of alternative approaches.

This final rule will have little or no net economic effect, because it will not change the requirement of State Child Support Enforcement programs or the penalties which may be levied against programs which fail to substantially comply with the requirements. The net effect here is not on actual State program practices but rather on the scheduling of audits to evaluate these practices. The number of States failing the audit is not expected to increase under this final rule.

Under the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), we are required to prepare a regulatory flexibility analysis for those rules which will have a significant economic impact on a substantial number of small entities. This final rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

List of Subjects in 45 CFR Part 305

Accounting, Child support, Grant programs/social programs.

(Catalog of Federal Domestic Assistance Program No. 13.783, Child Support Enforcement Programs)

Dated: November 24, 1989.

Eunice S. Thomas,

Acting Director, Office of Child Support Enforcement.

Approved: February 9, 1990.

Louis W. Sullivan,

Secretary.

For the reasons set out in the preamble, 45 CFR part 305 is amended:

PART 305—[AMENDED]

1. The authority citation for part 305 continues to read as set forth below:

Authority: 42 U.S.C. 603(h), 604(d), 651(a)(1) and (4), and 1302.

2. Section 305.11 is revised to read as follows:

§ 305.11 Audit period.

The audit will cover a period comprised of any 12 consecutive months. When the State is operating under a corrective action plan, the review will cover the first three-month period after the corrective action period. When the State fails to meet audit criteria related to the performance indicator under § 305.98 of this part, the review will cover the first full four quarters following the end of the corrective action period. The audit may, at State request, be conducted prior to the end of the one-year period prescribed under § 305.10(b) of this part when the State is being penalized under § 305.100 of this part.

3. Section 305.99 is amended by revising paragraphs (d)(1), (2) and (3) to read as follows:

§ 305.99 Notice and corrective action period.

* * * * *

(d) * * *

(1) The State has achieved substantial compliance with the unmet criteria cited in the notice and maintained substantial compliance with any marginally-met criteria cited in the notice;

(2) During the corrective action period, the State is not implementing its corrective action plan; or

(3) The State has implemented its corrective action plan but has failed to achieve substantial compliance with the unmet criteria cited in the notice and maintain substantial compliance with any marginally-met criteria cited in the notice. For State plan-related criteria, this determination will be made as of the first full three-month period after the corrective action period. For performance indicator-related criteria, this determination will be made as of the first full four quarters following the end of the corrective action period.

* * * * *

§ 305.100 [Amended]

4. Section 305.100 is amended by replacing the word "and" with the word "or" in paragraph (d).

[FR Doc. 90-5342 Filed 3-7-90; 8:45 am]

BILLING CODE 4150-04-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 89-109; RM-6642]

Television Broadcasting Services; Sun Valley, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 5 to Sun Valley, Idaho, as that community's first local commercial service. *See* 54 FR 22336, May 23, 1989. Channel 5 can be allotted to Sun Valley in compliance with § 73.610 of the Commission's Rules. The coordinates are North Latitude 43-41-48 and West Longitude 114-21-00. With this action, this proceeding is terminated.

EFFECTIVE DATE: April 16, 1990.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 89-109, adopted February 16, 1990, and released March 2, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73:

Television broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.606(b) [Amended]

2. Section 73.606(b), the Television Table of Allotments is amended under Idaho by adding Sun Valley, Channel 5.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 90-5288 Filed 3-7-90; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 89-70; RM-6610, RM-6786]

Radio Broadcasting Services; Seneca and Streator, IL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 291A to Streator, Illinois, at the request of Caroline Daugherity, and Channel 239A to Seneca, Illinois, in response to a counterproposal filed by Gene McCoy. *See* 54 FR 13535, April 4, 1989. Channel 291A can be allotted to Streator in compliance with the Commission's minimum distance separation requirements. The coordinates are North Latitude 41-07-30 and West Longitude 88-49-48. Channel 239A can be alloted to Seneca in compliance with the Commission's minimum distance separation requirements with a site restriction 7.6 kilometers (4.7 miles) south. The coordinates are North Latitude 41-14-47 and West Longitude 88-35-19. With this action, this proceeding is terminated.

DATES: Effective April 16, 1990. The window period for filing applications will open on April 17, 1990, and close on May 17, 1990.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 89-70, adopted February 16, 1990, and released March 2, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended under Illinois by adding Seneca, Channel 239A, and by adding Streator, Channel 291A.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 90-5287 Filed 3-7-90; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 89-348; RM-6717]

Radio Broadcasting Services; Mirando City, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 263C2 for Channel 265A at Mirando City, Texas, and modifies the permit of Station KZZQ(FM) to specify operation on the higher powered channel, as requested by Alderete Communications. *See* 54 FR 33721, August 16, 1989. Action taken here provides Mirando City and its surrounding area with expanded FM service. A site restriction 21.2 kilometers (13.2 miles) southwest of the community is required. The coordinates are 27-21-35 and 99-11-46. With this action, this proceeding is terminated.

EFFECTIVE DATE: April 16, 1990.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 89-348,

adopted February 16, 1990, and released March 2, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Texas, by removing Channel 265A and by adding Channel 263C2 at Mirando City.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 90-5289 Filed 3-7-90; 8:45 am]

BILLING CODE 6712-01-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

48 CFR Parts 705, 706, 719, 726, and 752

[AIDAR Notice 90-2]

Disadvantaged Enterprises

AGENCY: Agency for International Development, IDCA.

ACTION: Interim rule with request for comments.

SUMMARY: The AID Acquisition Regulation (AIDAR) is being amended to implement the provisions of section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, (Pub. L. 101-167), concerning requirements for contracting and subcontracting with disadvantaged enterprises.

DATES: Interim rule effective February 20, 1990; comments must be received on or before April 9, 1990.

ADDRESSES: Comments should be sent to Policy Branch Chief, MS/PPE, Room 16600I SA-14, Agency for International Development, Washington, DC 20523.

FOR FURTHER INFORMATION CONTACT: Ms. Kathleen O'Hara, MS/PPE, telephone (703) 875-1534.

SUPPLEMENTARY INFORMATION: Changes are made to part 705 and part 706 to incorporate the authority in section 579 of Public Law 101-167 to contract with small business concerns owned and controlled by socially and economically disadvantaged individuals, including women, using other than full and open competition. A new requirement to notify AID's Office of Small and Disadvantaged Business Utilization is added to part 705. A new part 726 is added to provide explanation of the requirements and authorities of section 579 and to specifically implement the requirement for subcontracting with disadvantaged enterprises.

The changes being made by this Notice are not considered significant rules under FAR section 1.301 and subpart 1.5. This Notice will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act. It is not considered a major rule under Executive Order 12291, and has been submitted to OMB for review. This Notice does not establish any information collection as contemplated by the Paperwork Reduction Act.

For the reasons set out in the Preamble, chapter 7 of title 48 of the Code of Federal Regulations is amended as follows:

1. The authority citations in parts 705, 706, 719, and 752 continue to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR 1979 Comp., p. 435.

PART 705—PUBLICIZING CONTRACT ACTIONS

Subpart 705.2—Synopsis of Proposed Contract Actions

2. Section 705.202 is amended by adding a new paragraph (c) to read as follows:

705.202 Exceptions.

* * * * *

(c) In accordance with section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, (Pub. L. No. 101-167) advance notice is not required for contract actions described in 706.302-71.

3. Section 705.207 is added to read as follows:

705.207 Preparation and transmittal of certain synopses.

In accordance with section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, the responsible contracting officer shall notify AID's Office of Small and Disadvantaged Business Utilization (OSDBU) at least seven business days before publicizing a solicitation in the *Commerce Business Daily* for an acquisition (a) which is to be funded from amounts made available for fiscal year 1990 for any development assistance and for assistance for famine recovery and development in Africa and (b) which is expected to exceed $100,000.

PART 706—COMPETITION REQUIREMENTS

Subpart 706.3—Other Than Full and Open Competition

4. Section 706.302-5 is added to read as follows:

706.302-5 Authorized or required by statute.

AID has authority under the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, to contract with small business concerns owned and controlled by socially and economically disadvantaged individuals using other than full and open competition. The provisions implementing this authority are set forth in 706.302-71 and part 726.

5. Section 706.302-71 is added to read as follows:

706.302-71 Small Disadvantaged Businesses.

(a) *Authority*—(1) *Citation.* Section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Public Law No. 101-167, 103 Stat. 1195, 1248-49 (1989).

(2) Section 579(a) of Public Law 101-167 requires that not less than ten percent of amounts made available for fiscal year 1990 for development assistance and for assistance for famine recovery and development in Africa be used only for activities of disadvantaged enterprises (as defined in 726.001). In order to achieve this goal, section 579(b) authorizes AID to use other than full and open competition to award contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals (small disadvantaged businesses), as the terms are defined in 726.001.

(b) *Application.* This authority may be used if the contracting officer determines that:

(1) The acquisition is to be funded from accounts referred to in paragraph (a)(2) of this section;

(2) Award of the acquisition to a small disadvantaged business is appropriate

to meet the requirement in paragraph (a)(2) of this section; and

(3) Award of the acquisition under the authority of section 8(a) is not practicable.

(c) *Limitations.* (1) Offers shall be requested from as many potential offerors as is practicable under the circumstances.

(2) Use of this authority is not subject to the requirements in FAR 6.303 and FAR 6.304, provided that the contract file includes an explanation justifying its use.

PART 719—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

Subpart 719.2—Policies

6. Section 719.272 is added to read as follows:

719.272 Small disadvantaged business policies.

In addition to the requirements in FAR part 19, part 726 provides for contracting and subcontracting with small disadvantaged businesses and other disadvantaged enterprises based on the provisions of section 579 of Public Law 101-167.

7. A new part 726 is added to read as follows:

PART 726—OTHER SOCIOECONOMIC PROGRAMS

Sec.
726.000 Scope of part.
726.001 Definitions.

Subpart 726.1—Policy

726.101 Policy.

Subpart 726.2—Determination of Status

726.201 Determination of status as a small disadvantaged business.

Subpart 726.3—Subcontracting Requirements

726.301 Subcontracting with disadvantaged enterprises.

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

726.000 Scope of part.

This part supplements FAR part 19 and implements certain provisions of section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990 (Pub. L. 101-167, 103 Stat. 1195, 1248-49 [1989]), which provides that not less than ten percent of the aggregate amount made available for fiscal year 1990 for development assistance and for assistance for famine recovery and development in Africa shall be made available to disadvantaged enterprises. See part 705 and part 706 for additional provisions implementing section 579 with respect to publicizing contract actions and using other than full and open competition.

726.001 Definitions.

Disadvantaged enterprises means U.S. organizations or individuals that are (a) business concerns (as defined in FAR 19.001) owned and controlled by socially and economically disadvantaged individuals, (b) institutions designated by the Secretary of Education, pursuant to 34 CFR 608.2, as historically black colleges and universities, (c) colleges or universities having a student body in which more than 40 percent of the students are Hispanic American, or (d) private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged.

Owned and controlled by socially and economically disadvantaged individuals means at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals and (2) has its management and daily business controlled by one or more such individuals.

Small disadvantaged business means any small business concern, as defined in FAR 19.001, that is owned and controlled by socially and economically disadvantaged individuals.

Socially and economically disadvantaged individuals, for the purposes of this part means the same as "economically disadvantaged individuals" as defined in FAR 19.001, and also includes women.

Subpart 726.1—Policy

726.101 Policy.

AID promotes participation in its projects by disadvantaged enterprises. In order to achieve the goals in section 579(a) of Public Law 101-167, contracts which are to be funded from amounts made available for fiscal year 1990 for development assistance and for famine recovery and development in Africa are subject to the following policies:

(a) Authority in section 8(a) of the Small Business Act (15 U.S.C. 637(a)) shall be used to the maximum practicable extent;

(b) Other than full and open competition in contracting with small disadvantaged business shall be authorized in accordance with 706.302-71;

(c) Subcontracting with disadvantaged enterprises shall be carried out in accordance with subpart 726.3;

(d) In accordance with 705.207, the Office of Small and Disadvantaged Business Utilization shall be notified at least seven business days before publicizing a proposed procurement in excess of $100,000.

Subpart 726.2—Determination of Status

726.201 Determination of status as a small disadvantaged business.

(a) To be eligible for an award under AIDAR 706.302-71 providing for other than full and open competition, the contractor must qualify as a small disadvantaged business, as defined in 726.001, as of both the date of submission of its offer and the date of contract award. The contracting officer shall insert the provisions at FAR 52.219-2 and FAR 52.219-3 in any solicitation or contract to be awarded under the provisions of 706.302-71, regardless of whether the contract is to be performed inside or outside of the United States.

(b) The contracting officer shall accept an offeror's representations and certifications under the provisions referenced above that it is a small disadvantaged business unless he or she determines otherwise based on information contained in a challenge of the offeror's status by the Small Business Administration or another offeror, or otherwise available to the contracting officer.

Subpart 726.3—Subcontracting Requirement

726.301 Subcontracting with disadvantaged enterprise.

(a) In addition to the requirements in FAR Subpart 19.7, any contract in excess of $500,000 (except for a contract with a disadvantaged enterprise) which is to be funded with amounts made available for fiscal year 1990 for development assistance or for assistance for famine recovery and development in Africa shall contain a provision requiring that not less than ten percent of the dollar value of the contract must be subcontracted to disadvantaged enterprises.

(b) Pursuant to section 579(b) of Public Law 101-167, the Administrator or designee may determine that this requirement shall not apply to a particular contract or category of contracts and has determined that this

requirement does not apply to contracts whenever the contracting officer certifies there is no realistic expectation of U.S. subcontracting opportunities and so documents the file.

(c) The contracting officer shall insert the clause in 752.226–2 in any solicitation or contract as provided in paragraph (a) of this section, unless exempted in accordance with the provisions of paragraph (b) of this section.

PART 752—TEXTS OF PROVISIONS AND CLAUSES

8. Section 752.226–1 is added to read as follows:

752.226–1 Determination of status as a small disadvantaged business.

As prescribed in 726.201, insert the clauses in FAR 52.219–2 and FAR 52.219–3 regardless of whether the contract is to be performed inside or outside of the United States.

9. Section 752.226–2 is added to read as follows:

752.226–2 Subcontracting with disadvantaged enterprises.

As prescribed in 726.301, insert the following clause:

Subcontracting With Disadvantaged Enterprises (FEB 1990)

Note: This clause does not apply to prime contractors that qualify as disadvantaged enterprises as described below.

(a) Not less than ten (10) percent of the dollar value of this contract must be subcontracted to disadvantaged enterprises as described in paragraph (b) of this clause.

(b) "Disadvantaged enterprises" means U.S. organizations or individuals that are (a) business concerns (as defined in FAR 19.001) owned and controlled by socially and economically disadvantaged individuals, (b) institutions designated by the Secretary of Education, pursuant to 34 CFR 608.2, as historically black colleges and universities, (c) colleges and universities having a student body in which more than 40 percent of the students are Hispanic American, or (d) private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged.

"Owned and controlled by socially and economically disadvantaged individuals" means at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals and (2) has its management and daily business controlled by one or more such individuals.

"Socially and economically disadvantaged individuals", means Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and other individuals found to be disadvantaged pursuant to section 8(a) of the Small Business Act.

(c) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a disadvantaged enterprise.

Dated: February 14, 1990.

John F. Owens,

Procurement Executive.

[FR Doc. 90–5300 Filed 3–7–90; 8:45 am]

BILLING CODE 6116-01-M

Proposed Rules

Federal Register
Vol. 55, No. 46
Thursday, March 8, 1990

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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1068

[Docket No. AO-178-A43; DA-90-010]

Milk in the Upper Midwest Marketing Area; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This hearing is being held to consider proposals to amend several provisions in the Upper Midwest milk marketing order. The hearing was requested by Associated Milk Producers, Inc., Land O'Lakes, Inc., and Mid-America Dairymen, Inc., (proponents) three milk producer cooperatives that represent a significant portion of the market's producers.

One proposal would have reserve supply plants meet minimum shipping requirements each month. Two other proposals would provide discretionary authority for the Director of the Dairy Division to change the shipping requirements for both regular and reserve supply plants in order to obtain adequate supplies for distributing plants or to avoid uneconomic and inefficient shipments.

Another proposal would provide the Director of the Dairy Division with discretionary authority to change the diversion limitations to reflect current market needs. The order now does not provide for such authority.

Proponents claim that these changes are needed to reflect current marketing conditions. Also, they have requested that the hearing be considered on an emergency basis that would allow the Secretary to waive the issuance of a recommended decision.

DATES: The hearing will convene at 1:00 p.m. on March 14, 1990.

ADDRESSES: The hearing will be held at The Sheraton Airport Hotel, 2525 East 78th Street, Bloomington, MN 55425, (612) 854-1771.

FOR FURTHER INFORMATION CONTACT: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-4829.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

Notice is hereby given of a public hearing to be held at the Sheraton Airport Hotel, 2525 East 78th Street, Bloomington, Minnesota, 55425, beginning at 1:00 p.m., on March 14, 1990, with respect to proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Upper Midwest marketing area.

The hearing is called pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions which relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreement and to the order.

Evidence also will be taken to determine whether emergency marketing conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR part 900.12(d)) with respect to proposals 1, 2, 3, and 4.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (Pub. L. 96-354). This Act seeks to ensure that, within the statutory authority of a program, the regulatory and information requirements are tailored to the size and nature of small businesses. For the purposes of the Act, a dairy farm is a "small business" if it has an annual gross revenue of less than $500,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with 4 copies of such exhibits for the Official Record. Also, it would be helpful if additional copies are available for the use of other participants at the hearing.

List of Subjects in 7 CFR Part 1068

Milk marketing orders.

The authority citation for 7 CFR part 1068 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

The proposed amendments, as set forth below, have not received the approval of the Secretary of Agriculture.

Proposed by Associated Milk Producers, Inc., Land O'Lakes, Inc., and Mid-America Dairymen, Inc.

Proposal No. 1

Section 1068.7(b) is revised to read as follows:

§ 1068.6 Pool plant.

* * * * *

(b) Any plant (which, if qualified pursuant to this paragraph, shall be known as a "pool supply plant") that is approved by a duly constituted regulatory agency for the handling of Grade A milk, subject to the following conditions:

(1) The volume of fluid milk products delivered to pool distributing plants as a percent of the total Grade A milk received at the plant from dairy farmers during the month (including milk delivered to the plant from dairy farms for the account of a cooperative association and milk diverted from the plant by the plant operator but excluding milk diverted to the plant from another pool plant) is not less than the marketwide Class I utilization percentage for the same month of the preceding year, subject to the following conditions:

(i) These shipping percentages may be increased or decreased, in increments of

full percentage points, by the Director of the Dairy Division if he finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the Director shall investigate the need for revision either on his own initiative or at the request of interested persons. If the investigation shows that a revision of the shipping percentage might be appropriate, he shall issue a notice stating that the revision is being considered and invite data, views, and arguments;

(ii) A cooperative association that operates a supply plant may include as qualifying shipments its deliveries to pool distributing plants directly from farms of producers pursuant to § 1068.9(c);

(iii) A proprietary handler may include as qualifying shipments milk diverted to pool distributing plants pursuant to § 1068.13(d);

(2) In order to meet the requirements of this paragraph, two or more supply plants operated by one or more handler(s) may qualify for pooling as a unit during the following months of August through July by meeting the applicable percentage requirements of this paragraph in the same manner as a single plant, provided that:

(i) The handler(s) file a request with the Market Administrator for such unit status no later than July 15 of each year. Such a request should specify the order in which plants would cease to be considered part of the unit if the unit fails to meet the applicable percentage requirements of this paragraph. Any plant that ceases to be part of a unit will not be eligible to rejoin a unit until the following August. No plant may become part of a unit after the unit is formed and the Market Administrator has been notified; and;

(ii) Each handler operating supply plant(s) for which the shipping percentages are met as part of a unit must ship at least 5 percent of the Grade A milk received at its plant(s) from dairy farmers during the month (including milk delivered to the handler's plant(s) from dairy farms for the account of a cooperative association pursuant to § 1068.9(c) and milk diverted from the plant(s) by the plant operator but excluding milk diverted to the plant(s) from another pool plant) to pool distributing plant(s) in one of the months of August through December in order for the handler's plant(s) to be a supply plant(s) for the month of December; and;

(3) The quantity of fluid milk products moved from a supply plant to a pool distributing plant that shall count toward meeting the shipping requirements of paragraphs (b)(1) and (b)(2) of this section shall be a net quantity which shall exclude the pounds of bulk fluid milk products transferred or diverted from the pool distributing plant by the plant operator during the month to another plant that is not a pool distributing plant.

Proposal No. 2

In § 1068.7, amend paragraph (d) by removing and reserving paragraphs (d)(1) and (d)(2), revising paragraphs (d)(4) and (d)(5)(ii)(B), and by redesignating paragraph (d)(7) as (d)(8) and adding a new paragraph (d)(7) as follows:

§ 1068.7 Pool plant.

* * * * *

(d) * * *

(1)—(2) [Reserved]

(3) * * *

(4) The volume of bulk fluid milk products shipped from the plant to pool distributing plants as a percent of the total Grade A milk received at the plant from dairy farmers during the month (including milk delivered to the plant from dairy farms for the account of a cooperative association pursuant to § 1068.9(c) and milk diverted from the plant by the plant operator but excluding milk diverted to the plant from another pool plant) is not less than 10 percent for each of the months January through June and, for each of the months of July through December, is not less than the marketwide Class I utilization percentage for the same month of the preceding year, subject to the following conditions:

(i) These shipping percentages may be decreased, in increments of full percentage points, by the Director of the Dairy Division if he finds that such revision is necessary to prevent uneconomic shipments. Before making such a finding, the Director shall investigate the need for revision either on his own initiative or at the request of interested persons. If the investigation shows that a revision of the shipping percentage might be appropriate, he shall issue a notice stating that the revision is being considered and invite data, views, and arguments;

* * * * *

(5) * * *

(ii) * * *

(B) Shipments from a reserve supply plant within the call area to a pool distributing plant outside the call area or to a comparable plant regulated under another Federal order may count as if delivered to a pool distributing plant within the call area if the Market Administrator is notified of the amount of any such commitments to ship milk prior to announcement of a shipping requirement pursuant to this paragraph. Total credit for shipments to plants regulated under other Federal orders shall be limited to the quantity of milk delivered from the plant to pool distributing plants during the month. Qualifying shipments to an other order plant may not be classified pursuant to § 1068.42(b)(3); and

(6) * * *

(7) The quantity of fluid milk products moved from the reserve supply plant to a pool distributing plant that shall count toward meeting the shipping requirements of paragraphs (d)(4), (d)(5) and (d)(6) of this section shall be a net quantity which shall exclude the pounds of bulk fluid milk products transferred or diverted from the pool distributing plant by the plant operator during the month to another plant that is not a pool distributing plant by the plant operator during the month to another plant that is not a pool distributing plant.

* * * * *

Proposal No. 3

In § 1068.13, amend paragraph (d) by redesignating paragraphs (d)(4) and (d)(5) as paragraphs (d)(5) and (d)(6), respectively, and add a new paragraph (d)(4) to read as follows:

§ 1068.13 Producer milk.

* * * * *

(d) * * *

(4) The diversion limitations specified in paragraphs (d)(2) and (d)(3) of this section may be increased or decreased, in increments of full percentage points, by the Director of the Dairy Division if he finds that such revision is necessary to prevent uneconomic shipments. Before making such a finding, the Director shall investigate the need for revision either on his own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, he shall issue a notice stating that the revision is being considered and invite data, views, and arguments;

* * * * *

Proposal No. 4

In § 1068.85, amend the introductory text by changing "3 cents per hundredweight", to "5 cents per hundredweight."

Proposed by the Dairy Division, Agricultural Marketing Service

Proposal No. 5

Make such changes as may be necessary to make the entire marketing agreement and the order conform with

any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the order may be procured from the Market Administrator, Mr. Aaron Reeves, Suite 210, 4570 W. 77th Street, Minneapolis, Minnesota, 55435, or from the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture
Office of the Administrator, Agricultural Marketing Service
Office of the General Counsel
Dairy Division, Agricultural Marketing Service (Washington office only)
Office of the Market Administrator, Upper Midwest Marketing Area

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Signed at Washington, DC, on March 2, 1990.

Daniel Haley,

Administrator.

[FR Doc. 90-5330 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 29

[Docket No. 26037; Notice No. 89-29]

Airworthiness Standards; Turboshaft Engine Rotor Burst Protection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This notice announces that the comment period for the notice of proposed rulemaking on turboshaft engine rotor burst protection for transport category rotorcraft is being extended in response to a request from industry associations.

DATES: The comment period is being extended from April 16, 1990, to October 16, 1990.

ADDRESSES: Comments on the notice may be mailed in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 26037, 800 Independence Avenue, SW., Washington, DC 20591, or delivered in triplicate to Room 915G of the same address. Comments must be marked Docket No. 26037.

FOR FURTHER INFORMATION CONTACT: Mrs. Debra Myers, FAA, Rotorcraft Standards Staff, Fort Worth, Texas 76193-0110; telephone 817-624-5118.

SUPPLEMENTARY INFORMATION: Notice No. 89-29 (54 FR 42716; October 17, 1989) proposes to amend the Federal Aviation Regulations to minimize the failure hazards of high speed powerplant rotor systems used in turboshaft engines in newly designed transport category rotorcraft. The comment period for Notice No. 89-29 is being extended in response to a request from Aerospace Industries Association of America (AIA) and Association European Des Constructeurs De Materiel Aerospatial (AECMA). Both AIA and AECMA have reviewed the notice and state that they will need additional time to determine the validity of economic data contained in the notice. The FAA has determined that it would be in the best interest of all concerned to grant the request; and accordingly, the comment period is extended until October 16, 1990.

Issued in Fort Worth, Texas, on March 1, 1990.

R. T. Weaver,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 90-5279 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 90-NM-07-AD]

Airworthiness Directives; Applies to Beech Model 400 Airplanes, Mitsubishi Model MU-300-10 and MU-300 Airplanes, Which Have Been Modified in Accordance With Branson Supplemental Type Certificate (STC) SA2744NM or SA1596NM.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to supersede an existing airworthiness directive (AD), applicable to certain Beech Model 400 airplanes and Mitsubishi Model MU-300-10 and Model MU-300 airplanes, which currently requires either the imposition of certain operating limitations, or the modification of the aft fuselage fuel tanks. That action was prompted by an incident where fuel vapors in the Branson STC extended range fuel tank ignited, and the resulting deflagration released liquid and vaporous fuel into the cabin. This condition, if not corrected, could result in an explosion and/or fire in the cabin. This action would require either the modification of the aft fuselage fuel tanks, or the deactivation of the aft fuselage fuel tanks.

DATES: Comments must be received no later than April 30, 1990.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention Airworthiness Rules Docket No. 90-NM-07-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Branson Aircraft Corporation, 3790 Wheeling Street, Denver, Colorado, 80239, or Beech Aircraft Corporation (United States agents for Mitsubishi Heavy Industries, Incorporated), P.O. Box 85, Wichita, Kansas, 67201-0085. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, Central Region, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas.

FOR FURTHER INFORMATION CONTACT: Mr. James M. Peterson, Wichita Aircraft Certification Office, ACE-140W; telephone (316) 946-4427. Mailing address: FAA, Central Region, 1801 Airport Road, Room 100, Wichita, Kansas 67209.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specifiefd above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 90-NM-07-AD." The post card will be date/time stamped and returned to the commenter.

Discussion

On December 7, 1989, the FAA issued AD 89-26-11, Amendment 39-6426 (54 FR 51874; December 19, 1989), to require either (a) the imposition of operating limitations which prohibit gravity refueling of the fuselage tanks and prohibit the use of JP-4 and JET B fuels, or (b) modification of the Branson fuel tank installation to improve electrical bonding and to install static charge dissipating charcoal-colored explosion suppression safety foam in the Branson fuel tank; and the modification of the Beech/Mitsubishi fuselage fuel tanks to remove and replace the blue-colored explosion suppression safety foam with static charge dissipating charcoal-colored explosion suppression safety foam. That action was prompted by a report that fuel vapors in the Branson STC extended range fuel tank ignited, and the resulting deflagration released liquid and vaporous fuel into the cabin. This condition, if not corrected, could result in an explosion and/or fire in the cabin.

Since the issuance of that AD, further review has revealed that under certain conditions, an electrostatic charge may be generated by fuel and/or air flowing through the blue colored explosion suppression safety form in the Beech/Mitsubishi fuselage fuel tank. If the electrostatic charge accumulates at a rate greater than it is dissipated, it may discharge by arcing. The arc may posses energy sufficient to ignite a flammable fuel/air mixture. In the Beech/Mitsubishi fuel tank, such an event will be of little or no consequence because of the intrinsic flame arrestor characteristics of the fuel tank explosion suppression foam. However, the Branson STC fuel tank does not contain fuel tank explosion suppression safety foam. Consequently, an ignition of a flammable fuel/air mixture may propagate into the Branson fuel tank. The result of such an event could cause an explosion and/or fire in the cabin.

The Beech Model 400 and the and Mitsubishi Models MU-300-10 and MU-300 airplane fuselage fuel tank systems are identical, as are the modifications described in Branson STC's SA2744NM and SA1596NM.

Since this condition is likely to exist or develop in other airplanes of this same type design, an AD is proposed which would supersede AD 89-26-11 with a new AD that would require (1) the deactivation of the aft fuselage fuel tanks (Procedure 1), or (2) the modification of the Branson and Beech/Mitsubishi aft fuselage fuel tanks (Procedure 2, which was retained from the existing AD 89-26-110). Additionally, this AD would delete the existing requirement for an AFM Fuel System Limitation which approves the use of only commercial kerosene Jet A and Jet A-1 fuels. Also, the placard installation and modification requirements in Procedure 1 of the existing AD have been deleted.

There are approximately 64 Beech Model 400 airplanes, 11 Mitsubishi Model Mu-300-10 airplanes and 91 Mitsubishi Model MU-300 airplanes, for a total of 166 airplanes of the affected design in th worldwide fleet. It is estimated that 120 airplanes of U.S. registry would be affected by this AD.

If the operator chooses to deactivate the aft fuselage fuel tanks (Procedure 1), it is estimated that it would take approximately $25 per airplane for parts and approximately 2 manhours per airplane to accomplish the deactivation procedures, and that the average labor cost would be $40 per manhour. Based on these figures, the cost impact of the AD per operator is estimated to be $105. Therefore, the maximum total cost impact of the AD on U.S. operators electing to accomplish Procedure 1 is estimated to be $12,600.

If the operator chooses to modify the aft fuselage fuel tanks (Procedure 2), Beech Aircraft Corporation and Mitsubishi Heavy Industries, Incorporated, have agreed to absorb all parts and labor costs to modify these airplanes. Therefore, there is no cost impact of the AD on any U.S. operator electing to accomplish Procedure 2.

The regulations proposed herein would 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 proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, 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 draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transporation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by superseding AD 89-26-11, Amendment 39-6426 (54 FR 51874; December 19, 1989), with the following new airworthiness directive:

Branson Aircraft Corporation: Applies to Beech Model 400, Serial Numbers RJ-1 through RJ-50, and RJ-52 through RJ-65, which have been modified in accordance with Branson STC SA2744NM; Mitsubishi Model MU-300-10 airplanes, Serial Numbers A1001S.A. through A1011S.A., which have been modified in accordance with Branson STC SA2744NM; and Mitsubishi Model MU-300 airplanes, Serial Numbers A001S.A. through A091S.A., which have been modified in accordance with Branson STC SA1596NM; certificated in any category. Compliance is required within 30 days after the effective date of this AD, unless previously accomplished.

To prevent the release of liquid and vaporous fuel into the cabin, and possible subsequent explosion and/or fire in the cabin, accomplish the following:

A. Accomplish either paragraph A.1. (Procedure 1) or paragraph A.2 (Procedure 2) below:

1. Procedure 1

a. Incorporate the following into the Operating Limitations Section of the FAA-approved Airplane Flight Manual (AFM):

FUSELAGE TANK REFUELING

Gravity refueling of the fuselage tank is prohibited. Refuel the fuselage tanks only by transfer from the left wing tank. Refer to the Branson Aircraft Corporation AFM Supplement for filling procedures and limitations.

Note: The above limitations supersede any other AFM limitations which may be contradictory.

b. Defuel and drain the fuselage fuel tanks in accordance with the procedures of Chapter 12 of the appropriate Maintenance Manual. If JP-4 or Jet B fuel was the last fuel serviced, refuel and defuel twice with Jet A, Jet A-1 or JP-5 fuel. Use only the Fuselage Tank Fill system to refuel; do not gravity refuel the fuselage tanks.

c. Apply external power and energize the airplane's electrical distribution system.

d. Place the left (L) and right (R) Fuel Transfer (FUEL TRANS) switches, located on the overhead switch panel, to the "OFF" position. Verify that the "L and R FUEL TRANS OPEN" lights on the overhead switch panel are extinguished.

e. On the Forward (F) Circuit Breaker Panel, open and collar circuit breakers F135, "F TRANS PUMP"; F194, "RIGHT F FUEL TRANS"; and F195, "LEFT F FUEL TRANS"; using PACO plastic ring PN S-4933959-503, or equivalent.

f. Place the Fuselage Tank Fill System switch, located on the center console, to the "FILL" position. Verify that the fill system valve in-transit light on the center console does not illuminate momentarily and that the "L BOOST" light on the overhead switch panel does not illuminate. Return the Fuselage Tank Fill System switch to the "OFF" position.

g. Place the "L and R FUEL TRANS" switches, located on the overhead switch panel, to the "ON" position. Verify that the "L FUEL TRANS TRANSIT", "L FUEL TRANS OPEN", "R FUEL TRANS TRANSIT", and "R FUEL TRANS OPEN" lights do not illuminate. Return the "L and R FUEL TRANS" switches to the "OFF" position.

h. Remove power from the airplane's electrical distribution system and remove external power.

i. Fabricate a placard with letters at least .10 inch in height which states:

DO NOT FUEL FUSELAGE FUEL TANK.

FUSELAGE FUEL TANK IS DEACTIVATED.

Install this placard on the Fuselage Tank Fill System Switch panel, located on the center console, in full view of the pilot.

j. Fabricate a placard with letters at least .10 inch in height which states:

DO NOT USE TRANSFER. FUS TANK DEACTIVATED.

Install this placard on the overhead switch panel, in close proximity to the Fuel Transfer control switch panel.

k. Install Beech placard P/N 128-920210-1, or equivalent, centered on the fuselage fuel tank fuel filler access door.

2. Procedure 2

a. Modify the fuel quantity probe mounting clamps and the transfer line clamps installation in the Branson extended range fuel tank and in the Beech/Mitsubishi aft fuselage fuel tanks, in accordance with the instructions in Branson Service Bulletin Number 2744-1, dated November 3, 1989 (for Beech Model 400 and Mitsubishi Model MU-300-10 airplanes), or in accordance with Branson Service Bulletin 1596-1, dated November 9, 1989 (for Mitsubishi Model MU-300 airplanes).

b. Install static charge dissipating charcoal-colored explosion suppression safety foam in the Branson extended range fuselage fuel tank in accordance with the instructions in Branson Service Bulletin Number 2744-2, dated November 3, 1989 (for Beech Model 400 and Mitsubishi Model MU-300-10 airplanes), or in accordance with Branson Service Bulletin 1596-2, dated November 9, 1989 (for Mitsubishi Model MU-300 airplanes).

c. Remove the existing blue-colored explosion suppression safety foam from the Beech/Mitsubishi aft fuselage fuel tank and install static charge dissipating charcoal-colored explosion suppression safety foam in accordance with the instructions in Part II of Beechcraft Mandatory Service Bulletin Number 2338, dated November 1989 (for Beech Model 400 and Mitsubishi Model MU-300-10 airplanes), or in accordance with Part II of Mitsubishi Heavy Industries Service Bulletin 28-001, dated November 21, 1989 (for Mitsubishi Model MU-300 airplanes).

d. If Procedure 2 is accomplished *after* accomplishing Procedure 1 (described in paragraph A.1., above), perform the following:

1. Remove the AFM limitation imposed by Procedure 1, subparagraph A.1.a., above.

2. Remove the circuit breaker collars and reset circuit breakers F135, F194, and F195, which were opened and collared by Procedure 1, subparagraph A.1.e., above.

3. Remove the placard from the Fuselage Tank Fill System Switch panel, which was installed by Procedure 1, subparagraph A.1.i., above.

4. Remove the placard from the overhead switch panel, which was installed by Procedure 1, subparagraph A.1.j., above.

5. Remove Beech P/N 128-920210-1 placard, or its equivalent, from the fuselage fuel tank fuel filler access door, which was installed by Procedure 1, subparagraph A.1.k., above.

B. An alternate means of compliance or adjustment of the compliance time, which provides an equivalent level of safety, may be approved by the Manager, Wichita Aircraft Certification Office, FAA, Central Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Wichita Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturers may obtain copies upon request to Branson Aircraft Corporation, 3790 Wheeling Street, Denver, Colorado 80239 and Beech Aircraft Corporation (United States agents for Mitsubishi Heavy Industries, Incorporated), P.O. Box 85, Wichita, Kansas 67201-0085. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, Central Region, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas.

Issued in Seattle, Washington, on February 27, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-5280 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 173, 175, 176, 177, 178, 179, 180, and 181

[Docket No. 85N-0145]

Use of Acrylonitrile Copolymers

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is considering publishing a proposal that would set forth safe conditions of use for acrylonitrile copolymers in contact with food and that would revoke the existing interim regulation on the use of those copolymers. This action may result in the restriction of some current uses of acrylonitrile copolymers. This advance notice of proposed rulemaking requests information on food-contact uses of acrylonitrile copolymers, on the levels of residual acrylonitrile contained in finished articles fabricated from those copolymers, and on the migration of this residual acrylonitrile to food. FDA will review this information before proposing modifications in the regulations concerning the food-contact uses of acrylonitrile copolymers.

DATES: Comments by May 7, 1990.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm.

4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Gerad L. McCowin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-472-5676.

SUPPLEMENTARY INFORMATION:

I. Background

Acrylonitrile is a chemical that is polymerized in the presence of other chemicals, such as butadiene and styrene, to form a broad range of copolymers. These copolymers have a variety of regulated food-contact uses.

Acrylonitrile copolymers are included in the following regulations: § 173.25 *Ion-exchange resins* (21 CFR 173.25); § 175.105 Adhesives (21 CFR 175.105); § 175.125 Pressure-sensitive adhesives (21 CFR 175.125); § 175.300 Resinous and polymeric coatings (21 CFR 175.300); § 175.320 Resinous and polymeric coatings for polyolefin films (21 CFR 175.320); § 175.360 Vinylidene chloride copolymer coatings for nylon film (21 CFR 175.360); § 175.365 Vinylidene chloride copolymer coatings for polycarbonate film (21 CFR 175.365); § 176.170 Components of paper and paperboard in contact with aqueous and fatty foods (21 CFR 176.170); § 176.180 Components of paper and paperboard in contact with dry food (21 CFR 176.180); § 177.1010 Acrylic and modified acrylic plastics, semirigid and rigid (21 CFR 177.1010); § 177.1020 Acrylonitrile/butadiene/styrene co-polymer (21 CFR 177.1020); § 177.1030 Acrylonitrile/butadiene/styrene/methyl methacrylate copolymer (21 CFR 177.1030); § 177.1040 Acrylonitrile/styrene copolymer (21 CFR 177.1040); § 177.1050 Acrylonitrile/styrene copolymer modified with butadiene/styrene elastomer (21 CFR 177.1050); § 177.1200 Cellophane (21 CFR 177.1200); § 177.1480 Nitrile rubber modified acrylonitrile-methyl acrylate copolymers (21 CFR 177.1480); § 177.1630 Polyethylene phthalate polymers (21 CFR 177.1630); § 177.2260 Filters, resin-bonded (21 CFR 177.2260); § 177.2600 Rubber articles intended for repeated use (21 CFR 177.2600); § 177.2910 Ultrafiltration membranes (21 CFR 177.2910); § 178.3790 Polymer modifiers in semirigid and rigid vinyl chloride plastics (21 CFR 178.3790); § 179.45 Packaging materials for use during the irradiation of prepackaged foods (21 CFR 179.45); § 180.22 Acrylonitrile copolymers (21 CFR 180.22); and § 181.32 Acrylonitrile copolymers and resins (21 CFR 181.32).

Residual amounts of reactants and other impurities are commonly found as contaminants in all chemical products, even in highly purified reagent-grade chemicals. When acrylonitrile copolymers are synthesized, some unreacted acrylonitrile monomer will remain as a residual impurity. The terms "acrylonitrile," "acrylonitrile monomer," and "residual acrylonitrile" as they appear in the text of this document all refer to the same chemical, acrylonitrile monomer.

When the copolymer is heated to fabricate a food-contact article, the copolymer may degrade slightly, producing small amounts of acrylonitrile monomer that will contribute to the total concentration of that impurity in the finished article. The amount of residual acrylonitrile in a food-contact article depends on the type of polymer and on the synthesis, purification, and fabrication processes employed in its production.

When acrylonitrile copolymers contact food, residual acrylonitrile will likely migrate from the food-contact article to food. This acrylonitrile can often be detected in the food or in food-simulating solvents by current analytical methods. The amount of the residual acrylonitrile that migrates to food varies with the concentration of residual acrylonitrile in the article, the type of food-contact article, and the conditions (such as the type of food, the temperature of the food, and the length of time food is in contact with the article) under which the article contacts food.

Before passage of the Food additives Amendment in 1958 and based on analytical data available at that time, FDA considered several acrylonitrile copolymer resins to be safe for use in contact with food. These analytical data indicated that there was usually no detectable migration of acrylonitrile monomer to food from these resins under test conditions.

After 1958, based on the apparent lack of migration to food, the agency issued several food additive regulations permitting certain uses of acrylonitrile copolymers. In 1973, however, FDA reviewed new data showing that detectable amounts of acrylonitrile monomer migrated to foods from packaging materials fabricated from acrylonitrile copolymer resins.

Because of safety concerns raised at about the same time, FDA adopted an interim regulation (21 CFR 180.22) that placed extraction specifications on acrylonitrile copolymers to limit the amount of residual acrylonitrile monomer that could migrate to food.[1] This interim regulation also required that new studies be performed to characterize the toxicity of acrylonitrile monomer more completely. These studies have been completed, submitted, and evaluated, and they, as well as other studies, have shown that acrylonitrile monomer is an animal carcinogen.

FDA believes that the available toxicology data are adequate to assess the risk from dietary exposure to acrylonitrile. The agency has estimated potential acrylonitrile monomer exposure on the basis of the regulated uses of acrylonitrile copolymers. Based on these estimates, the agency tentatively finds that the existing regulations do not ensure the continued safe use of acrylonitrile copolymers for all regulated and prior-sanctioned food-contact applications. It appears likely to the agency, however, that certain acrylonitrile copolymers can be used safely under appropriately prescribed conditions.

The purpose of this notice is to initiate the process for modifying the regulations on the use of acrylonitrile copolymers. The agency is requesting information on the current and projected uses of acrylonitrile copolymers that bring them into contact with food and on the migration of acrylonitrile to food that is likely to occur as a result of those uses. The agency is also requesting comment on regulatory approaches to ensure the safe use of these polymers.

The agency intends to use this information to develop a notice that will propose to establish safe conditions of use for food-contact acrylonitrile copolymers and to revoke the interim regulation for acrylonitrile copolymers, in accordance with § 180.1(d) (21 CFR 180.1(d)). This proposal will supersede the notice of proposed rulemaking published on March 11, 1977 (42 FR 1356Z), in which FDA proposed to amend § 180.22 Acrylonitrile copolymers to lower the amount of acrylonitrile permitted in food from 0.3 part per million (ppm) to 0.05 ppm.

[1] Interim food additive regulations are temporary regulations established to permit continued use of a substance for the limited period of time necessary to resolve, by further study, a substantial question about the safety or functionality of the substance (21 CFR 180.1(a)). The interim food additive regulations require, however, that upon the completion of the studies on the substance, the agency review all available data, terminate the interim food additive regulation, and either issue a food additive regulation or require elimination of the substance from the food supply (21 CFR 180.1(d)).

II. Regulatory History

A. Early History

Acrylonitrile-butadiene, acrylonitrile-styrene, and acrylonitrile-butadiene-styrene copolymers were used as components of food packaging before the passage of the Food Additives Amendment of 1958 to the Federal Food, Drug, and Cosmetic Act (the act). The copolymers given clearance by FDA before 1958 are considered to be "prior-sanctioned" substances, which are excepted from classification as food additives under section 201(s)(4) of the act (21 U.S.C. 321(s)(4)). These copolymers are listed under § 181.32 Acrylonitrile copolymers and resins.

Following enactment of the Food Additives Amendment of 1958, FDA issued food additive regulations for a wide variety of acrylonitrile copolymers. In 1973, FDA received a food additive petition for a new use of a new acrylonitrile copolymer packaging material. Data in this petition, which were derived from analytical procedures more sensitive than those used in earlier petitions, showed migration of acrylonitrile monomer to foods from the acrylonitrile copolymer.

At the time that FDA received this information, the primary toxicity information on acrylonitrile was an unpublished chronic rat feeding study entitled "The Pharmacology and Toxicity of Acrylonitrile and Acrylon" by P. E. Tullar, George Washington University, November 1947. The investigator presented the hypothesis that acrylonitrile ingestion might lead to tumor development, but this hypothesis could not be confirmed because of the inadequacies in the study and the lack of an apparent dose response. The only other pertinent studies known at the time were chronic feeding studies with dogs and rats, carried out by the U.S. Public Health Service (PHS). These studies were completed, but no final reports were ever written. The raw data available from the PHS studies were inadequate to confirm the Tullar hypothesis that acrylonitrile is a tumorigen.

B. Interim Regulation

FDA decided to obtain additional data concerning the dietary exposure to, and the toxicity of, acrylonitrile monomer. In the **Federal Register** of November 4, 1974 (39 FR 38907), FDA proposed: (1) To codify the prior-sanctioned uses of acrylonitrile copolymers; and (2) to issue an interim regulation for acrylonitrile copolymers that would, among other things, require new toxicology tests.

In the **Federal Register** of June 14, 1976 (41 FR 23940), FDA issued the interim regulation § 122.4010 (subsequently recodified as 21 CFR 180.22), for acrylonitrile copolymers as articles or components of articles for use in contact with food. As a condition for the continued listing of acrylonitrile copolymers, the agency required that the following toxicity studies be undertaken (§ 180.22(e)):

(1) Lifetime feeding studies with a mammalian species, preferably with animals exposed in utero to the chemical, (2) studies of multigeneration reproduction with oral administration of the test material, (3) assessment of teratogenic and mutagenic potentials, (4) subchronic oral administration in a nonrodent mammal, (5) tests to determine any synergistic toxic effects between acrylonitrile monomer and cyanide ion, and (6) a literature search on the effects of chronic ingestion of hydrogen cyanide.

The interim regulation also placed limitations on acrylonitrile migration from the finished food-contact articles (§ 180.22(a)).[2] These restrictions were intended to limit extracted acrylonitrile monomer to less than 300 parts per billion (ppb) in food, pending the clarification of the toxicity of acrylonitrile.

Additionally, during the review of the prior sanctions for acrylonitrile copolymers, FDA discovered that some copolymers that had been marketed in the belief that they were prior sanctioned for their intended use actually fell outside the scope of a valid prior sanction as published in § 181.32. To prevent disruption of an existing market, FDA, in the interim regulation (§ 180.22(f)), permitted the continued marketing of these copolymers provided that persons using them in contact with food submit to the agency a statement of the basis on which they, in good faith, believed that the use was prior-sanctioned. FDA also required such persons to submit food additive petitions to continue such use. Five firms submitted six food additive petitions for these copolymers (FAP 7B3272, 7B3273, 7B3275, 7B3277, 7B3278, and 7B3281), and the agency permitted the five petitioners to continue marketing the copolymers pending resolution of the acrylonitrile issue.

In response to the interim regulation, the required toxicological tests were begun. On November 9, 1976, the Manufacturing Chemists Association (now the Chemical Manufacturing Association) submitted to FDA a final report of its testing of acrylonitrile monomer for teratogenic effects. The test was performed by gavage administration of acrylonitrile monomer to four groups of rats at dosages of 0, 10, 25, and 65 milligrams per kilogram (mg/kg) of body weight per day. FDA concluded that this test showed some teratogenic responses at dose levels of 25 and 65 mg/kg/day. The dose level of 10 mg/kg/day showed no evidence of teratogenicity.

On January 14, 1977, the Manufacturing Chemists Association submitted to FDA a 13-month interim report of an ongoing 2-year study in which acrylonitrile monomer was incorporated into the drinking water of rats at concentrations of 0, 35, 100, and 300 ppm. The study, at 13 months, showed significantly lowered body weight, pathologic changes in the gastric epithelium, increased incidence of masses in the ear duct, and proliferative lesions of the central nervous system of rats. There was also a higher incidence of subcutaneous masses in the mammary region of the test animals.

C. Revocation of Beverage Bottle Use

FDA evaluated the teratology study and the 13-month interim report of the 2-year feeding study in rats. The agency tentatively concluded that the limitation for acrylonitrile monomer extraction for food-contact articles should be substantially reduced for all acrylonitrile copolymers. As a result, in the **Federal Register** of March 11, 1977 (42 FR 13562), FDA proposed to reduce the limitation for acrylonitrile monomer extraction from acrylonitrile copolymers from a concentration equivalent to 300 ppb in food to a concentration equivalent to 50 ppb in food. Because of growing concern over the adequacy of that proposal, and of simultaneous legal challenges discussed below, FDA did not issue a final rule.

FDA's review of the teratology study and the interim report also led the agency to conclude that the regulation permitting use of acrylonitrile copolymers as beverage containers should be stayed in the interest of public safety. In the same issue of the **Federal Register** (42 FR 13546), FDA published a stay of that regulation because: (1) Beverage containers represented a potentially large source of human exposure to acrylonitrile; (2) it was not clear whether beverage bottles could meet the 50 ppb extraction limitation; and (3) the agency concluded that it

[2] The specifications in § 180.22(a)(2) limit acrylonitrile extraction to a maximum of 300 parts per billion (ppb) for a single use article having a volume to surface area ratio of less than 10 milliliters (mL) per square inch of food-contact surface when extracted to equilibrium at 120 °F with food-simulating solvents appropriate to the intended conditions of use. Specifications in § 180.22(a) (1) and (3) limit acrylonitrile extraction to a maximum of 0.003 milligram (mg) per square inch, which is equivalent to 300 ppb for a volume to surface area ratio of 10 mL per square inch.

would be inappropriate to risk significant additional exposure to acrylonitrile monomer from beverage bottles during the time needed to resolve the remaining issues. The Monsanto Co., a manufacturer of acrylonitrile copolymer beverage containers, sought judicial review of the stay before the United States Court of Appeals for the District of Columbia (*Monsanto Co.* v. *Gardner*, C.A. No. 77-1245 (D.C. Cir. 1977)).

The court held that FDA's suspension of its food additive regulations without a hearing was invalid. The court ordered a prompt hearing and set a date, later extended to September 19, 1977, for issuance of a final decision. In the **Federal Register** of April 1, 1977 (42 FR 17529), the Commissioner issued a notice of hearing. Following a formal evidentiary public hearing, the Administrative Law Judge issued an initial decision on August 4, 1977, finding that acrylonitrile copolymers used to fabricate beverage containers are food additives that had not been shown to be safe. The manufacturers appealed the initial decision to the Commissioner.

In the **Federal Register** of September 23, 1977 (42 FR 48528), FDA published its final decision on acrylonitrile copolymers used to fabricate beverage containers. That document discussed at length the pertinent data from the formal evidentiary public hearing. In that document, the agency affirmed the decision of the Administrative Law Judge. As a result of this decision, the agency revoked all regulations authorizing beverage container uses of acrylonitrile copolymers, effective December 22, 1977.

D. Court Decision on Acrylonitrile Copolymer Bottles

In November 1977, the various groups that were affected by the agency's final decision of September 23, 1977, appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit (*Monsanto Company, et al.*, v. *Kennedy, et al.*, Court of Appeals No. 77-2023 and Consolidated Case Nos. 77-2024, 77-2026, and 77-2032). The two beverage containers at issue in the agency's final decision contained residual acrylonitrile monomer (RAN) levels of 15 ppm and 3 ppm in the wall of the containers. In post-argument testimony before the U.S. Court of Appeals, Monsanto claimed that no acrylonitrile would migrate to food from new containers with RAN levels lower then 0.1 ppm.

On November 6, 1979, the United States Court of Appeals for the District of Columbia Circuit upheld the agency's decision that the acrylonitrile copolymer beverage containers with RAN levels of 3 ppm or higher were food additives. See *Monsanto* v. *Kennedy*, 613 F.2d 947 (D.C. Cir. 1979).

With respect to containers with residual acrylonitrile levels below 0.1 ppm, the Court of Appeals stated that "If these assertions [concerning no migration at very low residual acrylonitrile levels] can be demonstrated to the satisfaction of the Commissioner, a modification of the current regulation is a likely corollary." 613 F.2d at 953.

E. Monsanto's New Acrylonitrile/ Styrene Copolymer Bottle

Following the court's decision, Monsanto Co. requested a formal advisory opinion that the "new" acrylonitrile/styrene copolymer bottles with residual acrylonitrile levels no greater than 0.1 ppm "* * * are not food additives because there is no migration from such containers * * *." (See Docket No. 80A-0109, Dockets Management Branch.) The agency evaluated the initial submission and the additional scientific data and arguments contained in a second submission. In a letter to Monsanto's counsel, FDA concluded that the scientific evidence did not demonstrate that there was no migration of acrylonitrile monomer from the new bottles.

The agency found that the new bottle is a food additive because there is a reasonable expectation of migration of acrylonitrile monomer and other constituents from the acrylonitrile/ styrene copolymer bottle. The agency also stated that "[t]his conclusion should not be interpreted as precluding the approval of a food additive regulation for the beverage container use of the new Cycle-Safe bottle based upon a risk assessment approach." Finally, the agency stated that "a food additive petition is the appropriate way to assemble the needed information and to obtain an amendment to § 177.1040 to provide for the safe use of the new Cycle-Safe bottle."

Monsanto chose to accept FDA's recommendation concerning the filing of a food additive petition for the new Cycle-Safe bottle and submitted a petition (FAP 3B3690) for the use of the new bottle on November 30, 1982.

The new bottle is produced by a manufacturing process that reduces the maximum level of RAN in the bottle wall to <0.1 ppm. This level of RAN in the bottle wall is approximately 30 to 150 times less than the average levels in the two preceding versions of the Monsanto bottle. This reduction substantially lowers the migration of acrylonitrile monomer from the bottle wall into beverages.

The agency evaluated all relevant data on the new bottle and, after assessing the upper limit of risk from dietary exposure to acrylonitrile monomer from these bottles, concluded that the intended use of the new bottle is safe. In the **Federal Register** of September 19, 1984 (49 FR 36635), the agency issued an order amending § 177.1040 to provide for the safe use of the new acrylonitrile/styrene copolymer beverage container. In the preamble to that final rule the agency stated:

> A preliminary review of the current use of acrylonitrile copolymers for food packaging and other food-contact uses, including those permitted by this final rule, gives no reason to expect dietary exposure to acrylonitrile to be unsafe. The agency is reviewing the regulated uses of acrylonitrile copolymers and is developing a proposal to amend the acrylonitrile copolymer regulations to ensure that dietary acrylonitrile monomer exposure from probable use of all acrylonitrile copolymers under the food additive regulations, including those permitted by this final rule, will remain safe in the future. (See 49 FR 36642).

F. Acrylonitrile Copolymer Petitions Submitted Under the Interim Regulation

Six food additive petitions for acrylonitrile copolymers were submitted in accordance with § 180.22(f) of the interim regulation. On October 29, 1984, the agency issued notices announcing the withdrawal of three of these petitions (49 FR 43506, FAP 7B3275; 49 FR 43506, FAP 7B3277; and 49 FR 43507, FAP 7B3278). A notice announcing the withdrawal of a fourth petition (FAP 7B3272) was published in the **Federal Register** of March 19, 1985 (50 FR 11014). A fifth petition (FAP 7B3273) was amended, as noted in the **Federal Register** of March 26, 1985 (50 FR 11946), to provide for repeated food-contact uses only, rather than for single and repeated uses as originally filed. The sixth petition (FAP 7B3281) was similarly amended to restrict application to repeat use material.

III. Toxic Properties of Acrylonitrile

The interim acrylonitrile copolymer regulation (§ 180.22) required, as discussed above, that interested persons perform a number of toxicity studies on acrylonitrile monomer. Based on the results of these and other studies, the agency believes that it now possesses adequate toxicology data to assess the safety of acrylonitrile copolymers used in contact with food.

The studies on acrylonitrile monomer show that this substance produces a multiplicity of toxic effects, including

mutagenicity, teratogenicity, and carcinogenicity. Of the observed toxic effects, carcinogenicity poses the greatest safety concern at low doses.

A. Chronic Animal Bioassays

Acrylonitrile has been reported to be carcinogenic in six recent rat bioassays, including four in which the acrylonitrile monomer was administered in the animals' drinking water. In a 2-year study with Sprague-Dawley rats performed by Dow Chemical Co. (sponsored by the Chemical Manufacturers Association) (Ref. 1), acrylonitrile monomer was administered in drinking water at concentrations of 35 ppm, 100 ppm, and 300 ppm. Based on its review of the data from this study, FDA concluded that the increased incidences of astrocytomas of the central nervous system, carcinomas of the Zymbal's gland (ear canal), papillomas and carcinomas of the stomach, and papillomas and carcinomas of the tongue were clearly associated with acrylonitrile treatment in both the male and female rats. The incidence of carcinomas of the small intestine and carcinomas of the mammary gland were also significantly increased in female rats. Treatment-related tumorigenic effects were observed at all dose levels.

In a 2-year study with Fischer 344 rats performed by Bio/dynamics, Inc. (sponsored by Monsanto) (Ref. 2), acrylonitrile monomer was administered in drinking water at concentrations of 1 ppm, 3 ppm, 10 ppm, 30 ppm, and 100 ppm. In its review of the data from this study, FDA found significant treatment-related increases in tumor incidence for astrocytomas of the central nervous system and papillomas and carcinomas of the Zymbal's gland in male and female animals. Significant tumorigenic effects were observed at 10 ppm, 30 ppm, and 100 ppm dose levels.

In another 2-year study with Spartan Sprague-Dawley rats performed by Bio/dynamics, Inc. (sponsored by Monsanto) (Ref. 3), acrylonitrile monomer was administered in drinking water at concentrations of 1 ppm and 100 ppm. The study was terminated early (19 months for females and 22 months for males) because of low survival rates. The 100 ppm acrylonitrile monomer treatment was associated with significantly higher incidence of tumors in the brain, the Zymbal's gland, and the stomach.

The fourth drinking water study in which acrylonitrile monomer was found to induce cancer was a three-generation reproduction study performed at Litton bionetics for the Chemical Manufacturers Association (Ref. 4). In this study with Charles River rats, significant increases in incidences of astrocytomas (brain) and Zymbal's gland carcinomas were observed after approximately 45 weeks of treatment with acrylonitrile monomer in drinking water at 500 ppm.

Monsanto also sponsored a 2-year gavage (stomach tube) study with rats at Bio/dynamics, Inc. (Ref. 5). Acrylonitrile monomer was administered to Spartan Sprague-Dawley rats at 0.1 milligram acrylonitrile monomer per kilogram body weight per day (mg/kg/day) and 10.0 mg/kg/day, 5 days per week. Because of poor survival in the high-dose group, the study was terminated at 20 months. Acrylonitrile monomer treatment at the 10.0 mg/kg/day dose level was associated with significantly increased tumor incidences in the central nervous system ear canal, stomach, intestine, and mammary gland.

The Chemical Manufacturers Association sponsored a 2-year acrylonitrile inhalation study with Spartan Sprague-Dawley rats at Dow Chemical Co. (Ref. 1). Treatment groups were exposed to air containing acrylonitrile monomer at concentrations of 20 ppm and 80 ppm for 6 hours per day, 5 days per week. At the 80 ppm concentration, exposure significantly increased tumor incidences in the brain, ear canal, small intestine, tongue, and mammary gland.

In summary, acrylonitrile monomer is a carcinogen that induces tumors at a number of sites in the rat. Similar carcinogenic responses have been observed in six studies that have involved administration of acrylonitrile monomer by both ingestion and inhalation and that have also involved different strains of rat. The carcinogenic effects of acrylonitrile monomer have been reproduced consistently.

B. Epidemiology Studies

The Environmental Protection Agency (EPA) has reviewed 10 epidemiology studies on human exposure to acrylonitrile monomer (Ref. 7). EPA found that six of the studies were inconclusive, but that the data in the remaining four studies "consistently demonstrate a statistically significant risk of lung cancer in various subgroups of the populations studied." For three of the latter four studies, however, there were problems that were sufficient "to cast doubt on the finding of significantly elevated risks of lung cancer found in each study." (See Ref. 7, pp. 13–174). The remaining study, in which an elevated lung cancer rate was reported, is the O'Berg study of Dupont acrylonitrile workers (Ref. 8). Because respiratory cancer was at issue in this study, the effect of smoking behavior on the cancer incidence is important.

After publication of the O'Berg paper, EPA's Cancer Assessment Group assessed the effect of smoking on expected respiratory cancer rates. EPA found that possible differences in smoking behavior between these workers and the control cohort could not account for the significantly higher cancer rate found by O'Berg in the workers. EPA concluded that the evidence for human carcinogenicity is characterized as being "limited" and "sufficient." Combining the animal and human data, EPA concluded acrylonitrile monomer is "probably carcinogenic in humans" (50 FR 24319; June 10, 1985).

IV. Safety Evaluation

A. Statutory Safety Requirements

Under section 409(c)(3)(A) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(c)(3)(A)), the so-called "general safety clause" of the statute, a food additive cannot be approved for a particular use unless the data presented to FDA establish that the food additive is safe for that use. The concept of safety embodied in this requirement was explained in the legislative history of the Food Additives Amendment of 1958. "Safety requires proof of a reasonable certainty that no harm will result from a proposed use of an additive. It does not—and cannot—require proof beyond any possible doubt that no harm will result under any conceivable circumstance." S. Rept. No. 2422, 85th Cong., 2d Sess. 6 (1958). This definition of safety is incorporated in FDA's food additive regulations (21 CFR 170.3(i)). The Delaney anticancer clause of the Food Additives Amendment of 1958 (section 409(c)(3)(A) of the act) provides further that no food additive can be deemed to be safe if it is found to induce cancer when ingested by man or animal.

B. Prior Action by FDA

In the past, FDA often refused to list a use of a food additive or color additive that contained or was expected to contain minor amounts of a carcinogenic chemical, even if the additive as a whole had not been shown to cause cancer. The agency now believes, however, that developments in science and experience with risk assessment procedures make it possible for FDA to judge the safety of additives that contain a carcinogenic impurity but that have not themselves been shown to cause cancer. Food packaging polymers, such as acrylonitrile copolymers, are not

normally tested for carcinogenicity because polymeric molecules are generally too large and insoluble to be absorbed from the gastrointestinal tract in sufficient amounts to induce cancer. Low molecular weight impurities in the polymers are more likely to present safety concerns.

In the preamble to the final rule permanently listing D&C Green No. 6 published in the **Federal Register** of April 2, 1982 (47 FR 14138), FDA explained the basis for approving the use of a color additive that had not been shown to cause cancer, even though it contains a carcinogenic impurity. Since that decision, FDA has approved the use of various color additives, including D&C Green No. 5 (47 FR 24278; June 4, 1982), and food additives on the same basis.

In brief, the agency believes that the Delaney anticancer clause is not triggered unless the food additives as a whole is shown to cause cancer. An additive that has not been shown to cause cancer, but contains a carcinogenic impurity, may properly be evaluated under the general safety clause of the statute, using risk assessment procedures to determine whether there is a reasonable certainly that no harm will result from the proposed use of the additive.

This approach to regulating carcinogenic impurities of additives that have not themselves been shown to cause cancer was upheld in *Scott* v. *FDA*, 728 F.2d 322 (6th Cir. 1984). The *Scott* case involved a challenge to FDA's decision to approve the use of D&C Green No. 5, which contains a carcinogenic chemical but has not itself been shown to cause cancer. Relying heavily on the reasoning in the agency's decision to list this color additive, the United States Court of Appeals for the Sixth Circuit rejected the challenge to FDA's action and affirmed the listing regulation.

The agency is confident that it possesses the capacity (through the use of extrapolation procedures) to assess adequately the upper limit of risk presented by the use of a food additive that has not been shown to be a carcinogen but that contains a carcinogenic impurity. The estimate of the risk is likely to be exaggerated because the extrapolation models used are designed to estimate the maximum risk consistent with the data. For this reason, the estimate can be used with confidence to conclude that a substance is safe under specific conditions of use.

C. Assessment of Human Cancer Risk From Use of Acrylonitrile Copolymers as Food Additives

The Office of Science and Technology Policy, in its final document, "Chemical Carcinogens; A Review of the Science and its Associated Principles, February 1985" (50 FR 10372; March 14, 1985) discussed the risk assessment process as follows:

> There are four steps or components that are typically involved in carcinogenic risk assessment. The first, which is often referred to as hazard identification entails a qualitative evaluation of both the data bearing on an agent's ability to produce carcinogenic effects and the relevance of this information to humans. The second, exposure assessment, is concerned with the number of individuals who are likely to be exposed and with the types, magnitudes, and durations of their anticipated exposures. The third component, hazard or dose-response assessment, uses the information on carcinogenicity from the hazard identification phase together with mathematical modeling techniques to estimate the magnitude or an upper bound on the magnitude of the carcinogenic effect at any given dose level. Finally, one may combine the information from the first three components or steps to characterize the carcinogenci risk associated with the expected human exposure to the compound of interest.

The first step, hazard identification, has been discussed above. Acrylonitrile monomer is carcinogenic when ingested by laboratory animals and is potentially carcinogenic to humans. RAN is expected to migrate from acrylonitrile copolymers to food when those copolymers are used in contact with food.

The second and third steps may be performed in either order, although it is FDA's usual practice to calculate the exposure assessment first. Exposure assessment, however, depends on the migration characteristics of the copolymers and the conditions under which they are used. The exposure, therefore, can be managed and will vary in response to specific conditions prescribed by regulation. The dose-response assessment, on the other hand, depends on the biological data and the modeling method chosen to best extrapolate results from those data to conditions of human exposure. Once this step is completed, various exposure scenarios can be considered in order to choose the most desirable risk management strategy. Thus, it is sometimes useful to develop a dose-response estimate before obtaining an exposure estimate. In this document, because FDA is seeking information on exposure, the agency will first discuss the information underlying any dose-response assessment before discussing exposure.

1. Dose-Response Assessment for Acrylonitrile

The agency chose the Chemical Manufacturers Association/Dow (Ref. 1) and the Monsanto/Bio/dynamics (Ref. 2) multidose studies in rats, where the rats ingested acrylonitrile monomer in their drinking water, as appropriate studies for assessing the carcinogenic potency of acrylonitrile and for risk extrapolation (Ref. 9). Both of these studies were conducted at several dose levels and showed tumor incidence increasing with dose. These two studies showed carcinogenic effects at doses lower than the other ingestion studies.

Therefore, the agency considers these two studies to contain the best available animal data for assessing low exposure risk from ingestion of acrylonitrile monomer. The available epidemiology data on workers in acrylonitrile monomer manufacturing plants are not adequate for quantitative risk assessment because of the large uncertainty in the worker exposure (concentration in air and duration) to acrylonitrile monomer and to other carcinogenic substances such as tobacco smoke.

The agency used a quantitative risk assessment procedure (linear proportional model) to extrapolate from the dose used in the animal experiments to very low doses corresponding to low levels of risk. When a linear proportion model is used, the estimated risk is directly proportional to exposure. Thus, a risk estimated at one exposure can be converted to a risk at a different exposure by simply multiplying the risk estimate by the ratio of the two exposures. Because of this fact, the estimated dose-response relationship can be characterized by the risk at a particular exposure. This relationship can be expressed either as the risk for a unit of exposure (such as mg/person/day) or as the exposure (such as ppb in the human diet) leading to a particular risk such as 1 in 1 million.

For each study, the agency first determined which tumors were related to acrylonitrile monomer treatment. In the Monsanto/Bio/dynamics study (Ref. 2), these tumors were the astrocytomas of the central nervous system and the papillomas and carcinomas of Zymbal's gland of the ear canal. In the Chemical Manufacturers Association/Dow study (Ref. 1), the acrylonitrile treatment-related tumors were the astrocytomas of the central nervous system, carcinomas of the Zymbal's gland, papillomas and carcinomas of the tongue, papillomas

and carcinomas of the stomach, carcinomas of the small intestine (female only), and carcinomas of the mammary gland (female only).

For each dose/sex group of animals, the agency computed the number of animals bearing any of these tumors. FDA corrected the incidences for missing tissues and early death. It then extrapolated the incidences for each sex, in each study, linearly to a low dose to estimate the lowest dose that might produce a risk as high as one in a million. The agency also estimated the cancer risk by estimating the risk for each tumor site and adding those estimated risks.

Both approaches yielded similar results. Even though the Monsanto/Bio/dynamics study used a lowest dose level 35-fold lower than the Chemical Manufacturers Association/Dow study, and even though these two studies were on different strains of rats, the cancer potencies calculated from these two studies are within a factor of two.

Thus, based on the studies discussed above, an acrylonitrile monomer exposure of approximately 0.5 to 1.0 microgram per day, for example, corresponds to an upper limit of lifetime risk of 1 in 1 million. This is a level of risk that the agency has used in documents of this type as a benchmark under the general safety clause in determining whether there is a reasonable certainty of no harm from the use of an additive that has not been shown to cause cancer but that contains a carcinogenic impurity.

2. Exposure Assessment

Evaluation of risk presented by the migration of acrylonitrile monomer from acrylonitrile copolymer food-contact articles requires an estimate of dietary exposure to acrylonitrile. The dietary exposure considered can be actual dietary exposure under current practices, dietary exposure permitted by current regulations, or probable dietary exposure under some new regulations. To assure safety, FDA must be able to conclude to a reasonable certainty that there will be no harm from probable dietary exposure to acrylonitrile monomer under the permitted conditions of use for acrylonitrile copolymer. The agency needs more information to establish such conditions.

As stated earlier, the interim regulation limits acrylonitrile migration from individual food-contact applications of acrylonitrile copolymers to less than approximately 300 ppb. Under current agency guidelines for estimating exposure to constituents of food packaging, FDA considers the percentage of the daily diet that is packaged in a particular material. For those packaging materials used to package less than 5 percent of the diet, the agency, as a matter of policy, still assumes that 5 percent of the diet will be in contact with the material. If 150 grams per day, i.e., 5 percent of a 3,000-gram diet, is packaged in articles containing acrylonitrile copolymers, then under current extraction limitations, dietary acrylonitrile monomer exposure could be as high as 45 micrograms per day. The agency could not conclude that this level, if it were to occur, would be safe. The actual exposure to acrylonitrile from its food uses, however, does not appear to be this high.

(a) *Migration of acrylonitrile to food.* The amount of acrylonitrile migrating to food from a packaging container will depend on the RAN concentration in the wall of the container, the thickness of the container, the ability of acrylonitrile monomer to diffuse through the particular copolymer resin, the type of food stored in the container, and the time/temperature conditions of storage. FDA and others have concentrated on obtaining reliable data from the use of acrylonitrile in rigid or semi-rigid packaging containers, rather than from its use in coatings, because the thick walls of containers provide a much larger reservoir of residual acrylonitrile, which can migrate to food, than is available with a coating.

Containers made with acrylonitrile copolymers have been used historically with fatty foods because these foods must be protected from oxygen migrating through the container. Many acrylonitrile copolymer resins provide a good oxygen barrier.

In a 1983 paper (Ref. 12), B.D. Page and C.F. Charbonneau, Health and Welfare, Canada, reported the concentration of acrylonitrile in samples of several goods packaged in acrylonitrile copolymer containers (listed here as average acrylonitrile monomer concentration): honey butter packaged in acrylonitrile-butadiene-styrene containers, 18 ppb (range 10 to 31 ppb); cold pack cheese packaged in acrylonitrile-butadiene-styrene containers, 27 ppb (range 24 to 32 ppb); peanut butter packaged in acrylonitrile-butadiene-styrene methyl methacrylate polymer containers, <20 ppb (range <10 to 38 ppb); and soft butter spread and creamed coconut packaged in acrylonitrile-butadiene-styrene containers, acrylonitrile monomer not detected at an analytical sensitivity of 2.5 ppb. The acrylonitrile-butadiene-styrene tubs in which the soft butter spread and creamed coconut were packed contained approximately 25 times less residual acrylonitrile on average than the other acrylonitrile copolymer packages.

The authors of this paper also tested luncheon meat packaged in a laminate consisting of an acrylonitrile-based copolymer layer and a food-contact polyethylene layer (Ref. 13). No detectable acrylonitrile monomer was found in the slice of meat in contact with the acrylonitrile resin package using analytical methodology sensitive to a level of 2 ppb.

In its petition for the new acrylonitrile/styrene copolymer bottle (see section II above), Monsanto demonstrated that extraction from its beverage bottle, which contained <0.1 ppm RAN, is not more than 0.16 ppb in 6 month extraction tests at 32 °C (90 °F) using 3 percent acetic acid as a food simulant (49 FR 36637). Based on these extraction results, which exaggerage actual use conditions for carbonated soft drinks, the agency estimated the potential acrylonitrile monomer concentration in beverages packaged in Monsanto's bottle to be 0.055 ppb (49 FR 36640).

(b) *Dietary Consumption of Acrylonitrile.* If foods containing 25 to 160 ppb acrylonitrile monomer (values consistent with past FDA analyses of food packaged in acrylonitrile copolymers) were to constitute 5 percent of the daily diet (i.e., 150 grams), dietary acrylonitrile monomer exposure would be 3.7 to 24 micrograms per day. These levels would clearly exceed the individual liftime risk of 1 in 1 million (about 0.5 to 1.0 microgram per day) for dietary acrylonitrile monomer exposure.

However, acrylonitrile copolymers have never been a major food-packaging material. Based on data published in various trade journals on the use of polymers in food packaging and information provided by industry to FDA, the agency believes that the portion of the daily diet that is packaged in acrylonitrile copolymer containers is much less than 5 percent. FDA is requesting data on the use of acrylonitrile, so that it can refine its exposure estimates and more reliably estimate actual risk.

Monsanto submitted a market survey in 1979 on acrylonitrile copolymer food-packaging uses in connection with its petition for its acrylonitrile/styrene copolymer beverage bottle (Ref. 14). Based on the results of this survey, Monsanto estimated that 0.24 percent of the foods in the United States were packaged in acrylonitrile copolymers in the year 1979. Luncheon meat and margarine accounted for the majority of the food packaged in acrylonitrile

copolymer containers at that time. The margarine industry stopped using these materials in 1980 (Ref. 16).

Currently, the major food-packaging use of acrylonitrile copolymers appears to be the use of an acrylonitrile copolymer barrier resin for blister-type luncheon meat packages (Ref. 14). As discussed previously, using a methodology sensitive to 2 ppb, no acrylonitrile was detectable in meat in these packages (made from a laminate consisting of an acrylonitrile-based copolymer layer and a food-contact polyethylene layer) (Ref. 13). Thus, the agency expects any migration of residual acrylonitrile into the meat to be very low.

In a sampling of blister-pack meat products in Washington, DC, area retail stores, FDA found that only 1 of 16 different products was packaged in an acrylonitrile copolymer package (Ref. 18). In that instance, the acrylonitrile copolymer was separated from direct food contact by another polymer layer.

The interim regulation, however, does not ensure that dietary exposure to acrylonitrile from the food-contact uses of acrylonitrile copolymers will remain acceptably low. Therefore, FDA tentatively finds that the acrylonitrile copolymer regulations should be modified to ensure that future use of these polymers will be safe.

V. Information Necessary To Propose Modified Acrylonitrile Copolymer Regulations

FDA considers it likely that the existing regulations for acrylonitrile copolymers are too broad to be retained in light of the carcinogenic potency of acrylonitrile monomer, the typical RAN levels in some copolymers, and the potential of acrylonitrile monomer migration from those copolymers. The interim regulation would permit ingestion of up to 45 micrograms of acrylonitrile per day, if 5 percent of a person's diet were packaged in acrylonitrile copolymers releasing the maximum amount of acrylonitrile monomer allowed. This level of exposure corresponds to a maximum lifetime risk to an individual of 4.5 to 9 in 100,000. This risk is substantially higher than those risks that FDA has found to provide a reasonable certainty of no harm in evaluating the safety of other food and color additives.

For example, FDA has estimated the following upper limit risks before concluding that use of the food or color additive in question is safe: (1) D&C Green No. 6 in externally applied drugs and cosmetics—1 in 15 million to 1 in 150 million (47 FR 14138 at 14144; April 2, 1982); and (2) acrylonitrile copolymer beverage bottle—1 in 8 million (49 FR 36635 at 36641; September 19, 1984). These upper limit risk estimates are substantially lower than that calculated for the situation in which 5 percent of one's diet may contain 300 ppb of acrylonitrile monomer, which could occur under the current regulations for acrylonitrile copolymers.

Although the agency believes that acrylonitrile copolymer food packaging does not currently present a public health hazard (because packaging uses that would yield the largest amount of acrylonitrile to foods are not currently being employed), the agency tentatively finds that modification of its regulations is necessary to assure safe use. Therefore, the agency, by way of this advance notice, is seeking comments on how best to achieve the modifications to its acrylonitrile copolymer regulations that apparently are necessary.

The agency expects that the modifications of the acrylonitrile copolymer regulations that will be necessary will be substantial, as suggested by the magnitude of the calculated potential acrylonitrile exposures in the previous section. The acrylonitrile copolymer regulations, however, can be modified in a number of ways. The "classes" of permitted acrylonitrile copolymers could be reduced, the range of permitted acrylonitrile copolymers within a "class" could be narrowed, some permitted food-contact uses could be eliminated, appropriate low residual acrylonitrile levels could be specified for the acrylonitrile copolymer resins or finished articles, and more suitable acrylonitrile extraction end tests could be prescribed. The agency considers it likely that it will use a combination of these approaches.

The agency is likely to propose to retain regulations, if consistent with the safety considerations, only for specific acrylonitrile copolymers intended for particular uses that are currently marketed or that are anticipated in the near future. A specific list of permitted acrylonitrile copolymers and uses would also make it more practical for the agency to estimate potential exposure to acrylonitrile. To develop modified regulations to ensure the continued safe use of food-contact acrylonitrile copolymers, as discussed above, the agency is requesting the following information on copolymers:

1. Identify specific copolymers (e.g., weight percent of each monomer in the copolymer) currently marketed and their food-contact uses. Include for each the amount of food packaged per unit weight of acrylonitrile copolymer or the amount of food in contact with a unit weight of acrylonitrile copolymer over the lifetime of the article (e.g., conveyor belt use), food type, and time/temperature conditions of use. Identify both single service and repeated uses.

2. Identify specific copolymers (e.g., weight percent of each monomer in the copolymer) and particular uses currently permitted, but not now marketed, that are anticipated in the near future. Include for each the amount of food to be packaged per unit weight of acrylonitrile copolymer or the amount of food in contact with a unit weight of acrylonitrile copolymer, food type, and time/temperature conditions of use. Identify both single service and repeated uses.

3. Provide RAN levels for these copolymers under current good manufacturing practice conditions of production. Provide the method of analysis (including method validation) for the residual acrylonitrile. This method might be used eventually as a regulatory method.

4. Provide acrylonitrile monomer migration data, particularly for single service articles, to support continued listing of the specific copolymers and their uses identified in items 1 and 2 above. In the absence of adequate migration data, the agency normally estimates the dietary acrylonitrile monomer exposure resulting from a particular acrylonitrile copolymer by assuming that 100 percent of the residual acrylonitrile monomer migrates into the food that the article contacts. Therefore, to avoid unnecessary overestimation of acrylonitrile monomer exposure, the agency is requesting the following:

a. Migration data for single service uses: (1) Provide available acrylonitrile monomer extraction data. If the data have previously been submitted to the agency, identify the submission.

(2) Provide new acrylonitrile monomer extraction data, if available data show no migration but have not been obtained by methodology capable of detecting 2 ppb. Extractions should be conducted with the following food-simulating solvents: (i) either 8 or 50 percent ethanol (if intended for use with alcoholic food containing more than 8 percent alcohol), and (ii) either food oil, such as corn oil, or heptane (heptane not to exceed 66 °C (150 °F)).

Extractions should be run for 2 hours at the highest temperatures expected for food contact, followed by 49 °C (120 °F) for 30 days. Portions of the extracts should be analyzed at the following times after the start of the experiment: the time necessary to reach 49 °C (120 °F) or 3 hours, whichever is longer, 8

hours, 1 day, 4 days, 10 days, and 30 days.

The sensitivity of the analytical method for acrylonitrile monomer should be at least 2 ppb. Variables of the extraction experiment, such as surface area of the article to volume of food simulant, thickness of the food-contact article, and fraction of the food-contact article that is acrylonitrile copolymer, are needed for proper data evaluation. The experimental design should be sufficiently conservative so that acrylonitrile monomer extraction is not underestimated. Regulations may have to restrict use for copolymers whose migration from commercial articles cannot be estimated from the experiment. The agency encourages interested persons to confer with the agency's food additive staff on extraction protocols.

b. Migration data for repeated uses: Provide available acrylonitrile extraction data as in section V.4.a.(1) above.

The agency expects that estimating dietary exposure to acrylonitrile by assuming 100 percent migration of the residual acrylonitrile into the contacted food over the lifetime of the repeated-use article will result in dietary exposures to acrylonitrile that are very low. There may be applications, however, where the conditions of exposure, such as a relatively long food-contact time or a relatively high ratio for the surface area of article to volume of the contacted food, would not result in very low acrylonitrile monomer exposures if estimated by 100 percent migration calculations. For those applications, extraction data, as in section V.4.a.(2) above, may be needed. The agency's food additive staff should be consulted concerning such applications.

All analytical procedures used to develop migration data should be supplied and validated in accordance with standard FDA requirements for food additives.

In addition to requesting the information above relating to exposure from food-contact applications of acrylonitrile copolymers, the agency is requesting comments on approaches for regulating these copolymers that would ensure that their food-contact uses are safe.

VI. Economic and Environmental Impact

The modification of the acrylonitrile copolymer regulations that the agency is considering may have economic consequences for individual industries. FDA is required by Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96-354) to assess the economic consequences of any regulation it proposes. However, the agency does not now possess the data that would permit a detailed assessment of the economic impact. Therefore, the agency requests that interested persons submit economic data, including manufacturing costs, that will aid the agency in determining the economic impact of a future action.

FDA is required to consider the potential environmental effects of the actions to be proposed and will prepare an environmental assessment that will be based, in part, on the environmental assessment/finding of no significant impact for approval of the new acrylonitrile/styrene copolymer beverage bottle (Docket No. 83F-0006). FDA requests comments on the potential environmental consequences, including solid waste management and incineration, of modifying the acrylonitrile copolymer regulations to reduce the potential exposure to acrylonitrile monomer in food and specifically seeks the following information:

(1) For each type of acrylonitrile copolymer marketed, for example acrylonitrile/styrene, specify the proportion of the monomers in the copolymer and provide the current annual markets (in pounds) of the copolymer for both single service and repeat uses. Market information may be submitted directly to the contact person, listed above, if it is confidential.

(2) Provide any information that bears on the conclusions in the environmental assessment/finding of no significant impact for approval of the new acrylonitrile/styrene copolymer beverage bottle (Docket No. 83F-0006).

VII. References

The following information has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Quast, J.F., C.E. Wade, C.G. Humiston, R.M. Carreon, E.A. Hermann, C.N. Park, and B.A. Schwetz, "A Two-Year Toxicity and Oncogenicity Study with Acrylonitrile Incorporated in the Drinking Water of Rats," Toxicology Research Laboratory, Dow Chemical USA, January 22, 1980.

2. "A 24-Month Oral Toxicity/Carcinogenicity Study of Acrylonitrile Administered in the Drinking Water of Fischer 344 Rats," Biodynamics Inc., submitted January 6, 1981.

3. Hogan, G.K., and W.E. Rinehart, "A 24-Month Oral Toxicity/Carcinogenicity Study of Acrylonitrile Administered to Spartan Rats in Drinking Water," Biodynamics, Inc., submitted July 28, 1980.

4. "Three-Generation Reproduction Study of Rats Receiving Acrylonitrile in Drinking Water," Litton Bionetics, Inc., February 1980.

5. Hogan, G.K., and W.E. Rinehart, "A 24-Month Oral Toxicity/Carcinogenicity Study of Acrylonitrile Administered by Intubation to Spartan Rats," Biodynamics, Inc., submitted July 28, 1980.

6. Quast, J.F., D.J. Schuetz, M.F. Balmer, T.S. Gushow, C.N. Park, and M.J. McKenna, "A Two-Year Toxicity and Oncogenicity Study with Acrylonitrile Following Inhalation Exposure of Rats," Dow Chemical USA, December 9, 1980.

7. "Health Assessment Document for Acrylonitrile," EPA 600/8-82-007F, October 1983, Chapter 13.5.

8. O'Berg, M.T., "Epidemiologic Study of Workers Exposed to Acrylonitrile," *Journal of Occupational Medicine*, 22:245, 1980.

9. Memorandum of Conference, Cancer Assessment Committee, "Acrylonitrile Risk Assessment," November 24, 1981.

10. Memorandum from Team Leader, Indirect Additives Laboratory, "Determination of Acrylonitrile in Locally Purchased Foods and Food Packages," April 29, 1980.

11. Memorandum from Chemist, Indirect Additives Laboratory, "Determination of Acrylonitrile in Locally Purchased Empress Olive Oil and Bottles," April 9, 1985.

12. Page, B.D., and C.F. Charbonneau, "Determination of Acrylonitrile in Foods by Headspace Gas-Liquid Chromatography with Nitrogen-Phosphorous Detection," *Journal of the Association of Official Analytical Chemists*, 66:1096, 1983.

13. Page, B.D., and C.F. Charbonneau, "Improved Procedure for Determination of Acrylonitrile in Foods and its Application to Meat," *Journal of the Association of Official Analytical Chemists*, 68-606, 1985.

14. Letter, Jerome H. Heckman to Gerad L. McCowin, May 26, 1983.

15. Letter, S. Riepma to R. Williams, November 29, 1983.

16. Letter, Jerome H. Heckman to Terry Troxell, November 11, 1983.

17. Memorandum from Supervisory Chemist, Indirect Additives Laboratory, "Margarine Tub Composition," January 20, 1983.

18. Memorandum from Supervisory Chemist, Indirect Additives Laboratory, "Identification of Polymers Used in Luncheon Meat Blister Packs," April 23, 1984.

Interested persons may, on or before May 7, 1990, submit to the Dockets Management Branch (address above) written comments regarding this advance notice. Trade secret and commercial confidential information should be submitted to the contact person identified above. Trade secret and commercial confidential information will be protected from public disclosure in accordance with 21 CFR part 20. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the

heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 23, 1990.

Ronald G. Chesemore,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 90-5294 Filed 3-7-90; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

RIN 1010-AB41

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: Minerals Management Service, Interior.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the regulatory program of the Minerals Management Service (MMS) governing offshore oil and gas operations. This action is required to notify the public of the proposed amendments and to invite substantive comments and recommendations on the content of the proposed action. The objective of this rule is to facilitate the public's access to MMS and to clarify provisions of the regulatory program administered by MMS.

DATES: Comments may be submitted on or before May 7, 1990.

ADDRESSES: Comments should be mailed or hand delivered to the Department of the Interior; Minerals Management Service; Mail Stop 646; 381 Elden Street; Herndon, Virginia 22070-4817; Attention: Gerald D. Rhodes.

FOR FURTHER INFORMATION CONTACT: Gerald D. Rhodes, Chief, Branch of Rules, Orders, and Standards; telephone (703) 787-1600, or (FTS) 393-1600.

SUPPLEMENTARY INFORMATION: The final rule published by MMS in the **Federal Register** on April 1, 1988 (53 FR 10596), consolidated and restructured existing rules contained in the regulations, OCS Orders, and Notices to Lessees and Operators. Since the final rule has been in effect, MMS has discovered a number of typographical errors and several minor inconsistencies between the previous regulations and OCS Orders and the final rule that could be viewed as a change from previous requirements when no change was intended. The MMS proposes to correct these typographical errors and inconsistencies by revising text of the related sections in 30 CFR part 250. Most of these revisions are minor and involve clarification of the section by modifying, removing, or adding a word or phrase. Several of the revisions contain requirements that were previously contained in the OCS Orders or in 30 CFR part 250 prior to the restructuring and consolidation of the offshore operating requirements under 30 CFR part 250. The revisions are discussed in greater detail below.

A new paragraph titled "Crane operations" (§ 250.20(c)) would be added to notify operators of requirements concerning the safe operation and maintenance of cranes on fixed platforms used during drilling, well-completion, well-workover, and production operations. The proposed requirements for the operation and maintenance of these cranes are the same as those currently required for cranes installed on fixed drilling platforms (§ 250.51(g)). The proposed requirements will be consolidated into one location under § 250.20, Safe and workmanlike operations, and § 250.51(g) will be deleted. The MMS is responsible for establishing requirements for cranes installed on all fixed OCS facilities according to the Memorandum of Understanding between MMS and the U.S. Coast Guard, dated August 29, 1989.

The revision to § 250.32, Well location and spacing, would add specific language addressing the Regional Supervisor's authority to require the lessee to protect the lessor from drainage. That protection may be in the form of drilling drainage protection wells or the payment of compensation to protect the interests of the lessor in lieu of drilling. The revision is needed to clearly identify that these authorities continue to be part of the Regional Supervisor's authority as provided by paragraph (b) of this section. The wording of the revision is similar to the language contained in the 30 CFR part 250 regulations prior to the restructuring and consolidation of the offshore operating regulations.

Section 250.124, Production safety-system testing and records, would be revised to delete the leakage rates specified for removing, repairing, and reinstalling or replacing subsurface-controlled subsurface safety valves (SSSV). It is inappropriate to specify test leakage rates for subsurface-controlled SSSV's because there is no hazard free and convenient method available to flow test a subsurface-controlled SSSV.

Section 250.183, Site security, would be revised to identify the current site security measures as those appropriate for the metering of liquid production. Security requirements for gas production, which differ somewhat from those for oil production, would be added in a new paragraph.

Paperwork Reduction Act

This rule would establish new information collection requirements by requiring lessees to maintain records of inspections, testing, maintenance, and crane operator qualifications for cranes used during well-completion, well-workover, and production operations on fixed platforms. The collections of information contained in this rule have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget. Public reporting burden for this collection of information is estimated to average 5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer; Minerals Management Service; Mail Stop 632, Parkway Atrium; 381 Elden Street; Herndon, Virginia 22070-4817; and the Office of Management and Budget, Paperwork Reduction Project 1010-0030; Washington, DC 20503.

Executive Order 12291

This amendment is not a major rule as defined under Executive Order 12291; therefore, a regulatory impact analysis is not required. The Department of the Interior (DOI) has determined that this rule will not have a significant economic effect on small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) since offshore activities are complex undertakings generally engaged in by enterprises that are not considered small entities.

Takings Implication Assessment

The rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, Government Action and Interference with Constitutionally Protected Property Rights.

National Environmental Policy Act

The DOI has also determined that this action does not constitute a major Federal action affecting the quality of

the human environment; therefore, an Environmental Impact Statement is not required.

Author

This document was prepared by William S. Hauser, Offshore Rules and Operations Division, MMS.

List of Subjects in 30 CFR Part 250

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Incorporation by reference, Investigations, Mineral royalties, Oil and gas development and production, Oil and gas exploration, Oil and gas reserves, Penalties, Pipelines, Public lands-mineral resources, Public lands-right-of-way, Reporting and recordkeeping requirements, Sulphur development and production, Sulphur exploration, Surety bonds.

Dated: January 22, 1990.

Barry Williamson,

Director, Minerals Management Service.

For the reasons set forth in the preamble, 30 CFR part 250 is proposed to be amended as follows:

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

1. The authority citation for part 250 continues to read as follows:

Authority: Sec. 204, Pub. L. 95-372, 92 Stat. 629 (43. U.S.C. 1334).

§ 250.1 [Amended]

2. Section 250.1, in paragraph (d)(2), remove citation "§ 250.51(g)" and add in its place the citation "§ 250.20(c)".

§ 250.19 [Amended]

3. Section 250.19, in paragraph (a), remove the citation "§ 250.41(b)" and add in its place the citation "§ 250.41(c)".

§ 250.20 [Amended]

4. In § 250.20, add a new paragraph (c) as follows: In § 250.20 Safe and workmanlike operating.

* * * * *

(c) *Crane operations.* Cranes installed on fixed platforms shall be operated and maintained in accordance with the provisions of the American Petroleum Institute (API) Recommended Practice (RP) for Operation and Maintenance of Offshore Cranes (API RP 2D) to ensure the safety of facility operations. Records of inspection, testing, maintenance, and crane operator qualifications in accordance with the provisions of API RP 2D shall be kept by the lessee at the lessee's field office nearest the Outer Continental Shelf (OCS) facility for a period of 2 years.

5. Section 250.32, add a new paragraph (c) as follows:

§ 250.32 Well location and spacing.

* * * * *

(c) The lessee shall drill and produce the wells the Regional Supervisor determines are necessary to protect the lessor from loss by reason of production on other properties, or in lieu thereof, with the approval of the Regional Supervisor pay a sum determined by the Regional Supervisor as adequate to compensate the lessor for the lessee's failure to drill and produce any well. Payment of that sum shall be considered as the equivalent of production in paying quantities for the purpose of extending the lease term.

§ 250.34 [Amended]

6. Section 250.34, in the second sentence of paragraph (t), remove the phrase "All applications for an APD to drill" and add in its place the phrase "All APD's".

§ 250.51 [Amended]

7. Section 250.51, remove paragraph (g) and redesignate paragraphs (h) and (i) as paragraphs (g) and (h), respectively.

§ 250.60 [Amended]

8. Section 250.60, remove the word "enclosed" from the title of paragraph (e).

§ 250.72 [Amended]

9. Section 250.72, in the last sentence remove the phrase "shut-in back-pressure valve" and add in its place the phrase "subsurface safety valve".

§ 250.86 [Amended]

10. Section 250.86, in the fourth sentence of paragraph (b)(2), remove the word "the" at the beginning of the sentence and add in its place the word "The" and remove the last word "operation" and add in its place the word "operations".

§ 250.87 [Amended]

11. Section 250.87, in the first sentence of paragraph (d) add the phrase "shall have a pressure rating greater than the shut-in tubing pressure and" between the words "equipment" and "shall".

§ 250.107 [Amended]

12. Section 250.107, in the first sentence of paragraph (d) add the phrase "shall have a pressure rating greater than the shut-in tubing pressure and" between the words "equipment" and "shall".

§ 250.123 [Amended]

13. Section 250.123, in the first sentence of paragraph (b)(1)(iii) remove the phrase "a significant change in operating pressures" and add in its place the phrase "a change in operating pressures which requires new settings for the high-pressure shut-in sensor and/or the low-pressure shut-in sensor as provided herein".

§ 250.123 [Amended]

14. Section 250.123, in the first sentence of paragraph (b)(7) remove the phrase "section A8" and add in its place the phrase "sections A4 and A8".

§ 250.124 [Amended]

15. Section 250.124, remove the last sentence of paragraph (a)(1)(ii).

§ 250.159 [Amended]

16. Section 250.159, in the first sentence of paragraph (c)(7)(i) add the phrase "determine to be reasonable, taking into account, among other things," between the words "parties," and "conservation".

§ 250.183 [Amended]

17. Section 250.183, in paragraph (a)(1) add the word "liquid" between the words "following" and "metering".

18. Section 250.183, add a new paragraph (a)(3) that reads as follows:

§ 250.183 Site security.

* * * * *

(a) * * *

(3) The following gas metering unit components shall be sealed in such a manner that the component cannot be opened, closed, or altered in any way without destroying the seal:

(i) All orifice and turbine meter tube flanges and fittings;

(ii) All orifice fitting housing components including bolts, plugs, ports, valves, and cranks;

(iii) All meter manifold piping valves and connections;

(iv) All differential pressure unit bolts and plugs;

(v) Chart or electronic recorder access doors;

(vi) Additional components as required by the Regional Supervisor.

* * * * *

[FR Doc. 90-5303 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

36 CFR Part 7

RIN 1024-AB85

Ozark National Scenic Riverways Restrictions for Motorized Vessels

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: This rulemaking will amend 36 CFR 7.83 by revising paragraph (a) which will designate zones of motorboat operation; restrict horsepower; and specify dates when the use of motors is restricted. This revision is necessary in order to resolve user conflicts, protect the quality of the rivers and the recreational experiences, and address visitor safety concerns. The intended effects are to increase safety, reduce conflicts and provide maximum recreational benefits to all river users.

DATES: Written comments, suggestions or objections will be accepted until April 9, 1990.

ADDRESSES: Comments should be directed to: Superintendent, Ozark National Scenic Riverways, P.O. Box 490, Van Buren, MO 63965.

FOR FURTHER INFORMATION CONTACT: Arthur L. Sullivan, Superintendent, Ozark National Scenic Riverways, Telephone: (314) 323-4236.

SUPPLEMENTARY INFORMATION:

Background

When the Ozark National Scenic Riverways was created in 1964, outboard motorboats were not a problem. The only outboard motorboats operating on the Current and Jacks Fork Rivers were the conventional propeller-driven motors with elongated shafts. These motors worked fine in deeper waters, but in shallow waters the propellers could hit bottom, often resulting in damage and requiring a frequent change of propellers. To get around this problem, local boat operators fitted their motors with a lever which, when lowered, would lift the shaft and propeller out of the water while the operator skimmed across shallow areas only a few inches deep. It took a great deal of skill and coordination to maneuver a boat through the shallows as the operator was required to increase his speed when approaching the shallows and press down on the lever at the right moment in order to lift the shaft and propeller out of the water to avoid damage, while maintaining sufficient momentum to get across the shallows and into deeper water where normal operations could be resumed. Because of this situation, most of the motorboats operating on the Current and Jacks Fork Rivers did not exceed 20 h.p. since larger heavier motors were more difficult to lift with a lever. However, a few motorboats up to 40 h.p. could be found on the lower Current River where the river is broader and deeper than the upper reaches of the Current River and Jacks Fork River.

The very nature of the narrow, winding and frequently shallow rivers coupled with the skill and coordination required to maneuver these streams tended to self-limit both the motor sizes and numbers of boaters operating on the rivers. Motorboaters and other river users co-existed peacefully so long as that situation prevailed.

Beginning in 1976 this situation changed abruptly when the first outboard motors retrofitted with jet pumps were introduced on the streams comprising the Ozark Scenic Riverways. It soon became evident to boating enthusiasts that the newly-introduced "jet motors" could operate easily in only inches of water and that no special skills were required. As a consequence, the number of boaters increased dramatically, as did the size of outboard motors no longer encumbered by the shallowness of the rivers. From approximately 11,000 boaters annually in the early 1970's, about 40,000 boaters were recorded in 1989. The smaller traditional motors with shaft and propellers have all but disappeared from the rivers and the Ozark Scenic Riverways is now dominated by large outboard jet motors, some with as much as 265 horsepower. Along with the increase in the number of boaters and the size of motors came a rise in conflicts with other river users—canoeists, tube floaters, fishermen and swimmers. The larger motors generated greater speed, some in excess of 50 mph, larger wakes, and required more space in proportion to their speed. They became a serious safety concern as well as a source of widespread dissatisfaction among other river user groups. In addition to the increase in the number and size of boats and motors, there was an increase in the number of canoeists and tubers. Canoe floater days increased from about 143,000 in 1975 to a high of 308,000 in 1982. Tubing statistics were first gathered in 1974 showing this form of river use to be a relatively minor activity as only 2,500 tubers were counted that year. Yet, this use too has grown dramatically to where nearly 38,000 tubers were recorded in 1988. The National Park Service first addressed river use issues in a General Management Plan (GMP) initiated in 1979 with a completed draft in 1981. During this planning process with extensive public involvement, two issues emerged as cause of greatest public concern—perceptions of overcrowding by canoeists and oversized motorboats. These issues were addressed in the GMP but approval of the plan was deferred primarily because commercial canoe use became involved in litigation. Since the court decision could impact the GMP, an administrative decision was made in 1984 to address river use issues in a separate River Use Management Plan so that management could proceed with implementation of the noncontroversial issues in the GMP. On this basis, the GMP was approved, December 7, 1984 and the park proceeded with the development of a River Use Management Plan completing the draft in November, 1986. In 1985 the United States District Court handed down its final decision clearly establishing the authority of the Federal Government to control commercial canoe operations on Ozark Scenic Riverways, thus concluding the litigation with the commercial canoe liveries.

During the preparation of the River Use Management Plan, seven public meetings were held in nearby communities, as well as St. Louis, Kansas City, Columbia, and Cape Girardeau, Missouri. More than 1,250 copies of the draft were distributed to various public agencies, organizations and individuals. In addition to comments received at public meetings, 1,680 mail responses were received and analyzed for consideration in preparing the final document.

Again, public response overwhelmingly favored reducing canoe use densities and placing horsepower limits on outboard motors. The River Use Management Plan, which was ultimately approved May 11, 1989 has successfully addressed public perceptions of overcrowding through the establishment of canoe density levels ranging from low (up to 10 canoes per mile) to high (up to 70 canoes per mile) and assigning these density levels to ten separate river zones. The general public has been made aware of this system through the development of a River Use Guide as an aid to river users in selecting the type of river recreational experience which meets their preference. The proposed outboard motor horsepower regulations, with respect to maximum limits, assigned zones and times of year, were designed to reduce conflicts between other river users, particularly canoeists, increase safety, provide for year-round fishing opportunities and enhance visitor enjoyment of the resources.

The Current River above Round Spring is the most popular and heavily-used section of the Riverways by canoeists, particularly from about the first of May through the middle of September. This 34-mile section of river is most suited to canoeing because it is narrower, more winding, shallower and has more riffles and chutes than does the remainder of the Current River below Round Spring. The very factors which contribute to the popularity of this river segment for canoeists are detrimental to large motors and few motorboats are to be found on this section of river in comparison to the lower Current. Thus, a maximum of 25 h.p. was deemed most compatible with this river segment, considering the other uses, and would have minimal impact on motorboaters as most motors found on this river segment are already within the proposed limits.

The Current River above Akers is even more narrow than below and becomes more congested with canoeists during the summer months. A 10 horsepower maximum is proposed for this segment to minimize conflict, and increase safety while permitting fishing opportunities for motorboaters throughout the summer.

Canoe use drops dramatically after Labor Day and the traditional gigging season opens September 15. Because of these factors, it is proposed to permit outboard motors up to a maximum of 25 horsepower to resume activities with the opening of the gigging season.

The river zones below Round Spring on the Current River have been designated either low (0–10 canoes per mile) or medium (11–40 canoes per mile) density use areas. Since canoe use is much lighter below Round Spring and the river is wider, deeper and more suitable for larger motors, it is proposed 40 horsepower maximum be allowed on the Current River below Round Spring and above the Big Spring boat launching ramp. This 57-mile segment of the Current River would be available to motorboaters on a year-round basis and be more closely related to the traditional motorboat use when propellerdriven 20 h.p. motors were prevalent. It is recognized that jet-propelled outboard motors lose some thrust and a 40 h.p. jet-propelled motor is roughly equivalent to a 20 h.p. propeller unit.

The 16-mile Current River segment below the Big Spring boat launching ramp has likewise been designated a low-density canoe use area. This river segment is the least travelled by canoeists and even less-used by tubers. This segment is also the widest, deepest and where the heaviest motorboat use occurs. It is the one river segment most suitable for larger motors and the one segment where conflicts between various user groups is minimal. Therefore, no limits on outboard motors is proposed for this river segment.

The Jacks Fork River above Alley Spring is similar to the Current River above Round Spring and 25 h.p. maximum is proposed for this 25-mile river segment for the same reasons. The canoe-use pattern differs somewhat in that water depths suitable for canoeing are seasonal and very limited, ranging from about March 1 to about the first of June. Canoe use above Bay Creek is very heavy during this period and is the rationale for limiting outboard motors to a maximum of 10 h.p. to reduce conflict, increase safety and enhance visitor enjoyment. The bass season opens the Saturday before Memorial Day and by this time canoe use above Bay Creek tapers off considerably because of dropping water levels. Although this river segment is not easily navigable during periods of low water, there are a number of deep pools which are favorite fishing haunts of local motorboaters and it is proposed that 25 horsepower maximum be again permitted with the opening of the bass season when conflict between motorboaters and canoeists is at its lowest. Below Alley Spring on the Jacks Fork, 40 horsepower maximum is proposed for the same reasons as on the Current River below Round Spring.

The need to define the horsepower rating method was prompted by the recent advent of rating horsepower at the propulsion device by some manufacturers, rather than ratings based on the use of the prevailing industry standard which measures horsepower output at the propeller shaft. This resulted in different interpretations of what size engine could be used on the river.

The very nature of the shallow, narrow rivers precludes the use of boats with inboard motors. Thus, only outboard engines, the traditional engine used on the rivers, are addressed by this regulation.

The proposed outboard motor horsepower restrictions are intended to complement other elements in the River Use Management Plan. River zoning, canoe density levels, horsepower restrictions and public education are all essential ingredients for a diversified, well-balanced river recreation program which will minimize river use conflicts, maximize public safety and enhance visitor enjoyment of resources.

Public Participation

The policy of the National Park Service is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule to the address noted at the beginning of this rulemaking.

Drafting Information

The authors of this regulation are Arthur L. Sullivan, Superintendent, and Tom Graham, Chief Ranger, both of Ozark National Scenic Riverways.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance With Other Laws

Pursuant to the National Environmental Policy Act (42 U.S.C. 4332) the Service prepared an Environmental Assessment and Draft River Use Management Plan in November 1985. Public input was provided during a series of public hearings and workshops. Extensive public comment, both oral and written, was received regarding the matter of motorized vessel horsepower limitations and zoning. The Service has determined that this rulemaking is not a "major rule" within the meaning of E.O. 12291 ((46 FR 13193); Feb. 19, 1981). In accordance with the Regulatory Flexibility Act (Pub.L. 96–511) which became effective January 1, 1981, the Service has determined that the regulations proposed in the rule making will not have a significant economic effect on a substantial number of small entities, nor does it require a preparation of a regulatory analysis.

List of Subjects in 36 CFR Part 7

National parks; Reporting and recordkeeping requirements.

In consideration of the foregoing, it is proposed to amend 36 CFR chapter I as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation continues to read as follows:

Authority: 16 U.S.C. 1,3,9a, 462(KK); § 7.69 also issued under DC Code 8–137 (1981;) and DC Code 40–721 (1981).

2. Section 7.83 is amended by revising paragraph (a) to read as follows:

§ 7.83 Ozark National Scenic Riverways.

(a) *Restrictions for motorized vessels.* (1) On waters situated within the

boundaries of Ozark National Scenic Riverways, the use of a motorized vessel is limited to a vessel equipped with an outboard motor only.

(2) For the purposes of this section, horsepower ratings on a particular motor will be based upon the prevailing industry standard of power output as established by the manufacturer at the propeller shaft.

(3) The use of a motorized vessel is allowed as follows:

(i) Above the Big Spring landing on the Current River and below Alley Spring on the Jacks Fork River with an outboard motor not to exceed 40 horsepower.

(ii) Above Round Spring on the Current River and above Alley Spring on the Jacks Fork River with an outboard motor not to exceed 25 horsepower.

(iii) Above Akers Ferry on the Current River from May 1 to September 15 with an outboard motor not to exceed 10 horsepower.

(iv) Above Bay Creek on the Jacks Fork River from March 1 to the Saturday before Memorial Day with an outboard motor not to exceed 10 horsepower.

(4) Operating a motorized vessel other than as allowed in § 7.83(a) is prohibited.

* * * * *

Dated: February 15, 1990.

Knute Knudson Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 90-5359 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3731-2]

Approval and Promulgation of Implementation Plans; Wisconsin

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Proposed rulemaking.

SUMMARY: Today's proposed rulemaking pertains to rules developed by Wisconsin for non-fugitive particulate emissions, sulfur dioxide, volatile organic compounds (VOC), carbon monoxide, lead, total reduced sulfur, non-criteria pollutants, and opacity sources and is in response to a November 17, 1987, submission from the State of Wisconsin. USEPA is proposing to disapprove Wisconsin's Rule Natural Resources (NR) 431.07—Establishing Alternate Opacity Limits; NR 439.04—Recordkeeping; NR 439.06—Methods and Procedures for Determining Compliance with Emission Limitations; NR 439.07—Methods and Procedures for Performing Compliance Stack Emission Testing, Fuel Sampling and Analysis and Continuous Emission Monitoring; and NR 439.12—Compliance Determination Requirements. USEPA is proposing to approve NR 439.03—Reporting; NR 439.09—Inspections; and NR 484.04—Code of Federal Regulations Provisions.

The intent of today's rulemaking is (1) to present a discussion of the materials submitted by the Wisconsin Department of Natural Resources (WDNR) to support the regulations, and (2) to provide an opportunity for the public to comment on the regulations and on USEPA's proposed disapproval of NR 431.07, NR 439.04, NR 439.06, NR 439.07, and NR 439.12; and proposed approval of NR 439.03, NR 439.09, and NR 484.04.

DATES: Comments on this revision and on the proposed USEPA action must be received by May 7, 1990.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review: (Please telephone Uylaine E. McMahan, at (312) 886-6031, before visiting the Region V office.)

U.S. Environmental Protection Agency, Regional V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604.

Wisconsin Department of Natural Resources, Bureau of Air Management, 101 South Webster, Madison, Wisconsin 53707.

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.)

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), Region V, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan, Air and Radiation Branch (5AR-26), Region V, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6031.

SUPPLEMENTARY INFORMATION: On November 17, 1988, the Wisconsin Department of Natural Resources (WDNR) submitted two sets of rules (1) NR 431.07, which governs issuance of alternative opacity limits, and (2) NR 39.03, .04, .06, .07, .09, and .12 and 484.04, which establish methods and procedures for determining whether sources are in compliance. These rules are titled as follows:

1. NR 431.07—Establishing Alternative Opacity Limits
2. NR 439.03—Reporting
3. NR 439.04—Recordkeeping
4. NR 439.06—Methods and Procedures for Determining Compliance with Emission Limitations
5. NR 439.07—Methods and Procedures for Performing Compliance Stack Emission Testing, Fuel Sampling and Analysis, and Continuous Emission Monitoring
6. NR 439.09—Inspections
7. NR 439.12—Compliance Determination Requirements
8. NR 484.04—Code of Federal Regulations Provisions and Other Materials in Chapter NR 439.

Below is USEPA's evaluation of these rules.

Section NR 431.07—Establishing Alternative Opacity Limits

USEPA is proposing to disapprove this rule since the method of calculation for establishing alternative opacity limits under NR 431.07(4) is not acceptable.

A. NR 431.07(4) Calculation of the Alternate Opacity Limit

This subsection provides the methods for calculating average opacity and establishing an alternative opacity limit. It sets the alternate visible emission limit at ten percent over the value recorded during performance testing which demonstrates compliance with the mass emission limit. However, setting an alternative opacity limit that is ten percent greater than the arithmetic mean of the average opacity values of each test run may relax the visible emission limit determined during the test to the extent that a source may be in compliance with the new visible emission limit while being out of compliance with the mass limit. Thus, the visible emission limit would not be an effective surrogate for determining compliance with the mass limit. USEPA is, therefore, proposing to disapprove this rule because the State has not demonstrated that compliance with the higher opacity level determined by NR 431.03(4) will still provide for compliance with the mass limit.

B. NR 431.07(5) Restriction on Establishing Limit

This subsection provides that no alternative opacity limit may be established under this section if any other applicable emission limit would be violated by the source when operating at the established alternative opacity.

This subsection is not enforceable because it does not specify clearly the procedure for verifying compliance with the applicable mass limit when the source is operating at the established alternative opacity. For this reason this subsection is being proposed for disapproval.

The provisions in NR 431.07(1)-(3) are acceptable and could be proposed for approval but for the fact that the elements discussed above are not acceptable. Therefore, the entire rule, NR 431.07, is being proposed for disapproval. In addition, NR 431.07 allows the WDNR to use an alternative test method. Such an alternative method would not be federally enforceable unless it is submitted and approved as a site-specific revision to the SIP. Traditionally, USEPA has approved such language in State rules with the understanding that the State would submit such rules as revisions to their SIPs, and the underlying SIP would remain federally enforceable until and if the new methodology is approved as a revision to the SIP. Recent District court opinions [1] have questioned whether USEPA can still enforce underlying methodologies where States have adopted an alternative method, if USEPA was not explicit in its rulemaking that methods approved under rules with such language remain enforceable until the alternative methods are submitted and approved as site-specific revisions to the SIP. USEPA specifically soliciting comment on whether this "agency discretion" provision in this rule is another reason it should be disapproved.

Section NR 439.03—Reporting

The provisions of these rules are consistent with the requirements for notification and recordkeeping described in 40 CFR 60.7. This portion of the rules is being proposed for approval.

Section NR 439.04—Recordkeeping

The provisions of this rule do not explicitly state those records which sources are required to keep to assess compliance for the time frames specified in chapters NR 400 to 499. For example, NR 422.09(5) allows daily weighted averaging of VOC emissions for automobile and light-duty truck manufacturing. However, nowhere in NR 439.04 or NR 422.09 are recordkeeping timeframe requirements specified. Additionally, failure to comply with recordkeeping requirements should be a violation in itself. Because of these inadequacies in compliance measurements, this rule is being proposed for disapproval.

[1] See *U.S.* v. *Allsteel, Inc.*, No. 87 C 4638 (N.D. Ill. August 30, 1989) and *GM Arlington* v. *U.S.*, No. 4-87-580-E (N.D. Tex. December 19, 1988).

Section NR 439.06—Methods and Procedures for Determining Compliance with Emission Limitations

This rule specifies the test method to determine a source's compliance with limitations for non-fugitive particulate emissions, sulfur dioxide, VOCs, carbon monoxide, lead, total reduced sulfur, non-criteria pollutants, and opacity. NR 439.06 allows the WDNR "to use any relevant information or appropriate method to determine a source's compliance with applicable emission limitation," in spite of the compliance demonstration methods which the owner or operator of a source is authorized to use under NR 439.06. This provision is not clear as to whether USEPA approval of the WDNR granted alternative compliance techniques is required on a case-by-case basis in order for the change mode of compliance to replace the existing federally enforceable requirement. If USEPA case-by-case approval is not required, then specific, objective, and replicable criteria must be set forth for determining whether the new arrangement is truly equivalent in terms of emission rates and control levels specified in the overall SIP control strategy.

NR 439.06(3)(F) allows a VOC surface coating source to determine the transfer efficiency of its coating equipment with methods approved by the WDNR. Rules allowing transfer efficiency to be used in determining compliance must set forth an appropriate test method so that the improved transfer efficiency can be demonstrated. Also, this provision does not state that USEPA approval is required on a case-by-case basis. Because of these compliance related inadequacies, these rules are being proposed for disapproval. See Footnote 1.

Section NR 439.07—Methods and Procedures for Performing Compliance Stack Emission Testing, Fuel Sampling and Analysis, and Continuous Emission Monitoring

The rule specifies the test protocol and procedure which are required by the State in performing a compliance stack test (e.g., test plan, pretest conference, witnessing requirements, equipment calibration, number of runs required, testing during soot blowing, and reporting of test results). This rule also provides the methods and procedures for fuel sampling and analysis, and procedures for installation, calibration, and operation of a continuous emission monitor.

The following provisions within NR 439.07 allow WDNR discretion in determining alternative equivalent techniques:

(1) NR 439.07(1) states that emission tests conducted for the purpose of determining compliance with an emission limitation shall be performed according to test methods established in 40 CFR part 60, Appendix A, or according to other methods approved in writing by the Department.

(2) NR 439.07(1)(h)1 states that an emission test, except as provided in subdivisions 3, 10, 1, or 13, shall consist of a minimum of three representative repetitions, as determined by the Department, of the applicable test method.

(3) NR 439.07(1)(h)7 allows the Department to approve alternate methods to determine the boiler heat input for boiler emission concentrations in pounds per million BTU heat input.

(4) NR 439.07(1)(h)14 allows the Department to approve methods and procedures for the analysis of the back half of the Methods 5 or 17 sampling train.

(5) NR 439.07(2) states that a source may use alternative methods approved by the Department to obtain a fuel sample and perform an analysis.

(6) NR 439.07(3) allows the Department to approve alternative methods for the installation, calibration, maintenance, and operation of a continuous emission monitoring system.

These provisions do not require USEPA case-by-case approval before implementation. Therefore, specific, objective, and replicable criteria must be set forth for determining whether the new arrangement is truly equivalent in terms of emission rates and control levels specified in the overall SIP control strategy.

With regard to test conditions (e.g., capacity of test and sampling duration specified in NR 439.07(1) and NR 439.07(1)(h)1.), the provisions do not specifically state and justify conditions for testing at less than full capacity and sampling for shorter times than specified in the rule. As these elements are presently written, the standard to which a source will be held when doing a compliance emission test is open to a subjective determination by the department. Therefore, USEPA is proposing to disapprove this portion of the rule.

NR 439.07(1)(h)12 does not specify a method to determine capture efficiency. Capture efficiency is required, in addition to efficiency of the control device, when determining the overall emission reduction efficiency of a control system. Without a test method, it is not clear how compliance will be

determined. Therefore, USEPA is proposing to disapprove this portion of the rule.

NR 439.07(1)(h)(14) states that the Department may require a source capable of emitting condensible particulate matter to include an analysis of the back half of the Method 5 or 17 stack sampling train. This provision should be clarified to state explicitly who will be required to do back half catch. Therefore, USEPA is proposing to disapprove this portion of the rule.

Section NR 439.09—Inspections

This rule is consistent with the inspection and monitoring requirements of sections 114(a)(2) of the Clean Air Act, therefore, USEPA proposes approval of this rule.

Section NR 439.12—Compliance Determination Requirements

This rule specifies the compliance testing requirements for emission sources for which permits have been issued. It also includes the emission sources that are exempted from the compliance testing requirements.

NR 439.12(1)(b)1 states that sources with an emission point that has allowable emissions of particular matter, sulfur dioxide, or organic compounds of 100 tons or more per year, or allowable emissions of total reduced sulfur of 25 tons or more per year, shall perform compliance emission testing according to the testing schedules in paragraph (c). It is not clear how the calculation of allowable emissions will be made. Additionally, because throughput varies from year to year, this provision should state how often the allowable determination will be made.

NR 439.12(2)(b) requires fuel sampling and analysis for certain coal burning installations. The averaging period for sources with a coal burning rate greater than 250,000 tons per year is daily. For sources with a coal burning rate between 100,000 and 250,000 tons per year, the averaging period is weekly. For sources with a coal burning rate greater than 10,000 tons per year but less than 10,000 tons per year, the averaging period is quarterly. These timeframes are inconsistent with the compliance timeframes associated with stack tests, and one can not say with certainty that the ambient standard will be protected.

NR 439.12(2)(C) requires fuel sampling for certain residual fuel oil burning installations. The averaging period for sources burning residual fuel oil at a rate equal to or greater than 1.5 million gallons per year is monthly. For sources with a fuel oil burning rate between 150,000 gallons per year and 1.5 million gallons per year, the averaging period is quarterly. Sources with a fuel burning rate less than 150,000 gallons per year are required to retain copies of the suppliers analysis for each shipment of residual fuel oil received. There is not a clear demonstration that the averaging times specified above are sufficient to protect the ambient standard.

NR 439.12(3)(e)1.a and NR 439.12(13)(e)1.b.2 allow WDNR discretion in determining equivalent compliance techniques as an alternative to continuous emission monitoring for opacity and sulfur dioxide at fossil fuel fired steam generating facilities. If USEPA case-by-case approval is not required, then specific, objective and replicable criteria must be sent forth for determining whether the new arrangement is truly equivalent in terms of emission rate and ambient impact. Therefore, USEPA is proposing disapproval of this rule. See Footnote 1.

Section 484.04—Code of Federal Regulation Provisions

This rule incorporates by reference the Appendices A (Reference Methods) and B (Performance specifications) of 40 CFR part 60 in the corresponding sections of NR 439. USEPA proposes approving this portion of this rule.

Conclusion

USEPA is proposing to disapprove the following Wisconsin's Rules:

1. NR 431.07 for establishing alternate opacity limits.
2. NR 439.04 for Recordkeeping.
3. NR 439.06 for Methods and Procedures for Determining Compliance with Emission Limitations.
4. NR 439.07 for Methods and Procedures for Performing Compliance Stack Emission Testing, Fuel Sampling and Analysis and Continuous Emission Monitoring.
5. NR 439.12 for Compliance Determination Requirements.

Even if USEPA were to ultimately approve NR 431.07, it would not be approving any alternate emission limit approved by the WDNR or those which will be approved by WDNR in the future. All such alternative opacity limits would have to continue to be submitted and approved as site specific revisions before they would become portions of the Wisconsin SIP. Also, USEPA is soliciting comments on whether the "Department Discretion" provision is another reason to disapprove the above rules.

The following sections are acceptable and are being proposed for approval unless the State informs USEPA during the public comment period that it does not wish these approved if USEPA disapproves the remainder of the rules.

1. NR 439.03, Reporting.
2. NR 439.09, Inspection.
3. NR 484.04, Code of Federal Regulation Provisions.

This action has been classified as a Table Two action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget waived Table Two and Three SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of 2 years.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under 5 U.S.C. 605(b), I certify that the elements of SIP disapproval proposed in this notice will not have a significant economic impact on a substantial number of small entities because they put no new requirements on sources.

USEPA is providing a 60-day comment period on this notice of proposed rulemaking. Public comments received on or before May 7, 1990, will be considered in USEPA's final rulemaking. All comments will be available for inspection during normal business hours at the Region V office listed at the front of this notice.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7642.

Dated: January 16, 1990.

Frank M. Covington,

Acting Regional Administrator.

[FR Doc. 90–5336 Filed 3–7–90; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 411

[BPD-482-P]

RIN 0938-AD73

Medicare Program; Medicare Secondary Payer for Disabled Active Individuals

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: This proposal sets forth the rules that limit Medicare payment for services furnished to disabled "active individuals" who are covered under a large group health plan (LGHP), and prohibit discrimination by an LGHP against such individuals.

These rules are necessary to implement section 1862(b)(1)(B) of the Social Security Act (the Act), and related provisions, which make Medicare benefits secondary to LGHP benefits.

DATES: To be considered, comments must be mailed or delivered to the appropriate address, as provided below, and must be received by 5:00 p.m. on May 7, 1990.

ADDRESSES: Mail comments to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: BERC-482-P, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Ave., SW., Washington, DC., or,

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

Due to staffing and resource limitations, we cannot accept facsimile (FAX) copies of comments.

In commenting, please refer to file code BERC-482-P. Comments received timely will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in Room 309-G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

FOR FURTHER INFORMATION CONTACT: Herbert Pollock, (301) 966-4474.

SUPPLEMENTARY INFORMATION:

Background

During the first 15 years of the Medicare program, Medicare was primary payer for all services to Medicare beneficiaries, with the sole exception of services covered under workers' compensation. It was not until 1980 that Congress began to amend section 1862 of the Act to make Medicare secondary, first to automobile, liability and no-fault insuance, and later to employer group health plans that cover end-stage renal disease (ESRD) patients, and that cover employed aged individuals and aged spouses of employed individuals of any age.

Statutory Amendments

Section 9319 of the Omnibus Budget Reconciliation Act of 1986 (OBRA '86) added a new section 1862(b)(4) to make Medicare secondary to benefits payable by "large group health plans" for services furnished to active individuals who are entitled to Medicare on the basis of entitlement to social security disability benefits.

OBRA '89 reorganized and clarified the Medicare Secondary Payer (MSP) provisions. In particular, it transferred the MSP provisions regarding the disabled to section 1862(b)(1)(B) of the Act. Amendments that were included in section 6202 of OBRA '89 but which are unrelated to the Medicare Secondary Payer for the Disabled provisions, will be included in a separate proposal.

Treatment of Disabled Active Individuals

The OBRA '86 amendment revised section 1862(b) to—

- Define "active individual" to include an employee (as may be defined in regulations), the employer, an individual associated with the employer in a business relationship, or a member of the family of any of those persons. (The definition of "active individual" is now located in section 1862(b)(1)(B)(iv)(I).)
- Define "large group health plan" (LGHP), by reference to section 5000 of the Internal Revenue Code of 1986, which defines the term as "a plan of, or contributed to by, an employer or employee organization, to provide health care to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families", and that covers employees of at least one employer that "normally employed at least 100 employees on a typical business day during the previous calendar year". We have interpreted the phrase "normally employed at least 100 employees on a typical business day", to mean that the employer employed at least 100 full-time or part-time employees during 50 percent or more of the employer's business days during the previous calendar year.
- Provide that Medicare may not pay for services furnished to an active individual on or after January 1, 1987 and before January 1, 1992, if payment has been made or can reasonably be expected to be made by an LGHP.
- Provide that an LGHP "may not take into account that an active individual is eligible for or receives" Medicare benefits on the basis entitlement to social security disability benefits. The effect of this prohibition is to require the LGHP to treat disabled active individuals the same way it treats other individuals enrolled, or seeking to enroll, in the plan. An individual who has been determined to be "under a disability" in accordance with section 223 of the Act must wait generally 5 months before he or she becomes entitled to social security disability benefits, and must be entitled to those benefits for 24 months before becoming entitled to Medicare benefits in accordance with section 226(b) of the Act. Thus, Medicare entitlement generally begins with the 30th month after disability begins.

Once the individual becomes entitled to Medicare benefits, he or she is protected against discrimination. It is clear that the Congress intended that this provision be applied in a manner that would prevent employers from denying LGHP coverage to individuals because they become entitled to Medicare based on disability. We believe that the provision does not require LGHPs

- To cover all disabled persons; or
- To maintain coverage of active individuals during the statutory waiting period between SSA's determination of disability and the individual's entitlement to Medicare on the basis of that disability.

However, there are circumstances under which an LGHP's denial or termination of coverage for disabled active individuals would be considered as "taking into account" their Medicare entitlement. The basic rule is that an LGHP that covers disabled individuals may not alter that coverage because of Medicare entitlement.

Consistent with this rule, HCFA would not consider an LGHP to have discriminated against a disabled active individual if it imposes on that individual the same rules regarding pre-existing conditions and exclusions from coverage that are applicable to all plan enrollees.

Because a determination by SSA that a person is "under a disability" results in Medicare entitlement once the statutory waiting period has elapsed, HCFA would compare what the LGHP offered or provided at or after the point of disability determination with what it offered at or after the point of Medicare entitlement. If there is LGHP coverage *at or after the point of disability determination*, the LGHP cannot, *at or after the point of Medicare entitlement*, deny or modify that coverage without the action's being considered as "taking

into account" the individual's Medicare entitlement.

In summary, we believe that if a LGHP limits an individual's coverage or removes the individual from the plan during the statutory waiting period, failure to reinstate the individual or to restore previous coverage when he or she becomes entitled to Medicare constitutes discrimination. HCFA would report that LGHP to the International Revenue Service as a nonconforming LGHP. Any other interpretation would defeat the purpose of the amendment since, except for the statutory waiting period, being "under a disability" creates Medicare entitlement, and since otherwise the LGHP could avoid responsibility simply by excluding or removing the disabled individual from the plan at any time during the statutory waiting period. Our interpretation is reflected in § 411.82 (definition of "disabled active individual") and in § 411.94.

Recovery of Incorrect Payments

Previous amendments to section 1862(b) of the Act had made explicit that HCFA has—

- Statutory recovery rights that exceed those of any other entity, as well as subrogation rights and the right to intervene, when third party payers fail to make payments primary to Medicare;
- The right to recover from any other entity that is responsible for making primary payment; and
- The right to recover from any other entity (such as a provider) that received payment from an insurer that is primary to Medicare and fails to reimburse the Medicare primary payments.

The above provisions were explained in the final rule that dealt with Medicare recovery against third parties, and was published on October 11, 1989 at 54 FR 41716.

The OBRA '86 amendments go beyond that to provide that HCFA may recover double damages from an LGHP that fails to provide for primary payment. OBRA '86 also amended section 1862(b) to create a private cause of action under which any claimant may collect double damages from any third-party payer that fails to pay primary benefits in accordance with section 1862(b) of the Act.

Internal Revenue provisions.

OBRA '86 also amended the Internal Revenue Code to—

- Define "nonconforming large group health plan" as a large group health plan that "at any time during a calendar year does not comply" with the requirements that preclude discrimination.
- Impose, on any employer or employee organization (other than a governmental entity) that contributes to a nonconforming LGHP, a tax equal to 25 percent of the expenses the employer or employee organization incurred, during a calendar year, for each LGHP to which it contributes.

As noted above, the OBRA '86 amendments require that an LGHP not take into account that an active individual is eligible for or receives Medicare benefits on the basis of entitlement to Social Security disability benefits.

This last amendment makes HCFA responsible for reporting to the IRS any LGHP that fails to comply with the requirement to treat disabled "active individuals" the same as others enrolled under the plan.

OBRA '86 also requires the Comptroller General to conduct a study to determine the impact of the above provisions on the access that disabled individuals and members of their families have to employment and health insurance.

Provisions of the Regulations

These proposed regulations would add a new Subpart G to Part 411—Exclusions from Medicare and Limitations on Medicare Payment, which was established by final rules published on October 11, 1989 at 54 FR 41716. Part 411 includes a subpart B that sets forth rules applicable to all the types of insurance that are primary to Medicare under section 1862(b), and that are commonly referred to as "third-party payers". Subpart B includes rules on recovery and waiver of recovery, Medicare secondary payments, and the effect of third-party payments on benefit utilization and deductibles. Accordingly, this proposed subpart G includes only those rules that apply exclusively to LGHPs, or that differ to some extent from similar rules applicable to other third-party payers.

In developing these proposed rules, it was necessary to answer several questions:

- What is the meaning of a "typical business day" during the previous calendar year?
- Since disabled individuals are usually not actively employed, how should we determine that such an individual is considered to be an "employee"?
- How does an LGHP "not take into account" that an active individual is "eligible for or receives" Medicare benefits based on disability?
- How can we deal with the above noted 30-month lapse between the finding of disability and entitlement to Medicare on the basis of entitlement to social security disability benefits?

In responding to the first question, we propose to interpret "typical business day" as 50 percent or more of the employer's regular business days during the previous calendar year.

- We propose to define "employee" as an individual who is actively working or whose relationship to an employer shows that he or she is an employee within the ordinary understanding of that term. We believe that "employee" status (in the case of persons who are not working) is established by the unique facts regarding the person's relationship to the employer, even if the employer categorizes the person differently.

We believe that employee status is established if the individual meets any of the following conditions:

- Receives from an employer payments that are subject to taxes under the Federal Insurance Contributions Act (FICA) or would be subject to such taxes except for the fact that the employment or the payment is exempt from those taxes under the Internal Revenue Code.
- Is termed an employee under a Federal or State law or in accordance with a court decision.
- Is designated as an employee in the employer's records, that is, has not had his or her employee status terminated. We do not consider termination from payroll to be, in and of itself, termination from employee status.

Failure to furnish information to enable HCFA to determine an individual's employee status, including failure to answer employer certification letters, may lead to denial of payment of Medicare primary benefits.

We also give examples of other commonly accepted indicators of employment status, examples that we developed in consultation with other government agencies, including the Department of Labor and the Internal Revenue Service. The existence of any of the other commonly accepted indicators could be a basis for concluding that the individual is an employee in the absence of evidence to the contrary.

We considered adding the following indicators to the list that appears in § 411.83(b):

- Accrues years of service credits for pension purposes (that is, the individual's age-based pension rights continue to increase); and
- May become vested under the employer's retirement plan, even though he or she was not vested at the time the disability was established.

We specifically request comments on whether to include those two indicators in the final rule.

The proposed rules also—

• Define "disabled active individual" as an active individual who has been determined to be "under a disability" under section 223 of the Act, as evidenced by issuance of an SSA notification to that effect, and who is not, and could not upon filing an application become, entitled to Medicare on the basis of end-stage renal disease.

• Define "family member" so as to include any person whose relationship to the active individual is the basis for coverage under an LGHP, for example, the relationship of a divorced or common law spouse, or that of an adopted, foster, natural or step-child, parent, or sibling.

• Provide examples of LGHP actions that would be considered discriminatory, including discontinuance of, or failure to offer or restore, LGHP coverage to a disabled active individual when he or she becomes entitled to Medicare on the basis of entitlement to social security disability benefits. This provision would ensure that a disabled active individual who is excluded or removed from the LGHP during the statutory waiting period, will have the opportunity to be covered under the LGHP as primary payer, once Medicare entitlement becomes effective.

• Indicate the kinds of information that HCFA may require to documenting an LGHP's compliance with the nondiscrimination rule.

• Specify that HCFA will refer to the Internal Revenue Service (IRS) any LGHP that it finds to be a nonconforming LGHP.

• Specify that the IRS will decide whether to impose, on employers or employee organizations that contribute to a nonconforming LGHP, the tax provided for under section 5000 of the Internal Revenue Code of 1986.

Regulatory Impact Statement

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed regulation that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in; an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. In addition, we generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a proposed regulation would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all providers and fiscal intermediaries as small entities.

Also, section 1102(b) of the Act requires the Secretary 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. Such an 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 with fewer than 50 beds located outside a metropolitan statistical area.

These proposed changes would conform the regulations to legislative provisions that are already in effect. Any costs or savings under these provisions are a result of the law and not the regulations themselves. Any costs or savings would be incurred regardless of the promulgation of regulations. Further, section 5000(e) of OBRA '86 requires the Comptroller General to study and report to Congress by March 1, 1990, on the impact of access to disabled individuals and their families, as well as the amount of savings to the Medicare program through this provision.

For these reasons, we have determined that a regulatory impact analysis is not required. Further, we have determined and the Secretary certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities and would not have a significant impact on the operations of a substantial number of small rural hospitals. We, therefore, have not prepared a regulatory flexibility analysis.

Paperwork Reduction Act

Sections 411.88(c)(2) and 411.94(e) of this proposed rule contain information collection requirements that are subject to Office of Management and Budget (OMB) review under the Paperwork Reduction Act of 1980.

Section 411.88(c)(2) requires, as a prerequisite for making Medicare conditional payments, information about the beneficiary and the employment status of the beneficiary and members of his or her family. It is estimated that providing this information requires about 15 minutes per response.

Section 411.94(e) provides that HCFA may require the employer or LGHP to submit documentation showing that there is no discrimination against disabled active individuals. The public reporting burden for this collection of information is estimated to be 20 hours per response.

If you comment on these requirements, please send a copy of your comments to:

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503, Attention: Allison Herron, Desk Officer for HCFA.

When OMB approves these requirements, we will publish a notice to that effect.

Response to Comments

Because of the large number of comments we receive on documents published in the **Federal Register**, we cannot acknowledge or respond to them individually. However, in developing the final rule, we will consider all timely comments and discuss them in the preamble to that rule.

List of Subjects in 42 CFR Part 411

Kidney diseases, Exclusions from Medicare, Limitations on Medicare payment, Medicare, Recovery against third parties, Reporting and recordkeeping requirements, Secondary payments.

42 CFR Chapter IV would be amended as set forth below:

A new subpart G would be added to part 411 to read as follows:

PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

* * * * *

Subpart G—Disabled Active Individuals: Limitations on Medicare Payment and Prohibition of Discrimination by Large Group Health Plans

Sec.

411.80 Basis and scope.
411.82 Definitions.
411.83 Determination of "employee" status.
411.85 Medicare benefits secondary to large group health plan benefits.
411.88 Basis for Medicare primary payments.
411.92 Recovery.
411.94 Nondiscrimination.

Authority: Secs. 1102, 1862(b), and 1871 of the Social Security Act (42 U.S.C. 1302, 1396y(b), and 1395hh).

Subpart G—Disabled Active Individuals: Limitations on Medicare Payment and Prohibition of Discrimination by Large Group Health Plans

§ 411.80 Basis and scope.

(a) *Statutory basis.* Section 1862(b) of the Act provides in part that—

(1) Medicare payment may not be made for services furnished to disabled active individuals if payment for those services has been made or can reasonably be expected to be made under a large group health plan (LGHP); and

(2) An LGHP may not take into account that an active individual is eligible for or receives Medicare benefits under section 226(b) of the Act, which provides for Medicare entitlement based on entitlement to social security disability benefits.

(b) *Scope and applicability.* This subpart—

(1) Sets forth rules for limiting Medicare payment for services furnished to active individuals who are entitled to Medicare on the basis of disability and are also covered under an LGHP; and

(2) Prohibits an LGHP from taking into account that a disabled active individual is entitled to Medicare on the basis of entitlement to social security disability benefits; that is, prohibits the LGHP from discriminating against that individual.

§ 411.82 Definitions.

As used in this subpart—

Active individual means an employee, an employer, a self-employed individual (such as the employer), an individual associated with the employer in a business relationship, or a family member of any of these persons.

Disabled active individual means an active individual who has been determined to be "under a disability" in accordance with section 223 of the Act (as evidenced by issuance of SSA notification to that effect) and who is not entitled, and could not, upon filing an application, become entitled to Medicare on the basis of end-stage renal disease.

Employee means an individual who is actively working for an employer or whose relationship to an employer is indicative of employee status on the basis of commonly accepted indicators such as those described in § 411.83.

Employer means, in addition to individuals and organizations engaged in a trade or business, other entities exempt from income tax such as religious, charitable, and educational institutions, the governments of the United States, the individual States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands and the agencies, instrumentalities and political subdivisions of those governments.

Family member means any person who is enrolled in a large group health plan because of a relationship to an active individual, including, for example, a divorced or common-law spouse or an adopted, foster, natural or step-child, parent, or sibiling.

Large group health plan or *LGHP* means any arrangement made by one or more employers or employee organizations to provide health care directly or through other methods such as insurance or reimbursement, to current or former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families, if the arrangement meets the following requirements:

(1) It is of, or contributed to by, one or more employers or employee organizations.

(2) If it involves more than one employer or employee organization, it provides for common administration.

(3) It provides substantially the same benefits or the same benefit options to all those enrolled under the arrangement.

(4) It covers employees of either—

(i) A single employer that employed at least 100 full-time or part-time employees on 50 percent or more of its regular business days during the previous calendar year; or

(ii) Two or more employers, at least one of which employed at least 100 full-time or part-time employees on 50 percent or more of its regular business days during the previous calendar year.

The term includes an "employee-pay-all" plan; that is, a plan that is under the auspices of one or more employers or employee organizations, but receives no financial contribution from them.

Proper claim means a claim that is filed timely and meets all other requirements specified by the LGHP.

§ 411.83 Determination of "employee" status.

(a) *General considerations.* When a disabled individual is not actively working, "employee" status is determined on the basis of that individual's relationship to an employer. The question to be decided is whether the employer treats the disabled individual as an employee, considering commonly accepted indicators of employee status.

(b) *Indicators of "employee" status.* In determining employee status for a disabled individual who is not actively working, the following rules apply:

(1) The individual is considered to have employee status if he or she—

(i) Receives from an employer payments that are subject to taxation under the Federal Insurance Contributions Act (FICA), or would be subject to such taxation, except for the fact that the payments are exempted under the Internal Revenue Code;

(ii) Is termed an employee under a State or Federal law or in accordance with a court decision; or

(iii) Is designated as an employee in the employer's record that is, has not had his or her employee status terminated. Termination from payroll status does not in and of itself constitute termination of employee status.

(2) The individual may be determined to have employee status on the basis of all the facts regarding the individual's relationship with the employer. Factors indicative of employee status include the following:

(i) Accrual of vacation time or receipt of vacation pay.

(ii) Accrual of sick leave.

(iii) A legally enforceable right to return to work if the disabling condition improves.

(iv) Payment by the employer, on the individual's behalf, of the same taxes that are paid on behalf of actively working employees.

(v) Participation in any employer benefit plan that is available only to employees. This includes participation in an LGHP or other benefit plan available to employees but not to retirees. This indicator applies even though the LGHP is available to certain former employees under laws that, as amended by title X of Pub. L. 99–272, require that former employees be offered the opportunity to continue health insurance coverage.

(3) In the absence of evidence to the contrary, the existence of any of the indicators listed in paragraph (b)(2) of this section could be the basis for concluding that the individual has employee status.

§ 411.85 Medicare benefits secondary to large group health plan benefits.

(a) Medicare Part A and Part B benefits are secondary to benefits payable by an LGHP for services furnished to an active individual during any month in which he or she—

(1) Is entitled to Medicare on the basis of entitlement to social security disability benefits; and

(2) Has LGHP coverage as an "active individual" as defined in § 411.82.

(b) When the condition of paragraph (a) of this section is met, Medicare makes secondary payments, within the limits specified in §§ 411.32 and 411.33, to supplement the primary benefits of the LGHP if that plan pays only a portion of the charge for the services.

(c) A disabled active individual may refuse to enroll in the health plan offered by the employer. If the individual refuses the plan, Medicare is primary payer for that individual.

(d) The employer may not offer a Medicare-entitled disabled active individual a plan that covers, on a secondary basis, services that are also covered by Medicare.

§ 411.88 Basis for Medicare primary payments.

(a) *General rule.* Medicare makes primary payments for Medicare covered services furnished to an individual who has LGHP coverage only if those services meet one of the following conditions:

(1) The services are furnished to a disabled active individual who—

(i) Is entitled to Medicare on the basis of entitlement to social security disability benefits, but has LGHP coverage for any reason other than his or her status as an "active individual"; for example, as the dependent of a former employee; or

(ii) Refused the LGHP coverage offered by the employer.

(2) The services are not covered for any of the individuals enrolled under the LGHP.

(3) The services are covered under the plan but not available to particular disabled active individuals because—

(i) They have exhausted their benefits under the plan; or

(ii) Their coverage under the plan was terminated for failure to pay the plan premiums.

(b) *Conditional primary payments: Basic rule.* Except as provided in paragraph (c) of this section, Medicare may make a conditional primary payment for any of the following reasons:

(1) The beneficiary, the provider, or the supplier that has accepted assignment has filed a proper claim under the LGHP and the LGHP has denied the claim in whole or in part.

(2) The beneficiary, because of physical or mental incapacity, failed to file a proper claim.

(3) The LGHP has not conformed to the requirement to offer the beneficiary the same coverage as it offers to non-disabled individuals enrolled in the plan. (This constitutes discrimination on the basis of Medicare eligibility.)

(c) *Conditional primary payments: Exceptions.* Medicare does not make conditional primary payments under either of the following circumstances:

(1) The claim is denied by the LGHP in whole or in part for one of the following reasons:

(i) It is alleged that the LGHP is secondary to Medicare.

(ii) The LGHP limits its payments when the individual is entitled to Medicare.

(iii) The services are not covered by the LGHP for disabled active individuals but are covered for others enrolled under the plan.

(iv) A proper claim is not filed for any reason other than physical or mental incapacity of the beneficiary.

(2) The LGHP or an employer or employee organization or the beneficiary fails to furnish information that is requested by HCFA and that is necessary to determine whether the LGHP is primary to Medicare.

§ 411.92 Recovery.

If HCFA has made primary or conditional primary payments and is later determined to be secondary payer, the rules in § 411.24 apply and the amounts of recovery are as follows:

(a) *Amount of recovery from an LGHP.* HCFA has the right to recover twice the lesser of the following:

(1) The amount of the Medicare payment.

(2) The amount payable by the LGHP as primary payer.

(b) *Amount of recovery from an entity that received an LGHP payment.* HCFA has the right to recover the lesser of the following:

(1) The amount of the Medicare payment.

(2) The amount of the LGHP payment to the entity.

§ 411.94 Nondiscrimination.

(a) *Applicability.* This section applies to disabled active individuals during the period in which they are entitled to Medicare on the basis of entitlement to social security disability benefits.

(b) *Basic prohibition.* An LGHP may not take into account the fact that a disabled active individual is entitled to Medicare on the basis of receipt of social security disability benefits; this is, it may not discriminate against such an individual. This means that the employer or employee organization, through the LGHP, must offer disabled active indiviuals the same enrollment opportunities, and the same coverage, under the same conditions, that it offers to others enrolled under the plan. For disabled active individuals, that coverage is primary to Medicare.

(c) *Nonconforming LGHP.* As used in this section, "nonconforming LGHP" means an LGHP that, at any time during a calendar year, discriminates against a disabled active individual who is eligible for or receives Medicare benefits on the basis of disability. (See paragraph (f) of this section regarding failure to provide acceptable documentation of nondiscrimination.)

(d) *Criteria.* HCFA will consider that an LGHP is discriminating if, for example, after having covered (or offered or extended coverage to) a disabled active individual, the LGHP—

(1) Offers a disabled active individual coverage that is secondary to Medicare;

(2) Fails to offer or restore LGHP coverage to a disabled active individual;

(3) Offers a disabled active individual less comprehensive health care coverage than is offered to others enrolled in the plan;

(4) Requires a disabled active individual to wait longer than other enrollees for coverage to begin;

(5) Provides less reimbursement to a disabled active individual than to other enrollees;

(6) Denies or terminates coverage of a disabled active individual on the basis of the disability;

(7) Charges a disabled active individual higher premiums than are charged other enrollees; or

(8) Fails to inform a disabled active individual about the consequences of rejecting LGHP coverage so that Medicare rather than the LGHP is primary payer.

(e) *Documentation of compliance.* HCFA may require the employer or the LGHP to submit documentation to show compliance with the prohibition. Examples of such documentation are—

(1) A copy of the employer's plan or policy which specifies the services covered, conditions of coverage, benefit levels and limitations with respect to persons found disabled under the Act, as compared to the provisions applicable to other enrollees; and

(2) Signed statements from disabled active individuals who decline LGHP coverage, acknowledging that they have been informed of the effects of rejecting LGHP coverage.

(f) *Lack of acceptable documentation.* If an employer or LGHP fails to provide acceptable documentation of nondiscrimination, HCFA may consider the LGHP to be a nonconforming LGHP.

(g) *Referral to the Internal Revenue Service (IRS).* (1) HCFA is responsible for referring to the IRS any LGHP that it considers to be a nonconforming LGHP

(2) The IRS administers section 5000 of the Internal Revenue Code which imposes a tax on employers or employee organizations that contribute to a nonconforming LGHP.

(Catalog of Federal Domestic Assistance Program No. 13.773 Medicare—Hospital Insurance, and No. 13.774—Supplementary Medical Insurance)

Dated: June 20, 1989.

Louis B. Hays,

Acting Administrator, Health Care Financing Administration.

Approved: November 3, 1989.

Louis W. Sullivan,

Secretary.

[FR Doc. 90-5341 Filed 3-7-90; 8:45 am]

BILLING CODE 4120-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards; Controls and Displays

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Denial of petition for rulemaking.

SUMMARY: This notice denies a petition for rulemaking submitted by Mr. Carlton G. Schenken, a private individual. The petitioner requested that the agency adopt new requirements for automobile turn signal controls and displays, to address the safety hazards that may result from drivers inadvertently leaving their turn signals on. After carefully evaluating the petition, the agency concludes that it fails to demonstrate any safety need for rulemaking.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Cavey, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC (202-366-5271).

SUPPLEMENTARY INFORMATION: A private individual, Mr. Carlton G. Schenken, petitioned the agency to establish new requirements for automobile turn signal controls and displays. The petitioner noted that the turn signal on automobiles is typically activated by a lever (stalk) under the steering wheel, and goes off automatically after the automobile completes a turn involving a sufficient angular change of direction. Mr. Schenken expressed concern, however, that when the turn signal is used for changing lanes, the turn is generally too small to turn off the signal automatically, and the turn signal remains on until the driver pushes the lever to the neutral position. The petitioner stated that "(if) the driver forgets to turn off the lever, the lights flash on and on, mile after mile, causing confusion among pursuing drivers who keep wondering when, if, and where the driver will make his turn."

Mr. Schenken noted that currently there is a flashing light (telltale) somewhere on the dashboard and a ticking sound to alert the driver to a continuing signal. The petitioner argued, however, that "it is obvious that these do not do the job, and it is urgent that the National Highway Traffic Safety Administration take some action to correct this situation."

The petitioner offered the following suggestion:

> Instead of having the turn signal below the steering wheel, why not have two buttons (right and left) embedded at the top of the steering wheel with flashing red lights in their centers when depressed. Being in a direct line with the viewing of the driver, he would be alerted to turn them off when they are no longer needed, by merely depressing the button a second time.
>
> In addition, instead of the current mechanical device which turns off the signal when a sufficient directional turn is made, why not a simple timing device that would turn off the signal after a pre-determined period of time. A timing device like that on the kitchen toaster would suffice.

Mr. Schenken argued that adoption of his suggestion would improve highway safety and would also be "less expensive than the present system, eliminating the lever under the steering wheel, the flashing lights hidden on the dashboard, and the disturbing ticking sound."

NHTSA shares the petitioner's concern that a safety hazard can be created if a turn signal is inadvertently left on. However, as discussed below, the agency does not believe that the petitioner demonstrated that there is a safety need for new requirements to address this concern.

Standard No. 101, Controls and Displays, already addresses the safety concern raised by the petitioner. First, section S5.1 of that standard requires that turn signal telltales be provided in a location that is "visible to the driver." Second, while Standard No. 101 permits most telltales to be adjustable to a level of invisibility, four critical telltales, including the turn signal telltale, may "not be adjustable under any driving condition to a level that is invisible." See section S5.3.4(b). In proposing the latter requirement, the agency noted that "(v)isibility of the turn signal telltale is particularly important since drivers of other vehicles can be misled and become involved in accidents as a result of turn signals that have been inadvertently left on." 50 FR 37242, September 12, 1985.

Given these visibility requirements, NHTSA disagrees with the petitioner's assertion that turn signal telltales are "hidden" on the dashboard. Moreover, as acknowledged by the petitioner, current vehicles typically incorporate not only a visual indicator but also an audible indicator ("ticking sound"). The agency also notes that turn signals can be operated, without "locking" them, so that when pressure is released, the turn signals cease operation. This feature is designed for the very type of lane-changing maneuver the petitioner is concerned about. The petitioner did not provide any arguments or data to support his assertion that "it is obvious on the highway" that current vehicle designs incorporating these indicators "do not do the job."

After carefully considering Mr. Schenken's petition, NHTSA is unaware of a safety need for additional requirements to address the concern of turn signals being inadvertently left on, particularly since manufacturers typically provide both a visual and audible indication of turn signal activation. No substantive arguments were presented by the petitioner to support a safety need for new requirements in this area. NHTSA therefore concludes that there is not a reasonable possibility that the order requested by the petitioner would be issued at the conclusion of a rulemaking proceeding and denies the petition.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

Authority: (15 U.S.C. 1392, 1407; delegation of authority at 49 CFR 1.50 and 501.8).

Issued on March 2, 1990.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 90-5256 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-59-M

Notices

Federal Register
Vol. 55, No. 46
Thursday, March 8, 1990

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

Forms Under Review by Office of Management and Budget

March 2, 1990.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Public Law 96–511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404–W, Admin. Bldg., Washington, DC 20250; (202) 447–2118.

Revision

- Forest Service

Special Uses Rules-Re: First Amendment Rights
None
On occasion
Individuals or households; 860 responses; 920 hours; not applicable under 3504(h)
Marian Connolly, (202) 235–1488

Extension

- Agricultural Marketing Service

Reporting Requirements Under 7 CFR part 51, Regulations Governing Inspection, Certification and Standards for Fresh Fruits, Vegetables, and Other Products
FV–237, FV–292
On occasion
State or local governments; Businesses or other for-profit; 212,206 responses; 6,341 hours; not applicable under 3504(h)
Doug Shearer, (202) 447–4186

New Collection

- Food and Nutrition Service

Food Stamp Application Processing Study
Recordkeeping, One Time Only
Individuals or households; State or local governments; 8,010 responses; 734 hours; not applicable under 3504(h)
Theodore Macaluso, (703) 756–3115

Reinstatement

- Food and Nutrition Service

Nutrition Program for the Elderly: Titles 111 and VI of the Older Americans Act. Program Performance Report; subpart 11, C–1, C–2
FNS–586A; FNS–586B
Recordkeeping; Monthly
State or local Governments; 2,172 responses; 2,765 hours; not applicable under 3504(h)
Celia Vila, (703) 756–3100

Donald E. Hulcher,
Acting Departmental Clearance Officer.

[FR Doc. 90–5333 Filed 3–7–90; 8:45 am]
BILLING CODE 3410-01-M

Agricultural Marketing Service

[No. LS-90-105]

Beef Promotion and Research: Certification and Nomination Cattlemen's Beef Promotion and Research Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: Notice is hereby given that the United States Department of Agriculture's Agricultural Marketing Service (AMS) is accepting applications from State cattle producer organizations and beef importers who desire to be certified to nominate producers or importers for appointment to vacant positions on the Cattlemen's Beef Promotion and Research Board (board). Organizations which have not previously been certified that are interested in submitting nominations must complete and submit an official application form to AMS. Previously certified organizations do not need to reapply. Notice is also given that vacancies will occur on the board and that during a period to be established, nominations will be accepted from eligible organizations and individual importers.

DATES: Applications for Certification must be received by close of business April 9, 1990.

ADDRESSES: Certification forms as well as copies of the certification and nomination procedures may be requested from Ralph L. Tapp, Chief; Marketing Programs Branch; Livestock and Seed Division; Agricultural Marketing Service, USDA; Room 2610–S; P.O. Box 96456; Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp at 202–447–2650 (FTS 447–2650).

SUPPLEMENTARY INFORMATION: The Beef Promotion and Research Act of 1985 (Act) (7 U.S.C. 2901 et seq.), approved December 23, 1985, authorizes the implementation of a national Beef Promotion and Research Order. The Order, as published in the July 18, 1986, **Federal Register** (51 FR 26132), provides for the establishment of a board. The current board consists of 108 cattle producers and 5 importers appointed by the Secretary. The duties and responsibilities of the board are specified in the Order.

The Act and the Order provide that the Secretary shall either certify or otherwise determine the eligibility of State or importer organizations or associations to nominate members to the board to ensure that nominees represent the interests of cattle producers and importers. Nominations for importer representatives may also be made by individuals who import cattle, beef, or beef products. Individual importers do not need to be certified as eligible to submit nominations. When individual importers submit nominations, they must establish to the satisfaction of the Secretary that they are in fact importers of cattle, beef, or beef products, pursuant to § 1260.143(b)(2) of the Order (7 CFR

1260.143(b)(2)). Individual importers are encouraged to contact AMS at the above address to obtain further information concerning the nomination process including the beginning and ending dates of the established nomination period and required nomination forms and background information sheets. Certification and nomination procedures were promulgated in the final rule, published in the April 4, 1986, **Federal Register** (51 FR 11557). Organizations which have previously been certified to nominate members to the board do not need to reapply for certification to nominate producers and importers for the existing vacancies.

The Act and the Order provide that the members of the board shall serve for terms of three (3) years. The Order also requires USDA to announce when a board vacancy does or will exist. The following States have 1 or more members whose terms will expire in 1990:

State or unit	No. of vacancies
Alabama	1
Arkansas	1
California	1
Colorado	1
Florida	1
Georgia	1
Idaho	1
Illinois	1
Indiana	1
Iowa	1
Kansas	2
Kentucky	1
Minnesota	1
Missouri	2
Montana	1
Nebraska	2
New York	1
North Dakota	1
Ohio	1
Oklahoma	2
Oregon	1
Pennsylvania	1
South Dakota	1
Tennessee	1
Texas	5
Virginia	1
Wisconsin	1
Northwest Unit	1
Importer Unit	2

Since there are no anticipated vacancies on the board for the remaining States' positions, or for the positions of the Northeast and mid-Atlantic units, nominations will not be solicited from certified organizations or associations in those States or units. However, on February 23, 1990, a proposed rule was published which would adjust representation on the board to reflect changes in cattle inventory and cattle and beef imports which have occurred since the board was appointed. Should this proposed rule become a final rule, Indiana, Oregon and Tennessee would not have any vacancies in 1990, while Nebraska would have only one vacancy. The Importer unit, on the other hand, would have an additional vacancy for a total of three.

Uncertified eligible producer organizations in all States that are interested in being certified as eligible to nominate cattle producers for appointment to the listed producer positions, must complete and submit an official "Application for Certification of Organization or Association," which must be received by close of business 30 days after publication of this notice in the **Federal Register**. Uncertified, eligible importer organizations that are interested in being certified as eligible to nominate importers for appointment to the listed importer positions must apply by the same date. Importers should not use the application form but should provide the requested information by letter, as provided for in 7 CFR 1260.540(b). Applications from States or units without vacant positions on the board and other applications not received within the 30-day period after publication of this notice in the **Federal Register** will be considered for eligibility to nominate producers or importers for subsequent vacancies on the board.

Only those organizations or associations which meet the criteria for certification of eligibility promulgated at 7 CFR 1260.530 as published in 51 FR 11557, 11559 (April 4, 1986) are eligible for certification. Those criteria are:

(a) For State organizations or associations:

(1) Total paid membership must be comprised of at least a majority of cattle producers or represent at least a majority of cattle producers in a State or unit.

(2) Membership must represent a substantial number of producers who produce a substantial number of cattle in such State or unit.

(3) There must be a history of stability and permanency.

(4) There must be a primary or overriding purpose of promoting the economic welfare of cattle producers.

(b) For organizations or associations representing importers, the determination by the Secretary as to the eligibility of importer organizations or associations to nominate members to the board shall be based on applications containing the following information:

(1) The number and type of members represented (i.e., beef or cattle importers, etc.).

(2) Annual import volume in pounds of beef and beef products and/or the number of head of cattle.

(3) The stability and permanency of the importer organization or association.

(4) The number of years in existence.

(5) The names of the countries of origin for cattle, beef, or beef products imported.

All certified organizations and associations, including those which were previously certified in the States or units having vacant positions on the board, will be notified simultaneously in writing of the beginning and ending dates of the established nomination period and will be provided with required nomination forms and background information sheets.

The names of qualified nominees received by the established due date will be submitted to the Secretary of Agriculture for consideration as appointees to the board.

The information collection requirements referenced in this notice have been previously approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C., chapter 35 and have been assigned OMB No. 0581-0152.

Done in Washington, DC on March 2, 1990.

Daniel Haley,

Administrator.

[FR Doc. 90-5351 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

[Docket 90-018]

U.S. Veterinary Biological Product and Establishment Licenses Issued, Suspended, Revoked, or Terminated; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice; correction.

SUMMARY: We are correcting an editorial error that appeared in a notice published in the **Federal Register** on December 18, 1989 (54 FR 51779-51781, Docket Number 89-192). The notice advised the public of the issuance, suspension, revocation, or termination of veterinary biological product and establishment licenses by the Animal and Plant Health Inspection Service during the months of August and September, 1989. In the fifth column of the chart on page 51781 listing product licenses terminated, the correct U.S. Veterinary Biologics Establishment License number for Keevet Laboratories

is 280–A for all the U.S. Veterinary Biological Product Licenses that were terminated for that firm.

FOR FURTHER INFORMATION CONTACT: Joan Montgomery, Program Assistant, Veterinary Biologics, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 838 Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–6332.

Done in Washington, DC, this 2nd day of March 1990.

Larry B. Slagle,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 90–5332 Filed 3–7–90; 8:45 am]

BILLING CODE 3410-34-M

Commodity Credit Corporation

1990 Feed Grains Program and Farmer-Owned Reserve Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice of Determination of 1990 Feed Grains Program and the Extension of the Farmer-Owned Reserve Program.

SUMMARY: The purpose of this notice is to affirm the determinations made by the Secretary of Agriculture in accordance with the Agricultural Act of 1949, as amended (the "1949 Act"), the Food Security Act of 1985 (the "1985 Act"), and the Commodity Credit Corporation Charter Act, as amended (the "Charter Act"), with respect to the 1990 Feed Grains Price Support and Production Adjustment and the Farmer-Owned Reserve (FOR) Programs.

EFFECTIVE DATE: March 7, 1990.

ADDRESSES: Bruce R. Weber, Director, Commodity Analysis Division, USDA–ASCS, Room 3741, South Building, P.O. Box 2415, Washington, DC 20013.

FOR FURTHER INFORMATION CONTACT: Philip W. Sronce, Commodity Analysis Division, USDA-ASCS, Room 3748, South Building, P.O. Box 2415, Washington, DC 20013 or call (202) 447–4418. The Final Regulatory Impact Analysis describing the options considered in developing this notice of determination will be available on request from the above-named individual.

SUPPLEMENTARY INFORMATION: This notice has been reviewed under United States Department of Agriculture (USDA) procedures established in accordance with Executive Order 12291 and Secretary's Memorandum No. 1512–1 and has been designated as "major." It has been determined that these program provisions will result in an annual effect on the economy of $100 million or more.

The titles and numbers of the Federal assistance programs, as found in the catalogue of Federal Domestic Assistance, to which this notice applies are:

Titles	Numbers
Commodity loans and purchases	10.051
Feed grains production stabilization	10.055

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since the Commodity Credit Corporation (CCC) is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of these determinations.

It has been determined by environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

General Information

General descriptions of the statutory basis for the determinations that are set forth in this notice are published in 54 FR 28078 (July 5, 1989).

Comments received during the specified comment period are summarized below for the 1990 Feed Grains Program.

Comments. A total of 79 respondents commented on the 1990 Feed Grains Program. Of the respondents, 65 percent were producers and 20 percent were farm organizations. The remaining 15 percent represented trade organizations and other private concerns.

(a) *Target Price:* Seventeen of 26 respondents favored a target price of $2.75 per bushel or higher for corn. The target price for corn is set at its statutory minimum. This target level ($2.75 per bushel) is well above the projected U.S. 1990-crop average variable cash cost of production ($1.20 per bushel), thereby ensuring program participants a reasonable safety net for farm income. The target prices for sorghum ($2.61/bu.), barley ($2.36/bu.), and oats ($1.45/bu.) are determined on the basis of being fair and reasonable in relation to that for corn.

(b) *Acreage Reduction Program (ARP):* Forty-five of 49 respondents favored an ARP. Eighteen respondents favored an ARP of 10 percent or less. Twenty-five respondents favored an ARP of more than 10 percent. Two respondents favored a 0 percent ARP for oats. The ARP for corn, sorghum and barley is set at 10 percent and for oats, 5 percent, the statutory maximum. The stock level for corn is below the statutory target carryover level (2 billion bushels), thus authorizing the Secretary to implement an ARP between 0 and 12.5 percent. The 1988 drought had an impact on the decisions made for both the 1989 ARP and the 1990 ARP. Ending corn stocks for the 1988/89 crop year were drawn down to 1.93 billion bushels, and even with the 1989 corn crop of 7.3 billion bushels, ending stocks for 1989/90 are projected at 1.75 billion bushels. Sorghum and barley ending stocks are declining but are at adequate levels to meet domestic and foreign demand. Oats carryover levels are increasing with the lower ARP requirements.

After taking into consideration these concerns, it has been determined that a 10 percent ARP for corn, grain sorghum and barley and a 5 percent ARP for oats will maintain the U.S. competitive posture in the export market, provide adequate feed and food supplies for domestic and foreign utilization, and support farm income.

(c) *Optional Paid Land Diversion (PLD):* Fourteen respondents favored a PLD, while 9 opposed a PLD. Because of the substantial reduction in 1988/89 production, resulting in less carryover stocks for both 1988/89 and 1989/90, it has been determined that a PLD for corn, sorghum, barley, and oats is not necessary for the 1990 crop year.

(d) *Marketing Loan and Loan Deficiency Payments:* Seven of 12 respondents on the loan aspects of the program opposed implementing a marketing loan program. Marketing loans for feed grains have not been authorized because (1) their respective loan and purchase rates are determined to be capable of maintaining competitive market positions, and (2) implementation of marketing loans would increase program costs, while increases in export demand would only be marginal.

(e) *Inventory Reduction Program (IRP):* No comments were received. Since the marketing loan program is not being implemented, inventory reduction payments will not be available.

(f) *Inclusion of Barley as an Eligible Commodity for Payments:* Seven respondents favored including barley in

the 1990 Feed Grains Program. It has been determined that barley shall be included.

(g) *Exemption of Malting Barley from an ARP:* Ten of 12 respondents opposed malting barley exemption from the ARP. It has been determined that malting barley will not be exempted.

(h) *Inclusion of Corn Grain Equivalent in Loans and Purchases Program:* Six of 13 respondents opposed a non-recourse loan for corn silage. Five respondents favored a non-recourse loan while 2 favored a recourse loan. Loans and purchases will not be made available to producers of corn silage, since the costs associated with such an option outweigh any benefits which may exist.

(i) *Method of Establishing the Feed Grain Crop Acreage Base:* Twelve of 19 respondents favored a combined feed grain base. Six of the 12 that favored a combined feed grain base indicated a preference for one feed grain base. Five respondents indicated a preference for separate corn, sorghum, barley, and oat bases. Two respondents preferred a combined barley/oats base. Corn and sorghum crop acreage bases will continue to be combined for 1990 crop program purposes to permit greater planting flexibility. But, in an effort to increase oats production the crop acreage bases for barley and oats will not be combined for the 1990 crop.

(j) *Premiums and Discounts for Grades, Classes, and Other Qualities:* Ten respondents submitted comments on this issue. No final determination on premiums and discounts has been made at this time, however, further comments on this issue have been requested pursuant to a separate **Federal Register** Doc. No. 26667, vol. 218, pages 47374–6, November 14, 1989.

(k) *Farmer-Owned Reserve:* The regulations of 7 CFR 1421.741 provide that producers with certain crop year FOR loans may extend such loans as determined by CCC. Notification of these extension opportunities is made by actual notice to the producer. On June 16, 1989, CCC announced that producers with 1985 crop corn and grain sorghum FOR loans which mature on or after August 31, 1989 may extend such loans for six months. Since that announcement, the 1989 crop of feed grains has been harvested. It is generally accepted that an adequate carryover supply of corn is 1.5 to 2.0 billion bushels. Section 105C of the Agricultural Act of 1949 provides for feed grains that if estimated carryover for corn on the first day of the marketing year will exceed 2.0 billion bushels, acreage reduction programs must be implemented. As of November 22, 1989, ending 1989/90 marketing year corn stocks are estimated at 1.89 billion bushels. Assuming that the quantity specified in section 105C is an adequate carryover quantity, the U.S. will have adequate, but clearly not abundant carryover of corn. Latest CCC estimates show that 1989-crop feed grain production is less than 1989–1990 marketing year feed grain use. This is the third consecutive year in which feed grain production is less than feed grain use. Accordingly, it has been determined that entry of 1989-crop feed grains in the FOR will not be allowed since there is not an abundant supply of feed grains. However, 1985-crop corn and grain sorghum FOR loans which mature after December 31, 1989, may be extended for one year. This action will allow for the orderly marketing of FOR stocks without unduly depressing feed grain markets. In order to provide equitable treatment to producers, this extension opportunity is also available to all producers who previously executed a six month loan extension with respect to FOR loans maturing between August 31, 1989, and December 31, 1989.

Determinations

1. *Loan and Purchase Level for Feed Grains.* In accordance with section 105C(a) of the 1949 Act, the price support loan and purchase level per bushel shall be $1.57 for corn, $1.49 for sorghum, $1.28 for barley, $0.81 for oats, and $1.33 for rye. These levels were selected because they will allow for the maintenance of competitive market positions for feed grains.

2. *Established (Target) Price for Feed Grains.* In accordance with section 105C(c)(1) of the 1949 Act, the established ("target") price per bushel shall be $2.75 for corn, $2.61 for sorghum, $2.36 for barley, and $1.45 oats. The target levels are well above the projected U.S. 1990 crop average variable cash costs of production per planted acre. These costs are $1.20 per bushel for corn, $0.98 per bushel for grain sorghum, $1.18 per bushel for barley, and $0.80 per bushel for oats.

3. *Acreage Reduction/Paid Land Diversion Program for Feed Grains.* In accordance with section 105C(f)(1) of the 1949 Act, the ARP has been established with respect to the 1990 crops of corn, sorghum, and barley at 10 percent and of oats at 5 percent.

In accordance with section 105C(f)(5) an optional PLD will not be offered. Accordingly, producers will be required to reduce their 1990 acreage of feed grains for harvest from the crop acreage base established for feed grains for a farm by at least the respective established percentage in order to be eligible for feed grain price support loans, purchases, and payments.

4. *Marketing Loan and Loan Deficiency Payments for Feed Grains.* In accordance with sections 105C(a) and 105C(b) of the 1949 Act, it has been determined that the marketing loan provision will not be implemented and loan deficiency payments will not be available for the 1990 crop of feed grains.

5. *Inventory Reduction Program (IRP).* In accordance with section 105C(g) of the 1949 Act, it has been determined that the IRP will not be implemented for the 1990 crop of feed grains.

6. *Inclusion of Corn Silage Grain Equivalent in Loans and Purchases Program.* In accordance with section 403 of the 1985 Act, it has been determined that loans and purchases will not be made available to producers of corn silage.

7. *Eligibility of Barley Under the Feed Grains Program and ARP Requirements for Producers of Malting Barley.* In accordance with section 105C of the 1949 Act, it has been determined that barley will be included in the 1990 Feed Grains Program and that malting barley producers will not be excluded from ARP requirements. ARP requirements for barley and not excluding malting barley producers from ARP requirements will improve the effectiveness of the production adjustment program and help to balance 1990/91 marketing year barley supply with demand.

8. *Method of Establishing the Feed Grain Crop Acreage Base.* In accordance with section 504 of the 1949 Act, it has been determined that corn and sorghum will have a combined base in the 1990 Feed Grains Program while the barley and oats bases will be split. Maintaining a separate oats base, along with the 5 percent ARP for oats and the determination not to impose limited cross compliance with respect to oats is expected to result in increased oats production.

9. *Premiums and Discounts for Grades, Classes, and Other Qualities.* No final decision on premiums and discounts has been made at this time.

10. *Farmer-Owned Reserve Program Determinations.* Entry of 1989 crops of feed grains into the FOR will not be permitted. Producers with 1985-crop FOR loans which mature after December 31, 1989, may extend such loans for one year.

Authority: Secs. 7 U.S.C. 714b, 714c, 1441, 1444e, 1445b–2, 1445b–4, 1445e, 1421, 1464 and 1465.

Signed at Washington, DC, on February 28, 1990.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 90-5328 Filed 3-7-90; 8:45 am]

BILLING CODE 3440-05-M

Targeted Export Assistance Program, Fiscal Year 1991

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice.

SUMMARY: This notice announces a contingent Targeted Export Assistance Program for Fiscal Year 1991.

FOR FURTHER INFORMATION CONTACT: Richard E. Passig, Director, Marketing Programs Division, Commodity and Marketing Programs, Foreign Agricultural Service, U.S. Department of Agriculture, Washington, DC 20250-1000, Telephone: (202) 447-4327.

SUPPLEMENTARY INFORMATION: section 1124 of the Food Security Act of 1985, as amended, provides that, for Fiscal Years 1986 through 1990, the Secretary of Agriculture shall use not less than a specified dollar amount of funds of, or commodities owned by, the Commodity Credit Corporation (CCC) for export activities authorized to be carried out by the Secretary or CCC. Funds or commodities made available shall be used to counter or offset the adverse effect of a subsidy, import quota or other unfair trade practice of a foreign country on the export of a U.S. agricultural commodity or product thereof.

CCC will carry out a Targeted Export Assistance (TEA) Program similar to the Program originally established to carry ou the reqirements of section 1124 of the Food Security Act of 1985 during Fiscal Year 1991 provided that a program level has been established for that purpose by Congress.

Subject to the establishment of such a program level, a Targeted Export Assistance Program will be implemented in accordance with the regulations set forth in 7 CFR part 1485. TEA project agreements will be entered into by CCC with nonprofit agricultural trade associations, regional state sponsored organizations, or private U.S. firms.

TEA project agreements will provide for the issuance by CCC of generic commodity certificates to partially reimburse participants for authorized promotional activities to increase the export of specific agricultural commodities or products. At the option of CCC, reimbursement may be made in CCC funds. Agreements are signed by the Vice President, CCC, who is the Administrator, Foreign Agricultural Service (FAS). Project agreements will provide for control and review of promotional activities via activity plans, reporting requirements, program evaluation, and the conduct of compliance audits.

To be eligible for promotional support, products must be composed of at least 50 percent U.S. commodity on a weight or value basis. Participant organizations must demonstrate an ability to provide a U.S.-based staff capable of developing, supervising and carrying out market development projects overseas and to contribute resources to joint projects.

In submitting proposals, prospective participants should include information on (1) Available domestic supplies of the commodity to be promoted for export; (2) the existence of a foreign unfair trade practice which has worked to restrain U.S. exports of the commodity or product; (3) the extent to which U.S. exports of the commodity or product have been affected by the unfair foreign trade practice or practices cited; (4) the makeup, membership base, and administrative capability of the applying organization (including prior export promotion experience, the staff and financial resources the organization proposes to devote to TEA program administration and promotion, and results of prior evaluations and audits in the case of current program participants); (5) a brief description of proposed promotional strategies and target markets; (6) a projection of export levels to be achieved as a result of the proposed promotional program; and (7) any other factors bearing on the anticipated impact of the proposed program of activities.

Applications for participation in this program must be received within 60 days from the date of publication of the Notice in the **Federal Register.** Applications for participation in the allocation of fiscal year 1991 TEA resources should provide the information described above, address the criteria provided in 7 CFR part 1485, and may include any other factors the applicant deems appropriate. Implementation of the Fiscal Year 1991 TEA Program is contingent on the establishment by Congress of a program level for the TEA program.

Information collection requirements related to the Targeted Export Assistance program described in this notice have been approved by OMB and assigned control number 0551-0027.

For more detailed information regarding application procedures and other aspects of the TEA Program, contact the Marketing Programs Division, Foreign Agricultural Service, Washington, DC 20250-1000, Telephone (202) 447-4327. Comments regarding the conduct of the TEA Program may be directed to the same address.

Signed at Washington, DC, December 18, 1989.

R.E. Anderson, Jr.,

Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. 90-5349 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-10-M

Forest Service

Creek Diversity Unit, Santa Fe National Forest, San Miguel County, New Mexico

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement for a proposal to harvest timber and construct/reconstruct roads in the Creek Diversity Unit. The diversity unit is located on the Pecos Ranger District, Santa Fe National Forest, San Miguel County, New Mexico.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and environmental impact statement should be directed to Larry Roybal, District Ranger, Pecos Ranger District, P.O. Drawer 429, Pecos, New Mexico 87552, (505) 757-6121.

SUPPLEMENTARY INFORMATION: The Forest Service is reviewing a range of alternatives for Creek Diversity Unit. The range includes deferring timber harvest during the planning period, to harvesting timber from approximately 6 mmbf to 26 mmbf. In deferring harvest, no roads would be constructed or reconstructed with the timber sale, and approximately 52 miles of system roads would remain open. In the various harvest alternatives, approximately 1 to 14 miles of roads would be constructed, and 16 to 49 miles of roads would be reconstructed. In addition, approximately 17 to 41 miles of existing roads would be closed, and 2 to 5 miles of existing roads obliterated with the harvest alternatives.

The key issues identified in the planning of Creek Diversity Unit include:

(1) Concern about impacts to soil and water resources from proposed vegetative activities

(2) Concern that the current transportation system is in some cases poorly designed and constructed

(3) Concern that the total of priced and non-priced benefits equal or exceed costs of implementing the project
(4) Concern that many timber stands are deteriorating from various endemic and potentially epidemic insect and disease conditions which could cause catastrophic natural events
(5) Concern about effects of proposed harvest activities on individual plant or animal populations.

The Santa Fe National Forest Plan Amendment #3 provides the management direction to implement the proposed Creek Timber Sale. Maynard Rost, Forest Supervisor, Santa Fe National Forest, P.O. Box 1689, Santa Fe, New Mexico 87504, (505) 988-6940, is the responsible official. Planning in the Creek Diversity Unit started in 1985. An environmental assessment was released for the area in 1987 and two months later the environmental assessment decision notice was withdrawn by the Forest Supervisor. In May 1988 the District Ranger reconvened the Interdisciplinary Team to reexamine the Creek environmental analysis which included extensive public involvement from May 1988 to May 1989. I have decided to prepare an environmental impact statement rather than an environmental assessment in order to allow the public the opportunity to provide formal comment, and to consider those comments before selecting an alternative.

The draft environmental impact statement (DEIS) is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review around the end of May 1990. At that time EPA will publish a notice of availability of the DEIS in the **Federal Register**.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The District Ranger will hold an open house for the public on the proposed project. The open house is tentatively scheduled for late June 1990 at the Pecos Elementary School in Pecos, New Mexico. The final environmental impact statement (FEIS) is expected to be filed with the EPA and to be available for public review around November 1990.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978).* Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points).

Dated: February 22, 1990.

Maynard T. Rost,

Forest Supervisor.

[FR Doc. 90-5295 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

East Walker Watershed Project, Nevada

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of availability of a record of decision.

SUMMARY: William D. Goddard, responsible Federal official for projects administered under the provisions of Pub. Law 83-566, 16 U.S.C. 1001-1008, in the state of Nevada, is hereby providing notification that a record of decision to proceed with the installation of the East Walker watershed project is available. Single copies of this record of decision may be obtained from William D. Goddard at the address shown below.

FOR FURTHER INFORMATION CONTACT: William D. Goddard, State Conservationist, Soil Conservation Service, 1201 Terminal Way, Room 219, Reno, NV 89502, telephone (702) 784-5863.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904—Watershed Protection and Flood Prevention—and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.)

Dated: February 26, 1990.

William D. Goddard,

State Conservationist.

[FR Doc. 90-5313 Filed 3-7-90; 8:45 am]

BILLING CODE 3410-16-M

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration.

Title: Statement of Financial Interests (for use by Members and Executive Directors of Regional Fishery Management Councils).

Form Number: NOAA Form 88-195; OMB-0648-0192.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 50 respondents; 25 reporting hours; average hours per response—.5 hours.

Needs and Uses: Section 302(k) of the Magnuson Fishery Conservation and Management Act, as amended by Public Law 99-659, requires disclosure of financial interests in any harvesting, processing, or marketing activity by nominees for the position of Exec. Director or for membership on fishery management councils. It is required that the information be made available for public inspection.

Affected Public: Individuals or households.

Frequency: On occasion or once every three years.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Ronald Minsk, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271,

Department of Commerce, room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230. Written comments and recommendations for the proposed information collection should be sent to Ronald Minsk, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 2, 1990

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-5327 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-CW-M

Bureau of Export Administration

[Docket Nos. 9137-01, 9137-02]

Export Privileges; Ahlberg Oy

Order

On January 30, 1990, the Administrative Law Judge entered his Recommended Decision and Order in the above-referenced matter. The Decision and Order, a copy of which is attached hereto and made a part hereof, has been referred to me for final action. Having examined the record and based on the facts in this case I hereby affirm the Decision and Order of the ALJ.

This constitutes final agency action in this matter.

Dated: February 27, 1990.

Dennis Kloske,

Under Secretary for Export Administration.

Decision and Order

Appearance for Respondent: Antii Sorjonen, Law Office of E. Pesonen Ky, Hameentie 64, 00500 Helsinki, Finland

Appearance for Agency: G. Roderick Gillette, Office of Chief Counsel for Export Administration, U.S. Department of Commerce, Room H-3837, 14th & Constitution Avenue, NW., Washington, DC 20230.

Preliminary Statement

In separate charging letters the Office of Export Enforcement has charged Paavo Olavi Manner, Rainier P. Perovuo, George B. Ahlberg, and their affiliated companies with various violations of the Export Administration Act and implementing regulations.[1] The evidence developed reflects that criminal proceedings were initiated and convictions obtained respecting the three named individuals in the criminal courts of Finland, which had jurisdiction of the persons and those aspects of the violations which related to violations of the criminal law. As noted in the administrative proceeding, *In the Matter of Spawr Optical Research, Inc.*, 51 FR 7477 (1986), and subsequent Federal court decision, *Spawr Optical Research, Inc.* v. *Baldrige*, 689 F.Supp. 1366 (1986), the determination of a Court of competent jurisdiction is not subject to redetermination before this administrative Tribunal.

In a charging letter dated August 31, 1989, it is charged that between October 30, 1986 and November 6, 1986, Respondent Ahlberg and his company Ahlberg Oy committed two violations of the Export Administration Act and Regulations. In the first, he is charged with conspiring with his two associates and their companies to reexport a VAX 11/750 computer from Finland to the Soviet Union without obtaining the required authorization for such export. In the second specification, it is alleged that on or about October 31, 1986, he reexported the VAX/750 computer from Finland to the Soviet Union without obtaining the required reauthorization.

Facts

Shortly after October 17, 1987, Paavo Olavi Manner purchased a Digital Equipment Corporation (hereinafter DEC) VAX 11/750 computer system for 450,000 Finnish marks[2] from Tekla Oy, a Finish company. At the time Manner acquired the VAX computer, Perovuo was operating out of an office he shared with Manner and was Manner's representative in import-export transactions. The system, which was a controlled item requiring United States Department of Commerce reexport authorization before it could be shipped to Russia from Finland, included a central processing unit (CPU) and a console. Pursuant to a conspiratorial agreement, Manner, Perovuo and these Respondents arranged for this equipment to be reexported from Finland to Russia.

On October 30, 1986, Respondents prepared an invoice to reflect the shipment of a "Pagitron" computer system consisting of, among other items, a CPU and a console, to ITALTRADE, Ltd., in Moscow. The value of the system for customs purposes was listed as 450,000 Finnish marks. That description and value of the equipment shows that this was the same DEC VAX 11/750 computer Manner, Perovuo, and these Respondents had acquired from Tekla Oy. A Finnish Customs export report prepared in conjunction with that reexport of the VAX 11/750 shows that it was shipped to the Soviet Union on October 31, 1986, by Ahlberg's company, George Ahlberg Oy.

On March 3, 1989, Respondents, Manner, and Perovuo were convicted by a Finnish court of "[a] continued offense which comprises international disclosures of information to be kept secret from a foreign state due to the protection of the economic and scientific interests and to the external security of Finland, made to benefit a foreign state, and international engaging in procurement of such information that can endanger the relations of Finland with a foreign state, made to benefit a foreign state."

The "international disclosures" for which these Respondents, as well as Manner, and Perovuo were convicted, included the specific reexport and conspiracy to reexport alleged in the charging letter.

The Finnish record of conviction described also states that these Respondents, Manner, and Perovuo's convictions were based, in part, on the export and conspiracy to export a "computer and peripherals" using Ahlberg Oy, on October 31, 1986. Finally, these Respondents have admitted that the VAX computer was reexported to Russia.

Discussion

Respondent in his submissions strongly protests against this action and denies any culpability. Through the statement of a Graphologist he has demonstrated that relevant signatures were not made by him personally. He also denies the jurisdiction of the United States in this matter and that the Export Administration regulations apply.

He nevertheless acknowledges that the VAX 11/750 was exported to the Soviet Union and that he gave Manner and Perovuo permission to use his name, though he denies knowledge of the facts of the VAX export. He claims that he was exploited by Manner and Perovuo and, indeed this may be true. However, by his own statement he placed himself, and his name, in a position to be used. Allowing the use of his or his company's name is sufficient to support the conclusions required in these administrative proceedings even if he lacked complete awareness of all of the details. The necessity and propriety of the United States' asserting some measure of control over the reexport of sophisticated technology is too well established to warrant explanation here,

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[1] The charging letter against Respondents was initially issued on June 20, 1989, and again on August 31, 1989, apparently because the first address was not sufficient. Service was effected on October 3, 1989. The charges respecting Manner and Perovuo are being adjudicated separately.

[2] The Finnish Mark is currently quoted at .2615 to the dollar.

particularly to an errant citizen of an allied nation which in this fading generation suffered from overwhelming technological superiority.

The evidence of record including Respondents admission fully supports the violation alleged in the charging letter. The criminal conviction independently confirms the impropriety of Respondents action.

Conclusion

Respondents conspired with others to reexport one U.S.-origin Digital Equipment Corporation VAX 11/750 computer from Finland to the Soviet Union without obtaining the authorization required by § 774.1(a) of the Regulations. Thereafter, Respondents reexported that VAX 11/750 computer from Finland to the Soviet Union without obtaining the authorization required by § 774.1(a) of the Regulations.

Order

I. For a period of eight years from the date of the final Agency action, Respondent: George Bernhard Ahlberg individually and doing business as Ahlberg Oy Elimaekatu 15 B, 00150 Helsinki, Finland and all successors, assigness, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations.

II. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated or general export license application;

(ii) in preparing or filing any export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) in obtaining or using any validated or general export license or other export control document;

(iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) in the financing, forwarding, transporting, or other servicing of such commodities or technical data. Such denial of export privileges shall extend to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which the Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. All outstanding individual validated export licenses in which Respondent(s) appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondent(s)'s privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

V. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(i) apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

VI. This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C.A. app. 2412(c)(1)).

Dated: January 30, 1990.

Hugh J. Dolan,

Administrative Law Judge.

To be considered in the 30 day statutory review process which is mandated by section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, U.S. Department of Commerce, 14th & Constitution Ave., NW., room 3898B, Washington, DC., 20230, within 12 days. Replies to the other party's submission are to be made within the following 8 days. 15 CFR 388.23(b), 50 FR 53134 (1985). Pursuant to section 13(c)(3) of the Act, the order of the final order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within 15 days of its issuance.

[FR Doc. 90-5252 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

[Docket Nos. 9106-01 and 9106-02]

Export Privileges: Grossauer

Summary

Pursuant to the January 31, 1990, Decision and Order of the Administrative Law Judge ("ALJ"), which Decision and Order is affirmed in part and modified in part, Michael Grossauer, individually and doing business as Allimex, A.G. ("Respondent"), with an address of Postrasse 30, CH-6301, Zug, Switzerland, is assessed a civil penalty in the amount of U.S. $20,000. Furthermore, Respondent and all successors, assignees, officers, partners, representatives, agents, and employees are denied for a period of ten (10) years, from the date of this final action, all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Export Administration Regulations ("Regulations"). [1]

Commencing on the date of this final action, the denial of export privileges set forth above shall be suspended, as authorized by § 788.16(c) of the Regulations, for a period of ten (10) years beginning on the date of entry of the final Order, and shall thereafter be waived, provided that Respondent complies fully with the terms and conditions of the Consent Agreement negotiated by the parties, and provided further that, during the period of

[1] Effective October 1, 1988, the Regulations have been redesignated as parts 768-799 of title 15 of the Code of Federal Regulations. 53 FR 37751 (September 28, 1988). The redesignation merely changed the first number of each part from "3" to "7". Until such time as the Code of Federal Regulations is republished, the Regulations can be found at 15 CFR parts 368-399 (1988).

suspension, Respondent commits no violation of the Export Administration Act of 1979, as amended (50 U.S.C.A. app. sections 2401–2420 (Supp. 1989)) (the "Act"), the Regulations, any license procured thereunder, or the final Order entered in this proceeding.[2]

Background

Pursuant to the authority of the Act and the Regulations, the Office of Export Enforcement, Bureau of Export Administration, U.S. Department of Commerce ("Agency"), initiated this administrative proceeding against Respondent Michael Grossauer, individually and doing business as Allimex, A.G., by issuing a charging letter dated March 29, 1989, as supplemented on May 5, 1989.

In Charge One, the Agency alleges that on or about May 18, 1983, Respondent committed one violation of § 787.2 of the Regulations in that, between on or about May 18, 1983, and on or about May 2, 1984, Respondent caused a false and misleading representation of material fact to be made to a United States agency in connection with the preparation of an export control document. In Charge Two, the Agency alleges that Respondent committed one violation of § 787.12 of the Regulations in that, between on or about May 18, 1983, and on or about May 11, 1984, Respondent participated in a transaction that involved a commodity to be exported from the United States or which was subject to the Regulations and that a denied party either obtained some benefit from such transaction or had some interest therein.

Respondent filed an Answer to the charging letter, after which the Agency and the Respondent entered into a Consent Agreement to settle the matter. Respondent consented to the payment of a civil penalty in the amount of U.S. $20,000 and to the denial of export privileges for a period of ten (10) years. The Agency consented to the suspension of the denial period contingent upon Respondent's complying fully with the terms and conditions of the Consent Agreement. The ALJ approved the Consent Agreement on January 31, 1990, finding its terms and conditions to be reseasonable.

Discussion

On January 31, 1990, the ALJ found the terms and conditions of the Consent Agreement negotiated by the Agency and Respondent to be reasonable and, accordingly, approved the Consent Agreement. The ALJ implemented such terms and conditions in the accompanying Order. *See* Decision and Order, In the Matter of Michael Grossauer, individually and doing business as Allimex, A.G., January 31, 1990. I concur with the ALJ's finding regarding the reasonableness of the Consent Agreement and affirm the ALJ's Decision and Order in that regard.

In his Decision, however, the ALJ stated that the Agency will suspend the denial of export privileges "provided that Respondent commits no further violations of the Export Administration Act, the Regulations, any license or the final Order issued in this proceeding." *Id.* at 3 (emphasis added). Paragraph II of the Recommended Order contains similar language. *See id.* at 4.

The ALJ's language deviates from the express terms and conditions of the Consent Agreement, the relevant provisions of which provide in pertinent part:

c. The Department agrees that, pursuant to § 788.16(c) of the Regulations, the denial period shall be suspended, in its entirety, for a period of 10 years from the date of the appropriate Order and shall thereafter be waived provided that:

i. During the period of suspension, Grossauer, individually and doing business as Allimex, commits no violation of the Act or any regulation, order or license issued under the Act;

ii. Grossauer, individually and doing business as Allimex, complies fully with all of the terms and conditions of this Consent Agreement;

Consent Agreement at 4, Paragraph 2(c)(i)(ii)(emphasis added).

The relevant provisions of the Consent Agreement make clear that the suspension of the denial period is contingent upon Respondent's complying with all the terms and conditions of the Consent Agreement, as well as committing no violation of the Act, the Regulations, or any license procured or order issued thereunder during the period of suspension. As noted by Agency counsel, the ALJ's use of the adjective "further" before the term "violations" suggests that the Respondent admitted violating the Regulations, as alleged in the charging letter.[3] As further noted by Agency counsel, the Consent Agreement contains no such admission.

Accordingly, to adhere strictly to the terms and conditions of the Consent Agreement and to avoid any potential misunderstanding of the ALJ's Decision and Order, I am modifying the ALJ's Decision and Order with regard to the suspension of the denial period.[4]

Order

On January 31, 1990, the ALJ entered his Recommended Decision and Order in the above captioned matter. That Decision and Order, a copy of which is attached to and made a part of this final Order, has been referred to me for final action. In accordance with the Discussion above, I am affirming in part and modifying in part the Decision and Order of the ALJ. Specifically, I affirm the ALJ's Decision to approve the Consent Agreement; however, I strike that portion of the Decision and Order pertaining to the suspension of the denial period and insert in lieu thereof the following language for the third full paragraph of page 3 of the ALJ's Decision:

Beginning on the date of final Agency action, which will be effected by the Order of the Under Secretary for Export Administration, the Secretarial delegee, the denial of export privileges is to be suspended, as authorized by § 788.16(c) of the Regulations, and as stated in the following Order, provided that Respondent complies fully with all of the terms and conditions of the Consent Agreement, and provided further that, during the period of suspension, Respondent commits no violation of the Export Administration Act, the Regulations, any license or the final Order issued in this proceeding;

and the following language for Paragraph II of the Recommended Order:

Commencing on the date of the final Agency action, the denial of export privileges set forth in Paragraph I, above, shall be suspended, in accordance with § 788.16(c) of the Regulations, for a period of 10 years beginning from the date of entry of the final Order, and shall thereafter be waived,

[2] On July 11, 1985, Hearing Commissioner Hoya issued an order that temporarily denied the export privileges of, *inter alia*, Allimex, A.G. of Zug, Switzerland. 50 FR 29245 (July 18, 1985). Pursuant to its terms, this order was to "remain[ ] in effect until the final disposition of any administrative or judicial proceedings initiated against [Allimex, A.G.] * * *." *Id* at 29246. The final Order of the Under Secretary for Export Administration in the current proceeding constitutes the "final disposition" of the administrative proceeding initiated against Allimex, A.G. Accordingly, pursuant to the terms of the temporary denial order, such order shall cease to have any legal force and effect with regard to Allimex, A.G. as of the date of entry of the final Order of the Under Secretary for Export Administration. This temporary denial order, however, shall remain in effect for all other companies and individuals named therein.

[3] "[N]either the Act nor the Regulations require that a finding of violation be made in order to impose sanctions under a consent agreement." *In the Matter of Bernardus Johannes Jozef Smit*, 54 FR 39027 (Sept. 22, 1989); *In the Matter of A.M.Y. Enterprises*, 54 FR 47801 (November 17, 1989).

[4] The second full paragraph of page 3 of this final Order also incorporates corrections of three minor typographical errors appearing in the second full paragraph of page 2 of the ALJ's Decision and Order.

provided that Respondent complies fully with all of the terms and conditions of the Consent Agreement, and provided further that, during the period of suspension, Respondent commits no violation of the Act, the Regulations, any license, or the final Order in this proceeding. The provisions of Paragraphs III, IV, V, and VI will also be suspended during the ten-year period. A civil penalty in the amount of U.S. $20,000 is assessed against Respondent Michael Grossauer, individually and doing business as Allimex, A.G.

This Order constitutes the final Agency action in this matter.

Dated: February 27, 1990.

Dennis E. Kloske,

Under Secretary for Export Administration.

Decision and Order

Appearance for Respondent: Dr. Ernst A. Brandenberg, Postrasse 30, CH-6301, Zug, Switzerland

Appearance for Agency: Anthony Hicks, Attorney-Advisor, Office of Chief Counsel for Export Administration, U.S. Department of Commerce, Room H-3837, 14th & Constitution Avenue, NW., Washington, DC 20230

Preliminary Statement [1]

This proceeding against Respondent Michael Grossauer, individually and doing business as Allimex, A.G. (Respondent), was initiated with the issuance of a charging letter on March 29, 1989, as supplemented on May 5, 1989, under the authority of the Export Administration Act of 1979 (50 U.S.C.A. app. 2401-2420), as amended, (the Act), and the Export Administration Regulations (the Regulations).

In Charge One it is alleged that on or about May 18, 1983, Respondent committed one violation of § 787.2 of the Regulations in that between on or about May 18, 1983 and on or about May 2, 1984, Respondent caused a false or misleading representation of material fact to be made to a United States agency in connection with the submission of an export control document.

In Charge Two it is alleged that Respondent committed one violation of 787.12 of the Regulations in that, between on or about May 11, 1984, Respondent participated in a transaction that involved a commodity to be exported from the United States or which was subject to the Regulations and that a denied party either obtained some benefit from or in which had some interest.

Respondent filed an answer to the charging letter, after which the Agency and the Respondent entered into a Consent Agreement to settle the matter. Respondent consented to pay a civil penalty of $20,000 and to a denial of export privileges for 10 years.

Respondent also agrees to cooperate with the Agency and supply documents and information as provided for in the consent agreement.

Finally, the Agency agrees that the consent agreement represents the settlement of all contemplated pending actions.

Beginning on the date of final Agency action, which will be effected by the Order of the Under Secretary for Export Administration, the Secretarial delegee, the denial of export privileges is to be suspended, as authorized by § 788.16(c) of the Regulations, and as stated in the following Order, provided that Respondent commits no further violations of the Export Administration Act, the Regulations, any license or the final Order issued in this proceeding.

Order

I. For a period of 10 years from the date of the final Agency action,

Respondent

Michael Grossauer, individually and doing business as Allimex, A.G., Postrasse 30, CH-6301, Zug, Switzerland

and all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations.

II. Commencing on the date of the final Agency action, the denial of export privileges set forth in Paragraph I, above, shall be suspended, in accordance with § 788.16 of the Regulations, for a period of 10 years beginning from the date of entry of the final Order; and shall thereafter be terminated, provided that Respondent has committed no further violation of the Act, the Regulations, any license, or the final Order in this proceeding. The provisions of Paragraphs III, IV, V, and VI will also be suspended during the ten-year period. A civil penalty in the amount of $20,000 is assessed against Respondent Michael Grossauer, individually and doing business as Allimex, A.G.

III. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated or general export license application;

(ii) in preparing or filing any export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) in obtaining or using any validated or general export license or other export control document;

(iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) in the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to those commodities and technical data which are subject to the Act and the Regulations.

IV. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, coproration, or business organization with which the Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

V. All outstanding individual validated export licenses in which Respondent(s) appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondent(s)'s privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

VI. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

[1] Pursuant to the Secretary's order *In the Matter of A.M.Y. Enterprises*, 54 FR 47801 (November 17, 1989) the Order here does not provide findings of facts, conclusions of law, nor findings of violation and *In the Matter of Bernardus Johannes Jozef Smit*, 54 FR 39027 (Sept. 22, 1989) where it was held:

[N]either the Act nor the Regulations require (sic) that a finding of violation be made in order to impose sanctions under a consent agreement (54 FR at 39028).

(i) apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

VII. This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C.A. app. 2412(c)(1)).

Dated: January 31, 1990.

Hugh J. Dolan,

Administrative Law Judge.

To be considered in the 30 day statutory review process which is mandated by section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, U.S. Department of Commerce, 14th & Constitution Ave., NW., room 3898B, Washington, DC., 20230, within 12 days. Replies to the other party's submission are to be made within the following 8 days, 15 CFR 388.23(b), 50 FR 53134 (1985). Pursuant to section 13(c)(3) of the Act, the order of the final order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within 15 days of its issuance.

[FR Doc. 90-5254 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

[Docket No. 9123-01, 9123-02]

Export Privileges; Perovuo

Order

On January 30, 1990, the Administrative Law Judge entered his Recommended Decision and Order in the above-referenced matter. The Decision and Order, a copy of which is attached hereto and made a part hereof, has been referred to me for final action. Having examined the record and based on the facts in this case, I hereby affirm the Decision and Order of the Administrative Law Judge.

This constitutes final agency action in this matter.

Dated: February 27, 1990.

Dennis Kloske,

Under Secretary for Export Administration.

Decision and Order

Appearance for Respondents: Matti Wuori, Esq., Matti Wuori Ky, Vanrikki Stoolin Katu 3 A 10, 00100 Helsinki, Finland

Appearance for Agency: G. Roderick Gillette, Esq., Office of Chief Counsel for Export Administration, U.S. Department of Commerce, Room H-3329, 14th & Constitution Ave., NW., Washington, DC 20230

Preliminary Statement

The Office of Export Enforcement ("the Agency"), Bureau of Export Administration, U.S. Department of Commerce issued a charging letter against Respondent Rainer Peter Perovuo, individually and doing business as Perosov Oy. The letter was issued under the authority of the Export Administation Act of 1979 (50 U.S.C.A. app. 2401-2420), as amended ("the Act"), and the Export Administration Regulations ("the Regulations"), promulgated pursuant to the Act.

This is but one of 3 pairs of charging letters in which the Office of Export Enforcement has charged Paavo Olavi Manner, Rainer P. Perovuo, George B. Ahlberg, and their affiliated companies with various violations of the Export Administration Act and implementing regulations. The record reflects that criminal proceedings were initiated and convictions obtained respecting the three named individuals in the criminal courts of Finland, which had jurisdiction of the persons and those aspects of the violations which related to violations of the criminal law. As noted in the administrative proceeding, *In the Matter of Spawr Optical Research, Inc.*, 51 FR 7477 (1986), and subsequent federal court decision, *Spawr Optical Research, Inc.* v. *Baldridge*, 689 F. Supp. 1366 (1986)], the determination of a Court of competent jurisdiction is not subject to redetermination before this administrative Tribunal.

Facts and Discussion

The charging letter alleged that in 1985 Respondent conspired with Paavo Olavi Manner to reexport, and did reexport, three U.S.-origin data generator devices and peripherals from Finland to the Soviet Union without the required U.S. authorization, in violation of §§ 787.3(b) and 787.6 of the Regulations. The evidence reflects that they shared an office in Helsinki, and that Respondent Perovuo acted as representative of a company owned and managed by Manner. In 1985 a U.S. manufacturer applied for authorization to reexport three data generator devices and peripherals from West Germany to Manner in Helsinki. The request was denied because ultimate consignee was considered an unsuitable recipient. This equipment was controlled for national security reasons. However, Manner succeeded in obtaining the data generator devices and peripherals from a firm in West Germany. In November 1985 Respondent and Manner conspired and reexported the equipment from Finland to the Soviet Union, without having obtained the required U.S. authorization for such reexport in violation of §§ 787.3(b) and 787.6.

Concerning the 1986 conspiracy and reexport set forth in the charging letter, the evidence establishes that Respondents Co-Conspirator Manner purchased a U.S.-origin VAX 11/750 computer from a Finnish company. Perovuo and Manner together with one George B. Ahlberg [1] reexported this computer to the Soviet Union on October 31, 1986. That reexport was also made without the required U.S. authorization in violation of §§ 787.3(b) and 787.6.

Respondents failed to answer the charging letter timely, and were declared in default. The Agency submitted evidence supporting its charges, and requested a ten-year denial of U.S. export privileges. Respondents did ultimately make submissions in which they essentially admitted commission of the alleged acts but denied U.S. jurisdiction, and advanced arguments for a lenient sanction. Respondents made no request for a hearing.

Respondents' defense is that, since they never dealt directly with any U.S. persons, their actions were beyond the reach of U.S. jurisdiction. Further, they argued that the items that they were charged with reexporting "consisted of very unsophisticated everyday computer equipment;" and Respondents claimed to have, even prior to initiation of the Finnish criminal proceedings, "completely desisted from any dealings with products involving high technology."

Respondents also noted that Respondent Perovuo was sentenced by the court of first instance in the Finnish criminal proceeding to two years and ten months imprisonment, and that the case is now pending in the Supreme Court of Finland. Accordingly, Respondents argued that "[a]ny additional sanctions * * * would * * *

[1] The charges respecting Ahlberg and Manner are being separately adjudicated.

seem both suprefluous [sic] and highly unreasonable" (*id.* 2). In addition, they claimed that "a general denial of export privileges * * * could also easily be interpreted as prejudicial to the criminal proceedings" (*id.*)

Conclusion

The evidence of record is sufficient to sustain the Agency's charges that in 1985 Respondent Rainer Peter Perovuo, individually and doing business as Respondent Perosov Oy, conspired with another to reexport, and did reexport, from Finland to the Soviet Union three U.S.-origin data generator devices and peripherals without the U.S. authorization required for such reexport. The evidence of record further sustains the Agency's charges that in 1986 Respondents conspired with other persons to reexport, and did reexport, from Finland to the Soviet Union a U.S.-origin computer without the U.S. authorization required for such reexport. Such conspiring violated § 787.3(b) of the Regulations, and such unauthorized reexporting violated § 787.6.

Respondents do not deny commission of the alleged actions, but rather advance various defenses. Their challenge to the asserted extraterritorial application of U.S. law, lacks citation of legal authority and is contrary to almost half century of export controls. Their characterization of the items reexported as "very unsophisticated every-day computer equipment" fails to rebut the then existing U.S. legal requirement that the technology had been determined to require U.S. authorization for its reexport.

Respecting the appropriate sanction, the deliberateness of Respondents' actions supports the recommendation for a denial of U.S. export privileges, as proposed by Agency Counsel. Respondents' violations of the Regulations have manifestly shown them to be unreliable recipients of U.S.-origin goods and technical data. Their statement that they no longer deal in "products involving high technology," when viewed against the background of their violations, offers insufficient assurance that in the future they would responsibly handle U.S.-origin products involving technology.

A denial of U.S. export privileges for ten years, as proposed by Agency Counsel, is a sanction reasonably calculated to prevent future violations. Concern was expressed that Respondent Perovuo has already been severely punished in the criminal proceeding, and speculation was proffered that any denial of U.S. export privileges might prejudice the future course of the criminal proceeding. The imposition of a ten-year denial in the instant administrative proceeding is not imposed as punishment, but is rather to protect the national interest of the United States. It is justified as achieving the purposes of the Act and the Regulations. It is not intended as a statement on any other legal proceeding, nor is its justification and appropriateness undercut by the pendency of or sanctions from another legal proceeding. Criminal and Civil Administrative proceedings serve different purposes and are not redundant. The *Spawr* decision cited above is the principal judicial precedent supporting these independent actions. Accordingly, a ten-year denial period of Respondents' U.S. export privileges is hereby ordered.

Order

I. For a period of ten years from the date of the final Agency action, Respondents

Rainer Peter Perovuo, individually and doing business as Perosov Oy, Sarvastonkaari 62, 00840 Helsinki, Finland

and all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole of in part, or to be exported, or that are otherwise subject to the Regulations.

II. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) as a party or as a representative of a party to a validated or general export license application;

(ii) in preparing or filing any export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) in obtaining or using any validated or general export license or other export control document;

(iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) in the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which any Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. All outstanding individual validated export licenses in which Respondents appear or participate, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondents' privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

V. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(i) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

VI. This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C.A. app. 2412(c)(1)).

Dated: January 30, 1990.

Hugh J. Dolan,

Administrative Law Judge.

To be considered in the 30 day statutory review process which is mandated by section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, U.S. Department of

Commerce, 14th & Constitution Ave., NW., room 3898B, Washington, DC., 20230, within 12 days. Replies to the other party's submission are to be made within the following 8 days. 15 C.F.R. 388.23(b), 40 FR 53134 (1985). Pursuant to section 13(c)(3) of the Act, the final order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within 15 days of its issuance.

[FR Doc. 90-5253 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Computer Systems Technical Advisory Committee; Partially Closed Meeting

A meeting of the Computer Systems Technical Advisory Committee will be held March 27, 1990, 11 a.m., in the Herbert C. Hoover Building, room 1617F, 14th & Pennsylvania Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions that affect the level of export controls applicable to computer systems or technology.

Agenda:

General Session

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the public.

Executive Session

3. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA/BXA, Room 4069A, U.S. Department of Commerce, 14th & Pennsylvania Ave., NW. Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on January 5, 1990, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C., 553b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, room 6628, U.S. Department of Commerce, Washington, DC 20230. For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: March 2, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 90-5246 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Computer Systems Technical Advisory Committee; Open Meeting

A meeting of the Hardware Subcommittee of the Computer Systems Technical Advisory Committee will be held March 27, 1990, 9 a.m., in the Herbert C. Hoover Building, room 1617F, 14th & Pennsylvania Avenue, NW., Washington, DC. The Hardware Subcommittee was formed to study computer hardware with the goal of making recommendations to the Department of Commerce relating to the appropriate parameters for controlling exports for reasons of national security.

Agenda:

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the public.
3. Discussion of TAC recommendations on graphics displays and graphics engine.

The meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA-BXA, Room 4969A, U.S. Department of Commerce, 14th & Pennsylvania Ave., NW., Washington, DC 20230.

For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: March 2, 1990.

Betty Ann Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 90-5247 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Computer Systems Technical Advisory Committee; Open Meeting

A meeting of the Licensing Procedures and Regulations Subcommittee of the Computer Systems Technical Advisory Committee will be held March 26, 1990, 1 p.m. in the Herbert C. Hoover Building, room 1617F, 14th & Pennsylvania Avenue, NW., Washington, DC. The Subcommittee was formed to review the procedural aspects of export licensing and recommend areas where improvements can be made.

Agenda:

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the public.
3. Discussion of rule-making procedure.
4. Presentation of update on pending regulations.

The meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA/BXA, Room 4069A, U.S. Department of Commerce, 14th & Pennsylvania Ave., N.W., Washington, DC 20230.

For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: March 2, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 90-5248 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Computer Systems Technical Advisory Committee; Closed Meeting

A meeting of the Software Subcommittee of the Computer Systems Technical Advisory Committee will be held March 26, 1990, 3:30 p.m., in the Herbert C. Hoover Building, room 1617F, 14th & Pennsylvania Avenue, NW., Washington, DC. The Software Subcommittee was formed to study

computer software with the goal of making recommendations to the Department of Commerce relating to the appropriate parameters for controlling exports for reasons of national security.

Agenda:

General Session

1. Opening remarks by the Chairman.

2. Presentation of papers or comments by the public.

3. Response to the draft regulation on mass market software.

4. Discussion of treatment of CAD/CAM software.

Executive Session

5. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA/BXA, Room 4069A, U.S. Department of Commerce, 14th & Pennsylvania Ave., NW., Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on January 5, 1990, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C., 552(c)(1) shall be exempt from the provisions relating to public meetings found in sections 10 (a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, U.S. Department of Commerce, Washington, DC, 20230. For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: March 2, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 90-5249 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Computer Systems Technical Advisory Committee; Open Meeting

A meeting of the Supercomputer Subcommittee of the Computer Systems Technical Advisory Committee will be held March 26, 1990, 9 a.m., in the Herbert C. Hoover Building, room 1617F, 14th & Pennsylvania Avenue, NW., Washington, DC. The Supercomputer Subcommittee was formed with the goal of making recommendations to the Department on licensing issues with respect to supercomputers.

Agenda:

1. Opening remarks by the Chairman.

2. Presentation of papers or comments by the public.

3. Discussion of proposed definition of "supercomputer."

4. Annual Review of definition of "supercomputer."

5. Discussion of treatment of supercomputer spare parts and the use of distribution license (DL) procedure for export of supercomputers.

6. Discussion of definition for massively parallel computers. The meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, Technical Support Staff, OTPA/BXA, Room 4069A, U.S. Department of Commerce, 14th & Pennsylvania Ave., NW., Washington, DC 20230.

For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 377-2583.

Dated: March 2, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit.

[FR Doc. 90-5250 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

Semiconductor Technical Advisory Committee; Closed Meeting

A meeting of the Semiconductor Technical Advisory Committee will held March 28, 1990, 9 a.m., Herbert C. Hoover Building, Room 1617-F, 14th Street and Constitution Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions which affect the level of export controls applicable to semiconductors and related equipment or technology.

Agenda:

General Session:

1. Opening Remarks by the Chairman and Commerce Representative.

2. Presentation of Papers or Comments by the Public.

3. Election of Chairman.

4. Expitaxial Equipment.

Executive Session:

5. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control programs and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, in order to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that you forward your public presentation materials two weeks prior to the meeting to the below listed address: Ms. Ruth D. Fitts, U.S. Department of Commerce/BXA, Office of Technology & Policy Analysis, 14th & Constitution Avenue, NW., Room 4069A, Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 5, 1990, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C. 529b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10 (a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, room 6628, U.S. Department of Commerce, Washington, DC. For further information or copies of the minutes call Ruth D. Fitts, 202-377-4959.

Dated: March 1, 1990.

Betty Anne Ferrell,

Director, Technical Advisory Committee Unit, Office of Technology & Policy Analysis.

[FR Doc. 90-5251 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

Importers and Retailers' Textile Advisory Committee; Partially Closed Meeting

A notice was published in the **Federal Register** on February 28, 1990, (55 FR 7018) announcing the date of the next Importers and Retailers' Textile Advisory Committee meeting. The purpose of this notice is to announce that the date has been changed to Monday, April 2, 1990, 10:30 a.m., Herbert C. Hoover Building, Room H3407, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Dated: March 5, 1990.

Augustine D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 90-5325 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DR-M

Management-Labor Textile Advisory Committee; Partially Closed Meeting

A notice was published in the **Federal Register** on February 28, 1990, (55 FR Page 7018) announcing the date of the next Management-Labor Textile Advisory Committee meeting. The purpose of this notice is to announce that the date has been changed to Monday, April 2, 1990, the time has been moved up to 2 p.m., Herbert C. Hoover Building, Room H3407, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Dated: March 5, 1990.

Augustine D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 90-5326 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-DR-M

National Oceanic and Atmospheric Administration

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The New England Fishery Management Council will hold a public meeting on March 14-15, 1990, at the Colonial Hilton Inn, Routes 128 and 95, Wakefield, MA. The Council will begin its meeting at 10 a.m., on March 14. It will reconvene on March 15 at 9 a.m., and adjourn when agenda items have been completed.

On the morning of the first day, the Council will hear reports from the Scallop Oversight Committee followed in the afternoon by reports of the Groundfish, Herring and Large Pelagics Committees.

On the second day, the Council will discuss the Marine Mammal Commission's draft "Guidelines To Govern The Incidential Take Of Marine Mammals After 1993", along with other relevent business matters. In addition, the Council may hold a closed session (not open to the public) to discuss administrative matters.

For more information contact Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906; telephone: (617) 231-0422.

Dated: March 2, 1990.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Services.

[FR Doc. 90-5211 Filed 3-7-90; 8:45 am]

BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, applicable form, and Applicable OMB Control Number: DoD FAR Supplement, part 17, Special Contracting Methods; No Form; and OMB Control Number 0704-0214.

Type of Request: Extension.

Average Burden Hours/Minutes Per Response: .332666 Hours.

Frequency of Response: On Occasion.

Number of Respondents: 2,637,600.

Annual Burden Hours: 903,240.

Annual Responses: 2,637,600.

Needs and Uses: This request concerns information, collection, and recordkeeping requirements to provide the contracting officers information that will be used to identify sources for participation in competitive acquisitions.

Affected Public: Businesses and other for profit.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

Dated: March 5, 1990.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5348 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement Submitted to OMB for Review

AGENCY: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Personnel Security Clearance Change Notification, DISCO Form 562; and OMB Number 0704-0275.

Type of Request: Extension.

Average Burden Hours: 2 Hours.

Frequency of Response: As necessitated by changes only.

Number of Respondents: 12,500.

Annual Burden Hours: 37,700.

Annual Responses: 187,500.

Needs and Uses: DISCO Form 562 is used by contractors participating in the Defense Industrial Security Program to report various changes in employee personnel clearance status or identification information, e.g., transfers, terminations, changes in name or other previously submitted information.

Affected Public: Contractors participating in the Defense Industrial Security Program.

Frequency: On occasion, as necessitated by changes only.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Dr. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at Office of Management and Budget, Desk Officer, room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

Dated: March 5, 1990.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5347 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Defense Intelligence Agency Advisory Board; Closed Meeting

AGENCY: Defense Intelligence Agency Advisory Board.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the provisions of Subsection (d) of section 10 of Public Law 92-463, as amended by section 5 of Public Law 94-409, notice is hereby given that a closed meeting of a committee of the DIA Advisory Board has been scheduled as follows:

DATE: Wednesday and Thursday, 21-22 March 1990 (8:30 a.m. to 5 p.m.) each day.

ADDRESS: Sandia National Laboratories, Albuquerque, NM.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel John E. Hatlelid, USAF, Chief, DIA Advisory Board Office, Washington, DC 20340-1328, (202/373-4930).

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), Title 5 of the U.S. Code and therefore will be closed to the public. Subject matter will be used in a special study on Intelligence Support for Arms Control Monitoring.

Dated: March 2, 1990.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5264 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Defense Science Board Task Force on Review of the B-2; Advisory Committee Meetings

Summary: The Defense Science Board Task Force on Review of the B-2 will meet in closed session on April 5, 1990 at the Institute for Defense Analyses, Alexandria, Virginia and on June 19-20, 1990 at the Northrop Corporation, Pico Rivera, California.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will review the B-2 program with emphasis on the flight test program and reductions of program costs.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that these DSB Task Force meetings, concern matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly these meetings will be closed to the public.

Dated: March 2, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5261 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Defense Science Board Task Force on SDIO Technology Assessment; Advisory Committee Meetings

Summary: The Defense Science Board Task Force on SDIO Technology Assessment will meet in closed session on March 20-21, 1990 at Long Island, New York.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will receive classified briefings on critical SDIO technologies.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that this DSB Task Force meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

Dated: March 2, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5262 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Defense Science Board Task Force on Strategic Sensors; Advisory Committee Meetings

Summary: The Defense Science Board Task Force on Strategic Sensors will meet in closed session on March 22, April 19, May 17, June 19, August 23, and September 18, 1990 at DBA Systems Inc., Fairfax, Virginia and July 17, 1990 at the US Air Force Academy, Colorado Springs, Colorado.

The mission of the defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will investigate technologies that are capable of improving strategic surveillance sensor performance.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that these DSB Task Force meetings, concern matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly these meetings will be closed to the public.

Dated: March 2, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90-5263 Filed 3-7-90; 8:45 am]

BILLING CODE 3810-01-M

Department of the Army

International Government Bill of Lading Program; Annual Performance Bonds Submission Method and Bond Text; Proposed Changes.

AGENCY: Military Traffic Management Command (MTMC).

ACTION: Proposed Change to Method of Submitting Annual Performance Bonds & Changes in Performance Bond Text.

SUMMARY: MTMC requests public comment on its proposed method of submission of the mandatory Annual Performance Bond for participation in the International Through Government Bill of Lading (ITGBL) program, and on bond text that has been changed as well.

MTMC proposes to change the annual performance bond requirement from the present method of submitting an annual performance bond every year, which covers all shipments handled during two cycles, to submission of one continuous performance bond to cover all shipments handled in every cycle the carrier participates in the program, or until cancelled.

Presently, ITGBL approved carriers are required to purchase a performance bond for a minimum liability of $100,000, or 2.5 percent of their gross annual income, derived from ITGBL traffic, whichever is greater. In keeping with this policy, bonds will be in the amount of $100,000, unless MTMC notifies a participating company otherwise. We would continue to use our present policy of notifying participating companies of their past revenue, as contained in their records, to determine the sum of the required bond.

The first year this method is used, those carriers needing a bond in the amount of 2.5 percent of their gross annual income will purchase a bond for the determined 2.5 percent amount. Each year thereafter, the carrier will obtain a rider to increase or decrease the bond for the upcoming year.

A copy of the proposed annual performance bond form may be obtained by calling, or writing Mrs. Rosemarie Guzzardo at the address and telephone number printed below. We have tailored the text in the bond to clarify the purpose of the bond. Specifically, we propose to:

a. Remove the word "Annual" from the title and instructions on the reverse side of the bond.

b. Remove the word "penal" from the face of the bond and instructions.

c. Change the block that now indicates, "One Year Beginning * * * and Ending * * *," to read, "Effective Date (Mo/Day/Hr) 12:01 Eastern Time and continuing until cancelled."

d. Change the second paragraph of text which now reads, "The condition of this obligation is such, that whereas the Principal contemplates entering into contracts, from time to time during the year shown above, with the Government * * *," to read, "* * * entering into contracts, from time-to-time during the effective period of this bond, * * *"

e. The fourth paragraph now reads, "The Government shall be the sole beneficiary of this bond in the event the Principal defaults and is unable to perform for whatever reason, including that of filing a petition in bankruptcy, or an involuntary bankruptcy, to include overcharges and claims to the Government. This bond may be terminated at any time by the Surety(ies) upon thirty (30) days notice in writing * * * *"

We propose it be changed to begin, "This performance bond serves to protect the Government against potential financial damage and interference with the Military Traffic Management Command's mission to effect delivery of shipments. By this performance bond, the Surety underwrites and assumes the Principal's liability to the Government for excess reprocurement costs when, due to the Principal's failure to complete delivery of a shipment, the Military Traffic Management Command deems it necessary to reprocure transportation service from an alternate carrier. The Government shall be the sole beneficiary of this bond in the event the Principal defaults and is unable to perform for whatever reason, including that of filing a petition in bankruptcy, or an involuntary bankruptcy.

This bond will be continuous, and may be cancelled at any time by the Surety(ies) upon thirty (30) days notice in writing to Headquarters, Military Traffic Management Command, ATTN: MTPP-CI, 5611 Columbia Pike, Falls Church, Virginia 22041-5050, representing the Government. Termination * * *"

f. Note 1 now reads, "The word contracts as used herein means agreements for transportation and services as provided in applicable Government bills of lading, * * *" We propose to insert the words, "and associated" at this point, before "Tenders of Service, rate tenders and tariffs."

g. On the reverse side of the bond, under Instructions for Completing Performance Bonds, Item 8 now reads, "The bond is effective for one year. The beginning and ending date of the bond shall be entered in the appropriate block." It will be changed to read, "The bond has no time limit and applies to all shipments/Government Bill of Lading contracts of the Principal, and is continuous until cancelled. Only the beginning date of the bond shall be entered in the appropriate block."

DATE: Comments must be received by April 13, 1990.

ADDRESS: Comments may be addressed to: Headquarters, Military Traffic Management Command, ATTN: MTPP-C, room 408, 5611 Columbia Pike, Falls Church, VA 22041-5050.

FOR FURTHER INFORMATION CONTACT: Mrs. Rosemarie F. Guzzardo at (703) 756-1190.

Kenneth L. Denton,

Alternate Army Liaison Officer With the Federal Register.

[FR Doc. 90-5296 Filed 3-7-90; 8:45 am]

BILLING CODE 5110-08-M

Military Traffic Management: International Household Goods Shipments; Intermodel Containers Use Feasibility

AGENCY: Military Traffic Management Command (MTMC), Department of the Army.

ACTION: Invitation to comment on the through container concept for moving household goods shipments.

SUMMARY: The Office of the Assistant Secretary of Defense (OASD) requested the Military Traffic Management Command to assess the feasibility of using intermodel containers, arranged through the Defense Transportation System (DTS) to ship household goods in international movements. This would supplement the current method of a single commercial carrier controlling household goods shipments through commercial ports.

If accepted, MTMC proposes a test be conducted for a 6-month period for selected channels.

a. Item 242: Rate Cycle: The current 6-month rate cycle submissions will remain in effect, to include those channels selected for the test period. Appropriate supplements to the solicitation would be made incorporating areas such as service responsibilities, performance criteria, test channels, and similar information.

b. MTMC will request a special solicitation for these test channels which will involve only origin and destination service. Rates submitted wi include packing, Type II containerization in MTMC approved containers, drayage to intermodel containerization point, and stuffing into ocean containers. At destination, rates will include unstuffing, drayage to residence, and unpacking.

DATE: Comments must be received by July 31, 1990.

ADDRESS: Comments may be addressed to: Headquarters, Military Traffic Management Command, ATTN: MTPP-CI, room 408, 5611 Columbia Pike, Falls Church, VA 22041-5050.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Milward at (703) 756-2383.

Kenneth L. Denton,

Alternate Army Liaison Officer with the Federal Register.

[FR Doc. 90-5297 Filed 3-7-90; 8:45 am]

BILLING CODE 3710-08-M

Military Traffic Management: International Through Government Bill of Lading Shipments; One Year Rates Requirement

AGENCY: Military Traffic Management Command (MTMC), Department of the Army.

ACTION: Invitation to comment on the requirement for carriers to provide one year rates on Department of Defense ITGBL shipments.

SUMMARY: The Office of the Assistant Secretary of Defense (OASD) has requested the Military Traffic Management Command (MTMC) to assess the feasibility of a 1-year rate cycle for international household goods shipments. The Military Traffic Management Command proposes to solicit industry comments, and, if practical, test a 1-year rate cycle on selected channels for household goods shipments versus the current 6-month cycle. This revision has the potential to improve efficiency and reduce transportation expenditures by giving carriers the opportunity to stabilize their operations through a long-term rate cycle. Solicitation items impacted are as follows:

a. Item 242: Rate Cycle. The current 6-month rate cycle submissions will remain in effect except for those channels selected for the test period.

b. The Military Traffic Management Command will request a special 1-year solicitation on selected channels. For the test period, rates submitted in response to the 1-year solicitation will apply to all test household goods traffic channels.

DATES: Comments must be received by July 31, 1990.

ADDRESSES: Comments may be addressed to: Headquarters, Military Traffic Management Command, ATTN: MTPP-CI, room 408, 5611 Columbia Pike, Falls Church, VA 22041-5050.

FOR FURTHER INFORMATION CONTACT: Mrs. Donna Jack at (703) 756-2383

Kenneth L. Denton,

Alternate Army Liaison Officer With the Federal Register.

[FR Doc. 90-5298 Filed 3-7-90; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF EDUCATION

[CFDA No. 84.209A]

Native Hawaiian Family-Based Education Centers; Applications for New Awards for Fiscal Year (FY) 1990

Purpose of Program: To make direct grants to Native Hawaiian organizations (including Native Hawaiian education organizations) to develop and operate a minimum of eleven family-based education centers throughout the Hawaiian Islands.

Deadline for Transmittal of Applications: April 16, 1990.

Deadline for Intergovernmental Review: June 15, 1990.

Applications Available: March 7, 1990.

Available Funds: $2,765,000.

Estimated Average Size of Awards: $1,382,500.

Estimated Number of Awards: 2.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 81, and 85.

Weighting for Selection Criteria: The Education Department General Administrative Regulations at 34 CFR 75.210(c) authorize the Secretary to distribute an additional 15 points among the selection criteria in 34 CFR 75.210 to bring the total possible points to a maximum of 100 points. For the purpose of this competiton, the Secretary will distribute the additional points as follows:

Meeting the Purpose of the Authorizing Statute: (§ 75.210(b)(1)). Five (5) additional points will be added for a possible total of 35 points for this criterion.

Plan of Operation: (§ 75.210(b)(3)). Five (5) additional points will be added for a possible total of 20 points for this criterion.

Budget and Cost Effectiveness: (§ 75.210(b)(5). Five (5) additional points will be added for a total of 10 points for this criterion.

For Applications or Information Contact: John R. Fiegel, U.S. Department of Education, 400 Maryland Avenue, SW, room 2049 FOB6, Washington, DC 20202-6436. Telephone: (202) 732-4342.

Authority: 20 U.S.C. 4904.

Dated: February 28, 1990.

Daniel F. Bonner,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 90-5362 Filed 3-7-90; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP90-805-000]

Alabama-Tennessee Natural Gas Co.; Application

March 2, 1990.

Take notice that on February 16, 1990, Alabama-Tennessee Natural Gas Company (A-T), P.O. Box 918, Florence, Alabama 35631, filed in Docket No. CP90-805-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon from interstate service by sale to Sun Operating Limited Partnership (SOLP) certain existing pipeline and appurtenant facilities, hereinafter referred to as the Tatum's Camp or South Mississippi facilities, being located in Lamar and Forrest Counties, Mississippi, and the related service, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

It is stated that A-T currently owns the Tatum's Camp facilities, a small gathering system in Lamar and Forrest Counties, Mississippi, which is non-contiguous to its interstate pipeline. A-T states that the gathering system is used to obtain natural gas produced by SOLP from the Tatum's Camp Field, Lamar County, Mississippi. It is also stated that any gas purchased from SOLP by A-T has been delivered into Tennessee Gas Pipeline Company's (Tennessee) pipeline at a point of interconnection with Tennessee's Delta-Portland line located in Forrest County, Mississippi and is transported by Tennessee and delivered to A-T at existing delivery points.

A-T requests authority to abandon by sale to SOLP approximately 17.7 miles of eight and five-eight inch pipeline and related facilities, including an amine plant constructed to make natural gas acceptable for transportation by Tennessee. The facilities which A-T seeks to abandon extend from the #1 and #2 Ross Beatty Wells in Tatum's Camp Field in Lamar County, Mississippi to a pont of interconnection with Tennessee's Delta-Portland line. A-T states that the amine plant is adjacent to such pipeline.

A-T states that it was authorized to construct and operate the Tatum's Camp facilities by order issued November 20, 1978 (5 FERC ¶ 61,123) in response to curtailment of deliveries by Tennessee, at that time A-T's sole supplier. As a result of substantial changes in the natural gas markets in the 1980s, A-T

states that it has numerous options which it did not have in 1978. For example, A–T states that Tennessee is now an open access transporter of natural gas, and A–T has interconnections, either directly or indirectly, with both Columbia Gulf Transmission Company and Texas Eastern Transmission Corporation.

It is further stated that Tennessee is no longer curtailing firm sales and has not for several years. Additionally, it is stated that the current gas sales contract between A–T and SOLP has expired pursuant to its terms, and any future sales would have to be made under a new agreement. A–T states that there has also been a substantial decline in the deliverability from the wells currently connected to the Tatum's Camp facilities, as shown by the following chart:

Year	Daily deliverability (average)
1980	11,152 Mcf.
1985	7,026 Mcf.
1988	3,858 MMBtu.
1989	3,084 MMBtu.

While the facilities have been utilized to provide service to its customers, A–T states that abandonment will not result in the diminution of service to those existing customers since all of A–T's firm obligations continue to be met under its firm sales contract with Tennessee. Finally, A–T avers that abandonment would enable it to avoid costs which would otherwise be incurred to replace or maintain those facilities.

In addition to abandonment of the facilities, A–T also seeks abandonment of all services performed by that segment of the pipeline. Specifically, A–T seeks to abandon a certificate issued in Docket No. CP80–354, *et al.*, 15 FERC ¶ 61,143A, authorizing the transportation of natural gas for Amoco Production Company (Amoco). A–T states that the transportation that was authorized there occurred in 1983; no transportation has taken place since that time and the contract between Amoco and A–T under which that service took place has been terminated.

A–T proposes to sell its Tatum's Camp facilities to SOLP at their depreciated book value, as of October 1, 1989, of $457,747. It is stated that Oryx Energy Company (Oryx), as managing General Partner of SOLP, would operate the facilities as gathering facilities and intends to deliver gas to Tennessee for transportation to any purchaser. A–T states that the sale of the facilities to SOLP is contingent upon receipt from the Commission of all necessary regulatory authorizations, including an order from the Commission disclaiming jurisdiction over the facilities. A–T states that SOLP and A–T concurrently filed a joint petition for declaratory order seeking such a determination.

Accordingly, A–T states that its abandonment application is subject to a Commission determination, satisfactory to A–T and SOLP, that the facilities constitute gathering. However, A–T states that regardless of the Commission's action on the gathering question, A–T still seeks to abandon the transportation service to Amoco. Should the Commission fail to issue a satisfactory declaratory order, A–T states that it will continue to own the facilities and they would be utilized as at the present time.

Any person desiring to be heard or to make any protest with reference to said application should on or before March 23, 1990, file with the Federal Energy Regulatory Commission, Washington, D.C. 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 proceeding. Any person wishing to become a party to a proceeding or to participate as a 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 the 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 permission and approval for the proposed abandonment are 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 A–T to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 90–5235 Filed 3–7–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TA90–1–48–000]

ANR Pipeline Co.; Proposed Changes in Gas Tariff

March 2, 1990.

Take notice that ANR Pipeline Company ("ANR"), on February 28, 1990, tendered for filing as part of its F.E.R.C. Gas Tariff, Original Volume No. 1, the following tariff sheet to be effective May 1, 1990.

Twenty-Eighth Revised Sheet No. 18

ANR states that the purpose of the instant filing is to implement its Annual PGA rate adjustment pursuant to section 15 of the General Terms and Conditions of ANR's Tariff.

Twenty-Eighth Revised Sheet No. 18 reflects an 8.13¢ per dekatherm ("dth") decrease in the gas cost component of the commotidy rate of ANR's CD–1/MC–1 Rate Schedules, a decrease of $0.059 in the monthly D–1 demand rate and a reduction of 1.83¢ in the D–2 demand rate applicable to the CD–1/MC–1 Rate Schedules. The instant filing further reflects a decrease in ANR's one-part rate applicable to Rate Schedule SGS–1 of 14.26¢ per dth.

ANR states that copies of the filing were served upon all of 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 Commission, 825 North Capitol Street, NE., Washington, DC, 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before March 22, 1990. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 90–5232 Filed 3–7–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TQ90-4-24-004]

Equitrans, Inc.; Proposed Change in Gas Tariff

March 2, 1990.

Take notice that Equitrans, Inc. (Equitrans) on February 22, 1990, tendered for filing with the Federal Energy Regulatory Commission (Commission) the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1, effective January 9, 1990:

Fourth Substitute First Revised Substitute Fourteenth Revised Sheet No. 10
Fourth Substitute First Revised Substitute Thirteenth Revised Sheet No. 14
Second Substitute Second Revised Sixth Revised Sheet No. 34

Equitrans, Inc. (Equitrans) hereby submits for filing revised tariff sheets from Docket No. TQ90-4-24-000, which reflect the correct tracking rates for Equitrans' supplier, Tennessee Gas Pipeline Company, and the transfer of demand costs associated with long-term gas purchase contracts to the commodity portion of its rate.

Equitrans states that a copy of its filing has been served upon its purchasers 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, 825 North Capitol Street NE., Washington, DC 20426, in accordance with § 385.21 and 385.214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before March 9, 1990. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 90-5233 Filed 3-7-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA90-1-47-000]

MIGC, Inc., Proposed Purchased Gas Adjustment Rate Change

March 2, 1990.

Take notice that on February 28, 1990, MIGC, Inc. (MIGC) tendered for filing Fifty-Seventh Revised Sheet No. 32 to its FERC Gas Tariff Original Volume No. 1.

MIGC states that the purpose of this proposed tariff change is to submit its second annual purchased gas cost adjustment (PGA) filing pursuant to the Commission's revised PGA regulations and the revised PGA provisions of MIGC's tariff, as approved in Docket No. RP88-143-000. The revised tariff sheet is proposed to become effective May 1, 1990.

Fifty-Seventh Revised Sheet No. 32 included in the filing reflects a PGA decrease of $.1153 per MMBtu. MiGC states that the proposed quarterly PGA decrease of $.1153 reflects an annual surcharge adustment of ($.1153) per MMBtu also effective May 1, 1990.

Any person desiring to be heard or to protest said filing should file a poetition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 384.214 and 385.211). All such petitions or protests should be filed on or before March 22, 1990. 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 the public.

Lois D. Cashell,

Secretary.

[FR Doc. 90-5237 Filed 3-7-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA90-3-38-000]

Ringwood Gathering Co.; Proposed Changes in Gas Tariff

March 2, 1990.

Take notice that on February 28, 1990, Ringwood Gathering Company (Ringwood), 4828 Loop Central Drive, Loop Central Three, Suite 850, Houston, Texas 77081, filed a Substitute Fifty-Fourth Sheet No. 5 to its FERC Gas Tariff and FERC Form No. 542-PGA pursuant to 18 CFR 154.308.

Ringwood states that copies of the filing were served upon Ringwood, jurisdictional customers and interested state agencies.

Ringwood's Quarterly PGA filing reflects an estimated $1.5078 per Mcf cost of gas, a current adjustment of $.059 per Mcf; a cumulative credit adjustment of $.4171 per Mcf; a surcharge adjustment of $.1746 per Mcf and a total sales rate of $2.0544 per Mcf.

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, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before March 9, 1990. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 90-5236 Filed 3-7-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-85-000]

Texas Eastern Transmission Corp., Proposed Changes in Gas Tariff

March 2, 1990.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on February 28, 1990 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies of the following tariff sheets:

Fourth Revised Sheet No. 497
Fourth Revised Sheet No. 509
Fourth Revised Sheet No. 514
Fourth Revised Sheet No. 515
Fourth Revised Sheet No. 516
Fourth Revised Sheet Nos. 517-519
Second Revised Sheet No. 681
Second Revised Sheet No. 681A
Original Sheet No. 681B
Third Revised Sheet No. 740
Original Sheet No. 740A

Texas Eastern states that the purpose of this filing is to simplify the procedures for requesting receipt points for transportation under Rate Schedules FT-1 and IT-1.

The proposed effective date of the tariff sheets listed above is April 1, 1990.

Copies of the filing were served on all Authorized Purchasers of Natural Gas from Texas Eastern, interested state commissions and all customers under Rate Schedules FT-1 and IT-1.

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, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or

before March 9, 1990. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 90-5234 Filed 3-7-90; 8:45 am]

BILLING CODE 6717-01-M

Office of Fossil Energy

[FE Docket No. 89-74-NG]

Westcoast Resources, Inc.; Order Granting Blanket Authorization to Import Natural Gas from Canada, Revoking Emergency Interim Order, and Granting Intervention

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of order granting blanket authorization to import natural gas from Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued an order granting Westcoast Resources, Inc., blanket authorization to import up to 300 Bcf of natural gas from Canada during a two-year period beginning on the date of issuance of this order and revoking an Emergency Interim Order granted on February 1, 1990.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, Room 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, March 2, 1990.

Constance L. Buckley,

Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 90-5346 Filed 3-7-90; 8:45 am]

BILLING CODE 6450-01-M

Office of Hearings and Appeals

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of Proposed Implementation of Special Refund Procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy solicits comments concerning the proposed procedures to be followed in refunding to adversely affected parties $48,500,000, plus accrued interest, that Tesoro Petroleum Corp. is required to remit to the DOE pursuant to a Consent Order executed on January 23, 1989. The funds will be distributed in accordance with the DOE's special refund procedures, 10 C.F.R. part 205, subpart V.

DATE AND ADDRESS: Comments must be filed in duplicate within 30 days of publication of this notice in the **Federal Register** and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All comments should display a conspicuous reference to Case Number KEF-0128.

FOR FURTHER INFORMATION CONTACT: Richard T. Tedrow, Deputy Director, Darlene Gee, Staff Analyst, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-8018 (Tedrow), (202) 586-6602 (Gee).

SUPPLEMENTARY INFORMATION: In accordance with the procedural regulations of the Department of Energy (DOE), 10 CFR. 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision sets forth the procedures that the DOE has tentatively formulated to distribute monies that have been and will be remitted by Tesoro Petroleum Corp. to the DOE to settle alleged pricing and allocation violations with respect to the firm's sales of crude oil and refined petroleum products. The DOE is currently holding Tesoro's first payment of $25 million in an interest-bearing escrow account pending distribution. Subsequent payments totalling $23.5 million plus interest will also be distributed pursuant to the procedures established in this proceeding.

Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized. Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments must be submitted within 30 days of publication of this notice in the **Federal Register** and should be sent to the address set forth at the beginning of this notice.

All comments received will be available for public inspection between the hours of 1 p.m. and 5 p.m., Monday through Friday, except Federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in room IE-234, 1000 Independence Avenue, SW., Washington, DC 20585.

Dated: March 1, 1990.

George B. Breznay,

Director, Office of Hearings and Appeals.

PROPOSED DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Name of Firm: Tesoro Petroleum Corporation.

Date of Filing: February 24, 1989.

Case Number: KEF-0128.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. *See* 10 CFR part 205, subpart V. On February 24, 1989, ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a Consent Order entered into with Tesoro Petroleum Corporation (Tesoro).

I. Background

Tesoro was a "producer," "refiner," and "reseller" of petroleum products as those terms were defined in 10 CFR 212.31. A DOE audit of Tesoro's records revealed possible violations of the Mandatory Petroleum Price and Allocation Regulations. 10 CFR parts 210, 211 and 212. More specifically, the audit revealed that between January 1, 1973 and January 27, 1981, Tesoro may have violated the DOE's pricing and allocation regulations with respect to its pricing, refining, and sales of crude oil and the pricing and sales of refined petroleum products.

The DOE has taken various administrative enforcement actions against Tesoro, including the issuance of Notices of Probable Violation, Proposed Remedial Orders, and Remedial Orders. Tesoro maintained, however, that it has calculated its costs, determined its prices, sold its crude oil and petroleum products, and operated in all other respects in accordance with the federal petroleum price and allocation regulations. However, Tesoro states that in order to avoid the expense of protracted and complex litigation and the disruption of its orderly business functions, it entered into a Consent

Order (No. RTSE006A1Z) with the DOE on January 23, 1989.[1] The Consent Order refers to ERA's allegations of overcharges, but does not find that any violations occurred. In addition, the Consent Order states that Tesoro does not admit any such violations.

The Consent Order requires Tesoro to pay a total of $48,500,000, plus interest on any unpaid balances, to the DOE over a period of six years. Under the terms of the Consent Order, Tesoro deposited $25,000,000 within thirty days after the effective date of the Consent Order. Beginning one year later, Tesoro will make six equal annual installments of $5,177,850.95, constituting an additional principal sum of $23,500,000, plus interest calculated at the rate of 8.61 per cent per annum. This Proposed Decision and Order sets forth the OHA's tentative plan for the distribution of the funds in the Tesoro escrow account. Comments are solicited.

II. Proposed Refund Procedures

The procedural regulations of the DOE set forth general guidelines to be used by OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR part 205, subpart V. The subpart V process may be used in situations in which the DOE is unable to identify readily those persons who may have been injured by the alleged regulatory violations or to determine the amount of such injuries. A more detailed discussion of subpart V and the authority of OHA to fashion procedures to distribute refunds is set forth in the cases of *Office of Enforcement*, 9 DOE ¶ 82,508 (1981); and *Office of Enforcement*, 8 DOE ¶ 82.597 (1981) (*Vickers*).

Because the Consent Order resolves alleged violations involving both sales of crude oil and refined petroleum products, we propose to divide the consent order fund into two pools. *See Shell Oil Co.*, 18 DOE ¶ 85,492 (1989) (*Shell*). According to the ERA, $2,000,000 of the consent order fund is attributable to refined product compliance issues and the remaining $46,500,000 is attributable to crude oil and related compliance issues. *See* January 23 Notice at 3109. However, the ERA's proposed division in the notice is merely a recommendation to OHA. The final division of the consent order funds is left for decision in this proceeding. While we have tended to accept the estimation figures set forth in consent order documents, we can also depart from that practice where compelling reasons are presented or where the evidence indicates that we should do so. OHA is bound by the provisions in subpart V at § 205.280 to make restitution to injured persons in order to remedy violations of the regulations. If following a recommendation on the distribution of settlement funds by ERA or the consent order itself would be inconsistent with the restitutionary goals of subpart V or would not further these goals, OHA will not follow the recommendation. *See Office of Enforcement*, 8 DOE 82,597 at 85,395–6 (1981) (*Vickers*), upheld in *Denny Klepper Oil Co.* v. *DOE*, Fed. Energy Guidelines (Court Decisions 1981–1984) ¶ 26,513 at 29,704. In this case, a number of factors in the record indicate that a different division of funds may better serve the restitutionary purposes of subpart V. We seek comments on this issue.

It appears likely at this point that the estimate of $2 million for product overcharges is inadequate to cover all meritorious refined product refund claims involving Tesoro. For example, a Proposed Remedial Order (PRO) was issued in February 1988 concerning certain cost issues relating to Tesoro's refined product sales during the period May 1973 and August 1973 through December 1980. That PRO alleged refined product overcharges estimated in the range of $4 to $6 million. Tesoro subsequently submitted documentation to demonstrate that the maximum overcharges in the case would amount to $1.3 million. With interest on that amount, however, Tesoro's maximum potential liability at the time of the consent order would be approximately $4 million. In addition, there is evidence in the record to suggest that some firms may have incurred sizable overcharges due to improperly increased transportation charges. In this regard, there is one potential claimant alone that asserts eligibility for a refund of as much as $1.5 million. If this claim were meritorious, it would for all practical purposes eliminate the $2 million allocation that the consent order suggests for refined products. Furthermore, during the consent order period Tesoro's refined product transactions constituted about 55% of its total operations, *i.e.*, crude oil transactions involved only 45% of Tesoro's operations. *See* February 15, 1990. Memorandum of telephone conversation between Darlene Gee, OHA Staff Analyst, and Mr. Larry Mosher, Counsel for Tesoro Petroleum Corporation. For the above-mentioned reasons, we believe an increase in the refined product pool and a decrease in the crude oil pool are warranted. We propose to increase the refined products pool to $6 million.

This $6 million amount, plus interest accrued, will be made available for distribution to purchasers of Tesoro refined petroleum products who demonstrate that they were injured as a result of Tesoro's alleged regulatory violations. In addition, to speed action in this proceeding, we propose that the principal amount of $6 million be taken in its entirety from the initial payment of $25 million made by Tesoro to the DOE. *See Texaco Inc.*, Case No. KEF–0119 (March 24, 1989) (Proposed Decision). We further propose that the remaining portion of the consent order fund, or $19 million from Tesoro's initial payment and all future payments, and accumulated interest on both the $19 million and those future payments, be set aside as a pool of crude oil overcharge funds available for disbursement. The specific distribution procedures for those funds are proposed in detail in the following section.

III. Crude Oil Claims

We propose that the funds in the crude oil pool be distributed in accordance with the Modified Statement of Restitutionary Policy (MSRP), which was issued by the DOE on July 28, 1986. 51 FR 27899 (August 4, 1986).[2] The MSRP, which was issued as a result of a court-approved Settlement Agreement in *The Department of Energy Stripper Well Litigation*, M.D.L. 378 (D. Kan. 1986), provides that crude oil overcharge payments will be distributed among the States, the United States Treasury, and eligible purchasers of crude oil and refined products.[3] Under the MSRP, up

[1] The Consent Order also resolves allegations in a Proposed Remedial Order issued jointly to Tesoro and DeMenno-Kerdoon (Inc.) on December 8, 1986, and a Proposed Remedial Order issued jointly to Tesoro and Kenco Refining, Inc., on November 6, 1986. In accordance with the terms of the Consent Order, fifty percent of DOE's claim in these two cases will remain against the parties other than Tesoro. Furthermore, DeMenno-Kerdoon (Inc.) and Kenco Refining, Inc., will not be eligible to receive any refunds in this proceeding.

[2] In the Order implementing the MSRP, the OHA solicited comments regarding the proper application of the MSRP to OHA refund proceedings involving alleged crude oil violations. On April 6, 1987, the OHA issued a notice which analyzes the comments that were submitted and explains the procedures the Office will follow in processing applications filed under subpart V regulations for refunds from the crude oil overcharge funds. 52 FR 11737 (April 10, 1987). Since the procedures apply to all crude oil funds subject to subpart V, we need not differentiate between the various crude oil transactions settled by the Tesoro consent order.

[3] Under the Settlement Agreement, firms which applied for a portion of certain escrow funds established under the Settlement generally must have signed a waiver releasing their claims to any

Continued

to 20 percent of these crude oil overcharge funds may be reserved to satisfy valid claims by eligible purchasers of crude oil and refined petroleum products. Remaining funds are to be disbursed to the state and federal government for indirect restitution as directed by the MSRP. In the present case, we have decided to reserve the full 20 percent, or $3.8 million of the initial $19 million crude oil pool, plus a proportionate share of the accrued interest on that amount, for direct refunds to purchasers of crude oil and refined petroleum products who prove that they were injured as a result of alleged crude oil violations.[4]

The process which the OHA will use to evaluate claims based on alleged crude oil violations will be modeled after the process the OHA has used in subpart V proceedings to evaluate claims based upon alleged overcharges involving refined products. *See Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 (1986).

As in non-crude oil cases, applicants will be required to document their purchase volumes and prove that they were injured as a result of alleged violations (i.e., that they did not pass on the alleged overcharges to their customers). We propose to utilize standards for the showing of injury which OHA has developed for analyzing non-crude oil claims. *See, e.g., Dorchester Gas Corp.*, 14 DOE ¶ 85,240 (1986). These standards include a presumption that end-users (i.e., ultimate consumers) whose businesses are unrelated to the petroleum industry absorbed the increased costs resulting from a consent order firm's alleged overcharges. *See A. Tarricone, Inc.*, 15 DOE ¶ 85,495 at 88,894–896 (1987). However, reseller and retailer claimants must submit detailed evidence of injury, and may not rely upon the presumptions of injury utilized in refund cases involving refined petroleum products. *Id.* They can, however, use econometric evidence of the type employed in the OHA Report in *In Re: The Department of Energy Stripper Well Exemption Litigation*, 6 Fed. Energy Guidelines ¶ 90,507.

Refunds to eligible claimants will be calculated on the basis of a volumetric refund amount derived by dividing the 20 percent of the crude oil pool currently available which is reserved for crude oil claimants ($3.8 million) by the total consumption of petroleum products in the United States during the period of price controls (2,020,997,335,000 gallons). Based upon the amount of the crude oil pool currently available, the crude oil volumetric refund amount in this proceeding is $0.0000018803 per gallon. This volumetric refund amount will increase as interest accrues on the consent order fund and as subsequent payments are made by Tesoro. After all valid claims are paid, unclaimed funds from the 20 percent claims reserve will be divided equally between federal and state governments. The federal government's share of the unclaimed funds will ultimately be deposited into the general fund of the Treasury of the United States.

We propose that the remaining 80 percent of the currently available crude oil pool ($15.2 million) and 80 percent of accumulated interest and future payments made by Tesoro be disbursed in equal shares to the federal and state governments for indirect restitution. *See Shell.* If this proposal is adopted, we will direct the DOE's Office of the Controller to segregate the crude oil share of Tesoro's initial payment and distribute $7.6 million, plus appropriate interest, to the States and the same amount to the federal government. Refunds to the States will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share (ratio) of the funds in the account which each state will receive if these procedures are adopted is contained in Exhibit H of the Stripper Well Settlement Agreement. These funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the States under the Settlement Agreement.

IV. Refined Product Claims

The remainder of the Tesoro consent order fund ($6 million plus interest accrued on that amount) shall be made available to injured purchasers of Tesoro refined products. Purchasers of Tesoro refined products during the period March 6, 1973 through January 27, 1981 (refund period) [5] may submit Applications for Refund.[6] From our experience with subpart V proceedings, we expect that potential applicants generally will fall into the following categories: (i) end-users; (ii) regulated entities, such as public utilities, and cooperatives; and (iii) refiners, resellers and retailers (hereinafter collectively referred to as "resellers").[7] Residual funds in the Tesoro escrow account will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA). Public Law No. 99–509, Title III. *See* 51 FR 43964 (December 5, 1986).

A. Calculation of Refund Amounts

The first step in the refund process is the calculation of an applicant's potential refund. The ERA specifically noted, however, that it was unable to identify all of the customers whom Tesoro allegedly overcharged. In order to determine the potential refunds for these purchasers, we propose to adopt a presumption that the alleged overcharges were dispersed equally in all of Tesoro's sales of refined petroleum products during the consent order period. In accordance with this presumption, refunds are made on a pro-rata or volumetric basis. In the absence of better information, a volumetric refund is appropriate because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices.

The volumetric refund presumption is rebuttable. Because we realize that the impact on an individual claimant may have been greater than its potential refund calculated using the volumetric methodology, a claimant may submit evidence detailing the specific alleged overcharge that it incurred in order to be eligible for a larger refund. *See Standard Oil Co. (Indiana)/Army and Air Force*

crude oil funds to be distributed by the OHA under subpart V. Accordingly, those firms will not be eligible for a refund from the Tesoro crude oil pool.

[4] The allocation of monies in the crude oil pool is based upon the amount of crude oil related funds currently available in the Tesoro consent order fund. When additional payments are received from Tesoro, they will be added to the crude oil pool and 20 percent of each payment will be reserved for direct claimants.

[5] Tesoro was not subject to mandatory controls prior to March 6, 1973. Because refunds in this type of case are only warranted for purchases of regulated products, the refund period begins on this date.

[6] OHA will not accept Applications for Refund on behalf of classes of applicants. We have previously determined that such claims are inappropriate because they amount to a proposal for "indirect" restitution, i.e., to distribute the funds attributable to parties not specifically identified by the DOE. *See Standard Oil Co. (Indiana)/Diesel Automotive Association*, 11 DOE ¶ 85,250 (1984); *Office of Special Counsel*, 10 DOE ¶ 85,048 at 88,214 (1982).

[7] We have previously held that affiliates or subsidiaries of a consent order firm are not eligible for refunds based upon the presumption that they were not injured. *See, e.g., Marathon Petroleum Co./EMRO Propane Co.*, 15 DOE ¶ 85,288 at 85,528 (1987). This presumption applies to firms affiliated with Tesoro during the consent order period but no longer affiliated with the firm. *See Cosby Oil Co./Yucca Valley Liquor Store*, 13 DOE ¶ 85,402 at 88,986 (1986). It also applies to firms that have become affiliated with Tesoro after the consent order period, because their receipt of a refund would allow the consent order firm to benefit from this proceeding. *See, e.g., Marathon Petroleum Co./Webster Service Stations*, 17 DOE ¶ 85,038 (1988). For a partial list of Tesoro affiliates that we propose to find ineligible under this presumption, see the Appendix to this Proposed Decision and Order.

Exchange Service, 12 DOE ¶ 85,015 (1984).

Under the volumetric approach, the potential refund for a previously unidentified claimant will be calculated by multiplying the number of gallons purchased from Tesoro during the consent order period times a volumetric factor of $0.000801 per gallon.[8] In addition, successful claimants will receive proportionate shares of the interest that has accrued on the Tesoro escrow account.

Ethane and Liquid Asphalt	Apr. 1, 1974
Residual Fuel	June 1, 1976
No. 1 and No. 2 Heating Oil, Diesel Fuel and Kerosene.	July 1, 1976 July 1, 1976
Naphthas	Sept. 1, 1976
Naphtha Based Jet Fuel	Oct. 1, 1976
Aviation Gas and Kerosene Based Jet Fuel.	Feb. 26, 1979 Feb. 26, 1979
Butane and Natural Gasoline	Jan. 1, 1980
Motor Gasoline and Propane	Jan. 28, 1981

As in previous cases, only claims for at least $15 in principal will be processed. This minimum has been adopted in refined product refund proceedings because the cost of processing claims for refunds of less than $15 outweighs the benefits of restitution in those instances. *See, e.g., Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985); *see also* 10 CFR 205.286(b). If an applicant's potential refund is calculated using the volumetric methodology, it must have purchased at least 18,726 gallons of Tesoro products in order for its claim to be considered.

B. Determination of Injury

Once a claimant's potential refund has been calculated, we must determine whether the claimant was injured by its purchases from Tesoro. *i.e.*, whether it was forced to absorb the alleged overcharges. Based on our experience in numerous subpart V proceedings, we will adopt certain presumptions concerning injury in this case. The use of presumptions in refund cases is specifically authorized by DOE procedural regulations. 10 CFR 205.282(e). An applicant that is not covered by one of these presumptions must demonstrate injury in accordance with the non-presumption procedures outlined in the latter part of this Decision.

1. *Injury Presumptions.* The presumptions we will adopt in this case are designed to allow claimants to participate in the refund process without incurring inordinate expense, and to enable OHA to consider the refund applications in the most efficient way possible. We will presume that end-users of Tesoro products, certain types of regulated firms, and cooperatives were injured by their purchases from Tesoro. In addition, we will presume that resellers and retailers of Tesoro products submitting small claims were injured by their purchases. On the other hand, we will presume that resellers and retailers that made spot purchases of Tesoro products and those who sold it on consignment were not injured by their purchases. Each of these presumptions is discussed below, along with the rationale underlying its use.

a. *End-Users.* First, in accordance with prior subpart V proceedings, we will presume that end-users, *i.e.*, ultimate consumers of Tesoro products whose businesses are unrelated to the petroleum industry, were injured by the firm's alleged overcharges. Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period, and were not required to keep records which justified selling price increases by reference to cost increases. Consequently, analysis of the impact of the alleged overcharges on the final prices of goods and services produced by members of this group would be beyond the scope of a special refund proceeding. *See Marion Corporation*, 12 DOE ¶ 85,014 (1984) and cases cited therein. Therefore, end-users need only document their purchase volumes of Tesoro products to demonstrate that they were injured by the alleged overcharges.

b. *Regulated Firms and Cooperatives.* Second, public utilities, agricultural cooperatives, and other firms whose prices are regulated by government agencies or cooperative agreements do not have to submit detailed proof of injury. Such firms would have routinely passed through price increases, including overcharges, to their customers. Likewise, their customers would share the benefits of cost decreases resulting from refunds. *See, e.g., Office of Special Counsel*, 9 DOE ¶ 82,538 (1982) (*Tenneco*); *Office of Special Counsel*, 9 DOE ¶ 82,545 at 85,244 (1982) (*Pennzoil*). Such firms applying for refunds should certify that they will pass through any refund received to their customers and should explain how they will alert the appropriate regulatory body or membership group to monies received. Purchases by cooperatives that were subsequently resold to nonmembers will generally not be covered by this presumption.

c. *Reseller and Retailer Small Claims.* Third, we will presume that a reseller or retailer seeking a refund of $5,000 or less, excluding accrued interest, was injured by Tesoro's pricing practices. Without this presumption, such an applicant would have to gather records dating as far back as 1973 in order to demonstrate that it absorbed Tesoro's alleged overcharges. The cost to the applicant of gathering this information, and to OHA of analyzing it, could exceed the actual refund amount. Therefore, a small claimant must only document the volumes of products it purchased from Tesoro in order to demonstrate injury. *See Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 at 88,210 (1984). Resellers and retailers of Tesoro products that are seeking refunds in excess of $5,000 must follow the procedures that are outlined below in section 2.

d. *Resellers and Retailers Filing Mid-Level Claims.* Fourth, in lieu of making a detailed showing of injury, a reseller claimant whose allocable share exceeds $5,000 may elect to receive as its refund the larger of $5,000 or 40 percent of its allocable share up to $50,000.[9] The use of this presumption reflects our conviction that these larger claimants were likely to have experienced some injury as a result of the alleged overcharges. *See Marathon*, 14 DOE at 88,515. In some prior special refund proceedings, we have performed detailed economic analysis in order to determine product-specific levels of injury. *See, e.g., Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985). However, in *Gulf Oil Corp.*, 16 DOE ¶ 85,381 at 88,737 (1987), we determined that based upon the available data, it was accurate and efficient to adopt a single presumptive level of injury of 40 percent for all medium-range claimants, regardless of the refined product that they purchased, based upon the results of our analyses in prior proceedings. We believe that approach to be sound in the absence of more detailed information regarding injury, and we therefore propose to

[8] We computed the volumetric factor by dividing $6,000,000 (the consent order funds in the refined product pool) by 7,486,205,213 gallons, the approximate number of gallons of covered products other than crude oil which Tesoro sold from March 6, 1973, the date that Tesoro became subject to the Federal price controls under Special Rule No. 1 (38 FR 6283) (March 8, 1973), through the date of decontrol of the relevant product.

Although the Tesoro consent order period begins January 1, 1973, refund applications may only be based upon purchases of refined products between March 6, 1973 and the relevant decontrol date for each product as summarized below:

[9] That is, claimants who purchased between 18,712,575 gallons and 187,125,749 gallons of Tesoro refined petroleum products during the consent order period (mid-level claimants) may elect to utilize this presumption. Claimants who purchased more than 187,125,749 gallons may elect to limit their claim to $50,000.

adopt a 40 percent presumptive level of injury for all medium-range claimants in this proceeding. Consequently, an applicant in this group will only be required to provide documentation of its purchase volumes of Tesoro refined petroleum products during the consent order period in order to be eligible to receive a refund of 40 percent of its total volumetric share, or $5,000, whichever is greater.

e. *Spot Purchasers.* Fourth, resellers and retailers that were spot purchasers of products from Tesoro, *i.e.*, made only sporadic, discretionary purchases, are presumed not to have been injured, and consequently, generally will be ineligible for refunds. The basis for this presumption is that a spot purchaser tended to have considerable discretion as to where and when to make a purchase, and therefore, would not have made a purchase unless it was able to recover the full amount of its purchase price, including any alleged overcharges, from its customers. *See Vickers* at 85,396–97. A spot purchaser can rebut this presumption by demonstrating that its base period supply obligation limited its discretion in making the purchases and that it resold the product at a loss that was not subsequently recouped. *See, e.g., Saber Energy,. Inc./Mobil Oil Corp.*, 14 DOE ¶ 85,170 (1986).

f. *Consignees.* Finally, we will presume that consignees of Tesoro products were not injured by the firm's alleged pricing violations. *See, e.q., Jay Oil Co.*, 16 DOE ¶ 85,147 (1987). A consignee agent generally sold products pursuant to an agreement whereby its supplier established the prices to be charged by the consignee and compensated the consignee with a fixed commission based upon the volume of products that it sold. A consignee may rebut the presumption of non-injury by demonstrating that its sales volumes and corresponding commission revenues declined due to the alleged uncompetitiveness of Tesoro's pricing practices. *See Gulf Oil Corp./C.F Canter Oil Co.*, 13 DOE ¶ 85,388 at 88,962 (1986).

2. *Non-Presumption Demonstration of Injury.* A reseller or retailer whose allocable share is in excess of $5,000 that does not elect to receive a refund under the small claims presumption will be required to demonstrate its injury. There are two aspects to such a demonstration. First, a firm generally is required to provide a monthly schedule of its banks of unrecouped increased product costs for products that it purchased from Tesoro. Cost banks should cover the period March 6, 1973. through January 27, 1981.[10] If a firm no longer has records of contemporaneously calculated cost banks for products, it may approximate those banks by submitting the following information regarding its purchases of products from all of its suppliers:

(1) The weighted average gross profit margin that the firm received for products on May 15, 1973;

(2) A monthly schedule of the weighted average gross profit margins that it received for products during the period March 6, 1973 through January 27, 1981; and

(3) A monthly schedule of the firm's purchase or sales volumes of products during the period March 6, 1973 through January 27, 1981.[11]

The existence of banks of unrecouped increased product costs that exceed an applicant's potential refund is only the first part of an injury demonstration. A firm must also show that market conditions forced it to absorb the alleged overcharges. We will infer this to be true if the prices the applicant paid Tesoro were higher than average market prices for products at the same level of distribution.[12] Accordingly, a claimant attempting to demonstrate injury should submit a monthly schedule of the weighted average prices that it paid Tesoro for products during the period March 6, 1973 through January 27, 1981.

If a reseller or retailer that is eligible for a refund in excess of $5,000 does not submit the cost bank and purchase price information described above, it can still apply for a refund of $5,000, plus accrued interest, using the small claims presumption.

If, however, a firm provides the above-mentioned data and we subsequently conclude that the firm should receive a refund of less than the $5,000 small claims threshold, the firm cannot opt for a full $5,000 refund.

C. Allocation Claims

We may also receive claims based upon Tesoro's alleged failure to furnish petroleum products that it was obliged to supply under the DOE allocation regulations that became effective in January 1974. *See* 10 CFR part 211. Any such applications will be evaluated with reference to the standards set forth in Subpart V implementation cases such as *Office of Special Counsel*, 10 DOE ¶ 85,048 at 88,220 (1982), and refund application cases such as *OKC Corp./Town & Country Markets, Inc.*, 12 DOE ¶ 85,094 (1984); *Marathon Petroleum Co./Research Fuels, Inc.*, 19 DOE ¶ 85.575 (1989), *action for review docketed*, C.A.–3–89–2983–G (N.D. Tex. November 22, 1989). These standards generally require an allocation claimant to demonstrate the existence of a supplier/purchaser relationship with the consent order firm and the likelihood that the consent order firm unlawfully failed to furnish petroleum products that it was obliged to supply to the claimant under 10 CFR part 211. In addition, the claimant must provide evidence that it had contemporaneously notified the DOE or otherwise sought redress from the alleged allocation violation. Finally, the claimant must establish that it was injured and document the extent of the injury. Claimants who make a reasonable and non-spurious demonstration of an allocation violation may receive a refund based on the profit lost as a result of their failure to receive the allocated product.[13]

V. Applications for Refunds

Applications for Refund should not be filed at this time. Before implementing the procedures outlined in this Proposed Decision, we intend to publicize the Decision in order to solicit comments from any interested parties. All comments must be filed within 30 days of the publication of this Proposed Decision in the **Federal Register.** Comments should be sent to: Tesoro Refund Proceeding, Case No. KEF–0128, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

It Is Therefore Ordered That:

The refund amount remitted to the Department of Energy by Tesoro Petroleum Corporation pursuant to the Consent Order executed on January 23, 1989, will be distributed in accordance with the foregoing decision.

Appendix—Tesoro Affiliates and Subsidiaries Presumptively Ineligible

Tesoro Alaska Petroleum Corp.
Tesoro Alaska Pipeline Co.
Tesoro Asia Co.
Tesoro Bolivia Petroleum Co.

[10] We generally require applicants to submit cost banks that continue until a product's price decontrol date. Retailers and resellers of motor gasoline, however, were only required to maintain banks through July 15, 1979, and April 30, 1980, respectively, rather than the January 27, 1981 decontrol date of products.

[11] For motor gasoline, retailers and resellers have to submit the information detailed in Parts (2) and (3) only through July 15, 1979 and April 30, 1980, respectively. *See supra note 11.*

[12] We generally obtain average market price information from Platt's Oil Price Handbook and Oilmanac (Platt's). If price data for a particular product is not available in Platt's, the burden of supplying alternative information will be on the claimant.

[13] If we receive numerous allocation claims, we may adopt a more general formula for calculating refunds based on alleged allocation violations.

Tesoro Coal Co.
Tesoro Crude Oil Co.
Tesoro Drilling Co.
Tesoro Europe Petroleum B.V.
Tesoro Gasoline Marketing Co.
Tesoro Indonesia Petroleum Co.
Tesoro Inter-American Production Co.
Tesoro Land & Marine Rental Co.
Tesoro Natural Gas Co.
Tesoro Petroleum Distributing Co.
Tesoro Pipeline Co.
Tesoro Pump & Valve Co.
Tesoro Refining, Marketing & Supply Co.
Tesoro Tank Lines
Tesoro Transportation Co.
Tesoro United Kingdom
Tesoro-Wyoming Pipeline Co.
Acme Machine
Alaskan Oil Refining Co.
Arnold Pipe Rental Co., Inc.
Basin, Inc.
Cardinal Transports, Inc.
Carib Oil Ltd. (Trinidad)
Charles Wheatley Co.
Commonwealth Oil Refining Co., Inc.
D & W Investments. Inc., Texas
DeHumber Handelmaatschappij B.V.
Digas
Eagle Transport Co., Texas
FWI, Inc.
NRG Gathering Co.
Nikiski Alaska Pipeline Co.
Trident Offshore Co., Ltd.
Turner Drill Pipe, Texas
Val-Cap Inc.

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BILLING CODE 6450-01-M

Office of Hearings and Appeals

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of proposed implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy (DOE) announces proposed procedures for the disbursement of $1,200,000, plus accrued interest, that Northeast Petroleum Industries, Inc., remitted to the DOE pursuant to a consent order executed on July 21, 1983. The funds will be distributed in accordance with the DOE's special refund procedures, 10 CFR part 205, subpart V.

DATES AND ADDRESSES: Comments must be filed in duplicate within 30 days of the date of publication in the **Federal Register** and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. All comments should conspicuously display a reference to Case Number HEF-0580.

FOR FURTHER INFORMATION CONTACT: Stephanie K. Maffett, Staff Analyst, Office of Hearings and Appeals, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6602.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute monies that have been remitted by Northeast Petroleum Industries, Inc., to the DOE to settle possible pricing and allocation violations with respect to its sale of crude oil and refined petroleum products. The DOE is currently holding $1,200,000 in an interest-bearing escrow account pending distribution.

Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized. Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of the publication of this notice in the **Federal Register** and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1 p.m. and 5 p.m., Monday through Friday, except Federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue SW., Washington, DC 20585.

Dated: March 1, 1990.

George B. Breznay,

Director, Office of Hearing and Appeals.

PROPOSED DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Name of Firm: Northeast Petroleum Industries, Inc.

Date of Filing: May 6, 1985.

Case Number: HEF-0580.

On May 6, 1985, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) filed a petition with the Office of Hearings and Appeals (OHA) requesting that the OHA formulate and implement procedures for distributing funds obtained through the settlement of enforcement proceedings involving Northeast Petroleum Industries, Inc. (Northeast). 10 CFR part 205, subpart V. This Proposed Decision sets forth the OHA's tentative plan for distributing these funds to qualified refund applicants. Section I outlines the approach to be used in the disbursement of Northeast funds related to alleged crude oil overcharges. Information necessary to prepare refund applications based on purchases of Northeast refined petroleum products appears in section II of this Proposed Decision. Section II(A) sets forth specific requirements applicable to each type of claimant that is likely to file an application based on purchases of Northeast refined products. A claimant should take note of those requirements applicable to its particular circumstances. The specific application requirements are followed at section II(B) by a discussion of general requirements that apply to all refund applications involving refined petroleum products. Since the procedures set forth in this Decision are in proposed form, no refund applications should be filed at this time. A final determination will be issued at a later date announcing that the filing of Northeast refund applications is authorized.

Northeast was a branded and non-branded independent marketer as those terms are defined in the Emergency Petroleum Allocation Act of 1973. 15 U.S.C. 751, *et seq.* Between January 1, 1973, and January 28, 1981 (the consent order period), Northeast engaged in the sale of crude oil, residual fuel oils and other covered petroleum products. Northeast was therefore subject to the Mandatory Petroleum Price and Allocation Regulations set forth at 10 CFR 211 and 212. The ERA conducted an extensive audit of Northeast's operations and found in its September 30, 1980 Notice of Probable Violation (Case No. 11OH00249) and in its August 27, 1982 Proposed Remedial Order (Case No. 6COX00241) (PRO) that the firm had likely violated applicable DOE pricing and allocation regulations in its sales of crude oil and refined petroleum products during the consent order period. In order to settle all claims and disputes between Northeast and the DOE, the two parties entered into a Consent Order that became final on July 21, 1983. Under the terms of the Consent Order, Northeast agreed to remit $2,000,000 to the DOE to settle alleged violations that occurred during the consent order period.

The Consent Order states that $800,000 of the $2,000,000 remitted by Northeast would be disbursed directly to identifiable, eligible end-users of No. 6 residual fuel oil. According to ERA files, these distributions have been

made by Northeast.[1] As a result, there remains $1,200,000 in principal in the Northeast Account ($2,000,000 − $800,000 = $1,200,000).

Because the Northeast Consent Order resolves alleged violations involving sales of both crude oil and refined products, we propose to divide the fund into two pools. *Standard Oil Co. (Indiana)* 10 DOE ¶ 85,048 (1982). We estimate that Northeast sold approximately 8,756,848,629 gallons of crude oil and refined products during the consent order period.[2] This total volume consisted of approximately 1,517,907,871 gallons (17.33 percent) of crude oil and 7,238,940,758 gallons (82.67 percent) of refined products.[3] We propose to divide the Northeast consent order fund between the crude oil and refined products pools in the same proportion as Northeast's sales occurred. Therefore, we propose to set aside 17.33 percent, or $207,960, as a pool of crude oil funds available for disbursement. The remaining 82.67 percent, or $992,040, shall be set aside as a pool of funds to be made available for distribution to claimants who demonstrate that they were injured by Northeast's alleged overcharges in its sales of refined petroleum products.

I. Proposed Refund Procedures for Crude Oil Claims

On July 28, 1986, as a result of the court-approved Settlement Agreement in *The Department of Energy Stripper Well Exemption Litigation, In Re:* M.D.L. No. 378, the DOE issued a modified Statement of Restitutionary Policy (MSRP) providing that crude oil overcharge revenues will be divided among the States, the United States Treasury, and eligible purchasers of crude oil and refined products. 51 FR 27899 (August 4, 1986). Up to 20 percent of the crude oil violations amounts will be reserved to satisfy claims from injured parties that purchased crude oil and/or refined petroleum products between August 19, 1973 and January 31, 1981 (the crude oil price control period). We propose that such claims be processed through Subpart V special refund procedures. The MSRP also calls for the remaining 80 percent of the funds to be disbursed among state and federal governments for indirect restitiution. Once all valid claims are paid, any remaining funds will be divided equally between the state and federal governments. The federal government's share of the unclaimed funds will ultimately be deposited into the general fund of the Treasury of the United States.

The Northeast crude oil funds are subject to the MSRP. Therefore, we propose to institute a claims process for the $207,960 in crude oil funds involved in this proceeding. In the present case, we have decided to reserve the full 20 percent, or $41,592, of the alleged crude oil violations amounts, plus a proportionate share of the accrued interest, for direct restitution to claimants that purchased refined petroleum products during the crude oil price control period. The process which the OHA will use to evaluate claims based on crude oil violations will be modeled after the process the OHA has used to evaluate claims based on alleged refined product overcharges pursuant to 10 CFR 205, subpart V. *Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 (1986) *(Mountain Fuel)*. As in non-crude oil cases, applicants will be required to document their purchase volumes and to prove that they were injured by the alleged violations (i.e., that they did not pass through the alleged overcharges to their own customers). We propose to apply the standards for showing injury that the OHA has developed in analyzing non-crude oil claims. *See, e.g., Dorchester Gas Corp.*, 14 DOE ¶ 85,240 (1986). These standards include a finding that end-users and ultimate consumers whose businesses are unrelated to the petroleum industry were injured by a consent order firm's alleged overcharges. Refunds to eligible claimants who purchased refined petroleum products will be calculated on the basis of a volumetric refund amount derived by dividing the Northeast crude oil refund pool of $207,960 by the total consumption of petroleum products in the United States during the crude oil price control period (2,020,997,335,000 gallons). *Mountain Fuel*, 14 DOE at 88,867. This approach reflects the fact that crude oil overcharges were spread to every region by the Entitlements Program.[4] The volumetric amount for the crude oil pool established in this proceeding is therefore $0.000000103/gallon of refined products purchased ($207,960/2,020,997,335,000 gallons = $0.000000103/gallon).

We propose that the remaining 80 percent of the funds, or $166,368, be disbursed in equal amounts to the state and federal governments for indirect restitution. We propose to direct the DOE's Office of the Controller to distribute $83,184 plus appropriate interest to the states and $83,184 plus appropriate interest to the federal government.

II. Proposed Refund Procedures for Refined Product Claims

The remaining $992,040 in the Northeast consent order fund is attributable to alleged violations involving refined products. Firms and individuals that purchased Northeast refined products during the consent order period may file claims in this proceeding. However, Northeast has entered into three prior consent orders with the DOE involving refined products, and special refund procedures have been established in connection with these consent orders. *See* note 2, *supra*. We are therefore excluding from this refund proceeding any claim attributable to transactions covered by a prior Northeast consent order.[5] In addition, any potential claimant that received a direct refund from Northeast on the basis of purchases pursuant to this consent order will not be eligible for a refund in this proceeding based on those same purchases.[6]

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[1] See June 2, 1989 memorandum of telephone conversation between Dan Bullington of ERA and Stephanie Maffett, OHA staff analyst.

[2] Northeast has entered into three previous consent orders with the DOE involving sales of specific refined products made during specific time-periods. We have deducted the volumes covered by the prior consent orders from Northeast's total sales volume. *See* Northeast Petroleum Industries, Inc., 10 DOE ¶ 85,021 (1982); Northeast Petroleum Industries, 13 DOE ¶ 85,162 (1985); Northeast Petroleum Industries, Inc., 14 DOE ¶ 85,410 (1986). In addition, we have deducted the volume of No. 6 residual fuel oil for which direct refunds have been made pursuant to the present consent order.

[3] See August 27, 1982 PRO and January 19, 1989 memoranda of telephone conversations between Matthew Paul, OHA staff analyst, and John Kanev, former owner of Northeast, and John Zentay, former counsel for Northeast. See also December 7, 1989 memorandum of telephone conversation between Ms. Maffett and Mr. Kanev.

[4] The Department of energy established the Entitlements Program to equalize access to the benefits of crude oil price controls among all domestic refiners and their downstream customers. To accomplish this goal, refiners were required to make transfer payments among themselves through the purchase and sale of "entitlement." This balancing mechanism had the effect of evenly dispersing overcharges resulting from crude oil miscertifications throughout the domestic refining industry. *See, e.g.*, Amber Refining, Inc., 13 DOE ¶ 85,217 (1985).

[5] The products and time-periods covered by the prior consent orders as follows:

[6] Northeast made these refunds to end-users customers based on their purchases of No. 6-residual fuel oil from Northeast during the period November 1973 to March 1974.

Case number	Product	Consent order period
BEF-0065	Motor gasoline	November 1, 1973-April 30, 1974.
HEF-0137	#6 residual fuel oil sales to cargo lot customers (including resales to subsquent purchasers)	November 1, 1973-June 30, 1975.
HEF-0138	Motor gasoline	May 1, 1974-August 31, 1979.

In establishing the procedures which will govern the Northeast special refund proceeding, we propose to adopt certain presumptions that will permit claimants to participate in the refund process without incurring inordinate expense and will enable the OHA to consider refund applications in the most efficient manner possible.[7] *American Pacific International, Inc.* 14 DOE ¶ 85,158 (1986) (*API*). First, we propose to adopt a presumption that the alleged overcharges were dispersed equally in all sales of refined products made by Northeast during the consent order period and that refunds should therefore be made on a volumetric basis. In the absence of better information, a volumetric refund assumption is sound because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices.

Under the volumetric refund approach we propose to adopt, a claimant will be eligible to receive a refund equal to the number of gallons purchased times the per-gallon refund amount, plus accrued interest. As stated earlier, Northeast sold approximately 7,238,940,758 gallons of refined products during the consent order period. Accordingly, we propose to set the per-gallon refund amount at $0.000137/gallon ($992,040/7,328,940,758 gallons = $0.000137/gallon). We also recognize that some claimants may have been disproportionately overcharged by Northeast. Therefore, any purchaser may file a refund application based on a claim that it suffered a disproportionate share of the alleged overcharges. *Sid Richardson Carbon and Gasoline Co.*, 12 DOE ¶ 85,054 at 88,164 (1984).

We also propose to adopt a number of injury presumptions that will simplify and streamline the refund process. These presumptions will excuse members of certain applicant categories from proving that they were injured by Northeast's alleged overcharges. From our experience with Subpart V refund proceedings, we believe that potential claimants will fall into the following categories: (1) End-users, i.e., consumers who used Northeast refined products; (2) regulated non-petroleum industry entities that used Northeast products in their businesses, or cooperatives that purchased Northeast products for their businesses; and (3) refiners, resellers or retailers who resold Northeast refined products. We will discuss the presumptions we propose to adopt and the showing that each type of applicant must make in Section II(A) below.

(A) Specific Application Requirements for Each Category of Refund Applicants

(1) *Refund Applications of End-Users.* We propose to adopt a finding that end-users, or ultimate consumers whose businesses are unrelated to the petroleum industry, were injured by the alleged overcharges settled in the Northeast Consent Order. Unlike regulated firms in the petroleum industry, end-users generally were not subject to price controls during the consent order period. Moreover, they were not required to keep records that justified selling price increases by reference to cost increases. For these reasons, an analysis of the impact of the alleged overcharges on the final prices of non-petroleum goods and services would be beyond the scope of a special refund proceeding. *Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 at 88,209 (1984) (*Texas*). Therefore, we propose that end-users of Northeast products need only establish that they were ultimate consumers of a specific volume of Northeast products to qualify for a refund of their full allocable share.

(2) *Refund Applications of Cooperatives and Regulated Firms.* We also will not require firms whose prices for goods and services are regulated by a government agency or by the terms of a cooperative agreement to demonstrate injury as a result of alleged overcharges on refined products. Although such firms, e.g., public utilities and agricultural cooperatives, generally would have passed any overcharges through to their customers, they would generally pass through any refunds as well. Therefore, we will require such applicants to certify that they will pass any refund received through to their customers, to provide us with a detailed explanation of how they plan to accomplish this restitution, and to explain how they will notify the appropriate regulatory body or membership group of their receipt of the refund money. *See Office of Special Counsel*, 9 DOE ¶ 82,538 at 85,203 (1982). However, utility claimants that are granted a refund of $5,000 or less will not be required to certify that they will pass the refund through to their customers. *See Placid Oil Co.*, 18 DOE ¶ 85,176 (1988). We further note that a cooperative's sales of Northeast products to non-members will be treated in the same manner as sales by other resellers.

(3) *Refund Applications of Resellers, Retailers and Refiners*—a. Refiners, Resellers and Retailers Seeking Refunds of $5,000 or Less—We propose to adopt a presumption, as we have in many previous cases, that purchasers seeking small refunds were injured by Northeast pricing practices. *See, e.g., Uban Oil Co.*, 9 DOE ¶ 82,541 at 85,224–25 (1982) (*Uban*). We recognize that the cost to the applicant of gathering evidence of injury to support a small refund claim could exceed the expected refund. Consequently, without simplified procedures, some injured parties would be denied an opportunity to obtain a refund. Under the small-claims presumption, a claimant seeking total refunds of $5,000 or less will not be required to submit any evidence of injury beyond establishing the volume of Northeast products it purchased during the settlement period. *Texas*, 12 DOE at 88,210.

b. *Reseller and Retailer Mid-Level Presumption.* We also propose to adopt the mid-level presumption which allows a reseller or retailer claimant whose allocable share exceeds $5,000 to receive as its refund the larger of $5,000 or 40 percent of its allocable share up to $50,000 without making the detailed demonstration of injury that is described below.[8] Consequently, an applicant in

[7] The Subpart V regulations specifically authorize the use of presumptions in special refund proceedings. 10 CFR part 205, subpart V.

[8] National average profit margin data for resellers and retailers and our experience in past proceedings indicates that resellers and retailers were generally injured by 40 percent of the amount of alleged overcharges incurred in their purchases. *See* Gulf Oil Corporation, 16 DOE ¶ 85,381 at 88,737 (1987).

this group will only be required to provide documentation of its purchase volumes of Northeast refined products during the consent order period. Resellers and Retailers that wish to receive refunds in excess of $50,000 must follow the procedures for demonstrating injury. *See Gulf Oil Corporation*, 16 DOE ¶ 85,381 (1987).

c. *Refiners, Resellers and Retailers Seeking Larger Refunds.* A refiner, reseller or retailer whose total allocable share is greater than $5,000 will be required to provide a detailed showing of injury. This showing will generally consist of two distinct elements. First, a claimant will be required to show that it maintained "banks" of unrecouped increased product costs (banked costs) in excess of the refund claimed. Second, because a showing of banked costs alone is not sufficient to establish injury, a claimant must provide evidence that market conditions precluded it from increasing its prices to pass through the additional costs associated with the alleged overcharges. *See National Helium Corp./Atlantic Richfield Co.*, 11 DOE ¶ 85,257 (1984), *aff'd sub nom Atlantic Richfield Co. v. DOE*, 618 F. Supp. 1199 (D. Del. 1985). Such a showing could consist of a demonstration that the firm suffered a competitive disadvantage as a result of its purchases from Northeast. *Id.; see also Sid Richardson Carbon and Gasoline Company and Richardson Products Company/Schupbach and Streitmatter Gas Company*, 14 DOE ¶ 85,186 (1986). Such a showing might also be made through a demonstration of lowered profit margins, decreased market share, or depressed sales volume during the period of purchases from Northeast. *API*, 14 DOE at 88,295.

(4) *Applicants Seeking Refunds Based on Allocation Claims.* We also recognize that we may receive claims alleging Northeast allocation violations. Such claims would be based on the consent order firm's alleged failure to furnish petroleum products that it was obliged to supply to the claimant under the DOE allocation regulations. 10 CFR part 211. Claimants seeking refunds based upon an alleged allocation violation by Northeast must make a reasonable demonstration that their claim is well founded and non-spurious. *Marathon Petroleum Company/Research Fuels, Inc.*, 19 DOE ¶ 85,575 (1989). In past cases, applicants have been required to make this demonstration by establishing (i) that there existed a supplier/purchaser relationship between the claimant and the consent order firm during the relevant base period, (ii) the claimant's purchase entitlement and how much of the entitlement was actually purchased, (iii) that the claimant demanded the volumes, and (iv) that the claimant took some contemporaneous action with the agency to mitigate its injury. *OKC Corp./Town & Country Markets, Inc.*, 12 DOE ¶ 85,094 (1984), and *Aztex Energy Co.*, 12 DOE ¶ 85,116 (1984). Claimants who make a reasonable and non-spurious demonstration of an allocation violation may receive a refund based on the profit lost as a result of their failure to receive the allocated product.[9]

(B) General Refund Application Requirements.

In addition to the specific requirements outlined above, all Applications for Refund must be in writing and must be signed by the applicant. An application must refer to the Northeast Petroleum Industries, Inc. Special Refund Proceeding (Case No. HEF-0580). Each applicant must submit a monthly purchase volume schedule for Northeast refined petroleum products during the period in which the relevant product was controlled. If an applicant indirectly purchased Northeast refined petroleum products from a reseller, it must explain why it believes that the products originated with Northeast and must identify the reseller from which the product was purchased.

If a claimant made only sporadic purchases of significant volumes of Northeast product, we will consider that claimant to be a spot purchaser. We will establish a rebuttable presumption that claimants who made only spot purchases from Northeast were not injured. Spot purchasers tend to have considerable discretion in where and when to make purchases. Therefore, they generally would not have made spot market purchases from Northeast unless they were able to pass through the full amount of any price increases to their own customers. *See Office of Enforcement*, 8 DOE ¶ 82,597 (1981). Therefore, a firm which made only spot purchases from Northeast will not receive a refund unless it presents evidence rebutting the spot purchaser presumption and establishing the extent to which it was injured.

Moreover, consignees of Northeast products will be presumed not to have been injured by the alleged overcharges. A consignee agent is a firm that distributed covered products pursuant to a contractual agreement with a refiner or reseller, under which the refiner or reseller retained title to the products, specified the price to be paid by the purchaser and paid the consignee a commission based upon the volume of covered products it distributed. 10 CFR 212.31 (definition of "consignee agent"). As in previous Decisions, we propose to adopt the rebuttable presumption that consignees of Northeast refined petroleum products were not injured as a result of their arrangement with their refiner/supplier. *See, e.g., Jay Oil Co., Inc.*, 16 DOE ¶ 85,147 (1987). A consignee, however, may rebut this presumption of non-injury by establishing that "[its] sales volumes, and [its] corresponding commission revenues, declined due to the alleged uncompetitiveness of [the consent order firm's] practices." *See Gulf Oil Corp./C.F. Canter Oil Co., Inc.*, 13 DOE ¶ 85,388 at 88,962 (1986).

We will also establish a minimum amount of $15.00 for refund claims. We have found through our experience in prior refund cases that the cost of processing claims in which refunds of less than $15.00 are sought outweighs the modest benefits of restitution in those situations. *Uban*, 9 DOE at 85,223. Successful applicants will also receive a pro rata share of the interest accrued on the Northeast escrow fund.

Applications for Refund should not be filed at this time. Detailed procedures for filing Applications for Refund will be provided in a final Decision and Order. Before distributing any portion of the consent order fund, we intend to publicize the distribution process, to solicit comments on the proposed refund procedures, and to provide an opportunity for any potential claimants to file an application. Comments regarding the tentative distribution process set forth in this Proposed Order should be filed with the Office of Hearings and Appeals within 30 days of publication of this Proposed Order in the **Federal Register.**

(C) Distribution of the Remainder of the Consent Order Funds Attributable to Northeast's Refined Product Sales

In the event that money remains after all refund claims from the Northeast refined product pool have been analyzed, those funds in that refund pool will be disbursed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986, H.R. 5400, Title III, 99th Cong. 2d Session., Cong. Rec. H11319-21, (Daily E. October 17, 1986).

It Is Therefore Ordered That: The refund amount remitted to the Department of Energy by Northeast Petroleum Industries, Inc. pursuant to the Consent Order finalized on July 21,

[9] If we receive numerous allocation claims, we may adopt a more general formula for calculating refunds based on alleged allocation violations.

1983 will be distributed in accordance with the foregoing Decision.

[FR Doc. 90-5344 Filed 3-7-90; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3731-1]

Chesapeake Bay Program; 1987 Chesapeake Bay Agreement; Proposals for Review

The Baywide Waterfowl Management Plan, the Submerged Aquatic Vegetation Policy Implementation Plan, and the Wetlands Policy Implementation Plan are now available for public review and comment. The proposals have been prepared by the Chesapeake Bay Program's Living Resources Subcommittee pursuant to commitments under the 1987 Chesapeake Bay Agreement.

The period for public comment has been re-scheduled for March 5 through April 18, 1990, because availability of the proposals was delayed after publication of an earlier announcement (**Federal Register**, January 11, 1990, p. 1096). Comments should be directed to the appropriate individual listed below:

Waterfowl

Mr. Steve Funderburk, U.S. Fish and Wildlife Service, 900 Bestgate Road, Suite 401, Annapolis, MD 21401, (301) 224-2732.

Submerged Aquatic Vegetation

Ms. Linda Hurley, U.S. Fish and Wildlife Service, 900 Bestgate Road, Suite 401, Annapolis, MD 21401, (301) 224-2732.

Wetlands

Mr. Larry Lower, Corps of Engineers, CENAB/PL/E, P.O. Box 1715, Baltimore, MD 21203-1715, (301) 962-4905.

For additional information, or copies of the proposals, call the appropriate individual at the telephone numbers listed above. Copies of the plans also are available from Mr. David Packer, Chesapeake Bay Liaison Office, (301) 266-6873.

Charles S. Spooner,

Director, Chesapeake Bay Liaison Office.

[FR Doc. 90-5338 Filed 3-7-90; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3730-7]

Proposal Granting of an Exemption to Bethlehem Steel Corporation for the Continued Injection of Hazardous Waste Subject to the Land Disposal Restrictions of the Hazardous and Solid Waste Amendments of 1984 (HSWA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to grant an exemption to the Burns Harbor Plant of Bethlehem Steel Corporation of Chesterton, Indiana for the continued injection of waste pickle liquor and waste ammonia liquor.

SUMMARY: The Environmental Protection Agency (EPA or Agency) today is proposing to grant an exemption from the ban on disposal of hazardous wastes through injection wells to the Burns Harbor Plant of Bethlehem Steel Corporation ("Burns Harbor Plant"), of Chesterton, Indiana. The Burns Harbor Plant may continue to inject Resource Conservation and Recovery Act (RCRA) regulated Hazardous Waste No. K062 (Waste Pickle Liquor) in its WPL well after the prohibition date of August 8, 1990, and Waste Ammonia Liquor which contains selenium (Hazardous Waste No. D010) in its WAL-1 and WAL-2 wells after the prohibition date of May 8, 1990, if the exemption is granted. In addition, the exemption will apply to injection of waste containing D010 into a proposed new well, if a permit application (currently under review) is approved. Bethlehem submitted a petition to the EPA under 40 CFR part 148, which allows any person to petition the Administrator to determine whether its continued injection of certain hazardous wastes is harmful to human health and the environment. After a comprehensive review, the EPA has determined that there is a reasonable degree of certainty that, after the required recompletion of the existing WAL wells, none of the wastes injected at the Burns Harbor Plant will migrate out of the injection zone over the next 10,000 years. Installation of a monitoring well in the first aquifer overlying the confining zone, as proposed by the petition, is one condition of this proposed decision.

DATES: The EPA is requesting public comments on today's proposed decision. Comments will be accepted until April 16, 1990. Comments received after the close of the comment period will be stamped "Late". A public hearing will be scheduled for this proposed action and notice will be given in a local paper and to all people on a mailing list developed by the Underground Injection Control (UIC) program. If you wish to be notified of the date and location of the public hearing, please contact the person listed below.

ADDRESSES: Submit written comments, by mail, to:

United States Enviromental Protection Agency Region V, Underground Injection Control Section (5WD-TUB-9), 230 South Dearborn Street, Chicago, Illinois 60604, Attn: Edward P. Watters, Chief.

FOR FURTHER INFORMATION CONTACT: Dr. Leah A. Haworth, Lead Petition Reviewer, UIC Section, Water Division, Office Telephone Number: (312) 886-6556.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority

The Hazardous and Solid Waste Amendments of 1984, enacted on November 8, 1984, impose substantial new responsibilities on those who handle hazardous waste. The amendments prohibit the continued land disposal of untreated hazardous waste beyond specified dates, unless the Administrator determines that the prohibition is not required in order to protect human health and the environment for as long as the waste remains hazardous (section 3004(d)(1), (e)(1), (f)(2), (g)(5), of RCRA). The statute specifically defined land disposal to include any placement of hazardous waste in an injection well (section 3004(k) of RCRA). After the effective date of prohibition, hazardous waste can only be injected under two circumstances:

(1) When the waste has been treated in accordance with the requirements of 40 CFR part 268 pursuant to section 3004(m) of RCRA, (the EPA has adopted the same treatment standards for injected wastes in 40 CFR part 148, subpart B); or

(2) When the owner/operator has demonstrated that there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. Applicants seeking an exemption from the ban must demonstrate either:

(a) That the waste undergoes a chemical transformation so as to no longer pose a threat to human health and the environment; or

(b) That fluid flow is such that injected fluids would not migrate vertically upward out of the injection zone or to a point of discharge in a period of 10,000 years by use of mathematical models (40 CFR 148.20(a)).

EPA promulgated final regulations on July 26, 1988, (53 FR 28118) which govern the submission of petitions for exemption from the injection prohibition

(40 CFR part 148). A time frame of 10,000 years was specified for the petition demonstration, not because migration after that time is of no concern, but because a demonstration which can meet a 10,000 years time frame will likely provide containment for a substantially longer period, and also allow time for geochemical transformations which would render the waste nonhazardous or immoble.

B. Facility Operation and Process

The Burns Harbor Plant in Chesterton, Indiana, is a fully integrated steel mill. The facility generates two hazardous wastes which are disposed of through injection wells. Waste Pickle Liquor (WPL) is produced as a by-product of chemical removal of oxides and scale from the surface of steel, using a hydrochloric acid solution. This waste is presently injected into the lower Mt. Simon Sandstone through one Class I hazardous waste injection well, known as the WPL well. Between 1963 and 1986, Bethlehem injected WPL into the lower Eau Claire Formation and the Mt. Simon Sandstone. Since 1986, the well has injected only into the lower Mt. Simon Sandstone. A total of 41 million gallons of WPL has been injected into this well.

Waste Ammonia Liquor (WAL) is produced as a by-product of coke production. This waste is injected alternately into two Class I hazardous waste injection wells, WAL-1 and WAL-2. Approximately 1.3 billion gallons of WAL have been injected since the wells became operational in 1968. Both wells are currently completed for injection into the upper and lower Mt. Simon Sandstone. As a condition of this proposed petition decision, both wells must be recompleted to inject only into the lower Mt. Simon Sandstone. Deeper injection will provide additional protection for underground sources of drinking water. After recompletion, a third well may be needed to maintain the present injection capacity because the injection interval will be smaller. Bethlehem Steel has applied for a permit to construct and operate a new Class I hazardous waste well to inject WAL into the lower Mt. Simon Sandstone. This application is currently under review in the Region V office and a draft decision will be published for public comment once the review is complete.

C. Waste Minimization

Section 3002(b) of RCRA requires that generators of hazardous waste have "a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable."

Bethlehem Steel recycles a large part of its Waste Pickle Liquor by selling it for reclamation. Waste minimization reports are made biennially to the State of Indiana concerning this and other hazardous wastes generated by Bethlehem Steel. In 1987, 95 percent of the WPL generated at the Burns Harbor Plant was sold for reuse, versus 42 percent sold for reuse in 1985. Bethlehem Steel is continuing efforts to increase marketing of its wastes.

D. Submission

On August 8, 1988, Bethlehem submitted a petition for exemption from the land disposal restrictions on hazardous waste injection under the Hazardous and Solid Waste Amendments to RCRA pursuant to the regulations set forth at 40 CFR Part 148. This submission was reviewed for completeness and revised documents were received dated September 7, 1988, July 17, 1989, October 12, 1989, January 24, and February 12, 1990. Several supplemental submissions were made during this period and thereafter to resolve minor deficiencies. Together these submissions constitute the factual basis for this proposed determination. These submissions were reviewed by staff at the EPA and, in part, by private consultants retained by the Agency.

II. Basis for Determination

A. Waste Description and Analysis

The wastes being injected are Waste Pickle Liquor (WPL) and Waste Ammonia Liquor (WAL). WPL is defined under 40 CFR Part 261 as RCRA waste code KO62; this waste is listed as a hazardous waste because it is corrosive (i.e., it has a pH less than or equal to 2.0) and because it contains toxic concentrations of chromium, lead, and nickel. The WPL injected at the Burns harbor Plant has a minimum pH of 1.1. Chromium is the most concentrated hazardous constituent in this waste and has a maximum concentration of 133 milligrams per liter (mg/1).

The Waste Ammonia Liquor is characteristically hazardous because it sometimes contains more than 1.0 mg/1 selenium. Past analyses of WAL at the Burns Harbor Plant had shown a maximum concentration of 4.4 mg/1 selenium. However, recent anlayses show the selenium content to be less than 1 mg/1.

B. Well Construction and Operation

The WPL well was drilled in 1963 and completed for injection into the lower Eau Claire Formation and the Mt. Simon Sandstone. In 1986, the well was recompleted for injection only into the lower Mt. Simon. The two WAL wells were drilled in 1968 and are located approximatley 1 ¼ miles from the WPL well and 900 feet from each other. Both WAL wells were initially completed for injection into the upper and lower Mt. Simon Sandstone. In 1976, both WAL wells udnerwent workovers and the tubing and packer were replaced on the WAL-1 well, resulting in a more protective construction.

Each of the Burns Harbor Plant injection wells are constructed with three strings of casing cemented to the surface (See Figure 1). Injection takes place through tubing set on a packer and waste within the injection tubing is isolated from the casing by a fluid-filled annulus which is continuously monitored. The monitoring systms are designed to trigger alarms and warn an operator to shut off injection if the injection or annulus pressure fall outside of permitted levels.

WPL is produced intermittently at the Burns Harbor Plant, but a constant injectin rate is maintained by the addition of lake Michigan water at an average proportion of 60 percent WPL to 40 percent lake water. Injection pressure for the WPL well is limited to 699 pounds per square inch gauge (psig) at the surface. However, injection in the WPL well actually occurs at an average pressure of 10 psig and an average rate of 30 gallons per minute (gpm).

WAL is produced continuously and is usually injected only through one well at a time. Injection pressure for the WAL wells is currently limited to 896 psig for each well; however after recompletion, this limit will be recalculated. Injection into the operating WAL well occurs at an average pressure of 630 psig and average rate of 170 gmp.

The permitted injection pressures for all Burns Harbor Plant wells are below the value yielded by the equation in 40 CFR 147.1153. This equation is designed to be conservative and to assure that the injection pressure provides insufficient energy to initiate or propagate fractures in the injection zone. The Burns Harbor Plant wells have never exceeded the pemitted injection pressures. Both rates and pressures are expected to continue for the foreseeable future.

C. Mechanical Integrity Test Information.

To assure that the wastes do not leak prior to reaching the injection zone, Mechanical Integrity Tests (MITs) of each well are required. Section 148.20(a)(2)(iv) requires submission of satisfactory MITs performed within one year of petition submission, including Radioactive Tracer Survey results. The

Burns Harbor Plant injection wells passed MITs most recently in December of 1989. The Standard Pressure Test as described in 40 CFR 146.8 and a Radioacitve Tracer Survey were performed on each well. Results of these tests demonstrated that each well has mechanical integrity and confirmed the positive results recorded on continuous monitoring equipment. Additional mechanical integrity tests will be required after recompletion of the WAL wells and before injection would commence in the proposed WAL well, if a permit is issued. Test results and monitoring reports for each of the Burns Harbor Plant wells are part of the Adminstrative Record for their injection permits on file at the EPA. From both a construction and operation standpoint, these injection wells ensure, with a reasonable degree of certainty, transmission of the injected fluids to the injection zone without leakage.

D. Site Description

As part of the "no migration" demonstration under part 148, subpart C, the petitioner must identify the strata wthin the injection zone which will confine fluid movement above the injection interval and the strata which act as a confining zone. In evaluating the confinement properties of these strata and the geologic suitability of the site for hazardous waste injection, the Agency used the standards set forth in 40 CFR part 146.

1. Regional Geology

The Burns Harbor Plant lies on the northern flank of the Kankakee Arch, a structural high that separates the Michigan Basin to the Northeast from the Illinois Basin to the southwest. At the site, glacial deposits overlie approximately 400 feet of sedimentary rocks (e.g., sandstones, carbonates, and shales) which dip gently southeastward at 5 to 7 feet per mile. These units, in turn, overlie granitic basement rocks. The injection and confining zones for the Burns Harbor Plant injection wells are at the bottom of the sedimentary sequence. The lowermost underground source of drinking water, or USDW (defined as less than 10,000 mg/1 total dissolved solids), is located 750 feet below the surface of this site. Approximately 1430 feet of alternating permeable and less permeable rock layers separate the lowermost USDW and the injection zone at this site and provide for secondary confinement and pressure reduction.

A review of the geologic literature demonstrates that all known faults are more than 30 miles distant from the Burns Harbor Plant. In terms of seismicity, the region generally is stable. Only non-damaging, small intensity seismic events have ever been recorded within a 75 mile radius of the site. Higher intensity events which might damage the mechanical integrity of the well or confining zone are extremely unlikely in this area. The recorded earthquake closest to the Burns Harbor Palnt occurred in 1938; its epicenter was 9 miles east-southeast of the plant and it had a magnitude of 4.2 on the Richter scale. The highest magnitude seismic event (4.7 on the Richter scale) recorded within 75 miles of this site occurred in 1912, 70 miles to the west. Should an earthquake of similar magnitude occur closer to the Burns Harbor Plant in the future, it would not be expected to cuase structural damage to the injection well or a release of waste from the injection zone.

The potential for earthquakes induced by injection is low due to the absence of faults at the site. In addition, local seismic networks, which are capable of detecting small intensity earthquakes, provide no indication of seismic activity induced by injection in this area. An existing seismic network, operated by the University of Michigan, includes stations sensitive enough to detect an earthquake near the Burns Harbor Plant of magnitude 2.0 or greater on the Richter scale.

2. Injection Zone Description

The injection zone must have sufficient permeability, porosity, thickness and areal extent to prevent migration of hazardous fluids out of this zone. The injection zone for the Burns Harbor Plant consists of the entire Mt. Simon Sandstone and the lower Eau Claire Formation. The thickness of the injection zone varies slightly from well to well at this site because of small differences in completion depth and formation thickness. At the WPL well, the injection zone is 2117 feet thick and ranges in depth from 2180 to 4297 feet below surface (Figure 1). The Mt. Simon and Eau Claire Formations extend over much of the midwestern United States and reach the surface approximately 200 miles away, in Wisconsin. At the Burns Harbor Plant, both formations are laterally extensive and undisturbed by faults or significant fractures, as documented by geologic literature, well log correlations, and by a Microscanner Log and cores from an injection well at a neighboring facility.

For the WPL well, the injection interval, or the portion of the injection zone into which waste is directly emplaced, is the lower Mt. Simon Sandstone (below the "B" Cap), located at a depth of 2734 to 4297 feet, with a thickness of 1620 feet (Figure 1). For the purposes of this discussion, the WAL wells will be treated as though recompleted and their injection intervals are substantially identical with that of the WPL well. Analysis of well logs from the three Burns Harbor Plant wells and cores from a well at a facility 1.3 miles to the west shows that the Mt. Simon Sandstone is moderately well sorted, fine-grained to medium-grained and contains minor amounts of siltstone, dolomite and gypsum.[1] The major constituents of the injection interval in the Mt. Simon are resistant to chemical degradation by the waste, and little, if any, compatibility problems are expected.

The upper injection zone, informally referred to as the "containment interval", for the wells includes the "B" Cap (described below), the upper Mt. Simon Sandstone, and the lower Eau Claire Formation. The containment interval is located at a depth of 2180 to 2734 feet below ground surface and has a total thickness of 554 feet (Figure 1). The "B" Cap accounts for 56 feet of this thickness, the upper Mt. Simon for 190 feet, and the lower Eau Claire Formation for 308 feet.

The "B" Cap is a unit of thinly interbedded shale, siltstone and silty sandstone which is located at the top of the lower Mt. Simon Sandstone. The "B" Cap has been correlated on geophysical logs in a 20 mile area surrounding the Burns Harbor Plant. Confidential whole-core tests of this unit report very low permeability to waste acids and low porosity, which will substantially inhibit the movement of waste. The "B" Cap is the first barrier to the vertical flow of injected wastes. The upper Mt. Simon Sandstone is similar in composition to the lower Mt. Simon, as described above. It is capped by a unit of interbedded siltstones referred to as the Mt. Simon "Cap" (Figure 1). A suite of open hole logs and confidential core data from a neighboring well show that the lower Eau Claire Formation consists of a dolomitic sandstone with siltstone interbeds. Overall, it has moderate porosity and permeability, and is suited for reducing vertical pressure propagation.

[1] The detailed core analysis for the injection and confining zones, taken at a nearby well belonging to the Midwest Steel Division of National Steel Corporation, include porosity and whole-core tests of permeability to waste acids. These analyses are not part of the Administrative Record available for public comment because they were accorded Confidential Business Information status on March 28, 1988.

3. Confining Zone Description

The confining zone must be (1) laterally continuous, (2) free of transecting, transmissive faults and fractures over an area sufficient to prevent fluid movement and (3) of sufficient thickness and proper geologic properties to prevent vertical propagation of fractures. The confining zone for the Burns Harbor Plant injection operation is the upper Eau Claire Formation, which is laterally extensive and free of transmissive faults and fractures throughout the Area of Review. The upper Eau Claire Formation is composed of interbedded shales, siltstones, and fine-grained sandstones. Confidential core data from a neighboring well demonstrate very low permeability to waste acids. The upper Eau Claire strata, with their pressure reduction characteristics, intervening between the confining zone and the injection interval, enhances the upper Eau Claire's adequacy as a confining unit.

At the Burns Harbor Plant, the upper Eau Claire Formation confining zone is located at an approximate depth of 1936 to 2180 feet and has a thickness of 244 feet (Figure 1). The net shale thickness of the confining zone is at least 200 feet. Based on a review of all available information, the Agency has concluded that the upper Eau Claire Formation is an adequate confining zone for the Burns Harbor Plant injection operation. With more than 1100 feet of rock separating the confining zone from the lowest USDW, the Agency is reasonably confident that injected contaminants will not reach drinking water sources. This confidence will be enhanced by the required monitoring well which will detect any migration while it is still many hundred feet below the USDW. Installation of a monitoring well near the WAL wells, as proposed by the petition, is a condition of this proposed decision. This monitoring well will be completed in the Galesville Sandstone, the first aquifer overlying the injection zone. The well will monitor water level and water quality changes.

4. Area of Review

The Area of Review (AOR) is the area within which the petitioner must identify all wells which penetrate the confining zone and demonstrate that they have been properly completed or plugged. For the Burns Harbor Plant injection operation, the AOR encompasses and area with a radius of from 3.0 to 3.8 miles, based on a conservatively designed cone-of-influence calculation. Bethlehem Steel extended their well search beyond this area, to encompass the northern half of Porter County. There are two wells within the AOR which penetrate the confining zone. One is an injection well operating under a permit from the EPA and the other is a monitoring well currently completed above the confining zone and adequately plugged back through this zone. The EPA permit requires proper completion of the monitoring well to ensure that fluids cannot migrate up the borehole. Accordingly, no corrective action under 40 CFR 146.64 is required for this facility. There are no other wells in the searched area which penetrate the confining zone.

E. Model Demonstration of No Migration

The demonstration of no migration of hazardous constituents from the injection zone at the Burns Harbor Plant involves the use of a mathematical model known as SWIFT II (Sandia Waste-Isolation Flow and Transport Model). In addition, an analytical model based on Theis and Darcy equations is used in some sensitivity analyses. The SWIFT model is used to predict the buildup of pressure and the vertical transport of waste. Lateral transport of waste is modeled using volumetric and analytical methods. The SWIFT numerical code has been widely used and extensively verified, as reported in various federal publications. The long history of development and the successful use of SWIFT for sites similar to the Burns Harbor Plant provide confidence that the model is well validated and appropriate for use at this site. The analytical model results were verified by comparison with SWIFT model runs.

1. Model Development and Calibration

The Bethlehem Steel model was developed by incorporating hydrogeological data of the site and surrounding vicinity into a conceptual model. These values were derived from well logs, cores, published literature, and local offsite geological data. The model contains six major stratigraphic layers extending from the top of the Eau Claire Formation to the base of the Mt. Simon Sandstone. These layers were further subdivided in some submodels. A calibration exercise was used to refine estimates of hydrogeologic parameter values for the Mt. Simon Sandstone. For this analysis, it was assumed that the lower Mt. Simon Sandstone was laterally infinite, and units above and below were more than several orders of magnitude less permeable than the lower Mt. Simon. This is an accurate assumption, based on core data. Calibration execrises reproduced the pressure response to a pressure falloff test run December 12, 1986, on the WPL injection well. This exercise indicates that the parameter values, taken as a group, adequately represent the injection interval. The parameter values included a permeability-thickness product of 8,790 millidarcy-feet (md-ft) for the lower Mt. Simon and a porosity of 0.15. These estimates are realistic. Reasonably conservative values were chosen for all parameters used to model injection-induced pressure and waste migration; details of this are discussed below. Two simulation time periods were considered in the demonstration: a historical and 20-year future operational period and a 10,000 year post-operational period.

2. Pressure Buildup Analyses

The SWIFT pressure buildup analyses included five major layers: lower Mt. Simon Sandstone, "B" Cap, upper Mt. Simon Sandstone, Mt. Simon "Cap", and lower Eau Claire Formation. The bottom of the Mt. Simon Sandstone and the bottom of the upper Eau Claire Formation were assumed to be more than several orders of magnitude less permeable impermeable than the Mt. Simon. These are realistically conservative assumptions, based on core data. For the operational period, actual values for WPL and WAL specific gravity (1.3 and 1.0, respectively) and viscosity (10 centipoise (cp) and 1 cp, respectively), and a realistic vertical permeability for the "B" Cap of 10^{-5} md, supported by core data, were used to predict vertical pressure buildup in the injection zone. Actual injection rates were used to model historical well operation (see section I(b)) and high rates to model future operation (175 gpm for WPL, between 750 and 240 gpm for WAL). Both WPL and WAL models included the effect of all Bethlehem wells and the effect of the National Steel injection well 1.3 miles away. Because higher than actual injection rates were used, the SWIFT models over-predicted pressure buildup. The modeled pressure buildup is greatest near the wells and declines to near 0 psi at a distance of approximately 12 miles. If WPL and WAL injection are maintained at present rates, as expected, then this distance will be significantly smaller.

3. Short-term Vertical Migration

The predicated pressure buildup at the end of the operational period was used as a basis of modeling the vertical migration of each waste stream. Sensitivity analyses using a variety of input values in SWIFT modeling of pressurization and vertical waste

transport, and also using analytical solutions, were included in the demonstration. Vertical transport at the Burns Harbor Plant is most likely to be affected by the injection pressure and to the permeability of the "B" Cap, which is the first overlying containing unit.

For each well, maximum permitted injection pressures and a "B" Cap permeability of 10^{-2} md were used to estimate waste movement due to pressure driven flow and hydrodynamic dispersion during the operational period. This permeability is a number of orders of magnitude higher than core data indicate, and is therefore conservative. The edge of the waste plume was defined as the point where the concentration of all hazardous constituents reached, or became lower than, health-based limits (based on a Maximum Contaminant Level of 0.1 mg/1 for chromium and .01 mg/l for selenium). The resulting waste movement is greatest near each wellbore. For WPL, the largest vertical migration is 56 feet and for WAL, less than 180 feet. These estimates are reasonably conservative and over-predict waste transport because (1) they are based on maximum injection pressures, and (2) they are based on "B" Cap permeabilities much lower than measured core data.

4. Long-term Vertical Migration

During the post-operational period, molecular diffusion is the primary transport mechanism for the vertical migration of waste. Geologic literature and log analysis were used to determine a reasonably conservative tortuosity of 0.15 and coefficient of molecular diffusion of 2×10^{-9} square meters per second. Based on these values, and a waste plume boundary defined by health-based limits, or lower, the maximum vertical transport during a 10,000 year post-operational period is 180 feet for WPL and 140 feet for WAL. Therefore, the total vertical migration of wastes injected after the dates of prohibition will be less than 240 feet (56 plus 180 feet) above the top of the lower Mt. Simon injection interval for WPL and less than 320 feet (180 plus 140 feet) from the base of the lower Mt. Simon injection interval for WAL. These wastes will be contained within the 56 foot thick "B" Cap and the 190 foot thick upper Mt. Simon Sandstone during the operational period, and within the 308 foot thick lower Eau Claire Formation during the 10,000 year post-operational period. In addition, it was demonstrated that all injected waste, including that previously injected into the upper Mt. Simon Sandstone, will be contained vertically within the injection zone during the 10,000 year period.

5. Short-term Lateral Migration

The distance of lateral migration of wastes during the operational period was calculated by accounting for volumetric displacement due to the injection of WPL at 175 gpm and of WAL at 240 gpm. These are the maximum flow rates which model calculations report can be maintained without exceeding permitted pressure limits. The rates exceed historical averages by 6 times for WPL and 1.4 times for WAL. Each waste plume is assumed to migrate laterally within a 313 foot thick interval, having a porosity of 0.15 and a sweep efficiency of 18 percent. The effective thickness and porosity are determined from Radioactive Tracer Surveys on the Burns Harbor Plant WPL well and other neighboring wells completed in the lower Mt. Simon Sandstone, and from core and log analysis. Both estimates are realistic. The sweep efficiency is a conservative estimate imposed for the sensitivity analysis; it accounts for geologic heterogeneity and uncertainty in effective thickness.

Model results indicate that the WPL will migrate laterally within the lower Mt. Simon approximately 3100 feet during the 20-year operational period. Hydrodynamic dispersion may conservatively be expected to increase the distance to the waste plume boundary (based on concentrations lower than health-based limits) to 4300 feet. During this same 20-year period, modeling predicts that the WAL plume within the lower Mt. Simon Sandstone will migrate 41009 feet. Hydrodynamic dispersion may increase this to 5700 feet. The plume size for waste previously injected into the upper Mt. Simon Sandstone would be much smaller because less waste was injected in that interval than the model assumes will be injected into the lower Mt. Simon in the future. The WPL and WAL waste streams may come into contract with each other in the subsurface. If this occurs, no compatibility problems are anticipated. The combined waste plume is likely to become less hazardous due to neutralization of acids and precipitation of some hazardous constituents. However, even if it is conservatively assumed that there is no overlap of the two plumes, the maximum radius of the combined plume within the lower Mt. Simon Sandstone would be 10,000 feet.

6. Long-term Lateral Migration

During the 10,000-year post-operational period, the combined waste plume will migrate due to the natural flow of groundwater in the Mt. Simon Sandstone, and due to hydrodynamic dispersion. A maximum groundwater flow velocity in the Mt. Simon Sandstone of 0.5 feet per year, based on maximum published literature estimates, would result in an additional drift of the combined waste plume of 5000 feet in 10,000 years. Hydrodynamic dispersion during the post-operational period may result in an additional migration of 2800 feet for the combined plume. This calculation is based on a dispersivity of 160 feet and a diffusion coefficent of 2×10^{-9} square meters per second (both determined from published literature values), and a waste plume boundary concentration below health-based limits. At this distance, the waste will also not have hazardous characteristics, such as corrosivity. Therefore, using reasonably conservative values, the maximum predicted lateral migration of the combined waste plume at the Burns Harbor Plant is 17,800 feet, or about 3.4 miles, in 10,000 years. The maximum area covered by the future waste plume is well within the area searched for well penetrations, that is, the northern half of Porter County.

Therefore, Bethlehem Steel has demonstrated, to a reasonable degree of certainty, that hazardous constituents will not migrate vertically out of the injection zone nor laterally to a point of discharge, in a 10,000 year period.

F. Quality Assurance and Quality Control

Bethlehem Steel Corporation and its consultants have demonstrated that adequate quality assurance and quality control plans were followed in preparing the petition for the Burns Harbor Plant. Bethlehem Steel has followed appropriate protocol for locating records for penetrations in the Area of Review, for collection and analyses of geologic and hydrogeologic data, for waste characterization, and for all tasks associated with the modeling demonstration.

III. Conditions of Petition Approval

As a condition of granting this proposed exemption from the ban on injection of Waste Pickle Liquor (K062), and of Waste Ammonia Liquor which contains a prohibited concentration of selenium (D010), the EPA requires that the following conditions be met by the Burns Harbor Plant of Bethlehem Steel Corporation:

(1) The average annual injection rate for Waste Ammonia Liquor (WAL) in all WAL wells combined, must not exceed 240 gallons per minute;

(2) After the effective date or prohibition, injection of WPL and WAL shall occur only into the lower Mt. Simon Sandstone below the "B" Cap;

(3) Groundwater monitoring must be fully implemented, in accordance with the schedule and conditions found in the administrative record for this draft decision; and

(4) The injected WAL must contain less than 5 mg/1 selenium.

These conditions are being incorporated into the existing UIC permits for the wells by permit modification.

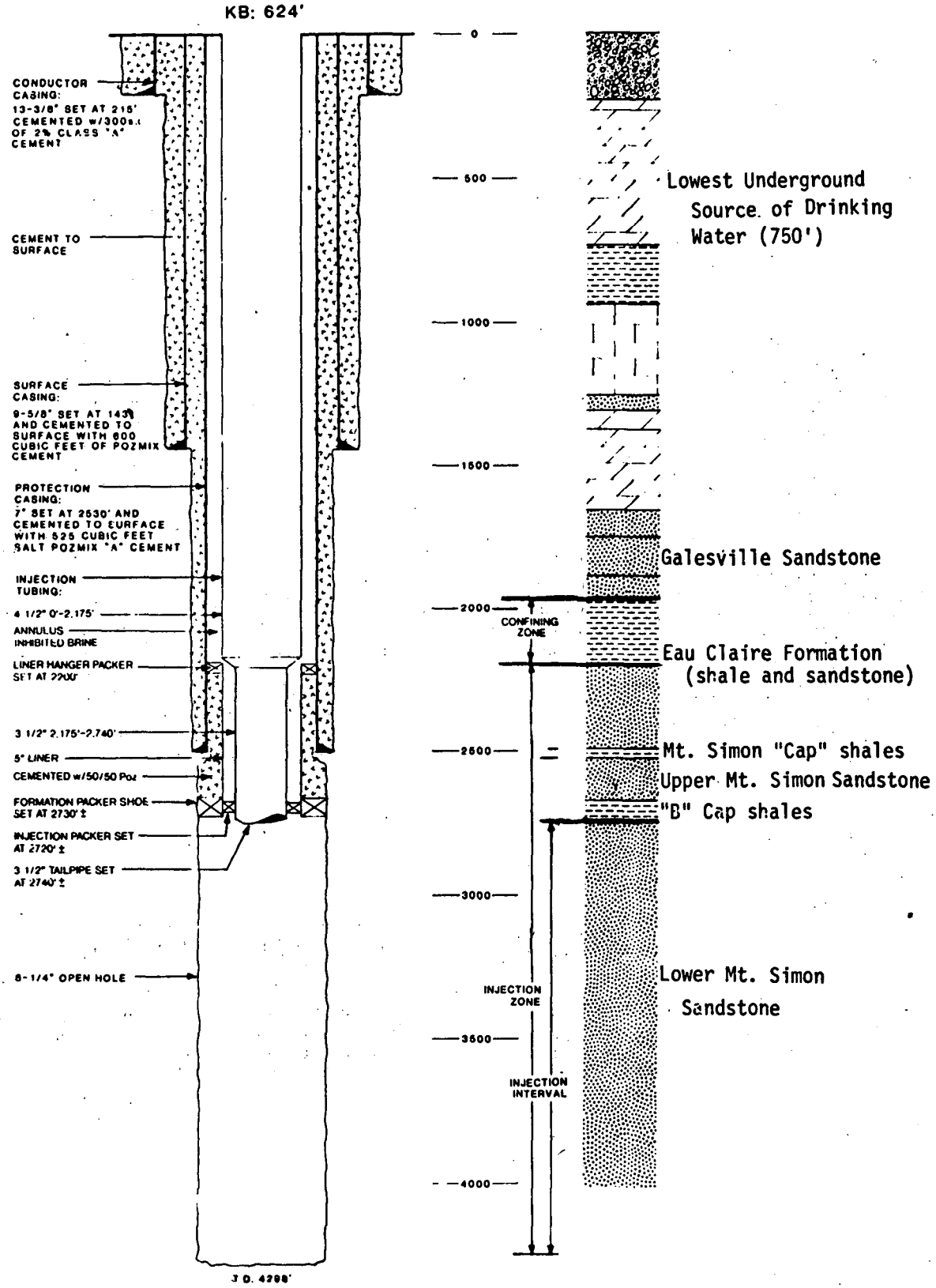
Dated: March 1, 1990.

Kenneth A. Fenner,

Acting Director, Water Division, Region V, U.S. Environmental Protection Agency.

BILLING CODE 6560-50-M

FIGURE 1
BETHLEHEM STEEL
WASTE AMMONIA LIQUOR WELL NO. 1



[FR Doc. 90-5350 Filed 3-7-90; 8:45 am]
BILLING CODE 6560-50-C

[FRL-3731-4]

Grants; Availability and Review or New Financial Assistance Program; Shallow Injection Well Initiatives

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability and review.

SUMMARY: The Environmental Protection Agency (EPA) announces the availability of a new financial assistance program "Shallow Injection Well Initiatives Program." This is a one-time funding effort, and therefore, the Program will not be listed in the *Catalogue of Federal Domestic Assistance.* Under this assistance program, States, Counties, universities and other non-profit organizations that submit proposals meeting the criteria established for Shallow Injection Well Initiatives are eligible to receive grants from EPA to fund these initiatives.

FOR FURTHER INFORMATION CONTACT: Thomas E. Belk, Shallow Injection Well Initiatives Leader, Office of Drinking Water, State Programs Division (WH-550E), U.S. EPA, 401 M Street, SW., Washington, DC, 20460 (202/382-5522); or EPA Regional Underground Injection Control Coordinators:

Region I: Jerome Healey, Groundwater and Water Supply Branch Chief, U.S. EPA, John F. Kennedy Federal Building, Boston, MA 02203 (617/565-3600).

Region II: Walter Andrews, Drinking Water/Ground Water Protection Branch Chief, U.S. EPA, 26 Federal Plaza, New York, NY, 10278 (212/26-1800).

Region III: Jon Capacasa, Drinking Water/Ground Water Branch Chief, U.S. EPA, 841 Chestnut Street, Philadelphia, PA 19107 (215/597-8228).

Region IV: James Kutzman, Ground Water Protection Branch Chief, U.S. EPA, 345 Courtland Street, NE., Atlanta, GA 30365 (404/347-3866).

Region V: Joseph F. Harrison, Safe Drinking Water Branch Chief, U.S. EPA, 230 South Dearborn Street, Chicago, IL 60604 (312/353-2151).

Region VI: Oscar Cabra, Water Supply Branch Chief, U.S. EPA, 1445 Ross Avenue, 12th Floor, Suite 1200, Dallas, TX 75202 (214/655-7150).

Region VII: Ralph Langemeier, Drinking Water Branch Chief, U.S. EPA, 726 Minnesota Avenue, Kansas City, KS 66101 (913/236-2815).

Region VIII: Patrick Crotty, Drinking Water Branch Chief, U.S. EPA, 999 18th Street, Suite 500, Denver, CO 80202-2405 (303/293-1652).

Region IX: Steve Pardieck, Drinking Water Branch Chief, U.S. EPA, 2590 Pebble Beach Loop, Lafayette, CA 94549 (415/930-7726).

Region X: Jan Hastings, Drinking Water Supply Branch Chief, U.S. EPA, 1200 Sixth Avenue, Seattle, WA 98101 (206/442-1224).

SUPPLEMENTARY INFORMATION: Section 1421 of the Safe Drinking Water Act (SDWA) authorizes the Administrator of the EPA to promulgate regulations to control the underground injection of fluids to protect Underground Sources of Drinking Water (USDW) from endangerment. The Administrator promulgated these regulations in 1984. The regulations divided injection wells into five classes. Prescriptive regulations were promulgated for Classes I-IV. Prescriptive regulations for Class V (Shallow Injection Wells) were deferred until States could inventory these wells and make an assessment of the threat they posed to USDW. Congress amended the SDWA in 1986 requiring EPA to prepare a report to Congress in 1987 based on these State reports. The Agency submitted this report to Congress in September 1987, stating that: (1) There are approximately 173,000 Shallow Injection Wells divided into 32 sub-categories nationwide (some estimate that there may be as many as 1,000,000); (2) they pose a varied threat to USDW; and (3) controls vary widely from State to State. The fact that these wells may not lend themselves to conventional controls has led the Agency to develop a Shallow Injection Well Strategy (published October 10, 1989). Part of that strategy is first to use shallow injection well initiatives to test innovative approaches for managing Shallow Injection Wells that would be broadly applicable by transferring experiences to other State and local governments, and second, to generate data and information to help in implementing the strategy for priority sub-categories of wells. The Agency requested and received $1,000,000 for FY 1990 to fund these initiatives. The Agency expects to fund 20 to 30 projects ranging in cost from $25,000-$50,000. Recipients must provide a 25% match of the total Federal grant. Guidance on the criteria EPA will use to evaluate applications may be obtained from the Information Contacts listed above.

The Shallow Injection Well Initiatives Program is eligible for inter-governmental review under Executive Order 12372 and is subject to the review requirements of section 204 of the Demonstration Cities and Metropolitan Development Act. The State must notify the following office in writing within 30 days of this publication whether applications to this program are subject to the State's official Executive Order 12372 review process: Grants Policy and Procedure Branch, Grants Administration Division (PM-216F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, ATTN: Corinne S. Allison.

Applicants must contact their State's Single Point of Contact (SPOC) for inter-governmental review as early as possible to find out whether Shallow Injection Well Initiatives Applications are subject to the State's Official Executive Order Review process and what materials must be submitted to the SPOC for review. SPOC's and other reviewers should send their comments concerning applications to the Grants Operations Branch, Grants Administration Division (PM 216F) no later than 60 days after receipt of an application and other required material for review.

Dated: March 2, 1990.

Robert H. Wayland III,

Acting Assistant Administrator.

[FR Doc. 90-5337 Filed 3-7-90; 8:45 am]

BILLING CODE 6560-50-M

FARM CREDIT ADMINISTRATION

Self-Evaluation Under 12 CFR part 606—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Farm Credit Administration

AGENCY: Farm Credit Administration.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that in accordance with section 504 of the Rehabilitation Act of 1973 as amended in 1978 and 12 CFR part 606, the Farm Credit Administration (FCA) has conducted a self-evaluation of FCA programs and activities. To meet the requirements of § 606.610(b), an opportunity is being provided to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process. Interested persons may review the draft at the McLean, Virginia, headquarters office any weekday between 9 a.m. and 4 p.m.

DATES: Oral or written comments must be received on or before April 9, 1990.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5079.

FOR FURTHER INFORMATION CONTACT: Gail Hill, Manager, Equal Employment

Opportunity, (703) 883–4144, TDD (703) 883–4444.

Dated: March 2, 1990.

Jeffrey P. Katz,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. 90–5238 Filed 3–7–90; 8:45 am]

BILLING CODE 6705–01–M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to the Office of Management and Budget for Review

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507. Persons wishing to comment on this information collection request should contact Eyvette Flynn, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, telephone (202) 395–3785. For further information contact Doris Benz, Federal Communications Commission, telephone (202) 632–7513.

Please Note: The Commission has requested expedited review of this item by March 26, 1990, under the provisions of 5 CFR 1320.18.

Title: Fee Processing Form

Form No.: FCC Form 155

Action: Initial Approval

Respondents: Individuals and Businesses

Frequency: On occasion

Estimated Annual Burden: 620,000 respondents; 10 minutes each.

Needs and Uses: This form must be completed by license applicants and other filers for Commission services for which a fee is charged. The data is used by the Commission's lockbox bank to perform initial fee verification tasks and by the Commission to provide the required linkage between application and deposited fee.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

BILLING CODE 6712–01–M

FEDERAL
COMMUNICATIONS
COMMISSION

Approved by OMB
3060-XXXX
Expires xx/xx/xx

The above blocks are for FCC use only

FEE PROCESSING FORM

Please read instructions carefully before completing this form. This form must accompany all payments. Please type or print legibly. All required blocks must be completed or application/filing will be returned without action.

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including the time for reviewing instructions, searching data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060-_____). Washington, DC 20503.

APPLICANT NAME (Last, first, middle initial)

(Address to which all correspondence, billings, refunds, etc., are to be sent)

MAILING ADDRESS (Line 1) (Maximum 35 characters)

MAILING ADDRESS (Line 2) (If required) (Maximum 35 characters)

CITY

STATE/COUNTRY (If foreign applicant) | ZIP CODE

CALL SIGN OR OTHER FCC IDENTIFIER (If required)

Enter in Column C, Lines (1) through (5) below, the total fee due for EACH Fee Type Code listed in Column A. The total fee due for each Fee Type Code should take into consideration any fee multiple entered in Column B.

	(A) FEE TYPE CODE	(B) FEE MULTIPLE (If required)	(C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A)
(1)			$
(2)			
(3)			
(4)			
(5)			

ADD ALL AMOUNTS SHOWN IN COLUMN C, LINES (1) THROUGH (5), AND ENTER THE TOTAL HERE.

THIS AMOUNT SHOULD EQUAL YOUR ENCLOSED REMITTANCE.

TOTAL AMOUNT REMITTED WITH THIS APPLICATION OR FILING $

This form may be reproduced.

FCC Form 155
May 1990

BILLING CODE 6712-01-C

Instructions For Completing Fee Processing Form, FCC Form 155, May 1990

(1) "Applicant Name"—Enter the name (last, first, middle initial) of the applicant as it appears on the original application or filing being submitted with this Fee Processing Form. If company, enter name which is used commercially.

(2) "Mailing Address (Line 1)"—Enter the street address or post office number to which the applicant or filing party wishes correspondence sent.

(3) "Mailing Address (Line 2)"—This line may be used for further identification of the address if additional space is required.

(4) "City"—Enter the name of the city associated with the given street address.

(5) "State/Country"—Enter the appropriate two-digit state abbreviation as prescribed by the U.S. Postal Service. If applicant or filing party is foreign, enter the appropriate country name here.

(6) "Zip Code"—Enter the appropriate five or nine-digit Zip code prescribed by the U.S. Postal Service.

(7) "Call Sign or Other FCC Identifier"—Enter an applicable call sign or unique FCC identifier, if any, as shown on your attached application or filing.

(8) Column (A), "Fee Type Code"—Enter correct Fee Type Code(s) from the appropriate Fee Filing Guide. Only one Fee Processing Form may be submitted per application or filing. Inaccurate or erroneous Fee Type Codes may result in your application or filing being returned to you without further processing.

(9) Column (B), "Fee Multiple"—Certain applications and filings may request action with respect to more than one station, license, frequency, or party and can be submitted together with one check if they meet specific conditions. Refer to the appropriate Fee Filing Guide for additional information.

(10) Column (C), "Fee Due For Fee Type Code In Column (A)"—Enter in this block the amount of the fee associated with the Fee Type Code shown in Column (A) (times (×) the fee multiplier, if required).

(11) "Total Amount Remitted With This Application or Filing"—Enter the total of lines (1) through (5) in Column (C). This amount should equal the amount of your check or money order.

How to Submit Applications and Filings

• Completed applications or filings should be mailed to the proper address shown in the Fee Filing Guide for the particular services for which you are applying or making a filing. Applications and filings which are properly addressed to the appropriate P.O. box number may also be hand delivered to the following address between 8:30 AM and 5:30 PM Monday through Friday (to be "officially" receipted on the same business day). For your convenience, deliveries may be made at any time, but will not be "officially" receipted until the next business day.

Federal Communications Commission, c/o Mellon Bank, Three Mellon Bank Center, 525 William Penn Way, 27th Floor, Rm. 153-2713, Pittsburgh, Pennsylvania, (Attention Wholesale Lockbox Shift Supervisor).

• A single check, bank draft or money order made payable to the Federal Communications Commission and denominated in U.S. dollars and drawn upon a U.S. financial institution must be included with each feeable application or filing. No postdated, altered or third-party checks will be accepted. Do not send cash.

• Parties hand delivering applications or filings may receive dated receipt copies by presenting copies of the applications or filings to the acceptance clerk at the time of delivery, along with copies of the associated Fee Processing Forms. Receipts will be provided for mail-in applications or filings if extra copies of the applications or filings are provided along with self-addressed stamped envelopes.

Remember

• A separate completed Fee Processing Form is required with each application or filing except in certain circumstances. Please refer to the appropriate Fee Filing Guide for additional information.

• A wrong Fee Type Code or incorrect remittance may result in your application or filing being returned without processing, or result in the dismissal or your application or filing. Please ensure that FEE TYPE CODES are correct and that your check or money order equals the amount shown in the TOTAL AMOUNT REMITTED WITH THIS APPLICATION OR FILING block before submitting your application or filing.

FCC Notice For Individuals Required by the Privacy Act and the Paperwork Reduction Act

Part 1, Subpart G of the Commission's rules authorize the FCC to request the information on this form. The information requested is required in order to obtain a license or authorization from the Commission. The purpose of the information is to provide a means to link a fee payment to a specific invoice, application or filing. The information will be used by the Commission to maintain data concerning fees and paid to the Commission, for internal financial control, audit, and reporting purposes. Information requested on this form will be available to the public. Your response is required to obtain a license or other authorization from the Commission.

[FR Doc. 90-5367 Filed 3-7-90; 8:45 am]
BILLING CODE 6712-01-M

Public Information Collection Requirements Submitted to Office of Management and Budget for Review

March 1, 1990.

The Federal Communications Commission has submitted the following information collection requirements to the Office of Management and Budget for review and clearance under the Paperwork Reduction Act, as amended (44 U.S.C. 3501-3520).

Copies of the submissions may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., suite 140, Washington, DC 20037.

Persons wishing to comment on these information collections should contact Eyvette Flynn, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-3785. Copies of these comments should also be sent to the Commission. For further information contact Jerry Cowden, Federal Communications Commission, (202) 632-7513.

OMB Number: 3060-0386.
Title: § 73.1635, Special temporary authorizations (STA).
Action: Extension.
Respondents: Businesss (including small businesses).
Frequency of Response: On occasion.
Estimated Annual Burden: 2,625 responses; 10,500 hours total annual burden; 4 hours average burden per response.
Needs and Uses: This rule allows licensees ro permittees of broadcast stations to file for special temporary authority to operate broadcast stations at specified variances from station authorizations not to exceed 180 days. The data is used by Commission staff to ensure that such operations will not cause interference to other stations.

OMB Number: 3060-0160.
Title: Section 73.158, Directional antenna monitoring points.
Action: Extension.
Respondents: Businesses (including small businesses).
Frequency of Response: On occasion.
Estimated Annual Burden: 75 responses; 300 hours total annual burden; 4 hours average burden per response.
Needs and Uses: Rule requires a licensee of an AM station using a directional antenna system to file an informal application to modify his or her station license for changes in field monitoring points and for the routing description to each point. Data used by Commission staff to alleviate electromagnetic interference.

OMB Number: 3060-0321.
Title: § 73.68, Sampling systems for antenna monitors.
Action: Extension.
Respondents: Businesses (including small businesses).
Frequency of Response: On occasion.
Estimated Annual Burden: 150 responses; 300 hours total annual burden; 2 hours average burden per response.
Needs and Uses: § 73.68(b) provides that licensees of existing AM broadcast stations with antenna monitor sampling systems, which meet performance standards of Commission rules, may file informal

requests for approval of their sampling systems. The data is used by Commission staff to ensure that interference is not being caused to other broadcast facilities.

OMB Number: 3060–0372.

Title: § 15.644, Information to user (cable terminal devices).

Action: Extension.

Respondents: Businesses.

Frequency of Response: On occasion.

Estimated Annual Burden: 10 responses; 40 hours total annual burden; 4 hours average burden per response.

Needs and Uses: Marketers of cable terminal devices must provide information to a user about the interference potential of the device and simple measures that a user can take to correct interference. Such information shall be included in a conspicuous place in the instruction manual.

OMB Number: 3060–0387.

Title: § 15.312(c), Authorization required (on-site verification of field disturbance sensors).

Action: Extension.

Respondents: Businesses.

Frequency of Response: Recordkeeping requirement.

Estimated Annual Burden: 200 recordkeepers: 3,600 hours total annual burden; 18 hours average burden per recordkeeper.

Needs and Uses: To monitor non-licensed field disturbances sensors operating in the low VHF television bands, equipment testing is required at each installation. Data is retained by the holder of the equipment authorization issued by the Commission and made available only at the request of the Commission.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90–5290 Filed 3–7–90; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act of 1980.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the FDIC hereby gives notice that it has submitted to the Office of Management and Budget a request for OMB review for the information collection system described below.

Type of Review: Extension of expiration date without any change in substance or method of collection.

Title: Notification of Performance of Bank Services.

Form Number: FDIC 6120/06.

OMB Number: 3064–0029.

Expiration Date of OMB Clearance: May 31, 1990.

Frequency of Response: On occasion.

Respondents: Insured state nonmember banks.

Number of Respondents: 100.

Number of Responses Per Respondent: 1.

Total Annual Responses: 100.

Average Number of Hours Per Response: 0.5.

Total Annual Burden Hours: 50.

OMB Reviewer: Gary Waxman, (202) 395–7340, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FDIC Contact: John Keiper, (202) 898–3810, Assistant Executive Secretary, Room 6096, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

Comments: Comments on these collections of information are welcome and should be submitted before May 7, 1990.

ADDRESSES: A copy of the submission may be obtained by calling or writing the FDIC contact listed above. Comments regarding the submission should be addressed to both the OMB reviewer and the FDIC contact listed above.

SUPPLEMENTARY INFORMATION: The FDIC is requesting OMB approval to extend, for a three-year period, the use of Form FDIC 6120/06, *Notification of Performance of Bank Services.* The current clearance for the form expires on May 31, 1990. There is no change in the method or substance of the collection.

Insured State nonmember banks are required to notify the FDIC, under section 7 of the Bank Service Corporation Act (12 U.S.C. 1867), of the relationship with a bank service corporation within thirty days after the making of such service contract or the performance of the service, whichever occurs first. The Form FDIC 6120/06 may be used by banks to satisfy the notification requirement. The information to be entered on the form is basically the identity and location of the submitting bank, the identity and location of the servicer and a brief description of the services performed. According to the Act, the servicer becomes subject to examination and regulation by the FDIC to the same extent as if the services were performed by the bank on its own premises. Section 304.5(b) of FDIC's regulations (12 CFR 304.5(b)) implements the notification requirement of 12 U.S.C. 1867.

Dated: March 5, 1990.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 90–5356 Filed 3–7–90; 8:45 am]

BILLING CODE 6714-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed; Brazil/U.S. Atlantic Coast and Gulf Ports Agreements

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 212–010027–026.

Title: Brazil/U.S. Atlantic Coast Agreement.

Parties: Companhia de Navegacao Lloyd Brasileiro, Companhia de Navegacao Maritima Netumar, American Transport Lines, Inc., Empresa Lineas Maritimas Argentinas S.A., A. Bottacchi S.A. de Navegacion C.F.I.I., Van Nievelt, Goudriaan and Co., B.V., Hamburg-Sudamerikanische, Dampfschifffahrts-Gesellschaft Eggert & Amsinck (Columbus Line).

Synopsis: The proposed amendment extends the special pool deduction for Wheels for Automobiles through 1990.

Agreement No.: 212–010320–021

Title: Brazil/U.S. Gulf Ports Agreement.

Parties: Compania de Navegacao Lloyd Brasileiro, Companhia Maritima Nacional, American Transport Lines,

Inc., Empresa Lineas Maritimas Argentinas S.A., A. Bottacchi S.A. de Navegacion C.F.I.I.

Synopsis: The proposed amendment extends the special pool deduction for Wheels for Automobiles through December 31, 1990.

By Order of the Federal Maritime Commission.

Dated: March 5, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90-5285 Filed 3-7-90; 8:45 a.m.]

BILLING CODE 6730-01-M

Agreement(s) Filed; Maryland Port Administration/Moller Steamship Co. Inc; Agreement

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW, room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No: 224-010896-004.

Title: Maryland Port Administration/ Moller Steamship Company, Inc. Lease Agreement.

Parties: Maryland Port Administration (Port), Moller Steamship Company, Inc. (Maersk Line).

Synopsis: The Agreement provides that the parties will file an amendment with the Federal Maritime Commission pursuant to the terms of the Shipping Act of 1984, if they decide to reinstate the preferential usage provision of the original Agreement & Lease.

Dated: March 5, 1990.

By Order of the Federal Maritime Commission.

Joseph C Polking,

Secretary.

[FR Doc. 90-5286 Filed 3-7-90; 8:45 am]

BILLING CODE 6730-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Drug Use and Alcohol Abuse Prevention Demonstration Grants in the Community Partnership Program

OFFICE: Office for Substance Abuse Prevention, ADAMHA, HHS.

ACTION: Request for applications.

The purpose of this program announcement is to provide funding to reduce drug use and alcohol misuse in communities through the building of coalitions of multiple agencies and organizations at the local level. This approach represents a priority program item in the President's Drug Strategy.

Introduction

The Anti-Drug Abuse Act of 1988, section 2051, amended section 508(b)(10) of the Public Health Service Act (42 U.S.C. 290aa-6(b)(10), as amended) authorizes the Office for Substance Prevention (OSAP) to provide assistance to communities to develop comprehensive long-term strategies for the prevention of substance abuse and to evaluate the success of different community approaches for the prevention of substance abuse.

The Office for Substance Abuse Prevention considers it essential that multiple/key segments of the community affected by drug use and alcohol abuse be involved in the development and implementation of programs to prevent drug use and alcohol abuse within communities, especially among its youth. This effort recognizes the need for involvement of families and coordination among public agencies, health, law enforcement, education, housing, voluntary, the business community and other relevant community-based organizations using a system-wide approach.

Several social learning theories suggest the efficacy of long-range comprehensive community prevention systems. Studies of the effects of comprehensive community-based prevention programs indicate a promising reduction in gateway alcohol and other drug use among adolescents. The combination of community organization, parent education, media, peer resistance and multidimensional school programming increases the success of each individual program component. Reinforcement of drug-free behavior is essential to help people shift from "knowing it is harmful" to "discontinuing use." There is support for the assumption that the mobilization of peer influences can be powerful tools in preventing experimentation with drugs and that adult role models also serve to augment prevention methods aimed at young people. Conversely, uncoordinated, short-term programs aimed exclusively at young people have been of limited success and have not produced any significant effects as preventative interventions. The Community Partnership Demonstration Program will permit applicant communities to build upon and extend those findings by provding the opportunity to develop and implement long-range, comprehensive and self-sustaining prevention programs.

Purpose and Program Goals

The purpose of the Community Partnership Demonstration Grant program is to promote the development of long-range, comprehensive, multi-disciplinary community-wide drug use and alcohol abuse prevention planning and programs through the formation and support of coalitions or partnerships of both public and private organizations, agencies and institutions, consortia and partnerships within local communities. The partnership should be designed and structured primarily as a planning and coordinating body and to enhance, promote and improve effective prevention program implementation at the local level. Sub-task groups comprised of representatives from different disciplines, community sub-sets (ethnic or geographic) or organizations are encouraged to be included as a part of the partnership.

Funds are to be used to identify the needs and service gaps for the target community, establish priorities, coordinate new and established prevention programs throughout the country and assist public and private organizations to promote and support drug abuse prevention programs. The grants funds are not intended to be used for provision of ongoing, direct prevention and early intervention services, to supplant existing positions, programs or services, or to support general operating costs of organizaions. By reducing the risk factors in the environment and increasing individual resiliency factors, the partnership can reduce drug use and alcohol abuse in the target community.

The goals of the Community Partnership Demonstration Grant Program are to achieve measurable and sustained reductions in drug and alcohol abuse among children and adolescents; reductions in drug related consequences (e.g., drug related deaths and injuries); a reduction in drug related crime; and a

reduction in workplace related drug abuse, through:

1. Encouraging community leaders, diverse orgnaizations and/or interest groups in local communities to more effectively coordinate prevention programs and to develop drug prevention initiatives.

2. Demonstrating that development of broad based support within the community and close coordination with appropriate State agencies can substantially contribute to the elimination of drug use and alcohol abuse.

3. Encouraging and stimulate in the target community self-sustaining multifaceted prevention and early intervention programs targeted toward affecting youth.

The Community Partnership may undertake the following activities or projects in the development and implementation of its comprehensive program. Each community would determine which activities are most appropriate for its own needs. The following are designed as examples of specific program activities:

—Program development activities that stimulate the initiation of enhanced or expanded drug and alcohol abuse prevention or early intervention services among institutions and organizations. Examples of such activities may be: youth/peer leadership, job training, or parent and family education projects/programs. Should a community choose this activity, the funds requested shall not exceed 10% of the direct costs of the grant award. Direct services are not allowable except as provided in this subsection. Since program development activities are designed only to initiate enhanced or expanded services, on-going financial support for these services has to be obtained from other funding sources outside of this grant program.

Other activities, which are not direct services, may include:

—Recruitment and training of both parents and other adults and youth/peers for grassroots leadership roles for substance abuse prevention.

—Community development and empowerment of local citizens to enable them to respond more effectively to drug use and alcohol abuse related problems in their communities through intensive consultation, addiction education, and strategic planning.

—Through the staff of the coalition provide support to community activities or citizen-sponsored advocacy and action planning for substance abuse prevention, including team-building and training workshops on maintenance and support between agencies and the community.

—Organizational development to improve system aimed at substance abuse prevention (i.e., a means for achieving systems change within a community).

—Mechanisms to plan, assess and coordinate planned and/or existing activities related to substance abuse prevention within the community.

Eligibility

Grant applications may be submitted by local governments or local private (non-profit) organizations/agencies designated to act on behalf of a larger community coalition. A community is defined as one whose boundaries are congruous with those of an incorporated governmental entity, e.g., city, county, or a multi-jurisdictional area (such as grouping of towns or a council of governments), or a subset of a larger community as defined below.

The partnership must have among its members the local government entity or entities having jurisdiction over the target community, e.g., city, county or regional government. The local government membership shall consist of the chief executive officer(s) or his/her designee(s). Units of local government must be included because a great many of the drug use and alcohol abuse prevention services and programs are public programs administered through the units of local government. In addition, the units of local government will be key actors in the institutionalization and long-term support for the systems changes expected to result from this grant program.

Only public or private, non-profit organizations are eligible applicants for this grant program because these are the agencies that have historically been active in developing and implementing prevention programs in communities and their interests are in serving the public. Accordingly, such agencies are likely able to generate community wide support and participation in a coalition which is targeted to this specific issue. While "for profit" organizations may not be grant applicants, they may be encouraged to be members of the partnership.

To be eligible, a partnership or coalition must ordinarily consist of at least seven organizations, agencies and/or (individuals representing organizations) that are committed to preventing drug use and alcohol abuse. Where an applicant develops a coalition of less than seven members, justification must be included in the application narrative section (see below) for how the coalition is expected to meet the requirements of this program with the reduced number. The partnership's membership is to be made up of both public and private sector organizations. Based upon community prevention research findings, it has been determined that in order to achieve a truly comprehensive prevention program in a community, at least the institutions representing the following service areas should be included—health, human services, education, housing, and law enforcement. Private sector agencies may include, but are not limited to education, business, community and neighborhood service organizations, media, religious institutions, civic and fraternal groups, family and parent or youth groups and health providers.

The applicant organization must be designated by the coalition membership to receive an award under this program activity on its behalf. This agreement must be documented through a letter from each member of the coalition designating the applicant to act on their behalf.

OSAP expects to fund grants in three categories, by population and relative rural/urban character.

The categories are:

—Small Communities and/or Rural Areas (Population approximately 50,000 and below which are incorporated municipal jurisdictions or counties).

—Medium Sized Communities (Population approximately 50,000 to 250,000).

—Larger Communities (Population approximately 250,000 and up).

In larger urban areas, exceeding 250,000 in population, applications for funds may also be made on behalf of a subset of the incorporated jurisdiction provided that subset has a population no less than 100,000. In these cases, the applicant must demonstrate (1) that the subset community is recognized as a clearly identifiable community within the larger urban area and (2) that the subset community has a history of decision making and program implementation that evidences its ability to carry out the requirements of this grant program, and (3) that the incorporated unit of local government having jurisdiction over the community, i.e. city or county, has made a commitment to the applicant agency that it will participate in the partnership. Such subsets shall, for review purposes, be treated as medium sized communities.

In the interest of promoting cooperation and coordination among candidate members of a coalition, multiple applications from the same geographic area or target community are strongly discouraged.

Letter of Intent

Organizations planning to submit an application in response to this grant announcement are requested to submit a letter of intent thirty (30) days prior to the application receipt date. Such notification is used by OSAP for purposes of review and program planning. The letter of intent should be no longer than one type written page and should succinctly indicate:

—The request for applications number (RFA SP90-01)
—The name of the potential applicant organization and names of coalition member organizations
—The name and telephone number of the program director if known
—The overall scope of the proposed program
—The size of the "target community/communities" partnership
- Small/rural incorporated jurisdictions (50,000 or under)
- Medium jurisdictions (50,000-250,000) (includes subsets of larger communities)
- Large (250,000 and over)

The letter should be directed to:
Salvatore Cianci, Ph.D., Director, Program Coordination and Review Unit, Office for Substance Abuse Prevention, 5600 Fishers Lane (Rockwall II), Rockville, Maryland 20857 (301) 443-4783.

The letter of intent is voluntary. This does not obligate the applicant to follow-up with an official grant application, i.e., the letter of intent does not commit the organization to the submission of an application.

Application Characteristics

The narrative section of the application must address the following topics and be preceded by an Abstract and a Table of Contents identifying sections A-G as follows:

A. Specific Aims
B. Background and Significance
C. Description of Community or Communities to be Served
D. Project Approach (Management and Implementation Plan)
E. Evaluation Plan
F. Resources/Budget
G. Project Staffing and Organization

Applications must be complete and contain all information needed for review. No material will be accepted later than the receipt date unless specifically requested by the executive secretary of the review committee. Letters of support must be contained in the application at the time of submission.

Abstract

An abstract should not exceed thirty type written lines on a single page. The abstract should clearly present the grant application in summary form, from a "who-what-when-how-where" point of view so that reviewers can see how the multiple parts of the application fit together to form a coherent whole. In the first sentences (1) identify the size of the target community the partnership application is addressing (2) indicate whether this is an ongoing partnership or one to be formed and (3) identify the lead organization for the partnership.

The application shall consist of no more than 35 pages. The narrative section of the application should be written in a manner that is self-explanatory to outside reviewers who are unfamiliar with prior related activities of the applicant. It should be succinct and well organized, may not exceed 25 single/spaced pages related to sections A through E and must contain all information necessary for reviewers to understand the proposed project. Up to 10 pages may be used to respond to sections F and G. Applications exceeding the 35 page limit will not be accepted for review.

Appropriately identified appendices may be attached for technical or specialized materials but may not be used merely to extend the narrative.

A. Specific Aims

The application must specify goals and objectives for the proposed program and indicate how these relate to the goals stated in this request for applications. Objectives should be stated in measurable terms and related to behavioral and/or environmental changes the project will aim to bring about in the reduction of drug use.

B. Background and Significance

The application must demonstrate familiarity and experience with, and understanding of, drug use and alcohol abuse prevention and the specific substance abuse needs in the target community. A conceptual framework should be established for the proposed project which may be based on a brief review of the literature, other related projects, and scholarly information and studies.

This section must include a brief statement of the problem that demonstrates (1) the need, (2) the available resources, e.g. funding from both public (national, State and/or local) and private resources, in-kind services, for the target community, (3) the gaps and other problems in the availability of prevention services for the target community, and (4) how the proposed project will address the need, and (5) prior knowledge/performance of the applicant organization in drug use and alcohol abuse prevention planning and programming in the target community. The application must describe how the project will contribute to the improvement or augmentation, rather than the duplication, of substance abuse prevention for the target community.

Specific detail on the methods for creating systems changes in the community as well as individual agencies should be provided.

C. Description of Community to be Served

The application must describe the community the proposed project is intended to serve (e.g. population, location, demographic and socioeconomic characteristics, ethnic minority composition, municipal entity or entities having jurisdiction). This section should include brief, summary information about the level of alcohol and other drug use within the selected community on which the project is focused. Identify significant gaps in the community services that require attention.

D. Project Approach (Management and Implementation Plan)

A planning phase will likely be required at the beginning of the coalition's existence. The time line and activities during this early planning stage should be reflected as part of the overall program plan (see item #2 below). The approach to be used in conducting the proposed project must be discussed clearly and with attention to detail.

The following information must be provided in the body of the application:

1. A brief description of the coalition or partnership including significant dates for major partnership developments and prior experience of the applicant organizations in community programs. Describe the coalition's operating or proposed operating proccess addressing leadership, policy and oversight functions including funding decisions. Indicate specifically:

a. Any committees, their purpose, and membership composition.

b. How the community wide prevention effort was or will be initiated, including whether or not a community substance abuse needs assessment has been done. How the proposed plan interfaces with State's prevention plan.

2. Provide a program development plan with specific timelines for implementation of the coalition's or partnership's activities. The program development plan must include a description of tasks to be performed, their sequence, performance schedule, and their relationship to each other. The accomplishment of these tasks should be related to project goals and objectives. The level of effort for each task should also be shown. In addition, specifically address the following:

a. An approach for developing in the target community self-sustaining multifaceted prevention, early intervention and treatment referral programs; and policies, procedures and activities to serve youth and young adults.

b. An approach for developing a limited public awareness campaign to generate broad-based community understanding of and support for the partnership's efforts to reduce the demand for drugs and alcohol.

c. A description of how the coalition is (or will be) culturally sensitive to the target community.

3. A strategy for disseminating knowledge and/or products resulting from the project to similar communities, organizations, agencies, etc., as well as obtaining similar information from such communities, organizations and agencies.

4. An approach for continued support for the project after Federal funding has ended, such as State or local revenue, support from the business community, Federal block grant funds, client fees or other fund raising activities.

5. A brief, clear description of the proposed organizations and/or agencies that will or do comprise the coalition or partnership. Identify the role each project member will have in the coalition.

6. Explain why the approach or model chosen is appropriate for the coalition to function in the target community. References should be cited, including, when possible knowledge gained from exemplary models applicable to similar communities.

In an appendix labelled "Coalition Members" provide (1) names, addresses and brief descriptions of organizations with which the partnership's activities are to be carried out and (2) signed letters of commitment and agreement for the applicant agency to act on behalf of the partnership from each partnership agency or organization.

E. Evaluation Plan

Applications must include an evaluation plan which addresses both process and outcome components. For the purpose of this grant announcement evaluations will be conducted at two levels—the individual project level and national level. At the individual project level, evaluations will include both process and outcome components.

The process evaluation involves the collection of quantitative and qualitative data that permit not only a detailed description of the implementation of the project, but also a description of what conditions existed prior to receiving grant funds. This may include a description of existing organizational arrangements concerned with substance abuse problems, staffing patterns, extent of formal/informal linkages, chronology of the development of such linkages, and initiatives which resulted from them.

The results of the process evaluation should, at a minimum, provide a useful description of who worked with whom, when, how often, in what settings and what were the results of those meetings. For specific prevention or treatment initiatives which can be linked to these partnerships, similar types of information concerning who, when, where, and how often should be collected.

The outcome evaluation is intended to assess whether the program was effective in meeting its goals and to what extent these effects can be attributed to the coalition's activities. The nature of outcome data will vary as a function of the goals of the project and should consider both intermediate level (e.g. changes in community policies or practices directed at substance abuse) and longer term outcomes (e.g. changes in knowledge, attitudes, and behavior concerning drug use and alcohol abuse), as appropriate.

The evaluation plan should include a description of the proposed data collection approach(s), a task/timetable for conducting the evaluation, and a description of the types of analyses to be performed (Suggested length 2–3 pages).

The budget should allocate a sufficient amount to carry out evaluation activities. It is suggested that approximately 10 to 15 percent be allocated for these purposes. However, it is the responsibility of the applicant to explain and justify the amount and purpose for these funds. Efforts should be made to utilize in-kind support with universities or appropriate public or private research organizations to maximize limited available funds for the evaluation component.

A national-level evaluation process is planned by OSAP and awardees will be asked to participate. To the extent possible, impact will be compared across programs. A national evaluation team will be formed by OSAP shortly after the demonstration projects begin to provide technical assistance to grantees on aspects of the evaluation, conduct aggregate-level data analysis, and prepare the national evaluation report. In addition to this, a small number of grantees are expected to participate in the formation of an evaluation group to work with the national evaluation staff in developing model criteria and formats for acquiring compatible information. The evaluation group will convene in the Washington, DC area twice annually and will provide overall guidance to grantees regarding the evaluation. Budgets submitted for this grant should include a travel allocation for two (2) evaluation staff to attend two (2) evaluation group meetings which will be approximately two nights and three days duration. These meetings are for all grantees and their evaluation staff, including the evaluation work group.

F. Resources/Budget

Describe the facilities, equipment, services, and other resources available to carry out the project and specify their source (e.g, agency, organization, individual). Indicate the terms, conditions, and timetables regarding the availability of these resources. Describe and justify the resources requested, including personnel and travel.

While cost-sharing is not a requirement of the program, OSAP encourages partnership programs to become self sufficient. Accordingly applicants should explain how they plan to assume an increasing share of costs during the grant period.

The budget should reflect the following guidelines:

—Sufficient travel allocation for two (2) evaluation staff to attend periodic meetings (two per year) in the Washington, DC area as required for participation in the national level evaluation process. Three days and two nights should be allocated for these meetings.

—Sufficient travel allocation for the project director and one staff person to attend two (2) meetings in the Washington, DC area as required by OSAP. These meetings will be for three days and two nights.

—No more than 10 percent of the grant award dedicated to program development costs (see Purposes and Goals).

—Approximately 10 to 15 percent of the budget allocated to evaluation (see section E).

Other Support

"Other Support" refers to all current or pending support related to this application. Applicant organizations are reminded of the necessity to provide full and reliable information regarding "other support," i.e., all Federal and non-Federal active or pending support. Applicants should be cognizant that serious consequences could result if failure to provide complete and accurate information is construed as misleading to PHS and could, therefore, lead to delay in the processing of the application. In signing the face page of the application, the authorized representative of the applicant organization certifies that the application information is accurate and complete.

For your organization and key organizations that are collaborating with you in this proposed project, list all currently active support and any applications/proposals pending review or funding that relate to the project. If none, state "none."

For all active and pending support listed, also provide the following information:

(1) Source of support (including identifying number and title).

(2) Dates of entire project period.

(3) Annual direct costs supported/requested.

(4) Brief description of the project.

(5) Whether projects overlaps, duplicates, or is being supplemented by the present application; delineate and justify the nature and extent of any programmatic and/or budgetary overlaps.

This information must be provided in a specially labeled appendix, "Resources/Other Support."

G. *Project Staffing and Organization*—1. *Organizational Structure.* A description of the organizational structure of the proposed project should be provided.

An organizational chart showing the organizations which make up the partnership should be included within the specially labeled appendix called "Coalition Members."

2. A description should be provided of organizational relationships between the State and local level health and human services agencies as they relate to the proposed project and the organizational units, such as sub-community units or task forces, that will be implementing the project. If the implementing organization is responsible to, or receives program management guidance from, a State, regional, tribe, local, or other office or agency, this relationship should be clearly described.

3. *Staffing Pattern.* Designate key staff of the coalition or partnership (grantee) and include biographical sketches for all key staff (including evaluation staff) for the project. Experience and/or training pertinent to the project should be highlighted. Curricula vitae (CV) may be included in an appropriately labeled appendix and will not be counted toward the page limit.

The narrative must include a brief section describing how staff will be recruited and selected, and whether any particular mix of background, skills, and/or personal qualities of staff is proposed. Key staff performing evaluation responsibilities should be identified and included as key pesonnel. The relationship of staff characteristics to the objectives of the project should be discussed. Consideration must be given to the employment of staff representing the gender, ethnic and cultural composition of the target communities.

Job descriptions for each by professional position identified in the proposed budget must be submitted as appendices. Job descriptions should include job title, description of duties and responsibilities, qualifications (e.g., required skills, knowledge, experience, education or training) for the position, and supervisory relationships.

APPLICATION RECEIPT AND REVIEW SCHEDULE

Receipt date	IRG review	Earliest start
May 4, 1990	July 1990	September, 1990.
November 15, 1990.	March, 1991	June, 1991.

Applications that are late for the May 4 deadline will be returned or held for the November 15 receipt date. Applications received after the November 15, 1990 receipt date will be returned without review unless this program is reannounced.

Applications received on or before the established receipt date or sent on or before the receipt date and received in time for orderly processing will be considered to be on time.

Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered post marks shall not be acceptable as proof of timely mailing.

Application Procedures

Applicants should use form PHS 5161-1 (Rev. 3/89). The title of this RFA, Community Partnership Demonstration Grant (SP 90-01) should be typed in item 9 on the face page of the PHS 5161-1. Applications Kits containing the necessary forms and instructions may be obtained from:

National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, Maryland 20852, Phone (301) 468-2600.

Each application must include one (1) original signed by an authorizing official and two (2) copies. The copies must be unbound with no staples, paper clips, fasteners, or heavy or lightweight paper stock within the document itself. The application will be reproduced in order to provide sufficient copies for review. Do not include anything that cannot be photocopied using automatic processors. Do not attach or include anything stapled, folded, pasted, or in a size other than 8½ × 11" on white paper. Heavy or light-weight paper will clog the photocopy machine and could be destroyed by the machine. Only one side should have printing. Odd attachments of any kind will not be copied.

Application materials could accidentally get out of order when being reproduced, thus every sheet of the proposal must have a page number. It is requested that pages be numbered consecutively from Beginning to end (for example, page 1 for the cover page, page 2 for the Abstract, etc.) The appendices should be labeled and separated from the narrative and budget section, and the page numbers continued in the sequence. Appendix material should not be used to extend the narrative portions of the applications. Do not include excessive material or oversized material, e.g., posters. Do not send video tapes or similar exhibits as part of the appendices. Such materials will not be made available to the review committee.

The signed original and two (2) permanent legible copies of the completed application with appendices should be sent to:

OSAP Programs, Division of Research Grants, NIH, Room 240 Westwood Building, 5333 Westbard Avenue, Bethesda, Maryland 20892.

(if express or overnight carrier is used, the Zip Code is 20816)

Further information and consultation on program requirements can be obtained from:

Ms. Gale A. Held, Director

OR

Ms. Darlind Davis, Deputy Director, Division of Prevention Implementation, Office for Substance Abuse Prevention, 5600 Fishers Lane,

Rockwall II, Rockville, Maryland 20857, Phone (301) 443-0369.

Further information on grants management can be obtained from: Marilyn Morgan, Grants Management Officer, Grants Management Unit, Office for Substance Abuse Prevention, 5600 Fishers Lane, Rockwall II, Rockville, Maryland 20857, Phone (301) 443-3958.

Executive Order 12372

Applications submitted in response to this announcement are subject to the intergovernmental review requirements of Executive Order 12372, as implemented through Department of Health and Human Services Regulations at 45 CFR part 100. Through this process, States, in consultation with local governments, are provided the opportunity to review and comment on applications for Federal financial assistance. Applicants should contact the State's Single Point of Contact (SPOC) as early as possible to determine the applicable procedure. A current listing of SPOCs will be included in the application kit. SPOC comments should be forwarded to: Dr. Salvatore Cianci, Director, Program Coordination and Review Unit, 5600 Fishers Lane, Rockwall II, Room 8-80, Rockville, Maryland 20857 within 60 days of the receipt date. OSAP does not guarantee to accommodate or explain comments from the SPOC that are received after the 60 day period.

The application must include a copy of a letter sent to the drug and/or alcohol abuse "Single State Agency" (SSA) briefly describing the grant proposal.

Review Process

Applications submitted in response to this RFA will be reviewed in accordance with ADAMHA/PHS peer review procedures for grants. OSAP staff will screen applications upon receipt and return those that are judged to be incomplete, non-responsive to the announcement or non-conforming (e.g. exceed the page limits). Returned applications will not be reaccepted into the originally planned review schedule.

Complete and responsive applications may enter a multi-stage review process. In the first stage, the evaluation component will be assessed by predominantly non-Federal reviewers. Applications judged to have a deficient evaluation component will be considered as non-competitive and removed from further review considerations. OSAP will notify and advise the applicant of any such action.

Applications judged to be conforming, responsive and competitive will be reviewed for technical merit in accordance with PHS/ADAMHA policies for peer review. The review group(s) will be composed primarily of non-federal experts. For applications judged to be competitive, written notification of the review outcome will be sent to the applicant upon completion of the initial review. In addition, recommendations from the initial review group may undergo a second level of review addressing policy issues by the Advisory Committee on Substance Abuse Prevention.

Confidentiality

Confidentiality of Alcohol and Drug Abuse Patient Records Regulations (42 CFR part 2). These regulations are applicable to any information about alcohol and other drug abuse patients obtained by a "program" (42 CFR 2.11) if the program is federally assisted in any manner (42 CFR 2.12 (b). This means that all project patient records are confidential and may be disclosed and used only in accordance with 42 CFR part 2.

Review Criteria

Each grant proposal will be reviewed and evaluated on its own merits. The following criteria will be used in the review. Greatest weight will be given to the comprehensiveness of the partnership approach to community prevention.

1. An understanding of the status of the drug use and alcohol abuse problem in the community targeted by the project.

2. Sensitivity to the cultural, ethnic, socioeconomic and geographic factors in the community and evidence that these populations have been included in the partnership in a meaningful way.

3. Evidence of participation, and commitment of public and private sector organizations in the partnership, including that of local government having jurisdiction in the target community.

4. The project's relationship to existing relevant State and/or local prevention activities in the target community and appropriateness and potential of plans for improving the coordination of existing prevention services and/or stimulating the delivery of new or additional services.

5. Clarity, feasibility and appropriateness of the proposed project overall and subprojects, including the resources and time frames proposed to sustain itself.

6. Evidence of the availability of resources or a viable plan for the future.

7. Clarity and appropriateness of the evaluation plan for the project, including the potential for long-range impact.

8. Capability and expertise of the proposed project staff.

9. Appropriateness of public awareness campaign for the target community and knowledge transfer plans during the course of the project and at its conclusion.

Award Criteria

Applications will be considered for funding on the basis of overall technical merit of the project as determined by the review process. Other criteria will include:

—The extent to which the project is consistent with the goals of this grant program,

—Significance of the proposed project in terms of developing an approach with applicability elsewhere,

—OSAP program needs and balance,

—Geographical distribution,

—Availability of funds, and

—Evidence of support for the proposed project from the Single State Agency (SSA) for Drug and/or Alcohol Abuse.

Availability of Funds

In FY 1990 it is estimated that approximately $44,000,000 will be available to support approximately 150 grants awarded under this RFA, ranging from $100,000 to $500,000 each depending upon size of community. The number of awards to be made for each of the three community categories will depend on the number and quality of applications received.

Terms and Conditions of Support

Grants must be administered in accordance with the PHS Grants Policy Statement (Rev. January, 1987).

Progress reports will be required and specified to awardees in accord with PHS Grants Policy requirements.

Grant funds may be used for expenses clearly related and necessary to carry out the services and activities, including both direct costs which can be specifically identified with the project and allowable indirect costs attributable to the organization responsible for implementing the project. In order for sub-grantee and/or contract organizations to recover those allowable costs with a project, it may be necessary to negotiate and establish an indirect cost rate. The grantee is responsible for assuring that sub-grantees and/or contractors have taken steps to establish an indirect cost rate in accordance with State or Federal regulations.

Allowable items of expenditure for which grant support may be requested include:

- Salaries, wages, and fringe benefits of professional and other supporting staff engaged in the project activities at the coalition management level;
- Travel directly related to carrying out activities under the approved project; including travel for two project staff to attend two meetings in Washington, DC;
- Supplies, communications, and rental of space directly related to approved project activities at the service sub-grantee or contract level;
- Contracts for performance of activities under the approved project; and
- Evaluation costs (including up to two trips per year for two evaluation staff members to Washington, DC).
- Other items necessary to support project activities such as those described in the Purpose and Program Goals section.

Federal regulations at title 45 CFR parts 74 and 92, generic requirements concerning the administration of grants, are applicable to the awards. Special conditions may be applicable in accordance with PHS Grants Administration Manual.

Grant Product Ownership

All products developed with these grant funds (with the exception of publications in scientific journals) must be published in the public domain, is not copyrighted and may be duplicated and used without prior approval. Grantees are strongly encouraged to make such products widely available, and OSAP may provide special resources to package and disseminate such products.

Period of Support

Support may be requested for a period of up to 5 years, non-renewable. Annual awards will be made subject to continued availability of funds and progress achieved.

The reporting requirements contained in this announcement are covered under the Paperwork Reduction Act of 1980, Public Law 96-511, OMB Approval Number 0937-0189.

(The Catalog of Federal Domestic Assistance number for this program is 13.194).

Joseph R. Leone,

Associate Administrator for Management, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 90-5353 Filed 3-7-90; 8:45 am]

BILLING CODE 4160-20-M

Health Care Financing Administration

[BPD-648-PN]

Medicare Program; Criteria for Medicare Coverage of Adult Liver Transplants

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed notice.

SUMMARY: This notice proposes Medicare coverage of liver transplantations in adults under certain circumstances. We would provide coverage for adult liver transplants based on the results of an assessment conducted by the Office of Health Technology Assessment of the Public Health Service and our subsequent determination that liver transplants are a medically reasonable and necessary service when furnished to adult patients with certain conditions and when furnished by participating facilities that meet specific criteria, incuding patient selection criteria.

DATES: To assure consideration, comments must be received at the appropriate address, as provided below, no later than 5 p.m. on May 7, 1990.

ADDRESSES: Mail comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD-648-PN, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Ave., SW., Washington, DC, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

Due to staffing and resource limitations, we cannot accept facsimile (FAX) copies of comments. In commenting, please refer to file code BDP-648-PN. Comments received timely will be available for public inspection as they are received, beginning approximately 3 weeks after publication of this document, in Room 309-G of the Department's offices at 200 Independence Ave., SW., Washington, DC on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: 202-245-7890).

Please address a copy of comments on information collection requirements to:

Office of Management and Budget, Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503, Attention: Allison Herron, HCFA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Vilis Kilpe, M.D., (301) 966-9365.

SUPPLEMENTARY INFORMATION:

I. Background

Administration of the Medicare program is governed by the Medicare law, title XVIII of the Social Security Act (the Act). The Medicare law provides coverage for broad categories of benefits, including inpatient and outpatient hospital care, skilled nursing facility (SNF) care, home health care, and physicians' services. It places general and categorical limitations on the coverage of the services furnished by certain health care practitioners, such as dentists, chiropractors and podiatrists, and it specifically excludes some categories of services from coverage, such as cosmetic surgery, personal comfort items, custodial care, routine physical checkups, and procedures that are not reasonable and necessary for diagnosis or treatment of an illness or injury. The statute also provides direction as to the manner in which payment is made for Medicare services, the rules governing eligibility for services, and the health, safety and quality standards to be met in institutions furnishing services to Medicare beneficiaries.

The Medicare law does not, however, provide an all-inclusive list of specific items, services, treatments, procedures, or technologies covered by Medicare. Thus, except for the examples of durable medical equipment in section 1861(m) of the Act, and some of the medical and other health services listed in sections 1861(s) and 1862(a) of the Act, the statute does not specify medical devices, surgical procedures, or diagnostic or therapeutic services that should be covered or excluded from coverage.

The intention of Congress, at the time the Medicare Act was enacted in 1965, was that Medicare would provide health insurance to protect the elderly or disabled from the substantial costs of acute health care services, principally hospital care. The program was designed generally to cover services ordinarily furnished by hospitals, SNFs, and physicians licensed to practice medicine. Congress understood that questions as to coverage of specific services would invariably arise and would require specific coverage decisions by those administering the program. It vested in the Secretary the authority to make those decisions.

Section 1862(a)(1)(A) of the Act prohibits payment for any expenses incurred for items or services "which are not reasonable or necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." We have interpreted this statutory provision to exclude from Medicare coverage those medical and health care services that have not been demonstrated by acceptable clinical evidence to be safe and effective. Effectiveness in this context is defined as the probability of benefit to individuals from a medical item, service, or procedure for a given medical problem under average conditions of use, that is, day-to-day medical practice. On January 30, 1989, we published a notice of proposed rulemaking in the **Federal Register** (54 FR 4302) which describes the process we use in reaching new coverage decisions and reevaluating coverage decisions already made. That notice includes a discussion of our reliance on the Office of Health Technology Assessment (OHTA) of the Public Health Service (PHS) for medical consultation and advice.

OHTA conducted an assessment of liver transplantation in 1983. At that time, the procedure was determined to be experimental in adults because its safety and efficacy had not been demonstrated. However, liver transplantation to treat children with extrahepatic biliary atresia was considered safe and effective. Therefore, based on its "reasonable and necessary" criteria, the Department concluded that liver transplantation in childen should be covered by Medicare and that liver transplantation in adults (age 18 and above) should not be covered. Since no child requiring this procedure has been eligible for Medicare benefits, the program has yet to reimburse for liver transplantation. However, the Medicare decision probably served to encourage Medicaid and private insurers to provide coverage for some children requiring liver transplantation.

In 1986, the Department of Health and Human Services' Task Force on Organ Transplantation issued a report recommending that Medicare provide coverage for liver transplantation in adults. Subsequently, HCFA asked the PHS, through OHTA, to review the scientific evidence for the safety and effectiveness of this procedure.

OHTA reported that since the 1983 assessment, there has been a substantial increase in the clinical experience with liver transplantation in the United States as well as Europe. More then 3,500 transplants have been carried out in the United States. OHTA derived the evidence for the safety and effectiveness of this procedure from clinical case reports and from expert opinion. In the OHTA assessment, the amount of experience with transplantation for a given condition and the 5-year survival rate were important considerations. In a few instances, the 5-year survival rate is so high that coverage has been recommended by the PHS despite limited experience.

Based on their review of data, the PHS experts have recommended that orthotopic adult liver transplantation is safe and effective in the treatment of end-stage liver disease when performed in facilities that meet certain criteria and for patients with one of the following speicific conditions:

Primary biliary cirrhosis;
Primary sclerosing cholangitis;
Hepatitis B, antigen negative (postnecrotic cirrhosis);
Alcoholic cirrhosis;
Alpha-1 antitrypsin deficiency disease;
Wilson's disease; or
Primary hemochromatosis.

Available evidence does not indicate at this time that liver transplantation is effective in treating adult patients with primary or metastatic malignancies of the liver. Consequently, the PHS does not recommend Medicare coverage, at this time, for liver transplantation performed on patients with these conditions. Also, coverage of liver transplantation was not recommended for patients with other conditions because there is insufficient information to reach conclusions about effectiveness.

The PHS also has concluded that survival rates are associated with the condition of the patient at the time of surgery and the characteristics of the treatment facility. Therefore, the recommendations include specific criteria for selecting patients who might be candidates for surgery and identifying facilities where the procedure can be performed safely and effectively.

II. Proposed Provisions

After consulting with PHS, we have determined that, for Medicare coverage purposes, liver transplants in adults with certain specified conditions are medically reasonable and necessary when performed in facilities that meet certain criteria. Therefore, in this notice, we propose a national coverage decision, under section 1862(a)(1)(A) of the Act, relating to liver transplants in adults. We will also publish this coverage decision as a manual instruction for use by our contractors.

For facilities which are approved, Medicare would cover under Part A (Hospital Insurance) all medically reasonable and necessary inpatient services. If the facility is receiving Medicare payment under the Medicare prospective payment system, we would use the DRG classification 478, "Liver transplants". We would establish a relative weight of 21.0000 for DRG 478 and a 64 day outlier threshold. DRG 478 would have the highest relative weight among the 478 DRGs. The methodology used to compute the proposed liver transplant weight is baed on the procedures that were published in our September 3, 1985 final notice on FY 1986 prospective payment rates for hospitals (50 FR 35646).

Organ acquisition costs would be paid separately on a cost basis, in the same manner as kidney acquisitions costs are handled in the End-Stage Renal Disease (ESRD) program under Medicare. Physician services, as well as other non-hospital services related to the transplant, and pre- and post-transplant care, would be covered under Part B (Supplementary Medical Insurance) and paid on a reasonable-charge or, in some cases, reasonable-cost basis.

Outpatient, self-administrable drugs used in immunosuppressive therapy, such as cyclosporine, are covered under Medicare for a period of up to 1 year beginning with the beneficiary's date of discharge from the inpatient hospital stay during which a covered organ transplant was performed.

If a Medicare beneficiary receives a covered liver transplant from an approved facility, reasonable and necessary services for followup care and for complications would be covered, as determined by our contractors. In fact, as discussed below, such services may be covered even if they are furnished by a hospital that is eligible for Medicare payment but is not specifically approved by Medicare for liver transplantation.

Medicare would not cover liver transplants or re-transplants in facilities that have not been approved as Medicare liver transplant facilities. If a Medicare beneficiary received a liver transplant from a facility that is not approved by Medicare for liver transplantation or received a liver transplant for a condition not covered under Medicare, we would not cover any inpatient services associated with the transplantation procedure. Nor would we cover physician services associated with the transplantation procedure in such cases. Thus, payment

would not be made for the performance of the transplant or for any other services associated with the transplantation procedure if performed in a non-approved facility.

However, after a beneficiary has been discharged from a hospital (whether or not it has been approved by Medicare as a liver transplant center) in which he or she received the non-covered liver transplant, subsequent medical and hospital services required as a result of the transplant would be covered in a facility otherwise eligible for Medicare payment if they are reasonable and necessary in all other respects. Thus, coverage would be provided for subsequent inpatient stays or outpatient treatment ordinarily covered by Medicare even if the need for treatment arose because of a previous non-covered liver transplant procedure. These services also would be covered for Medicare beneficiaries who were not beneficiaries at the time they received a liver transplant, regardless of whether or not the transplant was performed at an approved facility.

Once a facility applies for approval and is approved as a liver transplant facility for Medicare purposes, it is obliged to report immediately to HCFA any events or changes that would affect its approved status. Specifically, a facility must report any significant decrease in its experience level or survival rates, the transplantation of patients who do not meet its patient selection criteria, the loss of key members of the transplant team, or any other major changes that could affect the performance of liver transplants at the facility. Changes from the terms of aproval may lead to withdrawal of approval for Medicare coverage of liver transplants performed at the facility.

We propose to make the effective date of coverage for liver transplants in some cases as early as the date of publication of this proposed notice. Coverage as of the date of this notice is effective only for those facilities which would have qualified as liver transplant facilities when the transplant was performed and whose applications are received by HCFA within 90 days of the date of the final notice. The effective date of coverage for liver transplants performed at facilities applying after that date would be the date the facility received approval from HCFA as a liver transplant facility.

A. Requirements for Coverage

1. Specific Clinical Conditions Required for Liver Transplantation Coverage

Medicare coverage of liver transplants in adults would only be made for those beneficiaries who meet the applicable criteria and who are diagnosed as having one of the following clinical conditions:

Primary biliary cirrhosis;
Primary sclerosing cholangitis;
Hepatitis B, antigen negative (postnecrotic cirrhosis);
Alcoholic cirrhosis;
Alpha-1 antitrypsin deficiency disease;
Wilson's disease; or
Primary hemochromatosis.

Data available to the PHS indicates that for liver transplantation performed on adults with the above conditions a 5-year survival rate of 60 percent or higher was obtained. Published reports on liver transplants performed on individuals with alcoholic cirrhosis disclose a 3-year survival rate of 68 percent. However, there is now evidence of a 5-year survival rate for such individuals that is close to the 3-year survival rate. In studies with at least 5 year survival statistics, PHS found clinical evidence of only 10 transplants in adults with Wilson's disease and 5 transplants in adults with primary hemochromatosis. However, the 5-year survival rate for both conditions was 80 percent. Available data on 1-year survival rates for the seven recommended conditions ranged from 73 to 80 percent.

The decision to include Medicare coverage of transplants for individuals with alcoholic cirrhosis may be considered controversial by some, and we invite public comment on it. Available data suggests that the procedure is safe and effective for these patients. In 41 such patients, there was a 1-year survival rate of 73 percent. In the case of alcoholic cirrhosis, we would require that the patient meet the hospital's requirement for abstinence and have documented evidence of sufficient social support important to assure both recovery from alcoholism and compliance with immunosuppressive therapy.

Available evidence does not indicate at this time that liver transplanatation is effective in treating patients with primary or metastatic malignancies of the liver. Data on transplants performed on 296 adults with malignancies of the liver yielded a 5-year survival rate of 0 to 30 percent. In our view, liver transplantation in adults with primary or metastatic hepatic malignancies has not been proven to be effective. An exception might be made for liver transplantation of adults with epithelioid hemangioendothelioma. In such a case, the data suggests a 4-year survival rate of 0 to 68 percent. However, because of the wide variation in the survival rate and the relative lack of scientific data, we are unable to conclude that liver transplantation of adults with epithelioid hemangioendothelioma is reasonable and necessary. Thus, this condition would also not be covered under Medicare.

Further, liver transplantation for all other conditions lack clinical evidence of safety, effectiveness and acceptability by the professional medical community; that is, there is a paucity of clinical trials or other clinical data on these various conditions. The following is a partial list of these other conditions for which there is insufficient data to conclude, for Medicare coverage purposes, that liver transplantation is reasonable and necessary:

a. Hepatitis B, Antigen positive;
b. Non-A, Non-B Hepatitis;
c. Secondary Biliary Cirrhosis;
d. Lupus Hepatitis or Autoimmune Hepatitis;
e. Cytomegalovirus Hepatitis;
f. Epstein-Barr Virus Hepatitis;
g. Budd-Chiari Syndrome;
h. Veno-occlusive Disease; and
i. Liver damage caused by chemicals, toxins or external agents.

2. Other Coverage Criteria

Facilities must have patient selection criteria for determining suitable candidates for liver transplants. The PHS National Institute of Diabetes and Digestive and Kidney Disease (NIDDK) has reported to us that liver transplantation has resulted in incremental increases in life expectancy and improvements in the quality of life in certain cases. These cases have been carefully selected and the patients were managed according to specific protocols by experienced medical teams at facilities that have had substantial experience with the procedure. This practice of careful patient selection for liver transplants is essential to achieve optimal results.

When specific crtieria are considered in connection with the assessment of an individual patient's suitability for a liver transplant, we believe that liver transplants are medically reasonable and necessary. Therefore, we have developed patient selection guidelines (contained in II. E of this notice) that are a subset of the criteria that facilities would be required to meet so that we may be assured of their qualifications to provide medically reasonable and necessary liver transplants to Medicare patients.

B. Facility Requirements

Under current Medicare policies, a procedure can be considered medically

reasonable and necessary only if its safety and efficacy have been demonstrated adequately by scientific evidence, such as controlled clinical studies, and it has been generally accepted by the medical community. Normally, surgical procedures and medical regimens, although requiring competent, skilled personnel, are of a nature that they can be performed successfully on most patients who require them in most facilities that meet the Medicare conditions of participation for hospitals (42 CFR Part 482). In the case of liver transplantation, however, we believe many other factors are related to the safety and efficacy of the procedure. Thus, coverage of liver transplants requires detailed criteria to identify the context in which adult liver transplantations can be considered medically reasonable and necessary.

As we discussed previously, the Department concluded some time ago that liver transplantation in children under age 18 was safe and effective and should be covered by Medicare. However, the facility and patient selection criteria outlined below relate only to liver transplantations performed in adults (age 18 and over). We have not set forth specific criteria for liver transplantation in children because we believe the circumstances for coverage are rare since no child requiring this procedure has been eligible for Medicare benefits to date. We invite comment on the feasibility of specific facility criteria for coverage of liver transplantation in children.

We would cover only those liver transplantations performed in facilities that demonstrate good patient outcomes (for example, initially a 1-year survival rate of 77 percent for patients receiving a liver transplant) and broad compliance with the facility criteria. (While we believe that survival rates are important measures of successful outcomes, we do not believe that they can serve as the only criteria a center has to meet in order to receive Medicare payment for liver transplants.) Once a facility applies for approval and is approved as a liver transplant facility for Medicare purposes, it would be obliged to report immediately to HCFA any events or changes that would affect its approved status. Specifically, a facility would be required to report, within a reasonable period of time, any significant decrease in its experience level or survival rates, the loss of key members of the transplant team or any other major changes that could affect the performance of liver transplants at the facility. Changes from the terms of approval may lead to withdrawal of approval for Medicare coverage of liver transplants performed at the facility.

A discussion of the proposed criteria that we would require facilities to meet in order to receive Medicare payment for liver transplantation follows. A very similar approach is being used in determining eligibility of heart transplant facilities and has proved very successful.

1. Patient Selection

A facility must have adequate patient selection criteria and an implementation plan for their application. (Guidelines for patient selection criteria appear in II.E. of this notice.)

2. Patient Management

A facility must have adequate patient management plans and protocols that include the following:

a. Therapeutic and evaluative procedures for the acute and long-term management of a patient, including commonly encountered complications. The basis for confidence in these plans must be stated.

b. Patient management and evaluation during the waiting and immediate post-discharge, as well as in-hospital, phases of the program.

c. Long-term management and evaluation, including education of the patient, liaison with the patient's attending physician, and the maintenance of active patient records for a period of at least 5 years.

3. Commitment

A facility must make a sufficient commitment of resources and planning to the liver transplant program to carry through its application. Indications of this commitment should include the following:

a Commitment of the facility to the liver transplant program is at all levels and broadly evident throughout the facility. (A liver transplantation program requires a major commitment of resources. They may intermittently include many other departments as well as the principal sponsoring departments.)

b. The facility has expertise in the following areas: medical, surgical, and other relevant areas, particularly hepatology, vascular surgery, anesthesiology, immunology, infectious diseases, pulmonary diseases, pathology, radiology, nursing, blood banking, and social services. The facility must identify individuals in these areas in order to achieve an identifiable and stable transplant team. Responsible medical/surgical members of the team must be board certified or eligible to take the boards in their respective disciplines or have, in the opinion of the non-Federal experts discussed in II.C. of this notice, demonstrated competence irrespective of board status.

(1) The component teams must be integrated into a comprehensive team with clearly defined leadership and corresponding responsibility.

(2) The anesthesia service must identify a team for transplantation that must be available at all times.

(3) The infectious disease service must have both the professional skills and laboratory resources needed to discover, identify, and manage the complications from a whole range of organisms, many of which are uncommonly encountered.

(4) The nursing service must identify a team or teams trained not only in hemodynamic support of the patient, but also in the special problems of managing immunosuppressed patients.

(5) Pathology resources must be available for studying and reporting promptly the pathological responses to transplantation.

(6) Adequate social service resources must be available.

(7) Mechanisms must be in place for managing the liver transplant program that assure that—

(A) Patient selection criteria are consistent with those set forth in the facility's written patient selection criteria.

(B) The facility is responsible for the ethical and medical considerations involved in the patient selection process and application of patient selection criteria.

(8) Adequate plans exist for organ procurement meeting legal and ethical criteria, as well as yielding viable transplantable organs in reasonable numbers.

4. Facility plans

The facility must have overall facility plans, commitments, and resources for a program that will ensure a reasonable concentration of experience; specifically, 12 or more liver transplantation cases per year in adults who have one or more of the covered conditions. This level of activity must be shown feasible and likely on the basis of plans, commitments, and resources.

5. Experience and Survival Rates

The facility must demonstrate experience and success with a clinical organ transplantation program involving immunosuppresive technique.

The facility must have an established liver transplantation program with documented evidence of 12 or more adult patients, who have one or more of

the covered conditions, in each of the two preceding 12-month periods.

Survival rates may be influenced by many factors, including random chance and patient selection. However, most authorities agree that a patient who is not free of adverse prognostic factors warrants liver transplantation only if he or she has a reasonable prognosis and the donor liver cannot be used in a patient who is a good candidate with at least a moderately urgent need and who is in reasonable geographic proximity.

Initially, the facility must demonstrate actuarial 1-year survival rates of 77 percent for adult patients who have one of the seven covered conditions and who have had liver transplants at that facility during the time the facility is calculating its experience and survival rates. However, as discussed previously, data available to PHS indicate that for liver transplantation performed on adults with the seven covered conditions, a 5-year survival rate of 60 percent or higher was obtained. Therefore, based on the available data, we believe that a 60 percent survival rate for 2 years is reasonable. We specifically invite comment on whether we should also require the facility to demonstrate a 2-year survival rate of 60 percent. In reporting their actuarial survival rates, facilities must use the Kaplan-Meier technique and must report both 1-year and 2-year survival rates. The following definitions and rules also must be used:

a. The date of transplantation (or, if more than one transplantation is performed, the date of the first transplantation) must be the starting date for calculation of the survival rate.

b. For those dead, the date of death is used, if known. If the date of death is unknown, it must be assumed as 1 day after the date of the last ascertained survival.

c. For those who have been ascertained as surviving within 60 days before the fiducial date (the point in time when the facility's survival rates are calculated and its experience is reported), survival is considered to be the date of the last ascertained survival, except for patients described in paragraph (e) below. (**Note:** The fiducial date cannot be in the future; it must be within 90 days before the date we receive the application.)

d. Any patient who is not known to be dead but whose survival cannot be ascertained to a date that is within 60 days before the fiducial date, must be considered as "lost to followup" for the purposes of this analysis.

e. Any patient transplanted between 61 and 120 days before the fiducial date must be considered as "lost to followup" if he or she is not known to be dead and his or her survival has not been ascertained for at least 60 days before the fiducial date. Any patient transplanted within 60 days before the fiducial date must be considered as "lost to followup" if he or she is not known to be dead and his or her survival has not been ascertained on the fiducial date.

F. A facility must submit its survival analyses using the assumption that each patient in the "lost to followup" category died 1 day after the last date of ascertained survival. However, a facility may submit additional analyses that reflect each patient in the "lost to followup" category as alive at the date of the last ascertained survival.

In addition to reporting actuarial survival rates, the facility must submit the following actual information on every Medicare and non-Medicare patient who received a liver transplant between January 1, 1982 and the date of the application:

- Transplant number.
- Age.
- Sex.
- Date of transplant.
- Date of most recent ascertained survival.
- Date of death.
- The category of each patient (that is, living, dead, or "lost to followup" according to the criteria B.5.d or 3 above.

Unique patient identifiers are not needed for data prior to the application. The facility may submit additional information on any of the cases that it would like considered in the review.

Although we are not requiring that these data be submitted in a particular format, our review will be facilitated if the data are submitted as follows:

- Data are tabulated in seven columns, with data for each patient appearing as one line and listed in the sequence of date of transplant.
- The fiducial date should appear on each page.
- The transplant numbers listed may be existing liver transplant numbers used by the applicant facility. If so, the basis for any missing numbers should be explained.
- The tabulation should include no more than these required data. If more data are provided, they should be provided through additional tables or supplemental explanation.

6. Maintenance of Data

The facility must agree to maintain and, when requested, periodically submit data to HCFA, in standard format, about patients selected (including patient identifiers), protocols used, and short- and long-term outcome on all patients who undergo liver transplantation, not only those for whom payment under Medicare is sought. (Such data are necessary to provide a data base for an ongoing assessment of liver transplantation and to ensure that approved facilities maintain appropriate patient selection criteria, adequate experience levels and satisfactory patient outcomes.) In addition, facilities must agree to notify HCFA immediately of any change related to the facility's transplant program (including turnover of key staff members) that could affect the health or safety of patients selected for covered Medicare liver transplants or that would otherwise alter specific elements in their application. For example, a facility must report any significant decrease in its experience level or survival rates, the loss of key members of the transplant team, the transplantation of patients who do not meet the facility's patient selection criteria, or any other major changes that could affect the performance of liver transplants at the facility. Changes from the terms of approval may lead to withdrawal of approval for Medicare coverage of liver transplants performed at the facility.

Facilities not approved for Medicare covered liver transplants are not required to maintain data in standard format. However, if and when these facilities apply for Medicare approval, they will be required to submit such data for all patients receiving a liver transplant. The facility must submit these data beginning 30 days after notification of the data requirements. We plan to issue instructions to all hospitals regarding the required data in the near future.

7. Organ Procurement

The facility must be a member of the Organ Procurement and Transplantation Network (OPTN) as a liver transplant center and abide by its approved rules. The OPTN is currently administered under a HHS contract by the United Network for Organ Sharing. However, to date, the Secretary has approved no rules binding upon Medicare and Medicaid participants. The facility must participate in an organ procurement program to obtain donor organs.

a. If a liver transplantation center uses the services of an outside organ procurement agency to obtain donor organs, it must have a written arrangement covering these services. The liver transplantation program must notify the Secretary in writing within 30 days of terminating such arrangements.

b. "Organ procurement agency" is defined as an organization that has been designated by HCFA as an organ procurement organization and that meets ther criteria in section 371(b) of the Public Health Service Act, 42 U.S.C. 273(b). Such an agency performs or coordinates all of the following services:

(1) Retrieval of donated livers;
(2) Preservation of donated livers;
(3) Transportation of donated livers; and
(4) Maintenance of a system to locate prospective recipients for retrieved organs.

8. Laboratory Services

The facility must make available, directly or under arrangements, laboratory services (including blood banking) to meet the needs of patients. Laboratory services are performed in a laboratory facility approved for participation in the Medicare program.

9. Billing

The facility must agree to submit claims to Medicare only for adult liver transplants performed on individuals who have been diagnosed as having one of the following conditions:

a. Primary biliary cirrhosis;
b. Primary sclerosing cholangitis;
c. Hepatitis B, antigen negative;
d. Alcoholic cirrhosis;
e. Alpha-1 antitrypsin deficiency disease;
f. Wilson's disease; or
g. Primary hemochromatosis.

C. Process for Review and Approval of Facilities

Facilities that wish to obtain liver transplantation coverage for their Medicare patients would be required to submit an application and supply documentation showing their initial and ongoing compliance with each of the criteria. We would reexamine the use of the criteria in 3 years to verify its continuing appropriateness.

The approval of facilities would be based on a review of the materials submitted regarding their experience and expertise, as well as their commitment to the liver transplant program. We would conduct the review with the aid and advice of non-Federal experts in relevant fields. Generally, the consultants would have the responsibility of reviewing applications at the request of HCFA, making recommendations to HCFA on a timely basis concerning qualified facilities, and supporting each recommendation with written documentation. Consensus of the consultants would not be required. The individual consultants would report to us on their findings with respect to individual applications and would provide the basis for decisions as to the approval or disapproval of such applications.

Based on our experience in using a similar approach to reviewing applications from hospitals seeking approval as Medicare heart transplant programs, we believe this method permits the most effective use of the talents of experts in determining promptly and efficiently whether applicants meet the liver transplant facility criteria. It would permit relatively rapid implementation of the criteria and should assure applicants that their qualifications have been thoroughly and objectively reviewed by experts in the field of liver transplantation.

In approving facilities, we would compare the facility's submission against the criteria specified in this notice. The approval granted would be for a 3-year period and extensions of approval would require submission of a continuation application and would not be automatic.

We propose that, in addition to reviewing applications, the individual expert consultants may propose specific changes to the coverage criteria. Finally, we propose that, in certain limited cases, exceptions to the strict criteria may be warranted if there is justification and if the facility ensures our objectives of safety and efficacy. Under no circumstances would exceptions be made for facilities whose transplant programs have been in existence for less than 2 years, and applications from consortia would not be approved. In these two cases, disapprovals would be made by HCFA and would not require prior reviews by the expert consultants. Additionally, exceptions will not be granted on the basis of geographic considerations.

We propose that if a facility applies within 90 days of the date of publication of the final notice and is accepted on the basis of that application, coverage may be effective as early as the date of this proposed notice, or the date upon which the facility's survival rates are calculated and its experience is reported (fiducial date), whichever occurred later. The effective date of coverage for liver transplants performed at a facility applying after the 90-day timeframe would be the date the facility receives HCFA approval of its application.

D. Application Procedure

We will accept and begin to review applications after the final notice on these criteria has been published.

The application procedure is as follows:

1. An original and 10 copies of the application must be submitted on 8½ by 11 inch paper, signed by a person authorized to do so. The facility must be a participating hospital under Medicare and must specify its provider number, the name and title of its chief executive officer, and the name and telephone number of an individual we could contact should we have questions regarding the application.

2. Information and data must be clearly stated, well organized, and appropriately indexed to aid in review against the criteria specified in this notice. Each page must be numbered.

3. To the extent possible, the application should be organized into nine sections corresponding to each of the nine major criteria and addressing, in order, each of the sub-criteria identified.

4. The application should be mailed to the address below in a manner which provides the facility with documentation that it was received by us:

Administrator, Health Care Financing Administration, c/o Office of Executive Operations, Room 777 East High Rise, 6325 Security Boulevard, Baltimore, Maryland 21207.

E. Guidelines for Patient Selection Criteria

We would require facilities to have written patient selection criteria, which they would follow in determining suitable candidates for liver transplants. Such criteria would include or be comparable to, but need not be limited to, the following:

1. Patient selection criteria must be based upon both a critical medical need for transplantation and a maximum likelihood of successful clinical outcome.

2. The patient must have end-stage liver disease with a life expectancy of less than 12 months and no medical or surgical alternatives to transplantation.

3. In the case of alcoholic cirrhosis, selection of a patient who needs a liver transplant should include evidence of sufficient social support important to assure assistance in alcohol rehabilitation and in immunosuppressive therapy following the operation. Although the center should require abstinence at the time of the operation, we do not specify how long the patient should be abstinent prior to the operation. We believe the hospital and the transplant team should establish such guidelines. Facilities would be required to submit, as part of their application, the period of time they require for abstinence in patients with end-stage liver disease due to alcoholic cirrhosis. However, we believe that requiring long-term abstinence as a

criterion for surgery could make the patient an unsuitable candidate because of further decline in health.

4. The patient must not have the following:

a. Significant or advanced cardiac, pulmonary, renal, nervous system or other systematic disease.

b. Systemic infection.

c. Presence of malignancies either hepatic, extrahepatic, or metastatic.

d. Portal vein thrombosis.

e. Acute severe hemodynamic compromise at the time of transplantation if accompanied by compromise or failure of one or more vital organs.

f. Active alcohol or drug abuse.

g. The need for prior transplantation of a second organ, such as lung, heart, or kidney, or marrow, if this represents the coexistence of significant disease.

h. A history of a behavior pattern or psychiatric illness consdiered likely to interfere significantly with compliance with a disciplined medical regimen (because a lifelong medical regimen is necessary, requiring multiple drugs several times a day, with serious consequences in the event of their interruption or excessive consumption).

5. Many other factors must be recognized with regard to an adverse outcome after liver transplantation. The manner and extent to which adverse risk is translated into contraindication varies. For example, presence of insulin-dependent diabetes mellitus may have to be considered in relation to transplantation because of possible adverse effects on outcome as well as complications related to chronic immunosuppressive therapy.

6. Plans for long-term adherence to a disciplined medical regimen must be feasible and realistic for the individual patient.

These criteria take into consideration advances in the transplantation field and reflect discussions with experts in hepatology, infectious diseases, transplantation, surgery, biostatistics, and other experts. We realize that the indicators to measure the safety and efficacy of liver transplantations will continue to evolve. Thus, the criteria may need to be updated periodically to recognize further developments in liver transplantation technology.

III. Regulatory Impact Analysis

A. Introduction

Executive Order (E.O.) 12291 requires us to prepare and publish a regulatory impact anlaysis for any document such as this that meets the criteria of a "major rule". A major rule is one that is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), we prepare and publish a regulatory flexibility analysis for documents such as this, unless the Secretary certifies that implementation of the notice would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we would treat facilities that consider themselves capable of performing liver transplants as small entities. In this impact analysis, any reference to liver transplant/transplantation will mean liver transplantation in adults (age 18 or older). Liver transplantation to treat children (individuals under the age of 18) with extrahepatic biliary atresia was previously approved for Medicare coverage.

In additon, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any notice that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis also 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 which is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

This proposal would be considered a major rule under EO 12291 criteria based on our cost projections for the next five fiscal years (FYs). Additionally, the proposal would affect all facilities that consider themselves capable of performing liver transplants and may have an effect on the ability of those facilities to compete. We believe this notice would not have a significant economic impact on a substantial number of small rural hospitals since it is unlikely that they would be performing liver transplants. However, if there are any small rural hospitals performing liver transplants, they would be affected by this notice the same as any other hospital. We have prepared the following analysis, which, in combination with the other sections of this notice, is intended to conform to the objectives of E.O. 12291, the RFA, and 1102(b) of the Act.

B. Entities Affected

We believe the criteria that we have developed are essential to the maintenance of high standards of quality and the most successful outcomes. There are currently 73 liver transplant facilities in the United States according to information from the United Network for Organ Sharing. We estimate that the application of these criteria will result in the approval initially of about 10 facilities with a total of approximately 20 a year later. These estimates are being used primarily for the purpose of estimating the costs of covering liver transplants. We do not have any advance information on which facilities will apply or meet the criteria.

We estimate that there will be, at most, 74 covered Medicare liver transplant cases for FY 1990. By contrast, the number of non-Medicare cases for the same period is expected to be over 1500 cases. Thus, Medicare's share of the total liver transplant market for FY 1990 is expected to be only about 4.7 percent. However, by FY 1994, we expect that 19 percent of all liver transplants will be Medicare covered. Initially, we estimate that 10 hospitals out of the 73 hospitals currently performing liver transplants will meet the Medicare coverage criteria. However, by FY 1994, we expect that many, if not most, of the hospitals performing liver transplants will meet the criteria. A hospital that performs liver transplants but does not meet our Medicare coverage criteria could eventually be disadvantaged to the extent that the hospital performs liver transplants for Medicare beneficiaries and to the extent that the hospital must compete with nearby hospitals that meet Medicare coverage criteria for liver transplants.

Consequently, this notice could eventually provide those hospitals that meet the criteria for performing liver transplants with a significant amount of additional Medicare revenue. Also, these hospitals could use their status as Medicare liver transplant centers to enhance their prestige and standing as health care providers. This, in turn, could enable them to increase their overall market share of liver transplants at the expense of hospitals that also perform liver transplants but do not meet our criteria. Those facilities that do not meet the criteria may view our notice as having a significant adverse effect on competition. It is important to emphasize, however, that since the market for liver transplants is

constrained by the number of livers available for transplant, we do not believe that the criteria would in any way reduce the number of transplants.

Many facilities that have performed at least one liver transplant would not meet the levels of experience and success required under the facility criteria that we are proposing. However, some might be found to have acceptable clinical programs with an adequate prospect for successful outcomes. We would encourage these facilities to apply when they have achieved that success. We expect that Medicare coverage of liver transplantation could prompt additional third party payers, including State Medicaid plans, to cover this procedure and create incentives for some facilities to establish liver transplant programs. However, third party payers that either already cover or will cover liver transplants are not required to adopt our coverage standards.

Nonetheless, should most or all third party payers eventually adopt our policy, it may, indeed, adversely affect those facilities that fail to meet the criteria. Yet, we must point out that we have no authority to regulate private insurers, nor to limit any decision they may make to adopt policies similar to our own. If such a result were to occur, we believe it would merely reflect a general consensus that might have formed even if we had not addressed this issue.

Note that, due to the sensitivity of these estimates and the uncertainty of actual outcomes, we view our estimates of the number of liver transplant cases and the number of hospitals that will meet Medicare coverage criteria as opinions, rather than estimates.

C. Impact on Beneficiaries

It is likely that few beneficiaries entitled to Medicare on the basis of age would be suitable liver transplant recipients because the advanced age of these beneficiaries would generally make them poor medical candidates for this procedure. Beneficiaries entitled to Medicare on the basis of disability are required by law to serve a 24-month waiting period in addition to the 5 months they must have been disabled prior to entitlement to disability cash benefits. We recognize that the need for liver transplantation among some of those disabled by liver disease may arise earlier than the twenty-nine months that they must wait until they are entitled to Medicare.

We believe that the criteria we are proposing are the most effective means available to ensure that the liver transplants that are made available to Medicare beneficiaries are provided in a safe and effective manner so that they can be considered to be reasonable and necessary within the meaning of the law. We recognize that the criteria are fairly restrictive. Beneficiaries may have to travel long distances from their homes and have to incur travel expenses in order to receive a liver transplant at a Medicare approved facility. However, we believe this approach is justified, considering both our concerns for patient safety and the success rates that are currently achievable with this modality. Furthermore, we believe the benefit of affording beneficiaries the opportunity of undergoing this type of procedure with a very reasonable assurance of a successful outcome must be weighed against the possibility of somewhat higher personal expenses. In any event, we do not believe that the criteria would have an effect on the number of liver transplants performed.

D. Projected Expenditures Under Medicare

It is difficult to make a precise estimate of future Medicare costs, largely due to the difficulty of predicting the availability of donor organs over the next few years. All dollar estimates depend on assumptions and estimates related to the number of covered transplants.

Our projected estimates are based on an effective date of February 1, 1990. In developing these estimates, we made assumptions about the total number of liver transplants performed nationwide and the future rate of increase of the number of transplants performed at approved facilities. We assumed this would go up with the number of facilities, but the rate of increase would level off due to competition for suitable recipients and donor organs.

Again, due to the sensitivity of these assumptions and the uncertainty of actual outcomes, we view our projection of expenditure increases as an opinion, rather than an estimate.

PROJECTED EXPENDITURES FOR MEDICARE COVERAGE OF LIVER TRANSPLANTS

[In millions]

Fiscal year				
1990	1991	1992	1993	1994
$10	$25	$55	$85	$120

E. Projected Savings Under Medicaid

We also recognize that changes in Medicare coverage of liver transplants would affect Medicaid. Presently 37 States and the District of Columbia cover liver transplants. Medicare coverage of liver transplants would mean that if the transplant qualifies for Medicare coverage, these States would not have to pay for the transplant. In FY 1990 and 1991, we estimate the total Medicaid savings to be considerably less than $5 million. However, by FY 1992, we expect to see a noticeable increase in Medicaid savings because the number of approved Medicare liver transplant facilities and transplant operations is expected to increase substantially.

PROJECTED SAVINGS IN MEDICARE LIVER TRANSPLANT EXPENDITURES

[Rounded to nearest $5 million]

Fiscal year				
1990	1991	1992	1993	1994
0	$0	$5	$5	$5

F. Alternatives Considered

As an alternative, we considered allowing all Medicare participating hospitals to establish transplant programs without additional facility criteria, although the patient selection criteria would have to be used. Our major reason for rejecting this alternative was that it would permit uncontrolled proliferation of transplant facilities, raising all the concomitant questions about the quality of services, given the limited availability of donor organs and experienced teams. Further, because the procedure would be spread among a larger number of facilities, it is likely the average experience level would be lower and would probably result in lower success and survival rates among recipients. Our responsibilities for the well-being of Medicare beneficiaries and for the prudent expenditure of Medicare trust funds dictate that we pursue a cautious policy with respect to a procedure as complex as liver transplantation.

G. Conclusion

We believe that the conditions set forth in this proposed notice would maintain the quality of the services required by this complex procedure, minimize transplantation at facilities and under conditions which have not been shown to be safe and effective, and allow entry of new qualified providers. Although the proposed criteria for experience, survival rates and facility commitment are somewhat restrictive, we believe this approach is

justified, particularly in view of the typical relationship between experience and quality of service.

IV. Response to Comments

Because of the large number of comments we receive on notices, we cannot acknowledge or respond to them individually. However, if we decide to change the provisions of this notice, we will publish an additional notice in the Federal Register and respond to the major issues in that document.

V. Paperwork Burden

This notice proposes information collection requirements that are subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Specifically, facilities that wish to obtain approval for Medicare coverage of liver transplantation would be required to submit an application and documentation pertinent to liver transplantations. Public reporting burden for this collection of information is expected to be 100 hours.

A notice will be published in the Federal Register after approval is obtained. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official whose name appears in the "ADDRESS" section of this notice.

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare-Hospital Insurance Program)

Authority: Sec. 1102, 1862(a)(1) and 1871 of the Social Security Act (42 U.S.C. 1302, 1395y(a)(1) and 1395hh).

Dated: February 13, 1990.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

Approved: Feburary 16, 1990.

Louis W. Sullivan,

Secretary.

[FR Doc. 90-5242 Filed 3-7-90; 8:45 am]

BILLING CODE 4120-01-M

Office of Human Development Services

[Program Announcement No. HDS-90-1]

Fiscal Year 1990 Coordinated Discretionary Funds Program; Availability of Funds and Request for Applications

AGENCY: Office of Human Development Services, HHS.

ACTION: Announcement of availability of funds and request for applications under the Office of Human Development Services, Coordinated Discretionary Funds Program.

SUMMARY: The Office of Human Development Services (HDS) announces its Coordinated Discretionary Funds Program for Fiscal Year 1990. Funding for HDS grants and cooperative agreements is authorized by legislation governing the discretionary programs of three Program Administrations and one staff office within HDS—the Administration for Children, Youth and Families; the Administration on Developmental Disabilities; the Administration for Native Americans; and the Office of Policy, Planning and Legislation.

This announcement contains forms and instructions for submitting an application. Grants made under this program announcement are subject to the availability of funds for support of these activities.

DATES: The closing date for submittal of applications under this announcement is May 11, 1990.

ADDRESSES: Application receipt point: Department of Health and Human Services, HDS/Grants and Contracts Management Division, 200 Independence Avenue, SW., Room 724-F, Washington, DC 20201-0001, Attn: HDS-90-1.

FOR FURTHER INFORMATION CONTACT: Department of Health and Human Services, HDS/Office of Policy, Planning and Legislation, Division of Research and Demonstration, 200 Independence Avenue, SW., Room 724-F, Washington, DC 20201-0001. Telephone (202) 755-4560. To provide 24-hour coverage, calls to this number may be answered by an answering machine.

SUPPLEMENTARY INFORMATION: This program announcement consists of three parts. Part I provides information on Departmental and Office of Human Development Services' (HDS) initiatives, programs and statutory funding authorities covering this announcement, additional HDS discretionary program announcements anticipated this fiscal year, planned technical assistance workshops for prospective applicants and dissemination conferences. Part II describes the programmatic priorities under which applications are being solicited for projects to be funded. Part III describes in detail how to prepare and submit an application.

The forms to be used for submitting an application follow Part III. No additional application materials are available or needed to submit an application. All of the information and forms required to submit an application are contained in this announcement.

Part I—Preamble

A. Goals of the Office of Human Development Services

The program and staff offices within the Office of Human Development Services (HDS) differ in the populations they serve and in the programs they administer but share a common set of goals as follows:

- To increase family and individual self-sufficiency and independence through social and economic development strategies;
- To target Federal assistance to those most in need;
- To improve the accountability of HDS administered programs, and the effectiveness and efficiency of both internal management and State and locally administered social services; and
- To improve the quality of HDS programs and services while encouraging innovation and choice through the marketplace.

Increased specialization, categorical programs, and the diversity of services and providers at the local level have increased the need for effective comunication, networking, and cooperation among all concerned, particularly those at the level where services are delivered, to increase program effectiveness, maximize the use of existing resources, and avoid duplication or fragmentation of services. Program accountability and innovation are essential to more adequately address complex social issues and to help more individuals and families to reduce their dependency. Therefore, HDS' Coordinated Discretionary Funds Program attempts to take a coordinated approach at the Federal level to promote the achievement of these goals.

B. Office of Human Development Services Initiatives

Within the context of these broad goals, the Assistant Secretary for HDS has identified four initiatives for special emphasis:

- *Permanency Planning*—to promote a sustained commitment to family life; to the care and nurturing of our nation's young; and to the sound social, emotional, physical and cognitive development of our most vulnerable children.
- *Coordinated Services*—to encourage integration of services among specialized service providers to eliminate fragmentation, reduce duplication, and produce more effective responses in serving individuals and families.
- *Self-sufficiency*—to promote or structure programs to help individuals

and families overcome crises by developing and/or providing services which will enable them to gain independence and sustain themselves and their families without need for further intervention.

• *Innovative Services*—to develop innovative approaches to service delivery systems, based on current challenges and circumstances affecting families.

C. The Office of Human Development Services' Program and Staff Offices

Below is a brief description of the HDS program and staff offices related to this request for applications.

Administration for Children, Youth and Families

The Administration for Children, Youth and Families (ACYF) serves as the focal point within the Federal government for programs, activities, and initiatives designed to improve the quality of life for children, youth and families. ACYF administers the following programs which relate to discretionary grants under this announcement:

• *Head Start* provides comprehensive educational, health, nutritional, social and other services primarily to low-income preschool children, age three to the age of compulsory school attendance, and their families. An essential feature of every Head Start program is the involvement of parents.

• *Child Welfare Research and Demonstration* provides financial support to State and local governments or other nonprofit institutions, agencies, and organizations engaged in research or demonstrations in the field of child welfare. Research and demonstrations supported under this program address preventive intervention, the development of alternative placements for children such as foster care or adoption, and reunification services so that children can return home if at all possible.

• *Child Welfare Training* provides discretionary grants to accredited public or other nonprofit institutions of higher learning to develop and improve educational and training programs and to assist child welfare agencies to upgrade skills and qualifications of staff.

• *Adoption Opportunities* provides financial support for demonstration projects to improve adoption practices, to eliminate barriers to adoption and to find permanent homes for children, particularly children with special needs.

• *Child Abuse and Neglect* discretionary activities are designed to assist and enhance national, State, and community efforts to prevent, identify, and treat child abuse and neglect. These activities include conducting research and demonstrations; supporting service improvement projects; gathering, analyzing and disseminating information through a national clearinghouse; and coordinating Federal activities related to child abuse and neglect.

• *Temporary Child Care for Children With Disabilities and Crisis Nurseries* provides demonstration grants to States to assist private and public agencies in developing temporary child care (respite care) for children with disabilities and crisis nurseries for children at risk of child abuse and neglect.

• *Runaway and Homeless Youth* addresses the crisis needs of runaway and homeless youth and their families through the establishment or strengthening of community-based programs providing outreach, temporary shelter, counseling, and aftercare services. It also provides support to coordinated networks designed to share information, expertise, and resources among service providers; and to a toll-free, 24-hour National Runaway Switchboard which serves as a neutral channel of communication between young people and their families as well as a source of referral to needed services.

• *Abandoned Infants* provides discretionary grants to State and public or private nonprofit entities to develop, implement, and operate demonstration projects that will prevent the abandonment of infants and young children; identify and address their needs, especially those infected with AIDS; and provide necessary and appropriate care for those who are abandoned.

Administration on Developmental Disabilities

The Administration on Developmental Disabilities is the principal agency in the Federal government to help ensure that all persons with developmental disabilities can receive the services and other assistance and opportunities necessary to enable them to achieve their maximum potential through increased independence, productivity, and integration into the community. Under the Projects of National Significance grant program, support is provided to public and private nonprofit organizations and agencies for research and demonstration, technical assistance and data collection.

Administration for Native Americans

The Administration for Native Americans (ANA) promotes the goal of social and economic self-sufficiency for American Indians, Native Hawaiians, Native Alaskans and Native American Pacific Islanders. ANA defines self-sufficiency as the level of development at which a Native American community can control and internally generate resources to provide for the needs of its members and meet its own short and long range social and economic goals.

Office of Policy, Planning and Legislation

The Office of Policy, Planning and Legislation is a staff office in HDS which administers the following discretionary grant programs under this announcement:

• *Social Services Research and Demonstration* grants and cooperative agreements are awarded for innovative research and demonstration projects that are responsive to the HDS program priorities. This program promotes the demonstration of effective and innovative social services for dependent and vulnerable populations such as the poor, the aged, children and youth, Native Americans and the handicapped.

• *Family Violence Prevention and Services Act* provides grants to States and Indian Tribes to prevent family violence and provide immediate shelter and related assistance to victims of family violence and their dependents. Demonstration grants also support the training of family violence personnel and provide technical assistance to States and Indian Tribes in the conduct of their family violence programs.

D. Statutory Authorities Covering This Announcement

This announcement covers the following HDS discretionary grant programs; the Catalog of Federal Domestic Assistance (CFDA) number and the statutory authority are given for each program.

Program and statutory authority	CFDA No.
Abandoned Infants: Abandoned Infants Assistance Act (42 U.S.C. 670 Note)	13.551
Adoption Opportunities: Title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, as amended (42 U.S.C. 5113 *et seq.*)	13.652

Program and statutory authority	CFDA No.
Child Abuse and Neglect: Child Abuse Prevention and Treatment Act, as amended (42 U.S.C. 5101 *et seq.*)	13.670
Child Welfare Research and Demonstration: Section 426 of the Social Security Act, as amended (42 U.S.C. 626)	13.608
Child Welfare Training Grants: Section 426 of the Social Security Act, as amended (42 U.S.C. 626)	13.648
Developmental Disabilities Projects of National Significance: Developmental Disabilities and Bill of Rights Act, as amended (42 U.S.C. 6000 *et seq.*)	13.631
Family Violence Prevention and Services: Family Violence Prevention and Services Act, as amended (42 U.S.C. 10401 *et seq.*)	13.671
Head Start: Head Start Act, as amended (42 U.S.C. 9801 *et seq.*)	13.600
Native Americans Research, Demonstration and Evaluation: Native American Programs Act of 1974, as amended (42 U.S.C. 2991 *et seq.*)	13.661
Runaway and Homeless Youth: Runaway and Homeless Youth Act, as amended (42 U.S.C. 5701 *et seq.*)	13.623
Social Services Research and Demonstration: Section 1110 of the Social Security Act, as amended (42 U.S.C. 1310)	13.647
Temporary Child Care for Children with Disabilities and Crisis Nurseries: Temporary Child Care for Children with Disabilities and Crisis Nurseries Act of 1986, as amended (42 U.S.C. 5117)	13.656

E. Other Office of Human Development Services Announcements

Additional FY 1990 HDS discretionary grant program announcements which have been or will be published at a later date are listed below with the telephone number to contact for further information:

Aging	
Special Programs for the Aging—Title IV—Training, Research and Discretionary Projects and Programs (published 2/9/90)	(202) 245-0442
Special Programs for the Aging—Title VI, Part A—Indian Programs—Grants to Indian Tribes (published 2/5/90)	(202) 245-0011
Children, Youth and Families	
Abandoned Infants	(202) 245-0710
Drug Abuse Prevention and Education for Runaway and Homeless Youth	(202) 245-0078
Drug Abuse Prevention and Education Relating to Youth Gangs	(202) 245-0078
Head Start Family Services Demonstrations	(202) 245-0573
Head Start Services to Multicultural Populations	(202) 245-0418
Head Start Coordination Projects	(202) 245-0579
Runaway and Homeless Youth—Basic Centers	(202) 245-0049
Transitional Living for Runaway and Homeless Youth	(202) 245-0049
Developmental Disabilities	
Administration on Developmental Disabilities University Affiliated Programs	(202) 245-1961
Native Americans	
Financial Assistance for Alaskan Native Tribes and Villages—FY 1991	(202) 245-7730
Financial Assistance for Native American Tribes	(202) 245-7730
Native American Programs— Pacific Islanders, including American Samoan Natives (published 1/23/90)	(202) 245-7730

F. Principles of the Coordinated Discretionary Funds Program of the Office of Human Development Services

For the past eight years, HDS has issued a coordinated discretionary funds program announcement combining the research, demonstration and training initiatives for several programs. The priority areas identified in this announcement derive from HDS' goals and legislative mandates as well as agency and Departmental initiatives. The priorities reflect the state of current knowledge as well as emerging issues which come to HDS' attention by several means, including public comment and consultation with advocates, policymakers, and practitioners in the field. The priorities seek to focus attention on and to encourage research and demonstration efforts to obtain new knowledge and improvements in service delivery for the solution of particular social problems.

The principles and policies which underlie the HDS research and demonstration program include the following:

• *Human service needs are best defined through institutions and organizations at the local community level.* Services are best administered by State, Tribal or local governments where the needs of the vulnerable population can be best established. Public agencies, private and voluntary organizations, the business sector, community institutions, families and clients must all share in finding solutions to protect the vulnerable and to reduce dependence on public programs.

• *Social problems are complex.* Better use should be made of existing knowledge, resources and services. Differing perspectives of specialists and practitioners offer the promise of better and more timely solutions and service delivery. Interagency coordination can help to avoid duplication and fragmentation of services to maximize utilization of existing resources and to promote joint solutions to benefit clients.

• *Administrators and service providers at all levels must be accountable for investment of resources, programs and services under their direction.* Knowledge of one's own and others' prior efforts and experience needs to be applied to maximize the benefits of new and ongoing resource investments. Objectives and measures of progress must be clear. Monitoring, evaluation and information feedback are necessary to modify practice, improve program performance, assure greater accountability and achieve better outcomes.

• *Both applied research and demonstration efforts are needed to solve emerging social issues.* Research is needed to help in understanding social phenomena and emerging issues, and to measure the results of past and ongoing efforts. Demonstrations are needed to put existing knowledge into practice, and to develop and test new models in practice. Translation of research into practice is essential to progress; experience in practice is essential to guide research. More rigorously structured research and demonstration studies promise more

definitive answers to policy and programmatic questions.

• *Dissemination and utilization of experiences gained and products developed through research and demonstration projects are essential to progress.* The benefits of investments made in research and demonstration efforts depend on the application of findings, experience, and products in both policy and practice. Well reasoned and thoughtful reports of experiences, both positive and negative, help to inform policymakers, researchers, professionals, and practitioners. Well articulated negative experience can help others to avoid similar pitfalls; positive accounts help to avoid unnecessary repetition, allow for implementation of tested approaches or replication for further validation, and permit others to build on successes.

• *Projects typically have multiple audiences which can benefit from their results.* The type of information needed by various audiences can best be utilized if it is tailored to their needs or expressed in language familiar to them. Audiences which can benefit from project results need to be identified at the outset of the project. When feasible, it is useful to engage such audiences in dialogue early in the project. Their perspectives can be useful in shaping the project to yield the information which will be most helpful to them, and to encourage their interest and support in the effort.

G. Technical Assistance Workshops for Prospective Applicants

Three-hour workshops to provide guidance and technical assistance to prospective applicants will be held in Washington, DC and in various other cities as follows:

Atlanta, GA: April 4/9:00 a.m., Richard Russell Federal Building, Strom Auditorium, 75 Spring Street
Boston, MA: April 3/10:00 a.m., Federal Reserve Bank of Boston, Auditorium, 600 Atlantic Avenue
Dallas, TX: April 4/10:00 a.m., Rm. 7A23, Earl Cabell Federal Building, 1100 Commerce Avenue
Denver, CO: April 6/9:00 a.m., Rocky Mountain Room, EPA Institute & Conference Center, 2nd Floor Mezzanine, Denver Place, 999 18th Street
Kansas City, MO: March 13/10:00 a.m., Westin Crown Center Hotel, One Pershing Road
New Orleans, LA: Contact Ralph Rogers in the HDS regional office at (214) 767-4540.
New York, NY: April 3/10:00 a.m., Jacob K. Javits Federal Bldg., Room 305 (Third Floor), 26 Federal Plaza
Portland, OR: Contact Judith Wood in the HDS regional office at (206) 442-2430
San Francisco, CA: March 29/9:30 a.m., San Francisco Department of Public Health, 101 Grove Street
Seattle, WA: Contact Judith Wood in the HDS regional office, at (206) 442-2430
Washington, DC: April 2/1:00 p.m., Auditorium, Hubert H. Humphrey Building, 200 Independence Avenue, SW.

Lincoln University of Pennsylvania and Grambling State University of Louisiana are providing technical assistance and training in grant proposal development for Historically Black Colleges and Universities (HBCUs) and Minority Organizations. Seven joint workshops have so far been held through this collaborative effort at locations throughout the country. Additional technical assistance sessions will be scheduled following the publication of this announcement. For further information regarding the upcoming workshops, interested HBCUs and minority organizations may contact:

Dr. Mapule F. Ramashala, Project Director, Grantsmanship and Development Institute, Lincoln University, 4601 Market Street, Philadelphia, Pennsylvania 19139, (215) 476-6668
or:
Dr. V.T. Samuel, Department of Sociology, Grambling State University, P.O. Box AF, Grambling, Louisiana 71245

Training and technical assistance workshops targeted to Native Americans, Native Alaskans and Native Hawaiians will be conducted by Three Feathers Associates of Norman, Oklahoma, and the American Indian Law Center of Albuquerque, New Mexico. Both organizations have previously provided similar training and technical assistance workshops for Native American organizations.

For information regarding the time and location of the workshops, contact:

Antonia Dobrec, Project Director, Three Feather Associates, P.O. Box 5508, Norman, Oklahoma 73070, (405) 360-2919
or:
Marc Mannes, The American Indian Law Center, P.O. Box 4456, Station A, Albuquerque, New Mexico 87196, (505) 277-5462

H. Conferences on Human Service Innovations

The Office of Human Development Services periodically sponsors conferences in various locations around the country to showcase findings and products of funded projects in specific topical areas. The proposed list of workshops to be held this year is as follows:

City	Topic	Contact
Atlanta, GA	To be announced	Sherrill Ritter, (404) 331-2287.
Boston, MA	Drug Abuse	John Thomas, (617) 565-1102.
Chicago, IL	Hard to Place Children in Adoption and Foster Care	Hich Yamagata, (312) 353-8322.
Denver, CO	Training Conference on Native American Issues	Harry Frommer, (303) 844-2622.
Kansas City, MO	Families and Communities at Risk—New Partnerships for New Needs	Dan Sakata, (816) 426-3981.
Lake Placid, NY	Day Care and Head Start Collaboration	Junius Scott, (212) 264-3473.
Long Beach, CA	Teen Pregnancy, Drug Abuse, Illiteracy, High School Dropouts and Homelessness.	Richard Silva, (415) 556-7800.
Seattle, WA	Your City's Kids, the Agenda for the 1990's	Judith Wood, (206) 442-2430.

Part II—CDP PRIORITY AREAS

A. Priority Area Description

Each priority area description is composed of the following sections:

• *Eligible Applicants:* This section specifies the type of organization which is eligible to apply under the particular priority area. Specific restrictions are also noted, where applicable.

• Purpose: This section presents the basic focus and/or broad goal(s) of the priority area.

• *Background Information:* This section briefly discusses the legislative background, as well as the current state-of-the-art and/or current state-of-the-practice that supports the need for the particular priority area activity. Relevant information on projects previously funded by HDS and/or other State models are noted, where applicable. Specific priority areas list individuals to contact for more information.

• *Minimum Requirements for Project Design:* This section presents the basic set of issues that must be addressed in the application. Typically, they relate to project design, evaluation, and community involvement. Project products, continuation of the project

effort after the Federal support ceases, and dissemination/utilization activities, if appropriate, are also addressed. Any other specific considerations will be discussed here as well.

• *Project Duration:* This section specifies the maximum allowable length of time for the project period.

• *Federal Share of Project Costs:* This section specifies the maximum amount of Federal support for the project per budget period.

• *Matching Requirement:* This section specifies the minimum applicant contribution per budget period, either through cash or in-kind match, that is required in proportion to the maximum Federal funds which can be requested.

• *Anticipated Number of Projects To Be Funded:* This section specifies the number of projects that HDS anticipates it will fund in the priority area.

Please note that applicants that do not comply with the specific priority area requirements in the sections on "Eligible Applicants" and "Federal Share of Project Costs" will be screened out and not evaluated. Applicants should also note that nonresponsiveness to the specific priority area section "Minimum Requirements for Project Design" will result in a lower evaluation score by the panel of expert reviewers. Applicants must clearly identify the specific priority area under which they wish to have their applications considered, and to tailor their applications accordingly. Previous experience has shown that an application which is broad and general in concept is less likely to score as well as one which is more clearly focused on and directly responsive to the concerns of a specific priority area.

B. Eligible Applicants

Each priority area description contains information about the types of organizations which are eligible to apply under that priority area. Since eligibility varies from priority area to priority area depending on statutory provisions, it is critical that you read carefully the "Eligible Applicants" section under each specific priority area. Applications from organizations which do not meet the eligibility requirements for the specific priority area will not be evaluated. Only organizations, not individuals, are eligible to apply under any of the priority areas.

On all applications developed jointly by more than one organization, the applicant must identify only one organization as the lead organization and official applicant. The other participating organization(s) can be included as either subgrantee(s) or subcontractor(s).

For-profit organizations may be eligible to apply for certain grants under the authority of the Native American Programs Act, the Runaway and Homeless Youth Act, and the Head Start Act. For-profit organizations are also eligible to participate as subgrantees or subcontractors with eligible nonprofit organizations under all of the priority areas.

Any nonprofit agency which has not previously received HDS support must submit proof of nonprofit status with its grant application. The nonprofit agency can accomplish this by either making reference to its listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations or submitting a copy of its letter from the IRS under IRS Code section 501(c)(3). HDS cannot fund a nonprofit applicant without acceptable proof of its status.

C. Available Funds

HDS intends to award new grants and cooperative agreements resulting from this announcement during the fourth quarter of FY 1990 and in the first and second quarters of FY 1991 subject to the availability of funding. The size of the actual awards will vary. Each priority area description includes information on the maximum Federal share of the project per budget period and the anticipated number of projects to be funded.

The term "budget period" refers to the interval of time (usually 12 months) into which a multi-year period of assistance (project period) is divided for budgetary and funding purposes. The term "project period" refers to the total time a project is approved for support, including any extensions.

HDS encourages applications seeking grant awards smaller than the allowable Federal maximum, or shorter in duration than the maximum project period consistent with achieving the goals of the project. As mentioned previously, applications with budgets exceeding the Federal share specified in the section on "Federal Share of Proiect Costs" in the specific priority area will be screened out and not evaluated.

For multi-year projects, continued Federal funding beyond the first budget period is dependent upon proof of satisfactory performance and the availability of funds from future appropriations.

D. Grantee Share of Project Costs

Other than the exceptions described below, HDS does not make grant awards covering the entire project cost. Federal funds will be provided to cover up to 75% of the total allowable project costs during any budget period. Therefore, the non-Federal share must amount to at least 25% of the total (Federal plus non-Federal) project cost. This means that for every $3 in Federal funds received up to the maximum amount allowable under each priority area, applicants must contribute at least $1. For example, the cost breakout for a project costing $100,000 to implement would be:

Federal request	Non-Federal share	Total cost
$75,000 75%	$25,000 25%	$100,000 100%

Exceptions: The first exception to the grantee cost sharing requirement relates to projects funded under the Native American Programs Act. Successful applicants funded under this Act must contribute $1 for every $4 in Federal grant funds received up to the maximum specified in the priority area description. This non-Federal grantee share amounts to at least 20% of the entire project cost. For example, the project cost breakout for a $100,000 project would be:

Federal request	Non-Federal share	Total Cost
$80,000 80%	$20,000 20%	$100,000 100%

Applicants requesting funds under the Native American Programs Act (priority areas 2.1 and 2.2) should note that they may also include in their applications a request to the Administration for Native Americans for a waiver of the non-Federal cost-sharing requirement for the project based on the criteria specified in 45 CFR 1336.50(b). Each request will be dealt with on a case-by-case basis under the applicable laws and regulations. However, Native American organizations and Tribes applying under other priority areas must meet the 25% cost-sharing requirement.

The second exception relates to applications originating from American Samoa, Guam, the United States Virgin Islands and the Commonwealth of the Northern Mariana Islands. Applications from these entities are covered under Section 501(d) of Public Law 95–134, which requires that HHS waive "any requirement for local matching funds under $200,000."

The third exception relates to the traineeship projects funded under the following priority areas:

3.16A, Child Welfare Traineeships;
3.16C1, Special Grants for Indian Child Welfare Training—Traineeships; and

3.16D1, Special Grants for Historically Black Colleges and Universities—Traineeships.

For projects funded under these priority areas, there is no match or cost-sharing requirement.

The final exception pertains to research projects to be funded under the following priority areas which similarly require no non-Federal match or cost sharing:

3.12, Study of Reunification Risks and Successes
3.18, Joint Law Enforcement Agency/Child Protective Services Investigations of Reports of Child Maltreatment
3.19, Psychological Impact of Child Maltreatment
3.20, Empirical Evaluations of Treatment Approaches for Child Victims of Physical or Sexual Abuse
3.26, Field Initiated Research for Child Abuse and Neglect
3.28, Head Start and Research Institution Partnerships

The applicant contribution must always be secured from non-Federal sources, except for American Indian Tribes and Native American organizations. The non-Federal share of total project costs for each budget period may be in the form of grantee-incurred costs and/or third party in-kind contributions. HDS strongly encourages applicants to propose a grantee share that is more than 25% of total project costs. HDS also encourages applicants to meet their match requirement through a cash contribution, as opposed to an in-kind contribution. For further information on in-kind contributions, refer to the instructions for completing the SF 424A—Budget Information, in Part III.

The non-Federal share must be met by a grantee for each budget period during the life of the project. Otherwise, HDS will disallow any unmatched Federal funds.

The required amount of non-Federal share to be met by the applicant is the amount indicated in the application. Upon grant award, the applicant will be required to provide the agreed upon non-Federal share, even if this exceeds 25% (or other required portion) of the project costs. Therefore, an applicant should be sure of any amount proposed as match prior to inclusion in its budget.

E. Cooperation in Evaluation Efforts

Grantees funded under specific priority areas may be requested to cooperate in evaluative efforts funded by HDS. A statement is included in the priority area description of those priority areas involving common HDS-funded evaluators. The purpose of these evaluation activities is to learn from the combined experience of multiple projects funded under a specific priority area. To the degree possible, grantees under these priority areas will be expected to coordinate their data gathering efforts with one another, as appropriate, under the direction of the HDS-supported evaluator.

F. Public Comments

The Child Abuse and Neglect, Developmental Disabilities, and Runaway and Homeless Youth Programs published their proposed priority areas for comment in the **Federal Register** on September 18, 1989 (54 FR 38443). The final priorities selected for inclusion in this announcement reflect consideration of the comments and recommendations received from the public on the proposed priorities. For additional information on public comments, see the discussion immediately preceding the appropriate priority area descriptions under the Administration on Developmental Disabilities and the Administration for Children, Youth and Families.

G. Indexes of Priority Areas

To assist potential applicants in the use of this announcement, HDS has included two indexes. For easy reference, the first index lists the priority areas as they relate to specific key words. The second index lists all of the priority areas in numerical order.

FY 1990 Key Words Index

Abuse, 3.6, 3.18, 3.19, 3.20, 3.21, 3.22, 3.23, 3.24, 3.25, 3.26, 4.4
Adoption, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8
At-Risk Youth, 3.30, 4.1
Children, 1.4B, 3.1, 3.2, 3.3, 3.5, 3.6, 3.7, 3.9, 3.10, 3.11, 3.12, 3.13, 3.17, 3.18, 3.19, 3.20, 3.21, 3.22, 3.24, 3.25, 3.26, 3.27, 3.28, 3.29, 3.30, 4.1
Child Development, 3.27, 3.28
Child Welfare, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.16A, 3.16B, 3.26C, 3.16D, 3.17, 4.1
Clearinghouses/Resource Centers, 3.8, 3.14, 3.24
Collaboration, 1.4A, 3.11, 3.18, 3.22, 3.25, 3.28, 3.29, 3.30, 4.3
Community, 1.4A, 4.2
Crisis Nurseries, 3.17
Cultural Centers, 2.2
Data Collection, 1.2
Developmental Disabilities, 1.1, 1.2, 1.3, 1.4A, 1.4B, 1.4C, 3.9, 3.11, 3.17, 3.24
Evaluation, 3.20
Family, 1.1, 3.1, 3.6, 3.9, 3.10, 3.12, 3.25, 4.2, 4.4
Family Violence, 4.4
Foster Care, 3.9, 3.10, 4.1
Head Start, 3.27, 3.28, 3.29
Historically Black Colleges and Universities, 3.16D, 3.29
Homelessness, 3.30, 4.2
International, 4.3
Marketing, 2.1
Mentors, 4.1
Minorities, 1.4C, 2.1, 2.2, 3.4, 3.5, 3.23
Native Americans, 1.4C, 2.1, 2.2, 3.16C
Pediatric AIDS, 1.4B
Research, 3.12, 3.14, 3.18, 3.19, 3.20, 3.26, 3.28
Respite Care, 1.4B, 3.2, 3.17
Runaway Youth, 3.30
Sexual Abuse, 3.6, 3.20, 3.22, 3.25
Special Needs Adoption, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7
Technical Assistance, 1.3, 3.12, 3.14, 4.4
Temporary Child Care, 3.17
Training, 3.4, 3.14, 3.15, 3.16A, 3.16B, 3.16C, 3.16D, 3.22
Volunteers, 3.25, 4.1
Youth, 3.7, 3.9, 3.30, 4.1

List of the FY 1990 Priority Areas

1. Administration on Developmental Disabilities

1.1 Projects to Assist and Educate Policymakers: Self-Advocacy and Empowerment—A Process to Strengthen Families
1.2 Projects to Develop an Ongoing Data Collection System
1.3 Technical Assistance to State Developmental Disabilities Planning Councils, State Protection and Advocacy Agencies, and University Affiliated Programs
1.4 Other Projects of National Significance
1.4A Community Integration
1.4B Pediatric AIDS
1.4C Services to Minorities with a Developmental Disability

2. Administration for Native Americans

2.1 Stabilizing Markets for Indian Manufacturing Companies
2.2 Development of Native American Cultural Centers

3. Administration for Children, Youth and Families

Children's Bureau

3.1 Respite Care as a Service for Families Who Adopt Children With Special Needs
3.2 Provision of Post-Legal Adoption Services
3.3 Adoption Placement of Foster Care Children
3.4 Adoption Training and Minority Sensitivity
3.5 Increase Adoptive Placements of Minority Children
3.6 Services for Families Who Adopt Sexually Abused Children
3.7 Enhancing Adoption Opportunities for Older Children
3.8 Operation of a National Adoption Information Exchange System
3.9 Specialized Family Foster Care for Older Children With Physical, Mental and/or Emotional Disabilities
3.10 Use of Family-Based Services for Reunification of Children in Out-of-Home Care
3.11 Model Interagency Collaboration for Services to Developmentally Disabled Children in the Child Welfare System
3.12 Study of Reunification Risks and Successes
3.13 Resource Services for Child Welfare Programs
3.14 Child Welfare Research Center

3.15 Child Welfare Training Symposium
3.16 Child Welfare Training
3.16A Child Welfare Traineeships
3.16B In-Service Training for Child Welfare Workers
3.16C Special Grants for Indian Child Welfare Training
3.16D Special Grants for Historically Black Colleges and Universities
3.17 Temporary Child Care for Children With Disabilities and Crisis Nurseries

National Center on Child Abuse and Neglect

3.18 Joint Law Enforcement Agency/Child Protective Services Investigations of Reports of Child Maltreatment
3.19 Psychological Impact of Child Maltreatment
3.20 Empirical Evaluations of Treatment Approaches for Child Victims of Physical or Sexual Abuse
3.21 Synthesis and Utilization of Results of "Child Victims as Witnesses" Projects
3.22 Review of Existing Training for Judges to Improve the Criminal and Civil Court Intervention Process in Child Sexual Abuse Cases
3.23 Strengthening of Leadership and Resources for Cultural Competence in Child Abuse and Neglect
3.24 National Information Clearinghouse on Disabled Infants with Life-Threatening Conditions
3.25 FY 1991 National Conference on Child Abuse and Neglect
3.26 Field Initiated Research for Child Abuse and Neglect

Head Start Bureau

3.27 Head Start Program Improvement Demonstrations
3.28 Head Start and Research Institution Partnerships
3.29 Increasing Higher Education Opportunities for Head Start Component Coordinators at Historically Black Colleges and Universities

Family and Youth Services Bureau

3.30 Cooperation Between Law Enforcement Agencies and Runaway and Homeless Youth Centers

4. Office of Policy, Planning and Legislation

4.1 Mentors for Adolescent Foster Care Children
4.2 Comprehensive Early Intervention Strategies to Prevent Homelessness Among At-Risk Families
4.3 Transfer of International Innovations
4.4 Training and Technical Assistance for Family Violence Prevention and Services Programs

1. Administration on Developmental Disabilities

On September 18, 1989, a notice soliciting comments on ADD's proposed priority areas for FY 1990 Projects of National Significance was published in the **Federal Register**. A 60-day period was required to allow the public to comment on the proposed areas. After review and analysis of these comments, ADD is publishing its final priorities.

ADD received a total of 35 letters and 127 individual comments. The comments ranged from requests for copies of the final application solicitation to substantive, insightful responses to this year's priority areas. Twenty-six of the individual comments recommended additional priority areas for ADD to consider in FY 1990. Fifteen comments were received in the strengthening families priority area and sixteen comments were received in the familial self-advocacy priority area. The data collection priority area received 13 individual comments. The community integration, pediatric AIDS, reducing dependency priority areas received 12 comments each. The technical assistance and minorities with developmental disabilities priority areas received 8 comments each. There were also five general and support comments received.

Few of the comments provided specific guidance on the development of the final priority areas. Rather, the majority were supportive of what ADD proposed in the announcement, expanded on what was proposed, and/or related specifically to the program goals and priorities of the particular agency submitting the comments.

The majority of the comments were submitted by advocacy agencies (11 letters and 59 individual comments) which includes national organizations, state Developmental Disabilities Councils, state advocacy groups, and local advocacy agencies; the educational system (12 letters and 28 individuals comments) which included universities, programs located within a university setting (child abuse and neglect, research and training centers, etc.), University Affiliated Programs, and liberal arts colleges; and government agencies (8 letters and 23 individual comments) which includes Federal, state, county and local government agencies. The comments received were helpful in highlighting the concerns of the developmental disabilities field and have been extensively used in refining the final priority areas.

In addition, ADD funded two projects in FY 1988 to determine the feasibility and desirability of developing a nationwide information and referral system. The project completion date for these grants is January 31, 1990. As a result, ADD is not announcing that priority area for FY 1990.

1.1 Projects to Assist and Educate Policymakers: Self-Advocacy and Empowerment—A Process to Strengthen Families

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To increase policymakers' awareness of topics pertaining to people with developmental disabilities and their families by assisting them in accessing relevant information on self-advocacy and empowerment issues in support of the Departmental initiative on strengthening families. The focus of this priority area will be on familial as well as personal self-advocacy and empowerment. Policymakers include individuals in decision-making positions in business, local/ State government, associations, and community organizations.

Background Information: Individuals with developmental disabilities have often been dependent on others to advocate on their behalf. However, in keeping with the intent of P.L. 100-146 to offer people with developmental disabilities the opportunity to make decisions for themselves and exercise their full rights and responsibilities as citizens, ADD is focusing its efforts in support of self-advocacy and empowerment. As self-advocates, these individuals and their families can represent themselves on issues affecting their own lives and be able to communicate effectively to influence decision-making and policy development.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Identify model service programs and projects that focus on strengthening family and individual ability for self-advocacy and empowerment in order to improve community services and those persons' ability to access services. The provision of adequate support to these families and individuals impacts on a number of service areas including health, education, employment, child development, vocational rehabilitation, and child welfare.
- Outline an effective process for evaluating project activities, including a plan for dissemination and utilization, and/or replication/marketing of project findings.
- Provide a specific public awareness plan focusing on activities to enlighten and increase the public's awareness of self-advocacy and empowerment as related to individuals with

developmental disabilities and their families.

• Produce a guide of best practices which can be used by policymakers and program developers.

• Provide evidence of collaboration with human service and/or private sector organizations.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $85,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $85,000 is $28,333 for a total project cost of $113,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that at least one project will be funded.

1.2 Projects to Develop an Ongoing Data Collection System

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To assist States to develop reports on the nation's ability to coordinate service delivery systems which meet the needs of persons with developmental disabilities.

Background Information: There is a need for continuing ADD's current data collection effort that will support State Developmental Disabilities Planning Councils, State Protection and Advocacy Agencies, and University Affiliated Programs (UAP) in providing data to meet State data collection and reporting requirements as well as to document progress made to date in improving the independence, productivity and integration into the community of people with developmental disabilities.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Identify data collection projects that provide baseline data on residential services, expenditures, and vocational services in order to determine impact of services on enhancing the lives of persons with developmental disabilities. The data will also be used to analyze current trends in policy development affecting the provision of services to persons with developmental disabilities.

• Include a plan to collect data on the types of services being provided, demographics of persons receiving and not receiving services, and the outcomes of the services provided, especially for underserved populations.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $175,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share $175,000 is $58,333 for a total project cost of $233,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

1.3 Technical Assistance to State Developmental Disabilities Planning Councils, State Protection and Advocacy Agencies, and University Affiliated Programs

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To expand or improve the capacity building functions of the State Developmental Disabilities Planning Councils; the interdisciplinary training functions performed by University Affiliated Programs (UAPs) and Satellite Centers; and the protection and advocacy services relating to the State Protection and Advocacy Agencies.

Background Information: Section 162(a)(2) of the Developmental Disabilities Assistance and Bill of Rights Act provides that the Secretary of the Department of Health and Human Services may make grants and enter into contracts with public or nonprofit private agencies for technical assistance or demonstration projects which hold the promise to expand or otherwise improve the State Developmental Disabilities Planning Councils, UAPs, and State Protection and Advocacy Agencies.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should focus on one of the following categories:

• Provision of training and technical assistance to State Protection and Advocacy (P&A) System directors and managers which will strengthen and augment the skills required to manage the system in the 1990's. Ongoing training and technical assistance, based on a needs assessment, is needed to assist P&A directors and managers in keeping abreast of new legislative, judicial and administrative developments, e.g., ADD reauthorization, 1990 report implications for P&As, quality control, etc. In addition, training and technical assistance is needed on state-of-the-art approaches to P&A services that contribute to increased independence, productivity, and integration in the community of persons with developmental disabilities. This priority area category is specifically focused on projects which draw from expertise at the local, state and Federal levels for compliance, professional standards, successful management, and the provision of quality services to persons with disabilities. Improved coordination with and cooperation in the ADD Federal/State relationship should be process goals, in addition to the knowledge and skills to be gained in the training program.

• Provision of technical assistance to State Developmental Disabilities (DD) Planning Councils on emerging issues for the 1990's and successful implementation of the findings of the States' 1990 Report to the Secretary to affect systems change and to assure that appropriate services that enable fulfillment of independence, productivity and community integration are provided to all persons with developmental disabilities. ADD is interested in projects which focus on the following:

—Quality improvement in the Basic State program;
—Activities to educate policymakers;
—Systemic change; and
—Implementing the DD legislative reauthorization.

• Development of strategies for and provision of technical assistance to UAPs to assist in the effective implementation of training initiative grants in the areas of early intervention, community-based programs, and programs to serve elderly persons with developmental disabilities. In FY 1988, 34 UAPs were awarded grants in these priority areas. Project periods for the training initiative grants ranged from one to three years. For FY 1990, ADD is recompeting these training initiative grants. A major focus of each of the training grants has been and will continue to be the enhancement of program quality through systemic change, leveraging outside resources, and consumer/trainee impact.

This priority area category is specifically focused on the following:

—Identification, evaluation, synthesis and dissemination of technical assistance information materials to the UAP network regarding past and current accomplishments resulting from the training initiative grants.
—Development and dissemination of information regarding the network's ability to successfully measure systemic change, leveraging of

resources, and consumer/trainee impact through its program operations;
—Surveying the UAP network regarding past and current activities in the areas of early intervention, elderly persons with developmental disabilities, and community-based programs;
—Convening regional and national conferences to discuss significant issues and future directions; and
—Development and dissemination of publications and reports. Where feasible, applicants should coordinate with each other in the development of project proposals.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $85,000 per project period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $85,000 is $28,333 for a total project cost of $113,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that at least 1 project in each category will be funded.

1.4 Other Projects of National Significance

1.4A Community Integration

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To support people with developmental disabilities so they can live and be accepted in the neighborhoods in which they live.

Background Information: Further development, enhancement and dissemination of successful models of supported living and community integration are needed to support people with developmental disabilities in being accepted in their community as neighbors and friends. Of particular interest is the identification of creative and innovative models of integrated leisure and recreational programs that provide opportunities for greater independence, but may serve to knit the family closer together.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should focus on the following:

• Identify successful models of integrated leisure and recreational programs which have brought about an improved quality of life, increased independence, productivity and integration into the community of people with developmental disabilities.

• Outline an effective process for evaluating, synthesizing, and disseminating the available information on this issue, and/or replicating/marketing successful models.

• Provide a specific public awareness plan focusing on activities to enlighten and increase the public's awareness of successful community integration programs for people with developmental disabilities and their families.

• Provide evidence of collaboration with human service and/or private sector organizations.

Project Duration: The length of the project must not exceed 12 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $85,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $85,000 is $28,333 for a total project cost of $113,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that at least 1 project will be funded.

1.4B Pediatric AIDS

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To fund projects in one or more of the following areas that will address the needs of abandoned infants and young children who may test HIV positive, or who may be placed in foster care because the mother is HIV positive and unable or unwilling to care for the child: (1) Identification of at risk children; (2) development of early intervention strategies; (3) coordination of services; and (4) training.

Background Information: The number of children reported to the Centers for Disease Control with AIDS has doubled in each of the last two years. In 1987 there were approximately 500 known cases of children 0–12 years of age with AIDS. As of December 31, 1989, there were 1995 cases. Ninety percent of these cases are due to perinatal transmission. Virtually all of these children develop neurological and developmental problems. The physical problems experienced by these children are frequent and of such seriousness as to require repeated hospitalization and continuing medical care. Some of these children remain with parents or other relatives; some are abandoned and require foster care; others are placed in foster care because of the unsuitability of the home. The early trauma of separation from the mother and failure to bond are believed to add to the developmental difficulties of these children.

Special Conditions: These grants will be supported by funds authorized under the Abandoned Infants Assistance Act of 1988 (the Act). The following assurances are required under section 101(b) of the Act if the applicant expends the grant to carry out any program of providing care to infants and young children in foster homes or in other nonmedical residential settings away from the parents:

• That a case plan of the type described in paragraph (1) of section 475 of the Social Security Act will be developed for each infant or young child (to the extent that such infant or young child is not otherwise covered by such a plan) for whom funds would be expended for foster care; and

• That the program includes a case review system of the type described in paragraph five (5) of section 475 of the Social Security Act (covering each such infant and young child who is not otherwise subject to such a system).

Sections 475(1) and 475(5) are reprinted below:

Paragraph (1) of section 475 of the Social Security Act reads as follows: The term "case plan" means a written document which includes at least the following:

A. A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 472(a)(1); and

B. A plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

C. Where appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

Paragraph five (5) of section 475 of the Social Security Act reads as follows: The term "case review system" means a procedure for assuring that:

A. Each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity

to the parents' home consistent with the best interest and special needs of the child;

B. The status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship; and

C. With respect to such child, procedural safeguards will be applied, among other things, to assure each child of foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to) whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care (on a permanent or long-term basis) and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

The following additional assurances are required of all applicants by section 101(c) of the Act:

- That if, during the majority of the 180-day period preceding October 18, 1988, the applicant carried out any program with respect to the care of abandoned infants and young children, the applicant will expend grant funds only for the purpose of significantly expanding activities above the level provided during the majority of that period;
- That the applicant will use the funds provided under this grant only for the purposes specified in the application;
- That the applicant will establish such fiscal control and accounting procedures as may be necessary to ensure proper disbursement and accounting of Federal funds received under this grant; and
- That the applicant will report annually to the Secretary on the utilization, cost, and outcome of activities conducted, and services furnished under this grant.
- *Minimum Requirements for Project Design:* In order to successfully compete under this priority area, the application should address the requirements specified in one or more of the following topical areas:
- *Identification of at risk children:* Describe how the proposed project is intended to improve the early identification of abandoned infants and young children who are at risk of developmental disabilities resulting from the child or the mother's testing HIV positive.
- *Development of early intervention strategies:* Describe how the proposed project will develop exemplary models and public education/information dissemination techniques that are focused in educating personnel and caregivers on the particular developmental needs of infants and young children who are infected with HIV or who have AIDS, or who are, who have been, or who are at risk of being associated with substance abuse.
- *Coordination of services:* Describe how the proposed project will increase and improve coordination and interaction among developmental disabilities entities, maternal and child health service providers, and child protective service providers, including foster parents who are caring for children who test HIV positive.
- *Interdisciplinary Training:* Describe how the proposed project will provide interdisciplinary training for developmental disabilities service providers; maternal and child health providers; and foster, adoptive, and biological parents who are caring for abandoned infants and children who are diagnosed as having a developmental disability, or who are at risk of developing a developmental disability, as a result of the child or the mother testing HIV positive.
- *Caregiver Training:* Describe how the proposed project will provide training for developmental disabilities service providers and caregivers to increase their understanding of AIDS including the potential danger to unborn children. Training should specifically address enabling caregivers to interpret to others the meaning and impact of the HIV infection within their communities. This includes settings such as day care, preschool, and leisure-related programs.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that up to 5 projects will be funded.

1.4C Services to Minorities with a Developmental Disability

Eligible Applicants: State, public or private nonprofit organizations, institutions or agencies.

Purpose: To improve the delivery of services to individuals of different ethnic backgrounds who have developmental disabilities (including Blacks, Hispanics, Native Americans, Native Hawaiians, and other minority and underserved groups).

Background Information: Although great strides have been made in improving the lives of the American people, statistical trends show a persistent and distressing difference among minorities who have a developmental disability as well as underserved minority groups in the utilization of the social services network. Therefore, policy makers and service providers need information regarding the disparity between the minority and nonminority population in accessing the social services system.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Focus on one or both of the following categories:

1. Indepth state-by-state analysis of the status of minority participation in programs that service individuals with a developmental disability,

2. Identification of information on best practices related to serving minority populations such as Blacks, Hispanics, Native Americans, Native Hawaiians, and Asian/Pacific Islanders.

- Outline an effective process for evaluating and synthesizing information on project activities, including a plan for dissemination and utilization, and/or replication/marketing of project findings.
- Provide a specific public awareness plan focusing on activities to enlighten and increase the public's awareness of

issues related to minorities with developmental disabilities.

• Provide evidence of collaboration with human service and/or private sector organizations.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that at least 1 project will be funded.

2. Administration for Native Americans

2.1 Stabilizing Markets for Indian Manufacturing Companies

Eligible Applicants: American Indian Tribes, for-profit Native American organizations and non-profit Native American organizations.

Purpose: To develop a national Indian manufactured products marketing service. Indian manufactured products would be marketed initially to Defense or other government section 8(a) markets with the intent of developing private sector markets.

Background Information: In recent years, Indian Tribes have identified unemployment as their number one problem. To address this problem, several large Indian manufacturing businesses (employing or having the potential to employ 50 or more employees) have been established at considerable Federal and tribal governments expense.

Federal agencies are concerned about the growth and stability of these businesses because of their potential for impact on Indian unemployment rates. On most reservations, unemployment ranges from 40 to 90 percent of the population. It has been projected that on larger reservations as many as 125 manufacturing businesses, employing large numbers of people, would be needed to create enough jobs to substantially reduce unemployment.

When the existing manufacturing companies were formed, they were intended to be profitable on a long term basis at a level at least equal to their direct competition. Their problem, however, is that in the beginning they were under capitalized or debt financed and were placed in a non-competitive, subsidized "8(a)" status. Now these businesses are approaching their "graduation" from the section 8(a) process and are expected to be able to compete on the open market. Because of their tight financial structuring, the existing businesses will not be able to compete in this new market without assistance.

The long-term success of the Indian manufacturers requires the movement from marketing government agencies such as the Defense Department to commercial or private sector markets. Defense Department advisors commonly tell businesses not to rely too heavily on Defense markets because they rise and fall with Congressional appropriations. Defense appropriations are expected to be drastically reduced in the next few years. To address these problems, the proposed marketing effort should launch two marketing efforts at the same time: a government contracts approach that looks to ensure steady markets in the government arenas and a private sector approach that will develop markets in private sector arenas.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Indicate how sales, as well as advertising and marketing expertise, will be developed for the manufacturer represented in relation to both the Federal government contracting process and the private sector market.

• Demonstrate a knowledge of Indian economic development and the various preferential contracting opportunities available to Indians.

• Indicate how the project will ensure that sales will be achieved for the various companies represented by the applicant.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $200,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $200,000 is $50,000 for a total project cost of $250,000 per year. This match constitutes 20 percent of the annual project costs.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

2.2 Development of Native American Cultural Centers

Eligible Applicants: American Indian Tribes, Alaska and Hawaiian Native organizations and Native American Urban Centers.

Purpose: To develop a model cultural center which would explore new income-producing careers for Native Americans, serve as a living museum while preserving and enhancing cultural aspects, define the tourist market and identify non-federal resources that can be tapped in developing such centers.

Background Information: On November 28, 1989, the President signed a bill that establishes the National Museum of the American Indian as a new Smithsonian Institution museum. The enactment of this new law coincides with a growing national trend toward the development of cultural centers in Native American communities. The concept upon which this trend is based is multi-faceted and viewed as a very important step in reversing the devastating problems of health, economic well-being and social welfare currently facing most American Indians today. Support of the development of Native American cultural centers also has been recommended by national Indian organizations specifically in regard to economic development issues.

The immediate economic impact of a model cultural center would be to generate jobs through implementation of the project, produce revenue as a tourist enterprise and stimulate a number of small businesses as an outgrowth of the model. A cultural center would not only benefit the Native American community but have a positive reaction on the entire community.

The economic impact for the longer range would be the creation of a whole new series of income producing careers for Native American people in the form of qualified individuals to manage tribal archives, service Indian villages through cataloging and maintaining artifacts as well as working in museums. There will be a need in the future for qualified American Indian architects and others trained in educational design of cultural centers as they are replicated nationally. Demographics also indicate that not only is there growing awareness of the cultural renaissance of Native Americans within the U.S. but that European and other visitors are increasingly including those areas of native historical interest in their itineraries.

Additionally, as Americans live longer and have more leisure time, there is a growing, potentially captive audience with money to spend on such activities.

The cultural center, while containing artifacts and other historical entities generally found in museums, would be a living museum with hands-on capabilities. It would serve as an educational asset to Native American youth while fostering interest in new fields of work through the preservation

of their culture. Finally, with the enactment of the law enabling the Smithsonian to return ancestral remains to many Tribes, establishment of cultural centers will allow for this new responsibility.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Demonstrate experience with cultural and socio-economic features of Native American Tribes or organizations.
- Indicate the economic impact through the generation of jobs, production of revenue as an enterprise or stimulation of businesses as adjunct to the center.
- Outline the steps necessary to define the process involved in developing cultural centers that can be replicated by other Native American communities.
- Provide knowledge in terms of resources, both State and local, that can be tapped in the development of centers. This information also will assist in formatting the building blocks toward analyzing the tourist market in respective communities, urban centers and reservations.
- Include the rationale for a longer range socio-economic impact through the creation of new income-producing careers for Native Americans.
- Have a suitable facility available in which to house a cultural center.
- Establish criteria for shorter range economic impact in terms of measurable revenue produced, jobs created or other benefits realized as a result of the cultural center.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $200,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $200,000 is $50,000 for a total project cost of $250,000 per year. This match constitutes 20 percent of the annual project costs.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

3. Administration for Children, Youth and Families

Children's Bureau

3.1 Respite are as a Service for Families Who Adopt Children With Special Needs

Eligible Applicants: Eligibility is limited to States, local government entities, public or private nonprofit licensed child welfare or adoption agencies, licensed child care or respite care providers and incorporated adoptive parent groups with experience in working with adoptive populations.

Purpose: To develop or replicate a variety of affordable respite care models for the adoptive parents of children with special needs. These are children who are older; of minority heritage; emotionally, mentally or physically handicapped; or of sibling groups that should be placed together.

Background Information: HDS recognizes the importance of post-placement support services for adoptive families who often encounter a multitude of special issues and problems, some arising immediately upon placement and others manifested in later phases of the child's development. It has become clear that adoption does not end with placement of the child but that the nature of the process may require continuing support to preserve the family. Still, despite the increasing availability of post-placement/post-legal services for adoptive families, problems persist. There are few respite care programs for adoptive families that provide a period of temporary relief or rest from parental responsibilities. These programs can be especially helpful to families who adopt children with special needs. They provide support to families during emergencies or respite from the daily demands of a special needs child. Generally, respite care is provided by specially trained caregivers or companions; however, it can also be provided by various persons including friends, relatives, skilled care providers, and professionals.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Propose to develop or replicate models that include, but are not limited to:
  - —Facility-based models such as those located in churches, day care centers, community-based group homes, rehabilitation centers, and "mother's day out" programs, weekend respite, evening respite, and overnight respite programs;
  - —Respite host family services offered in the provider's home; and,
  - —In-home respite care services offered in the family's home.
- Describe the collaboration to be established with community recreational services, churches, day care centers, group homes, residential treatment centers, adoptive parent groups, and University Affiliated Programs.
- Describe the training to be provided to service providers and how specific models of respite care would be developed or replicated.
- Estimate the number of children and families to be served.
- Provide for a third party to conduct an independent evaluation of the project.
- Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $125,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $125,000 is $41,666 for a total project cost of $166,666 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that two projects will be funded.

3.2 Provision of Post-Legal Adoption Services

Eligible Applicants: States, local government entities, public or private nonprofit licensed child welfare or adoption agencies, and incorporated adoptive parent groups.

Purpose: To develop projects which will strengthen the provision of post-legal adoption services for families who have adopted special needs children. The services provided shall supplement, not supplant, services supported by any other funds available for the same general purposes.

Background Information: The Adoption Opportunities statute, as amended by Public Law 100-294, authorizes funds for increased post-legal adoption services. Recognition of special issues in adoption in the past decade has led adoption professionals to reconsider the concept that agency services to adoptive families end with legal consummation of the adoption. Historically, once the adoption was consummated, the newly formed family was likely to be considered the same as any other family. There is now a growing acknowledgment that adoption is a life-long process and that service providers need to understand the unique interpersonal dynamics of adoption in order to provide effective post-legal adoption services (those provided after legalization of the adoption) to families who seek help.

On September 30, 1989, the Administration for Children, Youth and Families funded projects in nine States—Iowa, Indiana, Ohio, Kansas, Pennsylvania, Puerto Rico, Michigan, South Carolina and Utah—to provide post-legal adoption services for families who have adopted children with special needs. Information on these projects and their post-legal adoption programs can be obtained from the National Adoption Information Clearinghouse, 1400 Eye Street, NW., Suite 600, Washington, DC 20005, Telephone: (202) 842-1919.

This priority area for fiscal year 1990 will support both the institutionalization and expansion of post-legal adoption services in communities where such services already exist, and the development of such services in communities where they do not yet exist. In addition, fiscal year 1990 funding will support the development of additional models of service delivery.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Propose to provide services such as individual, group and/or family counseling; case management; training of public agency adoption staff, staff of private, nonprofit child welfare and adoption agencies licensed by the State to provide adoption services, and support personnel including mental health professionals; and assistance to adoptive parent organizations and support groups for adoptive parents, adopted children, and siblings of adopted children.
- Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.
- Describe the models to be developed and the services to be provided.
- Describe existing post-legal adoption services, if any; the need for expanded or new services; and plans for the development, implementation, and institutionalization of enhanced and new services.
- Provide specific written commitments from collaborating or cooperating agencies, if any.
- Document and describe how the project will be an ongoing part of the agency or organization's program and the steps the applicant will take to accomplish this.
- Document that the project will be staffed and implemented within 90 days of the notification of the grant award.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 10 projects will be funded.

3.3 Adoption Placement of Foster Care Children

Eligible Applicants: Eligibility is limited to State and local public social service agencies.

Purpose: To develop programs which will assist States in their efforts to increase the adoption of foster children legally free for adoption according to a pre-established plan and goals for improvement.

Background Information: Title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1987, as amended, authorizes the funding of grants to States to improve adoption services for the placement of special needs children legally free for adoption. Children in foster care who are free for adoption, particularly children with special needs, do not always move smoothly through the child welfare system into placement with a permanent family.

States have received grants to make systemic changes in their adoption programs; to provide computer hardware, software and fees for membership in the National Adoption Network; and to develop a consortium to share knowledge to improve and enhance their special needs adoption programs and to increase the placement of children residing in the nine consortium States. More than half of the States have received grants to improve adoption services; however, only a small number have been able to sustain their efforts.

Increasingly, children entering foster care have more complex problems which require more intensive services. Permanent families must be continuously recruited and prepared to parent the growing population of children who cannot return to their birth families. Supportive services must be added or improved upon so that the children in foster care who are legally free for adoption can move into adoption in a more timely manner. Further, agencies must commit resources for the ongoing support of adoptive families not only at placement, but also after legalization of the adoption. Past projects demonstrate that systemic changes allow for greater improvements in placing these children by eliminating barriers to placement such as the lack of sufficient, trained and experienced staff; lack of administrative commitment to adoption; limited resources; and lack of coordinated community based effort.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Describe established plans and goals for improvement in the State adoption system.
- Include an evaluation component which focuses on the innovations used to improve the placement of special needs children who are legally free for adoption and which addresses the successes and failures of the initiative. The evaluation should include the collection and analysis of data to determine placement rates and the types of clients served (e.g., waiting children, prospective adoptive families). Statistics should also be collected to determine the availability of adoptive families during the program period. The evaluation should also include descriptive information on the process and procedures for implementing the program. This information should be used to explain placement rates and success or failure of the innovative program methodologies used.
- Identify and verify the number of foster care children legally free for adoption who are currently waiting adoptive placement.
- Verify the rate of placement of foster care children placed in adoption in the year preceding the application (the rate of placement is the number of children placed divided by the number of children waiting for adoption).
- Describe the plan to increase the rate of placement of foster care children into adoption and the goals for improvement to be achieved in the 12 months of the grant.
- Describe how the proposed improvement, if successful, will continue in the absence of Federal funds.
- Certify that all grant funds will be obligated by the State in the 12 month project period. (The project cannot be extended beyond 12 months.)
- Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.

Project Duration: The length of the project must not exceed 12 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333. This constitutes 25% of the total project cost.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

3.4 Adoption Training and Minority Sensitivity

Eligible Applicants: Accredited schools of social work.

Purpose: To provide a model for the in-service training of adoption workers, supervisors and administrators in "minority-sensitive" issues.

Background Information: Minority children continue to be overrepresented in the child welfare system's out-of-home care services, including children awaiting adoption. However, there have been relatively few training programs that specifically address the issue of sensitivity to minority groups. Adoption staff often do not reflect the racial and ethnic makeup of their client population so it is especially important that they receive training to facilitate an understanding and appreciation of the values of and the differences in minority clients. In addition, schools of social work have not specifically addressed this issue in their Bachelor of Social Work and Master of Social Work programs or in the in-service training provided to the adoption community. Similarly, most adoption agencies have not included such training in staff orientation or staff development programs.

The successful recruitment of prospective adoptive families, both minority and nonminority, for minority children, the preparation and utilization of recruited families, and the provision of post-adoption/post-legal services depend upon the knowledge, sensitivity and appreciation of minority issues at all levels of the adoption agency. Therefore, the development, utilization and institutionalization of a "minority-sensitive" curriculum for adoption agency personnel, including administrative, supervisory, and staff directly providing services, is important. The intended outcome of the project to be funded under this priority area is a model for schools of social work to incorporate in their curricula.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Provide for the establishment of an advisory board that includes representatives from public and private adoption agencies, adoptive parents, and representatives from minority groups (Black, Hispanic, Asian and Native American).
- Describe the methodology to be employed in developing the curricula and training the trainers, establishing the advisory board, and field testing the curricula in areas representative of the minority populations to be served.
- Describe the proposed dissemination plan which should include schools of social work and public or private social service agencies.
- Provide for a contract with a third party to conduct an evaluation of the project. The proposed evaluation plan must be described, including, at a minimum, plans for pre- and post-tests and a six month follow-up of individuals receiving the training.
- Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $150,000 is $50,000 for a total project cost of $200,000 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.5 Increase Adoptive Placements of Minority Children

Eligible Applicants: States, local government entities, public or private nonprofit licensed child welfare or adoption agencies, and incorporated adoptive family groups and community-based organizations with experience in working with minority populations.

Purpose: To develop programs designed to increase the number of minority children (who are in foster care and have the goal of adoption) placed in adoptive families, with an emphasis on the recruitment of minority families.

Background Information: The Adoption Opportunities statute, as amended by Public Law 100-294, places an emphasis upon the recruitment of minority families and authorizes funds for demonstration projects for the recruitment of families to adopt waiting minority children. It is estimated that roughly half of the 31,000 children currently free for adoption and awaiting placement are minority children. Some of these children are older with disabilities and may wait even longer for families. HDS is aware that there must be a continuous focus on the adoption of minority children and has funded a number of programs designed to specifically recruit minority families and to place minority children. Unfortunately, only a few of these programs continue beyond Federal funding.

There is an insufficient pool of minority applicants available to adopt waiting children. The Adoption Opportunities statute mandates the development of programs to increase the number of minority children adopted with a special emphasis on the recruitment of minority individuals.

Minimum Requirements for Project Design: Applicants may: (1) Replicate established or develop new models including outreach, education or media campaigns to inform the public about waiting minority children; (2) recruit and prepare families (including single applicants) to adopt these children; (3) expedite, as appropriate, the legal availability of children for adoption; and (4) provide cultural sensitivity training to all relevant staff to increase their effectiveness in serving minority children and families.

In order to successfully compete under this priority area, the application should:

- Describe existing minority child placement and recruitment programs, if any; the number of minority children in foster care with the goal of adoption; and the number freed for adoption.
- Describe how the newly recruited families will move through the process resulting in adoptive placement.
- Establish a specific number of children to be adopted as a result of this effort, if applicable.
- Document how the program that is developed will be continued as part of the agency's ongoing program and describe the specific steps which will be taken to accomplish this.
- Address the need for the training of workers to provide culturally sensitive and appropriate services which meet the needs of minority children and families.
- Provide for at least one person from the project to attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.
- Document that the project will be staffed and implemented within 90 days of the notification of the grant award.

Project Duration: The length of the project must not exceed 17 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $80,000.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal

share of $80,000 is $26,666 for a total project cost of $106,666. This constitutes 25 percent of the total project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 9 projects will be funded.

3.6 Services for Families Who Adopt Sexually Abused children

Eligible Applicants: Private or public adoption agencies, public child welfare or social service agencies, and national adoption organizations or professional associations interested in assisting the adoptive families of sexually abused children.

Purpose: To develop or replicate models for training staff to prepare prospective adoptive families for children who have been or are believed to have been sexually abused, and to provide early access to counselling and ongoing support for families who adopt such children.

Background Information: In FY 1988, HDS, through the Adoption Opportunities Program, funded two 24-month projects on "Services for Families Who Adopt Children Who Have Been Sexually Abused." Two main conclusions of these projects were that (1) considerable help is needed by these families to sustain the placements; and (2) special training is needed by caseworkers and counselors who serve these families. A family must be prepared for the behaviors that may be encountered from the child at placement and, possibly, years after the placement. Ongoing support and counseling must be available to these families.

The unique problems associated with the adoption of sexually abused children are not being adequately addressed. A child who has been sexually abused is affected for a long period of time and may act out these effects in his or her relationships with the adoptive family. Without strong preparation and ongoing support, a family may not be able to understand, accept, or cope with the child's behavior and the adoption can be in jeopardy. Models for the provision of treatment and support are needed for these families.

Prospective adoptive parents for these children must be adequately prepared, even in situations where a history of sexual abuse is only suspected for a child. Behavioral problems presented by the child may be threatening and confusing to the family, particularly a child's inappropriate sexual behavior within the family. Post-adoption services may need to be tailored or specifically targeted to the needs of these families.

• Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Describe the training to be developed or replicated for staff to prepare families and for counselors to provide services to maintain these families.

• Demonstrate the ability to successfully replicate service models.

• Describe the collaboration that would be established with mental health and social services agencies.

• Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $125,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $125,000 is $41,666 for a total project cost of $166,666 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

3.7 Enhancing Adoption Opportunities for Older Children

Eligible Applicants: Public or private non-profit licensed child welfare or adoption agencies.

Purpose: To support adoption opportunities for older children by developing or replicating successful models to facilitate the adoption of children over the age of 12.

Background Information: A disproportionate number of older children who are legally free for adoption remain in the child welfare system. Many of these children are not being prepared for adoption and are perceived as being "unadoptable." These children may exhibit behavioral difficulties. Many are boys (who are harder to place than girls); some have disabilities; and some have educational deficits. Many of these children have expressed a wish not to be adopted. They may be fearful of rejection and/or continue to feel ties to their birth families even though they cannot be reunited.

Recruitment efforts and preparation of the older child and the adoptive family require skill, determination and a belief that all children deserve a permanent home. Agencies must re-examine their attitudes with regard to the adoption of the older child and encourage workers to effectively plan and implement placement decisions. There must be effective recruitment, skillful preparation of potential parents and effective post-placement counseling for the older child and his or her adoptive family.

In FY 1987, HDS funded seven programs to demonstrate that the older child is "adoptable." These programs engaged in extensive recruitment efforts, developed a recruitment guide for volunteer adoption advocates, developed new assessment tools, and revised handbooks of agency policies and procedures to help staff prepare older children for adoption and to help preserve placements. Information on these projects can be obtained from the National Adoption Information Clearinghouse, 1400 Eye Street, NW., Suite 600, Washington, DC 20005, telephone (202) 842-1919.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Demonstrate a new model or replicate any of the existing models.

• Describe the child-specific recruitment that would be conducted, the preparation to be provided the child and family, and the assessment tools that would be utilized.

• Provide assurances that post-placement services, including counseling, are available.

• Indicate the types of training to be provided for staff.

• Contract with a third party to conduct an independent evaluation of the project.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $125,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $125,000 is $41,666 for a total project cost of $166,666 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

3.8 Operation of a National Adoption Information Exchange System

Eligible Applicants: Private non-profit or public organizations with expertise in adoption and the ability to develop and maintain a national adoption information exchange system.

Purpose: To operate a national adoption exchange which will facilitate a nationwide effort to bring together agencies with special needs children and families who are interested in, and capable of, adopting these children.

Background Information: The Adoption Opportunities statute spells out the intent of the Congress to facilitate the elimination of barriers to adoption and to provide permanent homes for children with special needs who are older, with disabilities, of minority heritage, or sibling groups who should be placed together.

This program requires HDS to "provide (directly or by grant or contract with public or private nonprofit agencies or organizations) for (A) the operation of a national adoption information exchange system (including only such information as is necessary to facilitate the adoptive placement of children, utilizing computers and data processing methods to assist in the location of children who would benefit by adoption and in the placement of children awaiting adoption); and (B) the coordination of such systems with similar State and regional systems."

In September 1982, the National Adoption Center, formerly the Adoption Center of Delaware Valley, was funded through a grant to provide a full service, automated adoption exchange program capable of serving children and families nationwide. In the second year, the Exchange established a national adoption network to provide rapid communication among exchanges and agencies and to expand the registration of waiting children and families. Forty-eight States, including Puerto Rico and the District of Columbia, received Federal funding in 1986 and 1987 to purchase computer equipment. These jurisdictions are now participating in the National Exchange. In addition, over 40 adoptive parent groups, adoption exchanges, national organizations, private agencies and the Children's Bureau Central Office and Region VII use the network.

During its seven years of operation, the Exchange has increased the visibility of special needs children and has enabled approved families to register and gain maximum access to children waiting for adoptive families.

In accordance with HDS grants policy, a new competition must be conducted for operation of the Exchange system in FY 1991. The current grantee's funding expires on September 30, 1990.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Describe the operation of a national adoption information exchange system with computer hardware and software.
- Maintain and update the existing database of approved families and waiting children.
- Demonstrate the capacity to report on placements facilitated by the system.
- Establish an advisory board of professionals who can provide consultation on adoption and information systems.
- Describe the process for providing technical assistance to network users through trained staff.
- Link adoption providers across the country and coordinate the system among the users.
- Provide for national outreach and public education to recruit potential families.
- Establish an information and referral system with States to respond to families interested in adopting children with special needs.
- Agree that at least one person from the project will attend the annual Adoption Opportunities Grantee Meeting in Washington, DC.
- Agree to make all information available to HDS or its evaluation contractor and to be fully cooperative in the evaluation process. All systems for collecting, recording and maintaining data must be approved by the Government Project Officer.

An evaluation will be conducted to determine the effectiveness of the National Adoption Information Exchange System. This evaluation will be handled by HDS independent of these grant funds and will address the effectiveness of the project as related to the following areas: (1) Number of children and families registered on the network; (2) number of families recruited and referred to agencies; (3) number of placements resulting from referrals; (4) number of users who join the network each year; (5) status of members, use of the network; (6) number of States on-line and using the network; and (7) number of non-State members on-line. The evaluation will begin no later than six months following the grant award.

Project Duration: The length of the project must not exceed 60 months.

Federal Share of Project Cost: The maximum Federal share of the project is not to exceed $350,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $350,000 is $116,666 for a total project cost of $466,666 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.9 Specialized Family Foster Care for Older Children With Physical, Mental and/or Emotional Disabilities

Eligible Applicants: State and local public or private non-profit child welfare agencies.

Purpose: To develop models for programs providing specialized family foster homes for children ages 11 through 18 who have physical, mental or emotional disabilities.

Background Information: Increasing numbers of older children are entering the foster care system for a variety of reasons. Many of these children come into and may remain in care due to a variety of behavioral difficulties resulting from physical, mental and/or emotional problems. These conditions are likely to be compounded by disturbed family environments or frequent replacements in foster care. In many instances, these children may be placed unnecessarily in institutional settings due to the lack of sufficient numbers of well-trained and adequately supported foster parents.

Specialized family foster care has been demonstrated to effectively provide substitute care for nearly all types of child needs. Such programs have successfully provided care to mentally and emotionally disturbed older children. However, such programs have not been developed in sufficient quantity to meet the need and to be recognized as a major resource.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Propose programs which include recruitment of families, specialized pre-service and in-service training protocols for foster families, support services, and utilization of a variety of community services.
- Provide an assessment of the need for the service and the model proposed.
- Respond to issues such as the appropriateness of foster family care, reunification or other permanency plans including adoption, support groups for foster families, respite care, independent living services and self-help groups for teenagers, therapeutic, medical or educational interventions and how identified community services will be involved in the project.
- Include, where cooperation of other organizations is expected or necessary, letters of commitment from these organizations.
- Specify proposed staffing for the project, recruitment and training protocols, licensing issues and a plan for

the independent evaluation of the project.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 for year one and $150,000 for year two.

Matching Requirement: The minimum non-Federal matching requirement for the first year in proportion to the maximum Federal share of $100,000 is $33,333 for a total cost of $133,333; for the second year the minimum non-Federal matching requirement in proportion to the maximum Federal share of $150,000 is $50,000 for a total cost of $200,000. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that up to 5 projects will be funded.

3.10 Use of Family Based Services for Reunification of Children in Out-of-Home Care

Eligible Applicants: State, Indian Tribal, and public and private child care and child placement agencies in cooperation with family-based treatment or mental health treatment services.

Purpose: To utilize more effective approaches to the problem of returning children home from foster and residential placements.

Background Information: A variety of specialized family treatment programs have been developed in the U.S. in the past five years. These have primarily been focused on family preservation to prevent the need for foster placement. These approaches have been found to be effective and cost beneficial. Children in foster care are increasingly coming from more difficult family situations and also need the benefit of specialized family treatment programs so that they may be returned home to an improved, stabilized family situation. Family treatment for children in placement is more complex as the child is already out of the home, and the foster parents must be involved. Comprehensive models of family treatment which address these situations are solicited.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Describe the model of family treatment to be employed or adapted.
- Indicate commitment from other support agencies and services to be part of a coordinated effort, e.g., alcohol and drug treatment, community mental health, housing and employment assistance, school liaison, child care, respite care, parent aides and parent education. Services may be directed to relatives as well as to natural parents.
- Include a plan for case management and at least six months follow up.
- Agree to provide data to and cooperate with a Federally funded evaluator.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 4 projects will be funded.

3.11 Model Interagency Collaboration for Services to Developmentally Disabled Children in the Child Welfare System

Eligible Applicants: State and local public or private child welfare agencies in collaboration with developmental disability agencies and organizations.

Purpose: To develop models of effective interagency collaboration in providing services to developmentally disabled children in State child welfare systems and to their families.

Background Information: It is estimated that well over 20% of the children in the child welfare system are developmentally disabled. However, because the children are not highly visible and do not threaten community or agency well-being, their developmental needs often are ignored. Generally, the complex needs of developmentally disabled children are not well understood by staff of child welfare agencies and many vital services such as medical, mental health, educational and family support services are under the jurisdiction of other State agencies. Scarce resources are not coordinated in a way to make these services available to this group. Further, child welfare agency staff with critically high caseloads and limited specialized skills and training are not well equipped to meet the specialized needs of developmentally disabled children and their families, nor are they in a position to negotiate effectively with staff of other State and community agencies.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Provide an assessment of the service needs of the client population and the resources available in the State, with an identification of the organizations which provide these services and plans for coordinating services for clients through agency collaboration. This might include inter-agency transfer of services, agreements, contracts for purchase of services or other arrangements for making existing services available, where needed, and to develop additional needed services. The plan should include collaboration among relevant State agencies and also identify other service agencies and the role each will have in the actual provision of services.
- Specify the proposed staffing, operations, evaluation and dissemination plan for the project.
- Provide, where cooperation of other organizations is expected, letters of commitment from these organizations.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.12 Study of Reunification Risks and Successes

Eligible Applicants: Public and private non-profit or university research organizations with written agreements from public agencies and courts for access to records.

Purpose: To study the decisionmaking process and to identify the case characteristics that lead to successful or unsuccessful reunification of children in substitute care with their families.

Background Information: Each year many children are returned home inappropriately and placed at risk of repeated abuse and neglect. At the same time, many children are successfully reunited with their families. Information is needed to respond to the following questions: What are the circumstances of the case which led to the return? Was there a lack of appropriate information? Was there a failure to consider all available information and to use appropriate sources of information such as foster parents? What is the role of the periodic review process? Is there wide variation between the agency's recommendation and the judge's decision? What are the formal and

informal processes that take place prior to the court hearing? Who participates at each level of the decision? What is the impact of involvement of Court Appointed Special Advocates, Foster Care Review Boards or guardians ad litem? Do newly emerging issues, e.g. crack addiction, require new risk assessment concepts or instruments relative to reunification?

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Propose a study design which includes a sample of children successfully reunited and another group of children who were returned to substitute care because of serious abuse and neglect, including cases of child death. The sample must be sufficiently large and diverse to represent communities of various sizes, in at least two different regions of the country, and include families of various minority backgrounds.
- Propose to review agency and court records, interview participants in reunification decisions, and assess the possible contribution of others who might have been included in the reunification decision.
- Propose to examine outcomes of reunification decisions.
- Demonstrate an understanding of the problems which may be encountered in accessing these data.
- Indicate how privacy/confidentiality will be maintained.
- Provide for the development of suggested guidelines for appropriate decision-making based on the findings of the research at the conclusion of the study.
- Demonstrate knowledge of recent applicable research and findings in proposing their research design.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal funding for the project is not to exceed $200,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.13 Resource Services for Child Welfare Programs

Eligible Applicants: Any State, local, public or non-profit agency or organization including accredited colleges and universities and existing National Resource Centers for Child Welfare Services may submit an application under this announcement. Applications developed jointly by State, local, and community-based social services agencies, foundations, colleges or universities are encouraged.

Purpose: To provide resources to State and local, public and private child welfare agencies in the development, expansion, strengthening and improvement of the quality and effectiveness of child welfare services to children and families through the (1) development and dissemination of materials, including curricula, guidelines and training materials; (2) development and dissemination of models of effective practices and programs; and, (3) provision of consultation, training and technical assistance in assessing and resolving program and practice concerns through the adaptation and implementation of models and materials.

Background Information: In September 1985, the Children's Bureau funded six National Resource Centers for the development of exemplary methods and resources to improve the quality, delivery and management of social services for children and families and to expand State and local agencies' capabilities to provide such services. These funds were intended to support projects and to provide leadership in the identification, collection, development and utilization of models, systems improvements, training programs and other resource materials on effective methods of addressing child welfare service needs. Each Center focused on a program priority in a major area of child welfare services: family-based preventive services, foster care, adoption, youth services, legal resources, and program management and administration. The Centers were funded for three years at approximately $200,000 per year. One criterion for the continued funding of these Centers was the extent to which they moved toward self-sufficiency.

Although this criterion was met, certain core functions which proved vital to the States—short-term consultation, clearinghouse functions and the development of new resource materials on emerging issues—could not be provided without continued support. Therefore, in FYs 1988 and 1989, the Centers were funded at $100,000 to insure the availability of these core functions.

The Children's Bureau intends to continue making these core services available to the field through the funding of projects under this priority area.

Minimum Requirements for Project Design: Applicants may apply to provide resource services to child welfare agencies in the following program areas: family-based preventive services, family foster care and residential care, special needs adoption, youth services, legal resources and management and administration. In order to successfully compete under this priority area, the application should:

- Address a single program area and describe how the proposed program would provide resources and services to the field to improve agencies' practices in the selected area through, but not limited to, the following types of activities:

—The documentation ond development of innovative methods and appropriate materials to respond to recognized resource deficiencies in specific aspects of programs designed to address emerging service needs.

—The provision of technical assistance, training, and consultation to promote the utilization of resources and best practices related to child welfare services, including methods and techniques for program implementation and evaluation.

—The development of networking and coordination activities for the establishment of linkages among agencies, organizations, and individuals serving children and families, including the use of national meetings or symposia to address specific issues.

- Develop specific work plans for addressing the needs of minority children and families within their respective area of activity. In developing work plans, special attention should be given to the requirements of Public Law 95–606, the Indian Child Welfare Act of 1978, to assist States in providing services to Indian families and children.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $150,000 is $50,000 for a total project cost of $200,000. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 6 projects will be funded.

The following six program priorities are of special interest to HDS.

Family-Based Services

Under Title IV–E of the Social Security Act, all States must provide services to families designed to prevent the separation of children from their families and, in cases where placement cannot be prevented, States must

provide services to families to reunify foster children with their families.

Resource services in this program area must assist in preventing placement through the provision of emergency and ongoing family-based services, services to reunify the families of children in care, and aftercare services to families of children who have returned home.

The help provided by the resource services program funded in this area must include the provision of technical assistance and consultation and the dissemination of exemplary models with an emphasis on effective and cost-effective family-based services directed toward activities at two levels:

(1) Technical assistance and consultation to State, county, Indian Tribal, and private agencies in the restructuring and reorienting of services for the provision of effective emergency and family-based services to child abusing or neglecting families. The technical assistance provided should also assist agencies to develop family-based service models which can assure that reasonable efforts are made to prevent the need for out-of-home placement while protecting the children from maltreatment, or to reunify the family if out-of-home placement has occurred, and/or to move toward alternative permanent plans in a timely manner as appropriate. The project's activities should encourage the development of family-based and crisis services in order to prevent placement as well as remedial and intervention services to reunify families when children are placed in foster care and upon their return to their homes.

(2) At the community level, the provision of information, consultation and networking activities to encourage the development of family and parenting capacity through the provision of parent education and parent support services. Networking among local resource systems should be specifically encouraged.

Family Foster Care and Residential Group Care

Children in foster care and their families continue to be a large and very costly segment of the population served by child welfare agencies. While the implementation of Title IV-E reduced the child welfare population by nearly 40 percent, the number of children in foster care has substantially increased during the past three years. Major elements of Title IV-E are specifically directed to improving services to children living in substitute care. Public child welfare agencies are required to establish services and procedures to improve the quality of substitute care and to make specific plans to reunify children with their families or to provide another permanent home, usually through adoption. However, the emergence of new and more severe family problems has resulted in children entering the system with unique and complex placement and service needs resulting in challenging demands being placed on agencies in their efforts to intervene and help these children and their families.

The already inadequate supply of foster homes is further decreasing, while the number of children needing homes and the severity of their problems requiring specialized services are increasing. Residential group care, already unable to meet the demands for service, is being increasingly used to care for children even when the placement is not appropriate for their needs. By improving the quality of agency staff skills and practices as well as family foster care programs, existing services can be utilized more effectively in meeting the needs of children and families.

Resource services for foster care program improvement should assist child welfare agencies in the following areas:

(1) The development of methods and techniques for implementing the permanency planning provision of Title IV-E including:

(a) Statewide implementation of case review systems and the provision of training in the development of appropriate case plans and other activities designed to facilitate family reunification;

(b) The establishment of clear guidance for terminating parental rights including documentation of efforts directed toward family reunification and family restoration; and

(c) An assessment of the characteristics of children now entering group care and the development of guidelines on the appropriate, selective use of residential group care.

(2) The development of methods for the effective recruitment, training and retention of foster parents to meet the increasingly complex needs of children entering foster care, including:

(a) The provision of specialized family foster care for drug affected, HIV+, AIDS infected and other special needs children;

(b) The provision of services to older children, including emotionally disturbed adolescents;

(c) Early preparation for independent living for children unlikely to be reunified with their families; and,

(d) The use of foster parents as active participants in case planning and reviews and in working with birth parents.

(3) The conduct of activities to strengthen services to children in foster care and their families through the dissemination of effective program models including:

(a) Mental health services to children in foster care;

(b) Medical assessment/treatment and permanent medical records for children in foster care;

(c) Special education and vocational education services for foster care children; and,

(d) The utilization of University Affiliated Programs to serve developmentally disabled children in foster care.

Special Needs Adoption

Adoption is a critical service in achieving permanent homes for children with special needs who are in the public child welfare system. In the past decade, the Adoption Opportunities Program has, through grants and contracts, developed extensive resources, training materials and program models to address barriers to the adoption of these children.

Several national programs were funded to assist agencies in improving services to children with special needs, to adoptive families and to families who wish to adopt. The National Resource Center for Special Needs Adoption, funded from 1985 to 1990, provides training, technical assistance and consultation to improve adoption services for children with special needs. The National Adoption Clearinghouse, funded in 1987, provides information to the public on all aspects of infant adoption and on the adoption of children with special needs. And, the National Adoption Center, funded from 1982 to 1990, operates a national adoption telecommunications network which allows States, adoption exchanges and agencies, parent groups and national organizations to communicate and to register special needs children and prospective families.

These national programs, as well as the demonstration grants that have been supported, have successfully assisted States in placing greater numbers of children with adoptive families and, in some cases, affected changes and improvements in Statewide adoption systems. However, three areas require additional attention: minority children placements, post-legal adoption services, and the placement of foster care children legally free for adoption.

This need was recognized in Public Law 100-294, the Child Abuse Prevention, Adoption, and Family Services Act of 1988, which makes funds available to: (1) Support programs to increase the number of minority children placed in adoptive families with a special emphasis on the recruitment of minority families; (2) provide post-legal adoption services; and (3) fund State programs to increase the placement rate of foster care children legally free for adoption.

Resource services for special needs adoption programs should provide broader agency access to methods and techniques for expanding and improving special needs adoption services. The programs must have the capability to assist agencies in the following areas:

(1) Increased intrastate cooperation among the public sector and between the public and private sectors. This should include networking and cooperation with agencies providing mental health and developmental disabilities services to children and to services for HIV+, AIDS and drug affected children;

(2) The development of techniques for the early identification and follow through of children for whom adoption placement is the plan;

(3) The development of models for increasing the rate of adoptive placements of children with special needs who are legally free for adoption;

(4) Facilitating the recruitment and preparation of adoptive families for special needs children with a focus on minority families and on the development of models for the preparation of children for adoptive placement, particularly older children; and,

(5) The provision of training in post-placement and post-legal adoption services.

Youth Services

Large numbers of at-risk youth, including runaway and homeless youth, are only marginally served by public child welfare agencies which do not provide effective alternatives or solutions to the problems of youth drug abuse, prostitution, delinquency, teenage pregnancy, and suicide. As the needs of youth have become more problematic, services or effective alternatives have not kept pace. This is especially true for pregnant teenagers whose numbers have increased significantly in recent years. Child welfare agencies need assistance in providing information, resources and alternatives for pregnant teenagers and for other subgroups of at-risk youth. Increasing numbers of adolescents also need assistance in making the transition from foster care into independent living.

Resource services to be provided must include the provision of technical assistance and the dissemination of training materials to States, localities, non-profit and profit-making agencies, and coordinated networks of such agencies to more effectively meet the needs of youth in the child welfare system, especially older adolescents.

Applicants should describe how they would address the following critical issues in each service area:

(1) Adolescent health care, including access to health services and prevention of chronic illness;

(2) Youth sexuality, including teen pregnancy and AIDS prevention;

(3) Substance abuse, through the networking of resources and the development and dissemination of special programs and materials;

(4) Education, including special education and vocational education, school drop-out prevention and illiteracy; and,

(5) Independent living services, including linkages to or networking among families, community services and organizations, and self-help groups.

Legal Resources

All child welfare programs operate within a framework of law. Recently, the legal context of child welfare programs has been expanded and redefined by major legislation. New and complex programs have been mandated and relationships have been redefined between State agencies, judicial systems and a range of advocacy groups and constituencies. State agencies are inundated with new concerns, conflicting issues and reinterpretations of principles and policies. States continue to require practical experience and legal expertise to delineate a range of legal issues and, through access to legal precedents, avoid a trial and error approach to these developing areas of law.

Applicants should focus on methods and techniques for addressing issues and problems and for improving coordination between the child welfare and judicial systems; providing legal education to State, local and voluntary agencies on emerging child welfare issues; and performing legal research and clearinghouse functions for use in developing legally supportable procedures on complex legal issues. Applicants should identify a variety of problem areas and relevant emerging issues affecting child welfare programs and should address the dissemination of information and materials to appropriate State and local agencies, including resource materials developed by other HDS grantees.

Applicants should also address:

(1) The activities that would be conducted to increase the professional awareness and competency of the child welfare community in regard to substance abuse. This includes legal bases for intervening in cases of drug and alcohol addicted pregnant women; the legal basis and procedures for terminating the parental rights of drug and alcohol addicted parents; and other legal concerns related to drug/alcohol use.

(2) The related activities that would be undertaken to increase professional awareness and competency in regard to HIV+ cases in areas such as identification, care, treatment, parental rights, client rights, and foster parent rights.

(3) The activities that would be conducted to increase professional awareness and competency in regard to the protection and appropriate representation of children in court proceedings with particular reference to their rights to treatment or rehabilitation and permanent homes.

(4) Interpretation/training for judges and other court personnel in the purpose and philosophy of the requirements in section 427 of the Social Security Act for reasonable efforts to prevent placement.

(5) The methods to be employed in identifying other emerging legal issues in regard to children and youth and their families.

Child Welfare Program Management and Administration

Recent developments have placed new demands on State agencies. Increasingly, they are responsible for more varied and difficult client populations, a wider range of service and child care settings, mandated case review systems, more specialized staff, and licensure of a larger variety and complexity of programs. Programs are funded under broad and complex legislation which holds agencies accountable for client outcomes and for providing services to clients. The innovative use of information, efficient resource utilization, and creative management approaches are required for program success.

State agencies also need assistance in dealing with a variety of personnel issues, including the recruitment and supportive management of personnel, staff development and training and performance evaluation.

In recent years, agencies have had to respond to a growing demand for new services for such populations as child

sexual abuse victims and their families, families who have adopted children with special needs, adolescents in foster care, pregnant adolescents, drug affected babies who are neglected or abused and frequently abandoned by drug dependent mothers, and families requiring in-home services. These developments have stimulated the need for increased staff training and for innovative approaches to the organization and management of child welfare agencies.

Services to improve program management and administration should address the following areas:

(1) The establishment of major agency service directions through strategic planning;

(2) The development, management and oversight of purchase of service contracts, including the development of guideline material;

(3) The provision of training in case management, case disposition and case documentation for supervisors and administrators;

(4) The use of computer technology to support and simplify program management and planning;

(5) The development of on-site training models for front-line service workers and supervisors focused on the requirements of titles IV-B and IV-E and major emerging issues in child welfare services delivery; and,

(6) The assessment of changing patterns of licensing children's services and the provision of training and guidelines for State licensing staff.

3.14 Child Welfare Research Centers

Eligible Applicants: Any public or nonprofit private agency or organization including accredited colleges and universities.

Purpose: To establish three centers in support of research on topics of national, State and local significance to policy and practice affecting the welfare of children.

Background Information: Over the years, numerous Federal and State statutes for child protection, education, maternal and child health, mental health, health and social services, and the rights of the disabled have been enacted and modified to improve conditions for children.

The array of services developed as a result of legislated programs and private initiatives has been impressive. Many conditions affecting children have improved; some have not. Economic and social changes have created new challenges. Traditional services do not always fit emerging needs, and the dynamics of economic and social change are often elusive. Meanwhile, systems which are slow to change may have difficulty in responding to new situations. Timely study and research are essential to sound decisionmaking in policy and practice.

The Federal government, States, counties, large cities and metropolitan areas, foundations, private voluntary and professional organizations, universities, and others have supported studies affecting the welfare of children. More systematic identification and integration of accumulated research knowledge in child welfare and related areas is needed for a more comprehensive understanding of the issues affecting children.

The centers would serve:

(1) To analyze and synthesize the results of related research and reports, including those funded by Federal, State and local agencies, foundations, advocacy agencies, universities, and others;

(2) To promote more effective communication between researchers and policymakers, legislators, and professionals serving children and families;

(3) To identify the research needed to help inform the child welfare services field;

(4) To establish, maintain, and provide leadership in a network for collaborative exchange with child welfare resource centers, clearinghouses affecting children and families, foundation groups concerned with child welfare, and other major resources which contemplate issues affecting children and families;

(5) To attract and sustain the interest of respected researchers to the study of issues affecting the welfare of children; and

(6) To conduct research of national significance.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Describe the applicant's understanding of what the proposed project is intended to accomplish.
- Demonstrate the applicant's knowledge of the breadth and complexity of conditions affecting the welfare of children, recent research and other efforts undertaken to address these concerns, and methods which can be applied to bring about needed changes.
- Identify and discuss, including a rationale and justification for, the long-range and incremental approaches which would be taken by the applicant to contribute to the stated purposes of the research centers. A plan of activities, charts and other diagrams showing timelines, staffing and level of effort should be included.
- Describe the plan, including timelines and level of effort, to evaluate the efficiency and effectiveness of the proposed project activities with specific reference to the purposes and roles of the research center.
- Document a plan for the growth of the center through increased interest and support from outside the Federal government.
- Outline a plan of interaction with HDS for implementation under a Cooperative Agreement. (A Cooperative Agreement is Federal financial assistance in which substantial Federal involvement is anticipated. The respective responsibilities of Federal staff and the awardee are identified and agreed upon prior to the award.)
- Describe the physical setting, the administrative and organizational structure within which the program will function, and internal and external organizational relationships relevant to this project. Charts outlining these relationships, and any formal agreements defining them, should be included in the appendices.
- Describe staff, space, equipment, research facilities, and other supports available to carry out the program.
- Describe briefly how the additional resources sought to accomplish the purposes of this effort will be integrated into and augmented by other resources available or accessable by the applicant.

Project Duration: Projects of up to five years will be considered.

Federal Share of Project Costs: The maximum Federal share of project costs is not to exceed $200,000 for the first year of operation.

Matching Requirement: A maximum Federal share of $200,000 will be made available for the first year of operation. Future funding levels will be dependent upon availability of funds. The minimum non-Federal matching requirement is $20,000 in the first year, $30,000 in the second year, $40,000 in the third year, $50,000 in the fourth year and fifth years.

Anticipated Number of Projects to be Funded: It is anticipated that three projects will be funded as Cooperative Agreements.

Length of Proposal: The 45 page limitation for proposals including appendices stated in Part III of this announcement does not apply to this priority area.

3.15 Child Welfare Training Symposium

Eligible Applicants: Accredited schools of social work.

Purpose: To bring together experts from universities, State child welfare programs and others involved in child welfare training issues to develop an effective approach for strengthening child welfare content in social work curricula and for targeting training for persons to be employed in child welfare agencies.

Background Information: Although the child welfare system is increasingly involved with difficult populations of children and families, recent data indicate that the vast majority of individuals employed in public child welfare lack the professional preparation to perform this demanding work. Few social work programs have a well developed, comprehensive child welfare curriculum that adequately prepares students for this difficult work.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Demonstrate an understanding of the barriers to the development and incorporation of new course materials into social work curriculum and the steps needed for implementation.
- Describe logistics related to the symposium, to be conducted in Washington, DC, including duration, estimated number of participants, and proposed date(s).
- Describe the types of participants and their roles in the preparation and conduct of the symposium.
- Provide an outline of the type of report that would be developed as a result of the symposium.

Project Duration: The length of the project must not exceed 12 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $30,000.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $30,000 is $10,000 for a total project cost of $40,000. This constitutes 25% of the total project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.16 Child Welfare Training

Eligible Applicants: Institutions of higher education which are accredited by the Council on Social Work Education. For Indian Child Welfare Training, applicants must be two or four year colleges which are controlled by Indian Tribes or serving Indian reservations and are accredited by the appropriate accrediting authorities. Historically Black Colleges and Universities (HBCUs) which apply must qualify under Executive Order 12320.

Purpose: To ensure the availability of adequately trained and skilled staff for public child welfare services, promote effective collaboration between schools of social work and public child welfare agencies, and expand the number of professionally trained and qualified individuals who manage and provide services in the public child welfare system.

Background Information: As child welfare programs are increasingly involved with older and more difficult to serve populations of children and families, it is critical that public child welfare staff are adequately trained and skilled. Yet, the most recently available data indicate that the vast majority of individuals employed in public child welfare agencies lack the professional preparation which would enable them to perform this demanding job. Further, reviews of State child welfare programs indicate a particular lack of skills in family-focused prevention and reunification services, case planning, and case assessment for family services directed toward reunification.

The social work profession has historically taken a leading role in the preparation of child welfare workers. However, as the field and the profession have evolved, fewer graduates of social work programs have taken positions in public agencies, and some agencies have either been unable to find qualified persons to fill positions or have declassified positions and hired individuals with no professional credentials. The combination of these and other factors has created a critical problem in the child welfare service delivery system at a time when child welfare agencies are facing an unprecedented array of problems and an overwhelming demand for services.

3.16A Child Welfare Traineeships

Eligible Applicants: Applicants must be institutions of higher education which are accredited by the Council on Social Work Education and which train bachelors or masters level students in social work or for degrees in child welfare. Trainees must be candidates for bachelors or masters degrees in social work or in child welfare.

Institutions having current Child Welfare Traineeship grants which will continue beyond September 30, 1990, are not eligible to apply under this priority area.

Purpose: To provide financial support for the education and professional training of students, particularly minority students, pursuing undergraduate or graduate social work degrees or graduate degrees in child welfare who have a stated interest in practice in public child welfare after graduation.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Include a field placement component that provides the student with direct experience in a child welfare related setting, preferably in the public sector.
- Establish or consider cooperative agreements with public child welfare agencies in order to provide traineeships to public agency employees who demonstrate potential for leadership in child welfare and who wish to return to school to obtain an undergraduate or graduate level degree in social work and have indicated a desire to remain in public child welfare for a period of time at least equal to the period of the traineeship.
- Agree to secure from each trainee a written commitment to work in the child welfare field for a period of time equal to the period of the traineeship.
- Describe the curriculum utilized and how it relates to the needs of child welfare practitioners.
- Implement a tracking system of child welfare trainees for a three year period to determine the percentage of students who secure employment in the child welfare field.
- Specify the number of students to receive traineeships.
- Ensure that traineeships grants are used only for student financial support and not for other direct or indirect costs for the applicant institution.
- Include the cost of attending an annual grantee meeting, to be held in Washington, DC, in the budget.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $25,000 per budget year. A traineeship may not exceed $5,000 per student per budget year.

Matching Requirement: No matching funds are required for traineeships.

Anticipated Number of Projects to be Funded: It is anticipated that 45 projects will be funded.

3.16B In-Service Training For Child Welfare Workers

Eligible Applicants: Institutions of higher education which are accredited by the Council on Social Work Education.

Purpose: To support training for personnel employed in public or Indian Tribal child welfare agencies.

Minimum Requirements for Project Design: In order to successfully compete

under this priority area, the application should:

• Describe how the in-service training would be directed to personnel employed in public or Indian Tribal child welfare agencies.

• Describe how the training topics address the specific high priority training needs identified by the public or Tribal agency and would focus on various levels of personnel including frontline workers, supervisors or administrators, and persons in management and senior supervisory positions.

HDS is particularly interested in the following topics: (1) The development of effective intervention strategies for working with drug dependent parents, including recognition of alcohol and drug dependency through behavioral indicators in parents and children, family roles and dynamics; (2) placement issues and case management for drug-affected infants and children, including the dynamics of chemical dependency and recovery, developmental implications and appropriate treatment strategies; (3) the development and delivery of independent living services; (4) family-focused preventive, reunification and aftercare services; (5) the development of specialized family foster care services; (6) case planning and case management; and (7) bilingual materials to assure access to services for significant populations of ethnic minorities.

• Ensure that trainees demonstrate potential for leadership and indicate the desire to remain in public child welfare for a period of time at least equal to the period of the in-service training received.

• Include an evaluation plan to assess both the immediate and long-term impact of the in-service training. Independent, third party evaluations are especially encouraged.

• Include in the budget travel costs for one person to attend the annual grantee meeting in Washington, DC.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 10 projects will be funded.

3.16C Special Grants for Indian Child Welfare Training

Eligible Applicants: Two or four year colleges controlled by Indian Tribes or serving Indian reservations and accredited by the appropriate accrediting authorities.

Purpose: To provide sufficient adequately trained and skilled staff in public and Tribal child welfare agencies serving Native American children and their families.

1. *Traineeships—Minimum Requirements for Project Design:* In order to successfully compete under this priority area, the application should:

• Provide financial support for the education and professional training of Indian students pursuing undergraduate or graduate social work degrees who have a stated interest in practice in public child welfare after graduation and have indicated a desire to remain in public child welfare for a period of time at least equal to the period of the traineeship.

• Include a field placement component that provides the student with direct experience in a child welfare related setting.

• Establish cooperative agreements with Tribal and other child welfare agencies in order to provide traineeships to agency employees who demonstrate potential for leadership in child welfare and have indicated a desire to remain in public child welfare for a period of time at least equal to the period of the traineeship.

• Provide for a system to track trainees for a three year period to determine the percentage of students who secure employment in the child welfare field.

• Consider agreements between two year colleges and four year colleges to assist child welfare trainees in two year colleges to enter advanced degree programs.

• Describe the curriculum utilized and how it relates to the needs of child welfare practitioners.

• Specify the number of students to receive traineeships.

• Ensure that traineeship grants are used only for student financial support and for limited additional support and advisory services which may be necessary to maintain Indian students in school, such as remedial assistance, but not for any other direct or indirect costs for the applicant institution.

• Include the cost of attending an annual grantee meeting, to be held in Washington, DC, as a part of the budget.

Project Duration: Traineeships will be awarded for up to 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $25,000 per budget period. A traineeship may not exceed $5,000 per student per budget year.

Matching Requirment: No matching funds are required for traineeships.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

2. *In-Service Training—Minimum Requirements for Project Design:* In order to successfully compete under this priority area, the application should:

• Support training for personnel employed in Indian Tribal child welfare agencies who have indicated a desire to remain in public child welfare for a period of time at least equal to the period of training.

• Identify topics for training that address specific high priority training needs identified by the Tribal agency and focus on any level of personnel, including front line workers, supervisors or administrators.

• Describe the training program in detail including specific measurable outcomes and a plan for the evaluation of its effectiveness.

• Show that Tribal child welfare agencies have actively participated in the selection of training topics and in the planning and implementation of the project.

HDS is particularly interested in the following topics: (1) The development of effective intervention strategies for working with drug dependent parents, including recognition of alcohol and drug dependency through behavioral indicators in parents and children, family roles and dynamics; (2) placement issues and case management for drug-affected infants and children, including the dynamics of chemical dependency and recovery, developmental implications and appropriate treatment strategies; (3) the development and delivery of independent living services; (4) family-focused preventive, reunification and aftercare services; (5) the development of specialized family foster care services; and, (6) case planning and case management.

• Include an evaluation plan to assess both the immediate and long-term impact of the in-service training. Independent, third party evaluations are especially encouraged.

• Include the cost of attending an annual grantee meeting, to be held in Washington, DC, as part of the budget.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1–2 projects will be funded.

3.16D Special Grants for Historically Black Colleges and Universities

Eligible Applicants: Historically Black Colleges and Universities (HBCU) as defined in Executive Order 12374 which offer baccalaureate and masters degree programs which have been accredited by the Council on Social Work Education. Generally, institutions qualify as HBCUs if they were established before 1964 with their principal mission having been and continuing to be the education of Black Americans. Institutions having a current child welfare traineeship grant which will continue beyond September 30, 1990 are not eligible to apply for traineeship grants.

Purpose: To provide sufficient adequately trained and skilled staff in public child welfare agencies.

1. *Traineeships—Minimum Requirements for Project Design:* In order to successfully compete under this priority area, the application should:

• Provide financial support for the education and professional training of students within an HBCU pursuing undergraduate or graduate social work degrees who have a stated interest in practice in public child welfare programs after graduation and have indicated a desire to remain in public child welfare for a period of time at least equal to the period of the traineeship.

• Specify the number of students to receive traineeships.

• Include a field placement component that provides the student with direct experience in a child welfare services related setting.

• Establish cooperative agreements with child welfare agencies in order to provide traineeships to agency employees who demonstrate potential for leadership in child welfare and have indicated a desire to remain in public child welfare for a period of time at least equal to the period of the traineeship.

• Implement a system to track trainees for a three year period to determine the percentage of students who secure employment in the child welfare field.

• Describe the curriculum utilized and how it relates to the needs of the child welfare practitioners.

• Ensure that traineeships grants will be used only for student financial support and not for other direct or indirect costs for the applicant institution.

• Include the cost of attending an annual grantee meeting, to be held in Washington, DC, in the budget.

Project Duration: Traineeships will be awarded for up to 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $25,000 per budget period. A traineeship may not exceed $5,000 per student per budget period.

Matching Requirement: No matching funds are required for traineeships.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

2. *In-Service Training—Minimum Requirements for Project Design:* In order to successfully compete under this priority area, the application should:

• Support training for personnel employed in public child welfare agencies.

• Identify topics for training that address specific high priority training needs identified by the public agency and focus on any level of personnel, including front line workers, supervisors or administrators.

HDS is particularly interested in the following topics: (1) The development of effective intervention strategies for working with drug dependent parents, including recognition of alcohol and drug dependency through behavioral indicators in parents and children, family roles and dynamics; (2) placement issues and case management for drug-affected infants and children, including the dynamics of chemical dependency and recovery, developmental implications and appropriate treatment strategies; (3) the development and delivery of independent living services; (4) family-focused preventive, reunification and aftercare services; (5) the development of specialized family foster care services; (6) case planning and case management; and, (7) bilingual materials to assure access to services for significant populations of ethnic minorities.

• Ensure that trainees demonstrate potential for leadership and have indicated the desire to remain in public child welfare for a period of time at least equal to the period of in-service training received.

• Describe the training plan in detail, including specific measurable outcomes and a plan for evaluating its effectiveness.

• Demonstrate and document that public child welfare agencies have actively participated in the selection of the training topics and in the planning and implementation of the project. Participating agencies are encouraged to contribute resources toward the completion of the project goals.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

3.17 Temporary Child Care for Children With Disabilities and Crisis Nurseries

Eligible Applicants: State agencies designated by the Governor of the State to carry out such programs may apply under this priority area. The term "State" means the 50 States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, the Federated States of Micronesia and Palau. Individuals, other agencies (public or private) or organizations are not eligible to apply. Current grantees are eligible to apply. States may apply under one or both program areas described below.

Purpose: To support States in their efforts to assist private and public agencies in developing two types of services:

(1) In-home or out-of-home temporary nonmedical child care (respite care) for children with disabilities and children with chronic or terminal illnesses, including children with AIDS or AIDS related conditions; and

(2) Crisis nurseries for abused and neglected children or children in families receiving protective services. Special attention should be paid in both program areas to the needs of drug affected infants.

Background: The Temporary Child Care for Children With Disabilities and Crisis Nurseries Act of 1986 (the Act), (previously titled the Temporary Child Care for Handicapped Children and Crisis Nurseries Act of 1986) directs the

Office of Human Development Services to make grants to States to assist private and public agencies in developing temporary child care or respite care services for children with disabilities and crisis nurseries for children at risk of abuse and neglect. These programs are intended to maintain and support the family unit and strengthen the parent-child bond. Programs were funded under this Act in FY 1988 and FY 1989. In FY 1990, HDS will fund continuation grants through a limited competition for the 32 grantees funded in FY 1988. Additional funding has been allocated for FY 1990 for temporary child care and crisis nurseries with special emphasis on programs which will serve drug affected children and their families.

A. Section 5117a of the Act: Temporary Child Care for Children With Disabilities and Chronically Ill Children

The purpose of establishing a temporary child care program for children with disabilities or chronically or terminally ill children is to alleviate social, economic, and financial stress among families of such children. Temporary child care, also known as respite care, is short-term, nonmedical child care for families with children with disabilities or chronically-ill children. Such care provides families or primary caregivers periods of temporary relief from the pressures of the demanding child care routine, thus preventing severe family stress.

The Act authorizes temporary child care programs for children with disabilities and requires applicants seeking temporary child care funds to define disabilities using the definition in the Education of the Handicapped Act "* * * as mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or children with specific learning disabilities who, by reason thereof, require special education or related services." (20 U.S.C. 1401(a)(1).)

The following components may be included in temporary child care or respite care projects:

- 24 hour services;
- Access to primary medical services;
- Referral to counseling/therapy services;
- Staff training programs, including child abuse/neglect reporting responsibilities; and
- Public awareness programs.

B. Section 5117b of the Act: Crisis Nurseries

A "crisis nursery" is defined in section 5117c(d) of the Act to mean a center providing temporary emergency services and care for children. Crisis nurseries are child care facilities which protect children by providing a safe environment at a time when the chances of neglect or physical abuse in the home are increased. These programs offer parents the option of "time out" as a preventive measure in reducing the incidence of child maltreatment. They are designed to:

(1) Develop a safe environment as a resource for children at risk of abuse;

(2) Deliver nonpunitive, nonthreatening services as a resource to caregivers of at-risk children; and

(3) Utilize existing community-based services to further diminish the potential for maltreatment of children in families experiencing crisis.

Services funded under section 5117b of the Act must be provided without fee for a maximum of 30 days in any year. Crisis nurseries must also provide referral to support services.

The following components may be included in crisis nursery programs:

- 24 hour services;
- Referral to counseling/therapy services including out-of-home placement (when appropriate);
- Access to primary medical services;
- Staff training including child abuse neglect reporting responsibilities; and
- Public awareness programs.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Provide documentation of the State's commitment to develop a State plan for coordination among agencies carrying out programs and activities provided by the State pursuant to a temporary child care grant under section 5117a. (Section 5117a(a)(v).)
- Describe the proposed State program to assist private and public agencies or organizations in providing in-home or out-of-home temporary nonmedical care of children with disabilities and children with chronic or terminal illnesses, including drug-related conditions and children with AIDS or AIDS related conditions, or crisis nurseries for abused and neglected children. The application must also describe the services to be provided, the agencies and organizations that will provide the services and the criteria for the selection of children and families for participation in the project. (Section 5117c(a)(1)(CA).)
- Assure that the State will submit an annual report to the Secretary evaluating the funded programs. The report should include the information required in section 205(c)(1) through (3) of the Act. Applicants must fully describe how they propose to meet this requirement and specifically describe how they propose to collect data that will provide this information.
- Set forth a plan for dissemination of the results of the programs and projects funded under the Act. (Section 5117c(a)(1)(A)(iii).)
- Provide the following assurances as required by statute:

(1) That not more than 5 percent of the funds made available under each section of the Act will be used for State administrative costs.

(2) That projects funded by the State will be of sufficient size, scope and quality to achieve the objectives of the program.

(3) That in the distribution of funds under the "Temporary Child Care" program, the State will give priority consideration to agencies and organizations with experience in working with disabled, terminally ill, and chronically ill children and their families and which serve communities with the greatest need for such services.

(4) That in the distribution of funds under the "Crisis Nursery" program, the State will give priority consideration to agencies and organizations with experience in working with abused or neglected children and their families and with children at high risk of abuse and neglect and their families and which serve communities which demonstrate the greatest need for such services.

(5) That Federal funds made available under this priority area will be used to supplement and, to the extent practicable, increase the amount of State and local funds available for these purposes, and in no case supplant such State or local funds.

(6) That the State will use the definition of handicapped children found in section 20 U.S.C. 1401(a)(1) of the Education of the Handicapped Act in implementing programs under the "Temporary Child Care" program.

(7) That all agencies and organizations funded under the "Temporary Child Care" program will provide child care only on a sliding fee scale with hourly and daily rates.

(8) That services provided under the "Crisis Nursery" program will be provided without fee for a maximum of 30 days in any year.

Project Duration: The length of the project must not exceed 17 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $150,000 is $50,000 for a total project cost of $200,000. This constitutes 25 percent of the total project budget.

Anticipated Number of Projects to be Funded: It is anticipated that approximately 20 projects will be funded, 10 under each program section.

Length of Proposal: The 45 page limitation for proposals including appendices stated in Part III of this announcement does not apply to this priority area.

National Center on Child Abuse and Neglect

On September 18, 1989, a notice soliciting comments on the National Center on Child Abuse and Neglect's (NCCAN) proposed priority areas for FY 1990 was published in the **Federal Register**. A 60-day period was required to allow the public to comment on the proposed areas. After review and analysis of these comments, NCCAN is publishing its final priorities.

NCCAN received 35 written responses. There were 37 specific comments on the seven research and demonstration priority areas, four comments on two of the three suggested symposia and three respondents mentioned the Ninth National Conference on Child Abuse and Neglect. Respondents recommended 15 new priority areas and two new symposia topics. The responses came from representatives of State and local public social welfare and law enforcement agencies and the judiciary, local nonprofit organizations, universities, hospitals, clergy, a Native American organization, the Advisory Board on Child Abuse and Neglect, and an individual expert. The largest number of responses came from universities followed by those associated with law enforcement and the judiciary.

All of the responses were generally in support of the seven research and demonstration priority areas, symposia topics and Ninth National Conference on Child Abuse and Neglect included in the Announcement. NCCAN addressed all of the comments from the Advisory Board on Child Abuse and Neglect and other respondents in preparing its FY 1990 priority areas. Comments which served to further clarify and focus the priorities—e.g., by proposing modifications in wording, suggesting expansion of the variables and issues to be addressed—were incorporated into the revised descriptions. Several comments recommended that elements of cultural responsiveness be added to all of the priority areas and this addition was made, as appropriate. Changes were also made in terminology based upon comments received. The comments that were not used in developing the final priorities primarily were those which proposed expanding the focus of a proposed priority beyond what it was intended to address or, conversely, would have to narrowly limited its focus.

3.18 Joint Law Enforcement Agency/Child Protective Services Investigations of Reports of Child Maltreatment

Eligible Applicants: National, State or local, public or nonprofit agencies, organizations, or institutions. Collaborative applications are encouraged.

Purpose: To determine how representatives from law enforcement and child protective services agencies can most effectively work together to improve child and family outcomes resulting from joint investigations of child maltreatment.

Background Information: The use of law enforcement/child protective services investigative teams to respond to reports of child maltreatment has been identified as an important strategy for reducing trauma to the child victims. A number of communities are implementing such collaborative efforts and there is a need to study their effectiveness as compared to independent agency investigations. This priority area is not intended to address the use of multidisciplinary teams for case management. Rather, it is designed to examine collaborative arrangements between law enforcement/child protective services agencies where there is shared responsibility or the potential for overlapping reporting to both agencies with respect to the same case. HDS is interested in learning how representatives from these two agencies can most effectively work together to improve child and family outcomes.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Include a review of the literature as well as an empirical evaluation of the effectiveness of law enforcement agency/child protective services investigative teams in such areas as reducing the number of duplicative interviews; the interviewing process itself; expedited collection of data and evidence; reducing trauma to the child; increased treatment for the child, the family and the perpetrator; reducing the length in time for system decisions about placement, prosecution, or family reunification; and the successful disposition of cases.
- Address the types of cases that are most effectively handled by joint investigations, and the types of collaboration between the two agencies.
- Provide in the study design for a comparison of one or more jurisdictions in which law enforcement agency/child protective services investigative teams are used with those in which independent agency investigations are employed. Information should be obtained on current and/or previous use of joint investigative teams within the jurisdiction; the circumstances under which they have been utilized; and the use of written or informal agreements, their scope and content and how any developed protocols have been implemented. Information should also be obtained on the professional composition of the teams, the roles and functions of each member and their demographic characteristics, the types of cross-training provided team members, and the methods of operation employed by the teams. Other questions to be explored include team member and client perceptions about the joint investigation process, and the administrative or institutional barriers, if any, to the use of such teams.
- Describe the methodology to be used in carrying out the study including the overall research design to be employed, sampling procedures, kinds of data to be collected, procedures for data collection, the instruments and measures to be utilized, adapted or developed and plans for data analysis. (Successful applicants may be expected to collect some data elements in common.)
- Address implications of the findings for the training of law enforcement agency/child protective services professionals, including the knowledge and skills needed for such teams to effectively work with children, families and perpetrators in a sensitive and culturally appropriate manner.
- Describe the strategies that would be employed for the dissemination of the findings to, and their utilization by, appropriate agencies and organizations.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that at least one project will be funded.

3.19 Psychological Impact of Child Maltreatment

Eligible Applicants: State or local, public or nonprofit agencies, organizations or institutions.

Purpose: To identify the variables which exacerbate or ameliorate the psychological impact of child maltreatment on the victim in order to improve treatment services.

Background Information: A number of variables have been hypothesized to exacerbate or ameliorate the psychological impact of child maltreatment on the victim. Among these variables are age of the child when maltreated, severity and type of maltreatment, the child's coping abilities and resources, and responses to the maltreatment by parents and others in the environment. The field needs to improve its understanding of the relationship between these and other variables and the psychological sequelae of child maltreatment. This information will enable treatment providers and others to more accurately identify the most appropriate case-specific intervention and to identify victims in need of long-term treatment.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Describe how research currently in progress would be expanded to include a component that examines the issue of the psychological sequelae of child maltreatment on the victim. This research must be at a sufficiently early stage that such an expansion is feasible and practical, and should be designed to investigate the variables which are hypothesized to exacerbate or ameliorate the psychological impact of child abuse on the victim. Projects are encouraged to use existing operational definitions and assessment tools to describe and evaluate the psychological sequelae of child abuse and neglect.

• Demonstrate the ability to address such areas as:

—Different patterns of psychological sequelae for different types of child abuse and neglect.

—The relationship between the child's age and the impact of abuse on the child's developmental level and psychological functioning.

—Environmental, familial, and support system factors which reduce or intensify the amount of damage to a child's psychological functioning attributable to maltreatment.

—Parental behaviors that can ameliorate the effects of maltreatment on the victim's psychological functioning.

• Describe the methodology to be used in carrying out this study including the research design to be employed, sampling procedures, kinds of data to be collected, procedures for data collection, the instruments and measures to be utilized, adapted or developed and plans for data analysis.

• Describe the strategies that would be employed for dissemination to, and utilization of, the findings by other researchers and practitioners in the field.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share is $200,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that at least one project will be funded.

3.20 Empirical Evaluations of Treatment Approaches for Child Victims of Physical or Sexual Abuse

Eligible Applicants: State or local, public or nonprofit agencies, organizations, or institutions.

Purpose: To identify effective treatment approaches for child victims of physical or sexual abuse.

Background Information: From its inception, the National Center on Child Abuse and Neglect has supported studies of treatment approaches for child maltreatment and has funded demonstration projects addressing treatment issues and research studies with implications for treatment. HDS is proposing to build upon existing research findings and clinical innovations in order to identify the most effective treatment approaches for child victims. This information will be used to help treatment providers make better decisions about treatment options for child victims of maltreatment.

This priority area focuses only on treatment approaches for physical or sexual abuse (intrafamilial and/or extrafamilial). Demonstration projects on chronic neglect are currently underway, and HDS believes that the data from the evaluation of these projects on neglect should be studied before undertaking further efforts related to this type of maltreatment.

The participants in the recent Research Symposium on Treatment Approaches to Child Maltreatment pointed out that, while a great deal of treatment is occurring, little outcome data are available regarding the effectiveness of these treatment approaches. Information is needed regarding the outcomes of different types of treatment, of varying time frames, as related to different types of abuse and categories of children. Symposium participants noted the differential efficacy of treatment and long-term effects indicating the need for longitudinal studies.

HDS is interested in supporting controlled studies on the impact of a prticular treatment on a specific problem exhibited by physically or sexually abused children. Examples of problem behaviors and symptoms include aggression exhibited by physically abused children and fear and anxiety observed in sexually abused children. The treatment modality to be studied is to be clearly defined and targeted to ameliorate the identified problem. The specific professional groups administering the treatment should be detailed, including the use of multidisciplinary teams. The time course for treatment should also be specified.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Include a review of the literature and provide for an empirical evaluation of a particular treatment approach for child victims of physical or sexual abuse.

• Provide, at a minimum, for a two-year follow-up after treatment for all children in the study design. This means that treatment should be completed by the end of the third year of the project.

• Describe how outcome measures that are culturally relevant and developmentally appropriate and psychometrically sound instruments and multiple sources of information would be used.

• Describe the methodology to be used in conducting the study including the overall research design to be employed, sampling procedures, kinds of data to be collected, procedures for data collection, the instruments and measures to be utilized, adapted or developed and plans for data analysis.

• Demonstrate the ability to gain access to necessary information, data, and clients.

• Describe implications of the study for potential future replication and for practice.

• Describe the strategies that would be employed in disseminating project findings.

Project Duration: The length of the project must not exceed 60 months.

Federal Share of Project Costs: The maximum Federal share of the project for the first three years is not to exceed $150,000 per budget year. For the final two years, it is not to exceed $85,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that at least 1 project will be funded.

3.21 Synthesis and Utilization of Results of "Child Victims as Witnesses" Projects

Eligible Applicants: State or local, public or nonprofit agencies, organizations, or institutions.

Purpose: To analyze and synthesize results of projects related to the child abuse victim's participation as a witness in a court proceeding and to develop strategies for the dissemination of findings to the field.

Background Information: The National Center on Child Abuse and Neglect, the Department of Justice and other public and private organizations have funded research and other projects related to the ability of child abuse victims to function as witnesses on their own behalf. These efforts include research on the credibility and competency of children as witnesses, specialized interviewing techniques such as the use of anatomically correct dolls, and innovative judicial practices including statutory procedural reforms and videotaped depositions. There is a need to analyze and synthesize the findings from existing studies and materials related to the child victim witness and to disseminate this information to the field.

The findings from projects with similar objectives implemented by the public and private sectors, including foundations, universities and other agencies or organizations, should be included in the synthesis along with those from projects funded by the National Center and the Department of Justice. Two major resources for such information are the Clearinghouse on Child Abuse and Neglect Information, P.O. Box 1182, Washington, DC 20013, and the National Victim Resource Center, Box 6000–AIQ, Rockville, Maryland 20850.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, applicants should:

- Demonstrate an understanding of the literature and of the issues to be addressed in carrying out a review of existing projects on children as witnesses.
- Delineate how the major findings from these projects would be distilled and synthesized into reports and materials that are appropriate and useful to the needs of the various user groups and are responsive to the population groups represented.
- Describe the strategies that would be employed for the dissemination and utilization of these reports and materials by policy makers and practitioners from a range of disciplines including social work, health, mental health, and law.

Project Duration: The length of the project must not exceed 17 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $150,000 is $50,000 for a total cost of $200,000. This constitutes 25 percent of the total project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.22 Review of Existing Training for Judges to Improve the Criminal and Civil Court Intervention Process in Child Sexual Abuse Cases

Eligible Applicants: National, State or local, public or nonprofit agencies, organizations, or institutions.

Purpose: To review curricula and other training materials on child sexual abuse prepared for judges and to develop strategies for the delivery of such training.

Background Information: Child sexual abuse cases, particularly the investigative and prosecutorial procedures, present unique and complex issues for the child victim as well as for all responsible officials. Judicial proceedings are most likely to involve both criminal and civil courts, may be convened in family, juvenile or adult courts and may involve such issues as placement of the child victim, custody, visitation rights, and the prosecution or diversion of the alleged offender. Because of the growing number of child sexual abuse cases, there is an urgent need to bring clarity to an understanding about the unique problems related to the judicial handling of child sexual abuse victims. HDS is interested in supporting efforts which will review the existing body of work in the field of child sexual abuse training for judges and will develop strategies for synthesizing this information and for providing training to the judicial population.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Address both the criminal and civil court systems as they relate to child sexual abuse and be national (as opposed to State or regional) in scope.
- Describe how training curricula and models that have been developed and provided to judges, as well as documentation concerning the evaluation and effectiveness of these curricula, will be reviewed.
- Describe how areas in which existing training curricula and models are effective and useful as well as topics that are not included in available curricula and models but are needed in order to meet the training needs of judges will be identified.
- Describe how needed topic areas to be incorporated into the training curricula would be developed as would recommendations for training models and strategies for delivering this training to the appropriate groups.
- Propose the use of an advisory group of experts to provide advice and assistance on the implementation of the project.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of the Project Costs: The maximum Federal share of the project is not to exceed $100,000 per year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25 percent of the annual project budget.

Anticiated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.23 Strengthening of Leadership and Resources for Cultural Competence in Child Abuse and Neglect

Eligible Applicants: Public or private nonprofit agencies, organizations, or institutions with a history of serving multi-cultural or cross cultural populations at the national, regional or State level and with experience in addressing issues related to the prevention and treatment of child abuse and neglect. Collaborative applications are encouraged.

Purpose: To encourage and support the strengthening of cultural, ethnic, and racially diverse national leadership at the administrative, policy and practice levels in the field of child abuse and neglect.

Background Information: Leadership in the field of child abuse and neglect needs to be racially and culturally diverse so that services and programs are culturally appropriate for all children and families being served. HDS is interested in encouraging and supporting the strengthening of a leadership network to participate in decisions for minority children and families involved in child maltreatment. HDS is also interested in the

development of exemplary methods and resources that are sensitive to racially and culturally diverse populations. Proposed projects should identify strategies and information to help institutions and organizations to (a) assess their levels of cultural competence, (b) secure the materials and information needed to increase culturally sensitive service delivery, and (c) recruit, nurture, and train minority staff in leadership and decision making roles.

Minimum Requirements for Project Design: Applicants must propose strategies and activities that focus on the following:

(1) *Strengthening Leadership:* The project should assist in identifying and supporting a national group of ethnically and racially diverse individuals and organizations who are prepared to take an active leadership role in the field of child abuse and neglect at the national, regional, and State levels.

(2) *Networking:* Applicants should address how they would identify and link with existing networks of ethnically and racially diverse individuals and organizations in the field of child abuse and neglect which have the capacity to promote professional development, provide training and technical assistance in service delivery, and foster interaction among researchers, trainers, clinicians, and administrators in varying professions.

(3) *Identifying and Promoting Existing Resources:* Applicants should address how they would assess the existing knowledge base on child abuse and neglect in terms of its comprehensiveness and identify areas that need to be enhanced. Applicants should also address strategies for the synthesis, dissemination and utilization of data, research findings, information on system improvements, model programs, training projects and other resources relevant to racial and ethnic minority cultures as they relate to child abuse and neglect.

Additionally, in order to successfully compete under this priority area, the application should:

- Describe how the National Clearinghouse on Child Abuse and Neglect Information, the National Resource Centers, key national organizations, the national Advisory Board on Child Abuse and Neglect and Inter-Agency Task Force on Child Abuse and Neglect and other such ongoing efforts would be involved in promoting the utilization of project results by the field.
- Address the four major racial and ethnic minority groups: Black, Hispanic, Native American and Asian.
- Propose a racially and culturally diverse staff at all levels of the organization and describe the capability, experience and capacity of the applicant organization to address the objectives and three foci of this priority area.
- Propose the establishment of an Expert Task Force which will be actively used to advise the project.

Project Duration: The length of the project must not exceed 48 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $250,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $250,000 is $83,333 per budget year for a total project cost of $333,333 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.24 National Information Clearinghouse on Disabled Infants with Life Threatening Conditions

Eligible Applicants: National organizations that have statewide networks which are knowledgeable about, and have experience with, the delivery of services or support to the disabled population. Applicants must have the capacity to ensure that their networks' services and support will cover all 50 States.

Purpose: To prevent the abuse and neglect of disabled infants with life-threatening conditions by:

- Assisting State, regional or local networks in the development and updating of directories of information on services to disabled infants with life-threatening conditions and their families within the geographic areas served, including medical treatment procedures and resources, community services and resources for legal, social services, financial, advocacy and parent support services.
- Developing and implementing strategies for the dissemination of information on the medical treatment procedures, services and support available to disabled infants with life threatening conditions, their families and other interested professionals through these networks.
- Establishing an advisory group of national organizations concerned with the provision of medical treatment, services or support to the target population which can assist the Clearinghouse in determining the most appropriate ways to satisfy the informational needs of professionals and families of disabled infants with life-threatening conditions.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Provide evidence of knowledge and experience with the provision of medical treatment, support and services to the disabled infant population, and specifically demonstrate an understanding of the needs of the target infant population and their families.
- If the requirements of this effort are to be carried out in conjunction with other organizations, specify plans for this coordination, including plans for ensuring coverage in *all* States.
- Describe strategies for involving projects and contacts such as the Early Intervention Program funded by the Administration for Developmental Disabilities, other University Affiliated Programs, State Liaison Officers for Child Abuse and Neglect, and other public and private organizations concerned with medical treatment and advocacy for and protection of disabled infants.
- Describe strategies for providing consultation and assistance to the network of organizations and specify how efforts will result in attainment of the project goals.
- Describe strategies for informing the public and, more specifically, interested individuals, groups and organizations of the available services and support through the Clearinghouse network.
- Describe strategies for providing information about activities and services provided to target infants, families and others as part of this effort.
- Provide information on the make-up of the advisory group and letters of commitment from the national organizations involved.

Project Duration: The length of the project will be five years.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $250,000 for the first year and $200,000 for each subsequent year of the grant.

Matching Requirement: The minimum non-Federal matching requirement for the first year in proportion to the maximum Federal share of $250,000 is $83,333; for subsequent years the minimum non-Federal matching requirement in proportion to the maximum Federal share of $200,000 is $66,667. At these proportions, total project costs would be $333,333 for the first year and $266,667 for subsequent years. The non-Federal match constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 1 project will be funded.

3.25 FY 1991 National Conference on Child Abuse and Neglect

Eligible Applicants: State or local, public or nonprofit agencies, or organizations with demonstrated and recognized leadership in the field of child abuse and neglect and an interest and capacity to work with local, State and national agencies and organizations in establishing a coordinated effort for sponsoring and conducting the Ninth National Conference on Child Abuse and Neglect.

Purpose: To support the planning for and conduct of the Ninth National Conference on Child Abuse and Neglect.

Background Information: National Conferences on Child Abuse and Neglect are held approximately every two years, and are designed to provide opportunities for a broad range of professionals, advocates, volunteers, and concerned citizns to interact with leaders in the field. Each conference is organized around a theme. The theme of the Eighth National Conference, held in October 1989, for example, was "Off the Beaten Path," and was designed to stimulate new thinking on how to put an end to child maltreatment. The conference sessions, which are interdisciplinary in nature, focus on a wide variety of issues related to research, policy, programs and practice.

The field has requested that the Ninth National Conference be scheduled in the Fall of 1991. Past conferences have lasted approximately three days and have consisted of plenary and workshop sessions organized around major policy, research and programmatic themes. Approximately 2,000–3,000 persons, representing a broad spectrum of professionals and volunteers, have attended.

Central to the success of past conferences has been the organization and development of the conference at the local site, the raising of funds to support special events and scholarships, and the joint planning of the conference among participants at the local site, national organizations in the field, and the National Center on Child Abuse and Neglect. The successful applicant is responsible for garnering both public and private sector involvement in this effort. Past conferences have been held in Salt Lake City, Utah; Chicago, Illinois; Baltimore, Maryland; Milwaukee, Wisconsin; Los Angeles, California; New York, New York; Houston, Texas; and Atlanta, Georgia. Preference will be given to applications that identify a site other than those where previous conferences have been held.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

- Include organization and management plans to prepare for the conference, including the identification and involvement of agencies, organizations and individuals from the public, voluntary and private sectors that are willing to participate in the planning and implementation of the conference, both within the State and nationally.
- Identify contributions and leadership involvement that can be expected by participating sponsors and organizations in regard to funds, space, personnel time and other administrative costs.
- Identify the conference site and discuss hotel and conference/meeting space available in the proposed location and the prices and quality of these facilities.
- Include plans for development of a theme, call for papers and development of an agenda for the plenary sessions, workshops, and technical forums reflecting critical issues in the field and state-of-the-art findings in policy, research and practice.
- Discuss preparation of a resource book and program for the conference.
- Include special efforts to address (a) issues of cultural, ethnic and racial diversity and leadership throughout the planning, design and implementation of the conference; and (b) involvement of a variety of disciplines and professions (social work, medicine, health and mental health, law, the judiciary and law enforcement, child development and child care) in the planning, convening and attendance at the conference.
- Include plans for a film and videotape forum, exhibits and resource tables.
- Discuss proposed satellite events and activities (both educational and social) to be held in conjunction with the national conference.
- Provide for an evaluation plan of the conference and its component sessions.
- Provide for the preparation of tapes of the conference proceedings including papers prepared on critical issues in the field for dissemination.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 per budget period for a total project cost of $133,333 for each of two years. This non-Federal match constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that one project will be funded.

3.26 Field Initiated Research for Child Abuse and Neglect

Eligible Applicants: State or local, public or nonprofit agencies, organizations, or institutions.

Purpose: To support new research initiated by researchers in the child abuse and neglect field designed to carry out the recent legislative responsibilities established for the National Center on Child Abuse and Neglect. These responsibilities include the conduct of research on the causes, prevention, identification and treatment of child abuse and neglect, and on appropriate and effective investigative, administrative and judicial procedures in cases of child abuse, particularly child sexual abuse.

Background Information: There is an ongoing need to generate new knowledge and an understanding of critical issues in the field in order to improve its capacity to prevent and treat child abuse and neglect. This priority area enables researchers to expand the current knowledge base, build on prior research, contribute to the development of programs and practice and provide insights into new approaches to the prevention and reduction of the problem.

Consideration will be given to secondary analyses of national databases such as data from the 1986 Study of the National Incidence and Prevalence of Child Abuse and Neglect. Public use data tapes and the documentation manual from this study are available from the Clearinghouse on Child Abuse and Neglect Information, P.O. Box 1182, Washington, D.C. 20013. Information on other available databases can be obtained from the National Data Archive on Child Abuse and Neglect at Cornell University, Family Life Development Center, E200 MVR Hall, Ithaca, New York 14853–4401. Research on already existing demonstration projects or clusters of demonstration projects will also be considered as will other proposed research projects which have direct application to the field of child abuse and neglect.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Describe how the proposed research addresses current and emerging issues that have direct application to the field of child abuse and neglect within the context of the National Center's legislative responsibilities.

• Indicate, if longitudinal studies are to be addressed, the willingness to cooperate with the NCCAN-sponsored Consortium for Longitudinal Studies of Child Maltreatment that seeks to aggregate compatible projects into a longitudinal study database.

• Demonstrate an indepth understanding of the issues and problems associated with child abuse and neglect and provide an up-to-date review of the relevant literature.

• Propose an approach that is comprehensive and culturally responsive to the populations included in the study.

• Describe the overall research design to be employed including sampling procedures, kinds of data to be collected, procedures for data collection, the instruments and measurements to be utilized, adapted or developed and the plans for data analysis; and demonstrate the ability to gain access to necessary information, data, and clients.

• Describe strategies for the dissemination of the findings in a manner that will be of use to other researchers and practitioners in the field.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $150,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that at least 1 project will be funded.

Head Start Bureau

3.27 Head Start Program Improvement Demonstrations

Eligible Applicants: Head Start grantees and delegate agencies.

Purpose: To conduct locally-based and locally-designed demonstration efforts to improve the quality of the Head Start program and to benefit children and their families during and after their Head Start experience.

Background Information: Since the inception of Head Start in 1965, most demonstration projects have been carried out either on a national level addressing national policy issues or on the local level by individual researchers/university staff addressing the interests of the research and early childhood development communities. Through this initiative, Head Start will support the investigation of issues that have practical relevance in meeting the needs of local grantees and in improving program quality. Project results should also benefit nonparticipating programs which have similar needs and concerns, and provide the Head Start Bureau with more clarity and insight into the efficacy of various options.

The specific issues to be addressed will be at the discretion of the individual program applying for a grant. The project objectives, however, must be linked to an identifiable problem and to the need for improvement in Head Start quality.

An issue of particular interest relates to improving the transition between Head Start and the public school system and to sustaining the gains made by Head Start children as a result of Head Start through the early grade school years. Also of interest is improving coordination between Head Start agencies and agencies implementing the Family Support Act to enable both to better serve AFDC families. Other topics of interest are improving parent involvement; improving educational practice, including more effective methods for training Head Start staff to utilize modern technology in serving children with disabilities; improving health and social service delivery to Head Start families; and increasing the utilization of community resources.

Projects funded under this priority area may be carried out on an individual program basis or in collaboration with other programs. Collaborative efforts may be proposed when grantees wish to undertake a coordinated exploration of issues of common interest.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Describe the project's objectives and the need for the effort.

• Identify the expected outcomes and the potential contribution of such results to improved program practices and/or policies.

• Describe the procedures to be used in carrying out the required tasks including how an independent evaluation of the project will be conducted. The involvement of any other programs, consultants or organizations, along with a brief description of their roles, must also be addressed.

• Identify the dissemination activities to be undertaken to make the knowledge, information or materials developed under the project available to other Head Start and non-Head Start programs.

• Describe the responsibilities of the project's personnel along with their training and previous experience in conducting projects similar to the one being proposed.

• Describe any collaborative arrangements with other grantees and/or delegates and explain the benefits of these arrangements. Letters of agreement from other participating Head Start grantees must be included. Also to be included is a management plan outlining activities, timelines and responsible parties.

• Provide information on any proposed agreements with other organizations, research foundations, and/or colleges or universities to provide any technical assistance that the program will need in implementing the project.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $50,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $50,000 is $16,667 for a total project cost of $66,667 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 8 projects will be funded.

3.28 Head Start and Research Institution Partnerships

Eligible Applicants: Colleges, universities and other organizations with the capability to conduct research in collaboration with Head Start programs.

Purpose: To develop new knowledge that will enhance the effectiveness of Head Start and other early childhood programs in serving children and families.

Background Information: An important part of Head Start's mandate is to serve as a model demonstration project for the development and dissemination of new knowledge which will continually improve Head Start services and inform other early childhood programs. Given the growth of the Head Start program over the past decade as well as the many problems facing low-income families in today's society, creative research is needed to learn how early childhood programs can most effectively address the needs of children and their families.

Examples of areas of research interest include program variables which have the most beneficial impact on child development and family functioning, the

relationship between learning styles and other child and family characteristics, and the program variables which most effectively foster family self-sufficiency.

ACYF is interested in funding projects which actively engage universities or other research institutions in early childhood and family research and demonstration efforts using Head Start programs as the study sites.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Pose one or more research hypotheses to be examined with a scientifically appropriate and rigorous research/evaluation design. The proposed research questions must relate to enhancing program quality and to the factors most likely to affect outcomes for children and families.

• Include the identification of the candidate Head Start programs with which the applicant institution would work in conducting the research.

• Describe the population served including size, ethnicity, income levels, percent of single parent families, welfare status, and related information.

• Provide assurances of the local Head Start programs' willingness to participate in and to comply with all aspects of the research design (e.g., random assignment of subjects).

• Describe how other research funds will be used to augment the research for which the applicant is seeking Federal assistance.

Project Duration: The length of project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget year.

Matching Requirement: There is no matching requirement.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

3.29 Increasing Higher Education Opportunities for Head Start Component Coordinators at Historically Black Colleges and Universities

Eligible Applicants: Historically Black Colleges and Universities (HBCUs) as defined in Executive Order 12677 which offer courses of study in the areas of human services delivery, early childhood education and care, health care services, and/or human resources development that lead to a bachelor's or master's degree. Preference will be given to those schools that serve geographic areas with limited educational resources.

Purpose: To assist HBCU's to improve the quality and long-term effectiveness of Head Start programs by developing models of advanced training for Head Start education, health, social services and parent involvement coordinators who are currently employed in rural or isolated Head Start programs within the geographical area served by that college or university.

Background Information: The overall goal of Head Start is to bring about a greater degree of social competence in the children of low-income families.

In order to accomplish this goal, Head Start provides comprehensive services to low-income children and their families. These services include education, health, social services and parent involvement. Typically, each service component is administered by a component coordinator. Many of these coordinators need specialized training to adequately implement a quality Head Start program.

These projects will improve the capacity of Historically Black Colleges and Universities to provide degree level training to Head Start staff. The projects funded under this priority area should benefit both Head Start and HBCUs.

Minimum Requirements for Project Design: In order to successfully compete under the priority area, the application should.

• Indicate that participating colleges have current credit courses in the areas of community health services, education and early childhood development including infant/toddler development, social services, parent involvement, and/or human resources development.

Indicate that the course work is contextually and culturally relevant to the Head Start environment and available to all interested and eligible Head Start program coordinators.

• Ensure that the Head Start coordinators participating in this training are full-time employees, in good standing, who have not completed their bachelor's or master's degrees and who have made a commitment to remain with Head Start for at least one year after completion of their training program.

• Describe the relevant curricula to be used; how courses will be scheduled; how students can earn credits and degrees; what support services, if any, would be provided to the students; the number of students to be involved (a minimum of 10 students must be trained per project during the grant period); the recruitment strategies to be employed; and plans for the evaluation of and the dissemination of information about the project.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $50,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal Share of $50,000 is $16,667 for a total project cost of $66,667 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

Family and Youth Services Bureau

The Family and Youth Services Bureau published proposed program priorities for the Runaway and Homeless Youth Program in the **Federal Register** on September 18, 1989. Comments from the public were received and reconciled, and the final program priorities were published in the **Federal Register** on January 5, 1990. As appropriate, the comments received are reflected in the priority area statement below.

3.30 Cooperation Between Law Enforcement Agencies and Runaway and Homeless Youth Centers

Eligible Applicants: States, localities, and private non-profit entities (and combinations of such entities).

Purpose: To increase communication between local law enforcement agencies and runaway and homeless youth centers; to improve collaboration, referrals, and services for runaway and homeless youth and other at-risk youth and their families; and to reduce unnecessary adjudication and incarceration of these youth.

A non-punitive approach, coordinating the activities of both runaway and homeless youth centers and law enforcement agencies, is intended to conform with the legislative requirements of the Runaway and Homeless Youth Act. The Act mandates that runaway and homeless youth be provided services by agencies outside of the law enforcement structure and the juvenile justice system.

Background Information: The placement of runaway and homeless and other at-risk youth in detention centers is both an inappropriate and a costly way of handling the crises that these populations encounter. Shelters for runaway and homeless youth, having established ties with community and service organizations, provide a natural framework for crisis intervention as they have experience in providing temporary housing and placement in stable living conditions as well as facilitating family reunification.

Law enforcement agencies often are the first to come in contact with a large number of runaway and homeless youth. Consequently, collaborative, systematic referrals by law enforcement personnel to established centers for runaway and homeless youth can more effectively meet the service needs of such youth.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Identify and describe existing barriers to police/center cooperation.

• Describe how new methods of improving cooperation, particularly in rural areas, would be developed, tested and evaluated.

• Describe how resource materials designed to institutionalize cooperation between law enforcement and youth service professionals would be developed and how these models would be disseminated within the law enforcement and youth service sectors.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $75,000 per budget year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $75,000 is $25,000 for a total project cost of $100,000 per year. This constitutes 25% of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 2 projects will be funded.

4. Office of Policy, Planning and Legislation

4.1 Mentors for Adolescent Foster Care Children

Eligible Applicants: State or local governments, universities, private foundations, voluntary or non-profit organizations, and national, regional or statewide foster family organizations.

Purpose: To support effective and innovative program strategies that use mentorships to assist adolescents who have graduated from the foster care system. Of particular interest are programs dealing with adolescent black males.

Background Information: Older adolescents in foster care often encounter difficulty in making a successful transition to independence, as they attempt to enter the labor force or continue academic training. Often they lack the parental support system and positive role models many other adolescents experience in a stable family environment.

Under the foster care program, maintenance payments generally end when the child reaches age 18, although some States continue to provide aid to high school students over age 18. The Independent Living services program was enacted in 1986 to provide services to facilitate the transition of children ages 16 and over from foster care to independent living.

The services funded under the Independent Living program include those that enable participants to obtain a high school diploma or receive vocational training; and to receive training in daily living skills, such as budgeting, career planning, or locating housing.

In 1988, HDS funded several projects involving mentors in the Independent Living Program. Although HDS is interested in funding new demonstration projects, applicants are expected to build upon the experiences of previously funded projects and the Independent Living Program. The initial program evaluations have found that there are several crucial components of a successful program:

• Training sessions for mentors and adolescents;

• A process for screening and recruiting volunteer mentors that includes a background check;

• Program commencement prior to their graduation from foster care;

• Employment components; and

• Public-private partnerships with either employers or academic institutions.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Describe the approach to recruitment and screening of potential mentors.

• Establish that the applicant organization will work with State and local agencies to identify and match adolescents with mentors.

• Describe how the foster care mentor program will complement and enhance current services to adolescent foster care graduates.

• Establish procedures and criteria for training and stipends (if applicable) to be provided to mentors.

• Provide for an evaluation component which assesses the effectiveness of the proposed strategy in achieving the desired objectives.

• Indicate how the applicant will ensure that foster care graduates can receive training or employment. Applicants should specify agreements with either colleges, vocational training institutions, universities or work sites.

Project Duration: The length of the project must not exceed 24 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $75,000 per year.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $75,000 is $25,000 for a total project cost of $100,000 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

4.2 Comprehensive Early Intervention Strategies to Prevent Homelessness among At-Risk Families

Eligible Applicants: State and local government agencies and locally-based private nonprofit organizations or any combination of such entities concerned with the problems of homelessness.

Purpose: To maximize the utilization and impact of all available community-based resources and programs in addressing the problems of low-income families who are either at-risk of becoming homeless or have recently (six months or less) become homeless; and to better link these families to appropriate early intervention programs and existing services in the community and target these services to identified problems and needs associated with homelessness, such as the lack of affordable housing, unemployment, underemployment, substance abuse, poor physical and mental health, inadequate skills and education. The ultimate goal is to enable these at-risk families to obtain and sustain social and economic self-sufficiency.

Background Information: Although little systematic national data are currently available, we estimate that homeless families comprise 20–25 percent of the homeless population. Children are the inevitable victims of this cruel condition which can adversely impact their health, individual aspirations, and future lives. A June 1989 Report to Congress from the General Accounting Office found that "on any given night, about 68,000 children and youths of age 16 or younger may be members of families that are literally homeless." This finding is consistent with a previous Urban Institute report in 1988 which found that in cities with a population of 100,000 or larger, approximately 13 percent of the homeless who used available services, or 86,000 individuals, were children.

Recognizing that the key to the solution of homelessness is not only helping the families who are homeless

now but working to prevent it in the future, a variety of Federal programs can now be used to prevent homelessness among families at risk of losing permanent housing as well as providing emergency assistance to those who become homeless.

Over the past few years, there have also been increasing efforts by State and local governments, as well as the private sector, to address the temporary and permanent housing needs of homeless families. A 1988 National Survey of Shelters for the homeless found that national spending on shelters alone increased from approximately $300 million in 1984 to $1.5 billion in 1988. There are also many programs in local communities which focus specifically on individuals and families at risk of eviction and homelessness. For example, through a Memorandum of Understanding, the Department of Health and Human Services and the Department of Housing and Urban Development are undertaking a series of coordinating activities to address these issues. This will include their participation in the recommendation process for this priority area.

Although innovative in design, these programs may not be systematically and effectively coordinated at the community level. What seems to be lacking is a comprehensive, city or county-wide and coordinated approach that would mobilize and maximize the utilization and impact of all available public and private resources. This approach should facilitate services integration and allow flexibility at the delivery level in designing and targeting services to respond to the widely varying and multiple needs of the target families in a manner that promotes self-sufficiency in the long term.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Include, as a critical element, the establishment of new, or strengthening of existing, city- or county-wide coordination mechanisms and public/private partnerships involving all relevant sectors and institutions within the community including those concerned with education, employment, health, housing and social support services for the target population. Such a mechanism should be capable of ensuring efficient and effective field-level cooperation and coordination.

• Present specific plans for, and demonstrate the ability to achieve, the involvement of all relevant housing, nutrition and child care, health, education, employment and training programs and services, including those funded under the McKinney Act, in the planned coordination and effort to provide the needed housing and services. Relevant community institutions, including those in the public and private sectors and religious and charitable organizations, also must be involved.

• Provide a description of the management systems and service delivery methods to be deployed by the project. This includes management information systems; case management services; outreach assistance in gaining access to appropriate support services in the community; working with the private sector in developing mentorship, internship and employment opportunities; and obtaining services to meet the special needs of the children.

• Include measurable and attainable project objectives, justification of the relative effectiveness and efficiency of the proposed approach, and provision for a third-party process and client outcome evaluation.

• Include a description of how the target families will be identified and what preventive strategies will be used. For the purposes of this priority area, the term "family" means a social unit consisting of one or both parents with preteen children under the age of 13.

• Describe methods for determining individual family needs and ensuring a flexible mix of housing, training, employment and social support services to meet those needs.

• Include a client tracking system and a process for providing follow-up services.

• Present evidence of commitment of local elected officials, local public housing agency (designating a number of housing vouchers or certificates), and other appropriate State and local public and private organizations.

• Describe specific methods to be used by the project to:

—Achieve flexibility in meeting the needs of various types of target families
—Develop needed housing, health, employment and other social services where there is a shortage
—Continue project operations beyond the grant period, if the project proved to be successful

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per 12-month budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 to 5 demonstration projects will be funded.

4.3 Transfer of International Innovations

Eligible Applicants: There are no eligibility restrictions for applications in this priority area. Applicants in other countries are eligible to apply.

Purpose: To improve the quality, accessibility and accountability of social service programs in the United States by transferring to this country innovations occurring in social service delivery systems in other countries, particularly in the areas defined in Part I: coordinated services, innovative services, literacy, permanency planning, and self-sufficiency.

Background Information: While the United States is a natural field for research and demonstration in the area of social services, we can gain considerable insight from other countries through a knowledge of their social service programs, authorizations, governance, and delivery systems. Transferring these innovations can lead to an enhancement of, or adaptations to, our domestic social service activities. The "Transfer of International Innovations" priority area has been included in three of the previous CDP announcements. Thirteen projects were funded. The titles of these projects and the grantees are:

• "Income Generating Projects for the Aging—The Transfer of Innovations" by the American Association for International Aging;

• "Increasing Self-Sufficiency and Self-Esteem in Old Age through Employment: The Japanese Experience" by Heller Graduate School of Social Work, Brandeis University;

• "Transfer of International Innovations in Home Care for the Elderly" by Columbia University School of Social Work;

• "Demonstration Project Using the Villar Model for Working with the Latino Family" by Familia Latino Family Resource Center in Washington, DC;

• "Application of the Tracer Method to Study and Improve Quality of Care in Domiciliary Care Facilities" by the State of Florida Department of Health and Rehabilitative Services;

• "To Improve the Learning and Living Environment of Children in Underprivileged Communities in Israel and the U.S.—An International Exchange of Services and Training" by

the Jewish Federation of Greater Kansas City;

• "Job Placement for Low-Income Unemployed Youth—Information Transfer Project" by the Kentucky River Foothills Development Council;

• "Community-Based and In-Home Services for Frail and Economically Disadvantaged Elderly Program Between the Cities of Los Angeles and Jerusalem—International Transfer" by the Jewish Federation Council of Los Angeles;

• "Home-Based Intervention for Low-Income Minority Preschool Children and Mothers: Head Start and HIPPY in Florida—International Transfer" by the University of Miami;

• "Community Self-Help Associations: Mediating Structures for Volunteers/Professionals: A Crossnational International Transfer of Technology Project" by the Center for Research of Social Organizations at the University of Michigan; "Reducing Violence Towards U.S. Children: Transferring Positive Innovations from Sweden" by the University of Wisconsin at Milwaukee;

• "Opening Technology to the Developmentally Disabled: An International Research Project Between the United States and Israel" by the University of California at Santa Barbara; and

• "Shepherd Spinal Center/ALYN Hospital International Spina Bifida Program" by the Shepherd Center for Spinal Injuries.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application must:

• Have the promise of contributing significantly to the achievement of one or more of the major HDS goals and be of benefit to one or more of the HDS target groups—Native Americans, the socially and economically needy, the elderly, the developmentally disabled, and at-risk children, youth, and families.

• Be relevant to domestic research with the possibility of complementing ongoing or new projects in the United States.

• Relate to the U.S. commitment to its participation in international organizations, both governmental and nongovernmental, and to United Nations-sponsored events, such as International Youth Year, follow-up to the World Assembly on Aging and the UN Decade of Disabled Persons.

• Include an adequate mechanism to allow for wide dissemination and replication of project findings.

• Indicate a focus either in the United States or shared with the transferring country. The focus cannot be be exclusively in another country. The application must include an American component and American co-project director.

Project Duration: The length of the project must not exceed 36 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $100,000 per budget period.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $100,000 is $33,333 for a total project cost of $133,333 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that 3 projects will be funded.

4.4 Training and Technical Assistance for Family Violence Prevention and Services Programs

Eligible Applicants: National, Regional, or State Coalitions/Councils of State Directors; or State Associations of Directors of Family Violence Programs; or entities and organizations with national level expertise in family violence technical assistance and training. Applicants should include as active participants, Directors or representatives of family violence prevention programs for Indian Tribes in the regional area for which the application is made.

Purpose: To provide training and technical assistance, on a multi-State basis, for personnel involved in the conduct of programs for the prevention and treatment of family violence, particularly in those States not previously provided such assistance. Those States include:

Minnesota	Montana
Iowa	Idaho
Missouri	Wyoming
North Dakota	Colorado
South Dakota	New Mexico
Kansas	Arizona
Utah	Nevada

Background Information: Programs to prevent family violence and to provide shelter and assistance to victims and their dependents have been established in all States. Under the Family Violence Prevention and Services Act, HDS provides financial support for such programs to all States and to approximately eighty Indian Tribes.

Typically, a program has been established by a local public or non-profit agency (including religious and voluntary associations) to provide emergency shelter and related assistance to victims of family violence and their dependents. Adjunct services such as counseling and health care may also be available in the community. Family violence shelters have a strong, local community-grass roots etiology, are usually short of staff, and have limited time in which to develop program and administrative efficiencies. From discussions with program operators, practitioners, and professionals in the field, we discovered that the most useful activity at this stage may be to support direct technical assistance to the program operators.

The applicant may secure additional information on the priorities, specific strategies, and products of previous family violence technical assistance and training grants by contacting the following organizations which are or have been grantees:

Connecticut Coalition Against Domestic Violence, 22 Maple Avenue, Hartford, Connecticut 06144, (203) 524-5890;

Georgia Network Against Domestic Violence, 250 Georgia Avenue, Suite 344, Atlanta, Georgia 30312, (404) 524-3847;

Pennsylvania Coalition Against Domestic Violence, 2505 North Front Street, Harrisburg, Pennsylvania 17110-1111, (717) 234-7353;

National Coalition Against Domestic Violence, P.O. Box 15127, Washington, D.C. 20003-0127, (202) 638-6388;

New Jersey Coalition for Battered Women, 308 West State Street, Trenton, New Jersey 08618, (609) 695-1758;

New York State Coalition Against Domestic Violence, 5 Neher Street, Woodstock, New York 12498, (914) 679-5231.

Applicants are encouraged to contact William Riley at (202) 245-2892 for additional information concerning this priority area.

Minimum Requirements for Project Design: In order to successfully compete under this priority area, the application should:

• Be responsive to the identified priority needs of the participating agencies and organizations, e.g., States, State Coalitions Against Domestic Violence, local public and non-profit agencies and organizations operating emergency shelter and related assistance programs, and Indian Tribal family violence programs. The applicant must clearly articulate those needs and present evidence of sufficient expertise to provide the training and technical assistance.

• Provide evidence of familiarity with and ability to utilize various methods to provide training and technical assistance including local, State, and regional workshops and conferences; collecting, developing, and distributing manuals and related how-to documents; utilizing newsletters, computer networks, and electronic bulletin boards; and utilizing human resource libraries, family violence-related clearinghouses, and field experts.

• Describe clearly the training and technical assistance to be provided, e.g., seminars or workshops on model programs, management and operational techniques, community relations, fund raising, the delivery of specialized services, contract management, program standards, outreach efforts, or victim advocacy.

• Describe how the considerable family violence prevention and service expertise available at the national, State and local levels will be used.

• Describe the plans for establishing an on-going process of coordination and peer assistance that will continue beyond the Federal funding period.

Project Duration: The length of the project must not exceed 12 months.

Federal Share of Project Costs: The maximum Federal share of the project is not to exceed $30,000 per project.

Matching Requirement: The minimum non-Federal matching requirement in proportion to the maximum Federal share of $30,000 is $10,000 for a total project cost of $40,000 per year. This constitutes 25 percent of the annual project budget.

Anticipated Number of Projects to be Funded: It is anticipated that no more than 2 projects will be funded.

Part III—General Information and Basic Guidelines for the Development, Submission and Review of Applications

This part contains general information and the basic guidelines for submitting applications in response to this announcement. Application forms are provided along with detailed instructions for developing and assembling an application package for submittal.

Potential applicants should read this section carefully in conjunction with the information contained within the specific priority area under which the application is to be submitted. The priority area descriptions are in part II.

A. General Information

1. Review Process and Funding Decisions

Applications that are submitted by the deadline date and which meet the screening criteria will be reviewed and scored competitively. Experts in the field, generally persons from outside of the Federal Government, will use the evaluation criteria listed later in this part to review and score the applications. The results of this review are a primary factor in making funding decisions.

HDS reserves the option of discussing applications with, or referring them to, other Federal or non-Federal funding sources when this is determined to be in the best interest of the Federal Government or the applicant. HDS may also solicit comments from other Federal agencies, Central and Regional Office staff, interested foundations, national organizations, specialists, experts, States and the general public. These comments, along with those of the expert reviewers, are considered by the Assistant Secretary for Human Development Services and the HDS Senior Staff in making funding decisions.

In making decisions on awards, the Assistant Secretary and the HDS Senior Staff may give preference to applications which focus on or feature: minority populations; a substantially innovative strategy with the potential to improve theory or practice in the field of human services; a model practice or set of procedures that holds the potential for utilization by organizations involved in the administration or delivery of human services; substantial involvement of volunteers; substantial involvement (either financial or programmatic) of the private sector; a favorable balance between Federal and non-Federal funds available for the proposed project; the potential for high benefit for low Federal investment; a programmatic focus on those most in need; and/or substantial involvement in the proposed project by national or community foundations.

To the greatest extent possible, efforts will be made to ensure that funding decisions reflect an equitable distribution of assistance among the States and geographical regions of the country, rural and urban areas, and ethnic populations. In making these decisions, the HDS Senior Staff may also take into account the need to avoid unnecessary duplication of effort.

The Assistant Secretary for Human Development Services and the HDS Senior Staff will make the final selection of grantees. In making funding decisions, they will consider the results of the competitive review, all comments from interested parties, and the factors specified in the previous two paragraphs.

2. Required Notification of the State Single Point of Contact (SPOC)

It is imperative that the applicant submit all required materials to the Single Point of Contact (SPOC) and indicate the date of this submittal (or date SPOC was contacted, if no submittal is required) on the SF 424, item 16a. SPOC will be notified of any applicant not indicating SPOC contact on the application, when SPOC contact is required. SPOCs have sixty (60) days starting from the application deadline to comment on applications for financial assistance under this program. Comments are, therefore, due from the SPOC no later than July 10, 1990.

These comments are reviewed as part of the award process. Failure to notify the SPOC can result in a delay in grant award. This process of notifying the State Single Point of Contact is required when a program is covered under Executive Order (E.O.) 12372 "Intergovernmental Review of Federal Programs" and 45 CFR part 100 "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs. Therefore, the applicant should contact his or her SPOC directly to determine what materials, if any, the SPOC requires. Contact information for each State's SPOC is found at the end of this part.

All States and territories, except Alaska, Idaho, Kansas, Minnesota, Nebraska, American Samoa and Palau, have elected to participate in the Executive Order process and have established SPOCs. Applicants from these seven areas need take no action regarding E.O. 12372. Applications for projects to be administered by federally-recognized Indian Tribes are also exempt from the requirements of E.O. 12372.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to differentiate clearly between mere advisory comments and those official State process recommendations which they intend to trigger the "accommodate or explain" rule. It is helpful in tracking SPOC comments if the SPOC will clearly indicate the applicant organization as it appears on the application SF 424. When comments are submitted directly to HDS, they should be addressed to the application mailing address located in part I of this announcement.

3. Notification of State Developmental Disabilities Councils

When the proposed project's target population includes individuals with developmental disabilities (i.e., priority areas 1.1, 1.2, 1.3 and 1.4), the applicant is required, under the Developmental Disabilities Act (Pub. L. 100–146, part E, section 162B), to submit a copy of the application to the appropriate State Developmental Disabilities Council for review and comment. A list of the Councils by State is provided at the end of this part. The Council will forward its comments directly to the Administration for Developmental Disabilities. This requirement is in addition to the SPOC notification required under the provisions of E.O. 12372.

B. Deadline for Submittal of Applications

The closing date for submittal of applications under this program announcement is May 11, 1990. Applications must be either postmarked or hand-delivered no later than May 11, 1990, to the address indicated in part I of this announcement.

Hand-delivered applications will be accepted Monday through Friday prior to and on May 11, 1990, during the working hours of 9:00 a.m. to 5:30 p.m. in the lobby of the Hubert H. Humphrey building located at 200 Independence Avenue, SW., in Washington, DC. When hand-delivering an application prior to the May 11, 1990 deadline, call (202) 755–4560 from the lobby for pick up. A staff person will be available to receive applications.

An application will be considered as meeting the deadline if it is either:

1. Received at, or hand-delivered to, the mailing address on or before May 11, 1990, or,

2. Postmarked before midnight of the deadline date, May 11, 1990, and received in time to be considered during the competitive review process (within four weeks of the deadline date).

When mailing proposal packages, applicants are strongly advised to obtain a legibly dated receipt from a commercial carrier (such as UPS, Federal Express, etc.) or from the U.S. Postal Service as proof of mailing by the deadline date. If there is a question as to when an application was mailed, applicants will be asked to provide proof of mailing by the deadline date. When proof is not provided, an application will not be considered for funding. Private metered postmarks are not acceptable as proof of timely mailing.

Applications which do not meet the April 30, 1990 deadline are considered late applications and will not be considered or reviewed in the current competition. HDS will send a letter to this effect to each late applicant.

HDS reserves the right to extend the deadline for all applicants due to acts of God, such as floods, hurricanes or earthquakes; if there is widespread disruption of the mail; or if HDS determines a deadline extension to be in the best interest of the Government. However, HDS will not waive or extend the deadline for any applicant unless the deadline is waived or extended for all applicants.

C. Application Screening Requirements

Applicants are advised to read and follow this section very carefully. Applications which do not meet these screening requirements will not be considered or reviewed in the competition, and the applicant will be so informed.

During the FY 1989 competition, numerous applications were not reviewed or considered for funding because they did not meet the screening requirements. Applications that were screened out were submitted by a wide range of organizations, including institutions of higher education, State agencies and voluntary organizations.

A complete and conforming application must meet the following screening requirements:

1. Eligible Applicant

In each priority area description, the type(s) of organization(s) eligible to apply for funding is specified. Only this type of organization is eligible to apply under that particular priority area.

2. Maximum Federal Funding to be Requested

In each priority area description, the maximum amount of Federal funding for a project, or for a one-year budget period (for projects longer than 17 months), is specified. Applications requesting Federal funds in excess of this amount will be screened out.

3. Application Form

The Standard Form (SF) 424 (revised April 1988) and SF 424A must be submitted. The SF 424 "Application for Federal Assistance" consists of one page, the application cover sheet. The SF 424A entitled "Budget Information—Non-construction Programs" is two pages in length.

4. Maximum Length

The length of the application must not exceed 45 pages, except for priority areas 3.14 and 3.17. The following list of items are in addition to the 45 page limit: The one-page SF 424 application cover sheet; the two page SF 424A budget information; a one-page table of contents; the IRS letter on non-profit status; the indirect cost rate agreement; and the required assurances including the SF 424B, "Assurances—Non-Construction Programs."

A page is a single side of an 8½ × 11" sheet of paper. Each page of the application will be counted to determine the total length.

Some examples of materials for which each page would be counted towards

part of the 45 page limit, if included in the application, are:

Budget justification
Summary description
Program narrative statement
References/bibliography
Organizational capability statement
Individual resumes or curriculum vitae
Letters of commitment from participating organizations
An appendix.

Applications meeting the deadline date for submission will be screened on the basis of the four screening requirements listed above. Applications which do not meet the screening requirements will not be reviewed and will not receive any further consideration for funding. Applications that meet the screening requirements will be reviewed and scored competitively based upon the evaluation criteria described in section D of this part. These screening requirements will be rigorously and consistently enforced.

D. Evaluation Criteria

The evaluation criteria correspond to the outline for the development of the Program Narrative Statement of the application.

Applications which meet the screening requirements in Section C above will be reviewed by a panel of at least three reviewers, primarily experts from outside the Federal Government. Reviewers will determine the strengths and weaknesses of each proposal in terms of the four evaluation criteria listed below, provide comments and assign numerical scores accordingly. The point value following each criterion heading indicates the maximum numerical weight that each section will be given in the review process.

1. Objectives and Need for Assistance (20 points)

The application pinpoints any relevant physical, economic, social, financial, institutional, or other problems requiring a solution; demonstrates the need for the assistance; states the principal and subordinate objectives of the project; provides supporting documentation or other testimonies from concerned interests other than the applicant; and includes and/or footnotes relevant data based on the results of planning studies. It identifies the precise location of the project and area to be served by the proposed project. Maps and other graphic aids may be attached.

2. Results or Benefits Expected (20 points)

The application identifies the results and benefits to be derived, the extent to which they are consistent with the objectives of the proposal and indicates the anticipated contributions to policy, practice, theory and/or research. The proposed project costs are reasonable in view of the expected results.

3. Approach (35 points)

The application outlines a sound and workable plan of action pertaining to the scope of the project and details how the proposed work will be accomplished; cites factors which might accelerate or decelerate the work, giving acceptable reasons for taking this approach as opposed to others; describes and supports any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvements; and provides for projections of the accomplishments to be achieved. It lists the activities to be carried out in chronological order, showing a reasonable schedule of accomplishments and target dates.

To the extent applicable, the application identifies the kinds of data to be collected and maintained, and discusses the criteria to be used to evaluate the results and successes of the project. It describes the evaluation methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. The application also lists each organization, agency, consultant, or other key individuals or groups who will work on the project, along with a description of the activities and nature of their effort or contribution.

4. Staff Background and Organization's Experience (25 points)

The application identifies the background of the project director/principal investigator and key project staff (including name, address, training, educational background, and other qualifying experience) and the experience of the organization to demonstrate the applicants' ability to effectively and efficiently administer this project. The application describes the relationship between this project and other work planned, anticipated or underway by the applicant with Federal assistance.

E. Components of a Complete Application

A complete application consists of the following items in this order:

1. Application for Federal Assistance (Standard Form 424, REV 4-88);
2. Budget Information—Non-construction Programs (Standard Form 424A, REV 4-88);
3. Table of Contents;
4. Budget justification for Section B—Budget Categories;
5. Letter from the Internal Revenue Service to prove non-profit status, if necessary;
6. Copy of the applicant's approved indirect cost rate agreement, if appropriate;
7. Project summary description and listing of key words;
8. Program Narrative Statement, organized in four sections addressing the following areas: (a) Objectives and need for assistance, (b) results or benefits expected, (c) approach, and (d) staff background and organization's experience;
9. Organizational capability statement, including an organization chart;
10. Any appendices/attachments;
11. Assurances—Non-construction Programs (Standard Form 424B, REV 4-88);
12. Certification Regarding Drug-Free Workplace;
13. Certification Regarding Debarment, Suspension and Other Responsibility Matters;
14. Certification Regarding Lobbying; and
15. Certification of Protection of Human Subjects, if necessary.

F. Instructions for Preparing the Application

The SF 424, SF 424A, SF 424B and certifications have been reprinted for your convenience in preparing the application. Single-sided copies of these required forms should be used for submitting your application. You should reproduce single-sided copies of these forms from the reprinted forms in the announcement, typing your application information onto the copies. Please do not use forms directly from the **Federal Register** announcement, as they are printed on both sides of the page.

In order to assist applicants in correctly completing the SF 424, and SF 424A, a sample of completed forms has been included at the end of Part III of this announcement. This sample is to be used only as a guide for submitting your application on the blank copies.

When specific information is not required under this program, N/A (not applicable) has been preprinted on the form. Please prepare your application in accordance with the following instructions:

1. SF 424 Page 1, Application Cover Sheet

Please read the following instructions before completing the application cover sheet. An explanation of each item is included. Complete only the items specified.

Top of Page. Enter the single priority area number under which the

application is being submitted. An application should be submitted under only one priority area.

Item 1. Preprinted on the form.

Item 2. Date application is submitted to HDS and applicant's own internal control number, if applicable.

Item 3. State use only (if applicable).

Item 4. Leave blank.

Item 5. Enter the legal name of applicant organization. For applications developed jointly, enter the name of the lead organization only. There must be a single applicant for each application. Use abbreviations to limit the organization name to 30 characters, including spaces and punctuation.

Enter the name of the primary organizational unit which will actually carry out the project activity. Do not use the name of an individual as the applicant. If this is the same as the applicant organization, leave the organizational unit blank. Use abbreviations to limit this line to 30 characters, including spaces and punctuation.

Enter the complete address that the organization actually uses to receive mail, since this is the address to which all correspondence will be sent. Do not include both street address and P.O. Box number unless both must be used in mailing.

Enter the name and telephone number of a person who can respond to questions about the application. This person should be accessible at the address given here. All correspondence will be sent to the attention of this individual.

Item 6. Enter the employer identification number of the applicant organization including, if known, the Central Registry System suffix as assigned by the Internal Revenue Service.

Item 7. Self-explanatory.

Item 8. Preprinted on the form.

Item 9. Preprinted on the form.

Item 10. Enter the Catalog of Federal Domestic Assistance (CFDA) number assigned to the program under which assistance is requested and its title. If more than one program could be involved in funding the project, enter "multiple." A list of the relevant CFDA numbers is included in section D, part I, of this announcement.

Item 11. Enter the project title. The title is generally short. It should be no more than 200 characters long, including spaces and punctuation, and should be typed in not more than four lines of 50 characters each. Use a short title which is descriptive of the project, not the priority area title.

Item 12. Enter the governmental unit where significant and meaningful impact could be observed. List only the largest unit or units affected, such as State, county, or city. If an entire unit is affected, list it rather than subunits.

Item 13. Enter the desirable starting date for the project, beginning during or after September 1990, and the proposed completion date for the project. Applicants are advised to allow themselves an additional 2–3 months start-up time in order to avoid the need for requesting an extension at a later date. Most awards made in response to this program announcement will have starting dates between September 1990 and March 1991. Projects may not exceed the maximum duration specified in the priority area description, generally between 12 to 36 months.

Item 14. Enter the number of the Congressional District where the applicant's principal office is located and the number of the Congressional districts(s) where the project will be located. If Statewide, a multi-State effort, or nationwide, enter "00."

Items 15a–g. Enter the amounts requested or to be contributed by Federal and non-Federal sources for the total project period, if the project period is 17 months or less. If the proposed project period exceeds 17 months, enter the budget for the first 12 months only.

Item 15a. Enter the amount of Federal funds requested. This amount should be no greater than the maximum amount specified in the priority area description.

Items 15b–e. Enter the amount(s) of funds from non-Federal sources that will be contributed to the proposed project. These items (b–e) are considered cost-sharing or "matching funds." The value of third party in-kind contributions should be included on appropriate lines as applicable. It is important that the dollar amounts entered here (the non-Federal share) total at least 25 percent of the total project cost (the requested Federal funds plus funds from non-Federal sources) for the project period, if that period is 17 months or less, or for the first 12 months, if the project period exceeds 17 months. For more information regarding funding as well as exceptions to these rules, see part II, sections C and D and the specific priority area description.

Item 15f. Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount entered under item 15g. Describe the nature, source and anticipated use of this income in the Project Narrative Statement.

Item 15g. Enter the sum of items 15a–15e.

Item 16a. Enter the date the applicant contacted the SPOC regarding this application. Select the appropriate SPOC from the listing provided at the end of part III. Review of the application is at the discretion of the SPOC. The SPOC will verify the date noted on the application. If there is a discrepancy in dates, the SPOC may request that the Federal agency delay any proposed funding until the full review time of 60 days is afforded.

Item 16b. Check the appropriate box if the application is not covered by E.O. 12372 or if the program has not been selected by the State for review.

Item 17. Check the appropriate box. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include audit disallowances, loans and taxes.

Item 18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for signature of this application by this individual as the official representative must be on file in the applicant's office. It may be requested.

Item 18a–c. Enter the name, title and telephone number of the authorized representative of the applicant organization.

Item 18d. Signature of the authorized representative named in Item 18a. At least one copy of the application must have an original signature. Use colored ink (not black) so that the original signature is easily identified.

Item 18e. Enter the date the application was signed by the authorized representative.

2. SF 424A—Budget Information

This is a form used by many Federal agencies. For this application, sections A, B, C, and E are to be completed. Section D does not need to be completed.

Sections A and B should include the Federal as well as the non-Federal funding for the proposed project covering (1) the total project period of 17 months or less or (2) the first year budget period, if the proposed project period exceeds 17 months.

Section A—Budget Summary. This section includes a summary of the budget. On line 5, enter total Federal costs in column (e) and total non-Federal costs, including third party in-kind contributors, but not program income, in column (f). Enter the total of (e) and (f) in column (g).

Section B—Budget Categories. This budget, which includes the Federal as well as non-Federal funding for the proposed project, covers (1) the total project period of 17 months or less or (2)

the first-year budget period if the proposed project period exceeds 17 months. It should relate to item 15g, total funding, on the SF 424. Under column (5), enter the total requirements for funds (Federal and non-Federal) by object class category.

A separate budget justification should be included to explain fully and justify major items, as indicated below. The types of information to be included in the justification are indicated under each category. The budget justification should immediately follow the table of contents.

Personnel—Line 6a. Enter the total costs of salaries and wages of applicant/grantee staff. Do not include the costs of consultants, which should be included on line 6h, "Other."

Justification: Identify the principal investigator or project director, if known. Specify by title or name the percentage of time allocated to the project, the individual annual salaries, and the cost to the project (both Federal and non-Federal) of the organization's staff who will be working on the project.

Fringe Benefits—Line 6b. Enter the total costs of fringe benefits, unless treated as part of an approved indirect cost rate.

Justification: Provide a break-down of amounts and percentages that comprise fringe benefit costs, such as health insurance, FICA, retirement insurance, etc.

Travel—6c. Enter total costs of out-of-town travel (travel requiring per diem) for staff of the project. Do not enter costs for consultant's travel or local transportation, which should be included on Line 6h, Other.

Justification: Include the name(s) of traveler(s), total number of trips, destinations, length of stay, transportation costs and subsistence allowances.

Equipment—Line 6d. Enter the total costs of all equipment to be acquired by the project. For State and local governments, including federally recognized Indian Tribes, "equipment" is non-expendable tangible personal property having a useful life of more than two years and an acquisition cost of $5,000 or more per unit. For all other applicants, the threshold for equipment is $500 or more per unit. The higher threshold for State and local governments became effective October 1, 1988, through the implementation of 45 CFR part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Justification: Equipment to be purchased with Federal funds must be justified. The equipment must be required to conduct the project, and the applicant organization or its subgrantees must not have the equipment or a reasonable facsimile available to the project. The justification also must contain plans for future use or disposal of the equipment after the project ends.

Supplies—Line 6e. Enter the total costs of all tangible expendable personal property (supplies) other than those included on Line 6d.

Justification: Specify general categories of supplies and their costs.

Contractual—Line 6f. Enter the total costs of all contracts, including (1) procurement contracts (except those which belong on other lines such as equipment, supplies, etc.) and (2) contracts with secondary recipient organizations, including delegate agencies. Also include any contracts with organizations for the provision of technical assistance. Do not include payments to individuals on this line. If the name of the contractor, scope of work, and estimated total costs are not available or have not been negotiated, include on Line 6h, "Other."

Justification: Attach a list of contractors, indicating the names of the organizations, the purposes of the contracts, and the estimated dollar amounts of the awards as part of the budget justification. Whenever the applicant/grantee intends to delegate part or all of the program to another agency, the applicant/grantee must complete this section (Section B, Budget Categories) for each delegate agency by agency title, along with the supporting information. The total cost of all such agencies will be part of the amount shown on Line 6f. Provide back-up documentation identifying the name of contractor, purpose of contract, and major cost elements.

Construction—Line 6g. Leave blank. New construction is not allowable and HDS funds are rarely used for either renovation or repair.

Other—Line 6h. Enter the total of all other costs. Where applicable, such costs may include, but are not limited to: insurance; medical and dental costs; noncontractual fees and travel paid directly to individual consultants; local transportation (all travel which does not require per diem is considered local travel); space and equipment rentals; printing and publication; computer use; training costs, including tuition and stipends; training service costs, including wage payments to individuals and supportive service payments; and staff development costs. Note that costs identified as "miscellaneous" and "honoraria" are not allowable.

Justification: Specify the costs included.

Total Direct Charges—Line 6i. Enter the total of Lines 6a through 6h.

Indirect Charges—Line 6j. Enter the total amount of indirect charges (costs). If no indirect costs are requested, enter "none." Generally, this line should be used when the applicant (except local governments) has a current indirect cost rate agreement approved by the Department of Health and Human Services or another Federal agency.

Local and State governments shall enter the amount of indirect costs determined in accordance with HHS requirements. When an indirect cost rate is requested, these costs are included in the indirect cost pool and should not be charged again as direct costs to the grant. In the case of training grants to other than State or local governments (as defined in title 45, Code of Federal Regulations, part 74), the Federal reimbursement of indirect costs will be limited to the lesser of the negotiated (or actual) indirect cost rate or 8 percent of the amount allowed for direct costs, exclusive of any equipment charges, rental of space, tuition and fees, post-doctoral training allowances, contractual items, and alteraions and renovations.

For training grant applications, the entry under line 6j should be the total indirect costs being charged to the project. The Federal share of indirect costs is calculated as shown above. The applicant's share is calculated as follows:

(a) Calculate total project indirect costs (a*) by applying the applicant's approved indirect cost rate to the total project (Federal and non-Federal) indirect costs.

(b) Calculate the Federal share of indirect costs (b*) at 8 percent of the amount allowed for total project (Federal and non-Federal) direct costs exclusive of any equipment charges, rental of space, tuition and fees, post-doctoral training allowances, contractual items, and alterations and renovations.

(c) Subtract (b*) from (a*). The remainder is what the applicant can claim as part of its matching cost contribution.

Justification: Enclose a copy of the indirect cost rate agreement. Applicants subject to the limitation on the Federal reimbursement of indirect costs for training grants should specify this.

Total—Line 6k. Enter the total amounts of lines 6i and 6j.

Program Income—Line 7. Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount.

Justification: Describe the nature, source, and anticipated use of program income in the Program Narrative Statement.

Section C—Non-Federal Resources. This section summarizes the amounts of non-Federal resources that will be applied to the grant. Enter this information under the column entitled "Totals" on line 12, Totals. In-kind contributions are defined in title 45 of the Code of Federal Regulations, part 74.51, as "property or services which benefit a grant-supported project or program and which are contributed by non-Federal third parties without charge to the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant."

Justification: Describe third party in-kind contributions, if included.

Section D—Forecasted Cash Needs. Not applicable. Leave blank.

Section E—Budget Estimate of Federal Funds Needed For Balance of the Project. This section should only be completed if the total project period exceeds 17 months.

Totals—Line 20. For projects that will have more than one budget period, enter the estimated required Federal funds for the second budget period (months 13 through 24) under column "(b) First." If a third budget period will be necessary, enter the Federal funds needed for months 25 through 36 under "(c) Second." Columns (d) and (e) are not applicable in most instances, since HDS funding is almost always limited to a three-year maximum project period. They should remain blank.

Section F—Other Budget Information.

Direct Charges—Line 21. Not applicable.

Indirect Charges—Line 22. Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

Remarks—Line 23. Provide any other explanations or comments deemed necessary.

3. Project Summary Description

Clearly mark this separate page with the applicant name as shown in item 5 of the SF 424, and the priority area number as shown at the top of the SF 424. The summary description should not exceed 1,200 characters, including words, spaces and punctuation. These 1,200 characters become part of the computer database on each project.

Care should be taken to produce a summary description which accurately and concisely reflects the proposal. It should describe the objectives of the project, the approaches to be used and the outcomes expected. The description should also include a list of major products that will result from the proposed project (such as software packages, materials, management procedures, data collection instruments, training packages, or videos). The project summary description, together with the information on the SF 424, will constitute the project "abstract." It is the major source of information about the proposed project and is usually the first part of the application that the reviewers read in evaluating the application.

At the bottom of the page, following the summary description, type up to 10 key words which best describe the proposed project, the service(s) involved and the target population(s) to be covered. The key words are to be selected from the list provided at the end of Part III of this announcement. These key words will be used for computerized information retrieval for specific types of funded projects.

4. Program Narrative Statement

The Program Narrative Statement is a very important part of an application. It should be clear, concise, and address the specific concerns mentioned under the priority area description in Part II. The narrative should also provide information concerning how the application meets the evaluation criteria (see section D of this part), using the topical headings outlined below.

The narrative should be typed double-spaced on a single-side of an 8½"x11" plain white paper, with 1" margins on all sides. All pages of the narrative (including charts, references/footnotes, tables, maps, exhibits, etc.) must be sequentially numbered, beginning with "Objectives and Need for Assistance" as page number one. Applicants should not submit reproductions of larger size paper, reduced to meet the size requirement.

Applicants are required to adhere to the following outline in preparing the Project Narrative Statement:

(a) *Objectives and Need for Assistance;*

(b) *Results and Benefits Expected;*

(c) *Approach; and*

(d) *Staff Background and Organization's Experience.*

5. Organizational Capability Statement

The Organizational Capability Statement should consist of a brief (two to three pages) background description of how the applicant organization (or the unit within the organization that will have responsibility for the project) is organized, the types and quantity of services it provides, and/or the research and management capabilities it possesses. This description should cover capabilities not included in the Program Narrative Statement. It may include descriptions of any current or previous relevant experience, or describe the competence of the project team and its demonstrated ability to produce a final product that is readily comprehensible and usable. An organization chart showing the relationship of the project to the current organization should be included.

6. Part V—Assurances

Applicants are required to file an SF 424B, Assurances—Non-construction Programs, and certifications regarding debarment, lobbying and drug-free workplace requirements. Copies of these assurances are reprinted at the end of this announcement and should be reproduced and used by the applicant. A duly authorized representative of the applicant organization must certify that the applicant is in compliance with these assurances.

For research grants involving Head Start and Runaway and Homeless Youth populations, an Assurance of Protection of Human Subjects is required. For other research projects in which human subjects may be at risk (for instance, research involving children in foster care), an assurance may also be needed. If there is a question regarding the applicability of this assurance (also located at the end of this announcement), contact the Office of Research Risks of the National Institutes of Health at (301) 496-7041.

G. The Application Package

Each application package must include an original and two copies of the complete application. Each copy should be stapled securely (front and back if necessary) in the upper left-hand corner. All pages of the narrative (including charts, tables, maps, exhibits, etc.) must be sequentially numbered, beginning with page one. In order to facilitate handling, please do not use covers, binders or tabs. Do not include extraneous materials as attachments, such as, agency promotion brochures, slides, tapes, film clips, minutes of meetings, survey instruments or articles of incorporation.

Do not include a self-addressed, stamped acknowledgment card. All applicants will be notified automatically about the receipt of their application and of the four digit identification number assigned to their application. This number and the priority area must be referred to in *ALL* subsequent

communication with HDS concerning the application. If acknowledgment of receipt of your application is not received within eight weeks after the deadline date, please notify HDS by telephone at (202) 755-4560. After an identification number is assigned and the applicant has been notified of the number, applications are filed numerically by identification number to aid in quick retrieval. It will not be possible for HDS staff to provide a timely response to inquiries about a specific application unless the identification number and the priority area are given.

H. Checklist for a Complete Application

The checklist below is for your use to ensure that your application package has been properly prepared.

—One original, signed and dated application, plus two copies. Applications for different priority areas are packaged separately;

1. Application Components:

—Application for Federal Assistance (Standard Form 424, REV 4-88);
—A completed SPOC certification with the date of SPOC contact entered in item 16, page 1 of the SF 424.
—Budget Information —Non-Construction Programs (Standard Form 424A, REV 4-88);
—Table of Contents;
—Budget justification;
—Letter from Internal Revenue Service to prove non-profit status, if necessary;
—Indirect cost rate agreement, if necessary;
—Project summary description and key words;
—Program Narrative Statement;
—Organizational Capability Statement;
—Appendices/attachments, if necessary.
—Assurances—Non-Construction Programs (Standard Form 424B, REV 4-88);
—Certification Regarding Drug-Free Workplace;
—Certification Regarding Debarment, Suspension, and Other Responsibility Matters;
—Certification Regarding Lobbying; and
—Certification of Protection of Human Subjects, if necessary.

2. Adherence to Screening Requirements:

—Applicant organization is eligible under the eligibility requirements defined in the priority area description;
—Federal funding requested does not exceed the maximum level specified in the priority area description.
—The length of the application does not exceed 45 pages (plus specified other items listed in part III C, section 4.), unless otherwise specified in the priority area description.

Dated: February 8, 1990.

Mary Shelia Gall,

Assistant Secretary for Human Development Services.

Timothy Wapato,

Commissioner, Administration for Native Americans.

Wade F. Horn,

Commissioner, Administration for Children, Youth and Families.

Linda G. Eischeid,

Director, Office of Policy, Planning and Legislation.

Deborah L. McFadden,

Commissioner, Administration on Developmental Disabilities.

Executive Order 12372—State Single Points of Contact

Alabama

Mrs. Moncell Thornell, State Single Point of Contact, Alabama Department of Economic and Community Affairs, 3465 Norman Bridge Road, Post Office Box 250347, Montgomery, Alabama 36125-0347, Tel. (205) 284-8905.

Alaska

None.

Arizona

Mrs. Janice Dunn, ATTN: Arizona State Clearinghouse, 1700 West Washington, Fourth Floor, Phoenix, Arizona 85007, Tel. (602) 542-5004.

Arkansas

Mr. Joseph Gillesbie, Manager, State Clearinghouse, Office of Intergovernmental Services, Department of Finance and Administration, P.O. Box 3278, Little Rock, Arkansas 72203, Tel. (501) 371-1074.

California

Glenn Stober, Grants Coordinator, Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814, Tel. (916) 323-7480.

Colorado

State Single Point of Contact, State Clearinghouse, Division of Local Government, 1313 Sherman Street, Room 520, Denver, Colorado 80203, Tel. (303) 866-2156.

Connecticut

Under Secretary, ATTN: Intergovernmental Review Coordinator, Comprehensive Planning Division, Office of Policy and Management, 80 Washington Street, Hartford, Connecticut 06106-4459, Tel. (203) 566-3410.

Delaware

Francine Booth, State Single Point of Contact, Executive Department, Thomas Collins Building, Dover, Delaware 19903, Tel. (302) 736-3326.

District of Columbia

Lovetta Davis, State Single Point of Contact, Executive Office of the Mayor, Office of Intergovernmental Relations, Room 416, District Building, 1350 Pennsylvania Avenue, NW., Washington, DC 20004, Tel. (202) 727-9111.

Florida

George H. Meier, Director of Intergovernmental Coordination, Single Point of Contact, Executive Office of the Governor, Office of Planning and Budgeting, The Capitol, Tallahassee, Florida 32399-0001, Tel. (916) 445-0613.

Georgia

Charles H. Badger, Administrator, Georgia State Clearinghouse, 270 Washington Street, S.W., Atlanta, Georgia 30334, Tel. (404) 656-3855.

Hawaii

Harold S. Masumoto, Acting Director, Office of State Planning, Department of Planning and Economic Development, Office of the Governor, State Capitol, Honolulu, Hawaii 96813, Tel. (808) 548-3016 or 548-3085.

Idaho

None.

Illinois

Tom Berkshire, State Single Point of Contact, Office of the Governor, State of Illinois, Springfield, Illinois 62706, Tel. (217) 782-8639.

Indiana

Frank Sullivan, Budget Director, State Budget Agency, 212 State House, Indianapolis, Indiana 46204, Tel. (317) 232-5610.

Iowa

Steven R. McCann, Division of Community Progress, Iowa Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309, Tel. (515) 281-3725.

Kansas

None.

Kentucky

Robert Leonard, State Single Point of Contact, Kentucky State Clearinghouse, 2nd Floor, Capital Plaza Tower, Frankfort, Kentucky 40601, Tel. (502) 564-2382.

Louisiana

Robin Hote, Division of Administration, Office of State Clearinghouse, P.O. Box 94095, Baton Rouge, LA 70804-9095, (504) 342-7006.

Maine

State Single Point of Contact, ATTN: Joyce Benson, State Planning Office, State House Station #38, Augusta, Maine 04333, Tel. (207) 289-3261.

Maryland

Mary Abrams, Director, Maryland State Clearinghouse, Department of State Planning, 301 West Preston Street, Baltimore, Maryland 21201-2365 Tel. (301) 225-4490.

Massachusetts

State Single Point of Contact, ATTN: Beverly Boyle, Executive Office of Communities

and Development, 100 Cambridge Street, Room 904, Boston, Massachusetts 02202, Tel. (617) 727-3253.

Michigan

Michelyn Pasteur, Deputy Director, Local Development Services, Department of Commerce, P.O. Box 30225, Lansing, Michigan 48903, Tel. (517) 375-1838.

Please direct correspondence to: Manager, Federal Project Review System, 6500 Mercantile Way, Suite 2, Lansing, Michigan 48911, Tel. (517) 334-6190.

Minnesota

None.

Mississippi

Cathy Mallette, Governor's Office of Federal State Programs, Department of Planning and Policy, 421 West Pascagoula Street, Jackson, Mississippi 39206, Tel. (601) 960-4282.

Missouri

Lois Pohl, Federal Assistance Clearinghouse, Office of Administration, Division of General Services, P.O. Box 809, Room 430, Truman Building, Jefferson City, Missouri 65102, Tel. (314) 751-4834.

Montana

Deborah Davis, State Single Point of Contact, Intergovernmental Review Clearinghouse, c/o Office of Lieutenant Governor, Capitol Station, Room 210—State Capitol, Helena, Montana 59620, Tel. (406) 444-5522.

Nevada

Ms. Jean Ford, Nevada Office of Community Services, Capitol Complex, Carson City, Nevada 89710, Tel. (702) 885-4420.

Please direct correspondence and questions to: John Walker, Clearinghouse Coordinator,

New Hampshire

Robert W. Varney, Director, New Hampshire Office of State Planning, Attn: Intergovernmental Review, Process/James E. Bieber, 2½ Beacon Street, Concord, New Hampshire 03301, Tel. (603) 271-2155.

New Jersey

Mr. Barry Skokowski, Director, Director, Division of Local Government Services, Department of Community Affairs, CN 803, Trenton, New Jersey 08625-0803, Tel. (609) 292-6613.

Please direct correspondence and questions to: Nelson S. Silver, State Review Process, Division of Local Government Services, CN 803, Trenton, New Jersey 08625-0803, Tel. (609) 292-9025.

New Mexico

Dean Olson, Director, Management & Program Analysis Division, Department of Finance & Administration, Room 424, State Capitol Building, Santa Fe, New Mexico 87503, Tel. (505) 827-3885.

New York

New York State Clearinghouse, Division of the Budget, State Capitol, Albany, New York 12224, Tel. (518) 474-1605.

North Carolina

Mrs. Chrys Baggett, Director, Intergovernmental Relations, NC Department of Administration, 116 W. Jones Street, Raleigh, North Carolina 27611, Telephone (919) 733-0499.

North Dakota

William Robinson, State Single Point of Contact, Office of Intergovernmental Affairs, Office of Management and Budget, 14th Floor, State Capitol, Bismarck, North Dakota 58505, Tel. (701) 224-2094.

Ohio

Larry Weaver, State Single Point of Contact, State/Federal Funds Coordinator, State Clearinghouse, Office of Budget and Management, 30 East Broad Street, 34th Floor, Columbus, Ohio 43266-0411, Tel. (614) 466-0698.

Oklahoma

Don Strain, State Single Point of Contact, Oklahoma Department of Commerce, Office of Federal Assistance Management, P.O. Box 26980, Oklahoma City, Oklahoma 73126, Tel. (405) 843-9770.

Oregon

Attn: Delores Streeter, State Single Point of Contact, Intergovernmental Relations Division, State Clearinghouse, 155 Cottage Street, NE., Salem, Oregon 97310, Tel. (503) 373-1998

Pennsylvania

Laine A. Heltebridle, Spec. Asst., Pennsylvania Intergovernmental Council, P.O. Box 11880, Harrisburg, Pennsylvania 17108, Tel. (717) 783-3700

Rhode Island

Daniel W. Varin, Associate Director, Statewide Planning Program, Department of Administration, Division of Planning, 265 Melrose Street, Providence, Rhode Island 02907, Tel. (401) 277-2656

Please direct correspondence and questions to: Review Coordinator, Office of Strategic Planning

South Carolina

Danny L. Cromer, State Single Point of Contact, Grant Services, Office of the Governor, 1205 Pendleton Street, Room 477, Columbia, South Carolina 29201, Tel. (803) 734-0435

South Dakota

Susan Comer, State Clearinghouse Coordinator, Office of the Governor, 500 East Capitol, Pierre, South Dakota 57501, Tel. (605) 773-3212

Tennessee

Charles Brown, State Single Point of Contact, State Planning Office, 500 Charlotte Avenue, 309 John Sevier Building, Nashville, Tennessee 37219, Tel. (615) 741-1676

Texas

Thomas C. Adams, Office of Budget and Planning, Office of the Governor, P.O. Box 12428, Austin, Texas 78711, Tel. (512) 463-1778

Utah

Dale Hatch, Director, Office of Planning and Budget, State of Utah, 116 State Capitol Building, Salt Lake City, Utah 84114, Tel. (801) 533-5245

Vermont

Bernard D. Johnson, Assistant Director, Office of Policy Research & Coordination, Pavilion Office Building, 109 State Street, Montpelier, Vermont 05602, Tel. (802) 828-3326

Washington

Catherine Townley, Coordinator, Intergovernmental Review Process, Department of Community Development, 9th and Columbia Building, Olympia, Washington 98504-4151, Tel. (206) 753-4978

West Virginia

Mr. Fred Cutlip, Director, Community Development Division, Governor's Office of Community and Industrial Development, Building #6, Room 553, Charleston, West Virginia 25305, Tel. (304) 348-4010

Wisconsin

James R. Klauser, Secretary, Wisconsin Department of Administration, 101 South Webster Street, GEF 2, P.O. Box 7864, Madison, Wisconsin 53707-7864, Tel. (608) 266-1741

Please direct correspondence and question to: Thomas Krauskopf, Federal-State Relations Coordinator, Wisconsin Department of Administration

Wyoming

Ann Redman, State Single Point of Contact, Wyoming State Clearinghouse, State Planning Coordinator's Office, Capitol Building, Cheyenne, Wyoming 82002, Tel. (307) 777-7574

Guam

Michael J. Reidy, Director, Bureau of Budget and Management Research, Office of the Governor, P.O. Box 2950, Agana, Guam 96910, Tel. (671) 472-2285

Northern Mariana Islands

State Single Point of Contact, Planning and Budget Office, Office of the Governor, Saipan, CM, Northern Mariana Islands 96950

Puerto Rico

Patria Custodio/Israel Soto Marrero, Chairman/Director, Puerto Rico Planning Board, Minillas Government Center, P.O. Box 41119, San Juan, Puerto Rico 00940-9985, Tel. (809) 727-4444

Virgin Islands

Jose L. George, Director, Office of Management and Budget, No. 32 & 33 Kongens Gade, Charlotte Amalie, V.I. 00802, Tel. (809) 774-0750

List of Key Words

Abuse
Accreditation
Adoption
Advocacy and guardianship
Adult day care (use home care with aging and elderly)
Adults
Aging and elderly
Aging-out
Agriculture
Alcoholism
Allied professional education
Alternative financing
Asians
At-Risk Youth
Audio-visual
Barrier-free design
Blacks
Budgeting and finance
Business development training
Cable television
Career and vocational education
Caregiving
Case management
Challenge grants
Child abuse and neglect
Child care
Child care centers
Child development
Child welfare
Children
Clearinghouse
Client outcome measures
Collaboration
Colleges
Community care
Community-based
Community college
Community integration
Community foundation
Competitive employment
Comprehensive care
Computer networks
Computers
Conferences
Congregate housing
Consumer education
Continuing education
Contracting
Cooperative agreement
Cooperatives
Coordination
Coordinated services
Corrections
Counseling
Courts
Crisis intervention
Crisis nurseries
Cross-cultural
Cross-cutting
Cultural activities
Curriculum
Curriculum development
Data collection
Day care
Day care centers
Deinstitutionalization
Design
Developmental child care
Disabled
Developmental disabilities
Dissemination
Dropouts
Dsyfunctional families
Drug exposed infants
Economic development
Education and training
Effectiveness measures
Efficiency
Elderly persons
Emergency services
Emergency shelters
Employer-supported human services
Employment
Entrepreneurship
Environment
Environmental design
Evaluation
Exploited youth
Families
Family counseling
Family day care
Family preservation
Family violence
Films
Finance
Fire safety
Fiscal management
Food and nutrition
Food banks
Forecasting
Foster care
Foster grandparents
Foundations
Frail elderly
Friendly visitors
Gerontology training
Group homes
Guardianship
Handbooks
Head Start
Head Start children with handicaps
Health
Hispanics
Historically Black Colleges and Universities (use HBCU)
Home care
Home equity conversions
Homeless
Hospitals
Hospices and nursing homes
Housing
Human services
Immigrants and refugees
Income generation
Independent living
Indians
Infants and toddlers
Informal caregivers
Information centers
Information and referral
Information transfer
In-home care
Institutionalization
Information transfer
Interagency cooperation
Interdisciplinary
Intergenerational
International
Interstate agreements
Investigations
Isolated elderly
Job bank
Job clubs
Job placement
Judicial system
Juvenile justice
Latchkey and school-age children
Law enforcement
Legal
Legal counseling
Legislation and model codes
Liability and legal issues
Linkages
Literacy
Living skills
Local government
Low-cost alternatives
Low-income
Mainstreaming
Management
Management information systems
Management training
Manuals
Marketing
Materials
Meals
Media
Medical
Mental health
Mentally disabled
Mentors
Microcomputers
Minorities
Native Alaskans
Native Americans
Native Hawaiians
Needs assessment
Neglect
Networking
Newsletters
Newspapers
Nursing homes
Nutrition counseling
Older persons
On-the-job training
Outreach
Parent
Parent education
Pediatric AIDS
Peer counseling
Performance-based contracting
Permanancy planning
Placement Prevention
Physically disabled
Planning
Preschools
Prevention
Preventive care
Primary schools
Private sector
Prostitution
Protective services
Public education
Public/private partnership
Public-private cooperation
Radio
Rate-setting
Readiness skills
Recreation
Recruitment
Recycling
Referral
Refugees
Religious institution(s)
Research
Research center
Residential care
Resource allocation
Resource center
Respite care
Retirement
Runaway youth

Rural
Samoans
School-age children
Secondary schools
Self-care
Self-help
Self-sufficiency
Service integration
Sexual abuse
Seminars
Sheltered workshops
Single parents
Small business
Social services
Software
Special education
Special needs adoption
Speech impairment
Standards
Stipends
Support groups
Synthesis
Target populations
Television
Taxes
Technical assistance
Technology transfer
Teenage parents
Teenage pregnancy
Telecommunications
Temporary child care
Therapeutic day care
Toddlers
Training
Training of trainers
Transitioning
Transportation
Treatment
Tribally Controlled Community Colleges
Unemployed
University
Urban
Urban Indian Centers
User fees
Video
Visual Impairment
Vocational training
Volunteers
Vouchers
Women
Workplace
Workshops
Youth

State Developmental Disabilities Planning Councils

Alabama

Joan B. Hannah, Ed.D., Executive Director, Alabama Developmental Disabilities Planning Council, 200 Interstate Park Dr., P.O. Box 3710 Montgomery, AL 36193-5001, Tel. (205) 271-9278

Alaska

Dorothy J. Truran, Executive Director, Developmental Disabilities Planning Council, 600 University Avenue, Suite B, Fairbanks, AK 99709-3651, Tel. (907) 474-2440

American Samoa

Mata'u Taele, Executive Director, Developmental Disabilities Planning Council, American Samoa Government, P.O. Box 3823, Pago Pago, American Samoa 96799-0320, Tel. (684) 633-5908

Arizona

Rita Charron, Executive Director, Governor's Council on Developmental Disabilities, 1717 West Jefferson Street, MS 074Z, Phoenix, AZ 85007-3202, Tel. (602) 255-4040

Arkansas

Patricia Fordyce, Coordinator, Governor's Developmental Disabilities Planning Council, Arkansas Health Planning and Development Agency, 4815 West Markham, Little Rock, AR 72205-3867, Tel. (501) 661-2399

California

James F. Bellotti, Executive Director, State Council on Developmental Disabilities, 2000 "O" Street, Suite 100, Sacramento, CA 95814-5224, Tel. (916) 322-8481

Colorado

William L. Gorman, Executive Director, Colorado Developmental Disabilities Council, 777 Grant Street, Suite 410, Denver, CO 80203, Tel. (303) 894-2348

Connecticut

Edward T. Preneta, Director, Planning Council on Developmental Disabilities, Department of Mental Retardation, 90 Pitkin Street, East Hartford, CT 06108-3318, Tel. (203) 725-3829

Delaware

James F. Linehan, Administrator, Developmental Disabilities Planning Council, Dept. of Community Affairs, Box 1401, 156 South State Street, Dover, DE 19901-7329, Tel. (302) 736-4456

District of Columbia

Les Bernard, Acting Exec. Dir., (202) 727-4034, Developmental Disabilities, State Planning Council, 605 G Street, NW., Suite 1108, Washington, DC 20001-3754

Florida

K. Joseph Krieger, Executive Director, (904) 488-4180, Florida Planning Council, 1317 Winewood Blvd., Bldg. 1, Rm. 309, Tallahassee, FL 32399-0700

Georgia

Zebe Schmitt, Executive Director, (404) 894-5790, Governor's Council on Developmental Disabilities, 878 Peachtree St. NE., Room 620, Atlanta, GA 30309-3917

Developmental Disabilities Planning Councils

Guam

Rosa T. P. Salas, Director, The State Planning Council for Developmental Disabilities, (671) 646-9417, c/o Life Skills Center, 284 East Hospital Loop, Tamuning, Guam 96911-9999, Tel. (671) 646-8691

Hawaii

Diana Tizard, Executive Secretary, (808) 548-8482, State Planning Council on Developmental Disabilities, P.O. Box 3378, Honolulu, HI 96801-3378

Idaho

John D. Watts, Executive Director, (208) 334-5509, Idaho State Council on Developmental Disabilities, 450 West State Street, Boise, ID 83720-0001

Illinois

Cathy F. Terrill, Executive Director, (217) 782-9696, Illinois Developmental Disabilities Planning Council, 830 South Spring Street, Springfield, IL 62704

Indiana

Suellen Jackson-Boner, Director, (317) 232-7770, Governor's Planning Council for People with Disabilities, Harrison Bldg., Suite 404, 143 W. Market Street, Indianapolis, IN 46204

Iowa

Karon Perlowski, Exec. Director, (515) 281-7632, Governor's Planning Council for Developmental Disabilities, Dept. of Human Services, Hoover State Office Bldg., 1st Floor, Des Moines, IA 50319-0114

Kansas

John F. Kelly, Secretary, (913) 296-2608, Kansas Planning Council on Developmental Disabilities Services, Dept. of Social and Rehabilitation Services, Docking State Office Bldg., 5th Fl North, Topeka, KS 66612-1570

Kentucky

Prudence Moore, Exec. Director, (502) 564-7842, Kentucky Developmental Disabilities Planning Council, Dept. for Mental Health/Mental Retardation Services, 275 East Main Street, Frankfort, KY 40621-0001

Louisiana

Anne E. Farber, Ph.D., (504) 342-6804, Executive Director, Louisiana State Planning Council on Developmental Disabilities, P.O. Box 3455, Baton Rouge, LA 70821-3455

Maine

Peter R. Stowell, Exec. Director, (207) 289-4213, Maine Developmental Disabilities Council, Nash Building, Capitol and State Streets, Station #139, Augusta, ME 04333-9999

Maryland

Susanne Elrod, Executive Director, (301) 333-3688, Maryland State Planning Council on Developmental Disabilities, One Market Center, Box 10, 300 West Lexington Street, Baltimore, MD 21201-2323

Massachusetts

Jody Shaw, Exec. Director, (617) 727-6374, Massachusetts Developmental Disabilities Planning Council, 600 Washington Street, Boston, MA 02111-1704

Michigan

Elizabeth J. Ferguson, Exec. Director, (517) 373-0341, Michigan Developmental Disabilities Council, 373-0342, Lewis-Cass Bldg., 6th Floor, Lansing MI 48913

Minnesota

Colleen Wieck, Ph.D. Executive Director, Minnesota Developmental Disabilities, Planning Council, Room 300, 658 Cedar Street, St. Paul, MN 55155, (612) 296-4018

Mississippi

Ed C. Bell, Developmental Disabilities Staff Director, Mississippi Developmental Disabilities Planning Council, 1101 Robert E. Lee Building, Jackson, MS 39201, (601) 359-6238

Missouri

Kay Conklin, Coordinator, (314) 751-4054, Missouri Planning Council for Developmental Disabilities, P.O. Box 687, 1915 Southridge Drive, Jefferson City, MO 65102

Montana

Greg A. Olsen, Exec. Director, (406) 449-8325, Developmental Disabilities Planning and Advisory Council, FTS 8 585-5011, 25 South Ewing, Rm. 506, P.O. Box 4210, Helena, MT 59620

Nebraska

Mary Gordon, Director, (402) 471-2330, Governor's Planning Council on Developmental Disabilities, 2550 Ewing Rm. 506, P.O. Box 95007, Lincoln, NE 68509-5007

Nevada

Vacant, (702) 885-4440, Nevada Planning Council for Developmental Disabilities, Rehabilitation Division, Dept. of Human Resources, 505 E. King St., Room 502, Carson City, NV 89710-0001

New Hampshire

Edward P. Burke, Exec. Director, (603) 271-3236, New Hampshire Council on Developmental Disabilities, The Concord Center, 10 Ferry Street, P.O. Box 315, Concord, NH 03301-5022

New Jersey

Catherine Rowan, Executive Director, (609) 292-3745, Developmental Disabilities Planning Council, 108-110 North Broad Street, CN 700, Trenton, NJ 08625-0001

New Mexico

Chris Isengard, Exec. Director, (505) 827-2707, Developmental Disabilities Planning Council, State of New Mexico, Ark Plaza, Suite B-200, 2025 South Pachco Street, Santa Fe, New Mexico 87505

New York

Isabel T. Mills, Exec. Director, (518) 432-8233, New York State Developmental Disabilities Planning Council, 155 Washington Avenue, 2nd Floor, Albany, NY 12210-0001

North Carolina

James W. Keene, Exec. Director, (919) 733-6566, North Carolina Council on Developmental Disabilities, 1508 Western Blvd., Raleigh, NC 27606-1359

North Dakota

Tom Wallner, Director, (701) 224-2970, Developmental Disabilities Council, Dept. of Human Services, State Capitol, Bismarck, ND 58505-9999

Northern Mariana Islands

Nicholas W. Benjamin, Acting Director, (9) 011-671-8691, Office of the Superintendent, Department of Education, Saipan, CMNI 96956-9999

Ohio

Ken Campbell, Exec. Director, (614) 466-5205, Ohio Developmental Disabilities Planning Council, Dept. of MR/DD, 8 East Long Street, 6th Floor, Columbus, OH 43215-3414

Oklahoma

Patricia S. Burns, Director, (405) 521-4985, Developmental Disabilities Planning Council, Department of Human Services, P.O. Box 25352, Oklahoma City, OK 73125-0352

Oregon

Russ Curley, Exec. Director, (503) 373-7555, Oregon Developmental Disabilities Planning Council, MR/DD Program Office, Mental Health Division, 540 24th Place NE, Salem, OR 97301

Pennsylvania

David B. Schwartz, Executive Director, (717) 787-6057, Developmental Disabilities Planning Council, Room 569, Forum Building, Commonwealth Avenue, Harrisburg, PA 17120-0001

Puerto Rico

Maria Louisa Mendia, Exec. Director, (809) 722-0595, Puerto Rico Developmental Disabilities Council, P.O. Box 9543, Santurce, PR 00908-0543

Rhode Island

Marie V. Citrone, Executive Director, (401) 464-3191, Rhode Island Developmental Disabilities Council, State Executive Department, 600 New London Avenue, Cranston, RI 02920-3028

South Carolina

LaNelle C. DuRant, Exec. Director, (803) 734-0465, S.C. Developmental Disabilities Planning Council, Edgar Brown Building, Room 372, 1205 Pendleton Street, Columbia, SC 29201-3731

South Dakota

Thomas E. Scheinost, Program Administrator, (605) 773-3438, Department of Human Services, Div. of Developmental Disabilities, Richard F. Kneip Bldg., 700 Governors Drive, Pierre, SD 57501-2237

Tennessee

Wanda Willis, Director, (615) 741-3805, Developmental Disabilities Planning Council, Dept. of MH & MR, 706 Church Street, 3rd Floor, Doctor's Building, Nashville, TN 37219-5393

Texas

Roger A. Webb, Executive Director, (512) 483-4080, Texas Planning Council for Developmental Disabilities, 4900 NorthLamar Blvd., Austin, TX 78751-2316

Utah

Jan Mallett, Director, (801) 538-4184, Utah Council for Handicapped and Developmental Disabilities Persons, P.O. Box 1958, Salt Lake City, UT 84110-1958

Vermont

Thomas A. Pombar, Executive Secretary, (802) 241-2612, Vermont Developmental Disabilities Council, Waterbury Office Complex, 103 South Main Street, Waterbury, VT 05676-1534

Virginia

Sarah Liddle, Administrator, (804) 225-2042, Board for Rights of the Disabled, James Monroe Building, 17th Floor, 101 N. 14th Street, 17th Floor, Richmond, VA 23219-3641

Virgin Islands

Mark Vinzant, Director, (809) 772-2133, VI Developmental Disabilities Council, P.O. Box 2671 Kings Hill, St. Croix, U.S. Virgin Islands 00850-9999

Washington

Sharon Hansen, Executive Director, (206) 753-3908, Developmental Disabilities Planning Council, Department of Community Development, Room 360, Ninth & Columbia Bldg. MS-GH-51, Olympia, WA 98504-4151

West Virginia

Julie Pratt, Director, (304) 348-0416, Developmental Disabilities Planning Council, c/o Dept. of Health, 625 D Street, South Charleston, WV 25303-3111

Wisconsin

Jayn Wittenmyer, Executive Director, (608) 266-7826, Council on Developmental Disabilities, State of Wisconsin, P.O. Box 7851, Room 344, Madison, WI 53707-7851

Wyoming

Sharron C. Kelsey, Executive Director, (307) 777-7230, Governor's Planning Council on Developmental Disabilities, Herschler Bldg., 1 East, 122 West 25th, Cheyenne, WY 82001

BILLING CODE 4130-01-M

Priority Area Number 0.00

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

2. DATE SUBMITTED: 3/30/90

Applicant Identifier: 051884

1. TYPE OF SUBMISSION:
Application: ☐ Construction ☒ Non-Construction
Preapplication: ☐ Construction ☐ Non-Construction

3. DATE RECEIVED BY STATE

State Application Identifier

4. DATE RECEIVED BY FEDERAL AGENCY

Federal Identifier

5. APPLICANT INFORMATION

Legal Name: Childrens Center

Organizational Unit

Address (give city, county, state, and zip code): 3242 Montgomery Street, Trenton, NJ 08650

Name and telephone number of the person to be contacted on matters involving this application (give area code): Harriet Thomas (609) 555-8237

6. EMPLOYER IDENTIFICATION NUMBER (EIN): 08-7654321

7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐
A State
B County
C Municipal
D Township
E Interstate
F Intermunicipal
G Special District
H Independent School Dist
I State Controlled Institution of Higher Learning
J Private University
K Indian Tribe
L Individual
M Profit Organization
N Other (Specify) Non Profit Org.

8. TYPE OF APPLICATION:
☒ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐
A Increase Award B Decrease Award C Increase Duration
D Decrease Duration Other (specify):

9. NAME OF FEDERAL AGENCY: DHHS, Office of Human Development Services

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 13.608
TITLE: Child Welfare R & D

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT: Family Reunification Project

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.): Mercer County, NJ

13. PROPOSED PROJECT:
Start Date: 10/1/90
Ending Date: 9/30/93

14. CONGRESSIONAL DISTRICTS OF:
a Applicant: 5
b Project: 5

15. ESTIMATED FUNDING:

a Federal	$ 75,000.00
b Applicant	$ 25,000.00
c State	$ .00
d Local	$ .00
e Other	$ .00
f Program Income	$ .00
g TOTAL	$ 100,000.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?
a. YES THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON
DATE 3/1/90
b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372
☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?
☐ Yes If "Yes," attach an explanation ☒ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a Typed Name of Authorized Representative: Alice Calhoun

b Title: Executive Director

c Telephone number: 609-555-8235

d Signature of Authorized Representative: Alice Calhoun

e Date Signed: 3/30/90

Previous Editions Not Usable

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SAMPLE

OMB Approval No. 0348-0044

BUDGET INFORMATION — Non-Construction Programs

SECTION A – BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1. Child Welfare	13.608	$	$	$ 75,000	$ 25,000	$ 100,000
2.						
3.						
4.						
5. TOTALS		$	$	$ 75,000	$ 25,000	$ 100,000

SECTION B – BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY (1)	(2)	(3)	(4)	Total (5)
a. Personnel	$ NA	$ NA	$ NA	$ NA	$ 60,000
b. Fringe Benefits	NA	NA	NA	NA	9,000
c. Travel	NA	NA	NA	NA	2,000
d. Equipment	NA	NA	NA	NA	5,000
e. Supplies	NA	NA	NA	NA	3,500
f. Contractual	NA	NA	NA	NA	15,500
g. Construction		NA	NA	NA	0
h. Other	NA	NA	NA	NA	5,000
i. Total Direct Charges (sum of 6a - 6h)	NA	NA	NA	NA	100,000
j. Indirect Charges	NA	NA	NA	NA	0
k. TOTALS (sum of 6i and 6j)	$ NA	$ NA	$ NA	$ NA	$ 100,000
7 Program Income	$ NA	$ NA	$ NA	$ NA	$ 0

SAMPLE

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SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$ NA	$ NA	$ NA	$ NA
9.	NA	NA	NA	NA
10.	NA	NA	NA	NA
11.	NA	NA	NA	NA
12. TOTALS (sum of lines 8 and 11)	$ 25,000	$	$	$ 25,000

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$ NA	$ NA	$ NA	$ NA	$ NA
14. NonFederal	NA	NA	NA	NA	NA
15. TOTAL (sum of lines 13 and 14)	$ NA	$ NA	$ NA	$ NA	$ NA

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$ NA	$ NA	$ NA	$ NA
17.	NA	NA	NA	NA
18.	NA	NA	NA	NA
19.	NA	NA	NA	NA
20. TOTALS (sum of lines 16-19)	$ 70,000	$ 60,000	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21. Direct Charges: NA	22. Indirect Charges:

23 Remarks

SF 424A (4-88) Page 2
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SAMPLE

Priority Area Number [ ]

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

1. TYPE OF SUBMISSION. Application: ☐ Construction ☒ Non-Construction; Preapplication: ☐ Construction ☐ Non-Construction	2. DATE SUBMITTED	Applicant Identifier
	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name	Organizational Unit
Address (give city, county, state, and zip code)	Name and telephone number of the person to be contacted on matters involving this application (give area code)

6. EMPLOYER IDENTIFICATION NUMBER (EIN) [ ][ ] – [ ][ ][ ][ ][ ][ ][ ]

7. TYPE OF APPLICANT: (enter appropriate letter in box) [ ]

A State
B County
C Municipal
D Township
E Interstate
F Intermunicipal
G Special District
H Independent School Dist
I State Controlled Institution of Higher Learning
J Private University
K Indian Tribe
L Individual
M Profit Organization
N Other (Specify) _____

8. TYPE OF APPLICATION:

☒ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es) [ ] [ ]

A Increase Award B Decrease Award C Increase Duration
D Decrease Duration Other (specify)

9. NAME OF FEDERAL AGENCY:
DHHS, Office of Human Development Services
Washington, D. C.

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: [ ][ ] . [ ][ ][ ]

TITLE

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.)

13. PROPOSED PROJECT

Start Date	Ending Date

14. CONGRESSIONAL DISTRICTS OF:

a Applicant b Project

15. ESTIMATED FUNDING:

a Federal	$ .00
b Applicant	$ .00
c State	$ .00
d Local	$ .00
e Other	$ .00
f Program Income	$ .00
g TOTAL	$ .00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a YES THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON

DATE _____

b NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a Typed Name of Authorized Representative	b Title	c Telephone number
d Signature of Authorized Representative		e Date Signed

Previous Editions Not Usable

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OMB Approval No. 0348-0044

BUDGET INFORMATION — Non-Construction Programs

SECTION A – BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B – BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY (1)	(2)	(3)	(4)	Total (5)
a. Personnel	$ NA	$ NA	$ NA	$ NA	$
b. Fringe Benefits	NA	NA	NA	NA	
c. Travel	NA	NA	NA	NA	
d. Equipment	NA	NA	NA	NA	
e. Supplies	NA	NA	NA	NA	
f. Contractual	NA	NA	NA	NA	
g. Construction	NA	NA	NA	NA	NA
h. Other	NA	NA	NA	NA	
i. Total Direct Charges (sum of 6a - 6h)	NA	NA	NA	NA	
j. Indirect Charges	NA	NA	NA	NA	
k. TOTALS (sum of 6i and 6j)	$ NA	$ NA	$ NA	$ NA	$
7. Program Income	$ NA	$ NA	$ NA	$ NA	$

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SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$ NA	$ NA	$ NA	$ NA
9.	NA	NA	NA	NA
10.	NA	NA	NA	NA
11.	NA	NA	NA	NA
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$ NA	$ NA	$ NA	$ NA	$ NA
14. NonFederal	NA	NA	NA	NA	NA
15. TOTAL (sum of lines 13 and 14)	$ NA	$ NA	$ NA	$ NA	$ NA

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$ NA	$ NA	$ NA	$ NA
17.	NA	NA	NA	NA
18.	NA	NA	NA	NA
19.	NA	NA	NA	NA
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21. Direct Charges: NA	22. Indirect Charges:

23. Remarks

SF 424A (4-88) Page 2
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ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6 Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C.§§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

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10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program andto purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

BILLING CODE 4130-01-C

U.S. Department of Health and Human Services Certification Regarding Drug-Free Workplace Requirements Grantees Other Than Individuals

By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

This certification is required by regulations implementing the Drug-Free Workplace Act of 1988, 45 CFR part 76, subpart F. The regulations, published in the January 31, 1989 **Federal Register**, require certification by grantees that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when HHS determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or governmentwide suspension or debarment.

The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about:

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and,

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will:

(1) Abide by the terms of the statement; and,

(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted:

(1) Taking appropriate personnel action against such an employee, up to and including termination; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

By signing and submitting this proposal, the applicant, defined as the primary participant in accordance with 45 CFR part 76, certifies to the best of its knowledge and believe that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal Department or agency;

(b) Have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

The inability of a person to provide the certification required above will not necessarily result in denial of participation in this covered transaction. If necessary, the prospective participant shall submit an explanation of why it cannot provide the certification. The certification or explanation will be considered in connection with the Department of Health and Human Services' (HHS) determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

The prospective primary participant agrees that by submitting this proposal, it will include the clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," provided below without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions (To Be Supplied to Lower Tier Participants)

By signing and submitting this lower tier proposal, the prospective lower tier participant, as defined in 45 CFR part 76, certifies to the best of its knowledge and belief that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

(b) Where the prospective lower tier participant is unable to certify to any of the above, such prospective participant shall attach an explanation to this proposal.

The prospective lower tier participant further agrees by submitting this proposal that it will include this clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Organization

Authorized Signature Title Date

Note: If Disclosure Forms are required, please contact: Mr. William Sexton, Deputy Director, Grants and Contracts Management Division, Room 341F, HHH Building, 200

Independence Avenue, SW., Washington, DC 20201-0001

[FR Doc. 90-5101 Filed 3-7-90; 2:45 am]

BILLING CODE 4130-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-930-08-4333-11; NV5-90-12]

Nevada; Temporary Closure of Certain Public Lands in the Las Vegas District for Management of the Inaugural 1990 HDRA Nissan 400 Off-Highway Vehicle (OHV) Race

ACTION: Temporary closure of certain Public Lands in the Clark, County, Nevada, on and adjacent to the 1990 NISSAN 400 race course on March 2, and March 3, 1990. Access will be limited to race officials, entrants, law-enforcement and emergency personnel, licensed permittee(s) and right-of-way grantees.

SUPPLEMENTARY INFORMATION: Certain public lands in the Las Vegas District, Clark County, Nevada will be temporarily closed to public access from 0600 hours, March 2, 1990, to 2359 hours, March 3, 1990, to protect persons, property, and public land resources on and adjacent to the 1990 NISSAN 400 OHV race course. The Las Vegas District Manager is the authorized officer for the 1990 NISSAN 400 OHV race and permit number (NV5-90-12). These temporary closures and restrictions are made pursuant to 43 CFR part 8364. The public lands to be closed or restricted are those lands adjacent to and including roads, trails and washes identified as the 1990 NISSAN 400 OHV race course. The following public lands administered by the BLM restricted or closed are described as:

The Apex area: T. 19 S., R. 62 E., all of sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 32, 33, 34, 35, and 36.

The Nellis Dunes area; T. 19 S., R. 63 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The Arrolime area; T. 18 S., R. 63 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The Dry Lake area; T. 19 S., R. 64 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36; T. 18 S., R. 64 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36; and T. 17 S., R. 64 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The North Muddy area; T. 16 S., R. 66 E., all of sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32.

The California Wash area; T. 16 S., R. 65 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36; T. 15 S., R. 66 E., all of sections 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33; and T. 17 S., R. 65 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The Piute Wash area; T. 16 S., R. 64 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36; T. 15 S., R. 64 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The Arrow Canyon area; T. 16 S., R. 63 E., all of sections 7, 8, 9, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36; and T. 17 S., R. 63 E., all of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

The above legal land descriptions are for public lands within Clark, County, Nevada. A map showing specific areas closed to public access is available from the following BLM office: the Las Vegas District Office, 4765 Vegas Drive, P.O. Box 26569, Las Vegas, Nevada 89126, (702) 646-8800. Any person who fails to comply with this closure order issued under 43 CFR part 8364 may be subject to the penalties provided in 43 CFR 8360.7.

Dated: March 1, 1990.

Gary Ryan,

Associate District Manager, Las Vegas, NV.

[FR Doc. 90-5322 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-HC-M

[CA-060-0-4410-12]

1989 Amendment Review of California Desert Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction and amendment notice.

SUMMARY: In the **Federal Register** of January 18, 1990 (Vol. 55, p.1733), a Notice of Correction and amendment was published. This amends, clarifies, and corrects that notice. Because of expressed interest, the comment period is extended an additional 30 days until April 9, 1990. The purpose of the public review period is to obtain comments and issues to be addressed in the Environmental Impact Statement. Failure to comment will not preclude or prevent participating in the review of the draft environmental impact statement, the availability of which will be noted in the **Federal Register** and through a news release. The January 18th notice includes the following "Written comments on the proposed three additional ACECs and proposed deletion of the four competitive race routes will be accepted from the public until February 22, 1990 days after the Desert Advisory Council meeting." That portion beginning with "days after the * * * Council meeting" was incorrectly included and should be stricken.

FOR FURTHER INFORMATION CONTACT: Gerald E. Hillier, District Manager, California Desert District, 1695 Spruce Street, Riverside, California 92507.

Dated: March 1, 1990.

H.W. Riecken,

Acting District Manager.

[FR Doc. 90-5239 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-40-M

[CO-030-5101-90-YCKD-5100]

Intent to Prepare an Environmental Impact Statement (EIS) on a 22" diameter Natural Gas Pipeline in Western Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement (EIS) on a 22" Natural Gas Pipeline in Western Colorado and Notice of Scoping Meetings.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the Bureau of Land Management, Montrose; District, will be directing the preparation of an EIS to be prepared by a third party contractor on the impacts of a 300-mile long 22" diameter natural gas pipeline in Western Colorado. The proposed gas pipeline crosses private and public land. This project is called TransColorado Gas Transmission Project (TransColorado).

DATES: A series of public scoping meetings will be held at various towns in Western Colorado. These meetings are tentatively scheduled in April of 1990. Specific dates, times and locations will be disseminated in local newspaper, radio stations and television stations. Written comments will be accepted for a period of 30 days beyond the date of the last scheduled scoping meeting.

ADDRESSES: Any comments should be submitted to the District Manager, Bureau of Land Management, 2465 South Townsend, Montrose, Colorado 81401, Attention: TransColorado Gas Transmission Project.

FOR FURTHER INFORMATION CONTACT: Chuck Finch, (303) 249-7791.

SUPPLEMENTARY INFORMATION: The TransColorado Project is being proposed by WestGas, a subsidiary of Public Service Co., of Colorado, Rocky Mountain Natural Gas, a subsidiary of KNEnergy Inc., and Questar Pipeline Co., a subsidiary of Questar Corp. These same companies would own and operate the line should it be constructed. The 22" diameter high pressure line would extend from a location near Meeker, Colorado approximately 300 miles in a southerly direction to Ignacio, Colorado. Approximately 71% of the line would follow existing utility corridors. It is anticipated that a right-of-way width of 50' is required for this project. Approximately 144 miles of the line would be on Bureau of Land Management land, in the Craig, Grand Junction and Montrose Districts, 57 miles on National Forest land, in the Uncompahgre, San Juan, and White River National Forests, and 99 miles on private land. It is anticipated that the line would carry up to 300 million cubic feet of gas per day.

A Regional Environment Overview (REO) was completed by TransColorado in the fall of 1989, to identify, locate, and evaluate, potential environmental constraints for the pipeline's location. Two categories of environmental constraints were identified in the REO: Unacceptable and objectionable. The proposed pipeline route that was selected avoided all unacceptable constraints and most objectionable constraints. Based on these constraints a proposed pipeline route was developed. It represents the most economically feasible and environmentally sound route based on TransColorado's preliminary evaluation.

The Bureau of Land Management scoping meetings are being held to gather information on the proposed route, any viable alternatives, and environmental impacts that may be caused by the project.

Dated: February 27, 1990.

Ken Herman,

Acting District Manager.

[FR Doc. 90-5302 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-JB-M

Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Interior. Susanville District Grazing Advisory Board, Susanville, California.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Susanville District Grazing Advisory Board, created under the Secretary of Interior's discretionary authority on May 14, 1986, will meet on April 27, 1990.

The April 27 meeting will begin at 10 a.m. at the Alturas Resource Area Office, Bureau of Land Management, 608 West 12th Street, Alturas, California.

Subjects to be covered during the meeting will include a report of progress on range improvements for 1990, a report on new and revised Allotment Management Plans (AMPs) for FY 1990, an update on the Wild Horse and Burro Program, and a discussion of other items as appropriate.

The meeting is open to the public. Interested persons may make oral statements to the Board between 3 p.m. to 4:30 p.m. on April 27, 1990 or file a written statement for the Board's consideration. Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, 705 Hall Street, Susanville, California 96130 by April 18, 1990. Depending upon the number of persons wishing to make oral statements, a per person time limit may be established.

Summary minutes of the Board meeting will be maintained in the District Office, and will be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Robert J. Sherve,

Associate District Manager.

[FR Doc. 90-5324 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-40-M

[WY-920-00-4111-15; WYW78898]

Reinstatement of Terminated Oil and Gas Lease; Wyoming

March 2, 1990.

Pursuant to the provisions of Public Law 97-451, 96 Stat. 2462-2466, and Regulation 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW78898 for lands in Johnson County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre, or fraction thereof, per year and 16-2/3 percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW78898 effective October 1, 1989, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Beverly J. Poteet,

Supervisory Land Law Examiner.

[FR Doc. 90-5321 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-22-M

[WY-920-00-4111-15; WYW106046]

Reinstatement of Terminated Oil and Gas Lease; Wyoming

Pursuant to the provisions of Public Law 97-451, 96 Stat. 2462-2466, and Regulation 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW106046 for lands in Big Horn County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre, or fraction thereof, per year and 16⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this **Federal Register** notice.

The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW106046 effective October 1, 1989, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Beverly J. Poteet,

Supervisory Land Law Examiner.

[FR Doc. 90-5321 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-22-M

[MT-930-00-4212-13; SDM 57797]

Conveyance and Order Providing for Opening of Public Land in Lawrence County; South Dakota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This order will open lands reconveyed to the United States in an exchange under the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 et seq (FLPMA), to the operation of the public land laws. It also informs the public and interested state and local

governmental official of the issuance of the conveyance document.

The purpose of the exchange was to transfer 137 separate parcels of federal land in exchange for a parcel of private land with recreation potential that is adjacent to an existing public land tract. The public was well served through completion of this land exchange.

EFFECTIVE DATE: May 2, 1990.

FOR FURTHER INFORMATION CONTACT: James Binando, BLLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406-255-2935.

SUPPLEMENTARY INFORMATION: 1. Notice is hereby given that pursuant to section 206 of FLPMA, the following described lands were tranferred to Homestake Mining Company:

Black Hills Meridian, South Dakota

T. 4 N., R. 3 E.,
Sec. 3, lots 1-3, 6-10 and the Surething Lode of MS 1796;
Sec. 4, lots 1-3, 5, 6, 8-10, 12-16;
Sec. 9, lots 1-6, 11-13, 15-17, and the Alma Fraction and Donelson Fraction of MS 1557;
Sec. 10, lots 1-4, 7-11, 13, 15-17, 19, and Tract 72;
Sec. 15, lots 1, 3, 4, 6, Tract 72 and Tract 73.
T. 5 N., R. 3 E.,
Sec. 27, MS 2078;
Sec. 28, lots 1-14;
Sec. 29, lots 1-6, 9-12, MS 1544;
Sec. 30, lot 9;
Sec. 32, lots 1, 4-9, 11, 12, 15-21, and Tract 41;
Sec. 33, lots 1-14, 16-30
Sec. 34, lots 3-7, 12-14, 18, 22, and the Surething Lode of MS 1796.
aggregating 260.21 acres.

2. In exchange for the above selected land, the United States acquired the following described land from Homestake Mining Company:

Black Hills Meridian, South Dakota

T. 4 N., R. 3 E.,
Secs. 8, 9, 16, and 17: The Copper King and Iron Blossom Lodes of MS 1138; The Ground Hog and Rustler Lodes of MS 1318; The Wizard Wedge, Wizard No. 1; Little Ground Hog No. 1; Pilgrim, Ground Hog No. 1; Ground Hog No. 3, Ground Hog No. 6, Ground Hog No. 7, Ground Hog No. 8, Ground Hog No. 9 and Ground Hog No. 10 Lodes of MS 1874, Except Lot A of the subdivision of Ground Hog No. 1 and Ground Hog No. 3 as set out in that certain plat recorded in Lawrence County as Document No. 78-1866; The Morman, Mormon, No. 1, Ground Hog No. 2, Gold Bug No. 1 and Gold Bug No. 2 Lodes of MS 1927; Lone Star Lode of MS 1555.
containing 259.246 acres, more or less.

3. The values of the Federal public land were appraised at $215,305 and the values of the private land were appraised at $207,740. A cash equalization payment in the amount of $7,565 was made to the United States.

4. At 9 a.m. on May 2, 1990, the lands described in paragraph 2 above that were conveyed to the United States will be opened to the operation of the public land laws generally, subject to valid existing rights and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on May 2, 1990, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

Dated: February 27, 1990.

John A. Kwiatkowski,
Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 90-5301 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-DN-M

[AZ-020-00-4212-13; AZA-24412]

Realty Action Exchange of Public Land; Pima County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action, Exchange.

SUMMARY: All or part of the following described federal land is being considered for disposal via exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

Gila and Salt River Base and Meridian, Pima County, Arizona

T. 17 S., R. 10 E.,
Sec. 26: S½;
Sec. 27: S½;
Sec. 34: N½;
Sec. 35: N½, SW¼, SW¼SE¼, E½SE¼.
T. 18 S., R. 10 E.,
Sec. 2: lots 6 to 10, incl., SE¼NE¼, S½ NW¼, SW¼.
T. 18 S., R. 11 E.,
Sec. 21: NE½, S½.
T. 18 S., R. 12 E.,
Sec. 23: NE¼NW¼, N½NE¼;
Sec. 17: SW¼ (less patented mining claim), SE¼ (less patented mining claim).
Comprising 2,761.8 acres, more or less.

Final determination on disposal will await completion of an environmental analysis.

In accordance with the regulations of 43 CFR 2201.1, publication of this Notice will segregate the affected public land from appropriation under the public land laws, except exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976. The segregative effect shall also exclude appropriation of the subject public land under the mining laws, subject to valid existing rights.

The segregation of the above-described land shall terminate upon publication in the **Federal Register**, of a notice of termination of the segregation; or the expiration of two years from the date of publication, whichever occurs first.

For a period of forty-five (45) days from the date of publication of this notice in the **Federal Register** interested parties may submit comments to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

Dated: February 27, 1990.

Henri R. Bisson,
District Manager.

[FR Doc. 90-5314 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-32-M

Exchange of Public Lands in Lassen County, CA; Correction

AGENCY: Bureau of Land Management, Department of the Interior Susanville, California.

ACTION: Correction of notice of realty action; exchange of public lands in Lassen County, California (CACA 22471).

SUMMARY: The Notice of Realty Action (CACA 22471) published on February 1, 1990 (55 FR 3491-92) is hereby corrected as follows:

The address given in the third to last paragraph for information including the environmental assessment is 705 Hall Street, Susanville, California 96130, not 750 Hall Street.

Lands to be transferred from the United States will be subject to the following reservation in addition to those shown in the original notice:

There will be reserved to the United States a 220 foot wide exclusive easement for construction, use, maintenance and repair of a road within the NENE of section 22, T.31N., R.15E., M.D.M., located parallel and adjacent to the south boundary of said NENE of section 22, running from the NE 1/16 corner of said section 22, easterly to the N 1/16 corner of sections 22 and 23 of T.31N., R.15E., M.D.M.

Dated: March 1, 1990.

Robert J. Sherve,
Associate District Manager.

[FR Doc. 90-5323 Filed 3-7-90; 8:45 am]

BILLING CODE 4310-40-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-301]

Certain Imported Breast Prostheses and the Manufacturing Processes Thereof

Notice is hereby given that the prehearing conference in this matter will commence at 9 a.m. on March 8, 1990, in Courtroom C (Room 217), U.S. International Trade Commission Building, 500 E St. SW., Washington, DC, and the hearing will commence immediately thereafter.

The Secretary shall publish this notice in the **Federal Register**.

Issued: March 5, 1990.

Janet D. Saxon,

Chief Administrative Law Judge.

[FR Doc. 90-5404 Filed 3-7-90; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31573]

Paducah and Louisville Railway, Inc.—Trackage Rights Exemption—Louisville-Jefferson County Riverport Authority

The Louisville-Jefferson County Riverport Authority (Riverport) has agreed to grant local trackage rights to Paducah and Louisville Railway, Inc. (P&L), between the P&L line and the Riverport complex, in Louisville, KY, as follows: The co-exclusive right with Norfolk Southern Corporation to operate on the Lead Track from approximately station 7+59.50 to approximately station 34+96.00, (approximatley 3496 feet); and the non-exclusive right to operate on the Joint Portion track from station 34+96 to station 86+93 (approximately 5196 feet), the Onsite Line from station 86+93 to station 50+61.23 (approximately 5061 feet), and the Port Rail Trackage. The trackage rights will be effective upon consummation and execution of the proposed trackage rights and special maintenance charge agreements between P&L and Riverport.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Christopher E. Hagerup, Weiner, McCaffrey, Brodsky, Kaplan and Levin, 1350 New York Avenue, NW., Suite 800, Washington, DC 20005.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), a modified in *Mendocino Coast Ry., Inc.—Lease and Opeate*, 360 I.C.C. 653 (1980).

Dated: March 1, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 90-5179 Filed 3-7-90; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree; Bell Petroleum Services, Inc., et al.

In accordance with Section 122 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §9622, and the policy of the Department of Justice, as CFR 50.7, notice is hereby given that a complaint styled *United States* v. *Bell Petroleum Services*, Inc., et al., Civil Action No. MO-88-CA-005, was filed in the United States District Court for the Western District of Texas on December 1, 1988. On March 2, 1990, a consent decree, between the United States as plaintiff, and Bill Petroleum Services, Inc. and Regal International, Inc., as defendants, was lodged with the Court in partial settlement of the allegations in the complaint. This consent decree settles the government's claims in the complaint against Bell Petroleum Services, Inc. and Regal International, Inc., pursuant to section 104, 106 and 107 of CERCLA, 42 U.S.C. 9604, 9606, 9607, for injunctive relief to abate an imminent and substantial endangerment to the public health, welfare or the environment because of actual or threatened releases of hazardous substances from a facility, and for the recovery of response costs incurred by the United States with respect to a facility located in Odessa, Ector County, Texas, known as the "Odessa Chrominum I Site" (hereafter "the Site"). The complaint alleged, among other things, that the defendants are persons who at the time of disposal of any hazardous substances owned and operated any facility at which such substances were disposed of. The complaint further alleged that the United States has incurred and will continue to incur response costs in response to the release or threat of release of hazardous substances.

Under the terms of the proposed consent decree, the defendants Bell Petroleum Services, Inc. and Regal International Inc., agree to pay the United States a sum of one million dollars ($1,000,000.00) for United States' response costs. The United States will continue to seek the remainder of its response costs from defendants named in the complaint who are not parties to the consent decree.

The Department of Justice will receive comments relating to the proposed consent decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, 10th and Pennsylvania Avenue, NW., Washington, D.C. 20530. All comments should refer to *United States* v. *Bell Petroleum Services, Inc.*, D.J. Ref. 90-11-2-229. The proposed consent decree may be examined at the following offices of the United States Attorney and the Environmental Protection Agency ("EPA"):

United States Attorney's Office

Office of the United States Attorney, U.S. Courthouse, 200 East Wall Street, Midland, Texas 79701, (915) 684-4120.

EPA Region VI

Contact: Mike Barra, Office of Regional Counsel, U.S. Environmental Protection Agency, Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733, (214) 655-2120.

Copies of the proposed consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1515, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044. In requesting a copy of the decree, please enclose a check for copying costs in the amount of $7.10 payable to Treasurer of the United States.

Richard B. Stewart,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 90-5306 Filed 3-7-90; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; Coleman Evans Wood Preserving Co., et al.

In accordance with Departmental policy, 28 CFR 50.7, and the provisions of section 122(i) of the Comprehensive

Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. 9622(i), notice is hereby given that on February 15, 1990, a proposed Consent Decree in *United States v. Coleman Wood Preserving Company and Jack Coleman*, Civil Action No. 88-562-CIV-J-12, was lodged with the United States District Court for the Middle District of Florida. The proposed Consent Decree settles the United States claims (except for potential damage to natural resources and potential criminal liability) against the defendants, Coleman Evans Wood Preserving Company and Jack Coleman, on the basis of their demonstrated inability to pay the full costs of response in connection with the Coleman Evans Site, located outside of Jacksonville, Florida. Under the terms of the Consent Decree, Coleman Evans Wood Preserving Company and Jack Coleman will pay the United States a present lump sum of $350,000 in return for a full release from all liability under section 122(f)(6)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.* 42 U.S.C. 9622(f)(6)(B).

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments related to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Coleman Evans Wood Preserving Company*, D.J. No. 90-11-3-370.

The proposed Consent Decree may be examined at the office of the United States Attorney, Middle District of Florida, 409 Post Office Building, 311 West Monroe Street, Jacksonville, Florida, and at the Region 4 office of the Environmental Protection Agency, 345 Courtland Street, NE., Atlanta, Georgia 30364. A copy of the proposed Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1517, Ninth and Pennsylvania Ave., Washington, DC 20530. In requesting a copy, please enclose a check in the amount of $1.70 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Barry Hartman,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 90-5305 Filed 3-7-90; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

National Cooperative Research; International Partners in Glass Research

Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), International Partners in Glass Research ("IPGR") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission on January 3, 1989 and February 14, 1990 disclosing changes in the membership and scope of its venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, in the January 3, 1989 filing, IPGR advised that Rockware Glass Limited assigned its interest in IPGR to Rockware International Limited, a "Related Company" under the Partnership Agreement among the joint venture partners. In its February 14, 1990 filing, IPGR advised that IPGR was empowered to enter into an agreement providing for the licensing to it, by Yamamura Glass Co., Ltd., a partner, and by others, if necessary, of rights in connection with a polymer coating for glass developed by Yamamura Glass Co., Ltd. (alone or jointly with others) and the conduct by or for IPGR of a project for developing a method for applying such coating to glass containers.

On March 12, 1985, IPGR filed its original notification pursuant to section 6(a) of the Act. The Department of Justice (the "Department") published a notice in the Federal Register pursuant to section 6(b) of the Act on April 10, 1985, 50 FR 14175. On November 18, 1986 and April 25, 1988, IPGR filed additional notifications. The Department published notices in response to these additional notifications on January 6, 1987, 52 FR 468, and June 2, 1988, 53 FR 20194 respectively.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-5307 Filed 3-7-90; 8:45 am]

BILLING CODE 4410-01-M

National Cooperative Research Act of 1984; Microelectronics and Computer Technology Corp.; Correction

In notice document 89-25257 concerning Microelectronics and Computer Technology Corporation, appearing in the issue of Thursday, October 26, 1989 at 54 FR 43631, make the following corrections: (1) To the phrase "disclosing changes in the membership of MCC" add "and its planned activities"; (2) Delete the phrase "Effective on or about September 19, 1987, E-Systems, Inc. and General Dynamics Corporation are not parties to MCC" and add "E-Systems, Inc. and General Dynamics Corporation are now parties to MCC. In addition to its previously disclosed activities, MCC also plans to conduct research and development activities in the area of utilization of optics technology in computer systems"; (3) Delete "and September 22, 1988 (53 FR 28922)" and add "and September 22, 1988 (53 FR 36910), respectively."

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-5304 Filed 3-7-90; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background: The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review: As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in. Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions: Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523-6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, Room 3208, Washington, DC 20503 (Telephone (202) 395-6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larson of this intent at the earliest possible date.

New Collection

Employment Standards Administration.

Training Wage Provisons of the Fair Labor Standards Amendments of 1989.

29 CFR 517.

On occasion.

Individuals or households; State or local governments; Farms;

Businesses or other for-profit; Federal agencies or employees;

Non-profit institutions; Small businesses or organizations.

2.2 million respondents; 169,166 total hours; 2 min. to 1 hr. per response.

These reporting and recordkeeping requirements for employers and employees utilizing the training wage and necessary to insure employes are paid in compliance with the training wage provisions of the Fair Labor Standards Act.

Revision

Asbestos, Tremolite, Anthophyllite and Actinolite (Construction). 1926.58.

On Occasion.

Business or other for profit; Small Business or Organizations.

188,779 respondents; 438,532 burden hours; 2.32 hours per respondent.

The amended asbestros standard will require employers to administer the following: (a) Assure that employees working in or contiguous to regulated areas understand required waring signs, (b) that training programs specifically instruct employees about the content and presence of signs and labels and (c) add training requirements covering the availability of smoking control programs for employees.

Regulatory Requirement	*Burden hours*
1. Exposure Monitoring:	
(a) Initial Exposure Measurement	0
(b) Periodic Monitoring	0
(c) Employee Notification	0
2. Respiratory Protection:	
(a) Respirator Program	0
(b) Emergency-Use Respirators	0
(c) Respirator Fit-Testing	0
3. Notify the Laundry	0
4. Warning Signs & Labels	[1] 32,092
5. Employee Information & Training:	
(a) Training Program	[1] 60,941
(b) Access to Information	36,420
6. Medical Surveillance:	
(a) Medical Exams	127,899
(b) Information to Physician	12,790
(c) Physicians Written Opinion	12,315
(d) Medical Questionnaire	39,978
7 Recordkeeping:	
(a) Objective Data Records	0
(b) Monitoring Records	0
(c) Medical Records	12,315
(d) Employee Training Records	88,764
(e) Records Access	15,018
Total Information Collection Burden	438,532

[1] Amended.

Asbestos, Tremolite, Anthophyllite and Actinolite (General Industry).

1910.1001.

On Occasion.

Business or other for profit; Small Business or Organizations. 286,607 respondents; 184,986 burden hours; .65 hours per respondent.

The amended asbestos standard will require employers to administer the following: (a) Assure that employees working in or contiguous to regulated areas understand required warning signs, (b) that training programs specifically instruct employees about the content and presence of signs and labels and (c) add training requirements covering the availability of smoking control programs for employees.

Regulatory Requirement	*Burden hours*
1. Exposure Monitoring:	
(a) Initial Exposure Measurement	0
(b) Periodic Monitoring	7,429
(c) Additional Monitoring	75
(d) Employee Notification	422
2. Compliance Programs	292
3. Respiratory Protection:	
(a) Respirator Program	0
(b) Emergency-Use Respirators	2,280
(c) Respirator Fit-Testing	6,716
4. Notify the Laundry	0
5. Warning Signs & Labels	[1] 48,723
6. Material Safety & Data Sheets	0
7. Employee Information & Training:	
(a) Training Program	[1] 24,521
(b) Access to Information	23,076
8. Medical Surveillance:	
(a) Medical Exams	43,314
(b) Information to Physician	4,331
(c) Physicians Written Opinion	4,159
(d) Medical Questionnaire	12,999
9. Recordkeeping:	
(a) Monitoring Records	625
(b) Objective Data Record	0
(c) Medical Records	4,159
(d) Employee Training Records	610
(e) Records Access	1,255
Total Information Collection Burden	184,986

[1] Amended.

Extension

Employment Standards Administration.

DBRA/CWHSSA recordkeeping and reporting requirements; 29 CFR part 5

1215-0140; DBRA 5.

On occasion.

State or local governments; Businesses or other for profit; Federal agencies or employees; Small Businesses or organizations. 2,505 respondents; 630 total hours; ¼ to 1 hour per response. Recordkeeping and incidenal reporting requirements incurred by employers under DBRA/CWHSSA Regulations, 29 CFR 5.

Signed at Washington, DC this 1st day of March, 1990.

Marizetta L. Scott,

Acting Departmental Clearance Officer.

[FR Doc. 90-5229 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-22-M

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may

request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than ???

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than ???

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, SW., Washington, DC 20213.

Signed at Washington, DC this 20th day of February 1990.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (Union/Workers/Firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Abitibi-Price (Int. Woodworkers)	Alpena, MI	2/20/90	2/04/90	24,010	Wood Paneling.
Acadia Polymer, Inc. (Workers)	Clifton Forge, VA	2/20/90	2/07/90	24,011	Rubber Parts.
Ampe Corp. VSD & RSD Div. (Workers)	Colorado Springs, CO	2/20/90	2/01/90	24,012	Tape Recorders.
Becton Dickinson Infusion Systems	Lincoln Park, NJ	2/20/90	1/26/90	24,013	Medical Infusion Systems.
Bell's Foundry (Workers)	Hillsboro, OH	2/20/90	1/23/90	24,014	Iron Castings.
Blankenship Shake Co., Inc. (Company)	Forks, WA	2/20/90	2/08/90	24,015	Shakes & Shingles.
Champion Chemicals, Inc. (Workers)	Houston, TX	2/20/90	2/07/90	24,016	Oilfield Chemicals.
Control Data Corp. (Workers)	Bloomington, MN	2/20/90	2/03/90	24,017	Computers.
El Paso Brick Co., Inc. (Workers)	El Paso, TX	2/20/90	2/04/90	24,018	Bricks.
Elysburg Fashions, Inc. (Workers)	Elysburg, PA	2/20/90	2/05/90	24,019	Ladies' Sportswear.
Ford Electronics & Refrigeration Corp	Bedford, IN	2/20/90	2/08/90	24,020	Auto Components.
Gateway Coal Co. (UMWA)	Prosperity, PA	2/20/90	2/05/90	24,021	Coal.
Green Mountain Marble Co. (Workers)	Windsor, VT	2/20/90	2/07/90	24,022	Sinks & Countertops.
Jerrold Subscriber Systems, Inc. (CWA)	N Kansas City, MO	2/20/90	2/09/90	24,023	Cable Television Converters.
Kay Windsor, Inc. (ILGWU)	Lawrenceburg, TN	2/20/90	2/07/90	24,024	Ladies' Sportswear.
Kramer Trenton Co. (IUE)	Trenton, NJ	2/20/90	2/08/90	24,025	Refrigerators.
Lake Shore, Inc. (USWA)	Negaunee, MI	2/20/90	2/04/90	24,026	Vehicle.
Loral Defense Systems (Workers)	Litchfield Park, AZ	2/20/90	1/19/90	24,027	Electronic & Radar Equip.
Loth Lumber (Workers)	Forks, WA	2/20/90	2/06/90	24,028	Cedar Lumber & Siding.
Mission Resources, Inc. (Workers)	Alameda, CA	2/20/90	2/06/90	24,029	Oil & Gas.
Mission Resources, Inc. (Workers)	Bakersfield, CA	2/20/90	2/06/90	24,030	Oil & Gas.
Natalie Knitting Mills (Workers)	Chilhowie, VA	2/20/90	2/02/90	24,031	Sweaters.
New Hyer Boot Co. (Workers)	El Paso, TX	2/20/90	2/05/90	24,032	Boots.
NGK Berylco (USWA)	Reading, PA	2/20/90	2/09/90	24,033	Metals.
Polychrome Corp. (Company)	Yonkers, NY	2/20/90	1/31/90	24,034	Graphic Plates & Film.
Polychrome Corp. (Company)	Robbinsville, NJ	2/20/90	1/31/90	24,035	Graphic Plates & Film.
SKF Foundry, SKF USA, Inc. (Company)	Washington, MO	2/20/90	2/07/90	24,036	Iron Castings.
Sun Refining & Marketing/Dallas Computer Center (Workers).	Dallas, TX	2/20/90	2/02/90	24,037	Oil & Gas.
Temple-Stewart Co. (Workers)	Baldwinville, MA	2/20/90	2/08/90	24,038	Furniture.
Temple-Stewart Co. (Workers)	Winchester, MA	2/20/90	2/08/90	24,039	Furniture.
United Industries, Inc. (IAMAW)	Beloit, WI	2/20/90	2/06/90	24,040	Steel.
(The) Upjohn Co. (Orwin Employees Assoc.)	No. Haven, CT	2/20/90	1/30/90	24,041	Chemicals.
Wells Aluminum Corp. Moultrie Div. (Company)	Moultrie, GA	2/20/90	1/29/90	24,042	Aluminum Billets.

[FR Doc. 90-5227 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-23,286]

Circuline Fabrics, Inc.; Revised Determination on Reconsideration

On January 12, 1990, the Department issued an Affirmative Determination Regarding Application for Reconsideration for workers and former workers of Circuline Fabrics Inc., Brooklyn, New York. The affirmed notice will soon be published in the Federal Register.

Circuline Fabrics experienced declining sales and production in 1988 and in the first seven months of 1989 compared to the immediately preceding respective periods. Circuline Fabrics closed in July, 1989 and all workers were laid off.

Findings on reconsideration show that the subject firm was a women's sweater contractor for a manufacturer who had declining sales of women's sweaters in 1988 and 1989.

The Department's survey of the manufacturer's customers revealed that they had increased purchases of imported sweaters in 1988 and 1989 while the manufacture and contractor had declining sales of women's sweaters.

Circuline Fabrics was certified for firm adjustment assistance by the Department of Commerce on July 15, 1988, FNY 3749.

Conclusion

After careful review of the additional facts obtained on reconsideration, it is concluded that increased imports of articles like or directly competitive with women's sweaters produced at Circuline Fabrics Inc., Brooklyn, New York contributed importantly to the decline in sales or production and to the total or partial separation of workers at Circuline Fabrics Inc., Brooklyn, New York. In accordance with the provisions of the Trade Act of 1974, I make the following revised determination:

All workers of Circuline Fabrics Inc., Brooklyn, New York who became totally or partially separated from employment on or after August 5, 1988 and before March 1, 1990 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 26th day of February 1990.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Acturial Services, UIS.

[FR Doc. 90-5228 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

Sunshine Mining Company d/b/a Woods Petroleum Corp., and Texas Energies, Inc.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on November 18, 1988 applicable to all workers of Woods Petroleum Corporation, Oklahoma City, Oklahoma.

New information from the company indicates that the Sunshine Mining Company, Oklahoma City, Oklahoma was doing business as Woods Petroleum Corporation and Texas Energies, Inc. The workers were paid by the Sunshine Mining Company. Accordingly, the certification is being amended to properly reflect this finding.

The amended notice applicable to TA-W-21, 045 is hereby issued as follows:

All workers of Sunshine Mining Company d/b/a Woods Petroleum Corporation, Oklahoma City, Oklahoma and all locations in Colorado and Wyoming and d/b/a Texas Energies, Inc., Pratt Kansas who became totally or partially separated from employment on or after September 9, 1987 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC., this 23rd day of February 1990.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 90-5224 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period February 1990.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proporation of the workers in the worker's firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-23,676; Picker International, Highland Heights, OH

TA-W-23,734; Duquesne Slag Procucts Co., Pittsburgh, PA

TA-W-23,663; Dotson Wheels Corp., Saltville, VA

TA-W-23,730; Consolidated Thermo Plastics, Kenilworth, NJ

TA-W-23,678; R & K Originals, Inc., Div. of United Merchants & Manufacturing, Inc., North Bergen, NJ

TA-W-23,686; Ballantine Laboratories, Inc., Boonton, NJ

TA-W-23,720; Alorna Coat, Hoboken, NJ

TA-W-23,747; J & B Coat Corp., Hoboken, NJ

TA-W-23,710; Republic Metal Products, Inc., Hillside, NJ

TA-W-23,667; General Electric Co., Aircraft Electronics Div., Systems Display Department, Wilmington, MA

TA-W-23,696; Exide Corp., Logansport, IN

TA-W-23,786; G.F. Office Furniture Systems, Inc., Youngstown, OH

TA-W-23,748; Kayem Textiles, Inc., Guttenberg, NJ

In the following cases, the investigation revealed that the criteria for eligibility has not been met for the reasons specified.

TA-W-23,752; Sand Springs Oil & Gas, Tulsa, OK

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,687 & TA-W-23,688; Boise Cascade Corp., Goldindale, WA and Yakima, WA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,754; Sierra Oilfield Service Co., Oklahoma City, OK

The workers's firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA-W-23,669; Health-Tex, Centreville, AL

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,732; Dell Coat Co., Inc., Union City, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,750; N.L. Chemicals, Highstown, NJ

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA-W-23,712; Solray Manufacturing Corp., New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,671; Jeems Bayou Production Corp., Oil City, LA

The investigation revealed that criterion (2) has not been met. Sales of production did not decline during the relevant period as required for certification.

TA-W-23,707; National Semiconductor, Tucson, AZ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,668; H.E. Sutton Special, Oil City, LA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,692; Elco Dress Co., Inc., New Bedford, MA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,666; Flock Industries, Phillipsburgh, NJ

The investigation revealed that criterion (2) has not been met. Sales of production did not decline during the relevant period as required for certification.

TA-W-23,743; Health Tex, Inc., New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,694; Evan-Picone, North Bergen, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,751; Rose Lee Manufacturing, Inc., Brooklyn, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,733; Dow Brands, Inc., Piscataway, NJ

U.S. imports of soaps & detergents are negligible.

TA-W-23,749; Malouf Ranch & Livestock Co., Dallas, TX

U.S. imports of livestock has been negligible.

TA-W-23,769; Howe Richardson, Inc., Clifton, NJ

The invesigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,758; Baret Bias Binding, Inc., East Newark, NJ

U.S. imports of findings and trimings which includes bindings are negligible.

TA-W-23,735; Elf Aquitaine petroleum, Houston, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,737; Evanite Fiber Corp., Hardboard Div., Corvallis, OR

The investigation revealed that criterion (1) has not been met. A significant number or proportion of the workers did not become totally or partially separated as required for certification.

TA-W-23,756; AT&T Material Management System Div., San Leandro, CA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,699; Home Petroleum Corp., Denver, CO

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,699A; Home Petroleum Corp., At Various Locations in The State of Louisiana

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,700; Home Petroleum Corp., Geary, OK

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,701; Home Petroleum Corp., Plaza, ND

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,702; Home Petroleum Corp., Rock Spring, WY

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,703; Home Petroleum Corp., Houston, TX

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,704; Home Petroleum Corp., Gillette, WY

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,716; AT&T Material Management Systems Div., King of Prussia, PA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,801; Marilena Fashions, Inc., Jersey City, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,726; Chrysler Corp., Toledo, OH

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,725; Chrylser Corp., Jefferson Avenue Assembly, Detroit, MI

Increased imports did not contribute importantly to workers separations at the firm.

Affirmative Determinations

TA-W-23,742; Harris Graphics Corp., Kennedale, TX

A certification was issued covering all workers separated on or after December 1, 1988.

TA-W-23,729; Cliffside Co., Brooklyn, NY

Certification was issued covering all workers separated on or after November 20, 1988 and before April 30, 1989.

TA-W-23,738; Fiesta Apparel, Inc., Hoboken, NJ

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-23,746; ISA Fashion, Hoboken, NJ

A certification was issued covering all workers separated on or after December 1, 1988.

TA-W-23,760; Eastland Woolen Mill, Inc., Corinna, ME

A certification was issued covering all workers separated on or after December 8, 1988.

TA-W-23,718; After Six, Inc., Charlottsville, VA

A certification was issued covering all workers separated on or after December 5, 1988.

TA-W-23,739; Flexible Controls Corp., Dearborn, MI

A certification was issued covering all workers separated on or after October 1, 1989.

TA-W-23,721; Camparii Fashions, Inc., Newark, NJ

A certification was issued covering all workers separated on or after December 8, 1988 and before November 20, 1989.

TA-W-23,675; Orbit Drilling, Inc., Kimball, NE

A certification was issued covering all workers separated on or after November 20, 1988 and before December 30, 1989.

TA-W-23,757; AT&T Material Management System Div., Denver, CO

A certification was issued covering all workers separated on or after December 7, 1988 and before June 30, 1990.

TA-W-23,771; Lisa Originals, Inc., Hoboken, NJ

A certification was issued covering all workers separated on or after December 1, 1988.

TA-W-23,741; Gregg Originals, Inc., Hoboken, NJ

A certification was issued covering all workers separated on or after December 1, 1988.

TA-W-23,684; Star Fashion Coat Corp., Paterson, NJ

A certification was issued covering all workers separated on or after November 16, 1988.

TA-W-23,755; Stewart Warner Instrument Corp., Chicago, IL

A certification was issued covering all workers separated on or after December 6, 1988.

TA-W-23,739; Flexible Controls Corp., Dearborn, MI

A certification was issued covering all workers separated on or after October 1, 1989.

TA-W-23,744 and TA-W-23, 745; IRC, Inc., Newland, NC & Boone, NC

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-23,646; Health-Tex, Inc., 88 Martin Street, Cumberland, RI

A certification was issued covering all workers separated on or after November 14, 1988 and before January 5, 1990.

TA-W-23,634; Wear-Ever, Chillicothe, OH

A certification was issued covering all workers separated on or after November 3, 1988.

I hereby certify that the aforementioned determinations were issued during the month of February 1990. Copies of these determinations are available for inspection in Room 6434, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213 during normal business hours or will be mailed to persons to write to the above address.

Dated: February 27, 1990.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 90-5225 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-23,541]

American Carco, Dayton, Ohio; Negative Determination Regarding Application for Reconsideration

By an application postmarked January 29, 1990, Local 1104 of the United Rubber Workers (URW) requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on December 18, 1989 and published in the **Federal Register** on January 12, 1990 (55 FR 1291).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The union submitted a name of a customer that may have imported plastic parts during the survey period.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met. The "contributed importantly," test is generally demonstrated through a survey of the workers' firm's customers. The Department's survey of the major

customers of American Carco revealed that none of the respondents imported foreign-made electroplated plastic parts during the survey period.

The findings also show that the customer mentioned by the union did not purchase imported plastic parts during the survey period. That customer obtains its plastic parts, formerly purchased from American Carco, from a domestic company which took over American Carco's business.

Other findings show most of the worker separations occurred as a result of a transfer of production to another domestic company plant in April 1989.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 22nd day of February 1990.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 90-5221 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-01-M

[TA-W-23,490 and TA-W-23,490A]

S. Goldfeder, Inc., Yalesville, CT, et al.; Negative Determination Regarding Application for Reconsideration

By an application dated February 7, 1990, the company requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on December 8, 1989 and published in the **Federal Register** on January 12, 1990 (55 FR 1291).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances;

(1) If it appears on the basis on facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The company claimed that because of foreign competition they started to offer discounts in 1988 to increase sales which otherwise would have declined. Aso, the name and address of a customer was submitted that was not included in the Department's survey.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met.

In order for a worker group to be certified eligible to apply for adjustment assistance it must meet all three of the Group Eligibility Requirements of the Act—a significant decrease in employment; and absolute decrease in production or sales and increased imports of articles like or directly competitive with the articles produced at the workers firm which "contributed importantly" to decreased sales or production and employment declines.

Investigation findings show an increase in sales and production of silver plated holloware in 1988 and although this worker group criterion was met in 1989 the "contributed importantly" test was not met. This test is generally demonstrated through a survey of the subject firm's customers. The Department's survey of Goldfeder's major customers shows that most of the respondents did not import silver plated holloware. The few customers who imported silver plated holloware did not account for an important portion of Goldfeder's 1989 sales decline. The additional customer submitted had increased purchases of silver plated holloware from Goldfeder in 1988 and its 1989 sales decline from Goldfeder was too small to be important. Therefore, the Department sees no purpose in surveying the additional customer.

Also, foreign competition and discounts to increase sales which otherwise would have declined, would not provide a basis for a worker group certification.

Conclusion

After review of the application and investigation findings, I conlcude that there has been no error or misinterpretation of the law of of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 23rd day of February 1990.

Robert O. Deslongchamps,

Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 90-5222 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-23,609]

Republic Hose, Youngstown, Ohio; Negative Determination Regarding Application for Reconsideration

By an application dated January 30, 1990, Local 102 of the United Rubber Workers (URW) requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on January 8, 1990 and published in the **Federal Register** on January 31, 1990 (55 FR 3286).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The union claims that much of the hydraulic hose produced in a corporate plant in Canada was imported into the U.S. The union cites data from the Rubber Manufacturers Association's industry report that a significant amount of rubber hose was imported.

In addition to meeting the increased import criterion of the Group Eligibility Requirements of the Trade Act, the "contributed importantly" test of the same worker group requirements must also be met. Accordingly, increased imports must contribute importantly to declines in sales or production and employment. This test is generally demonstrated through a survey of the workers' firm's customers. The Department's survey of the major customers of Republic Hose revealed that the respondents did not import industrial or hydraulic hoses in 1988 or 1989. Other findings show that the Younstown plant did not import hoses.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 21st day of February 1990.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 90-5223 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

[Docket No. M-90-27-C]

Bodie Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Bodie Mining, Inc., P.O. Box 878, St. Paul, Virginia 24283 has filed a petition to modify the application of 30 CFR 75.1105 (housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps) to its No. 1 Mine (I.D. No. 44-00294) located in Wise County, Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statement follows:

1. The petition concerns the requirement that air currents used to ventilate belt-drive transformers be coursed directly into the return.

2. In a separate petition (M-89-174-C) petitioner proposes to use belt-haulage air in the active working places.

3. As an alternate method, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide detection system in the belt entries. The petitioner outlines the specific procedures and equipment in the petition.

4. In support of this request, petitioner states that persons on the working section would always be within 500 feet of fresh air intakes separate and distinct from the belt entry.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 26, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5215 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-28-C]

Clinchfield Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Clinchfield Coal Company, P.O. Box 7, Dante, Virginia 24237 has filed a petition to modify the application of 30 CFR 75.1710-1 (cabs and canopies) to its Austin Creek No. 2 Mine (I.D. No. 44-05128) loated in Dickenson County, Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that canopies be installed on the mine's electric face equipment at certain minimum heights.

2. The use of canopies on the mine's center-driven shuttle cars in mining heights less than 48 inches would result in a diminution of safety because the canopies would:

(a) Dislodge roof support;

(b) Decrease the operator's visibility; and

(c) Create discomfort to the operator.

3. For these reasons, petitioner requests a modification of the standard in mining heights less than 48 inches.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 26, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5216 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-30-C]

Green Power Inc.; Petition for Modification of Application of Mandatory Safety Standard

Green Power Inc., P.O. Box 126, Paxinos, Pennsylvania 17860 has filed a petition to modify the application of 30 CFR 75.301 (air quality, quantity, and velocity) to its Valley Coal No. 1 Slope Mine (I.D. No. 36-06279) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms by 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line be 9,000 cubic feet a minute. The minimum quanity of air reaching each working face is required to be 3,000 cubic feet a minute.

2. Air sample analysis history reveals that harmful quantities of methane are nonexistent in the mine. Ignition, explosion, and mine fire history are nonexistent for the mine. There is no history of harmful quantities of carbon monoxide and other noxious or poisonous gases.

3. Mine dust sampling programs have revealed extremely low concentrations of respirable dust.

4. Requiring extremely high velocities in small cross-sectional airways and manways in friable anthracite veins for control purposes, particularly in steeply pitching mines, present a very dangerous flying object hazard to the miners and cause extremely uncomfortable damp and cold conditions in the mine.

5. As an alternate method, petitioner proposes that:

(a) The minimum quantity of air reaching each working face be 1,500 cubic feet per minute;

(b) The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries be 5,000 cubic feet per minutes; and

(c) The minimum quantity of air reaching the intake end of a pillar line be 5,000 cubic feet per minute, or whatever additional quantity of air that may be required in any of these areas to maintain a safe and healthful mine atmosphere.

6. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish wirtten comments. These comments must be filed with the Office of Standards, Regulations and

Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 8, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5217 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-25-C]

Old Ben Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Old Ben Coal Company, 200 Public Square, 7-2306-D, Cleveland, Ohio 44114 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Mine No. 25 (I.D. No. 11-02392) located in Franklin County, Illinois. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that trolley wires and trolley feeder wires, high-voltage cables and transformers not be located inby the last open crosscut and be kept at least 150 feet from pillar workings.

2. The longwall mining equipment in use at the mine is powered by 950-volt a.c. electricity. The circuit breakers and cables used in medium-voltage systems are at the practical limits of safe and efficient operation.

3. This equipment is subject to unacceptable voltage drops across the system which causes a decrease in the working torques of the drive motors and leads to excessive strain on equipment and high current loads in the electric circuitry. In order to maintain compliance with overcurrent protection in low- or medium-voltage systems, it is necessary to split the loads and increase the number of cables. This doubles the amount of cable handling and electrical connections that has to be done and results in a diminution of safety to miners.

4. As an alternate method, petitioner proposes to use 2400-volt a.c. electricity to power the longwall mining equipment throughout the mine. The petitioner outlines specific equipment and procedures in the petition.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 27, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5218 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-24-C]

Old Ben Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Old Ben Coal Company, 200 Public Square, 7-2306-D, Cleveland, Ohio 44114 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Mine No. 24 (I.D. No. 11-00589) located in Franklin County, Illinois. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that trolley wires and trolley feeder wires, high-voltage cables and transformers not be located in the last open crosscut and be kept at least 150 feet from pillar workings.

2. The longwall mining equipment in use at the mine is powered by 950-volt a.c. electricity. The circuit breakers and cables used in medium voltage systems are at the practical limits of safe and efficient operation.

3. This equipment is subject to unacceptable voltage drops across the system which causes a decrease in the working torques of the drive motors and leads to excessive strain on equipment and high current loads in the electric circuitry. In order to maintain compliance with overcurrent protection in low- or medium-voltage systems, it is necessary to split the loads and increase the number of cables. This doubles the amount of cable handling and electrical connections that has to be done and results in a diminution of safety to miners.

4. As an alternate method, petitioner proposes to use 2400-volt a.c. electricity to power the longwall mining equipment throughout the mine. The petitioner outlines specific equipment and procedures in the petition.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 26, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5219 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-29-C]

Shamrock Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Shamrock Coal Company, P.O. Box 130, Manchester, Kentucky 40962-0130 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its No. 18 Mine (I.D. No. 15-02502) located in Leslie County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that at least one entry of each intake and return aircourse be examined in its entirety on a weekly basis.

2. Due to rock falls certain areas of the mine cannot be safely traveled, and to require certified personnel to perform weekly examinations would result in a diminution of safety.

3. As an alternate method, petitioner proposes to establish ventilation checkpoints at specific locations where the air passing over the falls would be monitored.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 9, 1990. Copies of the petition are available for inspection at that address.

Dated: February 26, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-5220 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-43-M

Occupational Safety and Health Administration

Washington State Standards; Approval

1. Background. Part 1953 of title 29, Code of Federal Regulations prescribes procedures under Section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR part 1902. On January 26, 1973, notice was published in the **Federal Register** (38 FR 2421) of the approval of the Washington plan and the adoption of subpart F to part 1952 containing the decision.

The Washington plan provides for the adoption of State standards that are at least as effective as comparable Federal standards promulgated under section 6 of the Act. Section 1953.20 provides that where any alteration in the Federal program could have an adverse impact on the at least as effective as status of the State program, a program change supplement to a State plan shall be required.

In response to Federal standards changes, the State has submitted by letter dated June 15, 1989, from Joseph A. Dear, Director, to James W. Lake, Regional Administrator, and incorporated as part of the plan, a State standard amendment comparable to the Federal standard 28 CFR 1910.20, Access to Employee Exposure and Medical Records, as published in the **Federal Register** (53 FR 38162) on September 29, 1988. The State standard, which is identical to the Federal standard, is contained in WAC 296-62-052. It was adopted on May 15, 1989, and became effective on June 30, 1989, pursuant to RCW 34.04.040(2), 49.17.040, 49.17.050, Public Meetings Act RCW 42.30, Administrative Procedures Act RCW 34.4, and the State Register Act RCW 34.08 as ordered and transmitted under Washington Administrative Order No. 89.03.

In response to Federal standards changes, the State has submitted by letter dated June 15, 1989 from Joseph A. Dear, Director, to James W. Lake, Regional Administrator, and incorporated as part of the plan, a State standard amendment comparable to the Federal standard amendment to 29 CFR 1910.177, Servicing of Single Piece and Multi-Piece Rim Wheels, as published in the Federal Register (53 FR 34737) on September 8, 1988. The State standard amendment is contained in WAC 296-24. The State standard amendment was adopted on May 15, 1989 and effective June 30, 1989, pursuant to RCW 34.04.040(2), 49.17.040, 49.17.050, Public Meetings Act RCW 42.30, Administrative Procedures Act RCW 34.04, and the State Register Act RCW 34.08 as ordered and transmitted under Washington Administrative Order No. 89-03. The standard amendment indicates the availability of revised charts, which are referred to in the Rim Wheel Servicing Standard and which provide information for employers and employees who service multi-piece or single piece rim wheels. The original State standard, Servicing of Multi-Piece Rim Wheels, received approval on July 7, 1981 (46 FR 35229); an amendment in response to a February 3, 1984 Federal amendment adding single piece rim wheels was approved on December 5, 1989 (54 FR 58292).

By letters dated January 13, 1989, and September 15, 1989, from Joseph A. Dear, Director, to James W. Lake, Regional Administrator, and incorporated as part of the plan, the State submitted amendments comparable to Federal standards amendments, including minor editorial and corrective amendments. The State amendments are in response to 29 CFR 1910.7, Definition and Requirements for a Nationally Recognized Testing Laboratory, hereinafter known as NRTL, which in turn required amendments to various sections of 29 CFR 1910 as appeared in the **Federal Register** (53 FR 12102) on April 12, 1988. These standards provisions require employers to use materials or equipment listed or approved by a NRTL. The State's original standards received **Federal Register** approval during the State's developmental period between March 9, 1973, and the State's certification on January 26, 1982.

The NRTL-affected standards and the State's responses are:

1910.28(f)(2)/WAC 296-24-82513(2),
1910.28(g)(3)WAC 296-24-82515(3),
1910.28(h)(2)/WAC 296-24-82517(2),
1910.28(i)(1)/WAC 296-24-82519(1),
1910.35(h)/WAC 296-24-55-001(8),
1910.103(a)(1)(ii)/WAC 296-24-31501(1)(b),
1910.106(a)(35)/WAC 296-24-33001(36),
1910.107(a)(8)/WAC 296-24-37001(8),
1910.108(a)(3)/WAC 296-24-40501(3),
1910.109(a)(2)(iii)(a)/WAC 296-52-489(4)(a)(i),
1910.110(a)(14)/WAC 296-24-47501(14),
1910.110(b)(2)(iii)/WAC 296-24-47505(2)(c),
1910.110(c)(5)(i)(g)(1)/WAC 296-23-47507(5)(a)(vii)(A),
1910.110(f)(5)(iv)/WAC 296-24-47513(5)(d),
1910.111(b)(1)(ii)/WAC 296-24-51009(1)(b),
1910.111(b)(1)(vi)/WAC 296-24-51009(1)(f),
1910.155(c)(3)(i)/WAC 296-24-58503(3)(c)(i),
1910.155(c)(3)(iv)/WAC 296-24-58503(3)(c)(iv)(E),
1910.178(a)(7)/WAC 296-24-23001,
1910.180(i)(4)(i)/WAC 296-24-24017(3)(a),
1910.181(j)(4)(i)/WAC 296-24-24519(4)(a),
1910.251(b)/WAC 296-24-68001(2),
1910.265(d)(2)(iv)(C)/WAC 296-78-5605(8),
1910.266(c)(4)(ii)/WAC 296-54-45001(4)(d)(iii),
1910.266(c)(4)(iv)/WAC 296-54-45001(4)(d)(iv), and
1910.399(a)(1)/WAC 296-24-95601(1)(a) and (c).

The State did not respond to 29 CFR 1910.7 as it deemed it unnecessary due to the Federal standard being referenced in the State's amendments. The State's letter dated September 15, 1989, indicates that the State will not establish its own lab accreditation program and will accept the Federal program as compliance with the State's rules. These amendments were adopted as Washington Administrative Order No. 88-25 on November 14, 1988, and became effective December 14, 1988, after a public hearing was held on October 11, 1988. The only substantive difference is the State's lack of response to 29 CFR 1910.7.

2. Decision. Having reviewed the State's submission in comparison with Federal Standards, it has been determined that the State's standard amendments for Requirements for a Nationally Recognized Laboratory are at least as effective as the Federal standard amendment. OSHA has also determined that the editorial and corrective amendments are minor in nature and have no adverse effect on other State or Federal standards. OSHA therefore approves this standard;

however, the right to reconsider this approval is reserved should substantial objections be submitted to the Assistant Secretary. OSHA has also determined that the State's standards for Access to Employee Exposure and Medical Records and Servicing of Single Piece and Multi-Piece Rim Wheels are identical to the comparable Federal standards, and therefore approves these standards.

3. Location of supplement for inspection and copying. A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, room 6003, Federal Office Building 909 First Avenue, Seattle, Washington, 98174; Department of Labor and Industries, General Administration Building, Olympia, Washington 98501; and the Office of State Programs, Occupational Safety and Health Administration, Room N-3476, 200 Constitution Avenue, NW., Washington, DC 20210.

4. Public Participatiion. Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Washington State Plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standard is as effective as the Federal standard which was promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standard was adopted in accordance with the procedural requirements of State law and further participation would be unnecessary.

This decision is effective March 8, 1990.

Authority: Sec. 18, Pub. L. 91-596, 84 STAT. 6108 (29 U.S.C. 667)

Signed at Seattle, Washington, this 1st day of February, 1990.

James W. Lake,

Regional Administrator.

[FR Doc. 90-5317 Filed 3-8-90; 8:45 am]

BILLING CODE 4510-26-M

Office of the Assistant Secretary for Veterans' Employment and Training

Solicitation for Grant Application; Job Training Partnership Act, Title IV, Part C, Program Year 1990

AGENCY: Office of the Assistant Secretary for Veterans' Employment and Training, Labor.

ACTION: Notice.

SUMMARY: This announcement (1) gives notice of a Solicitation for Grant Application (SGA) to be issued on or about February 28, 1990 for Job Training Partnership Act title IV, part C (JTPA IV-C) funds and, (2) describes changes in the requirements of this SGA for Program Year 1990 (PY 1990). JTPA Title IV-C provides for programs to meet the employment and training needs of service connected disabled veterans, veterans of Vietnam-era, and veterans who are recently separated from military service. Applications for funds under this solicitation will be accepted only from the designated JTPA administrative entity for the State/Governor, as recognized by the Employment and Training Administration (ETA), U.S. Department of Labor (DOL), or the State Employment Security Agency (SESA), should the former elect not to submit an application.

DATES: An application package and instructions for completion will be available for issuance on or about February 28. The closing date for receipt of an application or a letter of intent to submit a later application in response to the SGA will be April 1, 1990.

ADDRESSES: SGA packages will be sent to State Administrative JTPA entities and SESAs. Other parties who wish to obtain a copy of the SGA must provide a written request and include two self-addressed mailing labels sent to: U.S. Department of Labor, Office of Procurement Services, room S5220, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Grant Officer.

FOR FURTHER INFORMATION CONTACT: James Rude, Office of the Assistant Secretary for Veterans' Employment and Training, 200 Constitution Avenue NW., room S1316, Washington, DC 20210, Telephone (202) 523-9110.

SUPPLEMENTARY INFORMATION: The Office of the Assistant Secretary for Veterans' Employment and Training, Department of Labor announces new provisions to be included in an SGA for JPTA title IV-C funding for PY 1990.

1. Publication of the SGA For JTPA Title IV-C

The SGA for PY 1990 will provide a few new and significant changes in the programmatic design of Title IV-C. This announcement serves to provide applicants with a description of the new features so that they have adequate opportunity to consider and plan effective program designs by the submittal deadline.

2. Emphasis To Be Placed On The Hardest-To-Employ Target Groups

During Program Year 1990, the JTPA Title IV-C program will continue to place an emphasis on providing employment and training services to special disabled, Vietnam theater and minority veterans and will make changes which reflect initiatives being undertaken by other JTPA programs. Such changes include a requirement that an Individual Service Strategy similar to an Employability Development Plan be developed for every participant enrolled in a JTPA IV-C program.

3. Role of the Disabled Veterans Outreach Program (DVOP) and the Local Veterans' Employment Representative (LVER) Program

All veterans applying for JTPA IV-C services must continue to be screened by a DVOP specialist, or an LVER, when reasonably available, to ensure that the applicant is unable to compete for adequate employment in the local labor market, and that other training options are either inappropriate or unavailable. However, it is no longer required that DVOP and LVER staff be the sole source of applicant referrals. Although Title IV-C resources cannot be used for outreach activities except in exceptional circumstances, this activity can be charged to matching resources. A copy of a Memorandum of Understanding (MOU) between the applicant and the State Employment Security Agency (SESA) must accompany all applications for funding except in cases where the SESA will administer the program to ensure that adequate coordination exits between these SESA personnel and the JTPA IV-C program staff.

4. Emphasis On Training Activities

Veterans who are served by JTPA IV-C funds must be enrolled in primary training activities, i.e., activities which directly contribute to the development of occupational skills. These activities include, but are not limited to, on-the-job training, classroom training, customized training, on-site industry-specific training, upgrading and retraining, and so forth. As in PY 1989,

job search assistance services cannot be supported by JTPA IV-C funds unless they are offered in conjunction with a primary training activity. However, in PY 1990, participants can receive "standalone" job search assistance and other "ancillary services" such as counseling and vocational exploration providing these services are fully funded by matching resources. Ancillary services may be supported by JTPA title IV-C resources only in conjunction with the provisions of primary training activities.

5. Programmatic Goals.

Once again, each grant application must target services to special disabled, Vietnam theater, and minority veterans to the extent that at least 75 percent of the participants served will be in one or more of these three categories. Furthermore, new goals are required for terminations; follow-up employment rate at 13-weeks; and average weekly income earned during the 13th week following termination. These goals are consistent with the Employment and Training Administration's reporting requirements for JTPA title IIA programs.

6. Match.

As in previous program years, applicants are required to augment the amount of requested title IV-C funds with a 100 perecent match from other resources. However, during this program year, under most circumstances, match can be used to fund the complete range of employment and training services allowed by law and regulations and, for the first time, an employer's contribution to an on-the-job training contract is an allowable form of match.

Signed at Washington, DC, this 1st day of March 1990.

Thomas E. Collins,

Assistant Secretary for Veterans' Employment and Training.

[FR Doc. 90-5316 Filed 3-7-90; 8:45 am]

BILLING CODE 4510-30-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 90-18]

National Environmental Policy Act; Notice of Availability of Final Environmental Impact Statement

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Availability of Draft Environmental Impact Statement.

SUMMARY: Notice is hereby given of the public availability of the draft Environmental Impact Statement (EIS) for the Space Station Freedom Program. This document addresses National Aeronautics and Space Administration decision making associated with the development and operation of Space Station Freedom, including its first element launch in 1995, a permanent manned capability in 1996, and assembly complete in 1998.

Comments on the draft EIS and on matters set forth therein are solicited from and may be submitted by State and local agencies and members of the public. Such comments should be submitted to Ms. Lynette Wigbels, NASA, Code MF, Washington, DC 20546. All comments must be received within 45 days of the Environmental Protection Agency Notice of Availability in order to be considered in the preparation of the final EIS.

Copies of the draft statement may be examined at any of the following locations:

(a) NASA Headquarters Information Center, National Aeronautics and Space Administration, Washington, DC 20546.

(b) NASA Information Center, Ames Research Center, Moffett Field, CA 94035.

(c) NASA Information Center, Dryden Flight Research Facility, P.O. Box 273, Edwards, CA 93523.

(d) NASA Information Center, Goddard Space Flight Center, Greenbelt, MD 20771.

(e) NASA Information Center, Johnson Space Center, Houston, TX 77058.

(f) NASA Information Center, Kennedy Space Center, FL 32899.

(g) NASA Information Center, Langley Research Center, Hampton, VA 23665.

(h) NASA Information Center, Lewis Research center, 21000 Brookpark Road, Cleveland, OH 44135.

(i) NASA Information Center, Marshall Space Flight Center, Huntsville, AL 35812.

(j) NASA Information Center, Stennis Space Center, Stennis Space Center, MS 39529.

(k) NASA Information Center, (Jet Propulsion Laboratory), NASA Resident Office, 4800 Oak Grove Drive, Pasadena, CA 91109.

(l) NASA Information Center, Wallops Flight facility, Wallops Island, VA 23337.

C. Howard Robins, Jr.,

Associate Administrator for Management.

[FR Doc. 90-5315 Filed 3-8-90; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Agency Information Collection Under OMB Review

AGENCY: National Endowment for the Humanities.

ACTION: Notice.

SUMMARY: The National Endowment for the Humanities (NEH) has sent to the Office of Management and Budget (OMB) the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Comments on this information collection must be submitted on or before April 9, 1990.

ADDRESSES: Send comments to Ms. Susan Daisey, National Endowment for the Humanities, Grants Office, Room 310, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 (202-786-0494) and Mr. Jim Houser, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Room 3002, Washington, DC 20503 (202-395-7316).

FOR FURTHER INFORMATION CONTACT: Ms. Susan Daisey, National Endowment for the Humanities, Grants Office, Room 310, 1100 Pennsylvania Avenue, NW, Washington, DC 20506 (202) 786-0494 from whom copies of forms and supporting documents are available.

SUPPLEMENTARY INFORMATION: All of the entries are grouped into new forms, revisions, or extensions. Each entry is issued by NEH and contains the following information: (1) The title of the form; (2) the agency form number, if applicable; (3) how often the form must be filled out; (4) who will be required or asked to report; (5) what form will be used for; (6) an estimate of the number of responses; (7) an estimate of the total number of hours needed to fill out the form. None of these entries are subject to 44 U.S.C. 3504(h).

Category: Revisions

Title: Application Instructions and Forms for the Access Category
Form Number: Not applicable
Frequency of Collection: Annual
Respondents: Humanities researchers and institutions
Use: Application for funding
Estimated Number of Respondents: 138 per year
Frequency of Response: Once
Estimated Hours for Respondents to Provide Information: 60 per respondent

Estimated Total Annual Reporting and Recording Burden: 15,960 hours.

Thomas S. Kingston,

Assistant Chairman for Operations.

[FR Doc. 90-5339 Filed 3-7-90; 8:45 am]

BILLING CODE 7536-01-M

Humanities Panel; Meeting

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended) notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Stephen J. McClearly, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/786-0322.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or (3) information the disclosure of which would significantly frustrate implementation of proposed agency action, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated January 15, 1978, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

1. *Date:* April 19-20, 1990.
Time: 9 a.m. to 5:30 p.m.
Room: 430.
Program: This meeting will review applications submitted to Humanities Projects in Libraries and Archives program for the March 1990 deadline, submitted to the Division of General Programs, for projects beginning after March 1990.

2. *Date:* April 26-27, 1990.
Time: 9:00 a.m. to 5:30 p.m.
Room: 430.
Program: This meeting will review applications submitted to Public Humanities Projects program for the March 1990 deadline, submitted to the Division of General Programs, for projects beginning after March 1990.

Catherine Wolhowe,

Advisory Committee, Management Officer (Alternate).

[FR Doc. 90-5340 Filed 3-7-90; 8:45 am]

BILLING CODE 7536-01-M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Columbia River Basin Fish and Wildlife Program

AGENCY: Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Announcement of procedures for considering amendments to the Columbia River Basin Rish and Wildlife Program, and termination of rulemaking to define circumstances under which a power plan revision requires fish and wildlife program amendments.

SUMMARY: On November 15, 1982, pursuant to the Pacific Electric Power Planning and Conservation Act (the Northwest Power Act, 16 U.S.C. section 839, et seq.) the Pacific Northwest Electric Power and Conservation Planning Council (Council) adopted a Columbia River Basin Fish and Wildlife Program (program). The program has been amended from time to time since then.

The Council is scheduled to begin this summer a major rulemaking to consider amending into the program subbasin and system plans for salmon and steelhead production. The Council is also scheduled to begin a full-scale review of the power plan later this year. Under the Council's past practice, a review of the power plan would cause the Council to request recommendations for amendments to the fish and wildlife program. However, this would require the Council to conduct three major rulemaking processes almost simultaneously: system planning amendments, power plan amendments, and fish and wildlife program amendments generally. With this problem in mind, in 1988, the Council began a rulemaking process to define the circumstances in which a power plan revision would trigger a fish and wildlife program amendment process, and comments were received. In the Fall of 1989, the Council circulated a proposed schedule for handling these 3 major processes, and comments were received on this proposal. Based on the comments, the Council decided on February 15, 1990, not to adopt a rule, but instead to proceed as follows:

Request for Amendment Recommendations

1. The Council requests the region's state and federal fish and wildlife agencies and appropriate and Indian tribes to submit recommendations for anadromous fish production amendments in the form of a proposed salmon and steelhead system plan by September 1, 1990, unless the Council extends the time for submission. Others may submit recommendations on the same subject and on the same schedule.

2. Over the coming 3 months, the Council will meet with the fish and wildlife agencies and Indian tribes to identify other areas of the program in which amendment recommendations may be submitted. On request, the Council will meet with other interested parties for the same purpose.

3. After these meetings, the Council will announce deadlines for submitting amendment recommendations for other parts of the program.

Parties wishing to schedule a consultation with the Council regarding the amendments process should contact Janie Pearcy at (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon.

In the near future, the Council will issue a detailed workplan for system planning amendments.

The rulemaking the Council began in 1988 to define the circumstances in which a power plan revision would trigger fish and wildlife program amendments is terminated without further action.

For a Fuller Explanation of the Council's Program Amendment Process, or for Further Information: Contact the Council's Public Involvement Division at 851 SW Sixth Avenue, Suite 1100, Portland, Oregon 97204 or (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon.

Edward Sheets,

Executive Director.

[FR Doc. 90-5308 Filed 3-7-90; 8:45 am]

BILLING CODE 0000-00-M

Columbia River Basin Fish and Wildlife Program and Northwest Conservation and Electric Power Plan

AGENCY: Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Notice of proposed protected areas amendments to the Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan, hearings and opportunity to comment.

SUMMARY: On November 15, 1982, pursuant to the Pacific Electric Power Planning and Conservation Act (the Northwest Power Act, 16 U.S.C. 839, *et seq.*) the Pacific Northwest Electric Power and Conservation Planning Council (Council) adopted a Columbia River Basin Fish and Wildlife Program (program). The Council adopted the Northwest Conservation and Electric Power Plan (power plan) on April 27, 1983. The program and the power plan have been amended from time to time since then. In August, 1988, the Council incorporated into the program and the plan "protected areas" measures to protect critical fish and wildlife habitat from new hydropower development. The protected areas provisions provided processes for amending protected areas on various grounds. In March, 1989, the Council made a small number of changes to protected areas, based on an expedited rulemaking schedule. In November, 1989, the Council received a number of petitions to amend protected areas. On the basis of these petitions, at its February 14–15, 1990 meeting, the Council voted to initiate rulemaking pursuant to section 4(d)(1) of the Northwest Power Act to consider amending certain protected areas provisions of the program and the power plan. This notice contains a brief description of the proposed amendments, describes how to obtain a full copy of the proposed amendments and background information concerning them, and explains how to participate in the amendment process.

PUBLIC COMMENT: All written comments must be received in the Council's central office, 851 SW Sixth Avenue, Suite 1100, Portland, Oregon, 97204, by 5 p.m. Pacific time on April 16, 1990. Comments should be submitted to Dulcy Mahar, Director of Public Involvement, at this address. Comments should be clearly marked "Protected Areas Comments."

After the close of written comment, the Council may hold consultations with interested parties to clarify points made in written comment, and will supply notice of such consultations. Consultations may be held up to the time of the Council's final action in this rulemaking.

HEARINGS: Public hearings will be held in Idaho, Montana, Oregon, and Washington, in March and April, 1990. If you wish to obtain a schedule of the hearings, or more information about this process, contact the Council's Public Involvement Division, 851 SW, Sixth Avenue, Suite 1100, Portland, Oregon 97204 or (503) 222–5161, toll free 1–800–222–3355 in Idaho, Montana, and Washington or 1–800–452–2324 in Oregon. To reserve a time period for presenting oral comments at a hearing, contact Judi Hertz in the Public Involvement Division. Requests to reserve a time period for oral comments must be received no later than two work days before the hearing.

FINAL ACTION: The Council expects to take final action on the proposed protected areas amendments at its May 1990 meeting. The actual date on which the Council will make its final decision will be announced in accordance with applicable law and the Council's practice of providing notice of its meeting agendas.

SUPPLEMENTARY INFORMATION: Most of the proposed amendments are recommended by state fish and wildlife agencies. Many of these are based on new information, which indicates either: (1) An additional river reach may merit protection; or (2) an already-protected reach should be unprotected; or (3) no change in protected status is merited, but a different or additional reason for protection is indicated; or (4) changes are recommended to bring the Council's designations in line with federal wilderness areas or wild and scenic areas.

Some other changes—approximately 2 dozen—are proposed that would affect proposed hydroelectric projects. Some of these are proposed by developers, who believe protection is unwarranted, and some are either proposed or concurred in by state fish and wildlife agencies.

FOR FURTHER INFORMATION: Those wishing to receive a fuller version of this notice, including a list of affected river reaches or copies of particular petitions, should contact Judi Hertz at the address or telephone numbers listed above.

Edward Sheets,

Executive Director.

[FR Doc. 90–5309 Filed 3–7–90; 8:45 am]

BILLING CODE 0000–00–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–27753; File No. SR–Amex–89–29]

Self-Regulatory Organizations; the American Stock Exchange; Order Approving Proposed Rule Change Relating to New Listing Criteria Under Section 107 of the Amex Company Guide

I. Introduction

On November 15, 1989, the American Stock Exchange, Inc. ("Amex" or "Exchange") 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 amend the Amex "Company Guide" to provide listing guidelines for new securities not otherwise covered under existing sections of the "Company Guide".

The proposed rule change was published for comment in Securities Exchange Act Release No. 27500 (December 5, 1989), 54 FR 50832 (December 11, 1989). No comments were received on the proposal.

Under the Amex proposal, section 107 of the "Company Guide" will be revised to include Amex listing criteria for certain new types of securities which can not be readily categorized under existing criteria for common and preferred stocks, bonds, debentures, and warrants.[3] In today's ever-changing financial markets, issuers and underwriters frequently propose new types of securities and securities products for listing on securities exchanges. These securities may be comprised of features borrowed from more than one category of currently listed securities. Examples of these new financial products include fixed face amount debt securities incorporating an opportunity for equity appreciation and fixed amount payment certificates based on the price level of the issuer's equity securities. Such new types of securities are designed typically to achieve more than one objective in connection with a specific corporate transaction, and, on occasion, have involved assets or categories of assets that traditionally may not have been segregated or used as collateral for a particular issue. Consequently, such securities may take a variety of forms depending upon the

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] The Amex "Company Guide", sections 101–106, contains the criteria for listing these securities.

particular objectives being sought, as well as general market conditions.

To provide flexibility in its listing guidelines to accommodate such multi-faceted issues and to avoid continual revision of its listing criteria, the Amex has proposed to amend existing section 107 of its "Company Guide" to allow the Exchange to consider the listing of new securities on a case-by-case basis, in light of the suitability of the issue for auction market trading. The Exchange states, however, that the new criteria are not intended to accommodate the listing of securities that raise significant new regulatory issues, such as Americus Trusts,[4] currency warrants,[5] index warrants,[6] or unbundled stock units ("USUs").[7] Such products would require a separate filing with the Commission pursuant to Rule 19b-4 under the Act.

II. Description of the Proposal

Section 107 of the Amex "Company Guide" currently deals exclusively with subscription rights.[8] Under the Amex proposal, all references to subscription rights in section 107 would be deleted and incorporated into section 340, entitled Subscription Rights, which sets forth the procedures for listing subscription rights on the Exchange. Revised section 107 will contain numerical guidelines to accommodate new securities that can not be readily categorized under the Exchange's traditional listing guidelines for common and preferred stocks, bonds, debentures, and warrants.

A. Assets and Equity Criteria

Under the proposal, revised section 107 will apply to major issuers having assets of $100 million and stockholders' equity of $10 million. The new guidelines substantially will exceed the existing section 101A standard listing criteria which requires, as a condition of original listing, that stockholders' equity be at least $4 million.[9] In addition to size requirements, issuers that will be covered by section 107 must meet the current earnings criteria set forth in section 101A (pre-tax income of at least $750,000 in the last fiscal year or in two of the three last fiscal years). Issuers not meeting these criteria generally will be required to have assets in excess of $200 million and stockholders' equity of $10 million, or, alternatively, assets in excess of $100 million and stockholders' equity of $20 million.

B. Other Criteria

The distribution criteria in proposed section 107 are comparable to those which currently exist in section 102(a) for equity issues.[10] Section 107 requires a minimum public distribution of one million trading units with a minimum of 400 holders. When trading is expected to occur in larger than average trading units (for example a $1,000 principal amount), however, a minimum of 100 holders will be required.[11] The aggregate market value of issues listed under section 107 must be at least $20 million.[12] Where such an instrument contains cash settlement provisions, settlement will be required to be made in U.S. dollars. If the instrument contains mandatory redemption provisions, the redemption price must be at least $3 per unit. In addition, the Amex proposal makes the guidelines for continued listing contained in sections 1001 to 1003 applicable to new securities covered under section 107.[13]

C. Membership Circular

The Exchange states that the securities to be listed for trading under section 107 are likely to possess characteristics common to both debt and equity instruments. Consequently, prior to trading securities admitted to listing under section 107, the Exchange will evaluate the nature and complexity of the issue and, where appropriate, distribute a circular to the membership providing guidance regarding member firm compliance responsibilities when handling transactions in such securities. In determining whether such a membership circular is necessary, the Exchange will consider such characteristics of the issue as: Unit size and term; cash settlement; exercise or call provisions; characteristics that may affect payment of dividends and/or appreciation potential; whether the securities are primarily of retail or institutional interest; and such other features of the issue that might entail special risks not normally associated with securities currently listed on the Exchange.

III. Discussion and Conclusion

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 exchange, and, in particular, the requirements of section 6(b)(5) of the Act.[14] In particular, the Commission believes the proposal is consistent with the section 6(b)(5) requirement that the rules of an exchange be designated to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers, and dealers. The continued creation of new financial products and new types of innovative financing designed to achieve different financial objectives will likely increase with the continual changes in today's financial markets.[15] The Commission believes that the Amex has designed a reasonable approach to address the special concerns attendant to these new financial products while enabling the products to trade on an exchange market. The numerical, quantitative listing standards proposed for these new financial products should ensure that only the more financially substantial companies will be eligible to have their new financial products listed on the Exchange. This is important in light of the additional or contingent financial obligations created by these instruments, and should serve to protect investors and the public interest by ensuring that the financial products listed on the Exchange have met

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[4] *See* Securities Exchange Act Release No. 21863 (March 18, 1985), 50 FR 11972 (March 26, 1985).

[5] *See* Securities Exchange Act Release No. 24555 (June 5, 1987), 52 FR 22570 (June 12, 1987) (File No. SR-Amex-87-15) (proposal to list warrants on foreign currencies).

[6] *See* Securities Exchange Act Release No. 26152 (October 3, 1988), 53 FR 39832 (October 12, 1988) (approving File No. SR-Amex-87-27) (listing guidelines for foreign currency and index warrants); Securities Exchange Act Release No. 27565 (December 22, 1989), 55 FR 376 (January 4, 1990) (File No. SR-Amex-89-22) (proposal to list index warrants based on the Nikkei Stock Average).

[7] *See* File Nos. SR-NYSE-88-39 and 88-40 (proposals to list USUs and constituent securities). These proposals subsequently were withdrawn by the New York Stock Exchange.

[8] Section 107 currently states that "[t]he Exchange will not list subscription rights unless the underlying security is, or will be, listed on the Exchange * * *." Amex "Company Guide", section 107.

[9] Amex "Company Guide", section 101A.

[10] Section 102(a) requires a minimum public distribution of 500,000 shares together with a minimum of 800 public holders or a minimum public distribution of 1,000,000 shares together with a minimum of 400 public holders.

[11] The Amex listing guidelines currently require the same standard of 100 holders for debt securities of non-listed issuers. Amex "Company Guide", section 104(b).

[12] This is the same requirement applicable to debt securities of non-listed issuers. Amex "Company Guide", section 104(b).

[13] Sections 1001 to 1003 of the Amex "Company Guide" contain the Exchange criteria for the continued listing of securities. Under the Amex proposal, these criteria will apply to new securities listed under section 107.

[14] 15 U.S.C. 78f (1982).

[15] The Amex recently added provisions to its listing criteria to accommodate securities that could not be readily categorized under the Exchange's traditional listing guidelines. For example, the Commission recently approved a rule change adopting specific listing guidelines covering foreign currency and index warrants. *See* Securities Exchange Act Release No. 26152 (October 3, 1988), 53 FR 39832 (October 12, 1988) (approving File No. SR-Amex-87-27).

predetermined financial criteria set by the Exchange.[16]

The Amex's proposed rule regarding new financial instruments also addresses the additional rergulatory concerns raised by these products. Over the past several years, several new financial products issued by listed companies have been proposed for trading on exchange markets. These novel products, by combining features of debt, equity, and securities derivative instruments, may be more risky and complex than straight stock, bond, or equity warrants. In the past, the Amex has agreed to make certain recommendations or require certain action by its members in regard to suitability and sales practice issues pertaining to these instruments. In the instant filing, the Exchange has agreed to determine, on a product by product basis, whether to distribute a circular providing guidance to member firms regarding compliance responsibilities when handling public customer transactions in issues possessing special risks not normally associated with securities listed on the Exchange. This should provide the Amex with the ability to address in a flexible manner any potential sales practice problems and questions that may arise in connection with these new issues. Moreover, the Commission believes that the distribution of this circular should help ensure that only customers with an understanding of the risks attendant to the trading of particular securities products trade these products on their broker's recommendations.

Finally, the Amex proposal would provide an expeditious means for the Exchange to list products similar to those already traded on the Exchange, but which have no aspects that raise new regulatory issues. If a new product raises novel or significant regulatory issues, the Amex has committed to file a proposed rule change so that the Commission would have an opportunity to review the regulatory structure for the product.[17]

It is therefore ordered, Pursuant to section 19(b)(2) of the Act [18] that the proposed rule change is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

[16] This standard, however, would not preclude the Amex from submitting specific standards for other companies to have similar securities traded on the Exchange.

[17] *See supra* notes 4-7.

[18] 15 U.S.C. 78s(b)(2) (1982).

[19] 17 CFR 200.30-3(a)(12) (1989)

Dated: March 1, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-5259 Filed 3-7-90; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27755; File No. SR-NASD-90-9]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Obtaining Information Pertinent to Customer Accounts

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 February 22, 1990 the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 NASD. 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 proposed amendments to Article III, sections 2 and 21(c) of the NASD Rules of Fair Practice provide that NASD members make reasonable efforts to obtain certain additional information pertaining to customer accounts.

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 NASD 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. The NASD 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

Pursuant to existing Article III, section 21(c) of the Rules, the accounts of all customers are currently required to be maintained in such form and manner as to show name; address; age; signatures of the introducing representative and member, partner, officer or manager accepting the account for the member; and a customer's association with or employment by another member. In discretionary accounts, the customer's occupation must be noted, along with the signature of each person authorized to exercise discretion in such account. When recommending to a customer the purchase, sale, or exchange of any security, Article III, section 2 currently requires that a member have reasonable grounds for believing that the recommendation is suitable for the customer on the basis of any facts disclosed by the customer as to his other security holdings, financial situation and needs.

The NASD believes that these procedures should be strengthened to require additional information on each account and that sufficient information be obtained to permit the member firm to make more informed determinations about accounts and investment recommendations.

The NASD therefore proposes to amend section 21(c) to require a member to make reasonable efforts to obtain, prior to the settlement of the initial transaction in a noninstitutional customer account, the tax identification or Social Security number of the customer, and the occupation and name and address of the employer of each customer for each account, in addition to the above-listed information currently required to be obtained. In addition, if the customer is a corporation, partnership, or other legal entity, the member also must obtain the names of any persons authorized to transact business on behalf of such entity. With respect to discretionary accounts, the member would be required to obtain the signature of each person authorized to exercise discretion in the account and the date such discretion is granted.

Section 2 is to be amended to provide that, prior to the execution of a transaction recommended to a noninstitutional customer, a member must make reasonable efforts to obtain information concerning that customer's financial status, tax status, investment objectives, and such other information used or considered to be reasonable and necessary by the member or registered representative in making recommendations to the customer.

The proposed amendments exclude transactions and accounts where investments are limited to money market mutual funds.

The NASD believes that the proposed amendments to Article III, sections 2 and 21(c) of the Rules will provide extra protection for both customers and firms. The requirement of "reasonable effort,"

the NASD feels, can be met by prepared questionnaires for customers to complete and return, or by telephone inquiry. It is not necessary to obtain a written statement from a customer in each instance in order to be in compliance with the rule.

The requirement of section 21(c) that information be obtained prior to the settlement of the initial transaction, and of section 2 that information be obtained prior to the execution of a transaction recommended to a noninstitutional customer, will also allow some freedom in opening new accounts. In addition, it may be advisable for members to keep a record of efforts that they have made to obtain a customer's tax identification or Social Security number, as required by § 103.35, part 103 of title 31 of the Code of Federal Regulations adopted by the Treasury Department, effective June 1972.

The NASD believes the proposed rule change is consistent with section 15A(b)(6) of the Act which mandates that the rules of a national securities association be designed to promote just and equitable principles of trade and to remove impediments to, and perfect the mechanisms of, a free and open market because it will permit members to make more informed determinations as to accounts and investment recommendations, and will therefore provide extra protection for both customers and firms.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed amendments impose any burden on competition that is not necessary or appropriate in furtherance of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed amendment was published for comment in NASD Notice to Members 88–91 in November 1988.[1] As a result of this Notice, the NASD received 10 comment letters.[2] Of these, one commenter unqualifiedly supported the proposed amendment, 3 generally supported it with suggested modification, and 6 had concerns with specific provisions of the proposal.

Favorable Comment. The one unqualifiedly favorable comment agreed with the NASD that information as to a customer's financial background, tax status, investment objectives, and level of experience should be obtained in order to provide quality service to customers.

Negative Comments. Of the remaining commentators, five stated that they would prefer to delete employment information requirements; two suggested the deletion of tax identification and/or status information; two questioned the need for time and date of approval information on discretionary orders; two stated that discount broker/dealers should be exempt from the proposed requirements; and two questioned the application of the proposal to investment company securities accounts.

The NASD considered the substance of these comments and determined that the proposed requirements for additional account information would benefit the public, were not onerous and, thus, no exemption should be granted to either investment company securities accounts or discount brokers. For similar reasons, the NASD decided that the employment, tax identification, and status information requirements were important issues, and that requests for such information from customers would not impose an undue burden on members. An exemption was provided, however, for transactions and accounts where investments are limited to money market mutual funds as the NASD believed such accounts were not in need of the extra protection afforded by the gathering of additional customer information.

The NASD did clarify, however, that the employment and tax identification information requests were limited to non-institutional accounts and accounts not limited to transactions in money market funds, and the tax status information is required only when recommendations are made. Further, the NASD determined to maintain the requirement, also contained in the original section 21(c), of obtaining the signatures of the representative who introduced the account and the person who accepts the account for the member.

The NASD also deleted the requirement of time and date approval for each discretionary order because it believed that this represented too great an imposition on members, and substituted instead a requirement that a record be kept of the date on which discretion was granted for each account. The Board also clarified and extended the definition of the term "institutional account" to include registered investment advisers and entities with total assets of at least $50 million. In addition, the Board clarified the proposal to state that the names of persons authorized to act on behalf of partnerships and other legal entities, in addition to corporations, should be obtained, and that this requirement should apply to both institutional and noninstitutional accounts. Moreover, the questions raised as to the timing of the amendments were addressed by providing that the additional information would be obtained for each account opened after the effective date of the amendments.

As to the commenter who stated that she approved of the proposed amendments, but commented adversely as to the industry practice of "cold-calling," the NASD decided that the actual practice of cold-calling was dealt with elsewhere, and need not be addressed in these provisions dealing with obtaining customer information. However, the NASD noted that requirements to obtain certain information in section 2 prior to the execution of recommended transactions would aid in the control of cold-calling situations, as would the provisions of the Commission's recently enacted Rule 15c2–6.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule-change should be disapproved.

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

[1] The original proposal did not include an amendment to section 2. Rather, the amendment to section 21(c) originally proposed a subsection that encompassed information to be obtained prior to a recommendation made to a noninstitutional customer. After further discussion, the Board concluded that, organizationally, the requirements pertaining to recommendations to customers should be contained in section 2, rather than section 21(c).

[2] The Notice to Members, a list of the commenters, and the comment letters are attached as Exhibit 2 to the rule filing.

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 principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by March 29, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: March 1, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-5260 Filed 3-7-90; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-25048]

Filings Under the Public Utility Holding Company Act of 1935 ("Act")

March 1, 1990.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by March 26, 1990 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Jersey Central Power & Light Company (70-7603)

Jersey Central Power & Light Company ("JCP&L"), Madison Avenue at Punch Bowl Road, Morristown, New Jersey 07960, a wholly owned electric-utility subsidiary company of General Utilities Corporation, a registered holding company, has filed a post-effective amendment to its application filed under section 6(b) of the Act and Rules 50 and 50(a)(5) thereunder.

By Commission orders dated April 11, 1989 (HCAR No. 24859) ("April 1989 Order") and August 16, 1989 (HCAR No. 24939) ("August 1989 Order") (collectively, "Commission Orders"), JCP&L was authorized, among other things, on or before December 31, 1990 to issue and sell up to: (1) $500 million aggregate principal amount of first mortgage bonds under the competitive procedures of Rule 50 of the Act as modified by the Commission's Statement of Policy dated September 2, 1982 (HCAR No. 22623) ("Bonds"); and (2) $375 million of medium-term securities as first mortgage bonds ("MTNs"). The August 1989 Order reserved jurisdiction over the issuance and sale through December 31, 1990 of up to: (1) $375 million of additional first mortgage bonds under an exception from Rule 50 pursuant to Rule 50(a)(5); (2) $375 million of medium-term securities as unsecured notes; and (3) $100 million of cumulative preferred stock ("Preferred Stock") (collectively, "Securities"), provided that, together with the issuance and sale of the Bonds previously ordered, the aggregate amount of all Securities to be issued and sold will not exceed $500 million. Pursuant to the Commission Orders, $125 million of Bonds and $60 million of MTNs have been issued and sold leaving a balance of $315 million of Securities which JCP&L may issue and sell through December 31, 1990.

JCP&L now proposes to issue and sell the Preferred Stock. The Preferred Stock will be similar to JCP&L's outstanding series of cumulative preferred stock, i.e. (1) the Preferred Stock will have a stated value of not in excess of $100 per share; (2) the dividend rate, redemption prices and sinking fund provisions, if any, of the Preferred Stock will be determined in accordance with competitive bidding requirements of Rule 50 under the Act or under the alternative competitive bidding procedures as modified by the Commission's Statement of Policy dated September 2, 1982 (HCAR No. 22623); (3) the Preferred Stock will contain a redemption limitation providing that the Preferred Stock may not be redeemed for a period up to ten years from the date of issuance; and (4) the Preferred Stock may be entitled to a sinking fund requirement.

JCP&L requests authority to deviate from the "Statement of Policy Regarding Preferred Stock Subject to the Public Utility Holding Company Act of 1935" (HCAR No. 13105, February 16, 1956, as supplemented by HCAR No. 16758, June 22, 1970) as it applies to the redemption provisions of the Preferred Stock.

EUA Cogenex Corporation, et al. (70-7665)

EUA Cogenex Corporation ("Cogenex"), and its parent company, Eastern Utilities Associates ("EUA"), a registered holding company, both located at P.O. Box 2333, Boston, Massachusetts 02107, have filed an application-declaration under Sections 6(b), 12(b) and 12(c) of the Act and Rules 42(a), 45(a) and 50(a)(5) thereunder.

Cogenex proposes to issue and sell to one or more institutional investors, after negotiation, up to $35 million aggregate principal amount of secured and/or unsecured notes and/or first mortgage bonds ("Debt") maturing in not less than three nor more than 30 years from the first day of the month in which they are issued. The Debt is expected to be sold at not less than 98% nor more than 102.75% of its principal amount and to bear interest payable quarterly or semi-annually in arrears. Other terms of the Debt and of the purchase agreement under which it will be sold, including redemption provisions, security and sinking fund provisions if any, and covenants and default provisions will be determined by negotiation. If it becomes necessary to do so to obtain more favorable terms for the Debt, EUA proposes to guaranty all or a portion of the obligations with respect to the Debt.

The net proceeds of the sale of the Debt will be applied to pay or reduce short-term borrowings from banks, to pay or reduce short-term loans from EUA, to repay capital contributions from EUA for the acquisition of tangible assets of Cogenex, and for general corporate purposes.

Cogenex requests that the Commission, pursuant to paragraph (a)(5) of Rule 50, grant an exception from that rule with respect to the Debt, so that it may carry out negotiation of the terms of the Debt itself, with one or a few institutional investors, or to engage a placement agent to negotiate the terms and place the Debt with institutional purchasers. It may do so.

The Southern Company, et al. (70-7738)

The Southern Company ("Southern"), a registered holding company, 64 Perimeter Center East 30346, Atlanta, Georgia, and its public-utility subsidiary companies, Alabama Power Company ("Alabama"), 600 North 18th Street, Birmingham, Alabama 35291, Gulf Power Company ("Gulf"), 500 Bayfront Parkway, Pensacola, Florida 32520, Mississippi Power Company ("Mississippi"), 2992 West Beach, Gulfport, Mississippi 39501, and Savannah Electric and Power Company ("Savannah"), 600 Bay Street East, Savannah, Georgia 31401, and Southern Electric Generating Company ("SEGCO"), 600 North 18th Street, Birmingham, Alabama 35291, a subsidiary of Alabama and Georgia Power Company (collectively, "Applicants"), have filed an application-declaration under sections 6(a), 6(b), 7, 12(b) of the Act and Rule 50(a)(5) thereunder.

By Commission order dated March 30, 1989 (HCAR No. 24850) ("1989 Order"), Southern was authorized, among other things, to make equity investments, through March 31, 1991, in the form of capital contributions, to Gulf in an amount not to exceed $10 million. Pursuant to the 1989 Order, Southern has contributed $5 million to the capital of Gulf. Southern now proposes to make additional equity investments, through March 31, 1992, in the form of capital contributions to Gulf in amounts not to exceed $10 million.

The Applicants propose to issue and sell, from time-to-time, through March 31, 1992, up to an aggregate principal amount of $500 million for Southern, $350 million for Alabama, $50 million for Gulf, $120 million for Mississippi, $40 million for Savannah and $100 million for SEGCO: (1) Short-term notes to banks ("Short-Term Notes"); (2) short-term or term notes to banks under revolving credit agreements; (3) commercial paper to dealers; and/or (4) short-term non-negotiable promissory notes to public entities in connection with the financing of certain pollution control facilities through the issuance by public entities of their revenue bond anticipation notes.

The Short-Term Notes (to be issued by Alabama, Gulf, Mississippi and Savannah) will be dated as of the date of issue and will (except for Savannah): (1) Bear interest at the lending bank's prevailing rate offered to corporate borrowers of similar quality; or bear interest at (a) a margin over the London Interbank Offered Rate ("LIBOR"), (b) a margin over certificate of deposit rates ("CD Rate") or (c) the prime rate; (2) have maximum maturities of nine months; and (3) be prepayable in whole, or in part, without penalty or premium. Savannah's Short-Term Notes will bear interest at rates in all cases less than the prime rate at the time of issuance, will have maximum maturities of one year, and will not be prepayable without penalty or premium.

Compensation for the credit facilities is currently provided by: (1) for Gulf and Mississippi, balances of up to 5% of the available facilities or by fees equal to ⅛ of 1% per annum of the amount of the facilities; (2) for Alabama, balances of up to 5% of the lines or comparable fees in lieu of balances; and (3) for Savannah, balances of up to 6% of the lines is required at one of the banks, the other banks are paid fees, at varying times of the year, equal to ¼ of 1% of the unused amount of the respective lines.

SEGCO's revolving credit borrowings will be evidenced by notes ("SEGCO Revolving Credit Notes") to be dated on or before the date of the borrowings and will mature in not more than five years after the date of issuance. SEGCO has obtained specific commitments with a group of banks in amounts aggregating $60 million. The SEGCO Revolving Credit Notes will bear interest at one of three rates based on: (1) The lender's floating prime rate; (2) the lender's CD Rate (adjusted for Federal Reserve Board reserve requirements imposed upon the lender) plus a spread not to exceed ⅝% per annum at one of the banks and ½% per annum at the other banks; or (3) LIBOR (adjusted for Federal Reserve Board reserve requirements imposed upon the lender) plus a spread not to exceed ½% per annum at one of the banks and ⅜% per annum for the others. SEGCO has agreed to pay for lines of credit with: (1) One bank by paying fees equal to ½% per annum times an amount equal to 5% of average borrowings outstanding or by maintaining comparable balances; and (2) a group of banks by paying a commitment fee equal to ⅜ of 1% per annum on the daily unused portion of such commitment which is payable quarterly in arrears. Borrowings which bear interest at the lender's prime rate are prepayable at any time, without premium or penalty. Borrowings which bear interest at the other rates are prepayable only if amounts prepaid are accompanied by an amount equal to any loss or expense incurred by the lender as a consequence of such payments. Any future commitments will be at a rate or rates not to exceed the prime rate plus 2% per annum.

The revolving credit borrowings of Southern, Alabama, Gulf, Mississippi, and Savannah will be dated the date of the initial short-term borrowing by such borrower and will mature not more than 270 days after the date of borrowing. Such short-term borrowings will be renewable at maturity and may be converted to term loans at the borrower's option. Under the term-loan option, borrowings would be repaid in 12 equal quarterly installments, beginning after the termination date in effect at the time of borrowing, or at an earlier date at the borrower's option. The revolving credit agreement borrowings will bear interest at one of four rates, including: (1) The lender's floating prime rate ("Base Borrowing"); (2) the lender's CD Rate (adjusted for Federal Reserve Board reserve requirements imposed upon the lender) ("CD Borrowing") plus up to ⅜%; (3) LIBOR (adjusted for Federal Reserve Board reserve requirements imposed upon the lender) ("Eurodollar Borrowing") plus up to ½%; and (4) a rate to be negotiated between the bank and the borrower. Base Borrowings will be prepayable at any time, without premium or penalty. In connection with CD Borrowings and Eurodollar Borrowings, advances generally will be prepayable only at the end of each interest period with respect thereto. Compensation for the revolving credit facilities will be provided by fees equal to 3/16 of 1% times the unused portion of the bank's commitment or by comparable balances in lieu of fees.

The commercial paper will not be prepayable and will have varying maturities, none more than 270 days. The commercial paper notes will be sold directly to dealers at a discount rate not in excess of the discount rate per annum (or equivalent interest rate) prevailing at the date of issuance for commercial paper of comparable quality and of the particular maturity sold by issuers to dealers in commercial paper. The Applicants request an exception from the competitive bidding requirements of Rule 50 pursuant to Rule 50(a)(5) for the issuance and sale of the commercial paper.

The applicants will use the proceeds of the proposed borrowings for working capital purposes, including the financing in part of their construction programs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-5265 Filed 3-7-90; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

[Docket 46760]

Discovery Airways, Inc. and Mr. Philip Ho; Assignment of Proceeding

Notice is hereby given that this proceeding is assigned, effective March 5, 1990, to Administrative Law Judge John J. Mathias who will become Chief Administrative Law Judge of the Department on that date. All future pleadings and communications regarding the proceeding shall be served on him at the Office of Hearings, M-50, room 9228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, Telephone: (202) 366-2142.

William A. Kane, Jr.,

Chief Administrative Law Judge.

[FR Doc. 90-5291 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

Receipt of Noise Compatibility Program and Request For Review; Santa Maria Public Airport, Santa Maria, CA

AGENCY: Federal Aviation Administration.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces that it is reviewing a proposed noise compatibility program that was submitted for Santa Maria Public Airport, Santa Maria, California, under the provisons of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96-193) (hereinafter referred to as "the Act") and 14 CFR part 150 by Santa Maria Public Airport District. This program was submitted subsequent to a determination by FAA that associated noise exposure maps submitted under 14 CFR part 150 for Santa Maria Public Airport were in compliance with applicable requirements effective November 4, 1988. The proposed noise compatibility program will be approved or disapproved on or before August 19, 1990.

EFFECTIVE DATE: The effective date of the start of FAA's review of the noise compatibility program is February 20, 1990. The public comment period ends April 21, 1990.

FOR FURTHER INFORMATION CONTACT: Howard S. Yoshioka, Planning Section Supervisor, Federal Aviation Administration, Western-Pacific Region, P.O. Box 92007, Worldway Postal Center, Los Angeles, California, 90009, 213/297-1250. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed noise compatibility program for Santa Maria Public Airport which will be approved or disapproved on or before August 19, 1990. This notice also announces the availability of this program for public review and comment.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The FAA has formally received the noise compatibility program for Santa Maria Public Airport, effective on February 20, 1990. It was requested that the FAA review this material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before August 19, 1990.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, 800 Independence Avenue, SW., room 617, Washington, DC 20591.

Federal Aviation Administration, Federal Aviation Administration, Western-Pacific Region, 15000 Aviation Boulevard, Hawthorne, California, Mail Address: P.O. Box 92007, Worldway Postal Center, Los Angeles, California, 90009.

Mr. Dan J. Hoback, General Manager, Santa Maria Public Airport District, 3217 Skyway Drive, Santa Maria, California 93455.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Hawthorne, California on February 20, 1990.

James J. Wiggins,

Acting Manager, Airports Division, AWP-600.

[FR Doc. 90-5282 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

Environmental Impact Statement: Houston West Side Airport, Waller County, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent.

SUMMARY: The FAA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared and considered for a proposed new general aviation reliever airport, designated the Houston West Side Airport, to be located between the cities of Katy and Brookshire, Texas. (§§ 1501.7 and 1508.22 of Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR parts 1500-1508)).

FOR FURTHER INFORMATION CONTACT: Tim Tandy, Airport Environmental Specialist, ASW-611E, Federal Aviation Administration, Southwest Regional Office, Fort Worth, Texas 76193-0611. Telephone (817) 624-5859.

SUPPLEMENTARY INFORMATION: The FAA, in cooperation with the Houston Department of Aviation, will prepare an EIS for the proposed Houston West Side Airport. The city of Houston proposes to construct the Houston West Side airport as a general aviation reliever facility. Development of the airport would be a two-phased action. The initial development phase, proposed for 1991-1992, would consist of the following items: (1) Construct Runway 16L/34R, 6,000 x 100 feet; (2) construct dual parallel taxiway and dual east-west connectors for runway; (3) construct

aircraft parking apron; (4) construct conventional hangars, T-hangars, passenger service building, and auto parking areas; (5) install navigational aids (instrument landing system, precision approach path indicator system, and medium intensity approach lighting system); and (6) construct 14,300 feet of access road.

The second development phase, dependent upon future demand, is projected to occur prior to the year 2007. It would consist of the following items: (1) Extend and widen Runway 16L/34R to 8,000 x 150 feet; (2) construct Runway 16R-34L, 6,000 x 100 feet; and (3) install air traffic control tower and additional airfield lighting. The city of Houston intends to request Federal Airport Improvement Program funds for development of the proposed airport.

Alternatives to the proposed action include no action, expansion of existing airports, and development of a new airport at another site.

The FAA intends to consult and coordinate with Federal, state, and local agencies which have jurisdiction by law or have special expertise with respect to any environmental impacts associated with the proposed project. Preparation of an Environmental Assessment (EA) preceded the decision to prepare an EIS (a copy of the EA is available for inspection during regular business hours in the Planning and Programming Division of the Houston Department of Aviation, 16930 J.F. Kennedy Boulevard, Houston, Texas and the Airports Division of the FAA Southwest Regional Office, 4400 Blue Mound Road, Fort Worth, Texas). The EA process included public participation at all stages. In a Technical Advisory meeting, representatives of Federal, state, regional, and local agencies and interested environmental organizations were introduced to the project, categories of potential environmental impact, potential alternatives, and the assessment schedule. Attendees provided input regarding the study's scope, projected environmental impacts, and potential alternatives. The Houston Department of Aviation appointed a Technical Advisory Committee, composed of Federal, state, regional, and local representatives. This committee monitored EA progress and provided technical guidance. A public hearing held subsequent to publication of the EA provided an opportunity for interested parties to comment on the study and the project in general. The aforementioned actions, along with letters of comment received as a result of EA coordination, constitute sufficient scoping for preparation of an EIS. No further formal scoping meetings will be held.

Issued on: February 26, 1990.

John D. Anderson,

Manager, Airports Planning Branch.

[FR Doc. 90-5283 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

[Summary Notice No. PE-90-11]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before March 28, 1990.

ADDRESSES: Send comments on any petition in triplicate to:

Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of part 11 of the Federal Aviation Regulations (15 CFR part 11).

Issued in Washington, DC, on February 27, 1990.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No: 26085.

Petitioner: Capt. Arthur J. Lynch.

Sections of the FAR Affected: 14 CFR 121.383(a).

Description of Relief Sought: To allow petitioner to serve as a pilot of an aircraft engaged in air carrier operations under part 121 after he has reached his 60th birthday.

Docket No: 26123.

Petitioner: Bell Helicopter Textron Inc.

Sections of the FAR Affected: 14 CFR 133.45(e)(1).

Description of Relief Sought: To allow petitioner to perform a proposed training exercise for Dallas/Ft. Worth firefighters involving lifting personnel in a suspended Billy Pugh safety net in a helicopter that does not have the capacity of sustained flight in the event of an engine failure.

[FR Doc. 90-5281 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

Flight Service Station Closure; Scottsbluff, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Flight Service Station closure: Scottsbluff, Nebraska.

SUMMARY: Notice is hereby given that on April 1, 1990, the Flight Service Station at Scottsbluff, Nebraska, will be closed. Thereafter, services to the general public will be provided by the Automated Flight Service Station at Columbus, Nebraska. This information will be reflected in the next issue of the FAA Organizational Statement.

(Section 313(a), 72 Stat. 752; 49 U.S.C. 1354)

Issued in Kansas City, Missouri, on February 20, 1990.

William Behan,

Acting Manager, Air Traffic Division.

[FR Doc. 90-5284 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement; Weber County, UT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for a proposed highway project in Weber County, Utah. If the study and analysis conclude that all appropriate FHWA/UDOT criteria for a Finding of No Significant Impact (FONSI) are met, then the document may be converted from an EIS to a FONSI.

FOR FURTHER INFORMATION CONTACT: Tom Allen, U.S. Department of Transportation, Federal Highway Administration, P.O. Box 11563, Salt Lake City, Utah 84147, Telephone (801) 524-5143; or R. James Naegle, Utah Department of Transportation, 4501 S. 2700 W., Salt Lake City, Utah 84119, Telephone (801) 965-4160; or Lynn Zollinger, Utah Department of Transportation, 169 Wall Avenue, Ogden, Utah 84404, Telephone (801) 399-5921; or Andy Anderson, Ogden City Engineer, 2540 Washington Boulevard, 6th floor, Odgen, Utah 84401, Telephone (801) 629-8337.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with Utah Department of Transportation and Ogden City, Utah, will prepare an EIS on a proposal to upgrade 36th Street in Ogden City, from Wall Avenue to Harrison Boulevard for a distance of approximately 1.6 miles.

Improvements to the corridor are considered necessary to provide for the existing and projected traffic demand, and increased safety measures. Alternatives under consideration include: (1) A "No Action" alternative, (2) A low-cost Transportation System Management alternative (intersection improvements, traffic signal coordination, etc.), (3) A Build alternative: widening the existing highway to AASHTO criteria with four travel lanes, turning median, curb and gutter, park strip and sidewalks on both sides of the road, (4) A new location with travel demand to be addressed by routing on existing parallel or other streets in the corridor. Two new locations have been identified and include 30th Street and 40th Street, (5) Reconstruct the existing roadway within the limits of the existing 66-foot wide right-of-way. Incorporated into and studied with the build alternatives will be several minor alignment variations which would provide for mitigation in sensitive areas and other major intersection improvements to resolve operational and safety concerns.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have an interest in this proposal. A series of public meetings will be held. Informal informational public meetings will be held as necessary during the project development process. A public scoping meeting and a final public hearing will also be held. Public notice of the time and place of the meetings and hearings will be given. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that a full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the Ogden City Engineer (Mr. Andy Anderson) at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: February 26, 1990.

Donald P. Steinke,

Division Administrator, Salt Lake City, Utah.

[FR Doc. 90-5310 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-22-M

National Highway Traffic Safety Administration

[Docket No. IP80-12; Notice 2]

Budd Co; Mootness of Petition for Determination of Inconsequential Noncompliance

On September 4, 1980, the National Highway Traffic Safety Administration published a notice in the **Federal Register** asking for comments on a petition by the Budd Company, Detroit, Michigan, for a determination that its noncompliance with Motor Vehicle Safety Standard No. 121 Air Brake Systems was inconsequential as it relates to motor vehicle safety (45 FR 58742). This notice disposes of the petition by declaring it moot.

Paragraph S5.2.1.1 of Standard No. 121 requires that "a reservoir shall be provided that is capable, when pressurized to 90 p.s.i, of releasing the vehicle's parking brake at least once and that is unaffected by a loss of air pressure in the service brake system." In April 1980, Budd manufactured a total of 99 container chassis equippped with a brake valve system manufactured by the Berg Manufacturing Company, and known as the "SERV" system. Budd believes that the system "probably" does not comply with S5.2.1.1.

Specifically, Budd commented that S5.2.1.1 represented the state of the art when Standard No. 121 was formulated. It imposed a requirement that air brake vehicles be equipped with emergency and parking brakes which are not affected by loss of the vehicle air supply. The best available solution was the adoption of spring brake chambers in tandem with air chambers, so designed that loss of air pressure to the air chambers resulted in spring energy being applied to the vehicle brakes. However, there was concern that vehicles could become immobilized as a result of air pressure failure. Section S5.2.1.1 provided the solution but is silent as to how its stored energy must be applied. The SERV system does not have a protected reservoir on the trailer but releases the spring brakes by pressurizing the supply (emergency) line of the trailer.

Budd argued that the SERV system may also represent an improvement in providing shorter full emergency stops because the air-applied brakes offer a greater application force than spring-applied brakes.

The first relevant fact in discussing the agency's treatment of this petition is that the manufacturer of the SERV system, Berg Manufacturing Company, had consulted NHTSA as to whether its system met S5.2.1.1. before it was sold to Budd and installed on the container chassis. On August 27, 1979, NHTSA informed Berg that "assuming that your system operates as you detailed in your letter, the agency concludes that it complies with S5.2.1.1 of the standard." Thus, Berg appears to have provided Budd with the SERV system under the agency's favorable interpretation. The second relevant fact is that Budd, in filing its petition, had not made a conclusive determination that its container chassis failed to meet Standard No. 121, only that they "probably" did not do so.

The third relevant fact is that NHTSA also never concluded that an apparent noncompliance existed, or that, if it did, that it presented a safety problem of a magnitude requiring immediate denial of the Budd petition. The agency deferred action on the Budd petition for a number of years, conducting its own research and tests, and issuing a notice of proposed rulemaking (NPRM) in 1981 which would have deleted the requirement for a separate reservoir capable of releasing the spring brakes. This addressed the question presented by the SERV system. Adoption of this

proposal would have provided a basis on which to grant the Budd petition. However, the comments in response to the proposal did not provide the support for a final rule, for reasons other than the SERV system. On February 8, 1990, the agency published a NPRM (55 FR 4453), superseding the 1981 NPRM, which again proposes deleting the separate reservoir requirement.

The purpose of the inconsequentiality procedures is to relieve a motor vehicle manufacturer of the requirements under the National Traffic and Motor Vehicle Safety Act that it notify purchasers when a noncompliance occurs in its vehicles, and that it remedy the noncompliance without charge (15 U.S.C. 1411 *et seq.*) As a condition precedent to notification, the Act requires a determination of noncompliance by either the manufacturer or NHTSA. Once a determination is reached, notification "shall be furnished within a reasonable time" (section 1413(b)). If the noncompliant motor vehicle was purchased by the first purchaser more than 8 calendar years before notification, remedy must still be provided, but the manufacturer may impose a charge for it.

It is factually possible that a noncompliance or safety related defect could be discovered well into the life of a vehicle, and notification required to be provided immediately thereafter, even if the vehicle were more than 8 years old. This, however, is not the Budd case. In the first instance, no determination of noncompliance has been made. If, however, the filing of the petition is regarded as a concession of apparent noncompliance, then notification 9 years subsequent to the discovery of the noncompliance fails to meet the statutory test of reasonableness. Although the agency concludes that the filing of an inconsequentiality petition may toll the statute of limitations on remedy without charge, it does not adopt that position in this case. Fundamental fairness to the manufacturer dictates that the agency expeditiously resolve petitions that are before it, and that the manufacturer not be penalized for the agency's failure to do so. Accordingly, the agency has determined that Budd's duty to notify and remedy has been extinguished by the passage of time, and that therefore its petition is moot.

Authority: 15 U.S.C. 1417; delegations of authority at 49 CFR 1.50 and 501.8.

Dated: March 2, 1990.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 90-5255 Filed 3-7-90; 8:45 am]

BILLING CODE 4910-59-M

Saint Lawrence Seaway Development Corporation

Advisory Board; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation, to be held at 2:00 p.m., March 30, 1990, at the Corporation's Administration Headquarters, Room 5424, 400 Seventh Street, SW., Washington, DC. The agenda for this meeting will be as follows: Opening Remarks, Consideration of Minutes of Past Meeting; Review of Programs; Business, Closing Remarks.

Attendance at meeting is open to the interested public but limited to the space available. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact not later than, March 23, 1990, Marc C. Owen, Advisory Board Liaison, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590; 202/366-0091.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC on March 1, 1990.

Marc C. Owen,

Advisory Board Liaison.

[FR Doc. 90-5311 Filed 3-7-90; 8:45 am]

BILLING CODE 6910-61-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

March 2, 1990.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-1021.

Form Number: 8594.

Type of Review: Extension.

Title: Asset Acquisition Statement.

Description: Form 8594 is used by the buyer and seller of assets to which goodwill or going concern value can attach to report the allocation of the purchase price among the transferred assets.

Respondents: Individuals or households, Farms, Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.

Estimated Number of Respondents: 20,000.

Estimated Burden Hours Per Response/Recordkeeping: Recordkeeping, 10 hours, 46 minutes; Learning about the law or the form, 30 minutes; Preparing and sending the form to IRS, 42 minutes.

Frequency of Response: On occasion.

Estimated Total Recordkeeping/Reporting Burden: 239,000 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 90-5357 Filed 3-7-90; 8:45 am]

BILLING CODE 4830-01-M

Customs Service

19 CFR Part 24

Current IRS Interest Rate Used in Calculating Interest on Overdue Accounts and Refunds

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation of interest.

SUMMARY: The Tax Reform Act of 1986 established a new method of determining the adjusted rate of interest on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term federal rate and is adjusted quarterly. This notice advises the public that the interest rates,

as set by the Internal Revenue Service, will remain at 10 percent for overpayments and 11 percent for underpayments for the quarter beginning April 1, 1990. It is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: April 1, 1990.

FOR FURTHER INFORMATION CONTACT: Robert B. Hamilton, Jr., Revenue Branch, National Finance Center (317) 298–1245.

SUPPLEMENTARY INFORMATION:

Background

By notice published in the **Federal Register** on January 5, 1987 (52 FR 255), Customs advised the public that the Tax Reform Act of 1986 (Pub. L. 99–514), amended 26 U.S.C. 6621, mandating a new method of determining the interest rate paid on applicable overpayments or underpayments of Customs duties. This method provides a two-tier system based on the short-term Federal rate. As amended, 26 U.S.C. 6621 provides that the interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

The rates of interest for the period of April 1, 1990–June 30, 1990 are 10 percent for overpayments and 11 percent for underpayments. These rates will remain in effect through June 30, 1990, and are subject to change on July 1, 1990.

Dated: March 2, 1990.

Michael H. Lane,

Acting Commissioner of Customs.

[FR Doc. 90–5241 Filed 3–7–90; 8:45 am]

BILLING CODE 4820-02-M

UNITED STATES INFORMATION AGENCY

VOA Broadcast Advisory Committee Meeting

The United States Information Agency announces an open meeting of the VOA Broadcast Advisory Committee meeting March 12, 1990, 11 a.m.–2:30 p.m. in room 800, USIA Headquarters, 301 Fourth Street, SW., Washington, DC.

The agenda will include: Goals and objectives of the Committee, remarks by USIA Director Gelb and VOA Director Carlson, and discussion of VOA projects for consideration by Committee members.

For additional information call Louise G. Wheeler or Patricia Gribben at 485–8890.

Copies of minutes can be obtained by calling 485–8889.

Dated: February 20, 1990.

Douglas Wertman,

Committee Management Officer.

[FR Doc. 90–5273 Filed 3–7–90; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). this document lists the following information: (1) The agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addresses.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before April 9, 1990.

Dated: February 23, 1990.

By direction of the Secretary:

Frank E. Lalley,

Director, Office of Information Management and Statistics.

Revision

1. Veterans Benefits Administration
2. VA MATIC Authorization
3. VA Form 29–0532 and 29–0532–1
4. This form is used by the insured to authorize VA to make automatic deductions from the insured's bank account to pay insurance premiums.
5. On occasion
6. Individuals or households and businesses or other for-proift
7. 4,212 responses
8. ½ hour
9. Not applicable

[FR Doc. 90–5226 Filed 3–7–90; 8:45 am]

BILLING CODE 8320-01-M

Federal Register

Thursday
March 8, 1990

Part II

Environmental Protection Agency

40 CFR Part 300

National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3644-1]

RIN 2050-AA75

National Oil and Hazardous Substances Pollution Contingency Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The Superfund Amendments and Reauthorization Act of 1986 (SARA) amends existing provisions of and adds major new authorities to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Furthermore, SARA mandates that the NCP be revised to reflect these amendments. Today's revisions to the NCP are intended to implement regulatory changes necessitated by SARA, as well as to clarify existing NCP language and to reorganize the NCP to coincide more accurately with the sequence of response actions.

DATES: The final rule is effective April 9, 1990. CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha*, 462 U.S. 919, 103 S.Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, EPA will publish notice of clarification in the **Federal Register**. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of April 9, 1990.

ADDRESSES: The official record for this rulemaking is located in the Superfund Docket, located in Room 2427 at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, telephone number 1-202-382-3046. The record is available for inspection, by appointment only, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Tod Gold, Policy and Analysis Staff, Office of Emergency and Remedial Response (OS-240), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, at 1-202-382-2182, or the RCRA/Superfund Hotline at 1-800-424-9346 (in Washington, DC, at 1-202-382-3000).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Introduction
II. Response to Comments on Each Subpart (a detailed index is set forth at the beginning of this section)
III. Summary of Supporting Analyses

I. Introduction

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510 (CERCLA or Superfund or the Act), as amended by section 105 of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, and Executive Order (E.O.) No. 12580 (52 FR 2923, January 29, 1987), the Environmental Protection Agency (EPA), in consultation with the National Response Team, is today promulgating revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300. Today's final rule is based on revisions proposed on December 21, 1988 at 53 FR 51394; approximately 160 commenters submitted specific comments on the **Federal Register** proposal, in writing as well as in testimony at four public hearings held in January 1989. Revisions to the NCP were last promulgated on November 20, 1985 (50 FR 47912).

For the reader's convenience and because the section numbers are being changed, EPA is reprinting the entire NCP, except for Appendix A (Uncontrolled Hazardous Waste Site Ranking System: A Users Manual), which is the subject of a separate rulemaking (see 53 FR 51962, December 23, 1988); and Appendix B (National Priorities List), which undergoes frequent updates by rulemakings (see, e.g., 54 FR 29820, July 14, 1989); and Appendix C (Revised Standard Dispersant Effectiveness and Toxicity Tests), for which only minor technical corrections were proposed. Also the "Procedures for Planning and Implementing Off-Site Response Actions," 40 CFR 300.440, is the subject of a separate rulemaking and is not included in this notice. See proposed rule, 53 FR 48218 (November 29, 1988). Those sections of the NCP that are merely being repeated in this rule for public convenience, but for which no changes were proposed or comment solicited, are not the subject of this rulemaking and are not subject to judicial review.

All existing subparts of the NCP have been revised and several new subparts have been added. Furthermore, because the NCP has been reorganized, many of the existing subparts have been redesignated with a different letter. The reorganization of NCP subparts is as follows:

Subpart A—Introduction
Subpart B—Responsibility and Organization for Response
Subpart C—Planning and Preparedness
Subpart D—Operational Response Phases for Oil Removal
Subpart E—Hazardous Substance Response
Subpart F—State Involvement in Hazardous Substance Response
Subpart G—Trustees for Natural Resources
Subpart H—Participation by Other Persons
Subpart I—Administrative Record for Selection of Response Action
Subpart J—Use of Dispersants and Other Chemicals
Subpart K—Federal Facilities [Reserved]

Today's revisions to the NCP encompass a broad and comprehensive rulemaking to revise as well as restructure the NCP. The primary purpose of today's rule is to incorporate changes mandated by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and to set forth EPA's approach for implementing SARA. SARA extensively revised existing provisions of and added new authorities to CERCLA. These changes to CERCLA necessitated revision of the NCP. In addition, EPA is making a number of changes to the NCP based on EPA's experience in managing the Superfund program.

The preamble to the December 21, 1988 proposed revisions to the NCP provided detailed explanations of changes to the existing (1985) NCP. The preamble to today's rule consists mainly of responses to comments received on the proposed revisions. Therefore, both preambles should be reviewed when issues arise on the meaning or intent of today's rule. Unless directly contradicted or superseded by this preamble or rule, the preamble to the proposed rule reflects EPA's intent in promulgating today's revisions to the NCP.

The preamble to today's rule responds to the major comments received on the proposed revisions, except as noted in the following paragraphs. In general, a separate discussion is provided for each proposed section on which comments were received; the discussions are organized as follows: a description of

the "existing (1985) rule" and/or "proposed rule" is provided to aid the reader in understanding today's revisions; a summary of the comments received on each proposed section, and EPA's response to the comments, is then set out under the heading "response to comments;" and revisions made to proposed rule language are then set out under the heading "final rule." Revisions to the proposed rule that are simply editorial or that do not reflect substantive changes may not be described under the heading "final rule." In addition, citations have been updated or corrected, where appropriate.

More detailed explanations to comments received and responses to minor comments are set out in the "Support Document to the NCP," which is available to the public in the Superfund Docket, located in Room 2427 at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

A number of commenters on the proposal made statements relating to federal facilities, including suggestions for how subpart K of the NCP should address their concerns. Issues raised by commenters included the applicability of the NCP at non-NPL federal facilities, state involvement at federal facilities, the role of federal agencies as lead agency at their facilities, and the applicability of the removal time and dollar limits to removal actions at federal facilities. These are important issues that EPA is considering in the development of the proposed subpart K, which is the subject of a separate rulemaking. EPA will address these comments as well as additional comments received on the proposed subpart K in the preamble and support document to the final rule on subpart K.

Subpart K will provide a roadmap to those requirements in the NCP that federal agencies must follow when conducting CERCLA response actions where either the release is on, or the sole source of the release is from, any facility or vessel under their jurisdiction, custody, or control, including vessels bare-boat chartered or operated.

The preamble to the proposed NCP also announced that EPA was considering an expansion of the existing policy of deferring sites from inclusion on the National Priorities List (such as sites subject to the corrective action authorities of RCRA) to include deferral to other federal or state authorities, or CERCLA enforcement actions. A number of comments were received on this suggested policy expansion. EPA is still evaluating the issues raised by commenters and thus will not decide this policy issue at this time. Current policies with regard to what sites are appropriate for inclusion on the National Priorities List will remain in effect until further notice. Should EPA decide in the future to consider establishing an expansion to deferral policies, EPA will respond at that time to the comments received.

As part of a consent decree filed June 14, 1989 in *Natural Resources Defense Council, et al.*, v. *Reilly*, C.A. No. 88-3199 (D.D.C.), EPA agreed to deliver to the **Federal Register** by February 5, 1990, for publication, final revisions to the NCP proposed December 21, 1988, reflecting the requirements of CERCLA section 105(b), as amended. With the publication of this final rule, the requirements of that consent decree are now fulfilled.

The regulation and the rest of the preamble use the term "CERCLA" to mean CERCLA as amended by SARA; the term "SARA" is used only to refer to Title III, which is an Act separate from CERCLA, and to other parts of SARA that did not amend CERCLA. The term "SARA" is used in this overview portion of the preamble, however, to highlight the changes to CERCLA.

A. Statutory Overview

The following discussion summarizes the CERCLA legislative framework, with particular focus on the major revisions to CERCLA mandated by SARA as well as the provisions of E.O. No. 12580, which delegates certain functions vested in the President by CERCLA to EPA and other federal agencies. In addition, this discussion references the specific preamble sections that detail how these changes to CERCLA are reflected in today's rule.

1. *Reporting and investigation.* CERCLA section 103(a) requires that a release into the environment of a hazardous substance in an amount equal to or greater than its "reportable quantity" (established pursuant to section 102 of CERCLA) must be reported to the National Response Center. Title III of SARA establishes a new, separate program that requires releases of hazardous substances, as well as other "extremely hazardous substances," to be reported to state and local emergency planning officials. The preamble discussion of subpart C summarizes Title III reporting requirements.

CERCLA section 104 provides the federal government with authority to investigate releases. SARA amends CERCLA section 104 to clarify EPA's investigatory and access authorities, explicitly empowering EPA to compel the release of information and to enter property for the purpose of undertaking response activities. Amended section 104(e) also provides federal courts with explicit authority to enjoin property owners from interfering with the conduct of response actions. SARA further amends CERCLA section 104 to specifically authorize EPA to allow potentially responsible parties (PRPs), under certain conditions, to conduct investigations. The preamble discussion of subpart E details how today's rule reflects these revisions to CERCLA.

2. *Response actions.* CERCLA section 104 provides broad authority for a federal program to respond to releases of hazardous substances and pollutants or contaminants. There are two major types of response actions: the first is "removal action," the second is "remedial action." CERCLA section 104 is amended by SARA to increase the flexibility of removal actions. This amendment increases the dollar and time limitations on Fund-financed removal actions from $1 million and six months to $2 million and one year, and allows a new exemption from either limit if continuation of the removal action is consistent with the remedial action to be taken. (The existing exemption for emergency actions remains in effect.) SARA also amends CERCLA section 104 to require removals to contribute to the efficient performance of a long-term remedial action, where practicable.

In addition, SARA amends CERCLA section 104 to require that, for the purpose of remedial actions, primary attention be given to releases posing a threat to human health. (To this end, SARA also amends CERCLA section 104 to expand health assessment requirements at sites and to allow individuals to petition the Agency for Toxic Substances and Disease Registry (ATSDR) for health assessments.)

Among the major new provisions added by SARA are CERCLA sections 121(a) through 121(d), which supplement sections 104 and 106 by stipulating general rules for the selection of remedial actions, providing for periodic review of remedial actions, and describing requirements for the degree of cleanup. These new sections codify rigorous remedial action cleanup standards by mandating that on-site remedial actions meet applicable or relevant and appropriate federal standards and more stringent state standards. Where the remedial action involves transfer of hazardous substances off-site, this transfer may only be made to facilities in compliance with the Resource Conservation and Recovery Act (RCRA) (or other applicable federal laws) and applicable

state requirements, and at which releases from land disposal units are addressed.

Section 121 emphasizes a long-term perspective on remedies by requiring that long-term effectiveness of remedies and permanent reduction of the threat be considered and that the calculation of the cost-effectiveness of a remedy include the long-term costs, including the cost of operation and maintenance. The section mandates a preference for remedies that permanently reduce the "volume, toxicity, or mobility" of the hazardous substance, and requires that remedies use permanent solutions and alternative technologies or resource recovery technologies to the maximum extent practicable. The preamble discussion of subpart E details how these revisions to CERCLA are reflected in today's rule.

3. *State and public participation.* New CERCLA section 121(f) requires the "substantial and meaningful" involvement of the states in the initiation, development, and selection of remedial actions. States are to be involved in decisions on conducting preliminary assessments and site inspections. States will also have a role in long-term planning for remedial sites and negotiations with potentially responsible parties. In addition, states are to be given reasonable opportunity to review and comment on such documents as the remedial investigation/feasibility study (RI/FS) and the proposed plan for remedial action. CERCLA also provides in section 121(e)(2) that a state is permitted to enforce any federal or state standard, requirement, criterion, or limitation to which the remedial action is required to conform.

CERCLA section 104(d) provides that a state, political subdivision thereof, or federally-recognized Indian tribe may apply to EPA to carry out the action authorized in section 104. This section allows these entities to enter into cooperative agreements with the federal government to conduct response actions. SARA amends CERCLA section 104 to make it easier for states to enter into such cooperative agreements. The preamble discussion concerning subpart F details how these revisions to CERCLA are reflected in today's rule.

SARA adds a new CERCLA section 117 to codify public involvement in the Superfund response process. This section mandates public participation in the selection of remedies and provides for grants allowing groups affected by a release to obtain the technical expertise necessary to participate in decision-making.

4. *Enforcement.* CERCLA sections 106 and 107 authorize EPA to take legal action to recover from responsible parties the cost of response actions taken by EPA or to compel them to respond to the problem themselves. SARA adds to CERCLA a number of provisions that are intended to facilitate responsible party conduct of response actions. CERCLA section 122, for example, provides mechanisms by which settlements between responsible parties and EPA can be made, and allows for "mixed funding" of response actions, with both EPA and responsible parties contributing to response costs.

SARA creates a new CERCLA section 310, which allows for citizen suits. Any person may commence a civil action on his/her own behalf against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution), alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to CERCLA (including any provision of an agreement under section 120 relating to federal facilities). A civil action may also be commenced against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the Agency for Toxic Substances and Disease Registry) where there is alleged a failure to perform any act or duty under CERCLA, including an act or duty under section 120 (relating to federal facilities), which is not discretionary with the President or such other federal officer, except for any act or duty under section 311 (relating to research, development, and demonstration). Section 310 requires that citizen suits be brought in a United States district court. CERCLA section 113(h)(4) provides that citizen suit challenges to response actions may not be brought until the response action has been "taken under section 104 or secured under section 106."

SARA amends CERCLA section 113 to require the lead agency to establish an administrative record upon which the selection of a response action is based. This record must be available to the public at or near the site. Section 113(j) provides that judicial review of any issues concerning the adequacy of any response action is limited to the administrative record. The preamble discussion of new subpart I includes the introduction of administrative record requirements into the NCP.

5. *Federal facilities.* Section 120(a)(2) of CERCLA provides that all guidelines, rules, regulations, and criteria for preliminary assessments, site investigations, National Priorities List (NPL) listing, and remedial actions are applicable to federal facilities to the same extent as they are applicable to other facilities. No federal agency may adopt or utilize any such guidelines, rules, regulations, or criteria that are inconsistent with those established by EPA under CERCLA. (For purposes of the NCP, the term "lead agency" generally includes federal agencies that are conducting response actions at their own facilities.)

Section 120 also defines the process that federal agencies must use in undertaking remediation at their facilities. It requires EPA to establish a federal agency hazardous waste compliance docket that includes a list of federal facilities. EPA must within 18 months of enactment take steps to assure that a preliminary assessment is conducted at each facility and, where appropriate, evaluate these facilities within 30 months of enactment for potential inclusion on the NPL. Sections 120(a) and (d) clarify that federal facilities shall be evaluated for inclusion on the NPL by applying the same listing criteria as are applied to private facilities. Requirements governing listing are set forth in subpart E of the NCP and in Appendix A (the Hazard Ranking System). Federal agencies must commence the RI/FS within six months of listing on the NPL and enter into an interagency agreement with EPA. Section 120(e) provides for joint EPA/federal agency selection of the remedy, or selection by EPA if EPA and the federal agency are unable to reach an agreement. CERCLA section 120(f) makes clear that state officials shall have an opportunity to participate in the planning and selection of the remedial action, in accordance with section 121.

B. Summary of Significant Changes From Proposed Rule

The following is a summary of the significant changes made to the proposed NCP in today's final rule. In subpart A, several definitions have been revised, including "CERCLIS," "Superfund state contract," "cooperative agreement" and "source control action." Also, definitions for "navigable waters," "post-removal site control" and "source control maintenance measures" have been added.

In subpart B, §§ 300.110 and 300.115 have been changed to provide that during activation of the National Response Team and the Regional Response Teams, the agency that provides the OSC/RPM will be the

chair. In § 300.165, a deadline of one year for submitting an OSC report has been promulgated, not 90 days as proposed. The National Response Center has been added to the list of agencies described in § 300.175. No major changes were made in subparts C and D.

In subpart E, the final § 300.430 incorporates a new goal and expectations into the regulatory section on RI/FS and selection of remedy. Also, the categories for the nine criteria—threshold, balancing and modifying—have been removed from the detailed analysis section (i.e., detailed analysis does not distinguish among nine criteria) and placed in the remedy selection section. When using criteria for balancing in selecting remedies, emphasis is now placed on the criteria for long-term effectiveness and permanence and for reduction of mobility, toxicity or volume. Further, innovative technologies need only offer the potential to be comparable in performance or implementability to demonstrated technologies to warrant further consideration in the detailed analysis step.

Also in subpart E, the acceptable cancer risk range in § 300.430(e)(2) has been modified from the proposed 10^{-4} to 10^{-7} to 10^{-4} to 10^{-6}. The 10^{-6} point of departure remains the same. Further, the proposed NCP stated that maximum contaminant levels (MCLs) generally would be the cleanup level for restoration of ground or surface water where they are relevant and appropriate under the circumstances of the release. In the final NCP, maximum contaminant level goals (MCLGs) that are set at levels above zero generally will be the cleanup levels where relevant and appropriate. Where MCLGs are set at levels equal to zero, the MCL generally will be the cleanup level where relevant and appropriate.

Other changes in subpart E include the following: As set forth in the preamble to § 300.435, EPA will fund operation costs for temporary or interim measures that are intended to control or prevent the further spread of contamination while EPA is deciding on a final remedy at a site. In § 300.400(g) on applicable or relevant and appropriate requirements (ARARs) ARARs, the factors used to determine whether a requirement is "relevant and appropriate" have been modified.

In the community relations sections, the rule is revised so that upon timely request, the lead agency will extend the length of 30-day public comment period on the proposed plan by a minimum of 30 additional days. The public comment period on non-time-critical removal actions will be extended, upon request, a minimum of 15 additional days. Also, the requirements during remedial action/remedial design have been revised to now include issuing a fact sheet and providing an opportunity for a public briefing after completion of design.

In subpart F, in a change to the proposed rule, a Superfund Memorandum of Agreement (SMOA) SMOA will not be a prerequisite in order for a state to recommend a remedy to EPA or for the state to be designated the lead agency for a non-Fund-financed response at an NPL site. Also, the proposed durations for review by the state of documents (e.g., RI/FS, proposed plan) prepared by EPA will now be applied as well to EPA's review of documents prepared by the state (i.e., when the state is the lead agency).

In subpart G and in other subparts, clarifications were made on notification of and coordination with natural resource trustees. Also, the proposed requirement that the Secretary of Commerce obtain the concurrence of other federal trustees where their jurisdictions over natural resources overlap has been revised so that the Secretary of Commerce shall seek to obtain such concurrence. No major changes were made in subparts H and I but several important clarifications are discussed in the preamble sections on these subparts. In subpart J, the proposed rule required concurrence of Commerce and Interior natural resource trustees, as appropriate, on the use of dispersants, burning agents, etc. The final rule does not require such concurrence but encourages consultation with these natural resource trustees.

II. Response to Comments on Each Subpart

Index to Response to Comments

Section numbers used in this index and in headings in preamble sections below refer to final rule section designations.

SUBPART A

300.3 Scope
300.4 Abbreviations
300.5 Definitions

SUBPART B

300.105 General organization concepts
300.110 National Response Team
300.115 Regional Response Teams
300.120 On-scene coordinators and remedial project managers: general responsibilities
300.125 Notification and communications
300.130 Determinations to initiate response and special conditions
300.135 Response operations
300.140 Multi-regional responses
300.145 Special teams and other assistance available to OSCs/RPMs
300.150 Worker health and safety
300.155 Public information and community relations
300.160 Documentation and cost recovery
300.165 OSC reports
300.170 Federal agency participation
300.175 Federal agencies: additional responsibilities and assistance
300.180 State and local participation in response
300.185 Nongovernmental participation

SUBPART C

300.200 General
300.205 Planning and coordination structure
300.210 Federal contingency plans
300.215 Title III local emergency response plans; Indian tribes under Title III

SUBPART D

300.300 Phase I—Discovery or notification
300.305 Phase II—Preliminary assessment and initiation of action
300.310 Phase III—Containment, countermeasures, cleanup and disposal
300.315 Phase IV—Documentation and cost recovery
300.320 General pattern of response
300.330 Wildlife conservation

SUBPART E

Section 300.400. General

300.400(d)(3); 300.400(d)(4)(i) Designating PRPs as access representatives; Administrative orders for entry and access
300.5; 300.400(e) Definition of on-site
Treatability testing and on-site permit exemption
300.400(h) PRP oversight

Section 300.405. Discovery or Notification

300.5 Definition of "CERCLIS"
300.405; 300.410(h); 300.415(e) Listing sites in CERCLIS

Sections 300.410 and 300.420. Removal and Remedial Site Evaluations

300.410 Removal site evaluation
300.410(c)(2); 300.420(c)(5) Removal site evaluation; Remedial site evaluation
300.410(g) Notification of natural resource trustee
300.415(b)(4); 300.420(c)(4) Sampling and analysis plans

Section 300.415. Removal Action

300.415(b)(5)(ii) Removal action statutory exemption
300.415(i) Removal action compliance with other laws
300.5; 300.415(g)&(h); 300.500(a); 300.505; 300.525(a) State involvement in removal actions

Section 300.425. Establishing Remedial Priorities

300.5; 300.425 Definition of National Priorities List; Establishing remedial priorities
300.425(d)(6) Construction Completion category on the National Priorities List

Section 300.430. Remedial Investigation/ Feasibility Study and Selection of Remedy

Introduction

300.430(a)(1) Program goal, program management principles and expectations
300.430(a)(1) Use of institutional controls
300.430(b) Scoping
300.430(d) Remedial investigation
300.430(d) Remedial investigation—baseline risk assessment
300.430(e) Feasibility study
300.430(e)(2) Use of risk range
300.430(e)(2) Use of point of departure
300.430(e)(9) Detailed analysis of alternatives
300.430(f) Remedy selection
300.430(f)(5) Documenting the decision
Ground-water policy

Section 300.435. Remedial Design/Remedial Action, Operation and Maintenance

300.435(b)(1) Environmental samples during RD/RA
300.435(d) Contractor conflict of interest
300.5; 300.435(f) Operation and maintenance
Notification prior to the out-of-state transfer of CERCLA wastes

Applicable or Relevant and Appropriate Requirements

Introduction

300.5; 300.400(g)(1) Definition of "applicable"
300.5; 300.400(g)(2) Definition of "relevant and appropriate"
300.400(g)(3) Use of other advisories, criteria or guidance to-be-considered (TBC)
300.400(g)(4) and (g)(5) ARARs under state laws
300.515(d)(1) Timely identification of state ARARs
300.430(f)(1)(ii)(C) Circumstances in which ARARs may be waived
300.430(f)(1)(ii)(C)(*1*) Interim measures
300.430(f)(1)(ii)(C)(*2*) Greater risk to health and the environment
300.430(f)(1)(ii)(C)(*3*) Technical impracticability
300.430(f)(1)(ii)(C)(*4*) Equivalent standard of performance
300.430(f)(1)(ii)(C)(*5*) Inconsistent application of state requirements
300.430(f)(1)(ii)(C)(*6*) Fund-balancing
300.430(e)(2)(i)(B) Use of maximum contaminant level goals for ground-water cleanups
300.430(f)(5)(iii)(A) Location of point of compliance for groundwater cleanup standards
300.430(e)(2)(i)(F) Use of alternate concentration limits (ACLs)
300.430(e)(2) Use of federal water quality criteria (FWQC)
300.435(b)(2) Compliance with applicable or relevant and appropriate requirements (ARARs) during the remedial action
300.5 Distinction between substantive and administrative requirements
300.430(f)(1)(ii)(B) Consideration of newly promulgated or modified requirements
Applicability of RCRA requirements
Determination of whether a waste is a hazardous waste
When RCRA requirements are relevant and appropriate to CERCLA actions
Examples of potential federal and state ARARS and TBCs

Community Relations

300.430(c); 300.430(f) (2), (3) and (6) Community relations during RI/FS and selection of remedy
300.415(m)(2)(ii); 300.430(f)(3)(i)(C); 300.435(c)(2)(ii)(C) Length of public comment period
300.435(c) Community relations during remedial design/remedial action
300.435(c)(2) Changes to the ROD after its adoption
Other community relations requirements

Enforcement

Superfund enforcement program strategy
Special notice and moratoria
Exemptions for federal facilities
300.420; 300.430; 300.435 Early notification and involvement

SUBPART F

300.5 Definitions of "cooperative agreement" and "Superfund state contract"
300.500; 300.505; 300.515(h) EPA/State Superfund memorandum of agreement (SMOA); Requirements for state involvement in absence of SMOA
300.510(c) (1) and (2); 300.510(e) State assurances—operation and maintenance and waste capacity
300.510(f) State assurances—acquisition of real property
300.515(a) Requirements for state involvement in remedial and enforcement response
300.515(b) Indian tribe involvement during response
300.425(e)(2); 300.515(c)(2); 300.515(c)(3); 300.515(h)(3) State involvement in PA/SI and NPL process; State review of EPA-lead documents
300.505 and 300.515(d) Resolution of disputes
300.515(e) (1) and (2) State involvement in selection of remedy
Whether states should be authorized to select the remedy at NPL sites
300.515(f) Enhancement of remedy
300.515(g) State involvement in remedial design/remedial action
300.520 (a) and (c) State involvement in EPA-lead enforcement negotiations
Dual enforcement standards

SUBPART G

300.600 Designation of federal trustees
300.610 Indian tribes as trustees for natural resources under CERCLA
300.615 Responsibilities of trustees

SUBPART H

300.700(c) Consistent with the NCP
300.700(c) Actions under CERCLA section 107(a)
300.700(e) Recovery under CERCLA section 106(b)

SUBPART I

General Comments

300.800(a); 300.810(a) Establishment of an administrative record; Contents of the administrative record
300.800(b) Administrative record for federal facilities
300.800(c) Administrative record for state-lead sites
300.800 (d) & (e) Applicability
300.805 Location of the administrative record file
300.810 (a)–(d) Documents not included in the administrative record file
300.815 Administrative record file for a remedial action
300.815 and 300.820(a) Administrative record file for a remedial action; administrative record file for a removal action
300.820(b) Administrative record file for a removal action—time-critical and emergency
300.825 Record requirements after decision document is signed

SUBPART J

300.900—300.920 General

APPENDIX C

APPENDIX D

Subpart A—Introduction

Subpart A, the preface to the NCP, contains statements of purpose, authority, applicability and scope. It also explains abbreviations and defines terms that are used in the NCP.

Name: Section 300.3. Scope.

Proposed rule: Proposed § 300.3 stated that the NCP applies to federal agencies and states and is in effect for discharges of oil into or upon the navigable waters of the United States and adjoining shorelines, and releases of hazardous substances into the environment, and releases of pollutants or contaminants which may present an imminent or substantial danger to public health or welfare.

Response to comments: A commenter suggested that § 300.3(a) of the proposed NCP should state that the NCP applies to private party responses as well as to federal agency and state responses, and the NCP should define the responsibilities of EPA and states for potentially responsible party (PRP)-lead response actions.

EPA has revised § 300.3(a) to eliminate the suggestion that the NCP applies only to cleanups conducted by federal agencies and states. EPA does not believe, however, that the roles or responsibilities of EPA or states during PRP-lead cleanups should be defined for the purposes of § 300.3(a). Rather, EPA prefers that these roles and responsibilities be negotiated and defined in site-specific enforcement agreements.

Final rule: Proposed § 300.3(a) is revised to read: "The NCP applies to and is in effect for:"

Name: Section 300.4. Abbreviations.

Final rule: Several abbreviations commonly used in the Superfund program have been added to § 300.4:

LEPC—Local Emergency Planning Committee
NCP—National Contingency Plan
RAT—Radiological Assistance Team
SERC—State Emergency Response Commission

Name: Section 300.5. Definitions.

Response to comments: Comments were received on several definitions. The comments and EPA's responses regarding revised and new definitions are included in the appropriate preamble sections, as indicated below. The revised or new definitions are found in the rule in § 300.5.

1. "Applicable" and "relevant and appropriate" are discussed in the ARARs preamble section.
2. "CERCLIS" is discussed in the preamble on § 300.405.
3. "Cooperative agreement" and "Superfund state contract" are discussed in the preamble to subpart F.
4. "On-site" is discussed in the preamble on § 300.400(e).
5. The definition for "navigable waters" used in 40 CFR 110.1 has been included in the NCP.
6. A new definition for "post-removal site control" is discussed in the preamble on § 300.415, "State involvement in removal actions." References to post-removal site control have been added to the definitions in § 300.5 of "remove or removal" and "remedy or remedial action."
7. "Source control action" and a new definition for "source control maintenance measures" is discussed in the preamble on § 300.435(f).

In addition, minor revisions were made to the following definitions:

1. Modifications to "National Priorities List" are discussed in the preamble to § 300.425.
2. In "operable unit," the last sentence has been deleted because it was not appropriate for a definition.
3. In "pollutant or contaminant," the reference to subpart E was deleted because the definition applies to the use of the term throughout the NCP.
4. In "Superfund Memorandum of Agreement (SMOA)," the words "nonbinding" and "may establish" are used to emphasize the voluntary nature of a SMOA (see preamble to subpart F). Also, a reference to "removal" has been added (see preamble to § 300.415).
5. In "United States," the term "Pacific Island Governments" is used instead of "Trust Territory of the Pacific Islands" (this revision is also made in §§ 300.105(d) (Figures 2 and 3) and 300.175(b)(9)(x)).

Subpart B—Responsibility and Organization for Response

Subpart B describes the responsibilities of federal agencies for response and preparedness planning and describes the organizational structure within which response takes place. Subpart B lists the federal participants in the response organization, their responsibilities for preparedness planning and response, and the means by which state and local governments, Indian tribes, and volunteers may participate in preparedness and response activities. The term "federal agencies" is meant to include the various departments and agencies within the Executive Branch of the federal government. Subpart B should be distinguished from subpart K (under preparation separate from this final rule), which deals specifically with site evaluation and remedial requirements for facilities under the jurisdiction of individual federal agencies.

The proposed revisions to subpart B did not include major substantive changes; however, EPA did propose to combine existing subparts B and C. The proposed subpart B also presented key information in a logical sequence of response-oriented activities from preparedness planning through response operations. The listing of the capabilities of federal agencies with respect to preparedness planning and response was proposed to follow the sections relating to response operations.

The following is a discussion of comments submitted and EPA's responses on specific sections of proposed subpart B. One change that has been made to the proposal throughout subpart B is, where appropriate, to delete references to Executive Orders. Although Executive Orders are binding on agencies of the federal government, such references are unnecessary in a rule.

Name: Section 300.105. General organization concepts.

Proposed rule: Section 300.105 directs federal agencies to undertake specified planning and response activities and describes the general organizational concepts of the National Response Team (NRT), the Regional Response Teams (RRTs) and the on-scene coordinator (OSC)/remedial project manager (RPM). The proposal provided general descriptions of member agency responsibilities with respect to their participation in the NRT and the RRTs.

Response to comments: Many of the commenters appear to regard both the NRT and the RRTs as response rather than planning, coordinating, and support organizations. Another commenter wanted § 300.105(c)(1) edited to clarify the fact that the NRT/RRTs are policy and planning bodies that support the federal OSC, but that they do not coordinate responses. One commenter proposed dividing Figure 1 into two parts, one to show the NRT/RRT planning roles and the relationship between the NRT/RRTs and the State Emergency Response Commissions (SERCs) and the Local Emergency Planning Committees (LEPCs) and the other to illustrate the relationship between the NRT and the RRT during incident-specific situations. Another wanted § 300.105(d)(1) expanded to describe all three figures rather than only the first figure. Another noted that corrections are needed in the references to trust territories in Figures 2 and 3 (described in § 300.105(d)(2) and (3)).

The above comments make it clear that some clarification of the NRT/RRT roles in the national response system is needed. In response, text changes in the rule now indicate the policy, planning, coordination and response support roles of the NRT and the RRTs. Figure 1 (§ 300.105(d)(1)) shows the National Response System has been expanded to better indicate the relationships between the parts of the organization showing NRT, RRT, OSC and RPM, special teams, and the connections with state and local responders. Added lines indicate the activities of the NRT and RRTs including planning and preparedness as well as response support. Another added line indicates NRC policy guidance from the NRT.

Experience has shown that the standing RRTs cannot provide a useful forum for individual local governments on a continuing basis because the RRT responsibilities extend through a multistate region and their regular meetings are only two to four times a year, and generally devoted to systemwide issues for the entire region rather than site-specific issues. Local governments may and often do participate in such meetings where lessons learned from a particular incident are being discussed, for example. At the standing RRT level, then, the most effective way for local interests to be represented is through the state member. When an incident-specific RRT action is needed, local interests on scene are represented in accordance with the local plans, including federal local plans, guiding the particular response. An essential purpose of the national response system is to ensure federal readiness to handle a response which might exceed local and state capabilities. Appropriate

RRT/federal representation on multi-agency local response groups can provide a forum for a particular community, harbor area, or other geographic locality, comparable to what the RRT provides for the multi-state region.

One commenter wanted the NCP to include checklists of the specific tasks to be completed by each agency during a response and to identify who in each agency is supposed to carry out those tasks. In response EPA believes that detailed checklists of response tasks and persons responsible for those tasks belong in local response plans, not in the more general regional and national plans.

One commenter said that "extremely hazardous substances" should be added to the substances listed in § 300.105(a)(1). Extremely hazardous substances are defined in a separate section of the SARA statute, Title III. Although some extremely hazardous substances are CERCLA hazardous substances, most are not. On January 23, 1989, however, EPA proposed to designate the remaining extremely hazardous substances as CERCLA hazardous substances (54 FR 3388). This addition, when promulgated, will in effect mean that any reference to "hazardous substances" will implicitly include extremely hazardous substances.

Another commenter wanted to correct awkward wording in § 300.105(a)(4). The wording in § 300.105(a)(4) has been changed as indicated below.

Final rule: Proposed § 300.105 has been revised as follows:

1. Section 300.105(a)(4): "Make available those facilities or resources that may be useful in a response situation, consistent with agency authorities and capabilities."

2. Section 300.105(c)(1): "The National Response Team (NRT), responsible for national response and preparedness planning, for coordinating regional planning, and for providing policy guidance and support to the Regional Response Teams. NRT membership consists of representatives from the agencies specified in § 300.175."

3. Section 300.105(c)(2): "Regional Response Teams (RRTs), responsible for regional planning and preparedness activities before response actions, and for providing advice and support to the on-scene coordinator (OSC) or remedial project manager (RPM) when activated during a response. RRT membership consists of designated representatives from each federal agency participating in the NRT together with state and (as agreed upon by the states) local government representatives."

4. Revisions to Figures 1 through 3 have been made. The revised Figure 1 clarifies the response support or planning roles of the various entities and shows the planning relationships between the RRTs and the SERCs and LEPCs. It also clarifies that, apart from state and local participation in the RRT, the federal membership of the NRT and the RRTs is the same. Figures 2 and 3 have also been revised slightly to refer to Pacific Island Governments rather than Trust Territory of the Pacific Islands.

Name: Section 300.110. National Response Team.

Proposed rule: The proposed rule delineated the roles and responsibilities of the NRT, specified who will act as chair and vice-chair during activation for a response action, outlined the planning and preparedness responsibilities of the NRT, and discussed responses in general, to oil discharges and releases of hazardous substances, pollutants or contaminants. The organization of the National Response Center (NRC) was placed in the notification section, § 300.125.

Response to comments: A commenter suggested that more detail on the NRC organization be included in the final rule. EPA agrees that more descriptive language is needed but feels it is better placed in the section on notification and communications. These changes are discussed under § 300.125.

A commenter suggested that more information is needed on the specific duties of the NRT in an emergency, as well as a remedial action. After careful consideration, EPA believes that the roles and responsibilities of the NRT are addressed satisfactorily in §§ 300.110 and 300.175, and no changes are required. The NRT is activated in only a limited number of responses, and its activities then are usually carried out through communications between individual NRT member agencies with their RRT members in the field as needed to support the OSC or RPM. Since the NCP generally describes action tied to the response incident or site, and the NRT is generally not involved in actions on scene, NCP discussion of possible NRT activities is not necessary. The idea of a clearer pre-planned procedure for dealing with an event of catastrophic or national significance has been discussed, but decisions have not yet been made as to the form such protocols might take, when or if they are deemed to be needed.

Another commenter suggested that, in view of the limitation on United States Coast Guard (USCG) response authority following the 1987/1988 Department of Transportation (DOT)/EPA Instrument of Redelegation (May 27, 1988), the second sentence of § 300.110(b) would be more instructive if the chair of the NRT during activation was the agency providing the OSC/RPM.

EPA agrees. Who sits as chair or vice chair of the NRT will depend on which agency provides the OSC/RPM for the particular response action. It does not necessarily depend on "whether the discharge or release occurs in the inland zone or coastal zone." EPA has certain responsibilities for releases in the coastal zone. The second sentence in § 300.110(b) has been changed as recommended by this comment.

It was suggested that § 300.110(h)(3) further clarify who determines when it is necessary to activate the NRT. EPA believes that activation of the NRT is adequately described in § 300.110(j) and does not need to be outlined additionally in § 300.110(h)(3).

Final rule: The second sentence of proposed § 300.110(b) is revised as follows: "During activation, the chair shall be the member agency providing the OSC/RPM."

Name: Section 300.115. Regional Response Teams.

Proposed rule: This section delineates the roles and responsibilities of the Regional Response Team (RRT). For example, proposed § 300.115(b)(2) addressed the activation of the incident-specific RRT, and how the incident-specific RRT supports the OSC/RPM when the designated OSC/RPM directs and coordinates response efforts at the scene of the spill.

Response to comments: It was suggested that the NCP more clearly define the role of the RRT in the remedial program and require that regional and state remedial managers be informed of the assistance available from the RRTs. In response, EPA believes that the description of the roles and responsibilities of the RRT in § 300.115 provides the necessary framework for RRTs to support RPMs in the remedial program as they traditionally have supported OSCs. Upon notification and request, the RRT can function the same way for all response actions, whether they involve oil spill or hazardous material releases, and removal or remedial actions. Experience has not yet shown the need or usefulness of specific RRT actions in connection with the implementation of the remedial program as described in the NCP, while the flexibility exists for them to be involved if a need does arise.

One commenter suggested that this section should not indicate that the RRTs are response organizations, but that they are there to provide advice and assistance to the OSC, as necessary. In response, § 300.115 was not intended to portray the RRTs as response organizations. It indicates that they are the "appropriate regional mechanism for development and coordination of preparedness activities before a response action is taken and for coordination of assistance and advice to the OSC/RPM during such response actions." The proposed § 300.115(i)(7) indicated, however, that the standing RRT should "be prepared to respond to major discharges or releases outside the region." This may have been somewhat misleading, and has been changed to indicate that the RRT may provide "response resources" to major discharges or releases outside the region.

It was also recommended that the RRT support the designated OSC/RPM of the state response agency without assuming federal OSC direction and coordination of all other efforts at the scene of the release. EPA does not agree with this suggested comment to § 300.115(b). An essential purpose of the national response system is to ensure federal readiness to handle a response which might exceed local and state capabilities. That being so, the RRT would generally not be activated unless the federal government was needed as the lead in the response. In general, the authorities under which a federal agency operates require that commitments of federal resources and personnel be made through particular channels or command chains. Through specific memoranda of understanding, state OSC/RPMs could request certain kinds of federal assistance from individual agencies, but the RRT as a unit is designed to support a federal OSC in those situations where the size or nature of the response calls for a significant federal presence. (Experience shows that a federal OSC is on scene many times with no need to activate the RRT.)

Another commenter wanted the following language added to § 300.115(c): "If the RRT is activated upon the request of the state representative to the RRT, then the chair of the incident-specific RRT may be that representative if the members of the RRT so agree." EPA does not agree with the comments. Who sits as chair and co-chair to the incident-specific RRT depends on where the spill occurred and who provides the OSC/RPM, not who requests activation of the RRT. Certainly, the state representative will always be an active member of the incident-specific RRT when a spill occurs in the particular state, but the chair or co-chair will usually be the USCG or EPA representative.

Also suggested was the reconsideration of the extension of § 300.115(d) to allow for the participation of the Indian tribal governments on both the standing RRT and on incident-specific RRTs. Given that there are over 200 federally recognized Indian communities or groups in Alaska, participation by these entities on the same basis as the State of Alaska in the planning and coordination functions of the RRT is not administratively feasible. The comment stated that this provision should be modified to allow flexibility in determining how Alaska Native villages will be represented on the Alaska RRT.

EPA understands the commenter's concern as to the workability of a large number of Indian tribal governments participating in an RRT's activities. However, the 1986 amendments to CERCLA added several provisions for Indian tribal governments to be afforded the same opportunities as states. Indeed, CERCLA section 126(b) specifically states that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a state with respect to the provisions of * * * section 105 (regarding roles and responsibilities under the national contingency plan * * *)." It is consistent with that provision to include Indian communities in the national response system by having their jurisdictions recognized in the context of nationwide provisions for response activities. The proposed NCP language appeared to be the best way to allow interested Indian tribal governments to determine if the benefits of RRT membership would be such that they would be willing to undertake the responsibilities of RRT membership, or if there is an ad hoc basis, a planning project, or other basis on which an RRT-tribal relationship might be useful. In some regions, an existing inter-tribal or multi-tribal organization might provide appropriate representation. The language in the proposed rule was intended to afford these kinds of opportunities.

Furthermore, it was submitted that, for consistency, it would be much more effective to mandate local government involvement from the national level, rather than to rely upon each state. The comments state that due to the impact a local jurisdiction can experience from a hazardous substance release, it is imperative that local governments have the ability to participate on the RRT. EPA agrees that the impacts to a local government from a major release are substantial, but EPA does not agree that the local government should be mandated to participate in all RRT activities. The local governments may attend meetings and may actively participate in RRT functions through their state representative. The state representative is generally responsible for actively representing the interests of the local governments. If the state representative is performing his/her duties properly, all local governmental interests will be represented at RRT functions.

Also, it was suggested that RRT review of LEPC plans should be conducted only after the plans have been reviewed by the SERC, as required EPA agrees that the RRTs will not be able to review and comment on every LEPC plan within their region. LEPC plans should be initially reviewed by the states, and if the state believes that the RRT should also review the LEPC plan, then the state should request such a review from the RRT.

One commenter wanted the phrase "or participation in" inserted after "conduct" in § 300.115(i)(8), noting that this would allow the state RRT representative/SERC the ability to request RRT participation, within allowable resources. EPA agrees that the phrase "or participate in" should be inserted after "conduct" in § 300.115(i)(8). This would give the RRT more flexibility in deciding whether it wanted to manage a particular exercise or training program or simply act as a participant.

Regarding § 300.115(j)(1)(i), one commenter raised the question of who decides when the OSC's/RPM's response capability is exceeded. This question does not need to be addressed in the final rule. The particular OSC/RPM will know when his/her response capability is going to be exceeded, and that information will be passed on to the RRT as soon as it is known. In addition, if the agencies on the RRT believe that the response capability to the OSC/RPM will be exceeded, then they also have the option of activating the RRT.

There was a request for clarification as to whether a pollution report satisfies the requirement for written confirmation of a request for RRT activation under § 300.115(j)(2). EPA responds that a written pollution report confirming the request to activate the RRT would satisfy the requirement; the pollution report is the primary means of providing information during the course of an

incident. A request to activate the RRT should also be confirmed in a letter from another RRT representative.

Also, it was suggested that § 300.115(k) be expanded to address the contingency of what happens when a federal lead agency fails to perform its assigned role. The comment stated that if this situation occurs, the RRT should be notified and EPA or the USCG should assume the federal responsibilities.

In E.O. 11735 and E.O. 12580, the President has delegated certain functions and responsibilities vested in him by the CWA and CERCLA to various federal agencies. If federal agencies cannot perform their assigned tasks, such federal agencies may authorize another agency to perform the task through interagency agreement or contract. (See also preamble discussion below on § 300.130(a).)

Final rule: Proposed § 300.115 has been revised as follows:

1. The second sentence of § 300.115(c) reads: "When the RRT is activated for response actions, the chair shall be the member agency providing the OSC/RPM."

2. Section 300.115(i)(7): "Be prepared to provide response resources to major discharges or releases outside the region."

3. Section 300.115(i)(8): "Conduct or participate in training and exercises as necessary to encourage preparedness activities of the response community within the region."

Name: Section 300.120. On-scene coordinators and remedial project managers: general responsibilities.

Proposed rule: Consistent with the delegation of the President's response authority to the various federal agencies under section 2(d)–(f) of Executive Order 12580, proposed § 300.120(b) specifies when federal agencies other than EPA or USCG shall provide OSCs and RPMs.

Response to comments: One commenter recommended that proposed § 300.120 be divided into two subsections. One subsection would discuss the responsibilities of an OSC and the other subsection would discuss the responsibilities of an RPM. In the commenter's view, the responsibilities of an OSC and an RPM do not overlap as much as was suggested in proposed § 300.120.

Another commenter recommended that a distinction be developed between actions where the OSC is in a monitoring role and actions where the response is undertaken using a federal funding mechanism such as the oil pollution fund established under CWA section 311(k) or the Hazardous Substance Superfund. The commenter stated that when the response action is federally funded, local responders "interpret the OSC's actions as tantamount to a command role."

In response, the NCP is intended to provide a framework within which response managers have the flexibility to use their best judgment, consonant with applicable law, regulation and guidance. In general, the role of the RPM parallels that of the OSC. Also, in general, the role of the OSC is the same whether or not the response action is federally funded. The roles as they are described in the current NCP are accurate, though not very detailed. EPA feels that the comments are well taken, and that it might be useful to have somewhat more detailed, separate descriptions of OSC and RPM responsibilities, and of any differences in OSC actions depending on whether the response is federally funded or funded by the responsible party. EPA has decided not to make such revisions in today's rule but will explore this matter with other federal agencies and will also consider developing guidance on this subject.

Another commenter pointed out that a state law may provide a fire chief with coordination authority over all on-scene officials, federal, state, and local, and inquired if the local fire chief's authority is superseded by proposed § 300.120. In addition, the commenter suggested that a conflict can be avoided if the authority to supersede the local fire chief's authority was clearly spelled out. Finally, the commenter recommended that § 300.120 be amended to permit the OSC to delegate his authority to a state or local official.

In response, the legal authority of the OSC to take action to respond to a discharge or release is section 311(c) of the Clean Water Act (CWA), 33 U.S.C. 1321(c) or section 104 of CERCLA. To the extent that an action of a state or local official to direct response actions conflicts with actions under federal law to direct response, the federal law will prevail if there is federal participation in the response action. However, circumstances under which an OSC's authority is changed (local or state to federal, for example) should be spelled out in federal and local contingency plans, so that problems with conflicting authorities do not arise at the scene of a response action.

With regard to the recommendation that § 300.120 be amended to permit the OSC to delegate his/her authority to a state or local official, such delegation is allowed only to the extent authorized by law. There is no mechanism provided under the CWA for such a delegation. Section 104(d) of CERCLA, however, does permit certain agencies of the federal government to enter into contracts or cooperative agreements with a state to undertake, on behalf of the United States, actions authorized by section 104 of CERCLA. Finally, changing § 300.120 to clearly state that the federal OSC's authority supersedes the authority of the local fire chief is not necessary because § 300.120 states that the OSC "* * * directs response efforts and coordinates all other efforts at the scene * * *."

Paragraph (a): One commenter recommended that the term "hazardous waste management facility" used in proposed § 300.120(a)(1) be defined since, according to the comment, it is unclear whether all facilities under the jurisdiction, custody or control of a federal agency are considered to be hazardous waste facilities. According to the comment, if all such federal facilities are "hazardous waste management facilities," the section should be amended to conform to E.O. 12580. The comment apparently relates to the following sentence in the proposed rule: "The USCG shall provide an initial response to the discharges or releases from hazardous waste management facilities within the coastal zone in accordance with DOT/EPA Instrument of Redelegation * * *."

The comment appears to assume that this section is intended to apply to all or many federal facilities as that term is used in section 120 of CERCLA. Instead, the NCP reference to "hazardous waste management facility" is to its very narrow meaning within the terms of the DOT/EPA Instrument of Redelegation (May 27, 1988) dealing with predesignation of Coast Guard and EPA OSCs. For this reason, it is not necessary to define this term in the NCP

With regard to § 300.120(a)(2), another commenter recommended that the term "federally funded" be deleted and "Fund-financed" be inserted, because EPA's authority to undertake response actions with regard to releases from facilities or vessels owned, possessed or controlled by other federal agencies is limited by E.O. 12580. The recommended change is not necessary since proposed § 300.120(a)(2) provides for an exception to the general statement of EPA authority for facilities and vessels under the jurisdiction or control of other federal agencies. No change is necessary since the exception is consistent with Executive Order 12580.

Paragraph (b): One commenter recommended that § 300.120(b) be amended to indicate which agency would be responsible for providing

OSCs and RPMs in the case of a release from a Coast Guard vessel. In addition, the commenter recommended that "emergencies" be defined in § 300.120(b)(2).

With regard to the first comment, in accordance with sections 2 (e) and (f) of E.O. 12580, the Department of Transportation is responsible for providing OSCs and RPMs in the event of a release from a Coast Guard vessel. As written, proposed § 300.120(b)(2) stated that in the case of a federal agency other than the USCG, EPA, DOD or DOE, the federal agency involved shall provide the OSC or RPM. The final rule does not include the USCG in § 300.120(b)(2) so that it is clear that the USCG will respond to a release from a USCG vessel.

Regarding the second comment, the preamble to the proposed rule provided a definition of the term "emergencies" for purposes of the delegations under E.O. 12580 (53 FR 51396). An additional definition in § 300.120(b)(2) is unnecessary.

Paragraph (c): One commenter stated that the Department of Defense (DOD) only has removal response authority for incidents involving DOD weapons and munitions. EPA agrees and has revised this section to state that DOD will have response authority for incidents involving weapons and munitions within the control, custody or jurisdiction of DOD.

Paragraphs (d) and (e): One commenter stated that while § 300.120(d) is supposed to describe the general responsibilities of OSCs and RPMs, it is primarily concerned with which federal agency will provide the OSC or RPM. EPA disagrees. In addition to specifying the agency that provides the OSC or RPM, § 300.120 also contains a description of the general responsibilities of OSCs and RPMs.

In order to further clarify the general responsibilities of OSCs and RPMs, EPA has added language to paragraphs (d) and (e) to make it clear that OSCs and RPMs are responsible for coordinating and directing responsible parties—as well as agencies and contractors—in their conduct of either federally financed or non-federally financed (e.g., enforcement) response actions. Under this authority, OSCs and RPMs may stop or redirect work if, in their judgment, it appears likely to result in a release or threatened release of hazardous substances into the environment or poses an imminent and substantial endangerment to human health, welfare or the environment.

Paragraph (f): One commenter stated that the role of the support agency coordinator (SAC) should not be limited to responding as requested by the OSC/RPM. Both the federal government and the state government should designate an OSC or RPM with parallel responsibilities. EPA believes that it is essential to have one person in charge and responsible for seeing that the response action proceeds expeditiously and, therefore, has not made this change.

Paragraph (g): Two commenters suggested that the NRT establish a curriculum for OSCs and RPMs and a certification process. In response, the NCP is not the appropriate mechanism for addressing this recommendation. The comments on this topic have been forwarded to the National Response Team for further action as it deems appropriate.

Final rule: Proposed § 300.120 is revised as follows:

1. The fourth sentence of § 300.120(a)(1) has been amended by adding the following: "* * * except as provided in paragraph (b) of this section."

2. The last sentence of § 300.120(a)(2) has been amended by deleting "except those involving vessels" and adding the following: "except as provided in paragraph (b) of this section."

3. Section 300.120(b)(2) has been revised by deleting "USCG."

4. Section 300.120(c) has been revised as follows: "DOD will be the removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody or control of DOD."

5. EPA has added language to paragraphs (d) and (e) to make it clear that OSCs and RPMs are responsible for coordinating and directing responsible parties—as well as agencies and contractors—in their conduct of either federally financed or non-federally financed (e.g., enforcement) response actions.

Name: Section 300.125. Notification and communications.

Proposed rule: The proposed NCP added the word "notification" to the title of this section, and moved its location to more accurately reflect its place in the response sequence. Both the title and the location change better reflect the importance of the National Response Center (NRC) in the national response system.

Response to comments: One series of comments cited potential confusion about notification procedures—reporting of spills or releases—to any place other than the NRC, since the proposed NCP, in various places, suggests such alternatives as notifying EPA or USCG OSCs directly when it is "not practicable" to reach the NRC. The commenter suggested that the NCP should clarify that reporting to the NRC is a provision in law, not an option. No matter how many other places a spill is reported, the notification must be made to the NRC by the person in charge of the vessel or facility, as soon as possible.

EPA agrees with these comments, but believes the language in § 300.125 is simple and direct, and makes clear the requirement for notice to the NRC. Two changes were made in notification language elsewhere in the rule, however, to emphasize the commenter's point. In subpart D, § 300.300(b), and in subpart E, § 300.405(b), identical changes were made to reinforce the requirement for reporting to the NRC regardless of other reports or notifications made. The operative sentences will now read: "If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made immediately to the nearest USCG unit. *In any event, such* person in charge of the vessel or facility *shall notify* the NRC as soon as possible." (New language italicized.)

It was suggested that more places in the NCP should repeat the concept that whenever there is doubt as to the size or nature of a spill or release, or which reporting requirements are applicable, reporting to the NRC is encouraged. Although recognizing the potential for confusion, EPA believes that the rule should state the notification or reporting requirement as simply and directly as possible, in the proper sequence of actions delineated by the rule. Other methods, outside of rulemaking, should be found to make the industry and the general public aware of these responsibilities. Repeating the concept in various places with various different wordings has the potential for additional interpretations, which may be misleading. Some suggested language described which actions do not meet the requirements of the law. The final rule describes which actions do satisfy the statutory requirements.

Also, the commenter recommended that the tone and clarity of language on reporting requirements in the preamble to the proposed rule (53 FR 51401, third column) should be included in the rule itself. EPA believes that these two paragraphs are more appropriate in a preamble and is repeating them here because of their importance:

EPA reiterates that statutory and regulatory reporting requirements are still keyed to discharges of oil and releases of hazardous substances exceeding a reportable quantity (RQ).

EPA is aware, however, that many notifiers do not have the training or knowledge to determine if there is an RQ of a substance involved in a release. Therefore, whenever there is any doubt about whether a release exceeds an RQ, EPA encourages that the release be reported to the NRC. Reporting ensures positive referral of every incident to each federal agency with jurisdiction and/or regulatory interest.

The NRC is tasked with processing all reports regardless of the material involved or the reported significance of the incident. All reports are passed immediately by telephone to the proper federal response entity and recorded in the NRC data base at the time of receipt. Public, government, industry, or academic requests for access to stored data may be made through a written Freedom of Information Act request to the Chief, National Response Center, 2100 Second Street NW., Room 2611, Washington, DC 20593.

One commenter suggested that many people are not aware of the range of functions for which the NRC is responsible. After careful scrutiny, EPA has decided that not all the NRC functions are appropriately listed in a section covering on-scene action, the intent of § 300.125. However, the basic activities will be listed in a new entry in § 300.175, Federal agencies: additional responsibilities and assistance.

One commenter said that § 300.125(b) should not put the responsibility for the NRC facility/service on the Coast Guard as a requirement, since support for the NRC is a cooperative federal effort under Coast Guard lead. EPA agrees and has inserted the phrase "in conjunction with other NRT agencies," to this section.

One comment cited an error in the commercial phone number listed in the proposed NCP. EPA agrees; the correct telephone number is 202-267-2675.

Final rule: Proposed §§ 300.125, 300.300(b) and 300.405(b) are revised as follows:

1. Section 300.125(a) has been revised to more accurately describe the responsibilities of the National Response Center for notification and communications.

2. Section 300.125(b) has been amended by including the phrase "in conjunction with other NRT agencies."

3. Section 300.125(c) now includes the correct commercial telephone number for the NRC: 202-267-2675.

4. The last two sentences in §§ 300.300(b) and 300.405(b) now read as follows: "If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made to the nearest USCG unit. In any event, such person in charge of the vessel or facility shall notify the NRC as soon as possible."

Name: Section 300.130. Determinations to initiate response and special conditions.

Proposed rule: Proposed § 300.130(a) authorized EPA or the USCG to respond to discharges of oil or releases of hazardous substances, pollutants or contaminants except with respect to such releases on or from vessels or facilities within the jurisdiction, custody or control of other federal agencies. This section also described requirements with respect to certain kinds of releases, e.g., radioactive materials.

Response to comments: Paragraph (a): Several commenters commented that some federal agencies may be unable, due to lack of expertise, orientation, or funding, to respond to the threat of release or actual release of hazardous substances, pollutants or contaminants at their facilities. Accordingly, the commenters recommended that EPA and the USCG be given unrestricted response authority over releases, actual or threatened, at all federal facilities, except DOD and DOE facilities, and that federal agencies other than EPA, the USCG and, presumably, DOE and DOD should only be given lead agency authority if and when they meet certain minimum standards. One commenter stated that proposed § 300.130(a) does not specifically grant authority to a federal agency to initiate a response, and that the section should grant this authority. The commenter noted that the executive order delegating the President's authority under CERCLA grants this authority, and indicated that § 300.130(a) should reference the executive order.

In response, EPA disagrees with the commenter's suggestion that the USCG and EPA should retain unrestricted response authority over releases at federal facilities. In section 115 of CERCLA, Congress specifically authorized the President to "delegate and assign any duties or powers imposed upon or assigned to him" in the statute. By Executive Order 12580 (52 FR 2923, Jan. 29, 1987), the President delegated to federal agencies and departments the responsibility and authority for taking most response actions at non-NPL sites within their jurisdiction, custody, or control. (EPA believes that the explanation of these authorities in this preamble is sufficient, and need not be specifically repeated in the text of the rule.) Moreover, CERCLA section 120 makes clear that federal agencies are primarily responsible for the conduct of the RI/FS and remedial action at federal facility sites that are listed on the NPL. Amending § 300.130(a) of this rule to designate USCG and EPA as lead agencies for responses at federal facility sites would not be in accord with these mandates.

At the same time, it is important to note that federal agencies may request the services of the USCG or EPA on a reimbursable basis, and the NRT/RRT system provides for quick, appropriate communication of such requests. Experience to date has generally shown this to be adequate. A memorandum of understanding between a federal agency and EPA or USCG would also be possible to cover both required action and funding procedures, allowing for EPA and USCG to manage responses under certain predetermined circumstances.

Some commenters further recommended that federal agencies should be required to immediately notify the NRC and the appropriate RRT whenever the federal agencies are unwilling or unable to respond to a release.

In response, as a threshold matter, the federal agencies and departments are already required by section 103(a) of CERCLA to report all releases of reportable quantities of hazardous substances to the National Response Center. (Pursuant to section 103(a), the National Response Center notifies the Governor of each state whenever a report of a release is made with respect to that state.) In addition, with regard to federal facilities on the Hazardous Waste Compliance Docket (which includes releases for which a report is required under CERCLA section 103(a) and (c)), the federal agencies and departments are required to conduct a Preliminary Assessment (PA), after which EPA will evaluate whether the release should be listed on the NPL.

As to the specific suggestion of the commenter that federal agencies may be "unwilling or unable" to respond to certain releases, it is important to note that pursuant to CERCLA section 115 and E.O. 12580, the federal agencies and departments have been delegated the responsibility under CERCLA section 104 for evaluating and taking response actions, as necessary, for most releases that occur at non-NPL facilities within their jurisdiction, custody, or control (E.O. 12580, at section 2(d) and (e)). The federal agencies also have responsibilities for the conduct of response actions at NPL sites pursuant to CERCLA section 120. EPA does not believe that a separate reporting requirement is necessary to address those situations where the federal

agency or department decides that a response action is not necessary.

In situations where a federal agency experiences some difficulty in responding to a release, it is the general practice of the agencies to contact one or more of the sister agencies that have special expertise regarding the contamination problem (e.g., the Department of Defense for munitions waste, EPA more generally). As discussed above, the agencies may request the assistance of EPA or the USCG on an emergency basis, or enter into a more general memorandum of understanding. Finally, federal facility releases are included on the Hazardous Waste Compliance Docket, and are then evaluated by EPA for possible inclusion on the NPL; thus, EPA will be aware of significant releases to which the federal agency or department has been unable to respond as those releases move through the evaluation process. In conclusion, it is unnecessary to require the federal agencies to provide special notice to the NRC as suggested by the commenter.

Paragraph (b): One commenter recommended that the first line of § 300.130(b)(1) be revised by deleting "any oil is discharged" and inserting "there is a discharge of oil." The recommendation is suggested on the grounds that the definition of "discharge" in subpart A does not necessarily include the use of discharge as a verb. EPA does not agree with this comment.

The commenter pointed out that under section 104(a)(1) EPA, as the President's delegate, is authorized to take response action when there is a release or threatened release of a pollutant or contaminant only if the release or threatened release may present an imminent or substantial endangerment to the public health or welfare. Therefore, the commenter recommended that proposed § 300.130(b)(2) be revised to conform to section 104(a)(1) of CERCLA. In response, although "pollutant or contaminant" is defined for purposes of the NCP to mean any pollutant or contaminant that may present an imminent and substantial danger to public health or welfare (see § 300.5), EPA has made the requested change for the purpose of emphasis.

Final rule: Proposed § 300.130 has been revised as follows:

1. Section 300.130(a) has been revised to begin "In accordance with CWA and CERCLA,* * *."

2. Section 300.130(b)(2) has been revised to read: "Any hazardous substance is released or there is a threat of such a release into the environment, or there is a release or threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare; or"

Name: Section 300.135. Response operations.

Proposed rule: This section describes the responsibilities of the OSC/RPM to direct response efforts and coordinate all other efforts at the scene of a discharge or release. This section provides that the first federal official is authorized to coordinate activities on-scene and to initiate, in consultation with the OSC, any necessary actions. This official may also initiate Fund-financed actions as authorized by the OSC.

Response to comments: One commenter stated that while it is understood that specific response actions for every situation cannot be defined, guidance on how a response escalates from local to federal levels would be helpful. EPA believes that it is not practicable to provide specific guidance on how a response escalates from local to federal levels, due to the vast number of variables that are implicit in every spill scenario.

Referring to § 300.135(b), one commenter said that, regarding expenditures from the various federal funds, members of state pollution response agencies should be given the same scope of action as described in § 300.135(b) for the "first federal official" to arrive on scene. The commenter argued that state response personnel are knowledgeable of "first response" measures, as well as being familiar with basic cost documentation procedures. The commenter noted that existing EPA and USCG procedures are too cumbersome to allow negotiation of a cooperative agreement or contract in the initial hours of an emergency response operation.

EPA acknowledges the fact that state response personnel are knowledgeable of first response measures as well as basic cost documentation procedures. EPA and USCG procedures may be cumbersome in negotiating a cooperative agreement, but these procedures are necessary in order to maintain control of the two pollution funds. Under certain situations, the states can be reimbursed for their costs by the CWA 311(k) fund, in accordance with USCG rules for managing this fund.

Another commenter suggested that, for consistency, the authority of the first federal official to arrive at the scene of a release, which is discussed in § 300.135(b), should be discussed under § 300.130 with the other authorizations for the initiation of response. EPA disagrees. This discussion is more appropriate in § 300.135(b), because it deals primarily with the coordination of response activities on scene by the first federal official.

One commenter indicated that, under § 300.135(d), states should be encouraged to enter into cooperative agreements for removals under section 311 of the CWA or under CERCLA. Although EPA supports the concept, it does not feel it is necessary to add it as a regulatory requirement. (See also preamble section below on state involvement in removal actions.)

Another commenter noted that the requirement or expectation under § 300.135(e) that RPMs will consult with the RRT should not be promulgated unless the relationship between RPMs, the NRT, and the RRT has been clarified. In response, the relationship between RPMs, the NRT, and the RRT during remedial actions generally parallels the relationship between OSCs, the NRT, and the RRT during removal actions. These relationships are described in §§ 300.110, 300.115, and 300.120.

One commenter stated that § 300.135(f) and the definition of support agency coordinator suggested that the concept of support agency only applies to CERCLA releases. If so, the reference to the OSC advising the support agency for oil discharges, should be deleted. EPA agrees. By definition, the support agency coordinator "interacts and coordinates with the lead agency for response actions under subpart E of this part." There is no designation of the use of a support agency or support agency coordinator under the CWA.

In § 300.135(h), one commenter asked who defines "possible public health threat." The commenter contended that although it is necessary to have some broad language, misunderstandings can be reduced by more definitive phrases.

The determination of a "possible public health threat" is made by the OSC/RPM in consultation with other appropriate agencies. EPA believes that § 300.135(h) appropriately addresses this point. This section specifically states that assistance is available from the Department of Health and Human Services (HHS) in making the determination of public health threats.

Under § 300.135(i), one commenter indicated that there should be a requirement that the name of the office designated by each federal agency to coordinate response should be submitted to the RRT for inclusion in the regional contingency plan (RCP) and to the OSC and State Emergency Response Commission (SERC) for inclusion in

local contingency plans (LCPs) and Local Emergency Planning Committee (LEPC) plans.

EPA believes that it is important that this information be passed on to the RRT and local response agencies. However, it is not necessary to place this requirement in the NCP. If it was, EPA should require, through the NCP, every facility, vessel, etc., to provide the same information to the RRT and local response agency. Through their normal contingency planning process, this information should be readily available to the RRT and local response agencies.

A commenter noted that under § 300.135(m), it is not clear when it would be appropriate for an RPM to submit pollution reports to the RRT. In response, EPA wishes to clarify that the pollution reports described in § 300.135(m) are prepared for removal actions; thus, these reports are generally submitted by an OSC rather than an RPM. EPA has deleted the reference to "RPM" in this section.

Finally, it was commented that § 300.135(n), which requires that OSCs/RPMs inform public and private interests and consider their concerns throughout the response, does not address what kind of responses are being referenced. Also, this section should encourage appropriate public and private interests to become appropriately involved after the first notification and not to expect the OSC to keep them informed through updates.

In response, EPA believes that specifying the type and size of the incident response is not meaningful. All incident responses require some kind of communication between all public and private parties. Regarding the second part of the comment, EPA has no authority to require the public and private interests to contact the OSC for information. Keeping the appropriate interests informed by the OSCs/RPMs is simply a policy issue and represents good program practices.

Final rule: Proposed § 300.135 has been revised as follows:

1. In § 300.135(f), the words "discharges or" have been deleted.

2. Section 300.135(j) has been revised to read as follows (see preamble discussion on § 300.615 (notification)): "The OSC/RPM shall promptly notify the trustees for natural resources of discharges or releases that are injuring or may injure natural resources under their jurisdiction. The OSC or RPM shall seek to coordinate all response activities with the natural resource trustees."

3. In § 300.135(m), the reference to "RPM" has been deleted.

Name: Section 300.140. Multi-regional responses.

Proposed rule: This section discusses the procedures to follow in the event a discharge or release covers more than one jurisdictional area.

Response to comments: Commenters noted that § 300.140 should clearly state that the OSC responsible for the area in which the release originated is initially in charge. Changing OSCs can be accomplished after this point. EPA disagrees with the comments. Sections 300.140 (a) and (b) clearly outline OSC/RPM responsibilities in spill situations when more than one area will be impacted.

Another commenter pointed out that, in reality, the border between regions or districts becomes a no-man's land in which neither wishes to respond. While there can only be one OSC, the other affected regions/districts should have a representative at the command post. EPA disagrees with this comment concerning command posts and, therefore, has not changed the NCP. At the time of the spill, a simple agreement between the two predesignated OSCs or RRTs can alleviate this problem.

Another commenter noted that the NCP should reflect the fact that more than one OSC can be designated if the area impacted extends for many miles. EPA disagrees. There should only be one OSC coordinating the response efforts. The OSC may, however, utilize a number of OSC representatives to handle the response efforts in the outlying sections of a large spill area.

Final rule: Proposed § 300.140(c) is revised to delete an inappropriate reference to EPA/USCG agreements.

Name: Section 300.145. Special teams and other assistance available to OSCs/RPMs.

Proposed rule: This section describes the special teams that are available to the OSC/RPM and the availability of the scientific support coordinator (SSC).

Response to comments: One commenter stated that there is no reason for the title of this section to be changed from "Special Forces" to "Special Teams." The change only diminishes the role of the special forces. EPA disagrees. The change does not diminish the role of the special teams. It merely places a title upon this group of specialized teams that is more commonly used (i.e., Strike Teams, Public Information Assist Teams, Environmental Response Teams).

Another commenter indicated that it may be appropriate to specifically identify the ATSDR Public Health Advisors and Emergency Response Branch in this section as a special resource available to an OSC, as their availability is not well advertised. In response, ATSDR's role is not the same as that of a team, which is a unit organized and specially prepared to respond on call. ATSDR has both specific authorities for response and special expertise which might be called upon by an OSC, and thus their role is like those of other NRT member agencies. These are outlined in § 300.170. Other means of highlighting their availability, more appropriate and effective than the suggested revision to the NCP, would be to ensure that ATSDR activities and availability are referenced in local plans and OSC plans.

A commenter stated that § 300.145(d) should define the capabilities of an SSC and include what they can be expected to provide to the OSC. In response, although the term SSC as used throughout the NCP implies a single individual, in the case of the National Oceanic and Atmospheric Administration (NOAA), this support is in fact provided by a team of experts, several of whom may be in the field at the same time. This section has been revised to reflect the capabilities of an SSC.

Another commenter stated that an OSC often requires more information than is available from the responsible party, the Technical Assistance Team (TAT), or the SSC. Provided that the responsible party is willing to pay for additional scientific support, the OSC should be allowed to utilize other scientific experts without opening federal accounts.

In response, the OSC is allowed to utilize other scientific experts without opening federal accounts, provided he/she can convince the responsible party to pay for them. In most situations, if a particular resource is needed by the OSC/RPM, the OSC/RPM will request that the responsible party fund the particular resources. If the responsible party refuses, then the only other option the OSC/RPM has is to fund the resource using federal monies.

One commenter recommended that the description of the EPA Radiological Assistance Teams (RATs) in § 300.145(f) should be moved to the general agency descriptions in § 300.175(b)(2) or deleted. If this reference is retained, the commenter stated that something should indicate how the Radiological Response Coordinator is to be contacted. In response, proposed § 300.145(f) stated that the EPA Office of Radiation Programs (ORP) maintains the Radiological Assistance Teams. This section also stated that the assistance of

Radiological Assistance Teams can be obtained by contacting the Radiological Response Coordinator. However, it is not explicitly stated that the Radiological Response Coordinator is located and can be contacted in ORP. EPA will make the clarification by adding "* * * in the EPA Office of Radiation Programs" after "Radiological Response Coordinator." EPA believes that it is more appropriate to reference EPA's Radiation Program in § 300.145 rather than § 300.175 because the reference directly relates to providing assistance to the OSC/RPM.

Final rule: Proposed § 300.145 is revised as follows:

1. Section 300.145(d) has been revised to add the following sentence at the end of the section: "In the case of NOAA, SSCs may be supported in the field by a team providing, as necessary, expertise in chemistry, trajectory modeling, natural resources at risk, and data management."

2. In § 300.145(f), EPA has added "* * * in the EPA Office of Radiation Programs" after "Radiological Response Coordinator," in the next to last sentence.

Name: Section 300.150. Worker health and safety.

Proposed rule: Section 300.150 requires that each employer at response actions comply with the requirements of the Occupational Safety and Health Act of 1970, applicable state laws, and EPA regulations regarding worker safety and health. Section 300.150 applies to actions taken either by a responsible party or a lead agency and requires that there be an occupational safety and health program for the protection of workers at the response site.

Response to comments: One commenter recommended using the Incident Command System (ICS) concept as contained in the Occupational Safety and Health Administration (OSHA) rule to integrate response activities. In response, EPA notes that § 300.150(a) requires that response activities meet the requirements of 29 CFR 1910.120, Hazardous Waste Operations and Emergency Response, promulgated by OSHA, including the ICS concept (§ 1910.120(q)(3)(i)). Executive Order 12196 conveys the President's mandate that federal agencies comply with OSHA standards. State applicability is covered as described below. Routine hazardous waste operations do not require use of ICS. Thus, no change is needed in the rule, since if the situation warranted use of the ICS concept, it would already be covered within the § 300.150(a) requirements of the NCP.

The responsibility for assuring worker safety and health at a response scene is that of the employer. This is stated expressly in proposed § 300.150(a) (and in final § 300.150(e)). One comment indicated some confusion as to this requirement, particularly regarding firefighters involvement during response actions. In response, worker safety and health during response activities is protected by the regulations cited in this section, whether the workers are employed by private employers, or federal, state, or local governments. Federal employees are covered by the OSHA standards, as stated above. State and local government employees in the 23 states and 2 jurisdictions which have their own OSHA-approved occupational safety and health plans are covered by the state standards which must be comparable to the federal standards. These states are Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (for state and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. State and local government employees (such as firefighters) in the remaining 27 states (such as Ohio, plus Guam and the District of Columbia) are subject to EPA regulations identical to OSHA standards for response action workers under section 126 of SARA and 40 CFR part 311. The EPA rule will apply to firefighters by March 6, 1990 for emergency response (and September 21, 1989 for other relevant activities).

One commenter suggested that proposed § 300.150 be revised to state that the OSC should be alert to unsafe work practices and notify the regional OSHA office when such practices are observed. EPA agrees that the OSC may be in a position to observe unsafe work practices. However, no change is needed because EPA believes that since workplace safety and health conditions are the responsibility of the employer, unsafe practices should first be reported to the appropriate employer because the employer is in a position to make an immediate correction. If the condition remains uncorrected, it should be reported to the appropriate enforcement authority, whether it is federal OSHA, state OSHA, or EPA.

Further, highlighting a special responsibility for an OSC in this area carries additional implications—if the OSC fails to notice the violation, the employer might see that as official approval of his practice. Also, in general, the NCP sets out an organization and framework for generally needed actions and responsibilities, within which the OSC has, and must have, latitude to exercise his judgment. No section of the plan lists all possible actions of an OSC, however exceptional.

One commenter noted that the National Contingency Plan (NCP) requires CERCLA actions to directly comply with OSHA standards (proposed § 300.150), rather than complying only to the extent those standards are "applicable or relevant and appropriate requirements" (ARARs) under CERCLA section 121(d)(2), 42 U.S.C. 9621(d)(2). The commenter questioned why OSHA standards should be treated differently from other federal statutes.

In response, there are two principal reasons for the treatment of OSHA standards as non-ARARs in the NCP. First, as discussed below, Congress appears to have intended that certain OSHA standards apply directly to all CERCLA response actions. Second, EPA believes that OSHA is more properly viewed as an employee protection law rather than an "environmental" law, and thus the process in CERCLA section 121(d) for the attainment or waiver of ARARs would not apply to OSHA standards.

However, before addressing those issues in more detail, review of the comment revealed an inconsistency in the manner in which OSHA standards are considered under the NCP. As the commenter notes, proposed NCP § 300.150 directly requires CERCLA actions to comply with certain OSHA standards (e.g., 29 CFR parts 1910, 1926) (53 FR at 51489), while at the same time, the preamble to the proposed rule included most OSHA standards in EPA's list of potential ARARs (53 FR at 51448). This situation requires clarification, because requirements that are promulgated as part of the NCP are not evaluated for attainment or waiver as part of the ARARs process.

As a threshold matter, EPA believes that Congress intended certain OSHA standards (those for response action workers) to be always applicable to CERCLA response actions. Pursuant to mandates in CERCLA section 111(c)(6) and SARA section 126, the Department of Labor has promulgated regulations that apply directly to worker safety during hazardous waste operations and emergency response actions, including CERCLA actions:

(a) * * * (1) Scope. This section covers the following operations. * * * : (i) Clean-up operations required by a governmental body, whether federal, state, local or other involving hazardous substances that are

conducted at uncontrolled hazardous waste sites (*including, but not limited to, the EPA's National Priority List (NPL),* state priority list sites, *sites recommended for the EPA NPL,* and *initial investigations of government identified sites which are conducted before the presence or absence of hazardous substance has been ascertained.*

29 CFR 1910.120 (emphasis added). Thus, these regulations apply specifically to the response actions detailed in the NCP, and compliance with these standards is properly required in the text of § 300.150.

Other OSHA standards, however, are of general applicability and were not developed specifically for CERCLA response actions (e.g., OSHA Construction standards, Shipyard standards, Longshoring standards, etc.). EPA believes that these general OSHA standards are essentially workplace standards, designed to cover occupational exposures; they are properly viewed as requirements of a "federal environmental law," and thus do not come within the scope of ARARs under CERCLA section 121(d)(2).[1] Rather, like the requirements of other non-environmental laws, such requirements would apply of their own force, not through the CERCLA process. Thus, OSHA standards are no longer included on the list of potential ARARs. The final NCP package (§ 300.150) has been modified to reflect this approach, which EPA believes is consistent with both OSHA and CERCLA.

EPA does not believe that these changes will reduce compliance with OSHA standards at Superfund sites. The OSHA standards for response action workers will be met at every CERCLA site, and the more general OSHA standards will continue to be met where they apply.

EPA notes that there are some standards in OSHA that set contaminant levels for the workplace (see 29 CFR part 1910, subpart Z, limitations on exposure to toxic and hazardous substances) that may also be relevant—although not applicable—to the determination of a cleanup level at a CERCLA site (due to the absence of other standards). In such a case, those standards may be included among the requirements "To Be Considered" (TBCs).

In addition, the following changes were also made to proposed § 300.150. The statement that "the OSH Act requirements can be enforced, as appropriate, by the relevant federal or state agencies," has been removed from the final rule; although the statement is correct, it is more appropriate for a preamble discussion. Further on this point, EPA notes that although OSHA standards apply to the federal government by Executive Order, they are not independently enforceable against the federal government;[2] accordingly, NCP § 300.150(c) has also been revised to state that the lead agency should make OSHA programs available to response action employees, consistent with and to the extent required by 29 U.S.C. 1910.120.

The revisions to this section do not reflect any reduced commitment for compliance with applicable safety and health requirements, or any reduced responsibility for private employers to comply with worker protection standards.

Final rule: Proposed § 300.150 has been revised to read as follows:

(a) Response actions under the NCP will comply with the provisions for response action worker safety and health in 29 CFR 1910.120.

(b) In a response action taken by a responsible party, the responsible party must assure that an occupational safety and health program consistent with 29 CFR 1910.120 is made available for the protection of workers at the response site.

(c) In a response taken under the NCP by a lead agency, an occupational safety and health program should be made available for the protection of workers at the response site, consistent with, and to the extent required by, 29 CFR 1910.120. Contracts relating to a response action under the NCP should contain assurances that the contractor at the response site will comply with this program and with any applicable provisions of the OSH Act and state OSH laws.

(d) When a state, or political subdivision of a state, without an OSHA-approved state plan is the lead agency for response, the state or political subdivision must comply with standards in 40 CFR part 311, promulgated by EPA pursuant to section 126(f) of SARA.

(e) Requirements, standards, and regulations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) (OSH Act) and of state laws with plans approved under section 18 of the OSH Act (state OSH laws), not directly referenced in paragraphs (a) through (d) of this section, must be complied with where applicable. Federal OSH Act requirements include, among other things, Construction Standards (29 CFR part 1926), General Industry Standards (29 CFR part 1910), and the general duty requirement of section 5(a)(1) of the OSH Act (29 U.S.C. 654(a)(1)). No action by the lead agency with respect to response activities under the NCP constitutes an exercise of statutory authority within the meaning of section 4(b)(1) of the OSH Act. All governmental agencies and private employers are directly responsible for the health and safety of their own employees.

Name: Section 300.155. Public information and community relations.

Proposed rule: This section stated that OSCs/RPMs and community relations personnel should ensure that all appropriate public and private interests are kept informed when an incident occurs. This section also stated that an on-scene news office be established to coordinate media relations and to issue official federal information on an incident.

Response to comments: A commenter noted that there are three types of media coverage during an emergency: Newspapers, radio, and television. The comment suggested that television is most problematic to those responding to an incident and that this section did not address how to coordinate a response with televised coverage of the incident.

In response, EPA believes that the rule appropriately addresses the responsibility to provide information about an incident. It is not necessary or appropriate to include details in the NCP of different approaches to different media. In a separate effort, however, the NRT is considering additional guidance and support for incident-specific response teams in implementing public information procedures.

Another commenter noted that the community relations requirements referenced in § 300.155 are all from subpart E. The comment questioned whether any community relations requirements, other than those specifically stated in § 300.155, apply to responses to discharges of oil.

In response, § 300.155 appears in subpart B, which is the basic responsibility and organization for response which underlies the entire NCP, thus including response to discharges of oil under subpart D. The public information and community relations requirements outlined in § 300.155 are those generally applicable to all responses, and generally sufficient for emergency or relatively short term response actions such as those encountered in oil responses as covered in subpart D. Responses under subpart E, however, include long term actions at hazardous waste sites, and for these, there are specific and detailed requirements for community information and involvement in decision-making over the course of a response which may include removal or remedial actions carried out over a considerable period of time. These community relations

[1] CERCLA section 121(d)(2) defines potential ARARs as the standards, requirements, criteria or limitations under "any Federal environmental law." Note that the 1985 NCP—which did consider OSHA requirements to be ARARs—defined ARARs as "requirements of Federal public health and environmental laws."

[2] *Federal Emp. for Non-Smokers' Rights* v. *U.S.*, 446 F.Supp. 181 (D.D.C. 1978), *aff'd* 598 F.2d 310 (D.C.Cir.), *cert. denied*, 444 U.S. 926.

provisions might be applicable in a long term cleanup that followed an emergency release, hence the cross references linking the basic or minimal requirement to the more detailed program which is mandatory for long term responses, but optional for emergency or short term responses.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.160. Documentation and cost recovery.

Proposed rule: Section 300.160 discusses the procedures for documentation of cost recovery for a response action. Section 300.160(a) states that an accurate accounting of federal, state or private-party costs incurred for response actions can be supported with an OSC report as required by § 300.165 for all major releases and Fund-financed removals. Section 300.160(c) states that "Federal agencies are to make resources available, expend funds, or participate in response to discharges and releases under their existing authority," and adds, "The ultimate decision as to the appropriateness of expending funds rests with the agency that is held accountable for such expenditures" (53 FR 51490). Section 300.160(d) is a new section of the proposed NCP incorporating 1986 amendments to CERCLA that state that responsible parties are liable for the costs of any health assessment or health effects study conducted under the authority of CERCLA section 104(i). In addition, the preamble to the proposed NCP discussion of § 300.160(d) detailed the types of studies for which responsible parties are held liable (53 FR 51402).

Response to comments: Several commenters requested that EPA elaborate in the preamble discussion of § 300.160 on what are "standard EPA procedures for cost recovery" as stated in the proposed rule (53 FR 51490). One asked that EPA propose a list of guidance documents for cost recovery procedures. Another asked that EPA make available its list of standard cost-recovery procedures for public comment. Another asked that EPA circumscribe cost recovery to those studies which are determined to be appropriate or necessary. In a related comment, one group asked that the NCP clarify the scope of costs recoverable and recognize that OSC reports are a poor method of documenting those costs. This commenter asked for clarification on the involvement of the RRT or NRT in cost—recovery activities for remedial actions, and an explanation given for their involvement. Another asked that § 300.160(a) apply to oil discharges.

Most comments summarized above requested discussion of procedures for and staff participation in cost recovery that more properly belongs in EPA guidance rather than in the NCP. The preamble to the proposed NCP discussion of § 300.160(d) detailed the kinds of studies that are eligible for cost recovery. Including guidance documents in the NCP, or including information normally reserved for these guidance documents, would produce an unwieldy NCP, and require constant revision as Agency guidance and policy procedures change over time. In addition, EPA is developing a regulation that will provide for recovery of direct and indirect costs under CERCLA. That rulemaking will address the comments summarized above.

Oil discharges are not included under the provisions of § 300.160(a), but are referred, through § 300.160(b), to § 300.315, the documentation and cost recovery section of subpart D. The cost recovery and documentation processes for oil discharges are, by intent, somewhat different from those for hazardous substance release responses. Including oil discharges under the provisions of § 300.160(a) would subject them to conflicting cost recovery and documentation provisions. In addition, oil spills are statutorily exempt from the provisions of CERCLA, and come under the authority of the CWA.

One commenter stated that granting power to authorize expenditure of federal funds to the agency responsible for the response action represented preferential treatment for federal agencies who are PRPs that is not extended to private parties.

In response, the purpose of § 300.160 is to describe authority for expenditures in cases where federal agencies assist in a non-federal response, such as a coastal oil spill where no federal lands are affected. Their activities may be a mix of activities which they are required to undertake under their own authorities, and activities which they undertake as requested in support of an OSC (or RPM). The latter activities may be reimbursed from the Fund, later to be reclaimed from the potentially responsible party (PRP) by the Fund-managing agency. The commenter appears to misinterpret this section as applicable to situations when the federal agency is itself a PRP. It is not. If a federal agency were participating in a response for which it was the responsible party, no reimbursement from the Fund would be allowed. These provisions are amply covered in the appropriate Fund-management regulations. Thus, since there is no preferential treatment allowed or inferred for federal agencies over non-federal PRPs, no change is necessary.

Final rule: Proposed § 300.160 is revised as follows:

1. In § 300.160(a)(2), the cross-reference to § 300.165 in the last sentence is modified.

2. Proposed § 300.160(a)(3) is revised as follows (see preamble discussion on § 300.615 (notification)): "The lead agency shall make available to the trustees of affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries."

Name: Section 300.165. OSC reports.

Existing rule: Section 300.40(a) of the existing NCP requires the OSC to submit to the RRT a complete report on a response action within 60 days after the conclusion of a response to a major discharge of oil, or a major hazardous substance, pollutant or contaminant release, or when requested by the RRT.

Proposed rule: Proposed § 300.165(a) requires the submission of the OSC report within 90 days (rather than 60 days) of the conclusion of the response action or when requested by the RRT. Additionally, the RRT must review the OSC report and forward a copy of the report with the RRT's comments to the NRT within 30 days of receiving the OSC report.

Response to comments: Paragraph (a): A commenter recommended that OSC reports be approved by EPA prior to distribution to the RRT. EPA notes in response that the NCP deals with the distribution of OSC reports for the purposes of the NRT/RRT/OSC national response system. The OSC reports may be used for individual agencies' own management information purposes as well, but a primary purpose of these reports is to allow prompt knowledge of lessons learned, frank discussion of any problems, and timely and effective consideration of improvements or cautions which need to be shared throughout the system. Pre-screening by EPA (or other agency providing the OSC in question) would impede the timeliness of such reports, and perhaps diminish the immediacy of concerns which are intended to be conveyed to other responders. Thus, no change has been made in response to this comment.

Another commenter recommended that the OSC distribute the OSC report to the state representative to the RRT. This change is unnecessary. The state representative to the RRT has access to

such reports through the mechanism set up by each RRT to make OSC reports available to each member of the RRT. Therefore, the OSC would be duplicating the mechanism already created. In addition, there is no apparent reason why the state representatives should receive a copy of the OSC report directly from the OSC while the other members of the RRT receive a copy from the RRT.

One commenter stated that the OSC report deadline is unworkable because the vast differences between response actions and the degrees of complexity that they may entail dictate that varying amounts of time may be needed to complete an OSC report. Cost recovery actions, noted the commenter, may also dictate a specific deadline for report submission. The commenter also stated that the original intent of this requirement should be reexamined by the NRT and the RRT. To address these problems, the commenter recommended that after-action reports be required instead of OSC reports, and that no deadline for these reports be imposed on the OSCs. For those actions which are of significant size or nature, or at the request of the RRT or NRT, the commenter recommended that the OSC/RPM submit an executive summary which addresses the four existing requirements of the NCP. The commenter suggested that the deadline for this summary should be determined by the NRT or the RRT requesting it.

Recognizing that OSCs have extensive responsibilities and that response to discharges or releases is a higher priority than writing the OSC report, EPA proposed to extend the deadline for submission of the report from 60 days to 90 days after completion of the response. After considering the comments on this proposal, EPA agrees with the commenter that even this deadline for submission of the OSC report may be unworkable. Therefore, the final NCP now requires submission of the report within one year of the completion of removal actions or when requested by the RRT. EPA believes that the change provides needed flexibility while ensuring that RRTs are able to get reports sooner, if necessary. Although the deadline has been extended, EPA still expects that OSC reports will be written as soon as practicable. Generally, for removals of short duration (e.g., lasting less than 30 days), OSC reports should be available within six months of completion of the removal action because there is less to report.

EPA does not agree, however, that cost recovery actions need dictate the deadline for submission or the contents of the report. The purpose of the OSC report is to summarize the activities at the site and the lessons learned. It should be similar to the executive summary described by the commenter except that it should cover, briefly, all of the topics listed in § 300.165(b). Detailed information regarding day-to-day events may be found in the administrative record, the pollution reports, the site log book, and the OSC log book. At the completion of site activities, these information sources are maintained in the site file at the regional office. In the event a detailed review of site activities is necessary (e.g., for cost recovery purposes), the information can be obtained through the regional office. The OSC report should not attempt to include or duplicate all of this other information but rather should reference and summarize it.

One commenter stated that EPA should broaden this section to apply to situations other than "major" discharges or releases. In response, EPA does not agree that OSC reports should be required for every action that responds to a discharge or release. EPA notes, however, that § 300.165 provides that reports on response actions other than to major discharges or releases will be submitted when requested by the RRT.

One commenter noted that it is unclear why § 300.165 involves RPMs if it is limited to removal actions. In response, RPMs are referenced in § 300.165 because removal actions sometimes occur at NPL sites (e.g., a fire may have started at a site where a remedial action is planned or is being conducted); therefore, the RPM may actually submit the OSC report.

Paragraph (c): A comment relating to § 300.165(c)(1)(viii) noted that in the case of a large spill the damage assessment process will continue beyond the proposed 90-day time limit for submission of the OSC report. Therefore, the commenter states that § 300.165(c)(1)(viii) should include a "qualifying statement" concerning natural resource damage assessment activity. In response, EPA notes that the deadline for submitting OSC reports is now one year. Moreover, the OSC report need only observe that damage assessment activity is ongoing despite the conclusion of the response action. A qualifying statement, therefore, is not necessary.

One commenter argued that the OSCs should not comment on natural resource injuries or trustee activities. The commenter believed that OSCs lack expertise in natural resource fields and could inadvertently make statements that might affect trustee efforts to recover damages through litigation. The commenter wanted paragraphs (vii) and (viii) deleted from the OSC report format in § 300.165(c)(1). Another commenter stated that the phrase "documentation shall be sufficient to provide * * * impacts and potential impacts to the public health and welfare and the environment" seems to imply that damage assessment is an OSC responsibility. The commenter argued that responsibility for this complicated process should rest with the federal trustees, not with the OSC. The commenter noted that this point should be clarified in the NCP.

In response to the commenters that expressed concern that OSCs would be commenting on natural resource injuries or conducting damage assessments of natural resources, EPA believes that the commenter misinterpreted the intent of this requirement. OSCs are simply documenting the notification to trustees of natural resource damage or potential damage and then listing any activities taken by the trustees at the site. EPA believes that it is an important component of the report and does not believe the requirement should be eliminated. However, EPA does find that the wording in § 300.165(c)(1)(vii) and (viii) may be misleading and has changed it in today's rule to more accurately reflect the stated intent.

A comment relating to § 300.165(c)(4)(iii) questioned if the OSC is required to comment on plans developed by LEPCs and SERCs under section 303 of SARA, and recommended that § 300.165(c)(4)(iii) be amended to make it clear that OSCs should only recommend changes if those plans are in conflict with the OSC plans. In response, EPA believes that § 300.165(c)(4)(iii) does not require review of all section 303 plans. The subsection requires the OSC to make recommendations relating to the section 303 plans "as appropriate." Such recommendations are only appropriate if the section 303 plans are inconsistent with the NCP, RCP or OSC plan since the OSC is not authorized by any statute or regulation to review section 303 plans. Accordingly, the recommended change seems unnecessary.

Final rule: Proposed § 300.165 is revised as follows:

1. The first sentence of § 300.165(a) has been changed from "Within 90 days after completion of removal activities * * *," to read: "Within one year after completion of removal activities * * *."

2. Section 300.165(c)(1)(vii) has been changed to read: "Content and time of notice to natural resource trustees

relating injury or possible injury to natural resources."

3. Section 300.165(c)(1)(viii) has been changed to read: "Federal or state trustee damage assessment activities and efforts to replace or restore damaged natural resources."

Name: Section 300.170. Federal agency participation.

Proposed rule: Proposed § 300.170 described general responsibilities of federal agencies within the National Response System.

Response to comments: Under § 300.170, a commenter requested clarification of the responsibilities of federal agencies with respect to reporting of releases of hazardous substances, as compared to pollutants, or contaminants or discharges of oil, from facilities or vessels which are under their jurisdiction or control. EPA has revised this section to clarify the applicable reporting requirements.

Final rule: Proposed § 300.170(c) is revised as follows:

1. Section 300.170(c) has been modified as follows: "All federal agencies are responsible for reporting releases of hazardous substances from facilities or vessels under their jurisdiction or control in accordance with section 103 of CERCLA."

2. Section 300.170(d) has been added as follows: "(d) All federal agencies are encouraged to report releases of pollutants or contaminants or discharges of oil from vessels under their jurisdiction or control to the NRC."

Name: Section 300.175 Federal agencies: additional responsibilities and assistance.

Existing rule: 40 CFR 300.23. This section described federal agencies' capabilities and expertise related to preparedness planning and response, consistent with agency capabilities and legal authorities.

Proposed rule: The proposed revisions emphasized the leadership roles of EPA and the USCG, added the Nuclear Regulatory Commission to the list of federal agencies described, and revised and updated some of the other agencies' capabilities and expertise.

Response to comments: Paragraph (b): A commenter suggested adding language to § 300.175(b) regarding the staffing and administration of the National Response Center (NRC) by the USCG. It was also suggested to add to each of the other agency's organizational roles, language concerning communication procedures and specialized services and funding for NRC operations.

In response, EPA has added a description of the capabilities and expertise of the NRC to § 300.175(b)(15). EPA does not agree, however, that it is necessary to add language regarding organizational roles, communication procedures, etc., to the descriptions of the other federal agencies. Section 300.175 provides a brief generalized description of individual agency's expertise in preparedness planning or response actions, consistent with their legal authorities and capabilities. It is not meant to cover specific details of completing these activities. Further, § 300.125 has been revised to read: "The Commandant, USCG, in conjunction with other NRT agencies, shall provide the necessary personnel, communications, plotting facilities, and equipment for the NRC." In addition, if specialized services are needed by a particular agency, this, along with any appropriate funding, should be handled by a memorandum of understanding.

A commenter recommended adding to § 300.175(b)(1), a reference to the Coast Guard's authority to enter into cooperative agreements pursuant to section 311(c)(2)(H) of the CWA or section 104(d) of CERCLA. EPA has added such language.

One commenter questioned whether entering into a contract or cooperative agreement with the appropriate state in order to implement a response action applies only to remedial actions. If not, the following statement is recommended: "Coast Guard OSCs should be included in negotiating agreements for emergency responses."

In response, provisions of subpart B (and thus "negotiating agreements or contracts for response actions") generally apply to both removal and remedial actions; therefore, no change is necessary. As a practical matter, in the timeframe of an emergency response, or urgent need for a removal action, negotiating such an agreement for the particular event or place might take more time than the immediate situation allowed. Generic standing agreements for certain kinds of situations could be negotiated in advance. In general, however, proper contingency planning can meet mutually satisfactory emergency needs if state, local, and OSC plans show the same agreed-upon dispositions of resources and responsibilities and provide for appropriate levels of decision-making covering various kinds of incidents.

Under § 300.175(b)(3), it was recommended to add language to clarify EPA responsibilities to address the immediate short-term evacuations that are often the norm in hazardous chemical responses. EPA does not agree. This appears to be a specific responsibility which would be best handled in a Federal Emergency Management Agency (FEMA) policy or guidance document.

Under § 300.175 (b)(4) and (b)(5), one commenter requested clarification of the specific responsibilities of Department of Defense and Department of Energy OSCs concerning releases of hazardous substances, pollutants, and contaminants, and discharges of oil. The responsibilities of OSCs from all federal agencies are the same, as described in § 300.120 and elsewhere in the NCP.

One commenter suggested that language be added to § 300.175(b)(4) to clarify that consistent with CERCLA section 120(e)(4)(A), the EPA administrator has the ultimate authority with respect to selecting remedial actions for DOD facilities on the NPL. While the suggested addition is correct, EPA does not believe this section is the appropriate place for it. This item will be adequately covered in subpart K.

Another commenter suggested that EPA add language to § 300.175(b)(4) to identify the availability of Army Explosive Ordinance Demolition (EOD) units (for explosives, nerve agents, etc.). EPA believes that access to this expertise is limited by DOD authorities and should not be included.

Under § 300.175(b)(7), a commenter suggested a change to add a reference to the capabilities of the Department of Commerce (DOC) with respect to National Marine Sanctuary ecosystems. EPA has made the suggested change.

Under § 300.175(b)(9)(i), a commenter suggested a change to clarify the responsibilities of the Fish and Wildlife Service. EPA agrees with the suggested change.

Under § 300.175(b)(10), a commenter recommended expanding the section to describe the Department of Justice's (DOJ) role in litigation and the information that DOJ needs to negotiate or pursue a court action. EPA does not agree with the proposed change because the NCP is not the appropriate document for this purpose.

Final rule: Proposed § 300.175 is revised as follows:

1. The following sentence has been added to § 300.175(b)(1): "The USCG may enter into a contract or cooperative agreement with the appropriate state in order to implement a response action."

2. Section 300.175(b)(7) has been changed to add a reference to the National Marine Sanctuary ecosystems.

3. Section 300.175(b)(9)(i) has been changed to read as follows: "Fish and Wildlife Service: Anadromous and certain other fishes and wildlife, including endangered and threatened species, migratory birds, and certain marine mammals; waters and wetlands;

contaminants affecting habitat resources; and laboratory research facilities."

4. Section 300.175(b)(15) has been added describing the capabilities and expertise of the National Response Center.

Name: Section 300.180. State and local participation in response.

Proposed rule: This section described general responsibilities of state and local governments for response activities.

Response to comments: Paragraphs (a) and (c): Under § 300.180(a), a commenter suggested allowing each RRT to determine an appropriate number of seats to assign to each state within its jurisdiction. EPA disagrees with the suggested change. While it is recognized that states may assign tasks to a number of different state agencies, it is imperative to have one spokesperson for the state as the official representative on the RRT. As many state representatives as desired may attend the RRT meetings. Under § 300.180(a), a commenter recommended adding "OSC" in addition to RPM for state-lead response actions. EPA agrees with the recommended change.

Another comment asked two questions: Under § 300.180(c), what is meant by facilities not subject to response actions under the NCP, and is this section consistent with § 300.3(a)(2). In response, EPA agrees that the two cited sections should be consistent, and is revising the language in § 300.180(c) to read: "For facilities not addressed under CERCLA * * *."

Paragraph (d): One commenter indicated that the NCP should enable federal facilities to issue cooperative agreements to states to carry out remedial investigation, feasibility study, remedial action and remedial design activities. It was suggested that § 300.180(d) be modified to provide for this. EPA recognizes that federal agencies may cooperate with states in completing federal facility response activities. This will be adequately covered in subpart K and does not need to be included in this section.

Paragraph (e): Under § 300.180(e), a commenter recommended that state and local public safety organization response efforts should be consistent with containment and cleanup requirements in the NCP. EPA agrees and has made the recommended change.

Final rule: Proposed § 300.180 is revised as follows:

1. The first sentence of § 300.180(c) is revised to read: "For facilities not addressed under CERCLA * * *."

2. Section 300.180(e) has been changed as follows: "Because state and local public safety organizations would normally be the first government representatives at the scene of a discharge or release, they are expected to initiate public safety measures that are necessary to protect public health and welfare and that are consistent with containment and cleanup requirements in the NCP, and are responsible for directing evacuations pursuant to existing state or local procedures."

Name: Section 300.185. Nongovernmental participation.

Proposed rule: Proposed § 300.185, based on existing § 300.25, encouraged involvement by industry groups, academic organizations and others in response operations. This section also specified that contingency plans should provide for the direction of volunteers by the OSC or other federal, state or local officials.

Response to comments: A commenter suggested changing § 300.185 so that the OSC/RPM does not have the discretion to involve volunteers in on-site activities associated with hazardous substance response operations. EPA disagrees with this suggestion. This section provides adequate safeguards for the use of volunteer personnel, including restrictions from on-scene operations as necessary.

A change was suggested to make this section consistent with the authority of the scientific support coordinator (SSC) as stated in § 300.145(d)(2). EPA agrees and has made the change.

A commenter requested that the NCP further define strategies for dealing with cases involving multiple authorities. EPA disagrees with the recommended change. The situations involving multiple jurisdictions and authorities should be handled under the appropriate contingency plan, i.e., the RCP or OSC plan.

Final rule: The last sentence of proposed § 300.185(b) has been changed to read as follows: "The SSC may act as liaison between the OSC/RPM and such interested organizations."

Subpart C—Planning and Preparedness

Historically, the NCP has provided for federal planning and coordination entities and for federal contingency plans. Although there has previously been no federal requirement for state and local planning, the NCP has always provided for coordination with such entities and plans where they exist. However, SARA Title III now requires the development of a state and local planning structure and local emergency response plans.

Title III provides the mechanism for citizen and local government access to information concerning potential chemical hazards present in their communities. This information includes requirements for the submission of emergency planning information, material safety data sheets and emergency and hazardous chemical inventory forms to state and local governments, and for the submission of toxic chemical release forms to the EPA. Title III also contains general provisions concerning local emergency response plans to be developed by local emergency planning committees (LEPCs), emergency training, review of emergency systems, trade secret protection, providing public access to information, enforcement, and citizen suits. Regulations implementing Title III are codified at 40 CFR subchapter J. EPA will reference Title III and these regulations in subpart C where appropriate.

The proposed NCP states that in developing OSC contingency plans, the OSCs shall coordinate with State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) affected by the OSC area of responsibility. The OSC plans shall provide for a well coordinated response that is integrated and compatible with all appropriate response plans of state, local and other non-federal entities, and especially with Title III local emergency response plans.

The following sections discuss comments received on the proposed subpart C and EPA's responses.

Name: Section 300.200. General.

Existing rule: Subpart D—Plans (§ 300.41). Subpart D of the 1985 NCP required that, in addition to the National Contingency Plan (NCP), a federal regional plan be developed for each standard federal region, Alaska, and the Caribbean, and, where practicable, a federal local (i.e., OSC) plan also be developed. The purpose of these plans is coordination of a timely, effective response by various federal agencies and other organizations to discharges of oil and releases of hazardous substances, pollutants and contaminants in order to protect public health, welfare, and the environment.

Proposed rule: The equivalent section to subpart D in the 1985 NCP, is found in subpart C of today's rule. This subpart summarizes emergency preparedness activities relating to oil, hazardous substances, pollutants and contaminants; describes the federal, state, and local planning structure; provides for three levels of federal

contingency plans; and cross-references state and local emergency preparedness activities under SARA Title III.

Response to comments: A commenter stated that the planning activities referred to in subpart C apply to both oil and hazardous substances response activities, not to "hazardous chemicals and substances only" as provided in the proposed rule. EPA agrees with this commenter. As stated in the 1985 NCP, all federal, state, and local contingency plans must deal with emergency preparedness and response activities related to discharges of oil and releases of hazardous substances, pollutants, or contaminants.

Final rule: Section 300.200 is revised to read, "This subpart summarizes emergency preparedness activities relating to discharges of oil and releases of hazardous substances, pollutants, or contaminants * * *".

Name: Section 300.205. Planning and coordination structure.

Proposed rule: The SERC in each state is to establish local planning districts, appoint LEPCs, and supervise/coordinate their activities. The SERC must also establish information management procedures and appoint an individual to serve as the coordinator for the information.

Response to comments: A few commenters suggested that § 300.205(c) make reference to § 300.115(h) to ensure coordination of the RRT with the SERC. Section 300.205(b) references § 300.115 as the description of the RRT's responsibilities. Section 300.115(h) states that the state's RRT representative should coordinate with the SERC. Since it has already been stipulated that the RRT as part of their responsibility coordinate with the SERC, there is no need to reiterate that statement in § 300.205(c).

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.210. Federal contingency plans.

Proposed rule: This section describes the three levels of federal contingency plans and makes reference to Title III plans. See also general description in introduction above.

Response to comments: 1. *SARA Title III.* Several commenters suggested that all references to SARA Title III should be eliminated from the NCP in that SARA Title III establishes new, completely separate requirements to report to state and local emergency planning officials, which are totally unrelated to the CERCLA process. Another commenter, however, supported the complete incorporation and integration of Title III provisions with other notification, spill prevention and preparedness sections in the NCP. One commenter recommended that EPA make a clear distinction between the NCP preparedness activities and Title III requirements.

A major objective of both the NCP and SARA Title III is to increase public protection by developing response plans to deal with releases of oil and hazardous substances to the environment. Eliminating from the NCP all references to SARA Title III could lead to duplication of effort by federal, state and local governments regarding contingency planning. It could also cause confusion because the NCP would not provide a complete picture of the federal/state/local planning structure.

2. *Clarification of coordination procedures.* Some comments stated that the NCP should be revised to include procedures for coordinating emergency response planning amongst LEPCs, OSCs, RRTs and the NRT. EPA has considered this comment and is not including such language in the final rule. The NCP is not intended to be a detailed procedural guidance document and such coordination should be left to the discretion of the coordinating parties to provide greatest flexibility to address regional, state and local variations. Other guidance on planning and plan coordination is available, e.g. "Hazardous Materials Emergency Planning Guide," National Response Team, NRT-1 (March 1987), "Criteria for Review of Hazardous Materials Emergency Plans," National Response Team, NRT-1 (May 1988) and "Technical Guidance for Hazards Analysis," EPA, DOT and FEMA (December 1987), through the National Response Team (NRT) member agencies.

3. *Natural resources trustees and DOD and DOE OSCs.* A few commenters suggested that § 300.210 be expanded to require that natural resources trustees and DOD and DOE OSCs be identified. Section 300.210 states that "RCPs [Regional Contingency Plans] shall follow the format of the NCP and coordinate with state emergency response plans, OSC contingency plans, * * *". The NCP and OSC contingency plans stipulate that the trustees of natural resources, as well as DOD and DOE OSCs, should be identified. Therefore there is no need to further state that in § 300.210.

4. *OSC jurisdictional boundaries.* Another commenter stated that determining the OSC jurisdictional boundaries based on Title III district boundaries is not appropriate. EPA agrees. The language in the proposed NCP reads that "jurisdictional boundaries of local emergency planning districts * * * shall, as appropriate be considered in determining OSC areas of responsibilities." Thus, the proposed NCP does not require the OSC jurisdictions to be based on Title III local planning district boundaries, and there will be no change in the final rule.

5. *Coordination of RRT, OSC and LEPC plans.* A few commenters feel that it would be burdensome for RRTs or OSCs to coordinate their plans with the Title III local emergency response plans. They feel the drafters of Title III local emergency response plans should ensure that their plans coordinate with the OSC and RRT plans.

Other commenters recommended that the RRT be encouraged to advertise the availability of copies of the RCP to local emergency planning committees. One commenter suggested that the state should ensure the coordination of local plans with the OSC plan. Another stated that the NCP should be revised to indicate that drafters of Title III local plans should coordinate their plans with federal plans, not the other way around. Finally, another commenter noted that, for consistency, procedures for a LEPC to submit a plan to the RRT for review should be included in § 300.215(d), and that these procedures should require submission through the SERC.

EPA considers the coordination of the OSC plans with the Title III plans to be important. OSCs must be knowledgeable of local response groups and their response capabilities in order to prepare reliable and useful plans and to respond to incidents in their districts. The jurisdiction of some OSCs may include several Title III local planning districts, and the OSCs must ensure that their plans do not conflict with, but complement the Title III plans. A few people commented that language should be added proposing that the Title III local planning committees coordinate their plans with those of the OSCs. Section 300.215(a) already includes such language.

EPA also believes that the coordination through the SERC of regional plans with the Title III plans, to the greatest extent possible, is fundamental to the planning process.

Final rule: Proposed § 300.210(b) is changed to add the following sentence before the last sentence: "Such coordination should be accomplished by working with the SERCs in the region covered by the RCP."

Name: Section 300.215. Title III local emergency response plans.

Proposed rule: See general description in introduction above.

Response to comments: A commenter stated that § 300.215 should be revised to include comments regarding non-catastrophic event response. EPA disagrees with this commenter since Title III addresses all releases, catastrophic as well as non-catastrophic. Section 304 of Title III requires the reporting of releases in excess of a reportable quantity of an extremely hazardous substance or a CERCLA hazardous substance to the SERC, LEPC, and the NRC (where appropriate). These federal, state, and local officials will then respond to that report as appropriate.

Another commenter suggested that § 300.215 should be expanded to include procedures for a LEPC to submit a plan to the RRT for review. EPA has considered this comment and is making a revision in the final rule.

Final rule: Proposed § 300.215 is revised as follows:

1. Section 300.215(d) is revised to add the following last sentence: "This request should be made by the LEPC, through the SERC and the state representative on the RRT."

2. In the first sentence of § 300.215(e)(2), the phrase "to the SERC, LEPC and the local fire department" has been added.

Name: Indian tribes under Title III.

Proposed rule: The preamble to proposed subpart A stated that EPA is proposing to include Indian tribes in the definition of "state," except for purposes of Title III, or where specifically noted in the NCP.

Response to comments: Several commenters disagreed with excluding Indian tribes from being treated like states under Title III. These commenters encouraged EPA to allow tribal participation in this program because if the tribes do not become involved as governments in emergency response planning, the potential for harm to the reservation population and environment increases. These commenters also mentioned that EPA should allow tribes to participate as governments in Title III programs because tribes can be an important link in emergency planning and could be important in planning the appropriate response actions. These commenters recommended that EPA use its discretion to allow tribal participation under Title III on a government-to-government basis. Indian tribes wishing to develop local planning structure and local emergency response plans should be allowed to participate in Title III planning on the same basis as states.

In response, EPA notes that on March 29, 1989 (54 FR 12992), EPA proposed that Indian tribes be the designated implementing authority for Title III on all lands within "Indian country" as defined in 15 U.S.C. 1151. When this proposed rule becomes final, Indian tribes will, by rule, be included in the definition of "state" for the purposes of Title III.

Final rule: There is no rule language on this issue.

Subpart D—Operational Response Phases for Oil Removal

Subpart D contains only minor revisions to the existing subpart E. The following sections discuss comments received on the proposed subpart D and EPA's responses.

Name: Section 300.300. Phase I—Discovery or notification.

Proposed rule: This section describes the ways in which an oil discharge may be discovered and requires that reports of all discharges be made to the NRC. Alternative notification to the appropriate USCG or EPA predesignated OSC or the nearest USCG unit is permitted if immediate notification to the NRC is not practicable. This section also requires that immediate notification to the NRC be included in regional and local contingency plans. Upon notification of an oil discharge, the NRC must promptly notify the OSC who, in turn, will proceed with the additional response phases outlined in this subpart.

Response to comments: One commenter asserted that the addition of the EPA predesignated OSC as a contact through the regional 24-hour emergency response telephone number is unnecessary and should be deleted. The commenter went on to say that a single, all encompassing notification system must be established in the NCP so the federal government can be efficient and effective in its response actions. The concept of a single point of contact for reporting all environmental incidents throughout the United States is well established under the FWPCA and CERCLA. According to this commenter, with one telephonic notification to the NRC, many responsible parties fulfill several federal regulatory reporting requirements. If a responsible party can telephonically call EPA's 24-hour emergency number, then why can they not simply call the NRC. The requirement to call EPA's 24-hour number simply confuses and complicates the reporting requirements.

While EPA agrees that there should be a single notification system for discharges of oil, EPA believes that it is important to make available reasonable alternatives for reporting oil spills that are limited to the rare circumstances where it is not possible to contact the NRC. Furthermore, it is the opinion of EPA that the condition, "if direct reporting to the NRC is not practicable," is not ambiguous. It should be emphasized that reporting to the USCG or EPA predesignated OSCs or the 24-hour EPA regional emergency response telephone number are interim measures, and all reports shall be promptly relayed to the NRC by the discharger.

One commenter recommended that the "notification" language used in subpart D for Oil Removal (§ 300.300 and in subpart E for Hazardous Substance Response (§ 300.405)) should be identical asserting that this will limit confusion and make reporting of incidents that are both oil and hazardous substance simple. The commenter added that there is no need for the oil industry to determine, before notification, whether a spill will be interpreted to fall within the petroleum exclusion and recommended new language for §§ 300.300 and 300.405. Another commenter recommended rewriting the Discovery or notification section to accurately reflect the notification requirements for different types of discharges as mandated by statute adding that the procedures that the NRC and OSC must follow should be separate from the requirements of the discharger so as not to confuse the reader.

EPA believes that the notification provisions of subparts D and E, as proposed, are consistent except for necessary differences driven by statutory and programmatic requirements. EPA also believes that the concept of a single point of contact for reporting all oil and hazardous substance spills is preserved. Therefore, in today's final regulation, § 300.300 remains largely unchanged from the proposed rule.

Final rule: The last two sentences in § 300.300(b) are revised as follows (see discussion in preamble section on § 300.125 on editorial revision to § 300.300(b)):

"If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made to the nearest Coast Guard unit. In any event, such person in charge of the vessel or facility shall notify the NRC as soon as possible."

Name: Section 300.305. Phase II—Preliminary assessment and initiation of action.

Final rule: Proposed § 300.305(d) is revised as follows (see preamble section on § 300.615 (notification)):

"If natural resources are or may be injured by the discharge, the OSC shall ensure that state and federal trustees of affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G. The OSC shall seek to coordinate assessments, evaluations, investigations, and planning with state and federal trustees."

Name: Section 300.310. Phase III—Containment, countermeasures, cleanup and disposal.

Proposed rule: This section requires that the OSC initiate defensive actions as soon as possible to prevent, minimize, or mitigate the threat to the public health or welfare or the environment. These actions may include controlling the source of the discharge; initiating salvage operations; deployment of physical barriers to deter the spread of the oil; and the use of chemical or biological countermeasures in accordance with subpart J, to restrain the spread of the oil and mitigate its effects. This section directs the OSC to choose oil spill recovery and mitigation methods that are most consistent with protecting the public health and welfare and the environment. Sinking agents are specifically prohibited. This section requires that recovered oil and contaminated materials be disposed of in accordance with federal regional and local contingency plans.

Response to comments: A commenter noted that § 300.310(c) states that "oil and contaminated materials recovered in cleanup operations shall be disposed of in accordance with the RCP and OSC contingency plan and any applicable laws, regulations, or requirements." If the purpose of this paragraph is to require that the disposal of cleanup materials meet applicable or relevant and appropriate requirements (ARARs), the commenter recommended that ARARs should be substituted for "applicable laws, regulations, or requirements". Language similar to § 300.400(g) should then be added to aid in the identification of ARARs for oil removal.

The purpose of this paragraph is not to require that the disposal of oil-contaminated cleanup materials meet ARARs. Language that could be interpreted to the contrary inadvertently appeared in the preamble to the proposed regulation. ARARs, as required by CERCLA section 121, apply to remedial actions responding to releases of hazardous substances, the definition of which excludes "oil." CERCLA sections 101(14) and 101(33). The response to oil discharges is provided by section 311 of the Clean Water Act.

Final rule: EPA is promulgating § 300.310 as proposed.

Name: Section 300.315. Phase IV—Documentation and cost recovery.

Proposed rule: This section requires the collection and maintenance of documentation to support actions taken under the CWA and to form the basis for cost recovery.

Final rule: Proposed § 300.315 is revised as follows:

1. The cross-references to the USCG Marine Safety Manual and 33 CFR part 153 in the last sentence of § 300.315(a) are modified.

2. The following sentence is added to proposed § 300.315(c) (see preamble discussion on § 300.615): "The OSC shall make available to trustees of the affected natural resources information and documentation that can assist the trustees in the determination of actual or potential damages to natural resources."

Name: Section 300.320. General pattern of response.

Proposed rule: This section describes, in general, the actions to be taken when a report of a discharge is received.

Final rule: The phrase "rehabilitating or acquiring the equivalent of * * *" has been added to § 300.320(b)(3)(iii) in order to be consistent with CWA section 311(f)(5).

Name: Section 300.330. Wildlife conservation.

Proposed rule: This section describes coordination of professional and volunteer groups to participate in waterfowl dispersal, collection, cleaning, rehabilitation and recovery activities.

Response to comments: A commenter suggested that the more encompassing term "wildlife" be used in this section rather than "waterfowl." EPA agrees and has made the change.

Final rule: EPA has revised proposed § 300.330 to use the term "wildlife" rather than "waterfowl."

Subpart E—Hazardous Substance Response

The Hazardous Substance Response subpart contains a detailed plan covering the entire range of authorized activities involved in abating and remedying releases or threats of releases of hazardous substances, pollutants, or contaminants. EPA is making major revisions to the hazardous substance response authorities included in the NCP. The revisions implement the 1986 amendments to CERCLA and incorporate additional requirements deemed necessary and appropriate based on EPA's management of the Superfund program. The NCP reorganizes the sections of the subpart to coincide with the general order of established procedures during response.

Specifically, EPA is expanding current § 300.62 on the state role into a separate subpart (new subpart F), which incorporates the new state involvement regulations; the entire discussion now appears after subpart E. EPA is also revising and reformatting current § 300.67 on community relations so that it is no longer a separate section but is incorporated into the other sections as appropriate. Furthermore, EPA is renaming and reorganizing the sections in subpart E as follows:

§ 300.400 General
§ 300.405 Discovery or notification
§ 300.410 Removal site evaluation
§ 300.415 Removal action
§ 300.420 Remedial site evaluation
§ 300.425 Establishing remedial priorities
§ 300.430 Remedial investigation/feasibility study (RI/FS) and selection of remedy
§ 300.435 Remedial design/remedial action; operation and maintenance

The following sections discuss major comments received on the proposed subpart E and EPA's responses. Responses to other comments are included in the support document to the NCP.

Section 300.400. General.

Name: Section 300.400(d)(3). Designating PRPs as access representatives. Section 300.400(d)(4)(i). Administrative orders for entry and access.

Proposed rule: Section 300.400(d)(4)(i) provides that EPA or any appropriate federal agency, by the authority granted them in CERCLA section 104(e)(5), can issue an administrative order to secure entry and access to a site where the site owner does not give consent to entry or access. Section 300.400(d)(3) adds language that allows EPA to designate a PRP as its representative solely for the purpose of access, through CERCLA section 104(e), but only in cases where the PRP is conducting a response action pursuant to an administrative order or consent decree. This does not create liability in the federal government or limit EPA's right to ensure a proper remedial investigation/feasibility study (RI/FS).

Response to comments: Most commenters expressed support for § 300.400(d)(3), authorizing the agency to designate a PRP as its representative for access to a site, and concurred that such

designation would help ensure cooperative PRPs access to a site owned or operated by a recalcitrant PRP. Disparate comments were received on § 300.400(d)(4)(i). EPA received comments stating that PRPs should be provided access to Fund-lead and state-lead sites to allow them to conduct their own testing and sampling in order to respond knowledgeably to an EPA remedial action proposal or to prepare an adequate defense. One commenter suggested that PRPs should be afforded the same unrestricted access to a site that is afforded the lead agency. Another suggested that entry and access should be afforded any PRP that voluntarily conducts a response action, and not be contingent upon the PRP entering into a consent order or decree. A third suggested that the NCP distinguish between entry and access to abandoned hazardous waste sites and sites with active, operating businesses. They proposed limitations on entry and access by a lead agency and on the lead agency's ability to grant others entry and access to such ongoing commercial sites to prevent major disruptions of business. A final commenter proposed that DOD, as lead agency, should be granted the authority to deny state agents access to DOD vessels.

EPA opposes unrestricted access to a site by PRPs for several reasons. Unsupervised access, sampling and testing would present a potential health hazard to those on the site or residing near it. Unrestricted access could slow cleanup by disrupting authorized on-site activities. EPA further believes that the proper opportunity for access and sampling is afforded when PRPs are given the chance to conduct the RI/FS. Finally, a great deal of information about the site is already made available to PRPs and others through the administrative record for the site.

The statute makes no distinction between entry and access at abandoned sites and sites of operating businesses in conducting response actions. Protecting human health and the environment is EPA's first priority when it gains access to a site. Protecting private commercial and industrial enterprises from interruption may also be considered in certain circumstances where there is no effect on EPA's accomplishment of its primary purpose to protect human health and the environment. EPA has clarified this section, however, to make it clear that one or more PRPs, including representatives, employees, agents and contractors of PRPs may be designated as the lead agency's representative. EPA has also clarified that EPA or the appropriate federal agency may request the Attorney General to commence a civil action to compel compliance with a request or order for access.

Finally, the statute does not recognize the "uniqueness" of DOD's authority as a lead agency when granting site entry and access to any "state or political subdivision under contract or cooperative agreement" with EPA under CERCLA section 104(e)(1). Of course, the President may issue site-specific orders under CERCLA section 120(j) regarding response actions at Department of Defense or Energy facilities as necessary to protect national security.

Final rule: Proposed § 300.400(d) is revised as follows:

1. The language in proposed § 300.400(d)(2)(ii) on where the authority to enter applies is reordered.

2. Proposed § 300.400(d)(3) is revised to clarify that one or more PRPs, including representatives, employees, agents and contractors of PRPs, may be designated as the lead agency's representative.

3. Proposed § 300.400(d)(4)(i) is revised to state that EPA or the appropriate federal agency may request the Attorney General to commence a civil action to compel compliance with a request or order for access. Also, the phrase "or if consent is conditioned in any manner" is added to this section.

Name: Sections 300.5 and 300.400(e). Definition of on-site.

Proposed rule: Section 300.400(e) states that the term "on-site" for permitting purposes shall include the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

Response to comments: 1. *Definition of on-site.* Many commenters supported the proposed definition of on-site because it ensures flexibility in the design and construction of response actions, provides for expeditious cleanup of sites, and potentially provides significant cost savings. The commenters believed that the four alternative definitions described in the preamble were too restrictive and imposed various constraints on EPA that would delay and needlessly complicate actions at sites. One commenter noted that the RI/FS process, including the mandatory public participation aspects, is the functional equivalent of the permitting process. Another commenter requested that the permit waiver in existing NCP § 300.68 for actions under CERCLA section 106 be retained.

Other commenters generally supported the proposed definition but requested some modifications. Several questioned using "very" in the requirement that suitable areas adjacent to the site be in very close proximity to the contamination. Some suggested in its place the phrase "* * * which are both as close as practical to the contamination * * *." One commenter assumed that EPA was trying to establish a principle of practical effectiveness, i.e., that the area of contamination and the area in which response activities occur are sufficiently related in practice that they should be treated as one site under the permit exemption. This commenter requested further elaboration on this.

One commenter requested that the term "areal" be clarified to distinguish surface area from the atmosphere. Another requested that the definition should specifically mention that the permit exemption applies during investigations as well as implementation of the response action.

One commenter urged that the permit exemption not be applied to construction of new disposal units in previously uncontaminated areas. The commenter stated that it is good policy to discourage new units in uncontaminated areas. Other commenters recommended that on-site should include all areas affected by contamination, whether at a discrete location or through transport of contaminated soils or ground-water plume migration.

Some commenters supported the alternative interpretations described in the preamble to the proposed rule. Several commenters favored defining on-site as identical to a CERCLA facility. One commenter stated that this definition of on-site should provide that all treatment performed on-site refers to the entire facility, and is not limited to the specific operating unit or area of contamination. This commenter also recommended that the permit exemption be broadened to induce private parties to voluntarily implement the required CERCLA actions.

Another commenter favored defining on-site the same as CERCLA facility because Congress intended to limit unpermitted activities to on-site areas, not near-site areas. One commenter suggested combining the proposed definition with the alternative definition equating on-site to CERCLA facility. The commenter believed that this would be consistent with the use of these words throughout the NCP and with the statutory definition of facility.

One commenter protested that the scope of the proposed definition was too broad and beyond statutory intent. This commenter contended that the proposed

definition enabled EPA to unjustifiably usurp state permit laws. The commenter requested that the definition of on-site be limited to the contiguous area having the same legal ownership as the actual site of the release but in no event should it extend beyond the areal extent of contamination. The commenter also argued that the statute provides that the permit exemption applies only after a remedy is selected in accordance with section 121. The commenter also requested that if the proposed language in § 300.400(e)(1) is retained, the language "on-site * * * shall include * * *" should be modified to read "on-site * * * means." The commenter believed that the proposed language was over-expansive.

Another commenter generally supported the proposed definition but requested that EPA clarify that the scope of "on-site" for permitting purposes can differ from the geographical area covered by the affected site. The commenter stated that the scope of the affected site for purposes other than permitting is limited to the property owned or controlled by the site owner or operator in almost all situations. The commenter was concerned that too broad an interpretation of the affected site could effectively limit the value, transferability and use of adjacent property.

One commenter requested clarification on the applicability of the on-site permit exemption to all classes of non-NPL hazardous substance sites. The commenter also asked that the NCP clarify that the exemption does not apply to RCRA permits and HSWA corrective action requirements for solid waste management units.

In response, EPA believes that Congress intended to expedite cleanups when it provided for the permit exemption in CERCLA. Requiring the Superfund program to comply with both the administrative requirements of CERCLA and the administrative and other nonsubstantive requirements of other laws would be unnecessary, duplicative and would delay Superfund activities. Today's action is consistent with that intent.

EPA disagrees with those commenters who assert that the definition of "on-site" in the rule is unnecessarily broad. For practical reasons discussed in the preamble to the proposed rule (53 FR 51406), on-site remedial actions may, of necessity, involve limited areas of noncontaminated land; for instance, an on-site treatment plant may need to be located above the plume or simply outside the waste area itself. EPA does not believe that including in the definition of on-site those areas "in very close proximity to the contamination" and "necessary for implementation of the response," is beyond the intent of Congress, or that it would allow the permit exemption in section 121(e)(1) to be used for activities that are that fundamentally different in nature from conventional on-site actions.

EPA believes that its proposed definition of on-site is sufficiently narrow so that the permit exemption is not abused yet flexible enough to provide for practical and expedient implementation of Superfund remedies. Thus, EPA will promulgate the language as proposed, except that it will delete the phrase "for permitting purposes" in order to make clear that the "on-site" definition is also relevant to the definition of "off-site" under CERCLA section 121(d)(3). EPA believes this change is necessary for the consistency of the CERCLA program, and for the proper functioning of CERCLA section 121(d)(3). In addition, as suggested by a commenter, EPA will change the language in § 300.400(e)(1) to be consistent with the definition of on-site in § 300.5 so that both will read that "on-site means the areal extent of contamination * * *" rather than "on-site includes * * *."

Proposed § 300.400(e)(1) states that the permit waiver applies to all on-site actions conducted pursuant to CERCLA sections 104, 106, or 122; in effect, this covers all CERCLA removal and remedial actions (all "response" actions). However, a number of other federal agencies have inquired as to whether this language would reach response actions conducted pursuant to CERCLA sections 121 and 120. In response, EPA has made a nonsubstantive clarification of the applicability of the permit waiver in CERCLA section 121(e)(1) to include on-site response actions conducted pursuant to CERCLA sections 120 and 121.

The inclusion of actions conducted under CERCLA section 121 is basic, and reflects a literal reading of the statutory provision itself ("No * * * permit shall be required * * * where such remedial action is selected and carried out in compliance with this section"); indeed, the inclusion in § 300.400(e)(1) of sections 104, 106 and 122 is based in large part on the fact that remedial actions carried out under section 104 or 106 authority were selected under section 121 (the inclusion of those sections also stems from the reference to "removal actions" in CERCLA section 121(e)(1)). The addition of CERCLA section 120 simply recognizes that the permit waiver applies to federal facility cleanups conducted pursuant to CERCLA section 120(e), which are also selected and carried out in compliance with CERCLA section 121 (*see* CERCLA section 120(a)(2)).

In response to other comments, EPA intends that "areal" refers to both surface areas and the air above the site. EPA further intends that the exemption applies to all CERCLA activities, including investigations and CERCLA section 106 actions, conducted entirely on-site, before and after the remedy is selected. EPA generally agrees with the policy of not locating new disposal units in uncontaminated land and will only do so when the only practical method for reducing the risk posed by the contamination is to construct a unit in very close proximity to the contamination. The example described in the preamble to the proposed rule was contamination located in a lowland marshy area. When it is not possible to locate an incinerator or construction staging area in that marshy area, it may be located in an uncontaminated upland area in very close proximity and still fall within the exemption.

Commenters supporting the alternative definitions have not persuaded EPA that they offer significant advantages over the proposed definition. As stated in the preamble to the proposed rule, the problem with equating on-site with the CERCLA definition of "facility" is that a CERCLA facility is limited to the areas of contamination; it does not include adjacent areas necessary for implementation of response activities.[3] On the other hand, a "facility" as defined under RCRA (i.e., the property boundaries) may be too expansive for purposes of the permit exemption, as it may encompass many square miles, with discrete areas of contamination rather than contamination throughout. EPA believes that the permit exemption should not apply to activities at a site not directly related to responding to the contamination. Alternatively, the RCRA definition may be too narrow where the

[3] EPA does not believe that the definition being promulgated today is inconsistent with the statutory definition of "facility" in CERCLA section 101(9). First, Congress did not use the term facility, but rather used the term "on-site," in CERCLA section 121(e)(1). Second, the definitions are not in conflict; the on-site definition is simply broader in order to allow EPA to effectuate the cleanup of "facilities" defined in the statute. (Note that the size or extent of a facility listed on the NPL may be broader than the description in the original NPL listing package, and may extend to those areas where the contamination in question has "come to be located." *See* CERCLA section 101(9); 54 FR at 41017–18 (October 4, 1989); 54 FR at 13298 (March 31, 1989); *United States* v. *Conservation Chemical Co.*, 619 F. Supp. 162, 177, 185 (W.D. Mo. 1985).)

contamination crosses property boundaries. Also, defining on-site as the area having the same legal ownership as the primary contaminated area may not be useful when a ground-water plume has traveled a considerable distance away from the source of contamination. As the preamble to the proposed rule noted, such a definition may artificially constrain a remedy because the exemption would be defined in terms of a property line rather than the contamination.

Finally, EPA believes that Congress intended that activities conducted entirely on-site pursuant to CERCLA are exempt from all federal, state or local permits, including permits under RCRA and HSWA. A RCRA permitting requirement would present the same possibility of delay as any other permit. This permit exemption does not apply, however, to cleanup actions conducted under an authority other than CERCLA, such as RCRA or HSWA.

2. *Noncontiguous facilities.* The preamble to the proposed rule also stated EPA's interpretation that when noncontiguous facilities are reasonably close to one another and wastes at these sites are compatible for a selected treatment or disposal approach, CERCLA section 104(d)(4) allows the lead agency to treat these related facilities as one site for response purposes and, therefore, allows the lead agency to manage waste transferred between such noncontiguous facilities without having to obtain a permit (53 FR 51407). EPA requested comment on whether to limit this approach to situations where the noncontiguous facilities are under the ownership of the same entity. Several comments were received on EPA's proposal on noncontiguous facilities.

Some commenters requested that this proposal be expanded to include groups of sites that are not in close proximity to one another. One commenter requested an expansion to encompass large federal facilities with several discrete areas of contamination that are similar in nature but within boundaries that are spatially separated.

In response, the preamble to the proposed rule noted it may be appropriate to treat noncontiguous facilities as one site where the facilities are "reasonably close to one another" and the wastes are "compatible for the selected treatment or disposal approach" (53 FR 51407). However, the preamble specifically noted that these two factors were merely "among the criteria" EPA uses to decide whether noncontiguous facilities should be treated as one site. In some cases, the distance between facilities may be the deciding factor; in other cases, the consideration of distance may be outweighed by other criteria. Moreover, the "reasonably close" language in the proposal leaves room for Agency discretion; EPA recognizes that what may be a reasonable distance under some circumstances (e.g., in a sparsely populated area) may be less reasonable under others (e.g., in an urban setting). EPA makes these assessments on a case-by-case basis. EPA does not believe that the policy needs to be expanded in response to the comments on distance between areas of contamination; rather, the comments indicate that the policy needs to be more fully explained.

CERCLA section 104(d)(4) allows EPA broad discretion to treat noncontiguous facilities as one site for the purpose of taking response action. The only limitations prescribed by the statute are that the facilities be reasonably related "on the basis of geography" or "on the basis of the threat, or potential threat to the public health or welfare or the environment." [4] Once the decision is made to treat two or more facilities as one site, wastes from the several facilities could be managed in a coordinated fashion at one of the facilities and still be an "on-site" action, within the permit waiver of CERCLA section 121(e)(1).

In evaluating the appropriateness of aggregating two facilities, EPA evaluates one or both of the statutory criteria. The threshold issue is generally whether the two facilities are "related based on the threat posed," such that it makes sense under CERCLA to treat two or more contamination problems as one; the criterion of "waste treatment compatibility," discussed in the proposal, is one measure of this. For example, where wastes at two CERCLA facilities are similar or identical, and are appropriate for like treatment or disposal, it may be both protective of health and the environment and cost-effective to treat the two facilities as one site, and to take a coordinated response action. The treatment facility built on-site at the first facility (which would not need a permit pursuant to CERCLA 121(e)(1)) could then accept wastes from other contaminated areas "on-site"—i.e., from the second facility—without the need for a permit. This allows response actions to proceed expeditiously and cost-effectively.

The analysis of whether facilities that are "related based on the threat posed" should be aggregated may, in appropriate cases, also consider the distance between the facilities, especially where transportation risks are high (such as for highly volatile wastes or for transfers through heavily populated areas), or where transportation costs would be high (calling into question the cost-effectiveness of such an option).

Alternatively, EPA may consider whether the sites are "related based on geography," e.g., noncontiguous CERCLA facilities may both represent significant sources of contamination to a common ground-water aquifer or surface water stream. Here again, factors such as the distance between the facilities and the cost-effectiveness of the aggregated response may also be appropriate for consideration.

In any analysis under section 104(d)(4), EPA also believes that it is critical to consider the views of the affected state or states, as well as those of the affected communities (especially those persons living near the facility that would receive waste from other, noncontiguous facilities). Thus, EPA cannot precisely define what distance is appropriate for the aggregation of noncontiguous facilities. EPA will evaluate, on a case-by-case basis, the distance between facilities and the other factors discussed herein, to decide whether it is appropriate to treat two noncontiguous facilities as one under CERCLA section 104(d)(4).[5]

Another commenter recommended that the proposal be broadened to cover areas needed for transportation, storage, and/or treatment at centralized locations on an installation where similar removal or remedial actions can be taken at more than one site.

In response, the authority to treat two noncontiguous facilities as one site is limited under section 104(d)(4) to CERCLA facilities (a "facility," as defined in CERCLA section 101(9), is generally "any site or area where a hazardous substance has * * * come to be located"); thus, to the extent that the commenter was suggesting that a centralized location that is not a CERCLA facility may be aggregated with noncontiguous CERCLA facilities, EPA disagrees. Such an approach would go beyond the terms of section 104(d)(4), and would result in an improper

[4] Note that facilities may be aggregated for Fund-financed remedial response (as compared to removal or enforcement response) only if both facilities have been listed on the NPL. (*See* final rule § 300.425(b)(1).)

[5] Note that as a matter of policy, and due in part to special provisions in the Hazard Ranking System model (e.g., the three mile radius evaluation area), EPA applies more restrictive criteria to potential site aggregations for the purposes of NPL listings (*see* 48 FR 40663, Sept. 8, 1983).

expansion of the permit waiver for CERCLA actions conducted "entirely on-site." If a party wishes to establish a treatment or disposal facility at a location that is not within EPA's definition of on-site, it may do so, but it must secure the appropriate permits.

Many comments were received on the option of limiting application of section 104(d)(4) to facilities that are under common ownership. Some commenters objected to aggregating facilities of different ownership because of liability problems. They noted that PRPs at one site could be liable for the entire amount of response costs at the site where on-site activity occurs. A commenter stated that common ownership may lessen some of these legal concerns. One commenter recommended that EPA grant PRPs releases from liability with respect to sites where they did not send CERCLA substances, or that PRP consent will be obtained, before the lead agency employs centralized treatment. Another stated that extending this aggregation concept to facilities with different owners would, in effect, allow Superfund sites to take the place of permitted waste management facilities and goes far beyond the scope of the permit exemption.

Other commenters believed that applying CERCLA section 104(d)(4) to facilities of multiple ownership was acceptable. One commenter stated that EPA should treat noncontiguous sites as one site when the properties are owned by the same entity or owned by separate entities that agree to the arrangement. Some commenters supported multiple ownership but took note of the liability problem. One opined that EPA does not have the authority to make PRPs at noncontiguous sites responsible for activities at another site. Another suggested that PRP liability would have to be limited to the amount of liability that would have existed if each site were remediated separately.

In response, the question of whether noncontiguous facilities are commonly owned may appropriately be among the factors for consideration in deciding whether or not to treat noncontiguous facilities as one site; however, EPA disagrees that common ownership should be a necessary condition for coordinating response actions at noncontiguous facilities. At many sites, there are numerous, disparate PRPs although the environmental threat, and the response technology may be the same. Limiting application of CERCLA section 104(d)(4) to sites of common ownership would be unduly restrictive, with no gain in environmental protection. Rather, EPA's interpretation will allow for consolidated treatment or disposal responses at one unit rather than at several units, resulting in advantages in terms of cost, efficiency, and protection of human health and the environment.

EPA recognizes commenters' concerns regarding liability, but believes that the liability issue is separate and distinct from the question of whether two facilities are appropriate for treatment as one site; the latter issue must be evaluated on its own merits. EPA acts to treat noncontiguous facilities as one site where to do so would be in the best interests of achieving sound and expeditious environmental cleanups. Liability issues potentially arise from every response action, whether waste is left on site or is sent to a disposal facility off-site. Indeed, EPA does not believe that a decision to transfer waste from a CERCLA facility to a noncontiguous CERCLA facility as part of an EPA-authorized response action will result in a higher risk of liability than would the transfer of CERCLA wastes to an off-site commercial treatment or disposal facility. That risk of future liability is inherent in the hazardous nature of the waste, and in the quality of the treatment or disposal technology used; it does not result from this rule.

The commenter opposed to EPA's proposal argued that the attempt to include multiple sites within the definition of on-site may allow particular ecological areas, or limited segments of the population, to receive the adverse impacts of incineration or disposal for distant sites without the benefit of permit review.

In response to comments suggesting that PRPs and communities may be adversely affected by the application of this policy, it is important to note that where the lead agency plans to take a consolidated response action at two or more noncontiguous CERCLA facilities, the agency will solicit public comment on the proposed remedy. PRPs and members of the public at all of the noncontiguous facilities will be afforded an opportunity to comment on the wisdom of aggregating the sites and taking a coordinated response action. Indeed, as noted above, EPA has identified consultation with the state(s) and public as a critical factor in deciding whether or not to treat the facilities as one site.

Finally, EPA wishes to clarify that even where noncontiguous facilities are treated as one site, activities at the aggregated site must comply with (or waive) substantive requirements of federal or state environmental laws that are ARARs. In addition, even where noncontiguous facilities are treated as one site, movement of hazardous waste from one facility to another will be subject to RCRA manifest requirements.

Final rule: 1. EPA is revising the proposed definition of "on-site" in §§ 300.5 and 300.400(e)(1) as follows:

> *On-site* means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

2. Reference to CERCLA sections 120 and 121 is added to § 300.400(e)(1).

Name: Treatability testing and on-site permit exemption.

Proposed rule: The preamble to the proposed rule stated that the term on-site does not extend to a distant facility that may be conducting a treatability test (53 FR 51407).

Response to comments: One commenter supported a recommendation submitted by the Hazardous Waste Treatment Council (HWTC), summarized in the preamble to the proposed NCP, that EPA modify the NCP to permit treatability testing without the need to obtain a RCRA permit (53 FR 51407). EPA responded in the preamble to the proposed rule that adjustments to permitting requirements to encourage treatability testing should be accomplished by modifying RCRA regulations. EPA disagreed that the term on-site should be extended to encompass treatability testing at off-site facilities.

A commenter on this discussion in the preamble to the proposed rule stated that modifying RCRA rules may not be effective for CERCLA responses because, even if EPA did so, states are not required to modify their RCRA regulations to be consistent with EPA's revision. The commenter recommended that EPA expand the permitting exemption to include treatability tests conducted to support remedy decisions at CERCLA sites and promulgate the exemption in a separate fast-track interim final rule.

In response, as explained in the preamble to the proposed NCP, EPA believes that "to the extent that it is appropriate to adjust permitting requirements to encourage treatability testing, that should be accomplished by directly modifying the RCRA regulations to address such testing generally" (53 FR 51408). As the commenter has pointed out, a rule has been issued under RCRA to expand the RCRA permitting exemption at 40 CFR 261.4 to include waste samples used to conduct small-scale treatability tests. 53 FR 27290, July

19, 1988. That rule was issued after the public was provided notice and comment opportunities.

Although the commenter is not fully satisfied by the result of that RCRA rulemaking (speculating that the exemption may not be implemented quickly, and that some states may decide not to implement it at all), EPA is satisfied that the proper federal regulatory action has been taken. Further, if the commenter and other members of the public are concerned that states may not follow the federal example, they are free to urge state governments to take prompt and similar action. However, EPA holds to its belief that the RCRA rulemaking is the proper forum for deciding whether a RCRA permit should be required for treatability tests, including off-site treatability tests conducted in support of a CERCLA action.

EPA also declines to follow the commenter's recommendation that EPA interpret the permit exemption in CERCLA section 121(e) to reach non-proximate, off-site treatability tests. The CERCLA permit exemption applies to removal or remedial actions conducted "entirely on-site." Although EPA has interpreted the term "on-site" to include certain proximate areas not formally within the area of contamination, that interpretation has been a limited one. EPA has included within "on-site" only those areas that are both in "very close proximity" to the contamination and "necessary for implementation of the response action." As explained in the preamble to the proposed and final NCP, such an interpretation is necessary to give practical meaning to the permit exemption and to expedite cleanup actions. EPA does not believe, however, that the language of the statute can be interpreted so broadly as to accommodate the commenter's request. As EPA noted in the preamble to the proposed NCP, "EPA does not believe that the term 'on-site' can extend to a distant facility that may be conducting a treatability test." (53 FR 51408).

Final rule: There is no rule language on this issue.

Name: Section 300.400(h). PRP oversight.

Proposed rule: Proposed § 300.400(h) states that the lead agency "may provide oversight for actions taken by potentially responsible parties to ensure that a response is conducted consistent with this [rulemaking]." The section also states that the lead agency may oversee actions by third parties at a site.

Response to comments: Several of those who commented requested stronger language in the NCP preamble and the above sections clarifying that EPA will provide for site oversight, and not that it "may" provide oversight.

EPA agrees with the comment and will provide oversight for an enforcement action under CERCLA.

Final rule: Proposed § 300.400(h) is amended to include the following language: "EPA will provide oversight when the response is pursuant to an EPA order or federal consent decree."

Section 300.405. Discovery or Notification

Name: Section 300.5. Definition of "CERCLIS."

Proposed rule: Section 300.5 of the proposed rule defined CERCLIS as EPA's comprehensive data base and management system that inventories and tracks releases addressed by the Superfund program. The section stated that CERCLIS contains three distinct inventories: CERCLIS Removal Inventory, CERCLIS Remedial Inventory, and CERCLIS Enforcement Inventory. The proposed definition of CERCLIS also stated that it contains a record of both "active releases" and "inactive releases". The definition noted that records of these releases are retained in the database as an historical record.

Response to comments: One commenter suggested several changes to the definition of CERCLIS. First, the commenter suggested that the definition of CERCLIS should be clarified to indicate whether a site can be on more than one of the three sub-inventories at the same time. Second, the definition of CERCLIS should state that the term "inactive release" is replacing the "no further action" designation. Third, EPA should specifically state in the definition, as it does in the preamble, that once a "no further action" determination has been made, the site listing will be archived as an historical record and that for routine informational and dissemination purposes only active sites will be listed.

The commenter has pointed to several statements in the definition of CERCLIS and in the preamble description of that definition that need to be clarified. First, CERCLIS contains data integrated from the pre-remedial, remedial, removal, and enforcement sections of the Superfund program; however, it does not contain distinct sub-inventories for each of these program areas (although CERCLIS has the flexibility to retrieve each of these areas separately for tracking, planning or analysis purposes). Thus, there is only one CERCLIS inventory.

Second, the use of the terms "active releases" and "inactive releases" in the proposal may have been misleading, since EPA does not use these terms to categorize sites in CERCLIS. Sites that EPA decides do not warrant moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation in CERCLIS. This designation signifies that no additional federal steps under CERCLA will be taken unless information later indicates that this decision was incorrect.

The commenters' last point, which stems from a statement in the preamble to the proposed revisions to the NCP, also deserves clarification. EPA does not make a distinction for information dissemination purposes between NFRAP sites and sites that will continue in the site evaluation process. The public has access to information on all sites listed in the CERCLIS database. (See next preamble section for further discussion of the purpose of CERCLIS.) Sites remain in the database after they have been evaluated to document such evaluation and to avoid unnecessary repetition of evaluation activities.

Final rule: EPA has modified the proposed definition of CERCLIS to clarify several points noted by the commenter and to bring the definition more in line with current Superfund practice. The final rule's definition of CERCLIS deletes language that indicates that there are separate sub-inventories for removal, remedial, and enforcement sites. In addition, the final rule drops the terms "active release" and "inactive release" and uses the term "No Further Response Action Planned." The promulgated definition is:

CERCLIS is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions. Sites that EPA decides do not warrant moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation in CERCLIS. This means that no additional federal steps under CERCLA will be taken at the site unless future information so warrants. Sites are not removed from the data base after completion of evaluations in order to document that these evaluations took place and to preclude the possibility that they be needlessly repeated. Inclusion of a specific site or area in the CERCLIS data base does not represent a determination of any party's liability, nor does it represent a finding that any response action is necessary. Sites that are deleted from the NPL are not designated NFRAP sites. Deleted sites are listed in a separate category in the CERCLIS data base.

Name: Sections 300.405, 300.410(h) and 300.415(e). Listing sites in CERCLIS.

Proposed rule: Proposed § 300.405(f)(2) stated that when notification indicates that a removal action is not required, a remedial action may be performed and the release will be listed in CERCLIS. Proposed § 300.415(e) referred to listing releases in the CERCLIS removal inventory.

Response to comments: Several commenters suggested changes to the criteria used by EPA to list sites in CERCLIS. One commenter proposed that EPA not list in CERCLIS sites that had already been remedied since the time they were first discovered. In addition, the commenter urged EPA to adopt a delisting procedure for sites in CERCLIS that had already been remedied. The commenter noted that an alternative to this suggestion would be to keep two distinct lists—one for "resolved sites" and a second for "unresolved sites." A second commenter suggested that where a notifier is "doubtful" that a release has occurred, no such qualified release report should be included in CERCLIS without independent verification that a legally reportable release did occur.

In response, EPA believes that the commenters have attached more significance than is warranted to the listing of a site in CERCLIS. As noted in the definitions section of this rule (§ 300.5), CERCLIS is a computerized database in which EPA stores management information on all sites evaluated under the Superfund program. Sites are discovered through a wide variety of mechanisms, including such diverse sources as formal notification requirements and citizen telephone calls and, as appropriate, are placed in CERCLIS. Those sites that are included in CERCLIS are not removed from the database after completion of evaluations in order to document that these evaluations took place and to avoid unnecessary repetition of evaluation activities. Inclusion of a specific site or area in the CERCLIS database does not represent a finding of liability or a determination that response action is necessary. EPA also does not believe that significant financial liability can be inferred by the mere fact that a site is on CERCLIS.

The assumption that substantial, or any, risk to public health and the environment is associated with a site contained in CERCLIS is largely inaccurate. The percentage of sites going on to the National Priorities List, which is EPA's list of sites believed to pose environmental threats significant enough to warrant detailed evaluation for possible remedial action under Superfund, is now between 2 percent and 7 percent of those assessed. A full 50 percent of CERCLIS sites are eliminated from further consideration at the first step of the process, the preliminary assessment (PA).

Sites that EPA decides do not warrant moving further in the process are given a "No Further Response Action Planned (NFRAP)" designation in CERCLIS. This means that no additional federal steps will be taken at the site unless information arrives from some source indicating that this decision was incorrect. It is particularly important to note that EPA's NFRAP decision does not mean that there is no hazard associated with a given site; it means only that based on available information at that time, EPA does not plan to take further action under CERCLA. States are notified of all NFRAP decisions in order to inform them that the federal government does not plan to proceed further, and to allow states the opportunity to share any additional data they may have that would change the decision. A small percentage of NFRAP sites are returned to active consideration through this mechanism each year.

Accordingly, EPA is deleting language in the rule that implies that a release is entered into CERCLIS after a remedial evaluation has been performed. In fact, sites are generally entered into CERCLIS before a remedial evaluation has been performed. Thus, EPA is revising this rule language to more accurately reflect EPA evaluation practice.

Also, consistent with the explanation in the previous preamble section that CERCLIS does not contain distinct inventories for the removal, remedial and enforcement programs, references to removal and remedial inventories have been deleted from proposed §§ 300.405(f)(2), 300.410(h) and 300.415(e).

A sentence has been added to § 300.405(g) clarifying that federal agencies are not legally obligated to comply with the requirements of Title III because they are not included in the Title III definition of "person" contained in section 329(7). Federal agencies are encouraged, however, to establish programs to implement Title III to the extent practicable at their facilities.

Many federal facilities have already established procedures for working with local emergency planning committees and state emergency response commissions on compliance with the emergency planning and reporting requirements under Title III.

Final rule: Proposed §§ 300.405 and 300.415(e) are revised as follows:

1. The last sentence in proposed § 300.405(b) is revised as follows (see explanation in preamble discussion on § 300.615): "If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made immediately to the nearest Coast Guard unit. In any event, such person in charge of the vessel or facility shall notify the NRC as soon as possible."

2. The reference to the "CERCLIS Remedial Inventory" has been deleted from proposed § 300.405(f)(2).

3. The following sentence has been added to § 300.405(g): "Federal agencies are not legally obligated to comply with the requirements of Title III of SARA."

4. Proposed § 300.415(e) on CERCLIS removal inventory is deleted. The sections in § 300.415 have been renumbered.

Sections 300.410 and 300.420. Removal and Remedial Site Evaluations

Name: Section 300.410. Removal site evaluation.

Proposed rule: Proposed § 300.410 describes the removal site evaluation process, but does not address funding constraints placed on the evaluation or PRP participation in the evaluation.

Response to comments: One commenter recommended including NCP preamble language that would authorize the OSC to use outside scientific experts during the removal site evaluation, providing that the PRP is willing to pay for such scientific support.

There is nothing in the statute to prevent or discourage the use of additional scientific fact experts at a site provided PRPs are willing to pay for it themselves. The discussion in the preamble to the proposed § 300.410 suggested such additional activity is permissible with OSC oversight: "There may also be instances of voluntary response where the OSC provides monitoring to assure proper response and to avoid a situation where followup action would be needed" (53 FR 51409). Any data generated by outside scientific experts would have to conform to appropriate provisions of the NCP in order to be used as the basis for decisions under CERCLA.

Final rule: EPA is promulgating § 300.410 as proposed except for a revision to § 300.410(g) (see preamble section below) and deletion of the last sentence in § 300.410(h) (see preamble section above on listing sites in CERCUS).

Name: Section 300.410(c)(2). Removal site evaluation. Section 300.420(c)(5). Remedial site evaluation.

Proposed rule: Section 300.410(c)(2) details the steps of a removal preliminary assessment. Section

300.420(c)(5) describes the information contained in a lead-agency report following completion of a remedial site investigation, including documentation as well as sampling data and potential risks to humans and the environment.

Response to comments: A commenter asked that the NCP state that reasonable efforts will be made during the site investigation phase to identify PRPs and provide them copies of the preliminary assessment/site investigation (PA/SI) report and an opportunity to comment.

The removal and remedial processes as currently outlined in the NCP provide PRPs with a reasonable opportunity to review and comment on lead agency actions at a site when the proposed plan is made available. Before this time, documents placed in the administrative record, including the PA/SI, are available for public inspection. In addition, PRPs that are interested in more extensive involvement in the investigation process may agree to undertake removal or remedial actions through a settlement agreement with EPA. They may be granted substantially more site involvement than non-settling PRPs.

Extending the formal review and comment period to PRPs as far back in the removal and remedial process as the PA/SI stage would unnecessarily slow down preliminary fact-gathering at a site. In cases where removal actions are considered emergency or time-critical, such review and comment time would unjustifiably delay response to a dangerous situation. Also, in most cases, the PRP search has not been completed or even started in a comprehensive manner at the time of the PA/SI. Accordingly, specifying formal procedures for PRP involvement at that time is not practical.

Final rule: EPA is promulgating §§ 300.410(c)(2) and 300.420(c)(5) as proposed.

Name: Section 300.410(g). Notification of natural resource trustee.

Final rule: Section 300.410(g) is revised as follows (see preamble discussion on § 300.615):

If natural resources are or may be injured by the release, the OSC or lead agency shall ensure that state and federal trustees of the affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The OSC or lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

Name: Sections 300.415(b)(4) and 300.420(c)(4). Sampling and analysis plans.

Proposed rule: Proposed § 300.415 did not describe sampling requirements. Proposed § 300.420(c)(4) described the procedures necessary for preparing a site-specific sampling plan for a remedial site inspection.

Response to comments: One commenter stated that EPA should revise § 300.420(c)(4) to specify review of the sampling plan to ensure that appropriate sampling and quality control procedures are followed. In response, EPA is revising the description of the site-specific sampling plan in proposed § 300.420(c)(4) to conform with the purpose of the quality assurance project plan (QAPP) defined in § 300.5 and the QAPP and sampling and analysis plan described in § 300.430(b)(8), which states that such plans will be approved by EPA. This change emphasizes the similarity of these activities in the site evaluation and remedial investigation parts of the program. In addition, EPA believes that, when samples will be taken, it is appropriate to describe sampling requirements for non-time-critical removal actions to ensure that data of sufficient quality and quantity will be collected for this type of action.

EPA also notes that portions of the QAPP may incorporate by reference non-site-specific standardized portions of already-approved QAPPs, especially those portions addressing policy and organization, or describing general functional activities to be conducted at a site to ensure adequate data. This eliminates the necessity to reproduce non-site-specific quality assurance procedures for every site.

Final rule: Proposed §§ 300.415(b)(4) and 300.420(c)(4) are revised as follows:

1. In § 300.415(b)(4), a requirement has been added for developing a sampling and analysis plan, when samples will be taken.

2. Section 300.420(c)(4) is revised to better describe the required contents of the sampling and analysis plan.

Section 300.415. Removal Action.

Name: Section 300.415(b)(5)(ii). Removal action statutory exemption.

Proposed rule: CERCLA section 104(c)(1)(C) provides a new exemption to the statutory limits on Fund-financed removal actions of $2 million and 12 months. This exemption, stated in the NCP in § 300.415(b)(5)(ii), is applicable when continued response is otherwise appropriate and consistent with the remedial action to be taken. EPA expects to use the exemption primarily for proposed and final NPL sites, and only rarely for non-NPL sites (see 53 FR 51409).

Response to comments: One commenter supported EPA's proposal to allow waiver of the limits on Fund-financed removal payments if such an exemption is consistent with remedial actions.

One commenter stated that the decision to engage in a removal action should be based on site conditions and their impact on health and the environment, not cost or time; that once EPA concludes that a removal action is appropriate, the various alternatives should be analyzed at both likely NPL and non-NPL sites equally. The commenter felt that EPA should use the consistency exemption more liberally where time, rather than money, was the complicating factor.

In response, Congress has made the determination that cost and time are relevant factors in deciding how extensive a Fund-financed removal action may be; thus, contrary to the commenter's remark, EPA will continue to consider such factors. Further, Congress did not differentiate between time and dollar limits in setting the exemptions; EPA notes that exceeding the time limit will often also increase the cost of a removal action, even though it does not necessarily raise the cost to over $2 million. Thus, EPA does not believe it should set different criteria for their use.

The new exemption from the time and dollar limits applies to any Fund-financed removal and thus encompasses state-lead as well as EPA-lead responses. Actions where EPA has the lead, but is to be reimbursed by private parties or other federal agencies, are still subject to the statutory limits and provisions for exemption.

Because the exemption requires consistency with the remedial action to be taken, its use is well suited to proposed or final NPL sites where remedial action is likely to be taken. It may also be appropriate to use this exemption at some non-NPL sites where justified on a case-by-case basis.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.415(i). Removal action compliance with other laws.

Existing rule: The current NCP in § 300.65(f) requires that Fund-financed removal actions and removal actions pursuant to CERCLA section 106 attain or exceed, to the greatest extent practicable considering the exigencies of the circumstances, applicable or relevant and appropriate federal public health and environmental requirements. Other federal criteria, advisories, and guidance and state standards are to be

considered, as appropriate, in formulating a removal action.

Proposed rule: Proposed § 300.415(j) (renumbered as 300.415(i) in the final rule) required that removal actions attain, to the extent practicable considering the exigencies of the situation, all state as well as federal applicable or relevant and appropriate requirements (ARARs).[6] Other federal and state criteria, advisories, and guidance shall, as appropriate, be considered in formulating the removal action. The proposed revisions also note that statutory waivers from attaining ARARs may be used for removal actions. In addition, the preamble to the proposed revisions provided guidance clarifying three factors to be considered in determining the "practicability" of complying with ARARs: The exigencies of the situation, the scope of the removal action to be taken, and the effect of ARAR attainment on the removal statutory limits for duration and cost (53 FR 51410–11).

Response to comments: Several commenters supported the proposed revision to the NCP requiring that both federal and state ARARs be complied with when conducting removal actions. One commenter asked what documentation is required to show that ARARs have been identified and requested that EPA develop guidance providing hypothetical conditions describing the extent to which ARAR analysis should be performed. Another commenter stated that non-Fund-financed removal actions conducted at federal facilities also should be required to comply with ARARs.

In opposition to the proposal, a number of commenters pointed out that Congress did not intend that removal actions be required to comply with ARARs. The commenters suggested that, based on the legislative history, Congress intended that only remedial actions be subject to compliance with ARARs. According to one commenter, the legislative history states that ARARs do not apply during removal actions because removal actions are short-term, relatively low-cost activities of great urgency that should be free of the delays that may arise if it is necessary to identify and attain ARARs.

Other commenters suggested that attainment of ARARs should not be required during removal actions because removal actions are not intended to completely clean up a site, but rather to quickly eliminate or control an immediate threat. The commenters argued that compliance with ARARs is based on what remains on site after an entire remedy is completed, not after a particular problem is controlled. In addition, several commenters argued that the main purpose of the removal program is quick mitigation of threats, and that requiring ARARs to be complied with during removal actions undermines this purpose by slowing down the cleanup process. The commenters suggested that such procedural delays as identification of ARARs will hinder the removal program's ability to respond to emergencies swiftly.

Several additional commenters suggested that requiring attainment of ARARs discourages PRPs from undertaking removal actions. Fund-financed removals can use the statutory limits to limit attainment of ARARs; those limits do not apply to PRP actions.

One commenter opposed the provision that requires OSCs to justify why they are not attaining ARARs during a specific removal action. The commenter argued that the prospect of an OSC being required to justify why he or she is not attaining all ARARs is inconsistent with removal program objectives.

Other commenters believed that the current policy concerning compliance with ARARs during removal actions should be replaced with a more discretionary policy. They suggested that OSCs should only be required to comply with ARARs that are most crucial to the proper stabilization of the site and protection of public health and the environment.

In response, EPA has carefully reviewed this issue in light of the public comments, and believes a number of clarifying points need to be made. First, as a threshold matter, EPA agrees that Congress did not, in the 1986 amendments to CERCLA, "require" EPA to meet ARARs during removal actions. However, it has been EPA's policy since 1985, established in the NCP, to attain ARARs during removals to the extent practicable, considering the exigencies of the situation. EPA believes that this is still a sound policy. Reference to requirements under other laws (i.e., ARARs) help to guide EPA in determining the appropriate manner in which to take a removal action at many sites.

If, for example, a component of the removal action is to discharge treated waste to a nearby river or stream, effluent limitations based on federal or state water quality criteria will be useful in determining the extent of such treatment. Today's policy is consistent with section 105 of CERCLA which directs that the NCP include methods and criteria for determining the appropriate extent of removals. Thus, EPA is maintaining the policy described in the preamble to the proposed NCP, although EPA has modified the factors to be considered in determining practicability.

A number of other comments questioned the extent to which removals should attempt to attain ARARs. In responding to such comments, it is important to note that the policy that removals comply with ARARs to the extent practicable is defined in large part by the purpose of removal actions.

The purpose of removal actions generally is to respond to a release or threat of release of hazardous substances, pollutants, or contaminants so as to prevent, minimize, or mitigate harm to human health and the environment. Although all removals must be protective of human health and the environment within their defined objectives, removals are distinct from remedial actions in that they may mitigate or stabilize the threat rather than comprehensively address all threats at a site. Consequently, removal actions cannot be expected to attain all ARARs. Remedial actions, in contrast, must comply with all ARARs (or invoke a waiver). Indeed, the imposition by Congress of limits on the amount of time and Fund money that may be spent conducting a removal action often precludes comprehensive remedies by removal actions alone. Removal authority is mainly used to respond to emergency and time-critical situations where long deliberation prior to response is not feasible. All of these factors—limits on funding, planning time, and duration, as well as the more narrow purpose of removal actions—combine to circumscribe the practicability of compliance with ARARs during individual removal actions. Indeed, the vast majority of removals involve activities where consideration of ARARs is not even necessary, e.g., off-site disposal, provision of alternate water supply, and construction of fences, dikes and trenches.

Further, it should be noted that requirements are ARARs only when they pertain to the specific action being conducted. If, for example, a site has leaking drums, widespread soil contamination, and significant ground-water contamination, the removal action at the site might only involve actions necessary to reduce the near-term threats, such as direct contact and further deterioration of the ground

[6] Note that proposed § 300.415(e) has been deleted (see preamble section above on "Listing sites in CERCLIS," and the remaining sections in § 300.415 have been renumbered.

water; thus, the removal action might be limited to removal of the drums and surface debris and excavation of highly contaminated soil. Requirements pertaining to the cleanup of ground-water contamination would not be ARARs for that action because the removal action is not intended to address ground water; rather, requirements pertaining to the drums, surface debris, or contaminated soil may be ARARs for the specific removal action. Once the lead agency makes the determination that the requirements are ARARs for a removal, then it must determine whether compliance is practicable.

It will generally be practicable for removal actions to comply with ARARs that are consistent with the goals and focus of the removal. However, as stated above, removals are intended to be responses to near-term threats, with the ability to respond quickly when necessary; thus, ARARs that would delay rapid response when it is necessary, or cause the response to exceed removal goals, may be determined to be impracticable. Of course, even where compliance with specific ARARs is not deemed practicable, the lead agency for a removal must use its best judgment to ensure that the action taken is protective of human health and the environment within the defined objectives of the removal action.

In order to better explain how a lead agency can determine when compliance with an ARAR is practicable, the preamble to the proposed NCP included three factors for consideration: Exigencies of the situation, scope of the removal action and the statutory limits (53 FR 51410–11). Upon consideration of comments, EPA has decided to enumerate in the rule only two of those three factors as important for determining practicability: Urgency (simply renaming exigencies) of the situation, and scope of the removal action. EPA believes that statutory limits, because they relate to the authority to conduct removal actions, are easier to consider within, rather than apart from, the factor of scope of the removal action when determining whether compliance with an ARAR is practicable.

The factor of urgency of the situation relates to the need for a prompt response. In many cases, appropriate response activities must be identified and implemented quickly in order to ensure the protection of human health and the environment. For example, if leaking drums pose a danger of fire or explosion in a residential area, the drums must be addressed immediately, and it will generally be impracticable to identify and comply with all potential ARARs.

The second factor, the scope of the removal action relates to the special nature of removals in that they may be used to minimize and mitigate potential harm rather than totally eliminate it. Removals are further limited in the amount of time and Fund money that may be expended at any particular site in the absence of a statutory exemption. Again, using the example above, even though standards requiring cleanup of the lower level soil contamination would be an ARAR to that medium, they would be outside the scope of the removal action when such cleanup is not necessary for the stabilization of the site, or when it would cause an exceedance of the statutory limits and no exemption applied. Hence, such soil standards, while ARARs, would not be practicable to attain considering the exigencies of the situation. Of course, such standards may be ARARs for any remedial action that is subsequently taken at the site.

EPA disagrees with the comment that requiring PRPs to comply with ARARs to the extent practicable discourages PRPs from conducting removals because the statutory limits do not apply to non-Fund-financed actions. Although the limits apply by law to Fund-financed actions only, EPA has the discretion under CERCLA section 104(c)(1) to take removal actions that exceed those limits, in emergency situations or where the action is otherwise appropriate and consistent with the remedial action that may be taken at the site. EPA will select the appropriate remedy, even where an extensive removal action is warranted, regardless of whether the site is Fund-lead or PRP-based. The only difference is that if the site is Fund-lead, an exemption must first be invoked in order to proceed with the action. Thus, the time and dollar limitations generally will not result in PRPs performing a more extensive removal than EPA itself would conduct. That is, EPA's selection of a removal action, including what ARARs will be attained, will not be based on who will be conducting the removal.

Finally, as stated in the preamble to the proposed NCP (53 FR 51411), even if attainment of an ARAR is practicable under the factors described above, the lead agency may also consider whether one of the statutory waivers from compliance with ARARs is available for a removal action. EPA is developing guidance on the process of complying with ARARs during removal actions. EPA generally will only require documentation of ARARs for which compliance is determined to be practicable, in order not to burden OSCs with substantial paperwork requirements.

Final rule: Proposed § 300.415(j) (renumbered as final § 300.415(i)) is revised as follows:

1. The following has been added to identify factors that are appropriate for consideration in determining the practicability of complying with ARARs:

In determining whether compliance with ARARs is practicable, the lead agency may consider appropriate factors, including the following:

(1) The urgency of the situation; and

(2) The scope of the removal action to be conducted.

2. The reference to advisories, criteria or guidance has been modified (see preamble section below on TBCs).

3. The description of ARARs has been reworded (see preamble section below on the definition of "applicable.")

Name: Sections 300.5, 300.415(g) and (h), 300.500(a), 300.505 and 300.525(a). State involvement in removal actions.

Existing rule: Sections 300.61 and 300.62 of the current NCP encourage states to undertake actions authorized under subpart F. Such actions include removal and remedial actions pursuant to CERCLA section 104(a)(1). The regulation notes further that CERCLA section 104(d)(1) authorizes the federal government to enter into contracts or cooperative agreements with the state to take Fund-financed response actions authorized under CERCLA, when the federal government determines that the state has the capability to undertake such actions.

Proposed rule: Proposed § 300.415(h) and (i) (renumbered as final § 300.415(g) and (h)) and § 300.525(a) would codify EPA's existing policy of entering into cooperative agreements with states to undertake Fund-financed removal actions, provided that states follow all the provisions of the NCP removal authorities. The preamble to the proposed rule suggested that non-time-critical actions are the most likely candidates for state-lead removals (53 FR 51410). Proposed § 300.510(b) provided further that facilities operated by a state or political subdivision require a minimum cost share of 50 percent of the total response costs if a remedial action is taken. Section 300.505 describes what EPA and a state may agree to in a Superfund Memorandum of Agreement (SMOA) regarding the nature and extent of interaction on EPA-lead and state-lead response. The preamble clarified that, where practicable, a SMOA may include general provisions

for interaction on removal actions (53 FR 51455). The preamble to the proposed rule described other topics for EPA/state discussion on provisions in SMOAs on removal actions (53 FR 51454-55).

Response to comments: One commenter supported the proposed revision stating that state-lead removals through a cooperative agreement would be a very positive step. The commenter argued, however, that it would be unreasonable to provide guidance that strongly encourages states to conduct such removals when no funds for conducting them are made available.

Several commenters specifically called for the delegation of the removal program to the states. One of these commenters stated that the revised NCP should include more detailed and permissive language specifically allowing for program authority to be delegated to states. According to the commenter, this would allow response-capable states to pursue program authorization from EPA through cooperative agreements rather than through single or multiple project authorizations. In addition, the commenter recommended that states which become authorized to conduct removal actions be granted funding support similar to the support that EPA provides for the Technical Assistance Team and the Emergency Response Cleanup Services, thereby allowing the state to effectively administer the duties of the lead agency during a removal action. The commenter also recommended that authorized states be allowed full reimbursement of their removal costs from the Hazardous Substances Trust Fund. Another commenter suggested allowing states to develop administrative and technical staff capable of overseeing removal actions. The commenter believed that a policy should be included in the NCP that allows for the states to hire contractors on a stand-by basis to allow for timely response to removal sites. A third commenter recommended that states be permitted by the NCP to establish predesignated OSCs/RPMs who would have the authority to use federal funds pursuant to a cooperative agreement or contract for cleanup of oil and hazardous substances under these programs.

Other commenters called for at least some expanded opportunities for state involvement in the removal program. Several commenters argued that states should be allowed to conduct more than just non-time critical removals, indicating that it would be faster and far less costly for states to conduct all types of removals. Another commenter argued that states should be afforded the opportunity to conduct removal actions under cooperative agreements unless an emergency exists that does not allow time for EPA to enter into a cooperative agreement with the state. One commenter suggested that states now have very effective Superfund programs with experienced and capable staffs. According to the commenter, some of these programs have better cleanup records than the federal program. The commenter states that EPA has failed to take full advantage of these state programs to improve the performance of the federal Superfund effort.

Several commenters requested clarification of EPA policies on state-lead removals. The commenters requested further clarification in the NCP regarding the circumstances under which states will be allowed to conduct non-time-critical removals, what criteria will be used to make decisions concerning when states will be allowed to conduct such actions, and how a state-lead removal program will be structured.

Other commenters suggested that EPA more clearly define the EPA/state relationship concerning removal actions. One of these commenters suggested that EPA should emphasize state/EPA coordination on all removal actions regardless of who is in the lead. Another commenter stated that the NCP should outline the EPA/state interaction on removal sites in the same detail as the relationship is outlined at remedial sites.

One commenter representing a state presented specific examples of how present state/EPA removal interaction is ineffective. The commenter alleged that the state had been left out of public meetings and meetings between EPA and the PRPs, that the state is not consulted on press releases, and that state comments on negotiations with PRPs are not considered by EPA. Another commenter suggested that EPA in general take into consideration state comments when conducting removal actions.

In response, EPA is committed to state involvement in the removal program and is, therefore, revising regulatory language in §§ 300.5, 300.500(a) and 300.505 regarding SMOAs to include references to removal actions. EPA believes that the SMOA can often be used to specify the areas appropriate for EPA/state interaction during removal actions. As noted in the preamble to the proposed rule, the SMOA may include: (1) The process to be followed by EPA and a state to notify each other of a determination that a removal action is necessary; (2) the procedures to be followed by EPA and a state to consult and comment upon the nature of any proposed removal action; and (3) the procedures to be followed to provide for post-removal site control for Fund-financed removals as described in § 300.415(k). A definition of "post-removal site control" has been added to § 300.5 because this term is used in several places in the NCP. If EPA and a state desire, the SMOA provisions may also include details on interaction at public meetings, negotiations with PRPs, etc. EPA wishes to emphasize, however, that the negotiations concerning EPA/state interaction during removal actions should not be allowed to interfere with or prolong the completion of the SMOA negotiations. If EPA and the state find that discussion of the provisions regarding removal actions is delaying completion of the SMOA, they should proceed with the SMOA negotiations without removal action provisions, and at a later date amend the SMOA to include these provisions.

Currently, EPA's policy is that states may conduct a non-time-critical removal action for a specific site. In response to comments, EPA considered allowing states to conduct Fund-financed time-critical and emergency removal actions as well. After careful consideration, however, EPA decided to continue its current policy of allowing only non-time-critical removal actions to be state-lead. In arriving at this decision, EPA weighed several factors concerning the nature of removal actions, and the history of the removal program. First, EPA may not obligate funds in anticipation of removal actions that may take place in the future. Therefore, states must enter into site-specific cooperative agreements (CAs) before they are allowed to undertake a removal action. In the past, EPA attempted using CAs more extensively in the removal program but found that the CA negotiating process is often long and complicated. EPA was concerned that the process could hinder timely response to releases requiring emergency or time-critical action. Second, the removal program has limited funding. Because of the necessity for ensuring adequate response capabilities on the federal level, EPA does not anticipate that additional funding will be available for states to conduct emergency and time-critical removal actions and, therefore, does not believe it would be feasible to allow states to undertake these types of response actions. For these reasons, EPA believes that its current policy of permitting states to conduct only non-time-critical removal actions allows

EPA to retain its ability to respond immediately to releases that threaten human health and the environment while simultaneously providing states a role in the removal action process.

For a state to conduct Fund-financed, non-time-critical removal actions, the state must first enter into a CA with EPA. Additionally, only removal actions that are listed on the approved or revised Superfund comprehensive accomplishments plan (SCAP) can be state-lead. The Regional Administrator (RA) evaluates a state's request to lead a Fund-financed removal action and decides on a case-by-case basis whether the action is appropriate for state-lead. When making his/her decision the RA considers: (1) The state's experience in leading activities conducted under the remedial program that are similar to the response actions required to clean up or to stabilize the release at the site under evaluation for state-lead; (2) the state's experience in responding to hazardous substance releases independent of federal involvement and funds; and (3) whether the state has prepared a state contingency plan for hazardous substance release response. For more information concerning state-lead removals see 40 CFR part 35, subpart O.

In further response to the comment on delegating authority (and transferring funds) to states, EPA notes that although authority to conduct time-critical and emergency removals is not being delegated to states, funding may be available under the Core Grant Program to assist states in developing an infrastructure for involvement and interagency coordination during removal actions. For more information concerning the Core Grant Program see 40 CFR part 35, subpart O.

Final rule: 1. Proposed §§ 300.5 (definition of SMOA), 300.500(a), 300.505(a)(3) and 300.505(d)(1) are revised to add the word "removal" before the word "pre-remedial."

2. Proposed § 300.415(h) and (i) are renumbered as § 300.415(g) and (h) and promulgated as proposed.

3. A definition for "post-removal site control" is added to § 300.5 as follows:

"Post-removal site control" means those activities that are necessary to sustain the integrity of a Fund-financed removal action following its conclusion. Post-removal site control may be a removal or remedial action under CERCLA. The term includes, without being limited to, activities such as relighting gas flares, replacing filters and collecting leachate.

4. References to "post-removal site control" have been added to the definitions in § 300.5 of "remove or removal" and "remedy or remedial action."

Section 300.425. Establishing remedial priorities.

Name: Section 300.5. Definition of National Priorities List. Section 300.425. Establishing remedial priorities.

Proposed rule: Section 300.5 included a definition of National Priorities List. Section 300.425 identified the criteria, methods, and procedures EPA uses to establish its priorities for remedial action. The proposed rule stated that although only those releases included on the NPL are eligible for Fund-financed remedial action, remedial planning activities pursuant to CERCLA section 104(b) are not considered remedial actions and are not limited to NPL sites.

Response to comments: EPA has made several changes to language on listing sites on the National Priorities List. First, EPA is revising the rule to explain more clearly which EPA authorities are limited to sites on the NPL.

In both the existing NCP (40 CFR 300.66(c)(2), 300.68(a)(1)) and the 1988 proposed revisions (§ 300.425(b)(1), 53 FR at 51502), EPA has stated that Fund money may be used for CERCLA remedial actions only for those releases that are listed on the NPL. The 1985 NCP (40 CFR 300.68(a)(1)) and the proposed revision went on to state that this limitation on the use of Fund money would not apply to "remedial planning activities pursuant to CERCLA section 104(b)," which despite the use of the word "remedial" in the name, come within the definition of "removal" actions under CERCLA section 101(23). *See* 54 FR 41002 (October 4, 1989); 52 FR 27622 (July 27, 1987); 50 FR 47927 (November 20, 1985). In the interest of clarity on this point, EPA has amended final § 300.425(b)(1) to provide that the limitation on remedial action funding to releases on the NPL would not apply to "removal actions (including remedial planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b))." This clarification is consistent with the proposed and final § 300.415(b)(1), which states that a removal action may be taken at appropriate sites regardless of inclusion on the NPL.

The proposed and final rule, at § 300.425(b)(4), also make clear that EPA may take enforcement actions at non-NPL sites. EPA also notes that it has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. (*See* 54 FR at 41009 (Oct. 4, 1989).) In particular, where a site is at an active, RCRA-permitted facility, and the owner/operator is present and has adequate financial resources to fund the entire cleanup, EPA may consider whether the use of RCRA or CERCLA authorities (or both) is most appropriate for the accomplishment of cleanup at the site. In the context of federal facility cleanups, this decision, and the cleanup plan in general, would be discussed in the Interagency Agreement (IAG) for the facility.

Second, EPA is deleting a sentence from § 300.425(b)(2) that reads: "Responsible parties shall pay for or implement response actions to the fullest extent practicable." EPA reiterates that it is EPA policy for responsible parties to pay for or implement response actions to the maximum extent practicable. EPA believes, however, that this policy is more appropriately stated in the preamble.

In addition, proposed § 300.425(c)(2) is revised to add the phrase "(not including Indian tribes)" in order to be consistent with the reference to "state" in CERCLA section 105(a)(8)(B).

Consistent with the revisions to § 300.425, EPA is also revising the proposed definition of National Priorities List in § 300.5 to clarify that EPA may allow actions other than Fund-financed actions under CERCLA to be conducted at NPL sites.

Final rule: 1. The proposed definition in § 300.5 is revised as follows:

"National Priorities List" (NPL) means the list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term evaluation and response.

2. Proposed § 300.425(b) is revised as follows:

(b) *National Priorities List.* The NPL is the list of priority releases for long-term evaluation and remedial response.

(1) Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action. Removal actions (including remedial planning activities, RI/FSs and other actions taken pursuant to CERCLA section 104(b)) are not limited to NPL sites.

(2) Inclusion of a release on the NPL does not imply that monies will be expended, nor does the rank of a release on the NPL establish the precise priorities for the allocation of Fund resources. EPA may also pursue other appropriate authorities to remedy the release, including enforcement actions under CERCLA and other laws. A site's rank on the NPL serves, along with other factors, including enforcement actions, as a basis to guide the allocation of Fund resources among releases.

3. The first sentence of proposed § 300.425(c)(2) is revised as follows: "A state (not including Indian tribes) has

designated a release as its highest priority."

Name: Section 300.425(d)(6). Construction Completion category on the National Priorities List.

Proposed rule: EPA proposed to establish a new "category" as part of the NPL—the "Construction Completion" category (see 53 FR 51415). The category would consist of: (a) Sites awaiting deletion, (b) sites awaiting deletion but for which CERCLA section 121(c) requires reviews of the remedy no less often than five years after initiation, and (c) sites undergoing long-term remedial actions (LTRAs). EPA believes the new category would communicate more clearly to the public the status of cleanup progress among sites on the National Priorities List (NPL).

EPA would shift sites into the Construction Completion category only following approval of interim or final Close Out Reports. EPA would approve the Reports only after remedies have been implemented and are operating properly. Approval of an interim Close Out Report indicates that construction of the remedy is complete, and that it is operating properly, but that the remedy must operate for a period of time before achieving cleanup levels specified in the Record of Decision (ROD) for the site. Approval of a final (including amended) Close Out Report indicates that the remedy has achieved protectiveness levels specified in the ROD(s), and that all remedial actions are complete. The proposal also indicates that EPA believes that sites requiring five-year review under § 300.430(f)(3)(v) (renumbered as final § 300.430(f)(5)(iii)(C)) may, when appropriate, be deleted from the NPL.

Response to comments: All commenters on this policy recommended adoption of the proposal to recategorize sites. One commenter disagreed with EPA's name for the new category, stating that construction at some sites in the category would not be complete. EPA disagrees with this interpretation; as explained above, for both LTRA sites and sites awaiting deletion, construction of the remedy must be complete and operating properly before it may be placed in this new category. Another commenter interpreted EPA's proposal to mean that it would create a new status code on the NPL, rather than a new category, or sub-section. EPA believes a distinct category more clearly provides remedial progress information to the public. EPA has found this to be true with regard to federal facility sites, which have been placed in a separate category of the NPL. Thus, the idea of categorizing sites on the NPL is not a new one. Indeed, the 1985 NCP specifically afforded EPA the discretion to "re-categorize" certain types of sites (see 40 CFR 300.66(c)(7)(1985)). EPA is specifically acknowledging this discretion in final § 300.425(d)(6).

The commenter stated that EPA should seek state concurrence before placing a site under the new status. EPA disagrees that it should seek formal state concurrence to recategorize sites. Recategorization is a mechanical process and does not have regulatory significance; it is merely a better method of communicating site status to the public. Moreover, EPA will recategorize sites only on the basis of approved interim or final Close Out Reports, and states will continue to be involved in remedy inspections and review or preparation of the reports. EPA will obtain state concurrence and solicit public comments before deleting sites from the NPL, pursuant to § 300.425(e).

Another commenter supported the concept of recategorizing sites, particularly those at which only operation and maintenance remains to be conducted. However, the commenter also states that such sites could appropriately be deleted entirely from the NPL. A different commenter suggested that the Construction Completion category should exclude sites requiring only operation and maintenance and that such sites should be deleted from the NPL. EPA intends that a site requiring only operation and maintenance at the time of construction completion be recategorized as a temporary measure until the process of reviewing the site for possible deletion from the NPL has been completed.

One commenter stated that proposed § 300.430(f)(3)(v) is unclear regarding whether EPA would conduct five-year reviews at sites in certain phases of response, or having certain status vis-a-vis the NPL, i.e., sites still on the NPL, deleted sites, and sites where LTRAs are underway. The commenter went on to state that, if a five-year review indicates that additional action is required at a site that has been deleted from the NPL, EPA must clarify under what authority the action is to be conducted.

EPA will conduct five-year reviews for appropriate sites after initiation of the remedial action. Thus, reviews may be conducted during phases of the remedial action, during LTRA status, and, where appropriate, after a site has been deleted from the NPL. EPA continues to develop its policy on five-year reviews, and plans to issue further guidance on these issues. EPA has discretionary authority to take further action at a deleted site if a review indicates that the remedy is no longer protective. CERCLA section 105(e) states that EPA may restore the site to the NPL without re-applying the Hazard Ranking System (HRS), and CERCLA section 121(c) provides that EPA may take or require action, if appropriate, following a review. Section 300.425(e)(3) again states this point, and further states that all releases deleted from the NPL are eligible for Fund-financed remedial actions should future conditions warrant such actions.

Another commenter stated that "five-year review" sites should be deleted from the NPL rather than placed in the Construction Completion category. In response, at the time of proposal, EPA announced its view that five-year review sites may be considered "sites awaiting deletion," i.e., deletion candidates. Upon consideration of the issue, EPA believes that it may generally not be appropriate to delete any of these sites before performing at least one review after completion of the remedial action. This is consistent with a recommendation of the Administrator's 90-day study of the Superfund Program, "A Management Review of the Superfund Program," and with OSWER policy.[7]

This position reflects an EPA policy decision that in most cases where hazardous substances remain after the completion of remedial action, it is appropriate to act more slowly on deleting the sites from the NPL, consistent with the concern evidenced by Congress in specifically mandating review at least every five years at such sites. This policy is also consistent with the limited purpose of the NPL as an informational list of sites at which CERCLA attention is appropriate (53 FR at 51415–16); the continued inclusion of the site on the NPL does not mean that response action will be taken at the site. *See* 48 FR 40658, 40659 (Sept. 8, 1983) (quoting CERCLA legislative history).

This is not inconsistent with the long-standing provision on deletion in the 1985 NCP, which provides that "sites

[7] *See* "Performance of Five-Year Reviews and Their Relationship to the Deletion of Sites from the National Priorities List (NPL) (Superfund Management Review: Recommendation No. 2), Memorandum from Jonathan Z. Cannon, Acting Assistant Administrator, OSWER, to Regional Administrators (October 30, 1989); and "Update to the 'Procedures for Completion and Deletion of National Priorities List Sites'—Guidance Document Regarding the Performance of Five-Year Reviews (Superfund Management Review: Recommendation No. 2)," Memorandum from Henry L. Longest II, Director, Office of Emergency and Remedial Response, to Regional Waste Management Division Directors (OSWER Directive No. 9320.2–3B, December 29, 1989).

may be deleted from or *recategorized on* the NPL *where no further response is appropriate.*" 40 CFR 300.66(c)(7)(1985) (emphasis added). Thus even if no further action is planned at a five-year review site, recategorization is as appropriate a means of recognizing that status as is deletion. Further, deletion will be considered as part of the review.

EPA also does not view this policy for five-year review sites as inconsistent with EPA policy on deletions. The criteria for deletion in § 300.425(e) provide that "releases may be deleted from * * * the NPL where no further response is appropriate," thereby providing considerable flexibility to the Administrator. Further, the rule provides that EPA shall not delete a site from the NPL until the state in which the release was located has concurred, and the public has been afforded an opportunity to comment on the proposed deletion. Thus, the decision to delete is not an automatic one by EPA, but rather is decided as part of a formal public process. It is similarly important to note that a "site awaiting deletion" in the new Construction Completion category will not necessarily be deleted automatically upon recategorization.

One commenter stated that the first five-year review should not occur until five years after the operation and maintenance phase of the response action is complete. EPA disagrees with this comment; some sites will require operation and maintenance indefinitely, and thus adoption of such an approach would result in no five-year review. Further, CERCLA section 121(c) calls for reviews within five years of the "initiation"—not completion—of the remedial action. EPA is currently developing a policy regarding timing and conduct of five-year reviews.

Another commenter, though strongly favoring the creation of a new NPL category, recommended that EPA create two new categories: "remedy in long-term operation and maintenance", and "sites awaiting delisting". The commenter asserted that the public would understand such terms more easily than "Construction Completion". EPA disagrees with this comment because the phrase "long-term operation and maintenance" may cause more confusion for the public. EPA believes the commenter inadvertently confused two concepts: "operation and maintenance" and "LTRA." Many NPL sites will require operation and maintenance following deletion from the NPL in order to maintain the protectiveness of the remedy (e.g. cutting grass or maintaining monitoring wells), even though specified cleanup standards have been achieved and criteria for deletion have been met.

An LTRA, on the other hand, is an ongoing remedial action which has not yet achieved the cleanup standards in the ROD. It too may require operation and maintenance after achieving these standards, and after deletion of the site from the NPL. EPA will place an LTRA site in the Construction Completion category based on approval of an interim Close Out Report. EPA will finalize or amend the report when the remedy has achieved cleanup levels specified in the ROD(s). The LTRA will then be categorized on the NPL as either a site awaiting deletion or a five-year review site.

To minimize public confusion and administrative burden, EPA will create at present only one new category. However, EPA plans to denote in the category whether a site is: (a) An LTRA, (b) a site awaiting deletion, or (c) a "five-year review" site awaiting review and/or deletion. (Note that LTRA sites may be placed in the five-year review category upon attainment of the final remediation goals.)

Final rule: Proposed § 300.425 is revised as follows:

1. A new section has been added to the final rule, § 300.425(d)(6), to reflect EPA's long-standing discretion to establish categories of sites on the NPL: "Releases may be categorized on the NPL when deemed appropriate by EPA."

2. In § 300.425(e)(2), the timeframe for state review of notices of intent to delete has been changed to 30 working days (see preamble to § 300.515(h)(3), "State review of EPA-lead documents)."

Section 300.430. Remedial Investigation/Feasibility Study and Selection of Remedy

Introduction. Today EPA is promulgating revisions to the remedial investigation (RI)/feasibility study (FS) and selection of remedy sections of the 1985 NCP. While the framework of this portion of the regulation remains largely as proposed on December 21, 1988, significant changes have been made to respond to comments received and to articulate more clearly the remedy selection goal, expectations and process EPA intends to employ in implementing the Superfund program.

The remedy selection process promulgated today is founded on CERCLA's overarching mandate to protect human health and the environment. This approach emphasizes solutions that can ensure reliable protection over time. Today's rule promotes the aggressive use of treatment technologies to achieve reliable remedies while acknowledging the practical limitations on the use of treatment.

In this approach, EPA seeks to encompass the many statutory mandates while emphasizing the statutory preference for permanent solutions and use of treatment technologies. The approach is tempered by practicability to ensure that the remedies selected are appropriate and that the program responds to the threats posed by the worst toxic waste sites across the nation. Today's requirements for selecting remedies further provide a uniform framework to promote consistency in decision-making.

Today's regulation establishes a process that allows consideration and balancing of site-specific factors in remedy selection. EPA has used this type of decision-making process to select CERCLA remedial actions since the inception of the Superfund program. Revisions contained in today's rule modify the approach by incorporating the new requirements of the 1986 amendments to CERCLA into existing procedures. This approach relies on a process that examines site characteristics and alternative approaches for remediating site problems. This process evaluates remedial alternatives using nine criteria which are based on CERCLA's mandates to determine advantages and disadvantages of the alternatives, thus identifying site-specific trade-offs between options. These trade-offs are balanced in a risk management judgment as to which alternative provides the most appropriate solution for the site problem.

In response to comments requesting further clarification and structure in the remedy selection process, EPA has made changes to provide better guidance on the types of remedies that EPA expects to result from the process; to add more structure to the process by specifying the functional categories of the nine criteria in the rule; and to indicate which criteria are to be emphasized in the balancing process. EPA believes this process ensures the selection of remedial actions that fulfill statutory requirements to protect human health and the environment, comply with ARARs, be cost-effective, and utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. Further, this process considers the full range of factors pertinent to remedy selection and provides the flexibility necessary and appropriate to ensure that remedial actions selected are sensible, reliable solutions for identified site problems.

The approach promulgated in today's rule was supported by numerous commenters. Several expressed the view that alternate remedy selection methods presented in the proposal were inappropriate or inferior to the promulgated approach. Some commenters noted that the promulgated approach includes important criteria that the other approaches do not.

Two distinct groups of commenters who have sharply contrasting views on the goal of the Superfund program opposed the proposed approach that is promulgated today. One group of commenters believes EPA should establish a remedy selection process that adopts as its goal full site restoration and treatment of all material to the extent technically feasible. This approach would limit consideration of cost to the selection of the less expensive of comparably effective treatment technologies. Under this approach, methods of protection that rely on control of exposure (i.e., engineering controls such as capping or other containment systems and institutional controls) could only be used when treatment was technically infeasible. Several of these commenters expressed the view that remedy selection should be more structured and supported either the sequential decision-making approach or the point of departure strategy for remedy selection presented in the proposal.

The other group of commenters critical of the proposed approach believes the Superfund program should seek to achieve protection primarily by controlling exposure to current risks through use of engineering and institutional controls. Treatment would be used only if other controls are not expected to be reliable or greater protection can be achieved through treatment without a significant increase in cost. These commenters generally supported the use of a cost-effectiveness screen in site-specific balancing or the site stabilization strategy for remedy selection presented in the proposal.

The approach EPA promulgates today sets a course for the Superfund program between the two ends of the spectrum reflected in these comments. EPA is establishing as its goal remedial actions that protect human health and the environment, that maintain protection over time, and that minimize untreated waste.

This goal reflects CERCLA's preference for achieving protection through the use of treatment technologies that destroy or reduce the inherent hazards posed by wastes and result in remedies that are highly reliable over time. The purpose of treatment in the Superfund program is to significantly reduce the toxicity and/or mobility of the contaminants posing a significant threat (i.e., "contaminants of concern") wherever practicable to reduce the need for long-term management of hazardous material. EPA will seek to reduce hazards (i.e., toxicity and/or mobility) to levels that ensure that contaminated material remaining on-site can be reliably controlled over time through engineering and/or institutional controls.

Further, the Superfund program also uses as a guideline for effective treatment the range of 90 to 99 percent reduction in the concentration or mobility of contaminants of concern (see preamble discussion below on "reduction of toxicity, mobility or volume" under § 300.430(e)(9)). Although it is most important that treatment technologies achieve the remediation goals developed specifically for each site (which may be greater or less than the treatment guidelines), EPA believes that, in general, treatment technologies or treatment trains that cannot achieve this level of performance on a consistent basis are not sufficiently effective and generally will not be appropriate. EPA believes this 90 to 99 percent reduction treatment guideline allows for the use of an array of technologies and will not preclude the introduction of innovative technologies into the range of effective technologies. EPA believes the remedy selection process should encourage diversification of the range of treatment technologies available for addressing hazardous substances so that the program continues to find more effective, safer, and less costly ways of reducing the hazards posed by the various and often complex materials encountered at Superfund sites.

Along with the program goal, EPA is establishing expectations regarding the extent to which treatment is likely to be practicable for certain types of site situations and problems frequently encountered by the Superfund program. These expectations indicate that EPA intends to place priority on treating materials that pose the principal threats at a given site. The expectations also acknowledge that certain technological, economic and implementation factors may make treatment impracticable for certain types of site problems. Experience has shown that in such situations, remedies that rely on control of exposure through engineering and/or institutional controls to provide protection generally will be appropriate.

The goal and expectations should be considered when making site-specific determinations of the maximum extent to which permanent solutions and treatment can be practicably utilized in a cost-effective manner. Another important part of this framework is the range of alternatives EPA will consider as possible cleanup options. This range reflects the principle that protection of human health and the environment can be achieved through a variety of methods, including treatment, engineering and/or institutional controls and through combinations of such methods. Today's rule reflects the statutory preference for achieving protection of human health and the environment through treatment by emphasizing the development of alternatives that employ treatment as their principal element.

This framework for developing alternatives is one of the major changes to the 1985 NCP which called for the development of alternatives that do not attain, attain, and exceed ARARs, as well as an off-site and no action alternative. The 1985 framework was premised on the implicit assumptions that alternatives would share the same ARARs and that the ability to meet or exceed those requirements corresponded to different levels of protection. Program experience has shown that while alternatives may share chemical- and location-specific ARARs, generally each alternative will have a unique set of action-specific requirements. Additionally, it is now clear that ARARs do not by themselves necessarily define protectiveness. First, ARARs do not exist for every contaminant, location, or waste management activity that may be encountered or undertaken at a CERCLA site. Second, in those circumstances where multiple contaminants are present, the cumulative risks posed by the potential additivity of the constituents may require cleanup levels for individual contaminants to be more stringent than ARARs to ensure protection at the site. Finally, determining whether a remedy is protective of human health and the environment also requires consideration of the acceptability of any short-term or cross-media impacts that may be posed during implementation of a remedial action.

Another major revision to the 1985 NCP promulgated today is the establishment of nine criteria used for the detailed analysis of alternatives that serve as the basis for the remedy selection decision. These nine criteria encompass statutory requirements (specifically the long-term effectiveness factors that must be assessed under CERCLA section 121(b)(1)(A–G)), and include other technical and policy

considerations that have proven to be important for selecting among remedial alternatives. The various criteria have been categorized according to their functions in the remedy selection process as threshold, balancing and modifying criteria. This designation demonstrates that protection of human health and the environment will not be compromised by other factors, including cost. Revisions also clarify that trade-offs among alternatives with respect to the long-term effectiveness and permanence they afford and the reductions in toxicity, mobility, or volume they achieve through treatment are the most important considerations in the balancing step by which the remedy is selected.

Name: Section 300.430(a)(1). Program goal, program management principles and expectations.

Proposed rule: The preamble to the proposed rule described management principles which EPA intends to apply to the Superfund program and certain expectations regarding the types of remedies that EPA has found to be most appropriate for different types of waste (53 FR 51422). These expectations were developed based on both the preferences and mandates expressed in CERCLA section 121 as well as EPA's practical experience in trying to meet those preferences and mandates. The preamble declared EPA's intent to focus available resources on selection of protective remedies that provide reliable, effective response over the long-term. The expectations envision treatment of the principal threats posed by a site, with priority placed on treating waste that is highly toxic, highly mobile, or liquid; and containment of waste contaminated at low levels, waste technically infeasible to treat and large volumes of waste.

Also included in the expectations was the concept that contaminated ground waters will be returned to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. The preamble explained that institutional controls could be used, as appropriate, to prevent exposures to releases of hazardous substances during remedy implementation and to supplement engineering controls. The preamble also stated that the use of institutional controls should not substitute for active response measures as the sole remedy unless such active measures are determined not to be practicable.

The preamble also described three program management principles developed from program experience to promote the efficiency and effectiveness of the remedial response process. The preamble stated EPA's intent to balance the desire of definitive site characterization and alternatives analysis with a bias for initiating response actions necessary or appropriate to eliminate, reduce or control hazards posed by a site as early as possible. The preamble emphasized the principle of streamlining, which EPA would apply in managing the Superfund program as a whole and in conducting individual remedial action projects. The preamble explained that the bias for action and principle of streamlining may appropriately be considered throughout the life of a remedial project but begin to be evaluated as site management planning is initiated. Site management planning is a dynamic, ongoing and informal strategic planning effort that generally starts as soon as sites are proposed for inclusion on the NPL and continues through the RI/FS and remedy selection process and the remedial design and remedial action phases, to deletion from the NPL.

Response to comments: EPA has placed the program goal, expectations, and management principles into the rule in response to the strong support these principles received from commenters. By including these in the rule, EPA believes the regulation better articulates the objectives of the program. EPA also believes that placing them in the rule itself will ensure that the principles and expectations, although not binding, will remain a part of the codified rule and will not merely be detached preamble language. This will facilitate their use and identification by implementing officials and the public. Specific comments and changes to the rule are discussed below.

1. *Program goal.* EPA has added a statement of the national goal of the remedy selection process to the final regulation. The goal as expressed in today's rule is to select remedies that will be protective of human health and the environment, that will maintain protection over time and that will minimize untreated waste. Although EPA received no comment specifically addressing a national remedy selection goal, comments on other issues reflected different interpretations of statutory mandates. EPA is articulating a goal in order to reflect the effort of the Superfund program to select remedies that are protective of human health and the environment in the long-term and minimize untreated waste. The concept of this goal is to be maintained throughout the remedy selection process. The evaluation and remedy selection performed using the nine criteria determine the extent to which this goal is satisfied and the extent to which permanent solutions and treatment are practicable.

2. *Expectations.* EPA has decided to add to the final regulation the program expectations which appeared only in the preamble to the proposed rule. EPA takes this action in response to numerous comments expressing strong support for the principles underlying the expectations and requesting EPA to incorporate the expectations into the regulation. EPA has placed the expectations in the rule to inform the public of the types of remedies that EPA has achieved, and anticipates achieving, for certain types of sites. These expectations are not, however, binding requirements. Rather, the expectations are intended to share collected experience to guide those developing cleanup options. For example, EPA's experience that highly mobile waste generally requires treatment may help to guide EPA to focus the detailed analysis on treatment alternatives, as compared to containment alternatives. In effect, the expectations allow implementing officials to profit from prior EPA learning and thereby avoid duplicative or unnecessary efforts. However, the fact that a proposed remedy may be consistent with the expectations does not constitute sufficient grounds for the selection of that remedial alternative. All remedy selection decisions must be based on an analysis using the nine criteria.

Today's rule also contains an expectation on the use of innovative technologies that EPA developed in response to numerous comments calling for increased emphasis on the diversification of treatment technologies used in site remediation. EPA supports such diversification and expects that it will generally be appropriate to investigate remedial alternatives that use innovative technologies when such technology offers the potential for comparable or superior treatment performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated technologies.

Several commenters focused on the need for flexibility and discretion in complying with the various mandates of CERCLA. These commenters supported the expectations discussed by EPA in the preamble to the proposed rule as being consistent with these needs. EPA received the greatest support for the expectations concerning the use of treatment technologies.

EPA expects that treatment will be the preferred means by which to address the principal threats posed by a site, wherever practicable. Principal threats are characterized as waste that cannot be reliably controlled in place, such as liquids, highly mobile materials (e.g., solvents), and high concentrations of toxic compounds (e.g., several orders of magnitude above levels that allow for unrestricted use and unlimited exposure). Treatment is less likely to be practicable when sites have large volumes of low concentrations of material, or when the waste is very difficult to handle and treat (e.g., mixed waste of widely varying composition). Specific situations that may limit the use of treatment include sites where: (1) Treatment technologies are not technically feasible or are not available within a reasonable timeframe; (2) the extraordinary size or complexity of a site makes implementation of treatment technologies impracticable; (3) implementation of a treatment-based remedy would result in greater overall risk to human health and the environment due to risks posed to workers or the surrounding community during implementation; or (4) severe effects across environmental media resulting from implementation would occur.

In addition, commenters agreed with EPA that solutions often will involve a combination of methods of providing protection, including treatment and engineering controls and institutional controls. One commenter stated his belief that these expectations embody the extent to which treatment can practicably be utilized in a cost-effective manner on a site-specific basis.

Some commenters concluded that the presence of the expectations in the regulation would enhance private party participation in cleanups by relieving the burden of persuading EPA in each situation that such expectations, or remedies consistent with the expectations, are reasonable and in compliance with CERCLA.

Another commenter, while supporting the expectations, expressed concern that the regulation as proposed would not adequately ensure that the expectations would be achieved. EPA has concluded that the expectations will be of the most use if maintained as general principles to assist in flexible, site-specific decision-making. The expectations may not be appropriate in all cases. By stating "expectations" rather than issuing strict rules, EPA believes that critical flexibility can be retained in the remedy selection process.

This commenter and one other urged the addition of an expectation that treatment residuals and contaminated soils near health-based levels will be controlled through containment rather than treatment. The two commenters recommended language expressing their views. Although EPA generally concurs with the suggested expectation, EPA has not added this specific expectation to the rule. EPA believes the expectations in today's rule generally address the types of waste mentioned by this commenter.

One commenter urged elimination of the expectation that treatment is less likely to be practicable where sites have large volumes of low concentrations of material, or where the waste is very difficult to handle and treat. This commenter argued that the expectations combined with the program management principle of streamlining could be used to avoid studying alternatives in detail and could provide industries with significant incentives to ignore the "overarching mandate" to protect human health and the environment. In response, EPA does not intend or believe that the expectations will be used to ignore practicable, protective alternatives. In any event, EPA is required by statute to select protective remedies, which may include those that involve treatment (preferred) and those that do not.

In essence, EPA interprets this commenter's concern to be that remedies that do not employ treatment cannot be protective of human health and the environment. Today EPA confirms the statement in the preamble to the proposal that the overarching mandate of the Superfund program is to protect human health and the environment from the current and potential threats posed by uncontrolled hazardous waste sites. This mandate applies to all remedial actions and cannot be waived. Consistent with the program expectations, the mandate for remedies that protect human health and the environment can be fulfilled through a variety or combination of means. These means include the recycling or the destruction, detoxification, or immobilization of contaminants through the application of treatment technologies. Protection can also be provided in some cases by controlling exposure to contaminants through engineering controls (such as containment) and/or institutional controls which prevent access to contaminated areas. However, consistent with CERCLA, treatment remains the preferred method of attaining protectiveness, wherever practicable.

3. *Management principles.* Many commenters urged greater emphasis on the program management principles of a bias for action and streamlining that appeared in the preamble to the proposed rule. These commenters generally believe application of these principles would expedite cleanups and maximize reductions in risks to human health and the environment.

Many commenters advocated applying the streamlining principle to screen unnecessary/duplicative/impracticable remedial action alternatives and to ensure that the detail of the RI/FS for a site is commensurate with the overall risk posed by the site. Several commenters stated that an application of the bias for action principle would encourage early action to prevent further migration of contamination pending the completed remedial action. Consistent with this principle, a commenter suggested revising the first sentence of § 300.430(a) to state that the purpose of the remedial action process is to reduce risk "as soon as site data and information make it possible to do so." EPA agrees with this recommendation and has added this language in a new second sentence in § 300.430(a).

EPA has incorporated the program management principles into today's rule in response to the supportive comments received. EPA believes placement of these principles into today's rule promotes making sites safer and cleaner as soon as possible, controlling acute threats, and addressing the worst problems first.

One commenter argued that EPA lacks the requisite statutory authority to promulgate principles such as a bias for action. In response, EPA was given considerable discretion in CERCLA section 104(a)(1) to decide what action to take in response to releases of hazardous substances. In the NCP, EPA has set out provisions for taking various types of removal and remedial actions. Thus, it is clearly within EPA's discretion to decide how to balance the need for prompt, early actions, against the need for definitive site characterization. The bias for prompt action is wholly consistent with Congress' concern that CERCLA sites be addressed in an expeditious manner. Indeed, in CERCLA section 121(d)(4)(A), Congress specifically contemplated early or interim actions, by allowing EPA to waive ARARs in such cases. Further, a bias for action is consistent with EPA's long-standing policy of responding by distinct operable units at

sites as appropriate, rather than waiting to take one consolidated response action. The 1985 NCP originally codified this policy that remedial actions may be staged through the use of operable units.

EPA received comments urging the Agency to strengthen its commitment to early site action through expanded use of removal actions at NPL sites without foreclosing more extensive remedial actions. In response, EPA encourages the taking of early actions, under removal or remedial authority, to abate the immediate threat to human health and the environment. Early actions using remedial authorities are initiated as operable units. In deciding between using removal and remedial authorities, the lead agency should consider the following: (i) The criteria and requirements for taking removal actions in today's rule; (ii) the statutory limitations on removal actions and the criteria for waiving those limitations; (iii) the availability of resources; and (iv) the urgency of the site problem.

EPA expects to take early action at sites where appropriate, and to remediate sites in phases using operable units as early actions to eliminate, reduce or control the hazards posed by a site or to expedite the completion of total site cleanup. In deciding whether to initiate early actions, EPA must balance the desire to definitively characterize site risks and analyze alternative remedial approaches for addressing those threats in great detail with the desire to implement protective measures quickly. Consistent with today's management principles, EPA intends to perform this balancing with a bias for initiating response actions necessary or appropriate to eliminate, reduce, or control hazards posed by a site as early as possible. EPA promotes the responsiveness and efficiency of the Superfund program by encouraging action prior to or concurrent with conduct of an RI/FS as information is sufficient to support remedy selection. These actions may be taken under removal or remedial authorities, as appropriate.

To implement an early action under remedial authority, an operable unit for which an interim action is appropriate is identified. Data sufficient to support the interim action decision is extracted from the ongoing RI/FS that is underway for the site or final operable unit and an appropriate set of alternatives is evaluated. Few alternatives, and in some cases perhaps only one, should be developed for interim actions. A completed baseline risk assessment generally will not be available or necessary to justify an interim action. Qualitative risk information should be organized that demonstrates that the action is necessary to stabilize the site, prevent further degradation, or achieve significant risk reduction quickly. Supporting data, including risk information, and the alternatives analysis can be documented in a focused RI/FS. However, in cases where the relevant data can be summarized briefly and the alternatives are few and straightforward, it may be adequate and more appropriate to document this supporting information in the proposed plan that is issued for public comment. This information should also be summarized in the ROD. While the documentation of interim action decisions may be more streamlined than for final actions, all public, state, and natural resource trustee participation procedures specified elsewhere in this rule must be followed for such actions.

Several commenters endorsed placing the expectations and management principles into the rule to avoid collection of unnecessary data and evaluation of too wide a range of alternatives. Without providing a specific example, a commenter noted that many past Superfund cleanups have experienced the opposite of a bias for action by including unnecessary and costly data collection and report preparation without reaching conclusions on the recommended site remediation.

EPA agrees that site-specific data needs, the evaluation of alternatives and documentation of the selected remedy should reflect the scope and complexity of the site problems being addressed. This principle, derived from the streamlining principle discussed in the preamble to the proposal, has been incorporated into today's rule. The goal, expectations, and management principles incorporated into the rule, promote the tailoring of investigatory actions to specific site needs.

On a project-specific basis, recommendations to ensure that the RI/FS and remedy selection process is conducted as effectively and efficiently as possible include:

1. Focusing the remedial analysis to collect only additional data needed to develop and evaluate alternatives and to support design.

2. Focusing the alternative development and screening step to identify an appropriate number of potentially effective and implementable alternatives to be analyzed in detail. Typically, a limited number of alternatives will be evaluated that are focused to the scope of the response action planned.

3. Tailoring the level of detail of the analysis of the nine evaluation criteria (see below) to the scope and complexity of the action. The analysis for an operable unit may well be less rigorous than that for a comprehensive remedial action designed to address all site problems.

4. Tailoring selection and documentation of the remedy based on the limited scope or complexity of the site problem and remedy.

5. Accelerating contracting procedures and collecting samples necessary for remedial design during the public comment period.

Although the level of effort and extent of analysis required for the RI/FS will vary on a site-specific basis, the procedures for remedy selection do not vary by site. The lead agency is responsible for meeting procedural requirements, including support agency participation, soliciting public comment, developing an administrative record, and preparing a record of decision.

A more streamlined analysis during an RI/FS may be particularly appropriate in the following circumstances:

1. Site problems are straightforward such that it would be inappropriate to develop a full range of alternatives. For example, site problems may only involve a single group of chemicals that can only be addressed in a limited number of ways, or site characteristics (e.g., fractured bedrock) may be such that available options are limited. To the extent that obvious, straightforward problems exist, they may create opportunities to take actions quickly that will afford significant risk reduction.

2. The need for prompt action to bring the site under initial control outweighs the need to examine all potentially appropriate alternatives.

3. ARARs, guidance, or program precedent indicate a limited range of appropriate response alternatives (e.g., PCB standards for contaminated soils, Superfund Drum and Tank Guidance, Best Demonstrated Available Technology (BDAT) requirements).

4. Many alternatives are clearly impracticable for a site from the outset due to severe implementability problems or prohibitive costs (e.g., complete treatment of an entire large municipal landfill) and need not be studied in detail.

5. No further action or extremely limited action will be required to ensure protection of human health and the environment over time. This situation will most often occur where a removal measure previously has been taken.

Comments varied in their support for the proposed formalization of the operable unit concept. Some commenters encouraged EPA to make full use of the operable unit concept because it could prevent the worsening of some site problems. Other commenters argued against the use of operable units, stating that Congress intended cleanups to focus on sites, not on artificial subdivisions of sites.

The 1985 NCP originally codified the concept that remedial actions may be staged through the use of operable units (former NCP § 300.68(c)). Operable units are discrete actions that comprise incremental steps toward the final remedy. Although EPA agrees that total site remediation is the ultimate objective, often it is necessary and appropriate, particularly for complex sites, to divide the site or site problems for effective site management and early action. Operable units may be actions that completely address a geographical portion of a site or a specific site problem (e.g., drums and tanks, contaminated ground water) or the entire site. They may include interim actions (e.g., pumping and treating of ground water to retard plume migration) that must be followed by subsequent actions which fully address the scope of the problem (e.g., final ground water operable unit that defines the remediation level and restoration timeframe). Such operable units may be taken in response to a pressing problem that will worsen if not addressed, or because there is an opportunity to undertake a limited action that will achieve significant risk reduction quickly. Consistent with the bias for action principle in today's rule, EPA will implement remedial actions in phases as appropriate using operable units to effectively manage site problems or expedite the reduction of risk posed by the site.

One commenter perceived operable units as a source of inefficiency. This commenter criticized the extended investigative activities associated with the production of multiple and overlapping RI/FSs on operable units for a single site. The commenter advocated completion of RI/FSs within eighteen months, absent unusual conditions, and implementing operable units only where necessary to reduce an immediate risk to human health and the environment. This latter point was supported by another commenter who feared that use of an operable unit may provide a false impression that the project is progressing rapidly and may result in greater cost due to duplication of work.

In response, EPA has established as a matter of policy the goal of completing RI/FSs (i.e., through ROD signature) generally within 24 months after initiation. EPA agrees that duplication of efforts on RI/FSs should be avoided. However, EPA supports the operable unit concept as an efficient method of achieving safer and cleaner sites more quickly while striving to implement total site cleanups. Although the selection of each operable unit must be supported with sufficient site data and alternatives analyses, EPA allows the ROD for the operable unit to use data and analyses collected from any RI/FS performed for the site. No duplication of investigatory or analytical efforts should occur when selecting an operable unit for a site.

Although supporting the operable unit concept, one commenter argued that unless EPA alleviates the administrative burdens placed on an operable unit, no bias for action will be realized. Another commenter requested clarification of the procedures required to support the initiation of action prior to completion of the RI/FS for the entire site. This commenter cautioned EPA that encouragement of early action could result in actions being taken without a proper understanding of the site. According to a different commenter, application of the streamlining principle could result in additional and unnecessary costs to potential responsible parties by accelerating contracting procedures and collecting samples necessary for remedial design during the public comment period on the RI/FS and proposed plan. This commenter feared that the samples taken before remedy selection may prove irrelevant to the final selected remedy.

Similarly, some commenters requested guidance on operable units and more specificity on implementing the streamlining concept. Some commenters suggested phased RI/FSs and limiting the collection of data. One commenter added that a properly implemented streamlining approach could result in a more focused RI/FS and would minimize the collection of unnecessary data. This commenter cautioned, however, that poorly implemented streamlining could result in insufficient data upon which to base remedy selection, shortened time frames for settlement discussions, or actions that are inconsistent with later remedial actions. In addition, another commenter noted that documentation for the remedial action must be sufficient to support a legal challenge.

EPA acknowledges that the program management principles in today's rule are neither binding nor appropriate in every case; they must be applied as appropriate. The streamlining principle supports data collection and alternatives analyses commensurate with the scope and complexity of the site problem being addressed. The principles focus site investigations and alternatives analyses while maintaining the requirement that sufficient information be obtained for sound decision-making. The ROD for an interim remedy implemented as an operable unit does not necessarily require a separate RI/FS but instead can summarize data collected to date that supports that decision. This procedure provides an adequate basis on which to select an interim remedy and thus safeguards against taking premature action and avoids duplication among RI/FSs performed for the site. For guidance on documenting remedial action decisions, including operable units, see the Interim Final Guidance on Preparing Superfund Decision Documents (June 1989, OSWER Directive 9355.3-02).

Some commenters focused on interim actions, implemented as operable units. These commenters stressed the important role of interim action operable units in furthering the bias for action. According to these commenters, EPA's bias for action should be codified in the regulation to communicate that interim measures may be a legitimate component of the remedy selection process. Another commenter agreed th greater emphasis is needed on the importance of interim measures and added that these interim measures should be consistent with the remedia solution likely to be selected.

EPA encourages the implementation of interim action operable units, as appropriate, to prevent exposure or control risks posed by a site. Further actions will be taken at the site, as appropriate, to eliminate or reduce the risks posed. EPA is adding to today's rule a statement to clarify that operable units, including interim action operable units, must neither be inconsistent with nor preclude implementation of the expected final remedy.

One commenter supported the use of interim measures, when appropriate, and argued that the implementation of these measures should not be made contingent on the selection of a final remedy. According to this commenter, the RI/FS process should consider the interim action as one of the possible remedial alternatives to achieve the long-term site goals. Similarly, another commenter stated that it strongly believes that EPA should use its available funds to achieve cleanup at

the greatest number of sites, thereby saving resources and reducing overall risks, rather than trying to attain extremely low levels of risk at a smaller number of sites.

While the bias for action promotes multiple actions of limited scale, the program's ultimate goal continues to be to implement final remedies at sites. The scoping section of today's rule has been amended to make clear that the lead agency shall conduct strategic planning to identify the optimal set and sequence of actions necessary to address the site problems. Such actions may include, as appropriate, removal actions, interim actions and other types of operable units. Site management planning is a dynamic, ongoing, and informal strategic planning effort that generally starts as soon as sites are proposed for inclusion on the NPL and continues through the RI/FS and remedy selection process and the remedial design and remedial action phases, to deletion from the NPL.

This strategic planning activity is the means by which the lead and support agencies determine the types of actions and/or analyses necessary or appropriate at a given site and the optimal timing of those actions. At the RI/FS stage, this effort involves review of existing site information, consideration of current and potential risks the site poses to human health and the environment, an assessment of future data needs, understanding of inherent uncertainties in the process, priorities among site problems and the program as a whole, and prior program experience. The focus of the strategic planning is on taking action at the site as early as site data and information make it possible to do so.

Final rule: Today's rule includes at § 300.430(a)(1) EPA's goal for remedial actions to protect human health and the environment, maintain that protection over time, and minimize the amount of untreated waste. In addition, the rule also sets out expectations regarding the extent to which treatment is likely to be practicable for certain types of situations and problems frequently encountered by the Superfund program. These expectations place priority on treating materials that pose the principal threats at a given site. The expectations also acknowledge that certain technological, economic, and implementation factors make treatment impracticable for certain types of site problems and that other types of controls may be most effective in these situations. The bias for action and streamlining principles are also printed in the rule.

Name: Section 300.430(a)(1). Use of institutional controls.

Proposed rule: Proposed § 300.430(e)(3)(ii) directed that, as appropriate, one or more alternatives shall be developed that are based on engineering controls, such as containment that prevents exposure to hazardous substances, and, as necessary, institutional controls, which limit human activities at or near facilities, to protect health and environment and assure continued effectiveness of response. The preamble to the proposed rule gave "expectations" for remedies, explaining that institutional controls may be used as a supplement to engineering controls over time but should not substitute for active response measures as the sole remedy unless active response measures are not practicable, as determined based on the balancing of the trade-offs among alternatives that is conducted during the selection of the remedy. (53 FR 51423).

Response to comments: Several commenters supported the proposal as is, pointing out that there are situations where institutional controls can be a primary component of remedial action either because treatment is not practicable (as for large volumes of low-toxicity waste) or because natural attenuation will restore a resource in the same time as active remediation.

Several other commenters disagreed with the proposal because they believe that institutional controls are not reliable and are not permitted under the statute as active, permanent remedies, except under limited circumstances. One commenter maintained that institutional controls should never be used except as an interim measure. Another commenter felt that use of institutional controls as the sole remedy could lead to institutionalized pollution, and should only be used if state ARARs are not violated or cleanup is not feasible. Similarly, one commenter feared that the proposal could lead to well restriction areas or the like; the commenter also asserted that only state or local governments, not EPA, have the authority to restrict water use.

EPA agrees that institutional controls should not substitute for more active response measures that actually reduce, minimize, or eliminate contamination unless such measures are not practicable, as determined by the remedy selection criteria. Examples of institutional controls, which generally limit human activities at or near facilities where hazardous substances, pollutants, or contaminants exist or will remain on-site, include land and resource (e.g., water) use and deed restrictions, well-drilling prohibitions, building permits, and well use advisories and deed notices. EPA believes, however, that institutional controls have a valid role in remediation and are allowed under CERCLA (e.g., section 121(d)(2)(B)(ii) appears to contemplate such controls). Institutional controls are a necessary supplement when some waste is left in place, as it is in most response actions. Also, in some circumstances where the balancing of trade-offs among alternatives during the selection of remedy process indicates no practicable way to actively remediate a site, institutional controls such as deed restrictions or well-drilling prohibitions are the only means available to provide protection of human health. Where institutional controls are used as the sole remedy, special precautions must be made to ensure that the controls are reliable. Further, recognizing that EPA may not have the authority to implement institutional controls at a site, § 300.510(c)(1) has been revised to require states to assure that institutional controls implemented as part of the remedial action are in place, reliable and will remain in place after initiation of operation and maintenance (see preamble to § 300.510(c)(1), "State assurances").

Several other commenters recommended revisions to enlarge the scope or availability of institutional controls. These commenters wanted the rule to allow institutional controls to be used as a key component of a remedy whenever they provide similar protection to treatment or other active remedies at much lower cost. The commenters suggested that such controls may be the only cost-effective, practicable remedy at small, isolated, and stable sites, and that such controls would be viable at many federal facilities.

EPA disagrees with suggested revisions to the NCP that would expand or encourage the use of institutional controls in lieu of active remediation measures. CERCLA section 121 states Congress' preference for treatment and permanent remedies, as opposed to simply prevention of exposure through legal controls. The evaluation of the nine criteria (§ 300.430(f)(1)(ii)), including cost and other factors, determines the practicability of active measures (i.e., treatment and engineering controls) and the degree to which institutional controls will be included as part of the remedy.

Several commenters suggested that institutional controls be given a more explicit role in the rule through providing criteria for their use, explicitly

allowing for their use in interim actions, or providing that remedies with institutional controls be considered in the detailed analysis. EPA believes that the discussion of an expectation concerning institutional controls in the rule is the appropriate level of detail for guidance in the NCP. Additional, more specific guidance may be developed later, if necessary.

Final rule: EPA has added an expectation on use of institutional controls in § 300.430(a)(1)(iii)(D). EPA is promulgating § 300.430(e)(3)(ii) as proposed.

Name: Section 300.430(b). Scoping.

Existing rule: The 1985 NCP incorporated the scoping section within the remedial investigation (RI) section of the rule (§ 300.68(e)). Under that section, scoping served as a basis for requesting funding for removal actions and for the remedial investigation and feasibility study (RI/FS). The initial analysis performed in scoping indicates the extent to which the release or threat of release may pose a threat to public health or welfare or the environment, indicates the types of removal measures and/or remedial measures suitable to abate the threat, and establishes priorities for implementation. A preliminary determination of ARARs also is performed at this stage.

Proposed rule: As proposed, the purpose of scoping is to define more specifically the type and extent of investigative and analytical studies that are appropriate for a given site. Scoping entails formal planning for both the RI and FS. The proposal separated the scoping section from the RI section to which it was attached under the 1985 NCP. EPA separated these sections in the proposal to highlight the work plan development process and the development of other project plans (such as the sampling and analysis plan, the health and safety plan, and the community relations plan) that occurs in the scoping stage.

During scoping, a conceptual understanding of the site is established by considering in a qualitative manner, the sources of contamination, potential pathways of exposure and potential receptors. The identification of potential ARARs and other criteria, advisories and guidance to be considered will begin during scoping as lead and support agencies initiate a dialog on potential requirements. The main objectives of scoping are to identify the types of decisions that need to be made, to determine the types (including quantity and quality) of data needed, and to design efficient studies to collect these data. The scope and detail of the investigative studies and alternative development and analysis should be tailored to the complexity of site problems.

Response to comments: One commenter emphasized that aggressive scoping should be encouraged to ensure appropriate streamlining of the RI/FS. Another urged EPA to highlight the scoping process in the preamble or in the rule itself. Another commenter agreed with EPA's view of scoping as an important first step in the RI/FS process, but recommended development of project plans less formal and lengthy than those currently used in the Superfund program.

In response, EPA has incorporated into today's rule the principles of streamlining and a bias for action. These general principles are to be considered in scoping to assist in defining the principal threats posed by the site and to identify likely response scenarios and potentially applicable technologies and operable units. EPA has highlighted scoping by separating it from the text describing the RI and by specifically referencing scoping in the new goal and expectations section of today's rule. EPA believes the principles and expectations promote the development of documents, including project plans, commensurate with the scope and complexity of the site problems being addressed.

One commenter argued that the lead agency or contractors scoping a project should be directed to consult with PRPs or other informed private sector sources about potentially applicable technologies, and give this information serious consideration. This commenter suggested the following language be added to the rule: "In scoping the project, the lead agency shall solicit relevant information from PRPs or other private interests that may be in a position to provide substantive assistance." This commenter would then add a statement requiring the lead agency to consider such information.

Although the suggested language has not been incorporated into today's rule, EPA encourages the early participation of PRPs and the public during scoping and throughout the RI/FS process. To the extent PRPs are known to the lead agency during scoping and a dialog is occurring among the parties, the PRPs have the opportunity to participate in the planning activities and suggest and evaluate for themselves technologies worthy of consideration for site implementation. For example, during scoping, PRPs can participate in a "technical advisory committee," which gathers expertise on the site conditions and provides substantive assistance to the lead agency. In addition, the work plan for a site begins the administrative record, which is available for review by the public, including PRPs. PRPs and the public can also present information and issues at public meetings. EPA believes it would be inappropriate to establish in the NCP an absolute requirement that the lead agency solicit and consider information provided by PRPs. The lead agency must retain the discretion to determine the scope and quality of information to be collected and evaluated.

Several commenters stressed the importance of early coordination with natural resource trustees, noting that valuable technical assistance can be obtained through such communication. One commenter offered the opinion that it would be beneficial and cost-effective if EPA and the natural resource trustees worked together on the design of the RI/FS sampling and analysis plan. To this end, the commenter suggested that § 300.430 (b)(5) and (b)(6) of the proposed rule be reversed, so that notification comes before the development of the plans. Some commenters urged coordination of natural resource damage assessments and response actions, arguing that significant funds may be saved if opportunities to analyze and assess natural resources are not lost during early study and cleanup activities.

In response, EPA agrees that close communication and coordination with trustees for natural resources affected or potentially affected by the release of hazardous substances from the site is essential. (See subpart G for details on the designation and role of natural resource trustees.) EPA agrees with the commenter's suggestion to reverse the order of the sections numbered § 300.430 (b)(5) and (b)(6) in the proposal. Today's rule places the notification section (now § 300.430(b)(7)) before the section providing for the development of certain plans (now § 300.430(b)(8)). EPA agrees that coordination with the trustees during the conduct of the natural resource damage assessments and response actions is productive. However, although a trustee may be responsible for certain natural resources affected or potentially affected by a release, the lead agency retains the responsibility for managing activities at the site.

Final rule: Proposed § 300.430(b) is revised as follows:

1. EPA is clarifying certain aspects of the scoping phase in the rule to better reflect the objective of each activity. Section 300.430(b) of the rule clarifies the development of a conceptual

understanding of the site, the identification of operable units, the identification of data quality objectives, and the development of the field sampling plan and quality assurance project plan. In addition, the elements of the scoping phase have been reordered to better reflect that the timing of coordination with natural resource trustees may influence the development of sampling plans. This clarification does not reflect a change in the scope or function of the scoping process.

2. Proposed § 300.430(b)(6) is renumbered as § 300.430(b)(7) and is revised as follows (see preamble discussion on § 300.615 for explanation):

If natural resources are or may be injured by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

Name: Section 300.430(d). Remedial investigation.

Existing rule: The 1985 NCP states in § 300.68(d) that an RI/FS shall be undertaken, as appropriate, to determine the nature and extent of the threat presented by the release and to evaluate proposed remedies. This includes sampling, monitoring, exposure assessment, and gathering data sufficient to determine the necessity for and proposed extent of the remedial action.

Section 300.68(e) of the 1985 NCP specifically discusses characterization of response actions during the RI. This process consists of examining available information to determine the type of response that may be needed to remedy the release. Initial analysis shall indicate the extent to which the release or threat of release may pose a threat to human health or the environment, indicate the types of removal measures and/or remedial measures suitable to abate the threat, and set priorities for implementation of the measures. The 1985 NCP also includes an extensive list of factors that should be considered in characterizing and assessing the extent to which the release poses a threat. These factors are also used to support the analysis and design of potential response actions.

Proposed rule: The proposed rule separates the discussions, although not the implementation, of the RI and FS, and further separates project scoping from the RI discussion to highlight the workplan development process, which addresses both the RI and FS. The purpose of the RI, as stated in the proposed NCP, is to collect data necessary to adequately characterize the site for the purpose of remedy selection. Site characterization may be conducted in one or more phases to focus sampling efforts and increase the efficiency of the investigation. Site characterization activities are to be fully integrated with the development and evaluation of alternatives in the FS. To characterize the site, the lead agency conducts field investigations and a baseline risk assessment, and initiates treatability studies, as appropriate. The proposed NCP included a list of factors that are to be considered to characterize and assess the extent to which the release poses a threat to human health or the environment or to support the analysis and design of potential response actions (53 FR 51504). This list of factors, while less detailed than the 1985 NCP, is intended to be more inclusive, depending on the site-specific needs. The results of the baseline risk assessment conducted as part of the RI (which includes exposure assessment, toxicity assessment, and risk characterization components) help establish acceptable exposure levels for use in developing remedial alternatives in the FS. Treatability studies are initiated to assess the effectiveness of treatment technologies that may be used as remedial alternatives on site waste. ARARs and, as appropriate, other pertinent advisories, criteria, or guidance related to the location of the site or contaminants present are also to be identified during the RI.

Response to comments: Several commenters addressed RI site characterization issues. One commenter suggested adding the review of state files and the subpoena of company files during the RI to enhance site characterization. In response, EPA notes its commitment to the consideration of the best and most appropriate information available for site characterization and will review state files and require the production of company files as necessary for a site.

Another commenter recommended an alternative approach to RIs for sites with ground-water contamination (the "transport quantification" approach). Under the transport quantification approach, environmental sampling would be phased after the contaminant transport flow paths and mechanisms are evaluated. Transport quantification analysis requires a thorough evaluation of all data available at that time. According to the commenter, the prior quantification and predictive analysis of transport mechanisms may allow more realistic and accurate estimates of actual and potential exposure concentrations. Additionally, the commenter voiced concern over inappropriate investigative methods used in drilling of ground-water monitoring wells and soil gas monitoring.

In response, EPA recognizes the merits of the suggestions and observations made by the commenter. However, EPA believes that technical decisions on which model or investigation technique is best suited to a site is better left to guidance rather than a rule. Of course, EPA may decide to use a transport quantification approach, even if it is not formally included in the NCP. EPA will consider the merits of the approach recommended by the commenter with respect to the goals and limitations of the program. EPA is considering methods to modify investigation of ground-water aquifers to allow more efficient remediation of ground water. EPA is investigating vertical variations in hydraulic conductivity, methods to account for contaminant adsorption, and methods to utilize geophysical techniques, in addition to specific investigation of parameters that may affect monitoring and pump/treatment of ground water, such as screen length. As new information becomes available, it will be incorporated into the implementation of the RI.

In response to comments raised about drilling of ground-water wells through disposal areas, EPA acknowledges that drilling through waste may not be appropriate in some situations. However, at certain sites, it may be necessary to drill through disposal areas. In these cases, EPA is aware of the potential hazards associated with drilling through wastes and takes precautions, such as casing the wells and monitoring the well depths, to ensure that the wells do not become a conduit for the spread of contamination to other aquifers. As to the comment that soil gas monitoring is an inappropriate investigative technique, EPA states that EPA research laboratories are currently studying soil gases and their relation to ground-water contamination. EPA will use the results of these investigations to modify existing practices in ground-water investigations, if appropriate. Interested members of the public may comment on the use of such methods on a site-specific basis during the public comment period on the proposed plan, or they may raise such issues at appropriate times after the initiation of the administrative record.

Final rule: In order to clarify some ambiguities in the proposed rule and to

respond to the above-described and other comments, EPA is making certain minor changes to the wording in § 300.430(d) of the rule. Field investigations to assess the nature and extent to which these releases pose a threat are emphasized in the clarifications to the rule.

Name: Section 300.430(d). Remedial investigation—baseline risk assessment.

Proposed rule: As part of the remedial investigation, the baseline risk assessment is initiated to determine whether the contaminants of concern identified at the site pose a current or potential risk to human health and the environment in the absence of any remedial action. It provides a basis for determining whether remedial action is necessary and the justification for performing remedial actions. The Superfund baseline risk assessment process may be viewed as consisting of an exposure assessment component and a toxicity assessment component, the results of which are combined to develop an overall characterization of risk. As indicated above, these assessments are site-specific and therefore may vary in the extent to which qualitative and quantitative analyses are utilized, depending on the complexity and particular circumstances of the site, as well as the availability of pertinent ARARs and other criteria, advisories or guidance.

During risk characterization, chemical-specific toxicity information, combined with quantitative and qualitative information from the exposure assessment, is compared to measured levels of contaminant exposure levels and to levels predicted through environmental fate and transport modeling. These comparisons determine whether concentrations of contaminants at or near the site are affecting or could potentially affect human health or the environment. Results of this analysis are presented with all critical assumptions and uncertainties so that significant risks can be identified.

Response to comments: One commenter requested clarification on the purpose of risk assessment in the Superfund program, especially the baseline risk assessment. EPA responds that the purpose of risk assessment in the Superfund program is to provide a framework for developing risk information necessary to assist decision-making at remedial sites. Risk assessment provides a consistent process for evaluating and documenting threats to human health and the environment posed by hazardous material at sites. One specific objective of the risk assessment is to provide an analysis of baseline risk (i.e., the risks that exist if no remediation or institutional controls are applied to a site). The results of the baseline risk assessment are used to determine whether remediation is necessary, to help provide justification for performing remedial action, and to assist in determining what exposure pathways need to be remediated. The baseline risk assessment has also superseded the endangerment assessment, because the two have the same goal, function, and methodology.

A second major objective of risk assessment in Superfund is to use the risks and exposure pathways developed in the baseline risk assessment to target chemical concentrations associated with levels of risk that will be adequately protective of human health for a particular site (i.e., remediation goals). A similar process is used to assess threats to ecosystems and the environment and to develop remediation goals based on risk to the environment. The identification of ARARs is not the purpose of the baseline risk assessment, as recommended by one commenter. The identification of ARARs is a separate part of the RI, because many ARARs are not directly risk related. Nevertheless, ARARs should be addressed consistently in the baseline risk assessment, the RI/FS, and remedy selection.

Some commenters supported EPA's use of site-specific risk assessments because, in their view, such assessments more accurately reflect the variety of site conditions. Several comments, however, argued against use of a site-specific risk assessment to evaluate baseline risks and to establish remediation goals. One commenter stated that EPA should be applying either ARARs or a generic set of nationally applicable contaminant concentration standards at all sites to ensure consistent and uniform cleanup decisions. This commenter also felt that the use of site-specific risk assessments was illegal and served only to confuse the public about the basis for decisions to protect human health and the environment.

EPA agrees with the commenter and applies ARARs consistently at sites nationwide, as appropriate to develop remediation goals. However, ARARs generally do not provide an adequate basis on which to determine site risks, which are complex and often cannot be reduced to a single number. Further, EPA notes that CERCLA requires that all Superfund remedies be protective of human health and the environment but provides no guidance on how this determination is to be made other than to require the use of ARARs as remediation goals, where these ARARs are related to protectiveness. Under CERCLA (as under other environmental statutes), EPA relies heavily on information concerning contaminant toxicity and the potential for human exposure to support its decisions concerning "protectiveness." EPA's risk assessment methods provide a framework for considering site-specific information in these areas in a logical and organized way. EPA agrees that a uniform process should be used to develop risk assessments and cleanup levels. EPA disagrees with the commenter who advocates national cleanup standards, however, because the specific concentrations developed for one site may not be appropriate for another site because of the nature the site, the waste, and the potential exposures as noted above. If EPA does identify situations in which uniform national standards under CERCLA appear to be feasible and appropriate, it may decide to develop such standards.

The decision to perform site-specific risk assessments is consistent with CERCLA section 104(i)(6), which requires the ATSDR to perform health assessments for facilities on the proposed and final NPL. As explained in section 104(i)(6)(F), these health assessments shall include assessments of the "potential risk" to human health posed by "individual sites", based on such site-specific factors as the "nature and extent of contamination" and the "existence of potential pathways of human exposure."

EPA recognizes the logical advantages of establishing consistent preliminary remediation goals at sites where contamination and exposure considerations are similar. To the degree possible, EPA makes use of chemical-specific ARARs in determining remediation goals for Superfund sites. However, because these standards are established on a national or statewide basis, they may not adequately consider the site-specific contamination or the cumulative effect of the presence of multiple chemicals or multiple exposure pathways and, therefore, are not the sole determinant of protectiveness.

EPA does agree that a uniform process should be used to develop risk assessments and cleanup levels. To improve program efficiency and consistency, EPA is providing extensive guidance for characterizing site-specific risks and identifying preliminary remediation goals to protect human health and the environment in two

guidance documents: "Risk Assessment Guidance for Superfund: Human Health Evaluation Manual, Part A" No. 9285.701A, July 1989 (Interim Final) and the "Risk Assessment Guidance for Superfund Volume II: Environmental Evaluation Manual," EPA/540/1-89/001, March 1989 (Interim Final) hereafter referred to as risk assessment guidance. The "Human Health Evaluation Manual" is a revision of the "Superfund Public Health Evaluation Manual" (October 1986) and also replaces the "Endangerment Assessment Handbook."

EPA received many comments on the methodology EPA uses to conduct site-specific risk assessments. EPA conducts an exposure assessment to identify the magnitude of actual or potential human or environmental exposures, the frequency and duration of these exposures, and the routes by which receptors are exposed. This exposure assessment includes an evaluation of the likelihood of such exposures occurring and provides the basis for the development of acceptable exposure levels.

Some commenters wanted specific clarification of the meaning of the "reasonable maximum exposure scenario" and how it is to be used. Some said that the methodology results in overstated and unrealistic risks and that the procedures provide significantly biased estimates of risks that are several orders of magnitude greater than actual risks. Several commenters argued that not only did the risk assessment methodology that Superfund has used in the past overestimate risk, but that the proposal's use of a "reasonable maximum exposure scenario" would institutionalize this overestimation of risk. Some stated that this overestimation of risk was especially a problem because both exposures and the toxicity of chemicals are overestimated. The combination of the two in risk characterization leads to the overstatement of risk. Other commenters favored the use of the reasonable maximum exposure scenario and recommended its inclusion in the rule. EPA will continue to use the reasonable maximum exposure scenario in risk assessment, although EPA does not believe it necessary to include it as a requirement in the rule.

EPA responds to the requests for clarification of the reasonable maximum exposure scenario and the baseline risk assessment in the remainder of this section. In the Superfund program, the exposure assessment involves developing reasonable maximum estimates of exposure for both current land use conditions and potential future land use conditions at each site. The exposure analysis for current land use conditions is used to determine whether a human health or environmental threat may be posed by existing site conditions. The analysis for potential exposures under future land use conditions is used to provide decision-makers with an understanding of exposures that may potentially occur in the future. This analysis should include a qualitative assessment of the likelihood that the assumed future land use will occur. The reasonable maximum exposure estimates for future uses of the site will provide the basis for the development of protective exposure levels.

Several commenters stated that EPA's exposure assessment methodology overestimates risk, especially if worst-case assumptions are used. EPA is clarifying its policy of making exposure assumptions that result in an overall exposure estimate that is conservative but within a realistic range of exposure. Under this policy, EPA defines "reasonable maximum" such that only potential exposures that are likely to occur will be included in the assessment of exposures. The Superfund program has always designed its remedies to be protective of all individuals and environmental receptors that may be exposed at a site; consequently, EPA believes it is important to include all reasonably expected exposures in its risk assessments. However, EPA does agree with a commenter that recommended against the use of unrealistic exposure scenarios and assumptions. The reasonable maximum exposure scenario is "reasonable" because it is a product of factors, such as concentration and exposure frequency and duration, that are an appropriate mix of values that reflect averages and 95th percentile distributions (see the "Risk Assessment Guidance for Superfund: Human Health Evaluation Manual").

EPA does agree with one commenter that the likelihood of the exposure actually occurring should be considered when deciding the appropriate level of remediation, to the degree that this likelihood can be determined. The risk assessment guidance referenced above is designed to focus the assessment on more realistic exposures. EPA has adopted these positions as policy and has not revised the regulation. In addition, EPA agrees that risk assessments conducted for the Superfund should take into consideration background concentrations and conditions and should identify these critical assumptions and uncertainties in its risk assessments.

One commenter asked EPA to clarify that both actual and potential risks will be investigated in the baseline risk assessment. When considering current land use, the baseline risk assessment should consider both actual risks due to current conditions and potential risks assuming no remedial action. For example, these potential risks could arise by the migration of contaminants through ground water to wells that are currently uncontaminated. Future land use, where it is different from current use, is an evaluation of only potential exposures since the future land use addresses a potential situation. EPA is clarifying the language in the rule to indicate that both actual and potential exposure routes and pathways should be considered.

In considering land use, Superfund exposure assessments most often classify land into one of three categories: (1) Residential, (2) commercial/industrial, and (3) recreational. EPA also considers the ecological use of the property and, as appropriate, agricultural use. In general, the baseline risk assessment will look at a future land use that is both reasonable, from land use development patterns, and may be associated with the highest (most significant) risk, in order to be protective. These considerations will lead to the assumption of residential use as the future land use in many cases. Residential land use assumptions generally result in the most conservative exposure estimates. The assumption of residential land use is not a requirement of the program but rather is an assumption that may be made, based on conservative but realistic exposures, to ensure that remedies that are ultimately selected for the site will be protective. An assumption of future residential land use may not be justifiable if the probability that the site will support residential use in the future is small. Where the likely future land use is unclear, risks assuming residential land use can be compared to risks associated with other land uses, such as industrial, to estimate the risk consequences if the land is used for something other than the expected future use.

Some commenters recommended performing the baseline risk assessment assuming that institutional controls were in place and effective at preventing exposure. EPA disagrees that the baseline risk assessment is the proper place to take institutional controls into account. The role of the

baseline risk assessment is to address the risk associated with a site in the absence of any remedial action or control, including institutional controls. The baseline assessment is essentially an evaluation of the no-action alternative. Institutional controls, while not actively cleaning up the contamination at the site can control exposure and, therefore, are considered to be limited action alternatives. The effectiveness of the institutional controls in controlling risk may appropriately be considered in evaluating the effectiveness of a particular remedial alternative, but not as part of the baseline risk assessment.

Some commenters stated that use of EPA's toxicity values will lead to overestimation of risk because they incorporate uncertainty factors or "margins of safety" that will bias the estimate of risk. EPA responds that the toxicity assessment component of Superfund risk assessment considers the following: (1) The types of adverse health or environmental effects associated with chemical exposures; (2) the relationship between magnitude of exposures and adverse effects; and (3) related uncertainties such as the weight-of-evidence for a particular chemical's carcinogenicity in humans. EPA recognizes that toxicity values do incorporate "uncertainty factors." Because the toxicity information is usually derived from studies of industrial workers or test animals, the size of these uncertainty factors is generally determined by the confidence that effects seen in these studies will manifest themselves in humans exposed at Superfund sites. Larger uncertainty factors are generally used to ensure that protective levels are identified when considering data with greater uncertainty. It should be noted that weights-of-evidence (and uncertainty factors) are not directly related to toxicity. For example, a high weight-of-evidence indicates only a high confidence that a chemical will cause cancer in humans. A high confidence in a toxicity value reflects a consensus that the value is not likely to change.

One commenter argued that EPA, or other lead agency, must consider information on toxicity that PRPs or interested parties bring to their attention during the public comment period. In response, EPA will, of course, consider such public comments submitted on toxicity. However, it is important to note that the Superfund risk assessment process typically relies heavily on existing toxicity information or profiles that EPA has developed on specific chemicals. EPA believes that the use of a consistent data base of toxicological information is important in achieving comparability among its risk assessments. This information generally includes estimated carcinogen exposures that may be associated with specific lifetime cancer risk probabilities (risk-specific doses or RSDs), and exposures to noncarcinogens that are not likely to present appreciable risk of significant adverse effects to humans (including sensitive subgroups) over lifetime exposures (reference doses or RfDs). EPA has also developed toxicity information for some ecosystem receptors. Where no toxicological information is available in EPA's data base, then EPA routinely considers other available information, including information provided by PRPs or other interested parties. Depending on the evidence, however, EPA may feel it is not appropriate to assess the toxicity of specific chemicals quantitatively because of the questions of reliability and consistency in data development. EPA may decide to address these chemicals qualitatively.

The results of the baseline risk assessment are used to understand the types of exposures and risks that may result from Superfund sites. Key assumptions and uncertainties in both contaminant toxicity and human and environmental exposure estimates must be documented in the baseline risk assessment, as well as the sources and effects of uncertainties and assumptions on the risk assessment results. Exposure assumptions or other information, such as additional toxicity information, may be evaluated to determine whether the risks are likely to have been under- or overestimated. These key assumptions and uncertainties must also be considered in developing remediation goals.

Several commenters suggested that the baseline risk assessment should be used to determine whether particular requirements were applicable or relevant and appropriate for a site. EPA believes that this determination must be made independently from the risk assessment, although EPA agrees that the assumptions used in the risk assessment should be consistent with those used to determine what requirements will be ARAR for a site. Risk assessment and ARARs serve different functions. The identification of ARARs is used to identify remediation goals and to indicate how remedial alternatives are to be implemented. In contrast, the risk assessment is a technical analysis of the risks posed by hazardous materials at a site. Consequently, it would be inappropriate for these two elements of the RI/FS to be done together.

Final rule: Proposed § 300.430(d)(4) of the rule has been clarified to indicate that both current and potential exposures and risks are to be considered in the baseline risk assessment. No other changes have been made to the rule on risk assessment. The reference to advisories, criteria or guidance in § 300.430(d)(3) has been modified (see preamble section below on TBCs).

Name: Section 300.430(e). Feasibility study.

Existing rule: The 1985 NCP states in § 300.68(d) that a remedial investigation/feasibility study (RI/FS) shall, as appropriate, be undertaken to determine the nature and extent of the threat presented by the release and to evaluate proposed remedies. Part of the RI/FS may also involve assessing whether the threat can be prevented or minimized using source control measures or whether additional actions will be necessary because the hazardous substances have migrated from the area of their original location.

The 1985 NCP discusses FS development of alternatives in § 300.68(f), stating that to the extent it is possible and appropriate, at least one alternative should be developed in each of the following categories:

(1) Treatment alternatives; (2) alternatives that attain ARARs; (3) alternatives that exceed ARARs; (4) alternatives that do not attain ARARs; and (5) a no-action alternative. The alternatives should, as appropriate, consider and integrate waste minimization, destruction, and recycling.

The alternatives developed under § 300.68(f) are subject to an initial screening to narrow the list of potential remedial actions for further detailed analysis. The alternatives that remain after the initial screening must undergo a detailed analysis to evaluate and analyze each alternative against a set of specific criteria. The results of this analysis provide the basis for identifying the preferred alternative.

As specified in § 300.68(i), the appropriate extent of remedy will be determined by the lead agency's selection of a cost-effective remedial alternative that effectively mitigates and minimizes threats to, and provides adequate protection of, public health and welfare and the environment. This determination will require that a remedy, except in certain specified situations, attain or exceed federal public health and environmental ARARs. In selecting the appropriate

remedy, the lead agency will consider cost, technology, reliability, administrative and other concerns, and their relevant effects on public health and welfare and the environment. If there are no ARARs, the lead agency will select the cost-effective alternative that effectively mitigates and minimizes threats, and provides adequate protection to public health and welfare and the environment.

Proposed rule: The requirements of SARA led to significant changes in the feasibility study section of the 1985 NCP, primarily in the range of alternatives that are developed for consideration in the FS and in the development of the nine criteria, based on mandates and factors to consider specified by the statute, for analysis of the alternatives. The proposed rule separates the discussion of the FS from the RI. In § 300.430(e), the proposed NCP states that the primary objective of the FS is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the waste management options can be presented to a decision-maker and an appropriate remedy selected. The regulation requires the development and evaluation of alternatives to reflect the scope and complexity of the remedial action under consideration and the site problems being addressed. During the FS, alternatives are developed to protect human health and the environment by eliminating, reducing, and/or controlling risks posed through each pathway by a site. The number and type of alternatives that are analyzed is determined according to site-specific circumstances.

The first step in the FS process involves developing remedial action objectives for protecting human health and the environment which should specify contaminants and media of concern, potential exposure pathways, and preliminary remediation goals. The preliminary remediation goals are concentrations of contaminants for each exposure route that are believed to provide adequate protection of human health and the environment based on preliminary site information. These goals are also used to assist in setting parameters for the purpose of evaluating technologies and developing remedial alternatives. Because these preliminary remediation goals typically are formulated during project scoping or concurrent with initial RI activities (i.e., prior to completion of the baseline risk assessment), they are initially based on readily available environmental or health-based ARARs (e.g., maximum contaminant levels (MCLs)), ambient water quality criteria (WQC)) and other criteria, advisories, or guidance (e.g., reference doses (RfDs)). As new information and data are collected during the RI, including the baseline risk assessment, and as additional ARARs are identified during the RI, these preliminary remediation goals may be modified as appropriate to ensure that remedies comply with CERCLA's mandate to be protective of human health and the environment and comply with ARARs.

During the development and analysis of alternatives, the risks associated with potential alternatives, both during implementation and following completion of remedial action, are assessed, based on the reasonable maximum exposure assumptions and any other controls necessary to ensure that exposure levels are protective and can be attained. These are generally assessed for each exposure route unless there are multiple exposure routes where combined effects may have to be considered. For all classes of chemicals, EPA uses health-based ARARs to set remediation goals, when they are available. When health-based ARARs are not available or are not sufficiently protective due to multiple exposures or multiple contaminants, EPA sets remediation goals for noncarcinogenic chemicals such that exposures present no appreciable risk of significant adverse effects to individuals, based on comparison of exposures to the concentration associated with reliable toxicity information such as EPA's reference doses. Similarly, when an ARAR does not exist for carcinogens, EPA selects remedies resulting in cumulative risks that fall within a proposed range of 10^{-4} to 10^{-7} incremental individual lifetime cancer risk (revised in final rule to 10^{-4} to 10^{-6}), based on the use of reliable cancer potency information such as EPA's cancer potency factors. In addition, EPA will set remediation goals for ecological and environmental effects based on environmental ARARs, where they exist, and levels based on site-specific determination to be protective of the environment.

Once the remediation goals have been established, potentially suitable technologies, including innovative technologies are also identified, evaluated, and assembled into alternative remedial actions that are designed to meet the remediation goals established according to the principles stated in the previous paragraph. The proposed NCP directs that certain types of alternatives must be developed, as appropriate, for source control and ground-water response actions, and describes the requirements for developing innovative treatment alternatives and no-action alternatives. The short- and long-term aspects of three criteria (i.e., effectiveness, implementability, cost), will, as appropriate, guide the development and screening of alternatives.

Alternatives that remain after the initial screening must undergo a detailed analysis that consists of an assessment of individual alternatives against each of the nine evaluation criteria. These criteria are:

(1) Overall protection of human health and the environment;

(2) Compliance with ARARs;

(3) Long-term effectiveness and permanence;

(4) Reduction of toxicity, mobility, or volume;

(5) Short-term effectiveness;

(6) Implementability;

(7) Cost;

(8) State acceptance; and

(9) Community acceptance.

Response to comments: 1. *Remedial action objectives and remediation goals.* One commenter recommended that remedial action objectives be established in the RI rather than the FS because the commenter feels they are needed early in the process so that they may be used as part of the baseline risk assessment. EPA agrees that remedial action objectives are needed early in the process. However, EPA believes that putting the remediation goals as the first step of the FS accomplishes this objective and does not delay the development of remediation goals because the RI and FS are not sequential but rather concurrent processes. In fact, remediation objectives and goals are initially developed at the workplan stage, prior to the commencement of RI/FS activities. In addition, the remediation goals are not necessary for the baseline risk assessment. Rather, the results of the baseline risk assessment are used to either confirm that the preliminary remediation goals are indeed protective or to lead to the revision of the remediation goals in the proposed plan.

Another commenter suggested that preliminary remediation goals be reviewed when developing the remedial action objectives. This comment reflects widespread confusion about the remedial action objectives and remediation goals. Several commenters asked for clarification of these two concepts. The remedial action objectives are the more general description of what the remedial action will accomplish.

Remediation goals are a subset of remedial action objectives and consist of medium-specific or operable unit-specific chemical concentrations that are protective of human health and the environment and serve as goals for the remedial action. The remedial action objectives aimed at protecting human health and the environment should specify: (1) The contaminants of concern, (2) exposure routes and receptors, and (3) an acceptable contaminant level or range of levels for each exposure medium (i.e., a preliminary remediation goal). Remedial action objectives include both a contaminant level and an exposure route recognizing that protectiveness may be achieved by reducing exposure as well as reducing contaminant levels.

As noted above, the preliminary remediation goals are the more specific statements of the desired endpoint concentrations or risk levels. Initially, they are based on readily available information, such as chemical-specific ARARs (e.g., MCLs, WQCs) or concentrations associated with the reference doses or cancer potency factors. As the RI proceeds and information from the baseline risk assessment becomes available, the preliminary goals may be modified due, among other things, to consideration of site-related exposure through multiple exposure pathways or exposure to multiple chemicals, either of which may raise the cumulative risk from chemicals of concern at the site out of the risk range. The initial development of preliminary remediation goals is not intended to be a lengthy undertaking, although remediation goals are revised throughout the RI/FS process as additional information becomes available.

The development of preliminary remediation goals serves to focus the development of alternatives on remedial technologies that can achieve the remedial goals, thereby limiting the number of alternatives to be considered in the detailed analysis. This focusing is one means of implementing the program's expectation for streamlining the remedial process. Information to develop final remediation goals is developed as part of the RI/FS process. Consequently, the use of preliminary remediation goals does not preclude the development and consideration or selection of alternatives that attain other risk levels. Final selection of the appropriate level of risk is made based on the balancing of criteria in the remedy selection step of the process. Language in the regulation has been revised to clarify the development of remediation goals.

One commenter felt the remediation goals should be based only on ARARs and that EPA has no authority to require compliance with anything but ARARs, although the commenter acknowledges that other information may be necessary when ARARs are not available. EPA disagrees that it has no authority to comply with anything but ARARs. ARARs do not exist for all exposure media (e.g., certain types of contaminated soil) or for all chemicals, and therefore, EPA must use other information to set remediation goals that will ensure protection of human health and the environment as required by statute. EPA intends that this will focus on the EPA-developed toxicity information (cancer potency factors and the reference doses for noncarcinogenic effects). If neither ARARs nor EPA-derived toxicology information are available, other information will be used, as necessary, to determine what levels are necessary to protect human health and the environment (e.g., state guidelines on what is protective for a certain chemical).

Where ARARs do not exist or where the baseline risk assessment indicates that cumulative risks—due to additive or synergistic effects from multiple contaminants or multiple exposure pathways—make ARARs nonprotective, EPA will modify preliminary remediation goals, as appropriate, to be protective of human health and the environment. For cumulative risks due to noncarcinogens, EPA will set the remediation goals at levels for individual chemicals such that the cumulative effects of exposure to multiple chemicals will not result in adverse health effects. EPA is clarifying the language in the rule in response to a commenter to indicate that an acceptable exposure for noncarcinogens is one to which human populations, including sensitive subgroups such as pregnant women and children, may be exposed without adverse effects during a lifetime or a part of a lifetime, incorporating an adequate margin of safety. The phrase "part of a lifetime" is added to clarify that protective levels will be set for less than lifetime exposures, as appropriate. In general, acceptable chemical concentrations are lower for lifetime exposure than other exposure durations.

EPA will set remediation goals for total risk due to carcinogens that represent an excess upperbound lifetime cancer risk to an individual to between 10^{-4} to 10^{-6} lifetime excess cancer risk. A cancer risk of 10^{-6} will serve as the point of departure for these remediation goals. EPA is clarifying, based on a recommendation from a commenter, that all preliminary remediation goals will be set so that they are protective for sensitive subpopulations, such as pregnant women and children. Comments on the use of a cancer risk range and a point of departure for the establishment of remediation goals are addressed in preamble sections below.

Remedial action objectives and remediation goals should be set for appropriate environmental media, and performance standards established for selected engineering controls and treatment systems including controls implemented during the response measure. While points of compliance for attaining these remediation levels are established on a site-specific basis, as supported by some commenters, there are general policies for establishing points of compliance. For ground water, remediation levels should generally be attained throughout the contaminated plume, or at and beyond the edge of the waste management area when waste is left in place. For air, the selected levels should be established for the maximum exposed individual, considering reasonably expected use of the site and surrounding area. For surface waters, the selected levels should be attained at the point or points where the release enters the surface waters. (See preamble section on ARARs for further information on points of compliance.)

One commenter objected to the use of the "reasonable maximum exposure scenario" in the development of remediation goals, as described in the preamble to the proposed rule. In particular, the commenter objected to the use of the reasonable maximum exposure concept given the lack of definition and criteria on which to apply it. EPA believes that Superfund remedies need to be protective of all individuals exposed through likely exposure pathways, not just large populations, as suggested by another commenter. To that end EPA developed the concept of reasonable maximum exposure, which is designed to include all exposures that can be reasonably expected to occur, but does not focus on worst-case exposure assumptions. EPA has clarified the definitions and discussion of the reasonable maximum exposure in today's preamble discussion of the baseline risk assessment.

Another commenter expressed concern that even though a risk assessment shows a particular remedy is protective, EPA will set remediation goals at more stringent levels based on policy, criteria, or guidelines (not

regulations). EPA responds that it is the goal of the Superfund program to select remedies that protect human health and the environment, maintain that protection over time, and minimize untreated waste. The risk assessment is one factor in the determination of what is protective. EPA does not arbitrarily select remediation goals that exceed levels determined to be protective.

2. *Development and screening of alternatives.* Regarding the development of alternatives, several commenters stated that there is no justification for requiring an array of alternatives to be developed in every situation. Commenters were particularly concerned about situations where certain options were precluded by site conditions (e.g., municipal landfills where treatment of all site wastes is impracticable). One commenter suggested that § 300.430(e)(3)(ii) be deleted, since, in the commenter's opinion, there was no justification for requiring a containment alternative to be developed for every Superfund site, even when the scoping phase indicated that a range of treatment-based remedies is appropriate. Another commenter recommended specific revisions to § 300.430(e) to clarify this point.

EPA agrees with the commenter that focusing the development of alternatives only on those that show promise in achieving the goals of the Superfund program is a significant means by which the program can streamline the process and achieve more rapid cleanup. However, EPA feels that this flexibility is already present in the rule which repeatedly states that alternatives should be developed, as appropriate, for the particular situation at the site. This means that if treatment is not practicable for all wastes at the site, then complete treatment need not be included as an alternative. Alternatively, if it is clear that treatment will be part of the remedy, alternatives that rely solely on containment or institutional controls and that do not include treatment need not be considered. This practice is consistent with the program expectations discussed above.

Two commenters stated that the proposed approach for development and screening of alternatives is biased against innovative technologies, since there appears to be a strong tendency for EPA to select remedies that have been previously proven to be successful. One commenter asserted that it was not clear how EPA would evaluate innovative technologies in the screening analysis. EPA would like to clarify that it does not intend to inhibit the development of innovative technologies in the development and screening of alternatives. EPA has deleted the requirement in the final rule that innovative technologies must offer "better" performance than proven technologies. Instead, EPA has stated its intent to consider those innovative technologies that offer the potential for comparable or superior performance or implementability; fewer or lesser adverse impacts than other available approaches; or lower costs for similar levels of performance than demonstrated treatment technologies. By providing for the consideration of innovative technologies, EPA intends to eliminate from consideration only those innovative technologies that have little potential for performing well at specific sites.

As part of the encouragement of innovative technologies that EPA expects to result from this provision, EPA is emphasizing the need for performing treatability studies earlier in the remedial process. Because innovative technologies may not have been as thoroughly demonstrated, treatability studies during the RI/FS may be necessary to provide information sufficient for an appropriate evaluation of these technologies. The goal of treatability studies is to establish through the use of good science and engineering, the probable effectiveness of innovative technologies. EPA has issued guidance that further encourages the use of innovative treatment technologies in "Advancing the Use of Treatment Technologies for Superfund Remedies" (OSWER Directive 9355.0-26).

One commenter requested that § 300.430(e)(3) be revised to clarify that off-site disposal in a secure facility without treatment may be selected as a partial or complete remedy. The commenter also addressed in detail one particular alternative that the NCP and guidance should suggest for consideration and analysis (i.e., use of the site, once remediated, as a solid waste management unit). EPA agrees with the commenter that off-site disposal without treatment may be selected as the remedy in appropriate circumstances, such as where the site has high volumes of low toxicity waste. However, the statute clearly indicates that this is the least preferred alternative. EPA believes that this comment most directly addresses the remedy selection, not the feasibility study, and has modified proposed § 300.430(f)(3)(iii) (§ 300.430(f)(1)(ii)(E) in the final rule) to acknowledge that off-site disposal without treatment can potentially be an appropriate alternative while recognizing the statutory bias against it. As to the commenter's second point, nothing in the NCP prohibits the use of remediated sites as RCRA solid waste management units, provided all requirements under RCRA and other applicable laws, including permitting requirements, are met, and any CERCLA off-site policy/rule requirements are satisfied (OSWER Directive No. 9834.11 (November 13, 1987); 40 CFR 300.440 (proposed)(53 FR 48218, November 29, 1988)).

With reference to the screening of alternatives, several commenters supported EPA's proposal to allow the elimination of alternatives at the screening stage on the basis of cost. Some of these commenters suggested that determination of cost-effectiveness be made an explicit screening step, noting that Congress requires that remedies be cost-effective. They argued that inadequate consideration of cost will lead to inefficient use of the Fund and may result in some sites not being addressed. One commenter stated that the inability to eliminate cost-ineffective remedies early in the remedy selection process results in a misallocation of time, effort, and funds.

Other commenters opposed using cost as a criterion during the preliminary screening of alternatives. One commenter argued that many alternatives are rejected based on inadequate cost data. Another commenter stated that eliminating remedial alternatives based on consideration of cost before the ultimate health-based standards or levels of control are determined was inappropriate and illegal.

In response to comments received on the role of cost in the development and screening of alternatives, EPA has clarified the role of cost in screening of alternatives. Screening is to be performed to eliminate from further consideration those alternatives that are not effective, not implementable, or whose costs are grossly excessive for the effectiveness they provide. This last category would include those situations where cost is so excessive that a remedy is virtually unimplementable and is, therefore, impracticable to consider. Specifically, when alternatives vary significantly in their effectiveness, cost may be considered in conjunction with other factors to determine which alternatives are inordinately costly for the effectiveness they provide. For example, where total treatment of a large municipal landfill has been considered initially as a remedial

alternative, this alternative will likely be eliminated from further consideration due to the large volume of material for which treatment capacity is not available and for which costs are extremely high.

The other situation where cost may result in the elimination of an alternative during screening is where two or more alternatives are determined to provide similar levels of effectiveness and implementability by using a similar method of treatment or engineering control but their costs vary significantly. In this case, cost can be used to eliminate from further consideration the more costly alternatives. For example, if soil washing and bioremediation are expected to be similarly effective, but bioremediation is significantly more costly, the bioremediation alternative could be eliminated from further consideration while the soil washing option would be carried through to detailed analysis.

One commenter argued against considering cost in screening because the use of potentially inadequate cost data available in this stage of the remedial process may result in the elimination of viable alternatives. EPA responds that while cost data are continuously being developed, at the screening stage cost data of sufficient quality are usually available to determine whether the cost of an alternative is "grossly excessive" or significantly more costly for the results it provides. EPA believes that this screening should be used to help streamline the detailed analysis.

Finally, one commenter suggested that if there is proper coordination with natural resource trustees during the development of alternatives, trustee recommendations concerning, for example, appropriate mitigation for wetlands impacts and cost-effective restorations, may be incorporated into project plans. The commenter believed this would facilitate trustee determinations as required in section 122(j)(2) of CERCLA. EPA agrees that coordination with natural resource trustees during the development of alternatives is important. Today's rule indicates in several sections (§§ 300.615(c), 300.410(g), and 300.430(b)(7)) that the lead agency should seek to coordinate with the natural resource trustees. In fact, § 300.615 of this rule addresses a variety of natural resource trustee issues, including coordination and cooperation between multiple trustees and the lead agency.

Final rule: Several changes are being made to proposed § 300.430(e), the feasibility study section, primarily to clarify the feasibility study role and process.

1. The kinds of alternatives that are developed during the feasibility study have been expanded to indicate that recycling may be used to protect human health and the environment by eliminating, reducing and/or controlling risks at a site. Discussion of this change is found in the response to comments for the detailed analysis of alternatives.

2. Language in the regulation at § 300.430(e)(2)(i) has been clarified to indicate that preliminary remediation goals are initially developed based on easily available information, such as ARARs and other reliable information. This reliable information will likely be EPA-developed toxicity information (i.e., reference doses and cancer potency factors). As further information becomes available, then other factors listed in paragraphs (e)(2)(i) (A), (B), and (C) will be considered. In addition, the description of ARARs in § 300.430(e)(2)(i)(A) is revised (see preamble section below on definition of "Applicable"). Further, the language in § 300.430(e)(2)(i)(A)(*1*) is revised for clarity. Sections 300.430(e)(2)(i)(A) (*2*) and (*3*) of the proposal are being combined in the final rule to indicate that exposure to multiple contaminants and multiple exposure pathways are situations that may result in ARARs being nonprotective. Language in § 300.430(e)(2)(i)(G) is being added to indicate that where environmental ARARs do not exist, environmental evaluations, especially focusing on sensitive ecosystems and critical habitats of species protected under the Endangered Species Act, will provide information for developing remediation goals. These changes are being made to clarify the proposal and do not represent any change in the remedial process.

3. See ARARs preamble sections below for other additions or revisions to § 300.430(e)(2)(i): "Use of maximum contaminant level goals for ground water," "Use of federal water quality criteria (FWQC)," and "Use of alternate concentration limits (ACLs)."

4. Section 300.430(e)(6) has been revised to clarify that a no-action alternative may be appropriate where a removal or remedial action has already occurred at a site.

5. The provision on the development of alternatives that use innovative technologies is being revised to indicate that an innovative technology need only offer the potential to be comparable in performance or implementability to demonstrated technologies to warrant further consideration in the detailed analysis step.

6. Two factors used in the screening of alternatives are being revised. ARAR compliance and reduction of toxicity, mobility or volume through treatment are being added as considerations in determining effectiveness. This revision corrects an inadvertent omission in the proposal. The role of cost in screening alternatives has been revised to indicate that alternatives may be screened on costs in two ways. First, an alternative whose cost is grossly excessive compared to the effectiveness it provides may be eliminated in screening. Second, if two or more alternatives provide similar levels of effectiveness and implementability using a similar method of treatment or engineering control, the more expensive may be eliminated from further consideration.

7. The references to advisories, criteria or guidance in § 300.430(e) (8) and (9) have been modified (see preamble section below on TBCs).

Name: Section 300.430(e)(2). Use of risk range.

Proposed rule: Proposed § 300.430(e)(2)(i)(A)(*2*) states that for known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upperbound lifetime cancer risk to an individual of between 10^{-4} and 10^{-7} (53 FR 51426 and 51505).

Response to comments: A few commenters supported the proposed risk range of 10^{-4} to 10^{-7}, though generally with qualifications. One commenter's position on the point of departure makes clear that they view the risk range only as a fallback when 10^{-6} cannot be attained. Another commenter supporting the proposed risk range argued that the risk range should be used only as a guideline, in order to provide lead agencies with sufficient flexibility. Another commenter said that they could support the proposed range, but their comments clearly favor revision to a range of 10^{-4} to 10^{-6} as the really operative part. Several commenters (see below) supported a more stringent risk range or level.

Many commenters favored a less stringent range, i.e., one whose lower risk bound is higher than 10^{-7} and whose upper bound may even exceed 10^{-4}, while some favored a more stringent range or a single, stringent target cleanup level. A few commenters recommended dispensing with the use of a risk range or risk assessment altogether as a basis for cleanup in favor of what they maintained are more stringent levels (background or statutorily specified ARARs). Several

commenters pointed out that risk assessment methodology is as important as the range chosen.

The majority in favor of a less stringent range generally supported a risk range of 10^{-4} to 10^{-6}. A number of reasons were given in support of this alternative. The most commonly repeated reason is that the narrower, higher risk range is consistent with risk management decisions made in other EPA regulatory programs and in federal regulatory agencies in general. Commenters argued that allowing a lower risk on the order of 10^{-7} would be "unprecedented" and "indefensible," far less than many commonly accepted risks or the accepted *de minimis* level. Some also noted that no Superfund action has ever cleaned up to this stringent level. Another commenter stated that recent judicial decisions support the use of a narrower risk range. One commenter suggested a slightly different range of 10^{-5} to 10^{-6} in order to limit the pressure for less protective remedies.

Other reasons for opposing a risk range with a boundary at 10^{-7} are that such a range could lead to fewer cleanups of high-risk sites or less overall risk reduction, which would misallocate scarce resources (the Superfund) and be contrary to the statutory mandate for cost-effectiveness; that it is impossible to detect many chemicals at this low level; that it is not technologically feasible in many cases to achieve this level; that risk assessment already incorporates conservative assumptions; and that the broader, more stringent range complicates analysis of alternatives in the FS. One commenter pointed out that the more stringent level may be suitable for highly toxic chemicals such as pesticides, but otherwise it is not worth the additional cost. Another commenter charged that EPA's choice of the lower bound was improperly intended to bias selection of remedy toward treatment technologies, because it is clearly not necessary for protection of health.

Several commenters argued against the proposed risk range in favor of setting the overall cleanup level for the remedy at no higher than 10^{-6}. They argued that because risk assessment is fraught with uncertainty, remedies should always protect to this level at a minimum, regardless of the levels of individual ARARs. Commenters recognized that it may not be feasible to achieve 10^{-6}, or there may be "extraordinary circumstances" that preclude this level; in such cases one commenter proposed an upper bound of 10^{-4}.

These commenters also had problems with the specific boundaries proposed by EPA. One commenter said that 10^{-4} is too great a risk, and even 10^{-7} may be as well; they found the alternative of 10^{-4} to 10^{-6} to be unacceptable, although they did not say what risk level or approach would be preferable. They disputed the validity of the argument relating risk level and number of sites cleaned up because of the availability of PRPs. One commenter, while preferring a risk range to a single level, suggested that 10^{-5} rather than 10^{-4} might be more protective as the upper bound for one or two chemicals because the conservative assumptions become additive for more than two chemicals. Another commenter argued that an upper bound at 10^{-5} is needed because a state agency would have difficulty supporting or justifying using a higher risk level. A commenter expressed concern that a risk range might preclude more protective remedies that can practicably be achieved at little additional cost. One commenter argued that levels below 10^{-7} should be permissible, and that any limit at the lower end would undermine the state in negotiating with PRPs. A commenter suggested that risk assessment should be a final check on the most protective remedy practicable.

Commenters argued that use of a risk range does not adequately protect health and environment. One proposed that cleanup should always be to background levels as a first choice, because anything less leaves contamination whose cumulative and chronic effects are unknown. Another commenter disagreed with use of a risk range and site-specific risk assessment as a basis for remedy selection, saying that it violates the statute's mandate to use such stringent standards as MCLGs and water quality criteria, which would assure protection of health and environment. A commenter pointed out that there is no statutory authority for use of a risk range when ARARs exist.

Finally, several commenters suggested that the assumptions and methods of risk assessment are as important, or even more important, than the risk range used. They pointed out the need for standardized risk assessment methods and exposure assumptions, and gave suggestions for improved ways of handling uncertainties.

EPA recognizes the merits of many of the comments made on the risk range issue and appreciates the significance of the boundaries of the risk range for determining the extent of protectiveness and the cost of cleanups. Based on the comments received, EPA has decided to revise the boundaries of the acceptable risk range for Superfund cleanups to 10^{-4} to 10^{-6} but to allow for cleanups more stringent than 10^{-6} when warranted by exceptional circumstances. The following discussion explains the basis for using a risk range, the reasons for revising the range, and how this revised risk range is to be used when setting remediation goals for a specific medium—soil, ground water, surface water, or air—and responds to other comments summarized above on this risk range issue.[8]

The primary goals of Superfund cleanups are to protect human health and the environment and to comply with ARARs. When ARARs are not available, Superfund develops a reasonable maximum exposure scenario that describes the current and potential risk posed by the site in order to determine what is necessary to achieve protection against such risks to human health (see preamble section above on baseline risk assessment for more discussion of reasonable maximum exposure scenario). Based on this scenario, Superfund selects remedies that reduce the threat from carcinogenic contaminants at a site such that the excess risk from any medium to an individual exposed over a lifetime generally falls within a range from 10^{-4} to 10^{-6}. EPA's preference, all things being equal, is to select remedies that are at the more protective end of the risk range. Therefore, when developing its preliminary remediation goals, EPA uses 10^{-6} as a point of departure (see next preamble section on point of departure).

EPA believes that use of a risk range is consistent with the mandates in CERCLA and disagrees with comments that Superfund should not use a risk range. CERCLA does not require the complete elimination of risk or of all known or anticipated adverse effects, i.e., remedies under CERCLA are not required to entirely eliminate potential exposure to carcinogens. CERCLA section 121 does direct, among other requirements, that remedies protect human health and the environment, be permanent to the maximum extent practicable and be cost-effective. Remedies at Superfund sites comply with these statutory mandates when the amount of exposure is reduced so that the risk posed by contaminants is very small, i.e., at an acceptable level. EPA's risk range of 10^{-4} to 10^{-6} represents EPA's opinion on what are generally acceptable levels.

[8] Cleanup levels at a site are determined for a particular medium. Such cleanup levels encompass the acceptable risk levels for contaminants in that medium.

In response to comments received, and to be consistent with the accepted de minimis level used by other EPA programs, e.g., the drinking water program, the lower boundary of the risk range has been changed from 10^{-7} to 10^{-6}.[9] This change also reflects the fact, noted by commenters, that current available analytical and detection techniques cannot effectively verify for many contaminants that concentration levels corresponding to risk levels below 10^{-6} have actually been attained after remediation.

In the Superfund program, remediation decisions must be made at hundreds of diverse sites across the country. Therefore, as a practical matter, the remediation goal for a medium typically will be established by means of a two-step approach. First, EPA will use an individual lifetime excess cancer risk of 10^{-6} as a point of departure for establishing remediation goals for the risks from contaminants at specific sites. While the 10^{-6} starting point expresses EPA's preference for setting cleanup levels at the more protective end of the risk range, it is not a presumption that the final Superfund cleanup will attain that risk level.

The second step involves consideration of a variety of site-specific or remedy-specific factors. Such factors will enter into the determination of where within the risk range of 10^{-4} to 10^{-6} the cleanup standard for a given contaminant will be established.

Preliminary remediation goals for carcinogens are set at a 10^{-6} excess cancer risk as a point of departure, but may be revised to a different risk level within the acceptable risk range based on the consideration of appropriate factors including, but not limited to: exposure factors, uncertainty factors, and technical factors. Included under exposure factors are: the cumulative effect of multiple contaminants, the potential for human exposure from other pathways at the site, population sensitivities, potential impacts on environmental receptors, and cross-media impacts of alternatives. Factors related to uncertainty may include: the reliability of alternatives, the weight of scientific evidence concerning exposures and individual and cumulative health effects, and the reliability of exposure data. Technical factors may include: detection/quantification limits for contaminants, technical limitations to remediation, the ability to monitor and control movement of contaminants, and background levels of contaminants. The final selection of the appropriate risk level is made when the remedy is selected based on the balancing of criteria (see preamble discussion below on remedy selection).

Some commenters recommended establishing a single point, e.g., 10^{-6}, as the basis for cleanup at all sites. EPA does not agree with this recommendation because EPA believes that other risk levels may be protective when the 10^{-6} risk level will not be attained at a site due to the factors described above. Moreover, establishing 10^{-6} as the single cleanup level, i.e., the only level considered protective, would be incongruous with CERCLA's requirement to comply with ARARs. Many ARARs, which Congress specifically intended be used as cleanup standards at Superfund sites, are set at risk levels less stringent than 10^{-6}.

Ground water that is not currently a drinking water source but is potentially a drinking water source in the future would be protected to levels appropriate to its use as a drinking water source. Ground water that is not an actual or potential source of drinking water may not require remediation to a 10^{-4} to 10^{-6} level (except when necessary to address environmental concerns or allow for other beneficial uses; see preamble discussions below on EPA's ground-water policy and on use of MCLGs for ground-water cleanups).

EPA's approach on setting remediation goals for soils is based on risk levels and is intended to protect currently exposed individuals as well as those who potentially may be exposed in the future. A reasonable maximum exposure scenario (described in the preamble section above on "baseline risk assessment") is developed to estimate future potential uses of the site in order to provide a basis for the development of protective exposure levels. For example, soil that is not currently in residential use but may potentially have future residential uses would be protected to levels appropriate to residential uses. However, contaminated soil at an industrial site might be cleaned up to a less stringent standard, but still within the 10^{-4} to 10^{-6} risk range, than soil at a residential site, as long as there is reasonable certainty that the site would remain for industrial use only (institutional controls may be necessary to ensure that the site is not used for residential purposes). In the unusual circumstances where the baseline risk assessment indicates that there is little or no chance of any direct human exposure, for example, contaminated riverbeds in certain circumstances, remediation of the sediments to human health-based levels may not be necessary (although cleanup to address environmental concerns may be required).

"Potential" is a term used in a variety of contexts in § 300.430. When "potential" is used to describe risk, exposure, exposure pathways or threats, it means a reasonable chance of occurrence within the context of the reasonable maximum exposure scenario developed for that particular site (see preamble discussion above on "baseline risk assessment").

At some sites, it is not certain that a risk level of 10^{-6} will actually be attained, even when treatment technology designed to achieve 10^{-6} is selected, due to the presence of certain site-specific exposure factors. Such factors may indicate the need to establish a risk goal that is more protective than the overall goal of 10^{-6}. These site-specific exposure factors include but are not limited to: the cumulative effect of multiple contaminants; the potential for human exposure from other pathways at the site; population sensitivities; potential impacts on environmental receptors; and cross-media impacts. In addition, even if not specified as a goal, a cleanup more stringent than 10^{-6} may be achieved in some cases due to the nature of the treatment technology used. Remedial technologies exist that, in the process of meeting remediation goals within the range of 10^{-4} to 10^{-6} risk, can achieve risk reduction for particular contaminants below 10^{-6}.

In summary, EPA's approach allows a pragmatic and flexible evaluation of potential remedies at a site while still protecting human health and the environment. This approach emphasizes the use of 10^{-6} as the point of departure while allowing site- or remedy-specific factors, including potential future uses, to enter into the evaluation of what is appropriate at a given site. As risks increase above 10^{-6}, they become less desirable, and the risk to individuals generally should not exceed 10^{-4}.

In response to other comments received on the risk range issues, EPA does not agree that cleanup should always be to background levels. In some cases, background levels are not necessarily protective of human health; such as in urban or industrial areas; in other cases, cleaning up to background levels may not be necessary to achieve protection of human health because the background level for a particular

[9] Office of Drinking Water, National Primary and Secondary Drinking Water Regulations; Proposed Rule, 54 FR 22064 (May 22, 1989). In general, other federal agencies do not reduce individual lifetime risk levels below 10^{-6}. "Cancer risk management," Environmental Science and Technology, Vol. 21, No. 5 (1987).

contaminant may be close to zero, as in pristine areas.

Other commenters asserted that EPA must use statutorily-specified requirements, such as MCLGs or water quality criteria (WQC), instead of a risk range when setting cleanup levels. In response, EPA believes that a risk range is necessary to assist in determining protectiveness in the absence of potential ARARs. Further, in cases of mixtures of chemicals where attaining chemical-specific ARARs for each contaminant may still result in a cumulative risk in excess of 10^{-4} due to additivity of the risk of the contaminants, use of a risk range would be necessary to set a protective remediation level for the overall medium. Finally, some commenters stressed the importance of assumptions and methods used in conducting risk assessments to the establishment of cleanup goals. EPA agrees. EPA discusses assumptions and methods to be used when conducting risk assessments in greater detail in the preamble sections above on remedial investigation and baseline risk assessment.

Final rule: EPA has revised § 300.430(e)(2)(i)(A)(*2*) to state that: "For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-4} and 10^{-6} using information on the relationship between dose and response."

Name: Section 300.430(e)(2). Use of point of departure.

Proposed rule: Section 300.430(e)(2)(i)(A)(*2*) stated that the 10^{-6} risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective.

Response to comments: Essentially none of the commenters supported the point of departure exactly as proposed, that is, where ARARs are lacking or are not sufficiently protective, determination of cleanup levels would start at 10^{-6} and move within the risk range depending on certain enumerated factors.

Several commenters favored use of 10^{-6} as the cleanup level. Some of these commenters did not actually endorse the concept of a point of departure in that they thought the overall risk of a remedy should not exceed 10^{-6} in any case. Others essentially supported a sticky point from which departures in the direction of increased risk would only be justified on grounds such as infeasibility.

A number of commenters preferred the use of the full risk range rather than a single value for the cleanup level. In certain cases it was not clear whether commenters understood EPA's intention in having a point of departure. One commenter said that a point of departure does not help in developing cleanup goals. Other commenters argued that a point of departure undermines the risk range by establishing a single value for all sites, whereas use of a risk range accounts for variation among sites and for uncertainties in risk assessment. Another commenter supported use of the entire range rather than focusing on 10^{-6} in order to foster cost-effectiveness in the program, while several others similarly stated that a risk range, rather than a target level, recognizes such relevant factors as toxicity, exposure potential, and cost-benefit tradeoffs.

Several commenters proposed use of a different point of departure, and even one which could vary depending on the site circumstances. If a point of departure is chosen, one commenter suggested that 10^{-5} is the appropriate value, being within the suggested risk range of 10^{-4} to 10^{-6}. Another commenter, on the other hand, said the point of departure should be 10^{-4}: this level is considered acceptably protective; it is already based on very conservative assumptions, so that the true risk is lower; and anything lower would be a bias toward treatment.

In opposing the proposed point of departure, one commenter suggested that there should be different targets for various population sizes, and that a higher value such as 10^{-4} is adequate for smaller populations. Others echoed this comment, saying that population size should be a factor for moving in the risk range, and that for small populations 10^{-4} suffices. One commenter pointed out that other federal agencies have considered 10^{-4} as *de minimis* for small populations. A commenter stated that EPA has in the past considered 10^{-5} as insignificant when aggregate population risk is very low. The commenter did not suggest a value but said that EPA should re-examine the issue of not considering population size in setting cleanup levels. Finally, one commenter suggested that risk levels could be set depending on the conservatism of the assumptions used and other relevant factors such as the form in which the chemical is present in the environment.

EPA believes it is necessary to explain how it intends the point of departure to be used. Where the aggregate risk of contaminants based on existing ARARs exceeds 10^{-4} or where remediation goals are not determined by ARARs, EPA uses 10^{-6} as a point of departure for establishing preliminary remediation goals. This means that a cumulative risk level of 10^{-6} is used as the starting point (or initial "protectiveness" goal) for determining the most appropriate risk level that alternatives should be designed to attain. The use of 10^{-6} expresses EPA's preference for remedial actions that result in risks at the more protective end of the risk range, but this does not reflect a presumption that the final remedial action should attain such a risk level. Factors related to exposure, uncertainty and technical limitations may justify modification of initial cleanup levels that are based on the 10^{-6} risk level. The ultimate decision on what level of protection will be appropriate depends on the selected remedy, which is based on the criteria described in § 300.430(e)(9)(iii).

EPA believes, however, that it is both useful and necessary to have a starting point in those cases where the remediation goal is not determined by ARARs. Although adjustments may be necessary in determining the actual remediation goal for a site, it is important to have an initial value to which adjustments can be made, particularly since the risk range covers two orders of magnitude. By using 10^{-6} as the point of departure, EPA intends that there be a preference for setting remediation goals at the more protective end of the range, other things being equal. Contrary to assertions of some commenters, EPA does not believe that this preference will be so strong as to preclude appropriate site-specific factors. Also, EPA does not agree that cost should be considered when setting the preliminary remediation goal because reliable cost information is not available at this step of the process. Cost is ultimately one of the criteria used in selecting a remedy.

EPA would like to address those commenters who suggest that the point of departure should depend on population size. At this time EPA believes that the point of departure should be consistent across all sites. The point of departure represents a level from which analysis should begin, regardless of the circumstances. Preliminary and final remediation goals, i.e., target risk levels, however, may vary from the point of departure depending upon site-specific circumstances (see discussion above on risk range). The ultimate role of population size in determining response priorities or remedies is currently under

review by the Risk Management Council.

Final rule: EPA is revising proposed § 300.430(e)(2)(i)(A)(*2*) on the point of departure as follows: "The 10^{-6} risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure; * * *"

Name: Section 300.430(e)(9). Detailed analysis of alternatives.

Proposed rule: The purpose of the detailed analysis is to objectively assess the alternatives with respect to nine evaluation criteria that encompass statutory requirements and include other gauges of the overall feasibility and acceptability of remedial alternatives (53 FR 51428). This analysis is comprised of an individual assessment of the alternatives against each criterion and a comparative analysis designed to determine the relative performance of the alternatives and identify major trade-offs (i.e., relative advantages and disadvantages) among them. The decision-maker uses information assembled and evaluated during the detailed analysis in selecting a remedial action.

Response to comments: The preamble discussion of the detailed analysis section of the RI/FS process in the proposal categorized the nine criteria into three groups: threshold, primary balancing and modifying criteria (53 FR 51428). Although in general, commenters supported this tiered system, many were confused about the significance of the categories in the detailed analysis and remedy selection stages. After a careful study of the comments, EPA has concluded that the process EPA proposed would be expressed more clearly if the nine criteria were not divided into three categories during the detailed analysis phase, when all nine criteria need to be objectively assessed, but when the balancing decision is made. EPA believes that the characterization of the criteria into the three categories is important, and should be used during remedy selection, as discussed in that section of today's preamble.

Some commenters asked EPA to clarify the purpose and content of the detailed analysis. The following is a general description of the detailed analysis. The detailed analysis of alternatives consists of the analysis and presentation of the relevant information needed to allow decision-makers to select a site remedy. It is not the decision-making process itself. During the detailed analysis, each alternative is assessed against each of the nine criteria. The analysis lays out the performance of each alternative in terms of compliance with ARARs, long-term effectiveness and permanence, reduction of toxicity, mobility or volume through treatment, short-term effectiveness, implementability, and cost. The assessment of overall protection draws on the assessments conducted under other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness and compliance with ARARs. State and community acceptance also are assessed, although definitive assessments of these factors cannot be completed until the public comment period on the draft RI/FS and proposed plan is completed. Further guidance on this process is available in the "EPA Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," OSWER Directive No. 9355.3-01, October 1988 (Interim Final). This guidance will be updated following promulgation of the NCP.

After making the individual criterion assessments for each alternative, the alternatives are compared to each other. This comparative analysis identifies the key tradeoffs (relative advantages and disadvantages) among the alternatives with respect to the nine criteria. The purpose of this comparative analysis is to provide decision-makers with sufficient information to balance the trade-offs associated with the alternatives, select an appropriate remedy for the site and demonstrate satisfaction of the CERCLA remedy selection requirements.

In general, commenters supported the use of the nine criteria in performing the detailed analysis. The supporters wrote that the criteria provide the flexibility needed to analyze diverse site conditions, by allowing the consideration of a wide range of relevant factors.

Some commenters wrote that nine criteria are too many to address in the detailed analysis. These commenters argued that considering so many criteria makes the evaluation too complicated. While supporting the nine criteria, one commenter suggested adding as an additional criterion, the extent to which the alternative utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In addition, several commenters addressed the relation of the nine criteria used in alternatives evaluation and remedy selection to the statutory mandates for remedy selection described in section 121 of CERCLA. These commenters remarked that the use of the nine criteria was a significant departure from the remedy selection criteria in the 1985 NCP, which focused on protectiveness and cost. They also believed that increasing the number of criteria to be considered during remedy selection reduces flexibility and complicates an already complicated process. They suggested that the criteria should be based directly on the statutory language. Specifically, these commenters proposed the following four criteria: protection of human health and the environment; compliance/waiver of ARARs; preference for permanent solutions and treatment as a principal element; and cost-effectiveness.

Although agreeing with EPA's establishment of protection of human health and the environment and compliance with ARARs as the first two evaluation criteria, one commenter suggested significant modifications to the other criteria. This commenter suggested merging the five evaluation criteria of long-term effectiveness and permanence, reduction of toxicity, mobility or volume through treatment, short-term effectiveness, implementability, and cost, into three broad criteria: effectiveness, implementability and cost. This commenter noted that state and community acceptance, although relevant considerations in remedy selection, add nothing to the feasibility study process. The commenter believes this system would provide the most appropriate starting point for creating a structured method for selecting a site remedy.

EPA developed the nine evaluation criteria to give effect to the numerous statutory mandates of section 121 and in particular, the remedial action assessment factors of section 121(b)(1)(A)-(G). EPA does not believe analysis of alternatives under the four criteria approach suggested by the commenter would provide an adequate analytical framework. EPA also is not adding as a criterion the statutory mandate to utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. The analysis performed pursuant to the nine criteria concludes with selection of a remedy that meets the statutory mandates. This analysis requires consideration of a number of factors before making these conclusions. In particular, the mandate for cost-effective remedies clearly requires consideration of both costs and the effectiveness of alternatives. Similarly, EPA believes that a range of

factors, including long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness, must be considered to provide the basis for concluding that a particular alternative represents the practicable extent to which permanent solutions and treatment can be used at a given site. However, EPA has included two specific statutory requirements in the criteria (protection of human health and the environment and compliance with ARARs) in light of the paramount importance of these mandates. EPA notes that it does have an expectation that alternatives that will treat principal threats at sites will be considered, consistent with the statutory preference for treatment as a principal element.

The proposed rule stated that the detailed analysis is to be conducted on the limited number of alternatives that represent viable hazardous waste management approaches (53 FR 51506). One commenter recommended changing the wording to conduct a detailed analysis on those alternatives representing "viable approaches to remedial action," rather than "viable hazardous waste management approaches." EPA agrees with this recommendation and has substituted the commenter's wording for the phrase in the final rule. As a further clarification, today's rule consistently uses the term "remedial alternative" in all pertinent places.

A discussion of each of the nine criteria follows.

1. *Protection of human health and the environment.* This evaluation criterion assesses whether each alternative provides adequate protection of human health and the environment. The overall assessment of protection draws on the assessments conducted under other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness, and compliance with ARARs. Only those alternatives determined to be protective in the detailed analysis proceed to the selection of remedy step.

One commenter noted that effectiveness, implementability, extent of reduction in toxicity, mobility, or volume, and compliance with ARARs criteria should be considered before evaluating the protectiveness of a remedial alternative. EPA agrees that the protectiveness determination in the detailed analysis draws upon the assessments conducted under other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness, and compliance with ARARs. However, EPA has maintained protection of human health and the environment as the first criterion due to the clear statutory mandate to select remedies that are protective of human health and the environment.

One commenter stressed that the impact of the remedial action on natural resources must be assessed under this criterion. The commenter noted that the use of ground-water pump and treat systems as part of a remedial action may deplete valuable water resources, particularly in the western states. EPA agrees that the impact of the remedial action must be assessed and calls for this analysis under the short-term effectiveness criterion. As noted above, the evaluations of short-term effectiveness and other criteria are used in assessing the protectiveness of each alternative.

2. *Compliance with ARARs.* This evaluation criterion is used to determine whether each alternative will meet all of its federal and state ARARs (as defined in CERCLA section 121). The detailed analysis should summarize which requirements are applicable or relevant and appropriate to an alternative and describe how the alternative meets these requirements. When an ARAR is not met, the detailed analysis should discuss whether one of the six waivers allowed under CERCLA may be appropriate (see also preamble section below on ARARs).

One commenter noted that the responsibility for evaluating the applicability of ARARs waivers to a proposed remedial action lies with the lead agency and not with the potentially responsible party (PRP). This commenter also recommended that the lead agency evaluate potential grounds for ARARs waivers as early as possible in the feasibility study, due to the important role ARARs play in the ultimate remedy selection decision. EPA supports early evaluation of ARARs by the lead agency or the PRP, as appropriate, depending on site-specific enforcement agreements. Either the PRP or a state may perform the ARAR analysis and recommend the applicability of ARAR waivers, but ultimately EPA determines compliance with ARARs (and the applicability of ARARs waivers) when it selects the remedial action, as described in the proposed plan and finalized in the record of decision (ROD).

3. *Long-term effectiveness and permanence.* The analysis under this criterion focuses on any residual risk remaining at the site after the completion of the remedial action. This analysis includes consideration of the degree of threat posed by the hazardous substances remaining at the site and the adequacy and reliability of any controls (e.g., engineering or institutional controls) used to manage the hazardous substances remaining at the site. The criterion is founded on CERCLA's mandates to select remedies that are protective of human health and the environment and that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable and that maintain protection over time.

Seeking clarification of EPA's interpretation of "permanence," one commenter recommended that EPA define a permanent remedy as a remedy for a particular site that results in protection of human health and the environment without the need for significant levels of long-term operation and maintenance. Another suggested that a permanent solution is simply a remedy that is not an interim solution, i.e., it is a final solution. EPA evaluates permanence to the maximum extent practicable as the degree of long-term effectiveness and permanence afforded by a remedy. This is judged along a continuum, with remedies offering greater or lesser degrees of long-term effectiveness and permanence.

As a general observation, several commenters noted that many of the criteria (e.g., long-term effectiveness, short-term effectiveness, and reduction of toxicity, mobility or volume through treatment) overlap. EPA acknowledges that these factors are related. They derive from the mandates of section 121 and are designed to elicit analysis on distinct, but related factors to perform a comprehensive analysis of each alternative. Today's rule lists factors to be considered in performing the detailed analysis under each of the criteria. For further guidance, see the "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," OSWER Directive No. 9355.3-01, October 1988 (Interim Final).

Long-term effectiveness includes a consideration of the residual risk remaining at a site after the remedial action is complete. This assessment of risk is conducted assuming conservative but realistic exposures. This consideration will assess how much of that risk is associated with treatment residuals and how much is associated with untreated waste. The potential for this risk may be measured by numerical standards such as cancer risk levels or the volume or concentration of contaminants in waste, media, or treatment residuals remaining on site.

4. *Reduction of toxicity, mobility or volume through treatment.* This evaluation criterion addresses the statutory preference for selecting

remedial actions that employ treatment technologies that permanently and significantly reduce the toxicity, mobility or volume of the hazardous substances as a principal element. Specifically, this analysis examines the magnitude, significance and irreversibility of such reductions achieved by alternatives employing treatment.

One commenter pointed out that the preamble to the proposed rule lacked precision in stating that CERCLA section 121 mandates a preference for remedies that permanently reduce the volume, toxicity, or mobility of the hazardous substances. Rather, this commenter wrote, section 121 establishes a preference for remedies in which treatment permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances. The commenter noted the omission of the word "treatment" could be important because the ambiguous statement in the proposal would allow the conclusion that containment qualifies as a preferred remedy. In fact, some commenters suggested the rule contain language stating that physical control, or containment on site, would qualify as actions achieving a reduction of mobility for purposes of this criterion.

EPA must stress that the reductions analyzed pursuant to the reduction of toxicity, mobility or volume criterion must be attained through treatment. This criterion is designed to evaluate alternatives in light of CERCLA's preference for remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances is a principal element. This criterion has been amended in today's rule to specify analysis of the extent that toxicity, mobility or volume is reduced through treatment.

On a related point, another commenter noted that the statute establishes a preference for reduction of toxicity, mobility or (rather than "and") volume through treatment. EPA agrees with this comment and today's preamble and rule consistently refer to the reduction of toxicity, mobility or volume through treatment.

Another commenter expressed concern that the phrase "permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances" will be interpreted as a presumption in favor of incineration. This commenter believes such a presumption would dramatically increase remediation costs without providing a corresponding increase in protectiveness. Some commenters argued that the effectiveness of different treatment technologies should not be judged solely on the destructive efficiency of a particular technique, such as incineration, because treatment technologies that do not destroy hazardous constituents but rather immobilize them chemically also are capable of protecting human health and the environment and satisfying the statutory preference.

In response, the purpose of treatment in the Superfund program is to substantially reduce the toxicity, mobility, or volume of hazardous substances in order to decrease the inherent hazards posed by a site. Consistent with the statutory preference set out in CERCLA section 121(b)(1), EPA expects to treat the principal threats (e.g., contaminants of concern) posed by a site, wherever practicable (*see* § 300.430(a)(1)(iii)(A)). However, EPA agrees with the commenters that more than one treatment technology is capable of accomplishing these goals. In order to clarify this point, EPA is establishing, as a guideline, that treatment as part of CERCLA remedies should generally achieve reductions of 90 to 99 percent in the concentration or mobility of individual contaminants of concern, although there will be situations where reductions outside the 90 to 99 percent range that achieve health-based or other site-specific remediation goals (corresponding to greater or lesser concentration reductions) will be appropriate.

All treatment should involve well-designed and well-operated systems. In order to achieve 90 percent or greater reductions, the systems should be designed to achieve reductions beyond the target level under optimal conditions. If treatment results in the transfer of hazardous constituents from one medium to another (e.g., stripping of volatile organic compounds from sludges to air), treatment of the newly affected medium will often be required.

The reductions suggested by this guideline for effective treatment may be achieved by the application of a single technology or a combination of technologies (i.e., treatment train). In addition, EPA believes this 90 to 99 percent range allows the use of an array of technologies, including innovative technologies. As noted above, EPA agrees that a wide variety of treatment technologies are capable of achieving these reductions. For example, effective treatment may potentially include bioremediation, solidification, and a variety of thermal destruction technologies, as well as many others. EPA supports the development and use of a diverse array of treatment technologies to address hazardous substances at Superfund sites. Examples of efforts to support such development and use include the Superfund Innovative Technology Evaluation program and the increased encouragement of treatability testing of innovative technologies during the RI/FS to improve promotion and selection of such technologies. To provide further emphasis on the use of innovative technologies, today's rule incorporates an expectation that examination of such technologies shall be carried through to the detailed analysis if those technologies have the potential and viability to perform better than or equal to proven technologies in terms of performance or implementability, short-term effectiveness or cost (§ 300.430(a)(1)(iii)(E)).

This guideline for effective treatment is based on an evaluation by the Superfund program of the effectiveness of treatment technologies on hazardous constituents in sludges, soil, and debris, the most common waste addressed by Superfund source control remedial actions ("Summary of Treatment Technology Effectiveness for Contaminated Soil," EPA Final Report (March 1989)). This guideline is also consistent with guidance that establishes alternate treatment levels to be achieved when complying with the RCRA land disposal restrictions for soil and debris through a treatability variance ("Obtaining a Soil and Debris Treatability Variance for Remedial Actions," Superfund LDR Guide #6A, OSWER Directive 9347.3–06FS). Both documents are available in the docket in support of this final rule.

One commenter recommended that recycling should be considered in assessing the extent that each alternative reduces the toxicity, mobility or volume of the hazardous substances. Although the rule as proposed would have allowed recycling activities to occur as part of the remedial action, § 300.430(e)(9)(iii)(D) of today's rule is changed to specifically consider the reduction of toxicity, mobility or volume of the hazardous substances through recycling.

5. *Short-term effectiveness.* This evaluation criterion addresses the effects of the alternative during the construction and implementation phase until remedial response objectives are met. Under this criterion alternatives are evaluated with respect to their effects on human health and the environment during implementation of the remedial action.

One commenter requested additional guidance on the evaluation of short-term effectiveness. Today's rule lists the

factors to consider under this criterion. The assessment of short-term effectiveness includes an evaluation of how alternatives will protect the community during remedial actions. This aspect of short-term effectiveness addresses any risk that results from implementation of the proposed remedial action, such as dust from excavation, transportation of hazardous materials, or air quality impacts from a stripping tower operation that may affect human health. This assessment will consider who may be exposed during the remedial action, what risks those populations may face, how those risks can be mitigated, and what risks cannot be readily controlled. Workers are included in the population that may be affected by short-term exposures.

This criterion also addresses potential adverse impacts on the environment that may result from the construction and implementation of an alternative and evaluates the reliability of the available mitigation measures in preventing or reducing potential impacts on either of these potential receptors. More detailed guidance on evaluating the short-term impacts of a remedial alternative is included in the "EPA Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (OSWER Directive 9355.3-01, October 1988). This guidance lists relevant factors to analyze as part of this criterion and the bases for evaluation during the detailed analysis.

This commenter also expressed concern that EPA's definition of short-term effectiveness does not sufficiently highlight the use of institutional controls during remedy implementation. According to this commenter, because these techniques can substantially reduce risk, EPA should require consideration of these controls when assessing the short-term effectiveness of an alternative. Another commenter expanded on this concept, stating that both institutional controls and site stabilization can be used to mitigate the risks posed by the remedial action. This commenter argued that use of institutional controls and site stabilization activities would allow the use of innovative technologies, such as bioremediation, that could be effective in the long-term. EPA agrees that short-term effects often can be mitigated through the use of institutional controls along with other active measures that may include interim remedies (implemented as operable units) or removal actions. Program management principles and expectations placed in today's rule reflect these concepts.

One commenter noted that many of the same considerations that apply to the evaluation of long-term effectiveness also apply to evaluating the short-term effectiveness of certain remedial techniques. In analyzing short- and long-term effectiveness, EPA may study impacts or risks posed to many of the same receptors. However, the focus of the analyses under the two criteria differ. The analysis under the long-term effectiveness and permanence criterion addresses the risk remaining after response objectives have been met. The primary focus of this evaluation is the extent and effectiveness of the controls that may be required to manage the risk posed by treatment residuals and/or untreated wastes. The analysis under the short-term effectiveness criterion focuses on the effects on human health and the environment during implementation of the remedial action.

6. *Implementability.* The implementability criterion addresses the technical and administrative feasibility of implementing an alternative and the availability of various services and materials required during its implementation.

Some commenters linked implementability with effectiveness. These commenters argued that the two criteria must be analyzed together because an alternative that is not implementable also could not be effective. One commenter asserted that implementability is site-specific and therefore should include the variables of each site's topography, location, and available space, capacity and technologies.

Although EPA agrees that implementability and effectiveness are related, EPA has maintained them as separate analytical criteria. This allows distinct analysis of the various subfactors of each criterion (such as the magnitude of residual risk remaining at the conclusion of the remedial action for long-term effectiveness and permanence, and the technical feasibility associated with the remedial action for implementability), which generally do not relate to both. EPA agrees that implementability is determined on a site-specific basis. The factors listed by this commenter would be addressed under the technical feasibility component of the implementability criterion. Today's rule lists the factors to be considered under the criteria and the RI/FS guidance provides an additional discussion.

7. *Cost.* Many comments reflected some confusion over the role of cost as an analytical criterion under the detailed analysis and the required statutory finding that the remedy selected is cost-effective. One commenter focused on the need to distinguish the cost-effectiveness finding from the cost evaluation criterion. EPA agrees that this distinction is an important one. Although cost is used as a crude screen in the development and screening of alternatives, cost is primarily addressed in the detailed analysis and remedy selection phases of the remedial process. The detailed analysis evaluates and compares the cost of the respective alternatives, but draws no conclusion as to the cost-effectiveness of the alternatives. Cost-effectiveness is determined in the remedy selection phase, considering the long-term effectiveness and permanence afforded by the alternative, the extent to which the alternative reduces the toxicity, mobility, or volume of the hazardous substances through treatment, the short-term effectiveness of the alternative, and the alternative's cost (see preamble section below on detailed discussion of the role of cost in decisionmaking).

Several commenters addressed cost as an evaluation criterion. Some noted the importance of an adequate cost evaluation in the detailed analysis phase. EPA agrees that the evaluation of costs associated with an alternative must be based on as complete and accurate cost data as possible. Several commenters stated that the discount rate used to determine the net present value creates a bias against protective remedies. Some argued that use of the 10 percent discount rate established by Office of Management and Budget (OMB) Circular A-94 is inappropriately high. They believe use of this discount rate artificially reduces estimates of the cost of operation and maintenance (O&M) and encourages the selection of containment-based, low capital, high O&M cost remedies, while discouraging high capital, low O&M cost remedies. They commented that the discount rate of 10 percent is unrealistic because it does not take into account long-term market conditions and the likelihood that the beneficial value of a clean site will increase as populations increase and natural resources become more scarce. The discount rate may also be outdated because inflation rates have changed since the rate was developed. The commenters stated that five percent is a more realistic discount rate. EPA recognizes the importance of using an appropriate discount rate when deriving estimates of project costs. EPA does not intend to create a bias against high capital, low O&M cost remedies. EPA will follow OMB Circular A-94 and

notes that OMB is currently reviewing its provisions. If and when Circular A-94 is revised, EPA will address this matter in program guidance to ensure consistency with Circular A-94.

EPA received the suggestion that the cost criterion should include the assessment of savings due to recycling of salvageable or recyclable material. EPA has not changed the rule to specifically consider revenue realized due to recycling. However, EPA believes that to the extent response costs are directly offset by the receipt of revenue from recycling, such funds should be included when calculating the costs of the response action.

One commenter argued that costs of future remedial actions should be included in the cost estimate, when there is a reasonable expectation that a major component of a remedy may require replacement. EPA agrees and believes that such factors may be taken into account under today's rule. Analysis under the "long-term effectiveness and permanence" criterion should be used to determine which alternatives may result in future costs. A detailed statistical analysis is not required to identify probable future costs. Rather, qualitative engineering judgment should be used to assess whether replacement costs should be considered. EPA specifically has provided in the RI/FS guidance that such costs are to be addressed, and if appropriate, included in the cost estimate, when it may be reasonably assumed that a major component of the alternative will fail and require replacement to prevent significant exposure to contaminants. EPA notes that when developing cost information, both direct and indirect capital and operation and maintenance costs should be developed.

One commenter recommended considering as part of the analysis under this criterion, costs related to losses of business activities, residential development, and local, state, and federal tax revenues that may result from restricting future land use and ground water use that may be necessary with remedial actions that leave hazardous substances on site. The commenter also said that EPA should also take into account the reductions in the values of the neighboring properties that may occur when an inactive waste site is not restored to unrestricted use. In response, EPA does not believe it is appropriate under CERCLA to include these costs within this evaluation criterion. Section 111 of CERCLA governs the use of the Fund and according to that section, these costs are not included as costs that may be incurred by the Fund. In addition, section 107 provides the right to recover response costs, natural resources damages and costs of certain health assessments or health effects studies. The costs listed by the commenter also are not included specifically within the costs recoverable under section 107. Further, such indirect effects such as the reduction in property values are the result of the hazardous substance activity, not the response action.

One commenter asked EPA to acknowledge that federal procurement requirements apply to EPA contractors conducting Superfund remedial actions. EPA agrees with the commenter that EPA contractors must comply with federal procurement requirements and that this can reduce the cost of Fund-financed remedial actions (e.g., contract award to responsive, responsible low bidder). However, EPA does not believe it necessary or appropriate to acknowledge this in the rule. Similarly, EPA received comments that it should employ cost-cutting measures when implementing remedial actions. EPA agrees and does so whenever possible.

EPA received the comment that the detailed analysis does not afford sufficient weight to cost because, among the five criteria labeled as balancing criteria in the proposal, four address effectiveness and implementability and only one addresses cost. EPA stresses that the number of related criteria in the detailed analysis does not relate to the importance of each criterion. All nine criteria are important to address the requirements of CERCLA.

8. *State acceptance.* This criterion reflects the statutory requirement to provide for substantial and meaningful state involvement. State comments may be addressed during the FS, as appropriate, although formal state comments generally are not received until after the state has reviewed the draft RI/FS and the draft proposed plan prior to the public comment period.

EPA received several comments stressing the importance of this criterion. EPA agrees this consideration is important and has developed today's rule consistent with CERCLA's emphasis on state involvement in the remedial process (see also preamble section below on subpart F).

9. *Community acceptance.* This criterion refers to the community's comments on the remedial alternatives under consideration. For this evaluation, community is broadly defined to include all interested parties, including PRPs. These comments are taken into account throughout the RI/FS process, although formal community comments are made during the public comment period for the proposed plan and the RI/FS.

EPA received one comment suggesting that this criterion only consider the acceptance of a party if that party resides in a community near the site. This commenter argued that comments from parties affected only by interference of normal commerce or residing in areas unaffected by the potential health threat should not be afforded the same weight as those parties residing in the nearby community. As a matter of policy, EPA places the highest priority on comments received from the community to which the site potentially or actually poses a human health or environmental risk. However, today's rule establishes no formal priority for evaluating community comments. Instead, community concerns will be assessed on a site-specific basis, allowing flexibility to meet the demands of varying site conditions and diverse community needs.

Final rule: 1. Today's regulation revises proposed § 300.430(e)(9) based on comments received on the detailed analysis of alternatives using the nine criteria, the remedy selection, and the hierarchy of criteria used in the analysis. The revisions made in response to comments primarily attempt to clarify the process. The revisions reflect the fact that the detailed analysis should be an objective assessment of the alternatives with respect to the nine criteria and as a consequence, the threshold, balancing, and modifying labels have been removed from the discussion of the nine criteria during the detailed analysis and placed in the selection of remedy section, where the criteria are actually used as threshold, balancing, and modifying criteria.

2. The final rule requires specification of which reduction—toxicity, mobility or volume—will be achieved by an alternative. Section 300.430(e)(9)(iii)(D)(*1*) is revised to indicate that recycling is an acceptable means of accomplishing reduction.

Name: Section 300.430(f). Remedy selection.

Existing rule: The 1985 NCP calls for the selection of remedies that are cost-effective and that effectively mitigate and minimize threats to public health and welfare and the environment. 40 CFR 300.68(i)(1). In selecting the appropriate extent of remedy, the lead agency considers cost, technology, reliability, administrative and other concerns, and their relevant effects on public health and welfare and the environment. Federal ARARs are used

as the basis for determining cleanup levels.

CERCLA, as amended in 1986, elevated the use of ARARs, including state ARARs, as cleanup standards to a statutory requirement and provided other requirements for remedy selection. Congress retained the requirement for protective and cost-effective remedies and prescribed remedies that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable.

Proposed rule: The preamble to the proposed rule explained that selection of a remedial action is a two step process (53 FR 51429). First, the lead agency, in conjunction with the support agency, reviews the results of the RI/FS to identify a preferred alternative. The lead agency presents this preferred alternative, along with the supporting information and analysis, to the public in a proposed plan for review and comment. Second, the lead agency reviews the public comments, consults with the support agency to evaluate whether the preferred plan still is the most appropriate remedial action for the site or site problem, and makes the final remedy selection decision (see also § 300.515(e) for description of lead and support agency roles during the selection of remedy process).

The identification of the preferred alternative and the final remedy selection decision are based on an evaluation of the major trade-offs among the alternatives in terms of the nine evaluation criteria. Remedial alternatives must be protective of human health and the environment and comply with ARARs (or justify a waiver) in order to be eligible for selection. These are the two threshold criteria from among the nine criteria.

The lead agency balances the trade-offs, identified in the detailed analysis, among alternatives with respect to long-term effectiveness and permanence, reduction of toxicity, mobility or volume through treatment, short-term effectiveness, implementability, and cost. This initial balancing determines preliminary conclusions as to the maximum extent to which permanent solutions and treatment can be practicably utilized in a cost-effective manner. The preamble to the proposed rule referred to the criteria used for balancing the trade-offs as primary balancing criteria.

The alternative that is protective of human health and the environment, is ARAR-compliant and affords the best combination of attributes is identified as the preferred alternative in the proposed plan.

State and community acceptance are factored into a final balancing which determines the remedy and the extent of permanent solutions and treatment practicable for the site. State concerns will be factored into the proposed plan to the extent they are known. However, formal state comments may not be received until after the state has reviewed the draft RI/FS and the draft proposed plan prior to the public comment period. Similarly, to the extent possible, community concerns will be factored into the feasibility study and proposed plan. However, community acceptance cannot be assessed definitively until the formal public comment period is held.

Response to comments: 1. *Structure and consistency.* Although generally supporting the use of the nine criteria in remedy selection, several commenters expressed concern over whether the balancing process ensures selection of remedies that comply with the statutory mandates of CERCLA. In response, EPA believes that the remedy selection process promulgated today effectively harmonizes the somewhat competing requirements of CERCLA, and ensures that remedial actions will fulfill each statutory mandate.

Specifically, some commenters wrote that the absence from the rule of the categories of threshold, balancing, and modifying criteria described in the preamble to the proposal made the function of the criteria in remedy selection unclear and that the proposed rule did not provide sufficient practical guidance on remedy selection.

In response, EPA has modified the proposed rule to provide further clarification and structure in the remedy selection process. First, EPA has added expectations into the rule, in order to provide better guidance on the types of remedies that EPA expects to consider in detailed analysis, and has set out a program goal and management principles (§ 300.430(a)). Second, EPA has added structure to the process by specifying the functional categories of the nine criteria—threshold, primary balancing or modifying—in the remedy selection portion of the rule. Third, the rule emphasizes the importance of two of the nine criteria—long-term effectiveness and permanence, and reduction of toxicity, mobility or volume through treatment—in the balancing process.

Some commenters opposed the adoption of the proposed remedy selection framework. These commenters criticized the framework as being vague and providing little guidance on the weight to be afforded individual selection criteria or the order in which the criteria should be considered. The commenters criticized the process as likely to vary from site to site, resulting in the selection of different remedies for sites with similar characteristics. According to these commenters, the inconsistency could impair EPA's ability to negotiate settlements with PRPs. One commenter warned that the fluid nature of the proposed decision-making process will make it more difficult for states, other federal agencies, and PRPs to replicate. The commenter fears that EPA will waste time second-guessing remedy selections and justifying how a preferred remedy was identified by a lead agency or a PRP. These commenters requested clear and complete directions on how to select remedies.

In response, EPA believes that the basic remedy selection system as revised presents a sound, workable method for selecting protective remedies while balancing the technical, economic, and practical realities associated with each site and with the program as a whole to arrive at appropriate solutions. EPA believes that flexibility is needed in the remedy selection process precisely because each Superfund site presents a different set of circumstances. A rigid set of criteria for remedy selection, while perhaps more easily reproduced, would not be well suited to such diverse site circumstances, and would be less responsive to Congress' mandate to consider a large number of factors, including protectiveness, permanence and treatment, cost, effectiveness, and state and public participation.

At the same time, EPA agrees that clarification is needed concerning the role and relative importance of the different criteria in remedy selection, and has responded by categorizing the criteria by function (i.e., threshold, balancing, and modifying), and by identifying balancing criteria that should be emphasized. These revisions add structure to the process and indicate the relative importance of the different criteria. The inclusion of the goal, management principles, and expectations in the rule should also increase national consistency by focusing detailed analysis and remedy selection on fewer, more appropriate alternatives. EPA believes that these changes will make it easier for the public to understand and anticipate EPA decisions.

In addition, proposed § 300.430(f)(3)(iii) (§ 300.430(f)(1)(ii) (D) and (E) in the final rule) is revised to clarify the relation of the evaluation criteria to the statutory mandates of section 121 of CERCLA. Specifically, the regulation now states that cost-

effectiveness is to be determined by comparing the costs and overall effectiveness of alternatives to determine whether the costs are proportional to the effectiveness achieved. Overall effectiveness for the purpose of this determination includes long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; and short-term effectiveness. The determination of which alternative utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable takes into account long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost, as well as state and community acceptance.

Another revision made to enhance the clarity of the regulation is the direction at § 300.430(f)(1)(ii)(E) that special emphasis is to be afforded alternatives that offer advantages in terms of long-term effectiveness and permanence, and reduction of toxicity, mobility or volume through treatment, in performing the balancing by which the remedy is selected. These two criteria are given primary consideration in the rule and preamble when analyzing the relative merits of the alternatives. These criteria will be the most important, decisive factors in remedy selection when the alternatives perform similarly with respect to the other balancing criteria. When the alternatives provide similar long-term effectiveness and permanence and reduction of toxicity, mobility or volume, the other balancing criteria rise to distinguish the alternatives and play a more significant role in selecting the remedy. For example, if two alternatives offer similar degrees of long-term effectiveness and permanence and reduction of toxicity, mobility or volume through treatment, but one alternative would require more time to complete and would have greater short-term impacts on human health and the environment, the decision-maker would focus on the distinctions between the alternatives under the short-term effectiveness criterion.

One commenter stated that remedies should be evaluated on a national basis, rather than a site-specific basis to, at a minimum, determine the relative importance of each of the nine criteria. According to this commenter, site-specific remedy selection using balancing leads to nationally inconsistent remedies and hides from public view the remedy selection process. A different commenter argued that site-specific factors should dominate the remedy selection process.

EPA believes that today's modifications to the proposal clarify the remedy selection process and help ensure that consistent remedies are selected. The remedy selection process in today's rule, shaped by the program goal and expectations, promotes national consistency while allowing consideration of important site-specific factors. In addition, EPA is developing guidance on expected remedies for specific types of sites (e.g., municipal landfills) and specific types of waste (e.g., PCBs) that will assist in streamlining decision-making and promoting greater consistency.

One commenter suggested that the selection process focus on the risk reduction provided by the alternatives and the cost-effectiveness of each alternative. EPA agrees with the commenter that risk reduction and cost-effectiveness are major considerations in selecting remedial actions. The amount of residual risk remaining after implementation of the remedy is analyzed under the long-term effectiveness and permanence criterion in the detailed analysis. The trade-offs associated with this criterion are balanced with the other criteria when selecting a remedy. However, today's rule affords extra significance to the trade-offs associated with the "long-term effectiveness and permanence" and "reduction of toxicity, mobility or volume through treatment" criteria when comparing the attributes associated with the alternatives.

One commenter noted that EPA had omitted in the proposal a reference to the statute's bias against off-site land disposal of untreated waste. EPA notes the omission and has changed proposed § 300.430(f)(3)(iii) (§ 300.430(f)(1)(ii)(E) in the final rule) to clarify that an alternative that relies on the off-site transport and land disposal of untreated hazardous substances will be the least favored alternative where practicable treatment technologies are available, as determined by analysis using the nine criteria. EPA notes that CERCLA does not express a preference for or bias against off-site remedies involving treatment and that the NCP is similarly neutral.

Many commenters felt that protection of human health and the environment was appropriately established as a threshold criterion. One commenter requested that protectiveness be clearly identified as the dominant criterion for evaluating responses conducted by PRPs. Another commenter felt that the proposed NCP did not make it clear that the protection of human health and the environment must be met at a minimum by all remedies.

Section 121 of CERCLA makes clear, and the legislative history confirms, that the overarching mandate of the Superfund program is to protect human health and the environment from the current and potential threats posed by uncontrolled hazardous waste sites. This mandate applies to all remedial actions and cannot be waived. This priority has been reflected in the rule by including protection as a threshold criterion that must be satisfied by all remedies selected under CERCLA (§ 300.430(f)(1)(ii)(A)).

One commenter noted that, in general, if there will be significant exposure during implementation of the remedy, a remedial option that can be implemented quickly is preferable, in terms of the short-term protection it affords, to one that can only be implemented slowly but provides greater long-term effectiveness. EPA responds by cautioning against over-generalization and attempting to create too rigid a formula for remedy selection. EPA agrees that unacceptable short-term impacts can cause an alternative to be considered non-protective of human health and the environment and can remove that alternative from consideration as a viable option. However, in this example, the remedy that is less effective in the short-term (i.e., takes longer to implement) also provides greater long-term effectiveness than the remedy without unacceptable adverse short-term impacts. In this situation, generally EPA would evaluate the possible measures available to mitigate the short-term impacts and thus allow the alternative to be protective during implementation. This alternative, in other words, would not immediately be ruled out, due to its positive performance under the long-term effectiveness and permanence criterion.

One commenter cautioned that the threshold criteria should not be overly restrictive, i.e., must not include overly conservative safety factors. EPA believes it uses a sound, reasonable approach in judging the overall protection afforded by a remedial alternative. (See preamble description of § 300.430(e) for a complete discussion of evaluating risks associated with potential alternatives.) As for the requirement to meet ARARs, EPA is simply following the mandate in the statute that on-site remedies selected under CERCLA section 121 must meet all "applicable" and "relevant and appropriate" requirements of federal and state environmental laws, unless a

waiver is appropriate under the conditions set out in CERCLA section 121(d)(4). EPA has discretion to determine whether any, all, or only a portion of a requirement is relevant and appropriate, consistent with the factors set out in final rule § 300.400(g)(2); however, once determined to be relevant and appropriate, all relevant and appropriate portions of the requirement must be applied as though they were applicable (again, unless a waiver is available).

Some commenters concluded that since Congress did not list compliance with ARARs as one of the remedy selection criteria in section 121(b), this criterion should not be considered a threshold criterion. In addition, some commented that protection of human health and the environment should receive more emphasis than compliance with ARARs. EPA believes that CERCLA section 121(d)(2)(A) establishes compliance with ARARs as a threshold criterion for remedy selection. That section requires the selection of a remedial action that "at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation" (subject to waivers in CERCLA section 121(d)(4)). In some situations compliance with ARARs may not result in protective remedies because of exposure to multiple chemicals or through multiple exposure pathways that have additive or synergistic effects. In this case a remedy may need to achieve levels more stringent than the ARARs to ensure protection.

One commenter argued that since different remedies must meet different ARARs and, because meeting some ARARs precludes meeting other ARARs, some site cleanups will not be able to meet all ARARs. Another commenter sought clarification on comparing alternatives when different ARARs are identified and questioned how EPA would prioritize alternatives if none meets all the identified ARARs.

In response, EPA notes that in the detailed analysis, each alternative is evaluated individually to determine if the alternative will be ARAR-compliant. Each alternative will possess its own set of ARARs, and frequently ARARs for one alternative will not be ARAR for another alternative for the same site (e.g., an incineration alternative may have air emissions ARARs not applicable to a bioremediation alternative). Alternatives need only attain requirements that are applicable or relevant and appropriate for that alternative, not all ARARs identified for any alternative at the site. Alternatives that cannot meet all of their respective ARARs must justify a waiver under CERCLA section 121(d)(4) (final rule § 300.430(f)(1)(ii)(C)) for each requirement that will not be met in order for that alternative to be eligible for selection as the remedial action. Alternatives involving ARAR waivers, of course, must also provide adequate protection of human health and the environment in order to be eligible for selection as the remedy.

2. *Role of cost in cost-effectiveness determination.* The appropriate role of cost in remedy selection has been a controversial issue. EPA received questions concerning the weight afforded each of the criteria, including cost, when balancing the trade-offs among the criteria. Under the proposal and today's rule, cost is considered in making two statutory determinations required for selected remedies: that the remedy is cost-effective (i.e., the remedy provides effectiveness proportional to its cost) and that it utilizes permanent solutions and treatment to the maximum extent practicable. The comments that address the role of cost in the cost-effectiveness determination are discussed first.

According to several commenters, Congress clearly intended that remedies would be selected based on the protectiveness afforded by the alternative and cost would be used only to select from among protective alternatives. A different commenter argued that the cost-effectiveness mandate must be used to ensure that remedial actions, which must be protective of human health and the environment, ARAR-compliant, and utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, achieve these mandates at the lowest possible cost.

EPA agrees that cost can only be considered in selecting a remedy from among protective alternatives. The remedy selection process requires that alternatives must be demonstrated to be protective and ARAR-compliant (or justify a waiver) in order to be eligible for consideration in the balancing process by which the remedy is selected. This sequence of steps ensures that the selected remedy will be protective of human health and the environment and that protection of human health and the environment will not be compromised by other selection factors, such as cost. Several commenters supported the proposed remedy selection process believing it ensures the selection of a cost-effective remedy while at the same time not affording an overly dominant role to cost.

Some commenters argued that cost should only be used to *implement* a selected, protective remedy in the most cost-efficient manner, i.e., that cost-effectiveness should only be considered after the remedy has been selected to allow implementation in the least costly manner. The commenters assert that their interpretation follows from the statute and the legislative history. Another commenter asserted that cost-effectiveness primarily is a check to prevent unreasonable expenditures and to ensure remedies are implemented in a cost-efficient (and not necessarily the lowest cost) manner.

In response, EPA believes that cost is a relevant factor for consideration as part of the selection of the remedy from among protective, ARAR-compliant alternatives, and not merely as part of the implementation phase. EPA believes this position is consistent with both the statute and legislative history.

CERCLA, at section 121(a), states that "the President shall select appropriate remedial actions * * * which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response." Thus, cost-effectiveness is established as a condition for remedy selection, not merely as a consideration during remedial design and implementation. Further in the statute, at section 121(b)(1), Congress again repeats the requirement that only cost-effective remedies are to be selected, as follows:"The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment * * * to the maximum extent practicable." Again, cost-effectiveness is cited along with protectiveness as a key factor to consider in selecting the remedy. EPA believes that the statutory language supports the use of concepts of "cost" and "effectiveness" in this rule's nine evaluation criteria that provide the basis for the remedy selection decision, rather than as factors to be applied after the remedy has been selected.

EPA believes that this approach is also in line with the legislative history underlying the SARA Amendments, which added section 121 to CERCLA. The Conference report on SARA discussed the concept of cost-effectiveness, and specifically approved of the approach to cost-effectiveness taken by EPA in the 1985 NCP:

The provision that actions under both sections 104 and 106 *must be cost-effective is a recognition of EPA's existing policy as embodied in the National Contingency Plan.*

H.R. Rep. 962, 99th Cong., 2d Sess. 245 (1986) (emphasis added).

Specifically, the 1985 NCP required that:

in selecting the appropriate extent of remedy from among the alternatives that will achieve adequate protection of public health and welfare and the environment in accordance with 300.68(i)(1), the *lead agency will consider cost,* technology, reliability, administrative and other concerns, and their relevant effects on public health and welfare and the environment.

40 CFR 300.68(i)(2) (emphasis added). Thus, the 1985 NCP provided that cost should be a factor in the selection of a remedy, and emphasized that cost may be used to select "among" those alternatives that are protective; significantly, the 1985 rule does not contemplate a unique protective remedy in most cases, for which cost would simply be used to decide on possible implementation mechanisms.

The preamble to the 1985 NCP goes on to explain in more detail the role of cost in that rule:

The approach embodied in today's rule is to select a cost-effective alternative from a *range of remedies that protects the public health and welfare and the environment.* First, it is clear that if all the remedies examined are *equally* feasible, reliable, and provide the same level of protection, the lead agency will select the least expensive remedy. Second, where all factors are not equal, the lead agency must evaluate the cost, level of protection, and reliability of each alternative. In evaluating the cost of remedial alternatives, the lead agency must consider not only immediate capital costs, but also the costs of operating and maintaining the remedy for the period required to protect public health and welfare and the environment. For example, the lead agency might select a treatment or destruction technology with a higher capital cost than long-term containment because treatment or destruction might offer a permanent solution to the problem.

* * * * *

Finally, the lead agency would not always select the most protective option, regardless of cost. The lead agency would instead consider costs, technology, reliability, administrative and other concerns, and their effects on public health and welfare and the environment. This allows selection of an alternative that is the most appropriate for the specific site in question.

50 FR at 47921 (Nov. 20, 1985) (emphasis added).

Today's rule continues the approach embodied in the 1985 NCP, although some of the terminology has changed. First, the approach promulgated today requires that alternatives are determined to be adequately protective and ARAR-compliant before cost-effectiveness is considered in remedy selection (see § 300.430(f)(1)(ii)(D)). Second, today's rule recognizes that a range of alternatives can be protective and ARAR-compliant, and that cost is a legitimate factor for choosing among such alternatives.

The 1985 NCP based the cost-effectiveness determination on technology, reliability, administrative, and other concerns and their effects on public health and welfare and the environment. Today's rule considers basically the same factors but has recast them to reflect CERCLA's preferences and mandates. For example, *technology* is considered under the criterion of reduction of toxicity, mobility, or volume through treatment for treatment performance; long-term effectiveness and permanence for residuals, and short-term effectiveness for adverse impacts. Reliability of treatment technology is considered under reduction of toxicity, mobility, or volume through treatment. Reliability of long-term management controls used to address treatment residuals is considered under long-term effectiveness and permanence. Effects of alternatives on protection of human health and the environment is considered under short- and long-term effectiveness. Administrative and other concerns are replaced by the implementability criterion, which is not considered in determining cost-effectiveness but is used in determining the extent to which permanent solutions and treatment can be practicably utilized, along with state and community acceptance.

In addition to endorsing the 1985 NCP approach to cost-effectiveness, the SARA Conference Report went on to discuss the Conferees' view of the role of cost-effectiveness in the remedy selection process:

The term "cost-effective" means that in determining the appropriate level of cleanup the President first determines the appropriate level of environmental and health protection to be achieved and then selects a cost-efficient means of achieving that goal. Only after the President determines, by the selection of applicable or relevant and appropriate requirements [ARARs], that adequate protection of human health and the environment will be achieved, is it appropriate to consider cost-effectiveness.

H.R. Rep. 962, 99th Cong., 2d Sess. 245 (1986).

As the Conference Report contemplated, where there is an applicable or relevant and appropriate requirement (ARAR) that defines the "appropriate level of environmental and health protection to be achieved," e.g., a Maximum Contaminant Level (MCL) for ground water, EPA will select an appropriate and cost-efficient technology for achieving that level under today's rule.[10] If two or more alternatives are determined to be comparably effective in achieving that MCL standard and level of protection, the least costly of the alternatives would be selected as the cost-effective solution under today's rule.

However, the situation is often more complicated. Indeed, in most cases, there will not be one level or standard—e.g., one contaminant-specific ARAR—that defines protectiveness, but rather, there will be a range of protective, ARAR-compliant alternatives eligible for selection that vary in their costs and effectiveness.

There are two principal reasons for this. First, ARARs are not available in all situations. Contaminant-specific ARARs have been promulgated for a small percentage of contaminants,[11] and even if contaminant-specific ARARs were available for some relevant substances, they generally do not define protective levels for contaminated soils nor do they always define protective levels for mixtures of chemicals (typical Superfund site situations). Thus, EPA must evaluate additional information to determine what remedies would protect human health and the environment; the answer, as reflected by this final rule's definition of an acceptable risk "range," is that there are generally a range of remedies that may be protective.

The second major reason that there will not be one level or standard that defines protectiveness in most cases, is that the NCP requires the development of alternatives that represent *distinct strategies* for cleaning up the site or site problem. These alternatives will achieve protection of human health and the environment through different methods (e.g., treatment, containment) or combinations of methods and will often involve different ARARs, particularly action-specific requirements.[12] (As

[10] *See* final rule § 300.430(f)(1)(ii)(D), which provides that only after an alternative is found to be "protective and ARAR-compliant," is the alternative evaluated based on cost or other balancing factors.

[11] For example, although there are a large number of hazardous substances that may contaminate the ground water, final MCL levels have only been promulgated for approximately 31 chemicals (assuming "radionuclides" are grouped, and considered to be one chemical). *See* 40 CFR 141.11–141.16; 40 CFR 141.61–141.62; and 54 FR 27567 (June 29, 1989).

[12] Location-specific ARARs and action-specific ARARs are discussed in more detail in the preamble to the proposed NCP, 53 FR at 51437 (Dec. 21, 1988).

noted above, e.g., incineration may have a potential ARAR relating to air emissions that a chemical treatment option would not.) Different methods of protection typically will vary in their costs and effectiveness (e.g., treatment residuals, short-term impacts). Where costs and effectiveness vary among protective and ARAR-compliant alternatives, it is necessary to evaluate the relationship of costs to effectiveness within and across alternatives to identify which options afford overall effectiveness proportional to their costs.

EPA believes that the intent of the SARA Conference Report was to make clear that cost-effectiveness cannot be used to justify selection of a remedy that does not protect human health and the environment. By following the approach of the 1985 NCP, and by considering cost-effectiveness only after EPA has identified protective remedial options, EPA believes its approach is consistent with the objectives and intent of Congress.

Some commenters urged that EPA highlight cost in the remedy selection process, elevating cost-effectiveness to a threshold criterion, in recognition of the mandate for cost-effective remedies. Several commenters suggested several reasons why cost-effectiveness should be considered a threshold criterion. One commenter stated that the legislative history indicates that cost-effectiveness should be a threshold. Another commenter indicated that cost is considered throughout the FS and is the only truly objective criterion of the nine and that, in practice, EPA has made its decisions with cost as a primary consideration. Another commenter sought explicit confirmation in the rule that regardless of how the five factors balance out, only cost-effective remedies may be selected. Other commenters wanted clarification concerning the weight afforded each of the criteria, including cost, when balancing the trade-offs among the criteria.

In response to the comments urging an increased role of cost or requesting clarification on the role of cost, EPA notes that it has established cost as one of the evaluation criteria in the detailed analysis and that the final rule explains more clearly how cost is to be considered in determining cost-effectiveness and the practicable extent to which permanent solutions and treatment can be used.

EPA agrees that cost-effectiveness is like the two threshold criteria in that it is a statutory requirement with which an alternative must comply in order to be eligible for selection as the remedy. The statutory finding of cost-effectiveness is not "balanced," with any other statutory requirement, but rather certain evaluation criteria are balanced to reach the conclusion that the remedy is cost-effective. More than one alternative can be cost-effective.

EPA has decided, however, not to establish cost-effectiveness as a threshold finding largely due to the sequence in which the statutory findings are made. When EPA begins the selection step, information is readily available from the detailed analysis to determine immediately which alternatives are protective and ARAR-compliant and therefore eligible for selection. The focus of the remedy selection process from this point forward is on drawing conclusions about the distinguishing differences among eligible options to determine which alternative represents the maximum extent to which permanent solutions and treatment can be utilized in a cost-effective manner. The findings of cost-effectiveness and the extent to which permanent solutions and treatment are practicable both derive from the balancing of these differences or tradeoffs.

Commenters asked EPA to clarify the measure of effectiveness used in the determination that costs are proportional to an alternative's overall effectiveness. Overall effectiveness, as used in the cost-effectiveness determination, is a composite of long-term effectiveness and permanence; reduction in toxicity, mobility or volume of the hazardous substances through treatment; and short-term effectiveness. The relationship between overall effectiveness and cost is examined across all the alternatives to identify which options afford effectiveness proportional to their cost.

Because some commenters were confused by the description of cost-effectiveness in proposed § 300.430(f)(4)(ii)(D) ("the remedy provides overall effectiveness proportional to its costs"), EPA believes that it is necessary to better express its intent. This description of cost-effectiveness is in final §§ 300.430(f)(1)(ii)(D) and 300.430(f)(5)(ii)(D).

EPA uses the term "proportional" because it intends that in determining whether a remedy is cost-effective, the decision-maker should both compare the cost to effectiveness of each alternative individually and compare the cost and effectiveness of alternatives in relation to one another (see 53 FR 51427–28). In analyzing an individual alternative, the decision-maker should compare, using best professional judgment, the relative magnitude of cost to effectiveness of that alternative. In comparing alternatives to one another, the decision-maker should examine incremental cost differences in relation to incremental differences in effectiveness. Thus, for example, if the difference in effectiveness is small but the difference in cost is very large, a proportional relationship between the alternatives does not exist. The more expensive remedy may not be cost-effective. EPA does not intend, however, that a strict mathematical proportionality be applied because generally there is no known or given cost-effective alternative to be used as a baseline. EPA believes, however, that it is useful for the decision-maker to analyze among alternatives, looking at incremental differences.

EPA believes that using the term "proportional" describes well this type of multidimensional analysis. Using such an analysis should enable the decision-maker to determine whether an alternative represents a reasonable value for the money; more than one alternative may be considered cost-effective.

In response to the comment that cost should be used to distinguish between comparably protective remedies, EPA notes that many alternatives will be protective but will achieve that protection through different methods or combinations of methods, such that the commenter's characterization of alternatives as "comparably protective" may not be appropriate (though all alternatives may be protective). However, alternatives may emerge from the detailed analysis as comparably "effective," in terms of the three effectiveness criteria of long-term effectiveness and permanence, reduction of toxicity, mobility or volume through treatment and short-term effectiveness; in that event, the least costly of the comparably effective alternatives would be identified as cost-effective while the others would not. However, because the remedy selection process usually involves consideration of a range of distinct alternatives that generally vary in their effectiveness and cost, most often a comparative analysis of the relationship between the overall effectiveness of the alternatives and their costs will be required to determine which alternatives are cost-effective (i.e., provide overall effectiveness proportional to their costs).

One commenter suggested adding the following to proposed § 300.430(f)(3): "Remedies selected shall be cost-effective relative to other alternatives. In evaluating the cost-effectiveness of proposed alternatives, EPA shall take

into account the total short- and long-term cost of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required. A cost-effective remedy is one with costs proportional to the remedy's overall effectiveness."

EPA has not incorporated the entire suggested statement into the rule. EPA believes the commenter's statement is too narrow, because several types of costs are factored into the evaluation of the cost of the remedy during the detailed analysis. These costs include, but are not limited to, the direct and indirect costs identified by the commenter. Also, the language does not reflect that overall effectiveness involves a composite of effectiveness factors, i.e., long-term effectiveness and permanence, toxicity, mobility or volume reduction through treatment, and short-term effectiveness. EPA does agree with the commenter that a cost-effective remedy is one with costs proportional to the remedy's overall effectiveness. A more detailed discussion of the types of costs that may be considered is included in EPA's RI/FS guidance (cited above).

One commenter argued that because the requirement that all remedies be cost-effective is unconditional, should EPA select a remedy requiring treatment techniques that are more stringent than health based ARARs or the 10^{-4} to 10^{-6} acceptable risk range, EPA must demonstrate the ability of the techniques to provide meaningful and necessary risk reductions at a reasonable cost. Although EPA generally will not select a remedial action specifically to achieve a risk level below 10^{-6} (e.g., 10^{-7}), technology used in implementing the selected remedy could actually achieve additional risk reduction (e.g., 10^{-7}). EPA agrees with the commenter that as with any remedy selected under CERCLA section 121, a remedy selected with a risk level below 10^{-6} must be cost-effective (and meet the other requirements of section 121).

Another commenter suggested that EPA add language to the rule stating that EPA shall select a remedy with associated risk lower than 10^{-4} only when necessary for protection of human health or the environment or compliance with ARARs, or if EPA can demonstrate that such risk reductions can be achieved at a reasonable cost. In response, EPA explains that once levels are established for carcinogens that will satisfy ARARs, EPA will consider cumulative or synergistic effects from multiple contaminants or multiple exposures. For carcinogens without ARARs, 10^{-6} is a point of departure from which technical, uncertainty and exposure factors are used to establish preliminary remediation goals, which include a target risk level. Final remediation goals are determined in the remedy selection decision by balancing the major trade-offs among the alternatives based on the evaluation criteria (as described in § 300.430(f)(1)(ii)), which will establish the specific level within the acceptable risk range the remedy will be designed to achieve. (See preamble discussion above on risk range.)

One commenter requested clarification that the cost-effectiveness requirement applies equally to Fund-financed and PRP-financed remedies. However, several other commenters asserted that the cost-effectiveness requirement pertains only to remedies that EPA intends to seek from PRPs or to fund itself. When the PRPs are proposing a remedy, according to these commenters, cost-effectiveness is a matter only for the PRPs, not the government.

EPA provides the following clarification. The statutory requirement that each remedy selected be cost-effective applies to all Fund-financed as well as all PRP-financed remedies under CERCLA.

3. *Cost and practicability.* Some commenters requested clarification of the proper analysis of trade-offs between cost-effectiveness and the practical limitations of treatment technologies on one hand, and the mandate to utilize treatment to the maximum extent practicable on the other. In addition, one commenter wrote that the proposed process blurs the two concepts of cost-effectiveness and practicability. Some commenters noted that cost must be considered in determining what is "practicable." EPA responds that cost is considered in making both findings as are certain other criteria. Cost is considered in determining cost-effectiveness to decide which options offer a reasonable value for the money in light of the results they achieve. Cost differences must also be considered in the context of all other differences between alternatives to reach a conclusion as to which alternative, all things considered, provides the most appropriate solutions for the site or site problem. It is this judgment that determines the maximum extent to which permanent solutions and treatment are practicable for the site or site problem being addressed. Criteria other than cost that are also used to make both findings are long-term effectiveness and permanence, reduction in toxicity, mobility or volume through treatment, and short-term effectiveness. However, the determination of "practicability" also takes into account the implementability of the remedy and state and community acceptance.

In response to the comment that EPA may not select a non-permanent remedy if a permanent remedy is practicable, EPA notes that the final balancing by which the remedy is selected decides, from among protective, cost-effective alternatives, the extent to which permanent solutions and treatment are practicable for the site. EPA must select an alternative providing the maximum permanence and treatment practicable. EPA uses the balancing and modifying criteria to determine what is practicable. A commenter indicated that PRPs must be required to clean up the released hazardous substances to the maximum extent practicable. EPA agrees; PRP cleanups are subject to the same standards as Fund-financed remedial actions.

Several commenters addressed specifically the statutory mandate to utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. One commenter suggested establishing this statutory mandate as a threshold criterion. Similarly, another commenter argued that since the concepts of protection of human health and the environment, cost-effectiveness, and the preference for permanent solutions and alternative treatment technologies or resource recovery technologies are specifically grouped together by Congress, these criteria should be balanced with each other in the same context in the remedy selection process of the NCP. The commenter urged elimination of the distinctions between the threshold and primary balancing criteria.

EPA believes that it has established an appropriate process for addressing all these provisions, first by identifying protective, ARAR-compliant alternatives eligible for selection, and then by balancing tradeoffs among alternatives with respect to the other pertinent criteria to identify a cost-effective alternative that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. EPA does not believe that it is possible or appropriate to address the mandate to utilize permanent solutions and treatment to the maximum extent practicable as an evaluation criterion because this

mandate represents a conclusion reached about a remedy on the basis of several evaluation factors.

Some commenters stressed that the statute does not require permanent solutions or treatment in all cases. Another commenter argued different criteria should be applied if EPA determines that a site is "beyond technical and economic remediation." EPA agrees that under CERCLA, the requirement to select permanent solutions and treatment technologies is qualified by practicability. This concept ensures selection of remedies appropriate to the site problems.

Some commenters noted that cost must be considered in determining what is "practicable." As discussed above, the cost of the remedy is among the factors considered in determining the use of permanent solutions and treatment to the maximum extent practicable.

4. *State and community acceptance.* One comment believed state and community acceptance were appropriately categorized as modifying criteria. This commenter concluded that in the statute Congress did not afford the same weight to state and community acceptance as the other criteria. Another commenter felt that the proposal afforded too much weight to state and community acceptance and that these interests would exercise undue influence over the selection of a remedy. EPA disagrees with the latter comment. CERCLA calls for meaningful state and community involvement in selecting the remedial action. See, e.g., sections 117 and 121(f) of CERCLA. Today's rule provides a framework for such involvement. EPA notes, however, that information on state and community acceptance generally will not be complete until comments are received on the proposed plan. Once all comments are evaluated, state and community acceptance may prompt modifications to the preferred remedy and are thus designated modifying criteria. In no case will EPA sacrifice protection to achieve state and community acceptance.

Several commenters suggested that consideration of state acceptance as a modifying criterion did not adequately take into account state concerns in remedy selection. One commenter stated that the proposed approach would likely result in state input not being factored in until the ROD was being prepared, which would be too late for addressing serious concerns. For this reason, one commenter suggested making state acceptance a primary balancing criterion.

EPA believes that the process as proposed adequately addresses state interests. Often, a state agency may be the lead agency for RI/FS activities at a site, directly developing, in consultation with EPA, the alternatives that will be analyzed in detail, and the option that will be put forward as the preferred alternative in the proposed plan. When EPA is the lead agency, states participate as the support agency and are involved in these same decisions. The rule provides for consideration of state concerns throughout the remedial process, noting that such concerns should be reflected, to the extent possible, in the proposed plan. However, the rule acknowledges that the assessment of state concerns may not be completed until after the formal public comment period has been held and, therefore, highlights consideration of this criterion in the final remedy selection decision.

EPA received comments urging express recognition that Indian tribes have the opportunity, along with states, to review draft RI/FS reports prior to public review. These commenters requested that EPA afford substantial deference to Indian tribe and state comments on the RI/FS workplan, the ROD and regarding ARARs. In response, EPA notes that § 300.515(b) allows Indian tribes to be treated the same as states in the remedial process if certain conditions are met, thus ensuring the Indian tribes have the opportunity to review and comment on significant documents such as RI/FSs and RODs. EPA recognizes the substantial role that states and Indian tribes play in the remedial process and does not believe further emphasis is necessary in the remedy selection portion of the rule.

Several commenters argued that community acceptance is a significant criterion and should have more influence in alternatives evaluation and remedy selection. These commenters urged that this criterion be made a primary balancing criterion. The commenters felt that community, as well as state concerns, should be considered throughout the remedial process, highlighting in their comments the desire to participate in the development of RI/FS workplans and to participate in the detailed analysis. Similar to the concerns expressed on the role of state acceptance, some commenters cautioned that if community acceptance is addressed only at the ROD stage, lack of acceptance could result in serious conflict between EPA, the state and the community.

EPA agrees that community acceptance is extremely important and has established a Superfund community relations program to facilitate communication between the community and the lead and support agencies. To the degree that community acceptance of the alternatives is known at the time of the proposed plan, it will be taken into account in the development of the plan. Additionally, the public may access the administrative record throughout the remedial process and may voice concerns to the lead agency regarding the contents of the documents contained in the record at any time.

Due to the fact that information with respect to this factor generally will not be complete until after the official public comment period, EPA has not included community acceptance as a primary balancing criterion. A correct assessment of community acceptance necessarily is based on hearing from the community as a whole. Accordingly, EPA believes it would be premature to address this factor conclusively prior to the public comment period, during which EPA may hear from citizens who have not been vocal earlier during the RI/FS process. Although community acceptance is not addressed as early as the primary balancing factors, which serve as the principal basis for determining the preferred alternative, it nonetheless is an important factor in EPA's final remedy selection decision. If community acceptance is known earlier, it can be a factor in determining the preferred alternative.

In reference to the five-year review, two commenters generally endorsed EPA's interpretation of the statutory provision in the preamble that calls for a five year review whenever the selected remedy will leave wastes on site above levels that allow for unlimited use and unrestricted exposure. One commenter agreed that the five year review should focus on whether the remedy is still protective and should consist of an examination of monitoring data rather than new field investigations. Another commenter said that the five year review should also examine new technologies that may have been developed since the remedy was implemented, to the extent the remedy is not protective. Generally, EPA agrees with these comments, and guidance is under development to define the five-year review. EPA agrees that the review should generally focus on monitoring data, where available, to evaluate whether the remedy continues to provide adequate protection of human health and the environment. New technologies will be considered where the existing remedy is not protective, but the five-year review is not intended

as an opportunity to consider an alternative to a protective remedy that was initially selected.

As provided in CERCLA section 120(e)(4), for federal facility sites subject to interagency agreements (IAGs) under CERCLA section 120, the selection of a remedial action shall be "by the head of the relevant department, agency or instrumentality and the Administrator [of EPA] or, if unable to reach agreement on selection of a remedial action, selection by the Administrator." This provision is incorporated in the final rule at § 300.430(f)(4)(iii). EPA notes that where there are disagreements, EPA may invoke the process provided for under E.O. 12580, section 10(a), to facilitate resolution of issues, or a dispute resolution process may be specified in the IAG itself. In any case, however, the final remedy selection decision will be reserved for the EPA Administrator, consistent with CERCLA sections 120(e)(4) and 120(g).

Final rule: Section 300.430(f), the selection of remedy section of the final rule, has been substantially revised from the proposed rule in response to comments received. Many of these changes reflect EPA's attempt to clarify the role of the nine criteria during the remedy selection process and how the selected remedy complies with the statutory requirements for Superfund remedies. The promulgated rule also clarifies the role of the proposed plan (§§ 300.430(f)(1)(ii) and 300.430(f)(2)) and the final remedy selection (§ 300.430(f)(4)), taking into consideration state and community acceptance of the proposed plan.

1. The rule promulgated today moves the discussion of the hierarchy of criteria in remedy selection from the detailed analysis of alternatives section of the proposal rule to the selection of remedy section in the final rule (§ 300.430(f)(1)(i)). The hierarchy established in today's rule represents an important change from the hierarchy described in the preamble to the proposed rule. This change makes clear that overall protection of human health and the environment and compliance with ARARs (unless grounds for invoking a waiver is provided) are threshold criteria that must be satisfied by an alternative before it can be selected. Long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost are primary balancing criteria. However, today's rule places special emphasis on long-term effectiveness and permanence, and reduction of toxicity, mobility, or volume through treatment, during the remedy selection (§ 300.430(f)(1)(ii)(E)). State and community acceptance are modifying criteria that may have significant input in the final remedy selection (§ 300.430(f)(4)(i)) and, to the degree they are available earlier, may affect the development of alternatives and the selection of the proposed plan. Formal consideration of the modifying criteria may not be available until after the proposed plan, although informal consideration may be made earlier.

2. Today's rule makes clear that the determinations that the remedy is: (1) Cost-effective and (2) utilizes permanent solutions and alternate treatment technologies or resource recovery technologies to the maximum extent practicable, are separate findings that both result from balancing conducted during the remedy selection process. The final rule also reflects the statutory bias against off-site land disposal of untreated waste during remedy selection.

Name: Section 300.430(f)(5). Documenting the decision.

Proposed rule: Proposed § 300.430(f)(2) and (f)(4) (renumbered as § 300.430(f)(5)) required the publication of a notice of availability of the proposed plan and the final remedial action plan. The proposed plan describes and solicits comments on the preferred remedial action alternative and the other alternatives considered. Following receipt and consideration of public comments on the proposed plan, the remedy is selected and documented in a ROD. The ROD summarizes the problems posed by a site, the technical analysis of alternative ways of addressing those problems, and the technical aspects of the selected remedy that are later refined into design specifications. The ROD is also a legal document that, in conjunction with the supporting administrative record, demonstrates that the lead and support agency decision-making has been carried out in accordance with statutory and regulatory requirements and that explains the rationale by which remedies were selected. Finally, RODs are important public documents that summarize key facts discovered, analyses performed, and decisions reached by the lead and support agencies. The general process of documenting decisions is similar for either operable units or comprehensive remedial actions; however, the content and level of detail will vary depending on the scope of the action.

Response to comments: Few comments were received on the remedy selection documentation requirements. In general, those comments requested that EPA indicate that the ROD should explicitly document how each of the nine evaluation criteria have been considered and should include the reasoning on all key issues addressed in the decision process, including the bases for remedial objectives and an explanation of why ARARs are applicable or relevant and appropriate. EPA agrees that the consideration of the nine evaluation criteria, the reasoning behind all key decisions, the bases for remedial objectives, and the justification of the ARAR determinations should be included in the ROD and sufficient discussion needs to be included in the proposed plan so that the basis for the proposed remedy can be clearly understood. The ROD should include a brief summary of the problems posed by the site, the alternatives evaluated as potential remedies, the results of that analysis, the rationale for the remedial action being selected, and the technical aspects of the selected action. However, EPA believes that proposed § 300.430(f)(4) (renumbered as § 300.430(f)(5)) already required the presentation and discussion of these items and that no change to the rule is necessary. This section requires an explanation of how the nine evaluation criteria were used to select the remedy and sets forth the following requirements for all RODs:

1. All facts, analysis of facts, and site-specific policy determinations considered in the course of carrying out the selection of remedy.

2. A demonstration that the decision was made in accordance with statutory and regulatory requirements. The ROD shall discuss how the requirements of section 121 of CERCLA have been addressed.

3. A description of the remediation goal(s) and/or other performance standards that the remedial action is expected to achieve.

4. A description of whether or not hazardous substances, pollutants, or contaminants will remain at the site at levels requiring a five-year review of the response action.

5. A discussion of significant changes in the final selected remedy from the preferred alternative. A responsiveness summary that identifies and responds to significant comments should be available with the ROD. This responsiveness summary should include lead agency responses to comments made by the support agency, as recommended by one commenter.

In addition, EPA has established detailed guidance on proposed plans, RODs and other decision documents in

"Interim Final Guidance on Preparing Superfund Decision Documents" OSWER Directive No. 9335.3-02 (October 1989).

A commenter recommended deleting the phrase "as appropriate" from the requirement to document all facts, analyses of facts, and site-specific policy decisions in the ROD. In response, EPA believes that in certain situations, some information may not need to be included in the ROD, e.g., where the information is already documented adequately in the administrative record. In other cases, a document may not be appropriate for inclusion in the administrative record at all (*see* the discussion in subpart 1 on what is appropriate for inclusion in the administrative record). Thus, EPA is not removing the phrase "as appropriate" from the rule.

Similarly, this commenter recommended that the phrase "as appropriate" be deleted from the requirement to indicate remediation levels, arguing that such levels should always be documented in the ROD. EPA agrees that whenever remediation levels, which have been renamed remediation goals, are established they should be documented in the ROD. However, EPA believes it is necessary to retain existing language to provide for RODs for interim actions, which may not always specify final remediation goals, and for decisions that select no action, which will not establish remediation goals.

Final rule: Minor clarifying changes are being made to proposed § 300.430(f)(4)(renumbered as final § 300.430(f)(5)). The rule notes that the documentation in the proposed plan and the ROD should be at a level of detail appropriate to the site situation.

Name: Ground-water policy.

Background: EPA's Superfund program uses EPA's Ground-Water Protection Strategy as guidance when determining the appropriate remediation for contaminated ground water at CERCLA sites. EPA's Ground-Water Protection Strategy establishes different degrees of protection for ground waters based on their vulnerability, use, and value. The goal of EPA's Superfund approach is to return usable ground waters to their beneficial uses within a timeframe that is reasonable given the particular circumstances of the site. The Superfund remedial process assesses the characteristics of the affected ground water as the first step in deciding the remediation goal for ground-water restoration, the timeframe within which the restoration will occur, and the most appropriate method for achieving these goals. A determination is made as to whether the contaminated ground water falls within Class I, II, or III. (Guidance for making this determination is available in "EPA Guidelines for Ground-Water Classification" (Final Draft, December 1986).)

Reasonable restoration time periods may range from very rapid (one to five years) to relatively extended (perhaps several decades). EPA's preference is for rapid restoration, when practicable, of Class I ground waters and contaminated ground waters that are currently, or likely in the near-term to be, the source of a drinking water supply. The most appropriate timeframe must, however, be determined through an analysis of alternatives. The minimum restoration timeframe will be determined by hydrogeological conditions, specific contaminants at a site, and the size of the contaminant plume. If there are other readily available drinking water sources of sufficient quality and yield that may be used as an alternative water supply, the necessity for rapid restoration of the contaminated ground water may be reduced.

More rapid restoration of ground water is favored in situations where a future demand for drinking water from ground water is likely and other potential sources are not sufficient. Rapid restoration may also be appropriate where the institutional controls to prevent the utilization of contaminated ground water for drinking water purposes are not clearly effective or reliable. Institutional controls will usually be used as supplementary protective measures during implementation of ground-water remedies.

For Class I and II ground waters, preliminary remediation goals are generally set at maximum contaminant levels, and non-zero MCLGs where relevant and appropriate, promulgated under the Safe Drinking Water Act or more stringent state standards (see ARARs preamble section below on "Use of maximum contaminant level goals for ground-water cleanups"). CERCLA alternate concentration limits may also be used if the requirements of CERCLA section 122(d)(2)(B)(ii) are met (see ARARs preamble section below on "Use of alternate concentration limits (ACLs)."') The method for establishing ACLs under CERCLA generally considers the factors specified for establishing ACLs under RCRA with several additional restrictions. The ground water must have a known or projected point of entry to surface water with no statistically significant increases in contaminant concentration in the surface water, or at any point where there is reason to believe accumulation of constituents may occur downstream. In addition, the remedial action must include enforceable measures that will preclude human exposure to the contaminated ground water at any point between the facility boundary and all known and projected points of entry of such ground water into surface water.

The Superfund program will usually consider several different alternative restoration time periods and methodologies to achieve the preliminary remediation goal and select the most appropriate option (including the final remediation goal) by balancing tradeoffs of long-term effectiveness, reductions of toxicity, mobility, or volume through treatment, short-term effectiveness, implementability; and cost.

For Class III ground water (i.e., ground water that is unsuitable for human consumption—due to high salinity or widespread contamination that is not related to a specific contamination source—and that does not have the potential to affect drinkable or environmentally significant ground water), drinking water standards are not ARAR and will not be used to determine preliminary remediation goals. Remediation timeframes will be developed based on the specific site conditions. The beneficial use of the ground water (e.g., agricultural or industrial use), if any, is determined; and the remediation approach will be tailored for returning the ground water to that designated use. Environmental receptors and systems may well determine the necessity and extent of ground-water remediation. In general, alternatives for Class III ground waters will be relatively limited and the focus may be, for example, on preventing adverse spread of the significant contamination or source control to prevent exposure to waste materials or contamination.

Widespread contamination due to multiple sources is handled in a special way by the Superfund program. At most NPL sites, program policy is to determine contributors to the aquifer contamination, and involve them in the overall response action. EPA will take the lead role in managing the overall response if the NPL site is the primary contributor to the multiple-source problem. In the case of areawide ground-water contamination caused by multiple sources, Superfund participation in the overall ground-water remediation will be proportional to the contribution the NPL site(s) makes to the

area wide problem, to the extent it can be determined. EPA may also take any action necessary to protect human health and the environment, such as providing alternate water supplies or wellhead treatment, if there is a threat to human health and the environment.

Response to comments: The use of the Ground-Water Protection Strategy as a framework for Superfund ground-water response actions was the subject of many comments. Some commenters stated that the use of the strategy, and the Guidelines for Ground-Water Classification that support the strategy, was ill-advised and possibly illegal. Others supported the use of the strategy and classification guidelines, and a third group supported their use, provided site-specific decision-making concerning appropriate remediation was maintained. In response, part of the strategy is a scheme for classifying ground waters according to their beneficial uses. The Superfund program uses this scheme as a framework to help decide the level of remediation that is appropriate for that ground water. For the most highly valued uses, such as drinking water, the most rapid remediation will be employed, to the extent practicable. Ground water that is naturally unusable because of characteristics such as high salinity may not be actively remediated.

Commenters questioning or objecting to the use of the Guidelines for Ground-Water Classification noted that the guidelines have not received adequate notice and comment for rulemaking and have not been formally promulgated. One of those commenters stated that the proposed NCP improperly makes the Ground-Water Protection Strategy into a "super ARAR." EPA disagrees that either the Ground-Water Protection Strategy or the Guidelines for Ground-Water Classification are an ARAR. The strategy provides overarching guidance that EPA considers in deciding how best to protect human health and critical environmental systems threatened by contaminated ground water. EPA developed guidelines, consistent with the strategy, as guidance to apply the classification system. The guidelines are used by the Superfund program as guidance to help make decisions on the level of cleanup necessary for ground water at Superfund sites. The guidelines are not used as strict requirements.

As noted above, the strategy, and the guidelines that help implement the strategy, are not ARARs. Rather, they help define situations for which standards may be applicable or relevant and appropriate and help set goals for ground-water remediation. At every site, EPA must decide the appropriate level of remediation necessary to protect human health and the environment and determine what requirements are ARARs based on the beneficial use of the ground water and specific conditions of the site. The guidelines are not a means of circumventing the selection of a remedy that will protect human health and the environment; they are only tools to apply the ground-water strategy. Site-specific decisions will need to be justified in the proposed plan and the public will have an opportunity to comment on EPA's findings and proposed actions at that time.

One commenter said that the use of a ground-water classification system would inappropriately insert cost into cleanup decisions. EPA disagrees. The cost of remediation does not affect the determination of the highest beneficial use of the ground water and consequently does not affect the classification. However, all remedies must be cost-effective, which may affect the effort exerted to achieve the remediation goals in a shorter timeframe. A commenter requested that EPA include cost as an explicit factor in determining when aggressive measures will be used to address ground-water contamination. EPA believes this is unnecessary. Cost-effectiveness is sufficiently addressed through the determination that remedies, including ground-water actions, are cost-effective.

One commenter opposed the classification guidelines stating that the use of the guidelines is to argue against restoring Class III ground waters. Unfortunately, EPA has a limited budget to clean up the many sites for which it has responsibility. Because Class III ground waters already contain high levels of salinity, hardness, or other chemicals; have no beneficial use to humans or environmental ecosystems; and have a low degree of interconnection with Class I or II ground waters (i.e., neither humans nor the environment are threatened by contamination in these ground waters), EPA believes that scarce resources can better be spent cleaning up sites and ground waters that do pose a threat to human health and the environment. Several commenters supported the use of the differential ground-water protection and noted that CERCLA section 121(d)(2)(B)(i) refers to "the designated or potential use" of the ground water in determining cleanup levels, reflecting Congress' intent to apply varying cleanup standards to different kinds of ground water.

Several commenters, while supporting EPA's position that remediation levels for ground water will depend on the beneficial use of the ground waters, expressed concern about the implementation of the ground-water guidelines. Several commenters said that ground-water classification should only be done by the states (which for these purposes includes federally recognized Indian tribes or local governments). Another commenter stated that classification by a state should supersede EPA's classification of ground water unless EPA's classification would require a more stringent cleanup. EPA basically agrees; and to the degree that the state or local governments have classified their ground water, EPA will consider these classifications and their applicability to the selection of an appropriate remedy.

EPA will make use of state classifications when determining appropriate remediation approaches for ground water. When EPA must classify ground water for a Superfund action, that classification is only used to determine the scope of site-specific remedial actions and has no bearing outside of the Superfund action. It is not used by Superfund to provide regional classification of ground waters. Classification of ground waters is only done to the extent it guides remedy selection.

If a state classification would lead to a less stringent solution than the EPA classification scheme, then the remediation goals will generally be based on EPA classification. Superfund remedies must be protective. If the use of state classification would result in the selection of a nonprotective remedy, EPA would not follow the state scheme.

Two commenters argued that ground-water classification and remediation decisions should be based on current uses of the ground water, not just ground-water characteristics (i.e., potential use of the ground water). EPA disagrees. It is EPA policy to consider the beneficial use of the water and to protect against current and future exposures. Ground water is a valuable resource and should be protected and restored if necessary and practicable. Ground water that is not currently used may be a drinking water supply in the future.

Another major focus of comments was the issue of whether natural attenuation was an appropriate method for dealing with ground-water contamination. The comments reflect two points of view: one that supports natural attenuation as a reasonable and cost-effective means of remediating contaminated ground water and another that believes natural

attenuation is an inadequate method of cleanup.

Those commenters supportive of the use of natural attenuation as a method of addressing ground water recognize that ground-water extraction and treatment ("pump and treat") is generally the most effective method of reducing concentrations of highly contaminated ground water, but note that pump and treat systems are less effective in further reducing low levels of contamination to achieve remediation goals. These commenters suggest that natural attenuation may play a vital role in achieving the final increment of cleanup once pump and treat systems reach the point of diminishing returns. EPA agrees with the understanding reflected in these comments that active ground-water restoration may not always be able to achieve the final increment of cleanup in a timeframe that is reasonable. It is in recognition of the possible limitations on the effectiveness of pump and treat systems that EPA's approach provides for periodic evaluation of such systems and allows for the use of natural attenuation to complete cleanup actions in some circumstances. In some cases, proposed ground-water remediation goals may not be achievable. In these cases, it will be appropriate to modify the remediation goal to reflect limitations of the response action.

Several commenters suggested that EPA use institutional controls and natural attenuation to address ground-water contamination where human exposure to contaminated ground water is not currently occurring but potentially may occur. One commenter suggested that, in this situation, all ground-water remedies should be compared with natural attenuation. In response, during the analysis of remedial alternatives and remedy selection, EPA considers the current and potential use of the ground water. Natural attenuation is generally recommended only when active restoration is not practicable, cost-effective or warranted because of site-specific conditions (e.g., Class III ground water or ground water which is unlikely to be used in the foreseeable future and therefore can be remediated over an extended period of time) or where natural attenuation is expected to reduce the concentration of contaminants in the ground water to the remediation goals—levels determined to be protective of human health and sensitive ecological environments—in a reasonable timeframe. Further, in situations where there would be little likelihood of exposure due to the remoteness of the site, alternate points of compliance may be considered, provided contamination in the aquifer is controlled from further migration. The selection of natural attenuation by EPA does not mean that the ground water has been written off and not cleaned up but rather that biodegradation, dispersion, dilution, and adsorption will effectively reduce contaminants in the ground water to concentrations protective of human health in a timeframe comparable to that which could be achieved through active restoration. Institutional controls may be necessary to ensure that such ground waters are not used before levels protective of human health are reached.

Commenters opposed to natural attenuation do not find this method an acceptable substitute for treatment, noting that many contaminants at Superfund sites are not readily degraded in the subsurface. EPA agrees that natural attenuation will not provide contaminant reduction in all cases and that in many situations natural attenuation will not be appropriate as the sole remedial action. Factors that affect the ability of natural attenuation to effectively reduce contaminant concentrations include the biological and chemical degradability of the contaminants, the physical and chemical characteristics of the ground water, and physical characteristics of the geological medium.

In addition to objecting to the use of natural attenuation, some commenters provided specific examples of where they would consider rapid restoration of ground water to be necessary, such as water that feeds into, or that is interconnected with, sensitive or vulnerable aquatic ecosystems or where contaminated ground water results in vapors that impact nearby buildings. Under current policy, EPA determines remediation timeframes that are reasonable given particular site circumstances. Some "ecologically vital" ground water that feeds into or is interconnected with sensitive or vulnerable aquatic ecosystems is treated as a Class I ground water and actively restored, to the extent practicable. In addition, ground waters in designated wellhead protection areas are also to be treated as Class I ground waters and will be rapidly restored, to the extent practicable. Contamination of buildings due to soil vapors from ground water will be addressed on a site-specific basis and, if determined to be a continuing source of contamination, contaminated ground water will be actively restored, to the extent practicable. In contrast, such factors as location, proximity to population, and likelihood of exposure may allow much more extended timeframes for remediating ground water.

One commenter felt that more realistic assumptions and models were needed to calculate restoration times. The commenter believes EPA uses unrealistic and unproven models that result in overly optimistic estimates of restoration timeframes. Another commenter requested clarification on the technical feasibility of active ground-water restoration.

In response, EPA notes that it is engaged in ongoing research and evaluation of the effectiveness of ground-water pump and treat systems. This analysis has confirmed the effectiveness of plume containment measures in preventing further migration and of pump and treat systems in achieving significant reductions of ground-water contamination. "Evaluation of Ground-Water Extraction Remedies," EPA No. 540.2-89 (October 1989). However, this analysis also indicates the significant uncertainty involved in predicting the ultimate effectiveness of ground-water pump and treat systems. In many cases, this uncertainty warrants inclusion of contingencies in remedy selection decisions for contaminated ground water. Where uncertainty is great, a phased approach to remediation may be most appropriate. Such phasing might involve initial measures to contain the contaminant plume followed by operation of a pump and treat system to initiate contaminant removal from the ground water and to gain a better understanding of the ground-water system at the site. The decision as to the ultimate remediation achievable in the ground water would be made on the basis of an evaluation of the effectiveness of the pump and treat system conducted after a defined period of time. EPA's "Guidance on Remedial Action for Contaminated Ground Water at Superfund Sites" (December 1988) discusses factors that may be considered in establishing restoration timeframes.

To reflect the fact that restoration of ground water to beneficial use may not be practicable, the expectation from the preamble to the proposal that will be incorporated in today's rule has been modified. The expectation concerning ground-water remediation now indicates that when ground-water restoration is not practicable, remedial action will focus on plume containment to prevent contaminant migration and further contamination of the ground water, prevention of exposures, and evaluation of further risk reduction.

Another commenter contends that language in the preamble to the proposed rule creates the impression that active restoration is not practicable in fractured bedrock aquifers, which they stated was technically incorrect and inaccurately reflects other work in progress within EPA. EPA is clarifying that all of the factors listed as potentially making active ground-water restoration impracticable, including the existence of fractured bedrock or Karst formations, widespread plumes from non-point sources, particular contaminants (e.g., dense non-aqueous phase liquids), and physicochemical limitations (e.g., interactions between contaminants and aquifer material), are only examples of situations that may make active ground-water restoration difficult or impracticable. The presence of any of these situations does not mean that active restoration of ground water is presumptively impracticable and should not be considered; the decision of what ground water is or is not practicable to restore should be made on a site-specific basis.

Final rule: An expectation regarding restoration of ground water has been added in § 300.430(a)(1)(iii)(F).

Section 300.435. Remedial Design/Remedial Action, Operation and Maintenance

Name: Section 300.435(b)(1). Environmental samples during RD/RA.

Proposed rule: The proposed remedial design/remedial action (RD/RA) section did not discuss QA/QC requirements for chemical and analytical testing and sampling procedures associated with samples taken during the RD/RA for the purpose of determining whether cleanup action levels, as specified in the ROD, are achieved.

Discussion: Sampling and analysis plans prepared during the RI/FS are required, under final § 300.430(b)(8), to follow a process ensuring that data of sufficient quality and quantity is obtained, and that such sampling and analysis plans be reviewed and approved by EPA. In order to encourage consistency between the QA/QC of the sampling data generated during the RI/FS which is relied upon when determining cleanup action levels in the ROD, and confirmatory sampling data used to ensure that cleanup action levels are met during the RD/RA, EPA has decided that the QA/QC requirements for cleanup action level samples under the RI/FS generally should also apply to those taken during the RD/RA.

Final rule: The following section is added to the final rule in § 300.435(b)(1) to encourage consistency between the QA/QC of RI/FS and RD/RA samples taken for the purpose of cleanup action levels:

> Those portions of RD/RA sampling and analysis plans describing the QA/QC requirements for chemical and analytical testing and sampling procedures of samples taken for the purpose of determining whether cleanup action levels specified in the ROD are achieved, generally will be consistent with the requirements of § 300.430(b)(8).

Name: Section 300.435(d). Contractor conflict of interest.

Proposed rule: EPA proposed new § 300.435(d) on contractor conflict of interest for RD/RA and O&M activities which are Fund-financed. It states that potential contractors will be required to provide information on their status and on the status of their parent companies, affiliates, and subcontractors as potentially responsible parties at the site, and that all such information must be provided and disclosed before, and after (if so discovered) submission of their bid or proposal or contract award. It further provides that the lead agency should evaluate the information prior to contract award and determine that either: (1) No conflict of interest exists which would affect their performance; or (2) a conflict of interest exists which prevents them from serving the best interests of the state or federal government. If such a conflict of interest exists, the offeror or bidder may be declared to be a "nonresponsible" or "ineligible" offeror or bidder in accordance with appropriate acquisition regulations and the contract may be awarded to the next eligible offeror or bidder. The preamble to the proposed rule noted that the lead agency may opt for actions less severe than denial of the contract award for situations in which the contractor's role at the site has been very minor or is not yet determined (53 FR 51453).

In the enforcement context, PRPs may undertake remedial actions under consent decrees or court orders, and EPA commits significant oversight dollars to such actions to ensure that the inherent conflict of interest does not affect the proper conduct of the remedial action. By contrast, in Fund-financed situations, EPA does not, as a routine measure, commit significant dollars for oversight. This provision would alert EPA to potential conflict of interest situations at Fund-lead sites, and allows EPA to decide if it is cost-effective to award the contract and provide additional oversight.

Response to comments: A few commenters requested that EPA provide more detailed guidance on the circumstances under which a contractor would be determined nonresponsible or ineligible. One commenter believed that EPA did not intend the proposed regulation to be read so restrictively as to result in an automatic determination of being "nonresponsible", and requested additional guidance regarding the circumstances under which a contractor's status as a PRP is considered likely to affect contract performance. The commenter argued that EPA has not stated in the proposal why status as a PRP necessarily raises a conflict of interest as defined in the federal acquisition regulations (FAR). A few commenters recognized that a potential for conflict of interest might exist if a PRP selects a remedy for a site, or possibly if a design were conducted by a PRP. However, for situations involving implementation of a chosen remedy, these commenters felt it was unlikely that such conflict of interest would occur, and requested a detailed discussion of how a construction contractor's objectivity would be affected by its status as a PRP. A commenter noted that EPA might err on the side of an automatic exclusion of a contractor from conducting the remedial action if such detailed discussion is not provided in the preamble or final rule; such actions would thus significantly reduce competition for Superfund contracts and consequently increase costs.

Another commenter felt that implementation of oversight by the lead agency would alleviate EPA's concerns that the contractor would not serve the government's best interests. The commenter also noted that EPA should apply the rule only prospectively, in order to avoid problems associated with disqualifying a contractor who is already undertaking work.

EPA agrees that it does not intend the proposed regulation to be read so restrictively as to result in automatic determinations of a PRP being considered "nonresponsible" or "ineligible". However, EPA's use of contractors with conflicts of interest in the Superfund program has been a major issue of concern over the past several years. After a review of existing EPA policies and procedures covering the Superfund contracting program along with interviews with both internal and external parties having knowledge of EPA's administrative procedures regarding conflict of interest, § 300.435(d) was proposed because it was determined that EPA's procedures for this issue need strengthening in order to avoid conflicts in the future.

EPA is concerned with hiring contractors (or their subcontractors) to implement remedial actions under those

situations where a significant potential exists that such activity could significantly affect the success of the lead agency's ongoing or potential cost recovery or litigation efforts, or significantly impact the contractor's own liabilities. For example, actions such as the gathering, uncovering or documentation of evidence might be a standard task of a remedial action contractor at sites with potential for cost recovery. Contractors or subcontractors with conflicts of interest might not be completely objective or impartial when performing this work if evidence with unfavorable ramifications towards the contractor was encountered. Contractors or subcontractors with conflicts might also be tempted to recommend cost-saving measures that are not environmentally protective, in order to lower their potential cost share.

The lead agency usually conducts oversight of PRP-lead RD/RA projects in order to ensure that the RD/RA effort is proceeding in a manner which assures compliance with the requirements of the applicable record of decision and enforcement order or decree. However, at Fund-lead sites, EPA does not routinely engage in the level of scrutiny that may be necessary to prevent (or discover) actions motivated by the liability interests of the contractor. Thus, at a minimum, EPA needs to discover conflicts of interest that may warrant additional scrutiny; accordingly, disclosure requirements are necessary for Fund-lead projects.

In some cases, EPA may decide that even though a conflict of interest with a potential contractor or PRP exists, other considerations may justify its selection as a governmental contractor. Examples of such considerations include the uniqueness of site conditions, remedy, or the PRP's prior involvement at the site, the limited extent of potential liability of the contractor (or affiliate), or situations involving a significant potential for decreased competition or cost savings to the government (for example, if the contractor were the best offeror). In these situations, the lead agency might try to find an approach to mitigate such circumstances, ask offerors to list conflicts as well as their proposed steps they would take to lessen the conflict, or increase the level of oversight normally associated with that activity. In other cases, however, the lead agency might decide that the nature of the conflict overrides the potential benefits which could be realized by use of such contractors, and that governmental oversight might not successfully address this concern. The lead agency will evaluate each situation on a case-by-case basis through the careful exercise of judgement and the weighing of a variety of factors based on the specifics of the situation being reviewed.

In making and implementing these decisions under direct federal procurement, federal agencies are required to comply with the procedures set out in the applicable federal acquisition regulations. See FAR 9.507. EPA acquisitions are governed by 48 CFR 1509.507, which are consistent with the FAR. State procurements should follow the applicable state acquisition regulations in making and implementing these decisions; these regulations should be consistent with the applicable federal regulations.

EPA also does not agree that the lead agency should apply this section of the rule prospectively only. The same risks that exist from prospective contracts exist with regard to contracts underway. EPA, other federal agencies and state contracting officers should review existing remedial action contracts and determine whether the requirements set forth in this regulation are provided for in those contracts. Where it is determined to be appropriate, these government agency contracting officers should modify existing remedial action contracts to ensure that contractors already undertaking federally funded work will be required to submit information under this section regarding any potential conflicts of interest. If EPA determines that a conflict does exist, the agency will decide on a case-by-case basis what action is appropriate.

Final rule: Proposed § 300.435(d) is revised as follows to better define the circumstances under which the lead agency would determine whether a conflict of interest would exist, and to more accurately reflect possible EPA actions in response to such a finding:

(d) *Contractor conflict of interest.* (1) For Fund-financed RD/RA and O&M activities, the lead agency shall:

(i) Include appropriate language in the solicitation requiring potential prime contractors to submit information on their status, as well as the status of their subcontractors, parent companies, and affiliates, as potentially responsible parties at the site.

(ii) Require potential prime contractors to certify that, to the best of their knowledge, they and their potential subcontractors, parent companies, and affiliates have disclosed all information described in § 300.435(d)(1)(i) or that no such information exists, and that any such information discovered after submission of their bid or proposal or contract award will be disclosed immediately.

(2) Prior to contract award, the lead agency shall evaluate the information provided by the potential prime contractors and:

(i) Determine whether they have conflicts of interest that could significantly impact the performance of the contract or the liability of potential prime contractors or subcontractors

(ii) If a potential prime contractor or subcontractor has a conflict of interest that cannot be avoided or otherwise resolved, and using that potential prime contractor or subcontractor to conduct RD/RA or O&M work under a Fund-financed action would not be in the best interests of the state or federal government, an offer or bid contemplating use of that prime contractor or subcontractor may be declared nonresponsible or ineligible for award in accordance with appropriate acquisition regulations, and the contract may be awarded to the next eligible offeror or bidder.

Name: Sections 300.5 and 300.435(f). Operation and maintenance.

Proposed rule: EPA proposed a new section that discusses operation and maintenance (O&M), the final step in the remedial process. Proposed § 300.435(f) stated that for remedial actions which use treatment or other measures to restore ground or surface waters, the operation of such facilities until a level protective of human health or the environment is achieved, or for up to 10 years after construction/start-up, whichever is earlier, will be considered part of the remedial action. EPA pays up to a 90 percent cost share for remedial action; activities necessary after this period would be considered operation and maintenance (O&M) under § 300.435(f)(2) of the proposed rule, and CERCLA section 104(c)(6).

Proposed § 300.435(f)(3)(renumbered as final § 300.435(f)(4)) made clear that the following would not be considered necessary measures to restore contaminated ground or surface water, and thus would not be eligible for up to 10 years cost-share: "(i) Source control measures initiated to prevent contamination of ground or surface waters; and (ii) Ground or surface water measures initiated for the primary purpose of providing a drinking water supply, not for the purpose of restoring ground water." Proposed § 300.435(f)(4) (revised and renumbered as final § 300.435(f)(3)) then noted that "The 10-year period will begin once the ROD has been signed, construction activities have been completed, and the remedy is operational and functional."

Response to comments: EPA received several comments raising concerns with the proposed rule. Since most commenters were concerned with particular sub-components of this issue, EPA will respond separately to issues on each sub-component. Revisions to

proposed §§ 300.5 and 300.435(f) will be discussed at the end of these sections.

1. *Source control maintenance measures.* Several commenters argued that EPA has misinterpreted Congress's intent and does not have statutory authority in excluding source control maintenance measures from federal funding through the cost-sharing provisions for remedial actions. Some felt that Congress intended that source control maintenance measures (e.g., landfill cap maintenance and leachate collection and treatment) should be considered necessary to the proper functioning of measures restoring ground-water quality (e.g., ground-water pump/treat), and thus should be included within the coverage of CERCLA section 104(c)(6). These commenters reason that if source control maintenance measures are not operated, no restoration would occur, the protection of public health would not be assured, and water quality would not improve. Several commenters also argued that excluding "source control measures" is much too broad and requires clarification and examples, and stated that the example used in the proposed rule describing leachate control systems for containment units (53 FR 51453–54) exemplifies ground water restoration as well as source control. Another felt that the only example of a source control measure which would have operation and maintenance costs fully funded by the states would be a leachate collection system as found in a RCRA Subtitle C landfill.

In response, EPA has decided as a matter of policy not to fund the operation and maintenance of source control measures (e.g., landfill cap maintenance, leachate collection/treatment, gas collection/treatment) once such measures become operational and functional. EPA believes that source control maintenance measures should be treated like other O&M activities under CERCLA section 104(c)(6)(see preamble discussion on § 300.510(c)(1) below).

As a threshold matter, it is important to note that EPA will continue to fund the construction of the source control measures themselves (e.g., construction of the landfill cap or leachate collection system). As EPA noted in the preamble to the proposed NCP, EPA intends to pay up to a 90 percent Fund share for all source control measures until "completion of construction of a source control system, and * * * the system is operational and functioning properly" (53 FR 51454). After that point, when the system is simply being maintained and the contamination from the source is being controlled, the O&M phase begins for these measures, and EPA believes that it would be inappropriate for the Fund to continue to pay for such activities.

Congress made clear in CERCLA section 104(c)(6) that certain ground or surface water restoration actions would be considered "remedial action" (such that, under EPA policy, EPA would pay up to a 90 percent cost share) as compared to "O&M" (for which the states pay all costs under a long-standing EPA policy). EPA has determined that although a failure to perform source control maintenance could result in some new contamination of ground or surface water, maintenance measures are not specific restoration actions and do not come within the category of remedial measures "necessary to restore ground or surface water" as used in section 104(c)(6). Rather, they fall within the category of normal operation and maintenance activities.

Congress was specifically concerned with including within the idea of "remedial action" (and thereby within the group of actions funded at up to a 90 percent level by EPA), those measures that actively clean up ground and surface water. In a discussion of the issue, the Senate Committee on Environment and Public Works noted that EPA was paying up to a 90 percent cost share for most active remediation efforts, such as drum removals and soil cleanup, but did not comparably share in the cost of ground or surface water cleanup:

> The Committee felt that it was important to specify what the financial obligation of the Superfund is in regard to the cleanup of ground and surface water contamination at sites on the National Priority List. The current practice of the [EPA] is to finance remedial action activities such as the removal of drums, excavation of soil, and initial treatment of ground and surface waters on the 90/10 basis provided in section 104(c)(3). Under this policy, the long-term treatment of contaminated water becomes a state responsibility one year after all other remedial actions are completed. The *continued treatment of contaminated water, which is in actuality a major part of the cleanup program,* is considered by EPA to be an operation and maintenance cost.

S. Rep. 11, 99th Cong., 1st Sess. at 20–21 (1985), and S. Rep. 631, 98th Cong., 2d Sess. at 9 (1984). (Emphasis added.)

In order to distinguish between active cleanup ("remedial") actions and O&M, Congress specified in section 104(c)(6) that remedial actions would include those measures that are necessary to restore ground and surface water to "a level that assures protection of human health and the environment." By contrast, the statute provides that "[a]ctivities required to maintain the effectiveness of such measures * * * shall be considered operation or maintenance."

This distinction flows directly from the concern, expressed by the Senate Environment Committee, that the dividing line between remedial and O&M actions, for the purposes of cost share funding, should be achieving protective levels:

> This distinction between remedial action and operation and maintenance should be based on the degree of cleanup that has been achieved. This section determines that the cleanup of ground and surface water, whether on or off-site, is a remedial action until the protection of human health and the environment is assured * * *

Id. Thus, Congress appears to have contemplated that active measures necessary to clean up (or restore) a water body (e.g., the pumping and treating of groundwater) would be considered to be remedial action, but O&M to maintain that remedy would not.

However, at the same time, Congress was sensitive to EPA's concern that too broad a policy would require EPA to set aside large amounts of Superfund money for water treatment measures, thereby limiting EPA's ability to take other response actions. As the Senate reports noted, "[t]he reported bill addresses this concern by putting a five-year [later changed to a 10-year] time limit on the mandatory involvement of the federal fund in such treatment expenses." *Id.* Thus, the section requires EPA to consider active restoration measures to be remedial action until protective levels have been achieved, or for a period of 10 years after construction and commencement of operation, whichever is earlier.

For example, under section 104(c)(6), if EPA were to achieve protective levels (e.g., MCLs) after 6 years of ground-water treatment, then the "remedial" action phase would be considered complete and the ground water restored, and activities over the next 4 years (and thereafter) to maintain the effectiveness of that remedy would be considered to be O&M. However, these O&M activities might well include maintenance of the cap on a landfill above the aquifer, or continued operation of the landfill's leachate collection system. Because these source control maintenance activities would merely "maintain the effectiveness of the restoration"—and not be necessary to achieve the remedial action objectives and

remediation goals in the ROD—they are clearly the types of measures that are not "necessary" to restore the aquifer even though if they were not performed, some degradation of the aquifer might occur. These measures are O&M activities, and will be funded by the state.

If, as the commenters suggest, EPA considered source control maintenance and other O&M activities performed during the period of active restoration to be remedial action "necessary" to restore the aquifer (on the theory that if the O&M were not performed, the aquifer could become degraded), then EPA would also be compelled to consider O&M to be remedial action during the period after protectiveness levels have been reached (if less than 10 years after construction). Such an interpretation would directly conflict with the language and legislative history of section 104(c)(6) that ends the remedial action stage when protective levels are achieved or in 10 years.

The commenters' interpretation would also lead to a situation where virtually all on-site O&M activities could be characterized as "remedial action" under section 104(c)(6), on the theory that if they were not maintained, they might degrade the ground/surface water; again, the legislative history (and the wording of section 104(c)(6)) do not suggest that this was Congress' intention.

EPA's analysis is also supported by the common sense notion that once a landfill leachate collection system has been constructed and is operational, the releases have been controlled and the remedial action phase completed; ongoing operation of the leachate control and cap maintenance would merely be necessary to maintain that status quo. EPA further believes that this position is consistent with the need to balance demands on the Fund.

The record of decision for each operable unit of a site's remedy should clearly differentiate, where applicable, which remedial action components will serve the function of "source control maintenance" measures as compared to "restoration" measures. Source control maintenance, in particular, includes maintenance of caps, flood/erosion control measures, slurry walls, gas and leachate collection/treatment measures, and ground/surface water interception/diversion measures. In addition, source control maintenance measures include those leachate collection/treatment measures which function: (1) Within a containment unit, (2) within a source, or (3) immediately downgradient and adjacent to a source, and which serve to collect leachate from a source. In contrast, "source control action" is generally considered to include the construction or installation and start-up—as compared to maintenance—of those actions necessary to prevent the continued "release" of hazardous substances or pollutants or contaminants into the environment from a source (generally on top of or within the ground, or in buildings or other structures on the site).

2. *Measures whose primary purpose is to provide drinking water.* Several commenters argued that EPA has misinterpreted Congress' intent, and does not have statutory authority, in excluding from federal funding through the cost-sharing provisions for remedial actions, ground/surface water measures for the primary purpose of providing drinking water. Several commenters argue that CERCLA section 104(c)(6) does not exclude coverage since this section provides 10-year cost share for "the completion of treatment or other measures * * * necessary to restore ground or surface water to a level which assures protection of human health and the environment." They argue that 10-year cost share is warranted since, if measures for providing drinking water are not operated, no restoration would occur, the protection of public health would not be assured, and water quality would not improve. Some commenters claim that such a requirement would unfairly burden small communities/states which would have to pick up the cost of treating contaminated water and/or charge a high user fee for the use of treated water. One commenter believed that O&M funding should be extended on a case-by-case basis where drinking water is provided and the release at the source is controlled, but contaminant levels cannot be cost-effectively contained.

EPA has decided as a matter of policy not to fund the operation and maintenance of ground/surface water measures taken for the primary purpose of supplying drinking water. Section 104(c)(6) defines as "remedial" action (subject to up to a 90 percent EPA cost share) measures necessary to restore ground or surface water. Providing drinking water is simply not "necessary" for restoration. EPA recognizes that pumping and treating groundwater to primarily provide drinking water might, over time, tend to encourage recharge of the aquifer and could result in some localized improvement in ground or surface water quality; however, the effect is at best tangential to, not necessary for, restoration.

Moreover, EPA believes that the Superfund program was neither designed nor intended to provide drinking water to local residents over the long-term; providing drinking water generally is the responsibility of state and local governments and utilities. CERCLA often does provide drinking water on a temporary basis (e.g., bottled water) or construct drinking water facilities (e.g., water line extensions or treatment plants) in order to provide alternative water supplies; however, EPA does not believe that it is the purpose of the federal government under Superfund authority to fund the long-term operation and maintenance of a public works project such as a drinking water treatment system. EPA believes that this position is consistent with use of the Fund to implement the clear mandates of CERCLA.

The commenter suggests that if EPA does not provide the 10-year cost share for measures taken for the purpose of providing drinking water, no restoration will occur, and protection of human health will not be assured. EPA disagrees. First, if the ground or surface water is contaminated by a release under CERCLA, EPA may decide to take action with the primary purpose of restoring that aquifer (in which case the cost share would be provided). Second, if the state and locality believe that ground or surface water should be treated for the primary purpose of providing drinking water, such measures may be carried out by the state or locality itself or by the local utility. As noted above, Superfund was not intended to be a public works program.

The ROD for each operable unit of a site's remedy, where applicable, should clearly differentiate which remedial action components are "treatment or other measures initiated for the primary purpose of supplying drinking water" versus treatment or other measures "necessary for restoration." These RODs should clearly justify why a remedial action to restore a contaminated aquifer is or is not determined to be appropriate, and/or why the cost-effective selected alternative is to supply drinking water after treatment or other measures. These decisions must follow the NCP requirements involving the development, screening, and analysis of remedial alternatives, as well as NCP remedy selection procedures.

3. *Temporary or interim measures.* One commenter argued that in situations where a ROD for an operable unit identifies an action as temporary or non-final in anticipation of a subsequent final remedy, interim maintenance should not be considered O&M.

EPA has determined that, in certain cases, an interim or temporary response

action is both necessary and desirable in order to control or prevent the further spread of contamination while EPA is deciding upon a final remedy for the site. Indeed, in many cases, a significant escalation of final restoration remedial action costs would result if such measures were not utilized prior to installation of the remedy for the source. Therefore, as a matter of policy, EPA will consider, in certain cases, such interim measures to be "remedial action" (eligible for 90 percent funding), even if the interim measures include source control maintenance activities. Such interim action would be conducted as an operable unit component of a remedial action.

However, this does not mean that all interim actions will be so funded. Where EPA selects a final remedy for an operable unit (e.g., a final, as compared to a temporary, landfill cap), then any maintenance activity for that site will be considered O&M. It is only where the action is truly temporary, meaning that EPA anticipates replacing it with a final measure later on, that the activity will be considered part of the remedial action. In effect, EPA considers these temporary stabilization actions to be a necessary part of the remedy. Unlike normal O&M activities, these actions are not intended to maintain the effectiveness of the remedy; they are intended to ensure that the site conditions do not significantly worsen while EPA develops a comprehensive final remedy. Such measures must be taken promptly in order to assure protection of human health and the environment.

4. *Time at which a remedy becomes operational and functional.* The time period for calculating when a remedial action begins for the purpose of CERCLA section 104(c)(6) is the point at which the remedy becomes operational and functional, and is the relevant point for starting the ten-year period. In addition, for non-ground or surface water restoration remedies, O&M begins when the remedial action is operational and functional.

Several commenters requested clarification as to when a ground or surface water restoration remedy becomes "operational and functional" under proposed § 300.435(f)(4) (revised and renumbered as final § 300.435(f)(2) and (3)). One commenter felt that this determination is a matter of judgment with some remedies, and felt that a final inspection resulting in state and EPA concurrence on this determination was warranted. One commenter proposed that the period start when it is determined that the remedy works, has no start-up problems, and is performing as designed for a reasonable period of time, or either: (1) One year after construction is complete; or (2) after a reasonable start-up period after construction is complete (as defined through EPA/state SMOA, contract or agreement), whichever is longer, for each operable unit. This is referred to as the start-up period. Another commenter proposed that the period start when all parties (EPA, state, PRPs) agree that the remedy is operational and functional.

In response, under § 300.5, "operation and maintenance" means measures required to maintain the effectiveness of response actions. Except for ground or surface water restoration actions covered under § 300.435(f)(3), O&M measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD or consent decree, and is determined to be operational and functional.

EPA generally agrees with the comments that a measure should be said to be operational and functional approximately one year after construction has been completed (see § 300.510(c)). EPA does not, however, agree that in a federal- or state-lead action, the lead agency should await the agreement of all parties, including PRPs, before making this finding. Thus, the final rule provides that a remedy becomes "operational and functional" either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. This timetable is consistent with EPA experience, and with the period of time used in construction grant regulations. See 40 CFR 35.2218(c).

However, EPA also agrees with the comment that in certain cases a remedy may not be fully operational after a year, i.e., such that it merely needs to be maintained or operated; thus, the state may request an EPA extension of the one year limit for project start-up. Where EPA determines that an extension of the start-up period is warranted, an extension would be granted. If the request is not approved, the remedy would be considered operational and functional one year after its construction, or on the date of the EPA/state determination that it is operational and functional, whichever is earlier.

Other sections of the NCP also discuss state involvement during and after remedial actions; specifically, § 300.510(c) discusses state assurances for assuming O&M responsibility, and § 300.515(g) discusses state involvement in remedial action. In order to more clearly describe EPA/state roles and coordination between construction completion and O&M, and to ensure consistency when applying EPA's existing policy for the administrative procedures required to bring sites into the O&M phase, the following process is described.

For Fund-financed remedial actions, the lead and support agencies should conduct a joint inspection at the conclusion of construction of the remedial action and concur through a joint memorandum that: (1) The remedy has been constructed in accordance with the ROD and with the remedial design, and (2) the start-up period should begin. At the end of the start-up period, the construction contractor or agency will prepare a remedial action report that the work was performed within desired specifications and is operational and functional. The lead and support agencies will then conduct a joint inspection in order to determine whether to accept the remedial action report.

5. *When is ground or surface water considered "restored."* One commenter requested clarification in the proposed regulation regarding when a surface or ground water is considered to have been fully restored.

Ground or surface water restoration is considered to be complete, for the purposes of CERCLA section 104(c)(6), when the remedial action has achieved protective levels as set in the ROD, or after 10 years, whichever is earlier. Of course, if protective levels have not been achieved by year 10, then it may be appropriate for the state to continue the operation of the treatment or other restoration measures until the ground or surface water is fully restored to levels set out in the ROD.

EPA recognizes, however, that performance of remedies for restoring ground or surface waters can often only be evaluated after the remedy has been implemented and monitored for a period of time. Further, some water treatment systems may prove unable to meet cleanup goals, and instead may merely reach the point at which it is determined that restoration to health based levels in contaminant concentrations in the ground or surface water is not practicable. In such cases, it may be necessary to amend the ROD and waive certain ground or surface water requirements. Alternatively, the RODs may contemplate, as a contingency, that it may not be technically practicable to meet the specified levels, and thus set

out alternative measures to be taken under that contingency.

Performance evaluations should be conducted one to two years after the remedy is operational and functional, in order to determine whether modifications to the restoration action are necessary. More extensive performance evaluations should be conducted at least every five years. After evaluating whether cleanup levels have been, or will be, achieved in the desired time frame, the following options should be considered: (1) Discontinue operation; (2) upgrade or replace the remedial action to achieve the original remedial action objectives or modified remedial action objectives; and/or (3) modify the remedial action objectives and continue remediation, if appropriate.

6. *Who operates the restoration measures during 10-year period.* One commenter noted that CERCLA is unclear on who will be responsible for operating the remedial action measures necessary during the restoration period of up to 10 years, and believed that EPA is responsible for implementing such measures for EPA-lead sites. Another commenter felt that states should decide whether they have the capability and/or interest in conducting operation and maintenance, and felt that taking over this O&M would be encouraged if federal cost-share for O&M for up to ten years is assured. One commenter argued that section 104(c)(3)(A) of CERCLA, which requires states to assure all future maintenance of the removal and remedial actions, means that the state will assume the responsibility for physically taking over the future maintenance, not assume the responsibility for all future maintenance costs.

In response, CERCLA section 104(c)(6) defines treatment and other measures to restore aquifers (for up to ten years) to be "remedial action," not O&M. Therefore, the costs of operating the remedial action will be shared by EPA and the state according to the appropriate cost sharing provisions in CERCLA section 104(c)(3). However, states are encouraged to conduct such action and may be funded through a cooperative agreement for that portion of remedial action required to restore ground or surface water to levels which assure protection of human health and the environment (or 10 years, whichever is earlier). Such management would include performing any necessary compliance or monitoring requirements. The state is further encouraged to provide necessary information to other environmental programs when such programs are interested in activities at a Superfund site (e.g., providing information on surface water discharges to the appropriate water office or agency).

Of course, after the restoration is considered "complete," as discussed above (at the latest, after 10 years), the restoration activities become O&M, and the states must assume responsibility for the management of the restoration activities, including the costs of that O&M. This is consistent with the long-standing policy that states are responsible for all O&M costs. (See preamble discussion below on "Sections 300.510(c) (1) and (2). State assurances.")

Final rule: Proposed §§ 300.5 and 300.435(f) are revised as follows:

1. EPA is revising the proposed rule's definition of "source control remedial action" and is adding a separate definition for "source control maintenance measures," as follows:

"Source control action" is the construction or installation and start-up of those actions necessary to prevent the continued release of hazardous substances or pollutants or contaminants (primarily from a source on top of or within the ground, or in buildings or other structures) into the environment.

"Source control maintenance measures" are those measures intended to maintain the effectiveness of source control actions once such actions are operating and functioning properly, such as the maintenance of landfill caps and leachate collection systems.

2. In § 300.5, the definition of "operation and maintenance" is changed to refer to "measures" rather than "activities," consistent with 40 CFR part 35, subpart O:

"Operation and Maintenance" (O&M) means measures required to maintain the effectiveness of remedial response actions.

3. Section 300.435(f)(1) is revised as follows to clarify the point at which O&M measures are initiated:

Operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground or surface water restoration actions covered under § 300.435(f)(3). A state must provide its assurance to assume responsibility for O&M, including, where appropriate, requirements for maintaining institutional controls, under § 300.510(c).

4. A new § 300.435(f)(2) is added to explain the use of the term "operational and functional" in subsection (f)(1):

A remedy becomes "operational and functional" either one year after construction is complete, or when the remedy is determined concurrently by the EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period, as appropriate.

5. Proposed § 300.435(f)(2) (renumbered as final § 300.435(f)(3)) is revised to indicate that the restoration period begins after the remedy is operational and functional, consistent with the discussion of O&M measures in paragraph (f)(1). This section also defines administrative "completion." This revision also takes the place of proposed paragraph (f)(4).

(3) For Fund-financed remedial actions involving treatment or other measures to restore ground or surface water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the 10-year period, or after remedial action is complete, whichever is earlier, shall be considered O&M. For the purposes of federal funding provided under CERCLA section 104(c)(6), a restoration activity will be considered administratively "complete" when:

(i) Measures restore ground or surface water quality to a level that assures protection of human health and the environment;

(ii) Measures restore ground or surface water to such a point that reductions in contaminant concentrations are no longer significant; or

(iii) Ten years have elapsed, whichever is earliest.

6. Because the final NCP includes a definition of "source control maintenance measures," proposed § 300.435(f)(3)(i) (renumbered as final § 300.435(f)(4)) is revised to add the term "measures" and to delete the phrase "initiated to prevent contamination of ground or surface water."

Name: Notification prior to the out-of-state transfer of CERCLA wastes.

Policy: In response to the concerns of a number of states and localities, EPA has initiated a policy that prior to the shipment of Superfund wastes to a permitted waste management facility out-of-state, the lead agency should provide written notice to that state's environmental officials. EPA believes that such notice may be appropriate, and that indeed, such notice may be helpful in facilitating the safe and timely accomplishment of Superfund waste shipments. Notice should be provided under this policy for all remedial actions and non-time-critical removal actions involving the out-of-state shipment of Superfund wastes that are known to the lead agency, including waste shipments arising from Fund-lead responses, state-lead responses, federal facility

responses and responses conducted by PRPs (emergency and time-critical removals are not covered by this policy). This notification should specify the type and quantity of waste involved, the name and location of the receiving facility and the expected schedule for the transfer of the CERCLA waste. Such notification will enable the recipient state to obtain from its permitted facilities any other information it may need in order to support the out-of-state action. Although this notification is neither mandated by CERCLA nor required by this regulation, EPA believes that adherence to this procedure will help to ensure that these waste transfers occur in a safe and expedient manner. The policy is explained in more detail in OSWER Directive No. 9330.2-07 (September 14, 1989).

Because CERCLA actions may be carried out under a number of mechanisms and by a number of parties (e.g., lead state agencies, other federal agencies, PRPs), EPA plans to issue additional guidance or regulations, if appropriate, to implement this notification policy.

Final rule: There is no rule language on this issue.

Applicable or Relevant and Appropriate Requirements

Introduction. The November 20, 1985 revisions to the NCP required that, for all remedial actions, the selected remedy must attain or exceed the federal applicable or relevant and appropriate requirements (ARARs) in environmental and public health laws. It also required removal actions to attain ARARs to the greatest extent practicable, considering the exigencies of the circumstances. The preamble to the 1985 revisions to the NCP stated that ARARs could be determined only on a site-by-site basis, and it included from EPA's October 2, 1985 Compliance Policy a list of potentially applicable or relevant and appropriate requirements. The preamble also provided a list of federal non-promulgated criteria, advisories and guidance, and state standards "to be considered," called TBCs. EPA also provided five limited circumstances in which ARARs could be waived.

On October 17, 1986, CERCLA was reauthorized with additional new requirements. Section 121 of CERCLA requires that, for any hazardous substance that will remain on-site, remedial actions must attain requirements under federal environmental or state environmental or facility siting laws that are applicable or relevant and appropriate under the circumstances of the release or threatened release at the completion of the remedial action. The statute also retained most of the waivers, with a few additions.

Although section 121(d)(2) basically codified EPA's 1985 policy regarding compliance with other laws, the section also requires that state standards are also potential ARARs for CERCLA remedial actions when they are promulgated, more stringent than federal standards, and identified by the state in a timely manner.

Furthermore, the CERCLA amendments provide that federal water quality criteria established under the Clean Water Act (CWA) and maximum contaminant level goals (MCLGs) established under the Safe Drinking Water Act, must be attained when they are relevant and appropriate under the circumstances of the release.

Today's revision to the NCP continues the basic concept of compliance with ARARs for any remedy selected (unless a waiver is justified). ARARs will be determined based upon an analysis of which requirements are applicable or relevant and appropriate to the distinctive set of circumstances and actions contemplated at a specific site. Unlike the 1985 revisions to the NCP, where alternatives were developed based on their relative attainment of ARARs, in today's rule recognition is given to the fact that ARARs may differ depending on the specific actions and objectives of each alternative being considered (for more discussion of this point, see preamble of proposal at 53 FR 51438, section 9).

In today's rule, EPA retains its policy established in the 1985 NCP of requiring attainment of ARARs during the implementation of the remedial action (where an ARAR is pertinent to the action itself), as well as at the completion of the action, and when carrying out removal actions "to the extent practicable considering the exigencies of the situation."

For ease of identification, EPA divides ARARs into three categories: chemical-specific, location-specific, and action-specific, depending on whether the requirement is triggered by the presence or emission of a chemical, by a vulnerable or protected location, or by a particular action. (More discussion of these types can be found in the preamble of the proposal at 53 FR 51437, section 6).

Response to comments: EPA received a few comments on general ARARs policies. One commenter argued that the remedial action should not necessarily have to attain the most stringent applicable or relevant and appropriate requirement if a less stringent requirement provides adequate protection of human health and the environment.

EPA disagrees. CERCLA requires that remedial actions comply with all requirements that are applicable or relevant and appropriate. Therefore, a remedial action has to comply with the most stringent requirement that is ARAR to ensure that all ARARs are attained. In addition, CERCLA requires that the remedies selected be protective of human health and the environment *and* attain ARARs. A requirement does not have to be determined to be necessary to be protective in order to be an ARAR. Conversely, the degree of stringency of a requirement is not relevant to the determination of whether it is an ARAR at a site and must be attained (except for state ARARs).

Another commenter asked for confirmation that variance or exemption provisions in a regulation can be potential ARARs as well as the basic standards. EPA agrees that meeting the conditions and requirements associated with a variance or exemption provision can be a means of compliance with an ARAR. For example, EPA expects that CERCLA sites will frequently be complying with the terms of the treatability variance under the RCRA land disposal restrictions (LDR) for soil and debris when LDR is an ARAR.

Limitations in a regulation, such as the quantity limitations that define small quantity generators under RCRA and affect what requirements a generator must comply with, will also affect what requirements are applicable at a CERCLA site. However, it is possible that a requirement could be relevant and appropriate even though the requirement is not applicable because of a limitation in the regulation.

Indian tribe commenters contended that ARARs should not be defined as promulgated laws, regulations, or requirements because some Indian tribe laws, which could apply to a Superfund cleanup, may not be promulgated in the same fashion as state or federal laws. CERCLA section 126 directs EPA to afford Indian tribes substantially the same treatment as states for certain specified subsections of CERCLA sections 103, 104 and 105; EPA believes, as a matter of policy, that it is similarly appropriate to treat Indian tribes as states for the purpose of identifying ARARs under section 121(d)(2). EPA realizes that tribal methods for promulgating laws may vary, so any evaluation of tribal ARARs will have to

be made on a case-by-case basis. Tribal requirements, however, are still subject to the same eligibility criteria as states, as described in § 300.400(g)(4).

Another commenter disagreed with EPA's position that environmental laws do not apply to a CERCLA response action unless incorporated by CERCLA section 121(d). This commenter argued that EPA has confused the ARARs concept with one of preemption of state law.

In response, SARA established a process, in CERCLA sections 121(d)(2) and (d)(4), for how federal and state environmental laws should apply to on-site CERCLA remedial actions, i.e., the ARARs process. Based on these provisions, CERCLA remedies will incorporate (or waive) state standards, as appropriate under CERCLA. Thus, although other environmental laws do not independently apply to CERCLA response actions, the substantive requirements of such laws will be applied to such actions, consistent with section 121(d) and NCP § 300.400(g).

EPA's interpretation that CERCLA response actions are required to meet state (and other federal) environmental law standards only to the limited degree set out in CERCLA is also necessary to comply with the special mandates in CERCLA to respond quickly to emergencies, and to perform Fund-balancing. The position that on-site CERCLA response actions are not independently subject to other federal or state environmental laws is a long-standing one, based on a theory of implied repeal or pre-emption. See, e.g., 50 FR 47912, 47917–18 (Nov. 20, 1985); 50 FR 5862, 5865 (Feb. 12, 1985); "CERCLA Compliance With Other Environmental Laws" Opinion Memorandum, Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator, Nov. 22, 1985.

Following are summaries of major comments and EPA's responses on specific sections of the ARARs policy.

Name: Sections 300.5 and 300.400(g)(1). Definition of "applicable."

Proposed rule: "Applicable requirements" means those cleanup standards, standards of control, or other substantive environmental protection requirements, criteria, or limitations promulgated under federal or state law that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site. The preamble to the proposed rule pointed out that there is generally little discretion in determining whether the circumstances at a site match those specified in a requirement (53 FR 51435–37)

Response to comments: One commenter suggested that language used in § 300.400(g)(4) of the proposed NCP which provides that "only those state standards that are promulgated and more stringent than federal requirements may be applicable or relevant and appropriate" be added to the definition of ARARs found in § 300.5.

In response, EPA notes that the definition it proposed already includes the condition that standards, whether federal or state, must be promulgated in order to be potential ARARs. EPA accepts this comment on stringency and has revised both §§ 300.5 and 300.400(g) to specify that in order to be considered ARARs, state requirements must be more stringent than federal requirements. EPA notes that, in general, state regulations under federally authorized programs are considered federal requirements.

A commenter supported the discussion of ARARs in the preamble to the proposed NCP, but remarked that the definitions of ARARs do not adequately reflect many of the important aspects mentioned in the preamble. EPA believes that the definitions stated in the rule are sufficiently comprehensive and that the information contained in the preamble to the proposed and final rules will help the public in applying the definitions.

One commenter asked why EPA had deleted rule language that applicable requirements are those requirements that would be legally applicable if the response action were not undertaken pursuant to CERCLA. In working with this definition, EPA found the previous definition confusing because it was stated in the conditional, i.e., requirements that would apply if the action were not under CERCLA. EPA revised the definition to explain more specifically what it means by applicable requirements to avoid any confusion. However, the 1985 wording is still a correct statement of the applicability concept. EPA is modifying the definition, however, to make it clear that the standards, etc. do not have to be promulgated specifically to address CERCLA sites.

Final rule: The proposed definition of "applicable" in §§ 300.5 and 300.400(g)(1) are revised as follows:

1. Consistent with the language in CERCLA section 121(d)(2), the description of federal and state laws in § 300.5 is revised to read:

"* * * requirements, criteria or limitations promulgated under federal *environmental* or state *environmental or facility siting law* * * *"

[Comparable changes are made in §§ 300.415(i), 300.430(e)(2)(i)(A), 300.430(e)(9)(iii)(B) and 300.430(f)(1)(ii)(C).]

2. The following sentence is added to § 300.5: "Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable."

3. In §§ 300.5 and 300.400(g)(1), the word "found" is added before "at a CERCLA site."

Name: Sections 300.5 and 300.400(g)(2). Definition of "relevant and appropriate."

Proposed rule: "Relevant and appropriate requirements" means those cleanup standards, standards of control, and other substantive environmental protection requirements, criteria, or limitations promulgated under federal or state law that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

Section 300.400(g)(2) identified criteria that must be considered, where pertinent, to determine whether a requirement addresses problems or situations that are sufficiently similar to the circumstances of the release or remedial action that it is relevant and appropriate. The preamble to the proposed rule emphasized that a requirement must be both relevant and appropriate; this determination is based on best professional judgment. Also, the preamble stated that with respect to some statutes or regulations, only some of the requirements may be relevant and appropriate to a particular site, while others may not be (53 FR 51436–37).

Response to comments: 1. *General.* Several commenters expressed support in general for the revised definition of relevant and appropriate requirements and for the approach described in the proposal to identifying such requirements. Commenters in particular supported statements that a requirement must be both relevant, in that the problem addressed by a requirement is similar to that at the site, and appropriate, or well-suited to the circumstances of the release and the site, to be considered a relevant and appropriate requirement.

A few commenters recommended changes to the definition of relevant and appropriate requirements. One commenter suggested adding to the proposed definition that a relevant and appropriate requirement must be

"generally pertinent," a phrase used in the preamble of the proposed NCP in discussing the analysis of the relevance of a requirement, while another suggested adding "pertinent" to the circumstances of the site, expressing concern that "generally pertinent" was overly broad. EPA believes that the concept of "pertinence" is adequately considered as part of the evaluation of what is relevant and appropriate (see discussion of factors for determining relevant and appropriate requirements, below). EPA does not believe that the suggested changes should be made in the definition itself.

Another commenter suggested revising the definition to emphasize the jurisdictional prerequisites of a potentially relevant and appropriate requirement, recommending that a relevant and appropriate requirement be defined as one that, "while not applicable, sufficiently satisfies the jurisdictional prerequisites for legal enforceability." EPA disagrees, because the jurisdictional prerequisites, while key in the applicability determination, are not the basis for relevance and appropriateness. Rather, the evaluation focuses on the purpose of the requirement, the physical characteristics of the site and the waste, and other environmentally- or technically-related factors.

Another commenter objected to the policy that some portions of a regulation could be found relevant and appropriate, while other portions would not be. The commenter believed that this policy would lead to confusion and inconsistency, although the commenter agreed that the application of this policy to RCRA closure requirements, described in the proposal, was useful. EPA believes that this policy is appropriate and reflects its experience in evaluating RCRA closure requirements and other requirements as relevant and appropriate. Finding some parts of a regulation relevant and appropriate, and others not, allows EPA to draw on those standards that contribute to and are suited for the remedy and the site, even though all components of a regulation are not appropriate.

This approach has been particularly valuable as applied to RCRA closure, where the two applicable regulations, clean closure and landfill closure, address only the two poles of a potential continuum of closure responses. When RCRA closure is relevant and appropriate, Superfund may use a combination of these two regulations, known as hybrid closure, to fashion an appropriate remedy for a site that is protective of both ground water and direct contact (for more discussion of hybrid closure, see preamble to the proposed NCP at 53 FR 51446).

2. *Factors for determining relevant and appropriate requirements.* One commenter suggested referencing the criteria described in § 300.400(g)(2) in the definition. EPA believes this is not appropriate because it could lead to confusion about the role of the criteria and result in greater emphasis on rigidly applying the criteria than is warranted.

Based on this latter comment and others about specific criteria in the proposal, EPA wants to clarify the role of the factors. (Note that the rule now refers to "factors" rather than "criteria.") EPA intends that the factors in § 300.400(g)(2) should be considered in identifying relevant and appropriate requirements, but does not want to imply that the requirement and site situation must be similar with respect to each factor for a requirement to be relevant and appropriate. At the same time, similarity on one factor alone is not necessarily sufficient to make a requirement relevant and appropriate. Rather, the importance of a particular factor depends on the nature of the requirement and the site or problem being addressed and will vary from site to site. While the factors are useful in identifying relevant and appropriate requirements, the final decision is based on professional judgment about the situation at the site and the requirement as a whole.

In addition, as EPA discussed in the proposal, a requirement must be both "relevant," in that it addresses similar situations or problems, and "appropriate," which focuses on whether the requirement is well-suited to the particular site. Consideration of only the similarity of certain aspects of the requirement and the site situation constitutes only half of the analysis of whether a requirement is relevant and appropriate.

After review of comments it received, EPA has revised the language in § 300.400(g)(2) because it is concerned that it was misleading. Some commenters viewed the analysis required by this section as requiring consideration only of the similarity of the requirement and the problems or situation at the CERCLA site. While non-substantive for the most part, the changes to § 300.400(g)(2) make clearer that a requirement and a site situation must be compared, based on pertinent factors, to determine both the relevance and appropriateness of the requirement. The rule also now uses the term "factors," rather than "criteria," a change instituted to avoid confusion with the nine criteria for remedy selection in § 300.430.

One commenter suggested that factors be developed for use in evaluating whether a requirement is "appropriate." EPA does not believe this is necessary. Decisions about the appropriateness of a requirement are based on site-specific judgments using the same set of factors already identified. In the abstract it is very difficult to separate out those factors to be considered for relevance and those to be considered for appropriateness. In specific cases it would be possible to say, for example, that a requirement is relevant in terms of the substances but not appropriate in terms of the facility covered.

Several commenters questioned whether certain factors could legitimately be considered in identifying relevant and appropriate requirements. These and other comments on individual factors are discussed below; a brief description of each factor as described in the proposed NCP is given after the name of the factor.

(i): Purpose of the requirement. This factor compared the purpose of a requirement to the specific objectives of the CERCLA action. One commenter was concerned that the "objectives for the CERCLA action" could include the implementability of the remedy, its cost, and even the acceptability of the action to the community. This is not what EPA meant by "objectives." Rather, EPA intended that this factor consider the technical, or health and environmental purpose of the requirement compared to what the CERCLA action is trying to achieve. For example, MCLs are promulgated to protect the quality of drinking water; this is similar in purpose to a CERCLA action to restore ground water aquifers to drinkable quality. To avoid confusion, EPA has simplified the factor, which now states, "the purpose of the requirement and the purpose of the CERCLA action."

(ii): The medium regulated by the requirement. This factor compared the medium addressed by a requirement to the medium contaminated or affected at a CERCLA site. No comments were received on this factor, and the final rule is essentially unchanged from the proposal.

(iii): The substances regulated by the requirement. This factor compared the substances addressed by a requirement to the substances found at a CERCLA site. Several commenters argued that RCRA requirements for hazardous waste should not be potentially relevant and appropriate to wastes "similar" but not identical to a hazardous waste, and

that this criterion should be dropped. EPA disagrees and has discussed this issue in the section of this preamble on RCRA ARARs.

(iv): The entities or interests affected or protected by the requirement. This factor compared the entities or interests addressed by a requirement and those affected by a CERCLA site. Two commenters expressed concern about this factor. One commenter was concerned that it could be used to disqualify standards from being relevant and appropriate simply because the requirement regulated entities different from those at a CERCLA site. In contrast, another commenter was concerned that EPA would broadly apply requirements to entities that were never intended to be subject to the requirement. EPA agrees that this factor is confusing. EPA believes that the characteristics intended to be addressed by this factor are adequately covered under other factors, such as purpose and type of facility. Therefore, this factor has been eliminated.

(v): The actions or activities regulated by the requirement. This factor compared the actions or activities addressed by a requirement to those undertaken in the remedial action at a CERCLA site. No comments were received on this factor, and the final rule is essentially unchanged from the proposal.

(vi): Any variances, waivers, or exemptions of the requirement. This factor considered the availability of variances, waivers, or exemptions from a requirement that might be available for the CERCLA site or action. One commenter asked for clarification on this factor and expressed his view that the CERCLA waiver provisions for ARARs were the only waivers allowable. However, EPA believes that it is reasonable to consider the existence of waivers, exemptions, and variances under other laws because generally there are environmental or technical reasons for such provisions. These provisions are generally incorporated into national regulations because there are specific circumstances where compliance with a requirement may be inappropriate for technical reasons or unnecessary to protect human health and the environment. Again, this factor is only one that should be considered; even if a waiver provision in a requirement matches the circumstances at the CERCLA site, there may be other reasons why the requirement is still relevant and appropriate.

(vii): The type and size of structure or facility regulated by the requirement. This factor compared the characteristics of the structure or facility addressed by a requirement to that affected by or contemplated by the remedial action. One commenter argued that regulations routinely contain cut-offs based on type or size of the structure or facility for administrative or enforcement convenience. EPA agrees that cut-offs based solely on administrative reasons may not be critical in determining whether a requirement is relevant and appropriate. However, EPA believes that it is necessary and appropriate to consider the physical type or size of structure regulated because requirements may be neither relevant nor appropriate to structures or facilities that are dissimilar to those that the requirement was intended to regulate. In many cases, this factor is a very basic one: in identifying requirements relevant to landfills, one would turn to standards for landfills, not for tanks.

(viii): Consideration of use or potential use of affected resources in the requirement. This factor compared the resource use envisioned in a requirement to the use or potential use at a CERCLA site. One commenter objected to this factor based primarily on opposition to EPA's proposed ground water policy, which, along with the comments EPA has received on this issue, is discussed in the section on ground-water policy in the preamble discussion of § 300.430. EPA believes it is appropriate to compare the resource use considerations in a requirement with similar considerations at a CERCLA site.

Final rule: 1. The following sentence is added to the proposed definition of "relevant and appropriate" in § 300.5 (see preamble discussion above on "applicable"): "Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be relevant and appropriate."

2. Proposed § 300.400(g)(2) is revised as follows:

(2) If, based upon paragraph (g)(1) of this section, it is determined that a requirement is not applicable to a specific release, the requirement may still be relevant and appropriate to the circumstances of the release. In evaluating relevance and appropriateness, the factors in paragraphs (g)(2)(i) through (viii) shall be examined, where pertinent, to determine whether a requirement addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site, and therefore is both relevant and appropriate. The pertinence of each of the following factors will depend, in part, on whether a requirement addresses a chemical, location, or action. The following comparisons shall be made, where pertinent, to determine relevance and appropriateness:

(i) The purpose of requirement and the purpose of the CERCLA action;

(ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site;

(iii) The substances regulated by the requirement and the substances found at the CERCLA site;

(iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site;

(v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site;

(vi) The type of place regulated and the type of place affected by the release or CERCLA action;

(vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action;

(viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site.

Name: Section 300.400(g)(3). Use of other advisories, criteria or guidance to-be-considered (TBC).

Proposed rule: The preamble to the proposed rule provided that advisories, criteria or guidance to-be-considered (TBC) that do not meet the definition of ARAR may be necessary to determine what is protective or may be useful in developing Superfund remedies (53 FR 51436). The ARARs preamble described three types of TBCs: health effects information with a high degree of credibility, technical information on how to perform or evaluate site investigations or remedial actions, and policy.

For example, proposed § 300.400(g)(3) stated that other advisories, criteria, and guidance to be considered (TBCs) shall be identified, as appropriate, because they may be useful in developing CERCLA remedies. Proposed § 300.415(j)(§ 300.415(i) in the final rule) stated that other federal and state criteria, advisories, and guidance shall, as appropriate, be considered in formulating the removal action. Proposed § 300.430(b) stated that during project scoping the lead agency shall initiate a dialogue with the support agency on potential ARARs and TBCs. Proposed § 300.430(e)(2) provided that other pertinent information may be used to develop remediation goals. Proposed § 300.430(e)(8) provided that the lead agency shall notify the support agency of the alternatives to be analyzed to facilitate the identification of ARARs and TBCs. Proposed § 300.430(f) on selecting a remedy, however, referred to compliance with ARARs only, not TBCs. Proposed subpart F required that the

lead and support agencies timely identify ARARs and TBCs during the remedial process.

Response to comments: Several commenters requested that the category of "TBCs" be eliminated entirely. Commenters argued that the use of TBCs is not authorized by CERCLA, that this category of information is too broadly defined or open-ended, and that references to TBCs in the NCP mandate consideration of a seemingly limitless category of information. One commenter was concerned that by selecting a health effect assessments as a TBC candidate, the precedent for imposition of this TBC for all sites would be set and may drive remediation costs beyond cost-effectiveness. Some commented that using TBCs in the remedy selection process will lead to much confusion, uncertainty, and delay. Also, commenters suggested that the use of TBCs could lead to lengthy disputes or litigation.

Other commenters contended that the broad definition of TBCs will give lead agencies too much discretion when considering information and determining cleanup levels. A commenter stated that wide discretion could produce inconsistent selection of cleanup goals.

Several commenters argued that TBCs have been given ARAR-like status in the NCP because the proposal requires that lead and support agencies shall identify ARARs and TBCs during the remedial process. A commenter noted that the proposal requires identification of TBCs even when ARARs have been identified, adding an additional layer of regulatory activity not authorized by CERCLA. Another commenter stated that the proposed rule does not even require TBCs to be relevant and appropriate. One commenter stated that the proposal requires that TBCs be identified for remedial actions but does not specify what is to be done with them. Commenters raised due process concerns, arguing that, unlike ARARs, TBCs are not legally promulgated and may not have been subjected to public or technical review and comment.

Commenters suggested that TBCs are unnecessary for establishing contaminant levels because such levels can be determined by regulations or during risk assessments. A commenter proposed that site-specific risk-based remediation levels should be used. Another commenter asserted that TBCs are appropriate for use as general guidelines, but not as requirements. The TBCs listed in the preamble often are not subjected to thorough technical review and are inappropriate for use as substitutes for ARARs.

If EPA retains TBCs in the NCP, commenters suggested that the category be more specifically defined and referred to as helpful reference information only, or used on a voluntary basis. A commenter suggested that, if TBCs are retained, references to their identification and consideration be permissive, not mandatory (e.g., "may, as appropriate, identify TBCs * * *" rather than "shall identify TBCs * * *"). A commenter argued that EPA should state that remedies selected through the use of TBCs must be cost-effective, and that TBCs may be used only if the remedy selected falls within the acceptable risk range.

Commenters argued that if EPA uses TBCs to determine cleanup levels, PRPs must be provided with an opportunity to challenge their use. A commenter suggested that the preamble clarify that requirements more stringent than ARARs can be imposed only if ARARs are not protective of human health and the environment.

Some commenters requested clarification that requirements existing under Indian tribe law and enforced as a matter of tribal law should be considered ARARs rather than TBCs.

On the other hand, one commenter argued that some TBCs should be given the same status as ARARs. The commenter explained that most states have ARARs for determining ground and surface water cleanup levels, but promulgated standards for soil cleanup are largely unavailable. The commenter suggested that state policies used to determine guidance values, criteria or standards should be given the same status as ARARs, even if not promulgated, as long as they are used consistently within a state.

In response, EPA believes it is necessary to clarify how it intends TBCs to be used. As a first matter, EPA agrees with commenters that TBCs should not be required as cleanup standards in the rule because they are, by definition, generally neither promulgated nor enforceable so they do not have the same status under CERCLA as do ARARs. TBCs may, however, be very useful in helping to determine what is protective at a site, or how to carry out certain actions or requirements.

Because ARARs do not exist for every chemical or circumstance likely to be found at a Superfund site, EPA believes it may be necessary when determining cleanup requirements or designing a remedy to consult reliable information that would not otherwise be considered to be a potential ARAR. For example, when an MCLG or MCL does not exist for a particular contaminant, EPA intends that the lead or support agency use EPA-developed toxicity information such as cancer potency factors and reference doses for noncarcinogenic effects when developing preliminary remediation goals. Also, many action-specific ARARs have broad performance criteria. The technical information on how to implement such criteria may be contained in guidance documents only. The lead or support agency may need to consider these guidance documents in determining how to comply with the ARAR. Also, the lead or support agency may want to consider policy statements contained in advisories, criteria, or guidance when selecting or designing a remedy.

Accordingly, even though the use of TBCs is not specifically discussed in CERCLA, EPA believes that their use is consistent with the statutory requirements to protect human health and the environment and to comply with ARARs. This opportunity to consider TBCs applies to both removal and remedial actions.

EPA recognizes, as the commenters point out, that, unlike ARARs, the identification and communication of TBCs should not be mandatory. EPA has revised the NCP references to TBCs to make it clear that they are to be used on an "as appropriate" basis. EPA believes that TBCs are meant to complement the use of ARARs by EPA, states, and PRPs, not to be in competition with ARARs.

In response to other comments, even when TBCs are used, the requirements imposed on the remedy, including that it be cost-effective, still apply. Moreover, a PRP can comment on information derived from TBCs, including the reliability and validity of a TBC itself, when it submits comments on the proposed plan. PRP challenges to the use of TBCs are not precluded by EPA's TBC policy because PRPs may still assert in their comments that, in a particular instance, the lead agency's consideration of TBCs in determining remediation goals and objectives is not appropriate or consistent with CERCLA's mandates that remedies protect human health and the environment and be cost-effective.

Further, EPA does not agree that the use of TBCs will necessarily lead to inconsistent selection of cleanup goals. Better consistency may in fact be achieved if all lead agencies use EPA-developed toxicity information for contaminants for which a standard has not yet been developed. Finally, Indian tribal laws may be potential ARARs when they meet the requirements for state ARARs (see introductory preamble section on ARARs, above).

Final rule: References to TBCs will be changed in the following sections to make it clear that their use is discretionary rather than mandatory: §§ 300.400(g)(3), 300.415(i), 300.430(b)(9), 300.430(d)(3), 300.430(e) (8) and (9), 300.505(d)(2)(iii), 300.515(d) and (d)(1) and (2), and 300.515(h)(2).

Name: Sections 300.400 (g)(4) and (g)(5). ARARs under state laws.

Proposed rule: Section 300.400(g) specified that only promulgated state standards may be considered potential ARARs. A promulgated state standard must be legally enforceable and of general applicability. The term "legally enforceable," according to the preamble to the proposed NCP, means that state laws or standards which are considered potential ARARs must be issued in accordance with state procedural requirements and contain specific enforcement provisions or be otherwise enforceable under state law. The preamble also explained that "of general applicability" means that potential state ARARs must be applicable to all remedial situations described in the requirement, not just CERCLA sites (53 FR 51437–38).

The preamble also discussed a dispute resolution process to be followed if there is disagreement about the identification of ARARs, as well as policies to be followed if a state insists that a remedy attain a requirement not determined to be ARAR (see 53 FR 51437 and 51457).

Response to comments: Commenters on this subject called for EPA to establish a formal procedure to be followed by states to demonstrate that proposed state ARARs are legally enforceable and of generally applicability. Commenters suggested that states be required to provide legal citations from appropriate sections of state laws, as well as appropriate citations to legal authority for issuing compliance orders, obtaining injunctions, or imposing civil or criminal penalties in the event of noncompliance. These citations, according to commenters, would demonstrate that proposed ARARs are legally enforceable.

Commenters suggested that general applicability could be demonstrated by requiring states to identify the chemicals, locations, and cleanup actions to which a proposed ARAR would apply.

The proposed NCP did not prescribe a specific procedure to be used in evaluating state standards as potential ARARs. A formal process for demonstrating that state requirements are promulgated is not required by CERCLA. EPA believes that the imposition of a formal procedure on states would be a large administrative burden and could impede the cleanup process.

EPA expects, however, that states will substantiate submissions of potential ARARs by providing basic evidence of promulgation, such as a citation to a statute or regulation and, where pertinent, a date of enactment, effective date, or description of scope. Because a citation is the minimum needed to positively identify a requirement, EPA has added regulatory language requiring both lead and support agencies to provide citations when identifying their ARARs.

Section 300.400(g)(4) specifies that only promulgated state standards that are more stringent than federal requirements and are identified by the state in a timely manner may be considered potential ARARs. If a question is raised as to whether a requirement identified by a state conforms to the requirements for being a potential state ARAR, or is challenged on the basis that it does not conform to the definition, the state would have the burden of providing additional evidence to EPA to demonstrate that the requirement is of general applicability, is legally enforceable, and meets the other prerequisites for being a potential ARAR. If EPA does not agree that a state standard identified by a state is an ARAR, EPA will explain the basis for this decision.

Furthermore, the language of CERCLA section 121(d)(2)(A) makes clear, and program expediency necessitates, that the specific requirements that are applicable or relevant and appropriate to a particular site be identified. It is not sufficient to provide a general "laundry" list of statutes and regulations that might be ARARs for a particular site. The state, and EPA if it is the support agency, must instead provide a list of requirements with specific citations to the section of law identified as a potential ARAR, and a brief explanation of why that requirement is considered to be applicable or relevant and appropriate to the site.

Other comments on this section raised objections to EPA's acceptance of general goals as potential ARARs. One commenter questioned whether such general goals were implementable and satisfied the requirements of a promulgated standard, requirement, criteria, or limitation contained in CERCLA section 121(d). Another commenter argued that attempts to interpret compliance with a general goal will lead to confusion and delay. Several commenters requested clarification of the status of state nondegradation goals and whether such goals qualified as potential ARARs.

In response, it is necessary to examine the nature of a general goal in order to determine whether it may be an ARAR. General goals that merely express legislative intent about desired outcomes or conditions but are non-binding are not ARARs. EPA believes, however, that general goals, such as nondegradation laws, can be potential ARARs if they are promulgated, and therefore legally enforceable, and if they are directive in intent. The more specific regulations that implement a general goal are usually key in identifying what compliance with the goal means.

For example, in the preamble to the proposed NCP, EPA cited the example of a state antidegradation statute that prohibits the degradation of surface water below a level of quality necessary to protect certain uses of the water body (53 FR 51438). If promulgated, such a requirement is clearly directive in nature and intent. State regulations that designate uses of a given water body and state water quality standards that establish maximum in-stream concentrations to protect those uses define how the antidegradation law will be implemented are, if promulgated, also potential ARARs.

Even if a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria for state ARARs. However, EPA would have considerable latitude in determining how to comply with the goal in the absence of implementing regulations. EPA may consider guidelines the state has developed related to the provision, as well as state practices in applying the goal, but such guidance or documents would be TBCs, not ARARs.

Final rule: 1. EPA has revised § 300.400(g)(4) as follows:

(4) Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. For purposes of identification and notification of promulgated state standards, the term "promulgated" means that the standards are of general applicability and are legally enforceable.

2. Also, language has been added to § 300.400(g)(5) requiring that specific requirements for a particular site be identified as ARARs, and that citations be provided.

Name: Section 300.515(d)(1). Timely identification of state ARARs.

Proposed rule: Section 300.515(d)(1) stated that the lead and support agencies shall identify their respective

ARARs (and may identify TBCs) and communicate them to each other in a timely manner such that sufficient time is available for the lead agency to incorporate all potential ARARs and TBCs without inordinate delay and duplication of effort.

Section 300.515(d)(2) provided that a SMOA may specify timeframes for identification of ARARs and TBCs. In the absence of a SMOA, § 300.515(h)(2) provided that the lead and support agencies shall discuss potential ARARs and TBCs during the scoping of the RI/FS. This section also required the support agency to communicate in writing potential ARARs to the lead agency within 30 working days of the receipt of a request from the lead agency for potential ARARs at two steps in the process: no later than when site characterization data are available, and prior to the initiation of the comparative analysis. The preamble to the proposed rule (53 FR 51438) explained that different types of ARARs can be identified at various points in the RI/FS process: chemical-specific and location-specific ARARs after site characterization, and action-specific ARARs after development of alternatives.

Response to comments: Several commenters argued that even states with SMOAs should be required to identify potential ARARs within 30 working days of the receipt of a request from the lead agency. EPA believes, however, that it is appropriate to allow the timeframes for identification of potential ARARs to be negotiated as part of a SMOA, and therefore does not agree with this comment.

The purpose of the SMOA is for EPA and a state to agree on their respective roles and responsibilities during EPA-lead and state-lead response actions. A mutually acceptable timeframe for identifying ARARs is certainly an important component of the decision-making process. Such discussion may also lead to agreement on other important ARARs coordination issues such as the appropriate EPA/state management staff level for communication of ARARs.

One commenter stated that the 30-day requirement is too short, especially for Indian tribes who may not have well-developed systems for identifying and compiling tribal laws. Another commenter suggested that states be given a minimum of 20 working days to respond to a request for ARARs to account for numerous levels of authority involved in the response. Based on program experience, EPA believes a period of 30 working days is appropriate for a support agency to respond to a lead agency request for ARARs in the absence of a negotiated timeframe in a SMOA. The necessity for a longer period should be agreed upon during SMOA negotiations.

Commenters suggested that the discussion of timely identification of ARARs be revised to allow for ARARs identified after the signing of the ROD to be considered legally equivalent to ARARs identified prior to ROD signing. Commenters pointed out that many potential action-specific ARARs cannot be identified until the remedial design phase, which occurs after ROD signing. EPA believes that remedial actions should be required to comply with ARARs identified by the lead and support agencies before the ROD is signed and should not be required to comply with ARARs identified after that time, provided such ARARs could have been identified before the ROD was signed. However, if a component of a remedy is not identified at the time of ROD signing, requirements in effect when the component is later identified (e.g., during remedial design) will be used to determine ARARs. In addition, remedies will comply with requirements promulgated after ROD signature if necessary to maintain protectiveness (these issues are discussed in greater detail below in the section on "Consideration of newly promulgated or modified requirements.")

Final rule: EPA is promulgating the rule as proposed except that references to TBCs have been modified (see preamble section on TBCs).

Name: Section 300.430(f)(1)(ii)(C). Circumstances in which ARARs may be waived.

Introduction: CERCLA reauthorization modified somewhat the 1985 NCP's five circumstances in which a specific ARAR need not be attained. Four of the original waivers were essentially codified, and two new waivers added (equivalent standard of performance and inconsistent application of state requirements). These waivers, which by statute apply to on-site remedial activities, must be invoked for each ARAR that will not be attained; the waivers apply only to attainment of ARARs and not to any other CERCLA statutory requirements for remedial actions, such as protection of human health and environment. Since today's rule also requires removal actions to comply with ARARs to the extent practicable, these waivers are also available for removals, as discussed in the preamble for § 300.415(i).

Proposed rule: The proposed NCP revisions essentially incorporated the statutory language of the waivers in the rule without amplification or significant modification in proposed § 300.430(f)(3)(iv) (renumbered as final § 300.430(f)(1)(ii)(C)). The preamble to the proposal did, however, discuss criteria and circumstances under which the waivers might be invoked (53 FR 51438).

Each waiver is discussed below in terms of the proposed criteria, comments on the criteria, and EPA's response to comments. Unless explicitly stated otherwise, the criteria under each waiver may be presumed to remain the same as described in the preamble to the proposed rule.

Response to comments: Two general comments were made about use of waivers. One commenter suggested that the probability of exposure be allowed as grounds for a waiver; for example, the low probability of exposure at a remote site would allow an ARAR such as for drinking water levels in groundwater to be waived. EPA does not believe that there is authorization to use exposure probability as grounds for a waiver. Exposure probability may suggest what standards have to be attained (as with groundwater that may be used for drinking), but cannot exempt a CERCLA response from what would otherwise be ARAR.

Another commenter suggested that waivers be interpreted broadly and used more frequently to expedite response and conserve the Fund. The commenter gave as an example waiving MCLs for Class II groundwater that is not likely to be used for drinking water. EPA acknowledges that waivers of ARARs may be used more frequently in the future as more experience is gained about the practicability of remedies, the nature of state requirements, etc. However, EPA may invoke waivers only when appropriate under the terms of the statute, and not simply when it might be desirable to expedite an action. EPA also notes that a specific waiver is available to help conserve the Fund.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*1*). Interim measures.

Proposed rule: This waiver is intended for interim measures which by their temporary nature do not attain all ARARs. The criteria proposed were that an interim measure for which this waiver is invoked should be followed within a reasonable time by complete measures that attain ARARs, and that the interim measure should not exacerbate site problems nor interfere with the final remedy (53 FR 51438–39).

Response to comments: One commenter stated that EPA should define the term, "reasonable time," to put a limit on the amount of time between an interim measure and completion. The commenter was concerned that the waiver could be used to delay completion of a remedial action unless a time limit, such as 3 years, is imposed. EPA believes that putting a specific time limit as a pre-condition for invoking this waiver is impractical because it is difficult to predict exactly when complete measures can be undertaken, given changes in funding, priorities, and other factors.

Another commenter advised that this waiver should not be used to impose needless, duplicative costs in remediation by requiring unnecessary interim steps. EPA agrees that interim actions should be consistent with a final remedy to the extent the latter can be anticipated. This point is addressed in part by the criterion that the interim measure should not interfere with the final remedy.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*2*). Greater risk to health and the environment.

Proposed rule: This waiver is intended for ARARs whose implementation will cause greater risk to human health and the environment than non-compliance. The criteria proposed for this waiver included magnitude, duration, and reversibility of adverse impacts due to compliance with an ARAR compared to a remedy not complying with that ARAR (53 FR 51439).

Response to comments: Commenters did not specifically disagree with the criteria. One commenter advised caution in invoking this waiver because of the uncertainties in accurately assessing risks and the delays that could ensue from disagreements about these risks. The commenter also said that full public input should be sought before invoking this waiver. In response, EPA notes that public input is required through the proposed plan, which must describe use of a waiver. EPA agrees that risk assessment has uncertainties, but believes that careful assessments that reveal greater risks from compliance with ARARs may be grounds for using this waiver.

Another commenter objected to the preamble discussion for suggesting that the alternative to which compliance with an ARAR is compared is limited to a "no-action" alternative. While the examples provided perhaps suggest that the alternative might have been no action (as with PCB contamination), EPA certainly does not intend that the alternative to which a potentially high risk remedy is compared must be the no-action alternative. As with the example of excavation, there may be other active measures such as capping which can be taken if the ARAR-compliant remedy poses unacceptably high risks.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*3*). Technical impracticability.

Proposed rule: This waiver is intended when compliance with an ARAR is not technically practicable from an engineering perspective. The criteria proposed for this waiver included engineering feasibility and reliability, with cost generally not a major factor unless compliance would be inordinately costly. Both standard and innovative technologies should be considered before invoking this waiver (53 FR 51439).

Response to comments: Several commenters addressed the issue of cost. Some asserted that cost has no role in determining technical practicability, and should be dropped from consideration. Others stated that cost should play a more explicit role by being one of the criteria (along with feasibility and reliability). EPA believes that cost should generally play a subordinate role in determining practicability from an engineering perspective. Engineering practice is in reality ultimately limited by costs, hence cost may legitimately be considered in determining what is ultimately practicable. On the other hand, if cost were a key criterion in determining the practicability of an ARAR, ARARs would likely be subjected to a cost-benefit analysis rather than a test of true practicability.

One commenter argued that the waiver should be invoked even when an innovative technology is available that may achieve an ARAR unless EPA presents evidence that the technology will be reliable and effective. In the proposal EPA stated that the technical impracticability waiver should not be used where either existing or innovative technologies can reliably, logically, and feasibly attain the ARAR. Innovative technologies are encouraged by the statute and, in accordance with criteria presented elsewhere in the rule, should be employed to attain ARARs where appropriate; the burden of presenting information on such technologies would be on the PRP, not EPA.

One commenter suggested that this waiver should be granted for any carcinogen with an MCLG of zero. The role of MCLGs and MCLs is discussed below in today's preamble. EPA notes that because elimination of contamination to a level of zero is infeasible, this waiver would probably have to be invoked where an ARAR is zero.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*4*). Equivalent standard of performance.

Proposed rule: This waiver is intended where the standard of performance of a requirement can be equaled or exceeded through another method. The criteria proposed included degree of protection, level of performance, reliability into the future, and time required for results (53 FR 51439–40).

Response to comments: Several commenters maintained that a broader interpretation of the waiver should be used than that proposed by EPA. Specifically, they argued for a case-by-case analysis of concentrations at realistic points of exposure as the best measure of equivalent performance. In other words, they would use an evaluation of exposure risk as the measure of equivalent performance, allowing an entirely different remedial approach than that specified in a requirement as long as the final risk level is the same.

EPA disagrees fundamentally with this approach, which EPA believes is far broader than what Congress intended. As another commenter noted, the purpose of the waiver is to allow alternative technologies that provide a degree of protection as great or greater as the specified technology. The language from the Conference Report on SARA makes clear the narrower purpose of this waiver for the use of alternative but equivalent technologies; comparison based on risk is only permitted where the original standard is risk-based:

> This [waiver] allows flexibility in the choice of technology but does not allow any lesser standard or any other basis (such as a risk-based calculation) for determining the required level of control. However, an alternative standard may be risk-based if the original standard was risk-based.

H.R. Rep. No. 962, 99th Cong., 2d Sess. (1986) ("Conference Report on SARA") at p. 249. Another commenter believed that EPA's criteria are unnecessarily restrictive, in that these criteria should be balanced in evaluating an alternative rather than required to be equaled or exceeded. EPA believes that the first three criteria, i.e., degree of protection, level of performance, and future reliability, should at least be equaled for an alternative to be considered equivalent. While it is possible that

there may be redundancy among the three, a lesser level in any of these criteria would compromise equivalency with the original standard.

Regarding the fourth criterion, EPA proposed that the time required to achieve results using the alternative remedy should not be significantly more than that required under the waived ARAR. Several commenters objected to this criterion, arguing that it could preclude less expensive technologies or ones that provide greater protection or reliability. They were also troubled by the vagueness of the standard of "significantly more."

EPA appreciates the concerns raised by these commenters regarding the role of time in evaluating an alternative for this waiver. The standard proposed was not specific precisely in order to allow cases where alternative methods may provide great benefits even though requiring longer time for implementation, as with, for example, the use of bioremediation instead of incineration. While EPA still believes that the time required to implement an alternative should be considered in using this waiver, with a bias toward quicker remedies, EPA recognizes the validity of commenters' claims that the duration should be balanced against other beneficial factors and should not be a necessary condition for equivalence.

A final commenter expressed concern that this waiver as interpreted by EPA would actually require the alternative to exceed the level of protectiveness provided by the ARAR. EPA does not believe that the criteria that have been proposed for this waiver in any way require that the alternative be more protective than the ARAR, rather, that it be at least as protective as the ARAR.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*5*). Inconsistent application of state requirements.

Proposed rule: This waiver is intended to prevent application to Superfund sites of state requirements that have not been consistently applied elsewhere in a state. A standard is presumed to have been consistently applied unless there is evidence to the contrary. The preamble to the proposed NCP explained that consistency of application may be demonstrated by the similarity of sites or response circumstances, the proportion of noncompliance cases, reasons for noncompliance, and intentions to apply future requirements. Intent can be demonstrated by policy statements, legislative history, site remedial planning documents, or state responses to federal-lead sites (53 FR 51440).

Response to comments: Several commenters disagreed with EPA's position that potential state ARARs will be considered to have been consistently applied in the past unless evidence exists to the contrary. Commenters also disagreed with EPA's position on state intentions to consistently apply new ARARs. Commenters argued that the statutory language and the legislative history of CERCLA do not contain any basis for EPA's position that potential state ARARs will be presumed to have been consistently applied unless evidence exists to the contrary.

Commenters suggested that EPA develop a formal procedure to be followed by states in demonstrating the consistency of past and future application of standards. One commenter argued that states should bear the burden of proof and should be required to document past applications of potential ARARs.

For those ARARs with established implementation records, commenters favored a policy by which consistent application would be based on documented evidence supplied by the states. One commenter suggested that states be required to provide a list of enforcement actions as evidence in demonstrating consistent application. Another commenter favored the publication of all legally applicable state ARARs in a publicly available document, with appropriate review and comment periods.

For new ARARs without sufficient records of application, one commenter suggested that states should be required to develop an implementation plan for the new ARAR and demonstrate that sufficient funds exist to carry out the plan. Additionally, this commenter proposed that PRPs should have the opportunity to forego compliance with an ARAR if a state does not implement the ARAR in accordance with announced intentions. Another commenter suggested that state intentions to consistently implement an ARAR be recorded in an official record.

In response, the proposed NCP did not contain a specific procedure to be followed by states in demonstrating consistent application of state standards. Rather, the preamble describes what information can be submitted for EPA review when the consistency of application of a particular requirement is questioned.

A standard is presumed to have been consistently applied unless EPA questions that conclusion or requests additional information to substantiate the conclusion. EPA continues to believe that it is proper to presume that a state has consistently applied (or in the case of a newly adopted standard "intends to consistently apply") a standard unless there is reason to believe otherwise. CERCLA section 121(f)(4) is written such that this waiver may be invoked when the President finds that a state requirement is inconsistently applied. CERCLA does not require states to demonstrate consistent application in order for a requirement to be considered an ARAR. Also, imposing an up-front formal procedure on states for demonstrating consistent application would impose a heavy administrative burden. A special implementation plan for newly-promulgated requirements is likewise not required by statute and would be unnecessarily burdensome on states. States have the option of providing evidence of consistent application if EPA is considering waiving a standard. In such a case, the type of evidentiary showings suggested by commenters may be appropriate.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(f)(1)(ii)(C)(*6*). Fund-balancing.

Proposed rule: The proposed section is based on CERCLA section 121(d)(4)(F), which states that this waiver may be used for Fund-financed actions under CERCLA section 104 only. The proposal stated that an alternative may be selected that does not attain all ARARs when EPA determines that the ARAR-compliant alternative will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment. Further conditions for using this waiver were explained in the preamble to the proposed NCP (53 FR 51440).

The preamble solicited comment on EPA's intention to establish a dollar threshold and specific criteria for routinely invoking this waiver. The threshold would be based on an amount significantly higher than the average cost of remediating sites with problems similar to those at the site under consideration, e.g., the cost of addressing large municipal landfills.

Response to comments: Many of the comments received on establishing a dollar threshold were opposed to it, generally because such a threshold would be arbitrary. One commenter argued that a site cleanup should not be compromised because of a possible future funding shortage elsewhere. Other commenters noted that the

amount of money in the Fund is in a steady state of flux and that a fixed dollar threshold would not recognize the dynamic nature of the Superfund program (e.g., PRP-financed responses may have an impact on the Fund.) Establishing an arbitrary dollar threshold is not the proper methodology for this waiver, asserted one commenter. Rather, if an alternative would not attain an ARAR, yet would still fall within the acceptable risk range, then it would warrant selection. Another commenter disagreed with a threshold amount and advised EPA to focus on minimizing Fund-financed cleanups rather than raising the specter of a lower nationwide level of cleanup effort because the Fund may be depleted.

Some commenters supported establishing a dollar threshold. One commenter suggested a threshold of 15 percent over the average cost of remediation at similar types of Superfund sites. Another stated that a threshold addresses the realities of a limited pot of money for the national remediation effort. This commenter recommended calculating the average remedial cost for specific types of sites over 5 years. Such information would be updated periodically to account for inflation and increased costs of treatment and new technologies. Thresholds could be set at one standard deviation above the mean. Another commenter appeared to support the threshold but stated that Congress intended that this waiver be used only in extraordinary circumstances where the Fund resources may be seriously depleted. This commenter argued that exceeding a dollar threshold should result in only an examination of the waiver, not a presumption to invoke the waiver.

In response, the reason for having a Fund-balancing waiver is to ensure that EPA's ability to carry out a comprehensive national response program is not compromised by the expenditure of the Fund at a single site. EPA has decided to establish a policy to routinely consider—not necessarily invoke—the Fund-balancing waiver at a threshold point. EPA will use this threshold as a guideline, rather than a requirement, because of the dynamic nature of both the program and of the amount of funds annually appropriated to the program by Congress. EPA believes that it is appropriate to consider the Fund-balancing waiver for unusual, very costly cases. EPA believes that when a single action would be four times the cost of an average operable unit, it could compromise EPA's ability to conduct actions at other sites. Therefore, EPA has decided that the lead agency should routinely consider the Fund-balancing waiver when the cost of a remedy attaining an ARAR is four times the current average cost of an operable unit. EPA also reserves the right to invoke the waiver in specific situations when the cost of the remedy is expected to fall below the threshold and EPA determines that the single site expenditure would place a disproportionate burden on the Fund.

In response to comments on use of this waiver by federal agencies other than EPA and by PRPs, EPA notes that CERCLA section 121(d)(4)(F) clearly restricts use of this waiver to response actions conducted under CERCLA section 104 using the Fund, i.e., financed by the Hazardous Substance Superfund. Therefore, this waiver is unavailable for other federal agencies.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.430(e)(2)(i)(B). Use of maximum contaminant level goals for ground-water cleanups.

Proposed rule: CERCLA section 121(d) states that a remedial action will attain a level or standard of control established under the Safe Drinking Water Act (SDWA), among other statutes, where such level or control is applicable or relevant and appropriate to any hazardous substance, pollutant or contaminant that will remain on-site. The enforceable standards under the SDWA are maximum contaminant levels (MCLs) which represent the maximum permissible level of a contaminant which is delivered to any user of a public water system. Section 121(d) also states that remedial actions shall attain maximum contaminant level goals (MCLGs) where such goals are relevant and appropriate to the circumstances of the release.

Proposed § 300.430(e)(2)(i)(B) reflected EPA's determination that MCLs generally shall be considered relevant and appropriate standards when determining acceptable exposure for ground water and surface water that is a current or potential source of drinking water. This section also stated that in cases involving multiple contaminants or pathways where the risk is in excess of 10^{-4}, MCLGs may be considered when determining acceptable exposures.

An MCLG is a health-based goal set at a level at which no adverse health effects may arise, with a margin of safety. An MCL is required to be set as close as feasible to its respective MCLG, taking into consideration the best technology, treatment techniques, and other factors (including cost). MCLs for noncarcinogens are nearly always set at MCLGs. Many MCLGs for carcinogens, however, are set at zero. MCLs for carcinogens are set above zero.

In the preamble to the proposed rule (53 FR 51441–42), EPA explained that MCLs rather than MCLGs generally are relevant and appropriate to the cleanup of ground water that is or may be used for drinking because MCLs are the enforceable standards under the Safe Drinking Water Act (SDWA), the MCLs for carcinogens are within EPA's acceptable risk range, and MCLs are protective. MCLs represent the level of water quality that EPA believes is acceptable for over 200 million Americans to consume every day from public drinking water supplies. EPA decided that Superfund cleanup of drinking water should use the same standards as EPA's drinking water program.

Since MCLs are usually only legally applicable under the SDWA to the quality of drinking water at the tap, there will be few instances in which MCLs are applicable to cleanup of ground water at a Superfund site. For this reason, MCLs are generally considered "relevant and appropriate" to ground water that is or may be used for drinking. The preamble to the proposed rule further explained that MCLGs may be relevant and appropriate where the risk posed by multiple contaminants or pathways was in excess of 10^{-4} (53 FR 51441).

Response to comments: The majority of commenters supported the proposed NCP's policy on the use of MCLs rather than MCLGs as generally relevant and appropriate standards. Many of these commenters argued that MCLs should generally be the cleanup standard because they are protective of human health and the environment, are generally set at practical limits of detection, fall within EPA's acceptable risk range, and are the enforceable standards under the Safe Drinking Water Act and other environmental programs, e.g., MCLs are used as ground-water protection standards under RCRA.

Some agreed with EPA that it makes little sense to require MCLGs because the result would be that the water around Superfund sites would be cleaner than the water used for drinking. Others argued that requiring MCLGs would undermine SDWA's use of MCLs as enforceable drinking water standards. Commenters argued that MCLGs for ground-water cleanups equal to zero are unattainable and not detectable, primarily because no adequate technologies are presently available. A commenter further stated

that the purpose of MCLGs is not to establish cleanup levels and that MCLGs have no relationship to the circumstances at a Superfund site. Another commenter argued that cleanup standards other than MCLs are often impractical to measure.

Commenters also observed that cleanup levels determined by MCLGs may not be attainable. One commenter argued that limitations in cleanup techniques and analytical methodology would make it impossible to achieve MCLGs, waivers would have to be used, and remediation schemes would become needlessly complex and prolonged. Some commenters agreed with EPA's statement that CERCLA does not require EPA to eliminate all risks.

One commenter noted that MCLs for carcinogens are all within EPA's acceptable risk range. A commenter further stated that the use of MCLGs is inconsistent with the requirement that additive risks not exceed 10^{-4}. This commenter argued that because MCLGs represent zero risk, the use of MCLGs undermines EPA's risk assessment policy.

Other comments appeared to generally support the use of MCLs but advised that MCLs should not be used in certain situations. A commenter cautioned that EPA must assure that technical problems with measuring compliance are resolved. Also, this commenter argued that MCLs must be applied with flexibility because they may be overly conservative. Another commenter stated that MCLs should not be used where aquifers are not likely to be employed as drinking water sources or where MCLs may be technically unachievable.

Other commenters generally supported EPA's proposal but disagreed that MCLGs should ever be used for multiple contaminant or pathway situations posing risk in excess of 10^{-4}. Another commenter contended that MCLs provide adequate protection in most cases of potential multiple exposure.

Several of the comments opposed to the proposal argued that the MCL policy is in direct conflict with the statutory language. These commenters contend that MCLs are not sufficiently protective of human health because cost and technical feasibility factors are considered when developing MCLs and that cost considerations cannot be considered until health standards are determined. Some argued that cleanup levels should be based on either MCLGs or health-based standards.

One commenter argued that it is inappropriate for Superfund to use MCLs because the technologies available for Superfund cleanups are different than the technologies used to treat water at public treatment works. The commenter stated that EPA should not confine Superfund's cleanup to financial and technological realities experienced by municipal water systems and that Congressional intent was that Superfund cleanup standards must be more stringent than standards that apply to public drinking water systems.

A commenter argued that CERCLA requires EPA to establish tough upfront cleanup standards (i.e., MCLGs) and that EPA should be required to explain to a community when it needs to waive such requirements on a specific site. It is concerned that, behind closed doors, cleanup remedies that are more protective of public health will be eliminated on the basis of cost or other problematic criteria.

EPA has carefully considered the lengthy and disparate comments on the use of MCLs and MCLGs as potential relevant and appropriate requirements for the cleanup of ground and surface water at CERCLA sites. As a threshold matter, EPA disagrees with those commenters that assert that MCLGs can never be relevant and appropriate. Congress directed EPA in CERCLA section 121(d)(2)(A) to attain MCLGs "where relevant and appropriate under the circumstances of the release," suggesting that MCLGs may be relevant and appropriate in some but not necessarily all situations. The proposed rule itself noted that there may be situations in which MCLGs—rather than MCLs—are the relevant and appropriate standard, such as where multiple contaminants or pathways of exposure heighten risk to human health (e.g., risk greater than 10^{-4}). 53 FR at 51441.[13] However, EPA took the position in the proposed rule that consideration of MCLGs as potential relevant and appropriate requirements should be limited to those high-risk situations just mentioned. Now, based on the public comments and a re-examination of the issue, EPA has modified its position on when MCLGs are to be considered potential relevant and appropriate requirements.

EPA's opinion is that where an MCLG establishes a contaminant level above zero, it is appropriate and consistent with the language in CERCLA section 121(d)(2)(A) to consider that MCLG as a potential relevant and appropriate requirement, with determinations to be made on a site-specific basis as to the relevance and appropriateness of meeting that level under the circumstances of the release.[14] When an MCLG is determined not to be relevant and appropriate to the circumstances of the release, the corresponding MCL will be considered a potential relevant and appropriate requirement and will be evaluated under the circumstances of the release.[15] Site-specific assessments of whether a requirement is relevant and appropriate will be made based on the factors set out in § 300.400(g)(2).

Further, EPA believes, consistent with a number of comments, that where an MCLG is equal to zero level of contaminants (as is the case for carcinogens), that MCLG is not "appropriate" for the cleanup of ground or surface water at CERCLA sites. In such cases, the corresponding MCL will be considered as a potential relevant and appropriate requirement, and attained where determined to be relevant and appropriate under the circumstances of the release. This approach best harmonizes the multiple directions of the statute to consider MCLGs, MCLs, and practicability.[16]

By requiring CERCLA remedies to attain MCLGs only when "relevant and appropriate," section 121(d)(2) of the statute affords EPA considerable discretion. It is EPA's opinion that MCLGs of zero, while reasonable as non-enforceable goals under the SDWA, are not appropriate as cleanup standards under the terms of CERCLA for several reasons. First, the purpose of MCLGs under the SDWA is much different from the purpose of ARARs under CERCLA section 121. Examining the purpose of a requirement is one of the criteria used in the NCP to determine whether a requirement is relevant and

[13] As noted in the final rule, EPA believes it may also be appropriate to consider exposure criteria and other factors set out in § 300.430(e)(2)(i)(A) of the rule in cases involving multiple contaminants or pathways that present risks in excess of 10^{-4}.

[14] Statutory waivers may also be available on a site-specific basis. CERCLA section 121(d)(4).

[15] For noncarcinogens, MCLs generally are set equal to MCLGs. EPA establishes all MCLs, i.e., for carcinogens and noncarcinogens, at levels that protect human health.

[16] Compare CERCLA section 122(d)(2)(A) ("remedial action shall require a level or standard of control which at least attains maximum contaminant level goals established under the Safe Drinking Water Act * * * where such goals or criteria are relevant and appropriate * * * *"); section 121(d)(2)(A)(i) (remedial action shall require a level or standard of control which at least attains "any standard, requirement * * * under any Federal environmental law, including * * * the Safe Drinking Water Act [e.g., MCLs] * * * [that] is legally applicable to the * * * contaminant concerned or is relevant and appropriate * * * *"); and section 121(b) ("The President shall select a remedial action that * * * utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable.")

appropriate to the circumstances of a release. NCP § 300.400(g)(2)(i).[17]

The purpose of MCLGs under the SDWA is to set goals for both carcinogens and noncarcinogens, at a level at which "no adverse or anticipated effects on the health of persons occur and which allow an adequate margin of safety." SDWA section 1412(b)(1)(B). See also House Report No. 1185, 93rd Cong., 2d Sess. at 20 (July 10, 1974). The MCLGs are the basis from which legally enforceable MCL standards are set; MCLs are designed to come as close as feasible to the respective MCLG, taking into account the best technology, treatment techniques and other factors (including cost). SDWA section 1412(b)(3); 50 FR 46881 (Nov. 13, 1985). As explained in the House debate on the SDWA:

> The Administrator will have to make two judgments. He will have to determine what the health goal—recommended maximum contaminant level [now known as the MCLG]—should be. *If there is no known safe threshold, the recommended level should be set at zero. But this is not a requirement which is enforceable* against public water systems.

120 Cong. Rec. 36366–36403 (statement of Cong. Rogers) (daily ed., Nov. 19, 1974), reprinted in Senate Committee on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Safe Drinking Water Act* at 652 (Comm. Print 1982) (emphasis added).

EPA establishes MCLGs under SDWA at threshold levels—with a margin of safety—for non-carcinogens, and at a zero level for carcinogens where the threshold level is not known. Congress must be assumed to have been aware of this distinction when it required CERCLA remedies to use only those MCLG goals that are relevant and appropriate in setting enforceable standards to be attained at a site.

EPA also believes that MCLGs of zero are not appropriate for determining the actual cleanup levels to be attained under CERCLA because CERCLA does not require the complete elimination of risk or of all known or anticipated effects; i.e., remedies under CERCLA are not required to entirely eliminate potential exposure to carcinogens. CERCLA section 121 does direct, among other requirements, that remedies protect human health and the environment, be permanent to the maximum extent practicable and be cost-effective. Remedies at Superfund sites comply with these statutory mandates when the amount of exposure is reduced so that the risk posed by contaminants is very small, i.e., at an acceptable level. EPA's risk range of 10^{-4} to 10^{-6} represents EPA's opinion on what are generally acceptable levels. A contaminant level of zero, and the corresponding "no risk" level, are not consistent with the cleanup objectives of the CERCLA program. (Note that EPA has determined that MCLs for carcinogens protect human health because they generally fall within this acceptable risk range. See 54 FR 22093–94 (May 22, 1989); 52 FR 25700–01 (July 8, 1987).)

Another reason that EPA believes that an MCLG of zero is not "appropriate" is that it is impossible to detect whether "true" zero has actually been attained. EPA discussed the scientific difficulty in demonstrating zero contaminant levels during the 1985 rulemaking on MCLGs:

> EPA has emphasized in the rulemaking that *zero is not a measurable level in scientific terms* and will continue to emphasize that point to the public. That *zero is not measurable or attainable* is irrelevant to the purpose of setting RMCLs which is to set a health goal to prevent adverse effects with a margin of safety.

50 FR at 46884, 46896 (Nov. 13, 1985) (emphasis added).[18] EPA's experience and judgment is that determining that contaminant levels have been reduced to zero cannot be achieved in practice, and none of the many public comments on this issue provided evidence to the contrary. ARARs must be measurable and attainable since their purpose is to set a standard that an actual remedy will attain.

EPA's interpretation gives effect to another important mandate in CERCLA section 121. In addition to requiring EPA to attain MCLGs where relevant and appropriate, the statute directs EPA to require levels that attain the "requirements" under federal environmental laws, including the SDWA, where legally applicable or relevant and appropriate (section 121(d)(2)(A)). MCLs are the legally enforceable requirements under the SDWA. Thus, section 121 appears to require EPA to attain both MCLs and MCLGs, where applicable or relevant and appropriate, at CERCLA sites. EPA's policy gives effect to these two provisions by identifying the conditions under which either the MCLG or the MCL is the potential relevant and appropriate requirement.

EPA's determination that MCLGs equal to zero are not relevant and appropriate requirements is also consistent with CERCLA section 121(d)(4)(C), which establishes technical impracticability as a basis for waiving a requirement that would otherwise be applicable or relevant and appropriate. This waiver provision indicates that Congress did not intend standards to be attained if they are impracticable to meet under the circumstances of a specific release. EPA has determined that MCLGs equal to zero are not relevant and appropriate because whether that level has been attained cannot be verified under the circumstances of any release.

Alternatively, EPA could have assumed that all MCLGs (including those of zero) are relevant and appropriate requirements, and then used the waiver provision in CERCLA section 121(d)(4)(C) at every site where the issue arises. However, this would result in needlessly complex and prolonged procedures, as one of the other commenters noted.[19] Moreover, EPA believes the better approach is to resolve this issue as a matter of interpretation in its national rulemaking under CERCLA.

Other issues were raised by commenters, such as determining where in the ground water MCLs should be attained, determining which ground waters are or may be used for drinking, setting cleanup standards for several chemicals in an aquifer, and determining reasonable timeframes for ground water cleanups. These issues are addressed elsewhere in today's preamble.

Final rule: For the reasons discussed above, EPA is amending § 300.430(e)(2)(i) (B) through (D) of the final rule to provide as follows:

> (B) Maximum contaminant levels goals (MCLGs), established under the Safe Drinking Water Act, that are set at levels above zero, shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCLGs are relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2). If an MCLG is determined not to be relevant and appropriate, the corresponding maximum contaminant level (MCL) shall be attained

[17] Similarly, the statute cites the "purpose for which criteria were developed" as a principal factor to consider in deciding whether water quality criteria under the CWA are "relevant and appropriate under the circumstances of the release." See CERCLA section 121(d)(2)(B)(i).

[18] *See also* 49 FR 24347 (June 12, 1984) (emphasis added): "Due to limitations in analytical techniques, it will always be impossible to say with certainty that the substance is not present. In theory, *RMCLs at zero will always be unachievable* (or at least not demonstrable). While zero could be the theoretical goal for carcinogens in drinking water, in practice, a goal of achieving the analytical detection limits for specific carcinogens would have to be followed."

[19] Note, however, that the site-specific waivers in CERCLA section 121(d)(4) may still be appropriately considered under this rule in cases where a standard (such as an MCL or an MCLG) is identified as a relevant or appropriate requirement.

where relevant and appropriate to the circumstances of the release.

(C) Where the MCLG for a contaminant has been set at a level of zero, the MCL promulgated for that contaminant under the Safe Drinking Water Act shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCL is relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2).

(D) In cases involving multiple contaminants or pathways where attainment of chemical-specific ARARs will result in cumulative risk in excess of 10^{-4}, criteria in paragraph (e)(2)(i)(A) of this section may also be considered when determining the cleanup level to be attained.

Name: Section 300.430(f)(5)(iii)(A). Location of point of compliance for ground-water cleanup standards.

Proposed rule: Section 300.430(e)(2)(i)(B) specified the standards that shall generally be considered relevant and appropriate when determining acceptable exposure levels for ground water or surface water that is a current or potential source of drinking water. Proposed § 300.430(f)(4)(iii)(A) (renumbered as final § 300.430(f)(5)(iii)(A)) states that performance shall be measured at appropriate locations in the ground water, etc. The preamble to the proposed rule explained that for ground water, remediation levels should generally be attained throughout the contaminated plume, or at and beyond the edge of the waste management area when waste is left in place (53 FR 51426). (The preamble also discussed points of compliance for other media (*Id.*); see today's preamble to § 300.430(e), "Feasibility study, 1. Remedial action objectives and remediation goals," for discussion of these other points of compliance.)

Response to comments: Several commenters essentially supported the proposed policy regarding point of compliance, but emphasized that the ground-water classification scheme should not be used to delay cleanup or to "write-off" aquifers.

Several other commenters opposed the proposal that cleanup standards, specifically MCLs or MCLGs, should be met throughout the ground water. Most proposed alternatively that the standards be met only at the tap or other realistic point of use, based on a site-specific exposure or risk assessment, and that higher levels be allowed in the ground water, especially immediately downgradient from a waste management area, to take into acccunt natural attenuation. Some proposed that compliance should be at the facility property boundary, or beyond if exposure is precluded under CERCLA alternate concentration limits. One commenter argued that point of compliance is a site-specific, case-by-case determination that should not be specified in the preamble, while another sought the same level of flexibility for ground-water contamination cleanup as there is for contaminant source areas.

These commenters felt that if compliance is not linked to actual or realistic future exposure, the resulting cleanups would be unnecessary or not cost-effective. They also maintained that using actual or likely points of exposure would be more appropriate to ensure that actual drinking water meets standards. Also, they argued that the proposed point of compliance violates the intent of "relevant and appropriate" in that it is inconsistent with and more stringent than the compliance point under SDWA itself, which is at the tap.

EPA disagrees fundamentally with these commenters. MCLs, which are enforceable drinking water standards, and MCLGs above zero, are indeed relevant in considering cleanup levels for water that is or may be used for drinking. Although SDWA does not focus on general ground-water contamination, EPA believes that the MCL standards and non-zero MCLGs promulgated under SDWA are potentially relevant and appropriate to ground-water contamination. CERCLA sets out a mandate for remedies that are protective of use of ground water by private or public users. For example, section 104(c)(6) reflects Congress's expectation that ground water should be restored to protective levels. If ground water can be used for drinking water, CERCLA remedies should, where practicable, restore the ground water to such levels. Such restoration may be achieved by attaining MCLs or non-zero MCLGs in the ground water itself, excluding the area underneath any waste left in place. Thus, these standards and goals may appropriately be used as cleanup levels in the ground water as well as for the delivery of drinking water by public water systems.

Furthermore, as stated in the preamble to the proposed rule, "EPA's policy is to attain ARARs * * * so as to ensure protection at all points of potential exposure" (53 FR 51440). Under the approach proposed by many of these commenters—meeting standards only at the tap—most ground water would not be restored or remediated, since meeting standards through wellhead treatment could conceivably always be substituted for restoration of the ground water itself. This approach, however, would not protect many potential future users, particularly those with private wells, who may be unaware of the need to treat the contaminated ground water before using it for drinking water. Moreover, this approach depends entirely on institutional controls, which should not be used as the primary remedy when more active remediation measures, which provide greater reliability in the long term, are practicable.

Using the facility property boundary as a point of compliance for MCLs, non-zero MCLGs, or alternate concentration limits raises similar problems. At many CERCLA sites, the concept of a facility property boundary is not meaningful because a facility is not in operation (CERCLA defines the concept in terms of an area where contamination has come to be located). Also, allowing higher ACLs to be set at the boundary in the hope that MCLs or non-zero MCLGs will be achieved at a downgradient well through attenuation does not meet the statutory prerequisites for ACLs in CERCLA section 121(d)(2)(B)(ii), which requires (among other things) surface discharge of the ground water and enforceable means of protecting against use of the contaminated ground water.

One commenter objected that the proposed policy was vague and failed to give criteria for determining point of compliance. The commenter specifically cited the word "generally" in the policy as a source of confusion. EPA believes that the policy as reiterated above gives clear direction, considering that there will be situations, such as where waivers are needed, where cleanup levels cannot be attained throughout the plume.

EPA believes that remediation levels should generally be attained throughout the contaminated plume, or at and beyond the edge of the waste management area, when the waste is left in place. However, EPA acknowledges that an alternative point of compliance may also be protective of public health and the environment under site-specific circumstances.

In particular, there may be certain circumstances where a plume of ground water contamination is caused by releases from several distinct sources that are in close geographical proximity. In such cases, the most feasible and effective ground-water cleanup strategy may be to address the problem as a whole, rather than source-by-source, and to draw the point of compliance to encompass the sources of release. In determining where to draw the point of compliance in such situations, the lead agency will consider factors such as the proximity of the sources, the technical practicability of ground-water

remediation at that specific site, the vulnerability of the ground water and its possible uses, exposure and likelihood of exposure and similar considerations. Additional guidance on dealing with remote sites is provided in the preamble section above on ground-water policy.

Final rule: EPA is promulgating in final § 300.430(f)(5)(iii)(A) the statement on points of compliance ("performance shall be measured at appropriate locations in the ground water, * * *") that was in proposed § 300.430(f)(4)(iii)(A).

Name: Section 300.430(e)(2)(i)(F). Use of alternate concentration limits (ACLs).

Proposed rule: The preamble to the proposed NCP (53 FR 51434) discussed conditions under which alternate concentration limits (ACLs) specified under CERCLA may be used as cleanup standards. The preamble explained that CERCLA ACLs may be used if the conditions of CERCLA section 121(d)(2)(B)(ii) are met and cleanup to MCLs or other protective levels is not practicable.

Response to comments: Several comments were made on the proposed preamble section explaining the use of CERCLA ACLs. Some commenters supported the proposed use of ACLs as is; others suggested that EPA should do more to emphasize their utility, particularly within a facility; and one commenter maintained that ACLs should not be less stringent than other standards.

In support of the proposal, one commenter pointed out that use of institutional controls and ACLs are appropriate for the same reason, that is, when use of treatment to attain drinking water standards is not practicable. Other commenters noted that ACLs provide desirable flexibility and are already well established under the RCRA program. One commenter pointed out that use of an ACL at a site should not require a new risk assessment in addition to that done during the RI/FS.

Some commenters suggested ways to expand the use of ACLs at CERCLA cleanups. One commenter wanted EPA to include the use of ACLs in the NCP's regulatory language. Another commenter, noting that Congress's concern was primarily with use of ACLs for exposure points outside a facility, suggested that ACLs could be expected to have great utility within the boundaries of a CERCLA facility; they could be granted when contaminants in ground water will attenuate to ARAR-compliant levels at the leading edge of the plume. With this in mind the commenter suggested that ACLs should be an intrinsic consideration in the initial step of ARARs identification. In a similar vein another commenter suggested that the facility boundary should be defined to include the area covered by institutional controls for the purpose of the statutory criteria and for defining the point of exposure.

EPA disagrees generally with those commenters who would extend the use of CERCLA ACLs set above drinking water standards to areas within the facility boundary or areas covered by institutional controls. EPA interprets the CERCLA section on ACLs not as an entitlement, but rather as a limitation on the use of levels in excess of standards that would otherwise be appropriate for a site. Although the limitation refers only to areas outside the facility boundary, EPA maintains that the same principle holds within the boundary (to the edge of any waste management area left at the site), namely, that such ACLs should only be used when active restoration of the ground water to MCLs or non-zero MCLGs is not practicable. Clearly, the availability of institutional controls in itself is not sufficient reason to extend the allowance for levels above drinking water standards or non-zero goals; rather, as discussed elsewhere in the preamble, institutional controls are considered as the sole remedy only where active remediation is not practicable.

EPA also disagrees with a commenter who asserted that ACLs cannot be less stringent than state or tribal ARARs or MCLGs. There is clearly no point to the ACL described in CERCLA unless it is above the standard normally applied to ground water of a given class. EPA does, however, believe that the policy described above should mitigate the commenter's fears that ground water will be sacrificed.

These comments suggest some confusion as to when MCLs or MCLGs need to be waived under CERCLA section 121(d)(4). EPA's policy is that MCLs or MCLGs above zero should generally be the relevant and appropriate requirement for ground water that is or may be used for drinking, and that a waiver is generally needed in situations where a relevant and appropriate MCL or non-zero MCLG cannot be attained. If, however, a situation fulfills the CERCLA statutory criteria for ACLs, including a finding that active restoration of the groundwater to MCLs or non-zero MCLGs is deemed not to be practicable, documentation of these conditions for the ACL is sufficient and additional documentation of a waiver of the MCL or MCLG is not necessary.

In determining that a CERCLA ACL may be used outside the facility boundary, the risk assessment and other analysis conducted in the RI/FS generally should provide the information required for the documentation that the statutory criteria and other guidelines given above are satisfied. EPA has added a reference to use of ACLs as prescribed in CERCLA in § 300.430(e)(2)(i)(F).

Final rule: EPA has added a § 300.430(e)(2)(i)(F) to the rule to reference the language in CERCLA section 121(d)(2)(B)(ii) on alternate concentration limits.

Name: Section 300.430(e)(2). Use of federal water quality criteria (FWQC).

Proposed rule: The preamble to the proposed rule discussed when federal water quality criteria are likely to be relevant and appropriate (53 FR 51442). EPA stated that a FWQC, or a component of a FWQC, may be relevant and appropriate when the FWQC is intended to protect the uses designated for the water body at the site, or when the exposures for which the FWQC are protective are likely to occur. In addition, whether a FWQC is relevant and appropriate depends on the availability of standards, such as an MCL or state water quality standard, specific for the constituent and use. In particular, when a promulgated MCL exists, an FWQC would not be relevant and appropriate for a current or potential drinking water supply.

Response to comments: One commenter opposed EPA's policy on the relevance and appropriateness of federal water quality criteria (FWQC) for current or potential drinking water sources when both FWQC and MCLs are available for a contaminant. The commenter stated that the test for relevance and appropriateness of an FWQC was whether it is protective of humans or aquatic organisms and whether that kind of exposure is an issue at the site. The commenter maintained that if an FWQC is more stringent than an MCL, the FWQC should apply, consistent with the policy that the most stringent ARAR must be complied with.

In response, FWQC are to be attained "where relevant and appropriate under the circumstances of the release or threatened release," as provided in CERCLA section 121(d)(2)(B). Final rule § 300.430(e)(2)(i)(E) reflects this fact. However, EPA believes that at many sites, FWQC will not be both relevant and appropriate in light of other potential ARARs.

EPA agrees with the commenter that the more stringent ARAR should generally be attained, especially in the

case of "applicable" requirements. However, the determination of whether a requirement is relevant and appropriate is not based on its stringency; rather, other criteria are used, as discussed in the section on relevance and appropriateness, and the remedy must comply with the most stringent requirement determined to be ARAR. EPA also believes that, in some situations, the availability of certain requirements that more fully match the circumstances of the site may result in a decision that another requirement is not relevant and appropriate. EPA believes that one such situation is when an MCL or non-zero MCLG and an FWQC for human health are available for the same contaminant when a current or potential source of drinking water is of concern, and there are no impacts to aquatic organisms.

As discussed in this preamble, EPA believes that an MCL or non-zero MCLG is generally the relevant and appropriate requirement for ground water that is a current or potential source of drinking water. EPA also believes that an MCL or non-zero MCLG, promulgated specifically to protect drinking water, generally is the appropriate standard for ground water even if an FWQC for human health is also available for the contaminant, for the following reasons.

CERCLA section 121(d)(2)(B)(i) lists, among other factors, the purpose for which the criteria were developed and the designated or potential use of the water as factors in determining whether FWQC are relevant and appropriate. Since FWQC for human health are promulgated for exposures that include drinking water and consuming fish, on the one hand, and consuming fish only, on the other, it is not directly the purpose of such criteria to provide drinking water standards per se, although levels that protect such a use can be mathematically derived from these two values. Furthermore, such derived values for drinking water will not reflect the contribution of other sources (through an apportionment factor), as MCLs and MCLGs do. Finally, for carcinogens FWQC are recommended at zero, although values corresponding to risks of 10^{-5}, 10^{-6}, and 10^{-7} are also given. For the reasons given in the discussion of MCLs and MCLGs above, the zero value is not considered relevant and appropriate under CERCLA; MCLs, however, represent a level determined to be both protective of human health for drinking water and attainable by treatment.

For the same reasons, EPA believes that MCLs or non-zero MCLGs generally will be the relevant and appropriate standards for surface water designated as a drinking water supply, unless the state has promulgated water quality standards (WQS) for the water body that reflect the specific conditions of the water body. However, surface water bodies may be designated for uses other than drinking water supply, and therefore an FWQC intended to be protective of such uses, such as the FWQC for consumption of fish or for protection of aquatic life, may very well be relevant and appropriate in such cases. Also, where a contaminant does not have an MCL or MCLG, FWQC adjusted to reflect drinking water use may be used as relevant and appropriate requirements.

Final rule: EPA is including in the final rule at § 300.430(e)(2)(i)(E) language stating that FWQC are to be attained where relevant and appropriate under the circumstances of the release or threatened release.

Name: Section 300.435(b)(2). Compliance with applicable or relevant and appropriate requirements (ARARs) *during* the remedial action.

Proposed rule: CERCLA section 121 requires that, at the completion of a remedial action, a level or standard of control required by an ARAR will be attained for wastes that remain on-site. However, consistent with the 1985 NCP (§ 300.68(i), § 300.435(b)) of the proposed NCP also required compliance with ARARs during implementation of the action, stating that *during the course of the remedial design/remedial action (RD/RA),* the lead agency shall be responsible for ensuring that all federal and state ARARs identified for the action are being met, unless a waiver is invoked. Examples of such requirements given in the preamble to the proposed rule included RCRA treatment, storage, and disposal requirements, Clean Air Act national ambient air quality standards, and Clean Water Act effluent discharge limitations (53 FR 51440).

Response to comments: EPA received a number of comments that the NCP should not require compliance with ARARs during the remedial action. Commenters argued that this policy is inconsistent with the statute, which requires compliance with ARARs only at the completion of the remedial action, and questioned EPA's authority to require compliance with ARARs during remedial design/remedial action.

Several commenters pointed out that CERCLA section 121(d)(1) states that remedial actions must be protective and "must be relevant and appropriate under the circumstances," and argued that this standard should govern how the action itself is carried out. Design and operation of the remedial action should be based on best professional judgment and undertaken in a manner that is protective. Other commenters suggested requiring compliance only with those ARARs that "can reasonably be achieved," or listing specific types of ARARs that must be met during RD/RA.

Commenters were particularly concerned about problems created by requiring compliance with RCRA requirements and the land disposal restrictions in particular for remedial actions.

EPA disagrees with these commenters. EPA believes that it is appropriate to require that remedial activities comply with the substantive requirements of other laws that apply or are relevant and appropriate to those activities. The reasons for complying with such laws during the conduct of the remediation are basically the same as the reasons for applying ARARs as remediation objectives: the laws help define how the activity can be carried out safely and with proper safeguards to protect human health and the environment. EPA is concerned that, if the narrowest possible interpretation were applied to ARARs compliance, compliance with laws critical to protection of health and the environment would become subject to debate, laws such as those that govern surface water discharges or air emissions, or that set operational standards for incineration of hazardous waste.

Several commenters also stated that chemical-specific ARARs used as remediation goals, such as MCLs as ARARs for ground water remediation, cannot be attained during implementation. EPA wants to clarify that it recognizes that ARARs that are used to determine final remediation levels apply only at the completion of the action.

It is worthwhile to point out, in the context of this policy on complying with ARARs pertaining to the remedial activity itself, that CERCLA provides a waiver from ARARs for interim actions, provided the final action will attain the waived standard. If there is doubt about whether an ARAR represents a final remediation goal or an interim standard, and it cannot be met during the activity, this waiver could be invoked.

Comments were also received on EPA's discussion of compliance with ARARs during remedial investigations in the preamble to the proposed NCP (53 FR 51442–43). In that discussion, EPA stated that on-site handling, treatment or disposal of investigation-derived waste must satisfy ARARs and that the

field investigation teams should use best professional judgment in determining when such wastes contain hazardous substances. One commenter recommended that investigation-derived samples be required to be handled, treated, and disposed in accordance with applicable RCRA requirements.

In response, EPA wishes to clarify the discussion in the preamble to the proposed NCP. CERCLA section 101(23) defines "removal" to include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances * * * [including] action taken under section 104(b) of [CERCLA]." EPA has stated, therefore, that studies and investigations undertaken pursuant to CERCLA section 104(b), such as activities conducted during the RI/FS, are considered removal actions (54 FR 13298, March 31, 1989). EPA's policy, explained elsewhere in today's preamble, is that removal actions will comply with ARARs to the extent practicable, considering the exigencies of the circumstances. Thus, the field investigation team should, when handling, treating or disposing of investigation-derived waste on-site, conduct such activities in compliance with ARARs to the extent practicable, considering the exigencies of the situation. Investigation-derived waste that is transported off-site (e.g., for treatability studies or disposal) must comply with applicable requirements of the CERCLA off-site policy (OSWER Directive No. 9834.11 (November 13, 1987)) and § 300.440 when finalized (see 53 FR 48218, November 29, 1988).[20] EPA notes that CERCLA section 104(c)(1) provides that the statutory limits on removals do not apply to investigations, monitoring, surveying, testing and other information-gathering performed under CERCLA section 104(b).

Final rule: EPA is promulgating the rule as proposed except for minor editing revisions.

Name: 300.5. Distinction between substantive and administrative requirements.

Proposed rule: The proposed definitions of "applicable" and "relevant and appropriate" stated that they are cleanup standards, standards of control, and other substantive environmental protection requirements, criteria or limitations. The preamble to the proposed rule explained that requirements that do not in and of themselves define a level or standard of control are considered administrative (53 FR 51443). Administrative requirements include the approval of, or consultation with, administrative bodies, issuance of permits, documentation, and reporting and recordkeeping. Response actions under CERCLA are required to comply with ARARs, which are defined not to include administrative requirements.

Response to comments: Many comments were received on EPA's differentiation between substantive and administrative requirements. Some commenters supported the distinction between substantive and administrative requirements. Other commenters disagreed with EPA's interpretation for various reasons.

Several commenters argued that Superfund actions should not be exempt from consultation requirements. One commenter argued that consultation with a state may be necessary to determine how state ARARs apply to the remedy. A commenter contended that it is virtually impossible to meet substantive requirements without consultation. One commenter asserted that state procedures or methodology necessary to determine permit levels should be considered state ARARs. Another argued that not requiring consultation runs opposite to the spirit of cooperation with states. One commenter suggested narrowing the exemption to allow for consultation through existing Superfund mechanisms such as consent orders, SMOAs, and cooperative agreements.

Commenters also objected to the exemption from reporting and recordkeeping requirements. One contended that EPA had no legal authority for such exemption. Others argued that reporting and recordkeeping are necessary to ensure proper control of hazardous substances that will remain on-site and are also necessary for activities with local impacts: Long-term water diversions and air or surface water releases. Commenters asserted that the lead agency must meet reporting requirements to avoid gaps in a state's environmental data. One commenter noted that there are a number of federal and state programs that require the maintenance of complete databases and that the NCP's approach is inconsistent with such programs. Under these programs, a state needs all discharge information in order to evaluate surface water toxicity impacts in a stream or to establish total maximum daily loads.

The concern was also raised that maintaining reporting and recordkeeping procedures on a site-by-site basis would undermine a state's standardized reporting requirements, e.g., ground-water monitoring report forms, NPDES forms, etc. Also, unique site approaches to reporting and recordkeeping may result in problems not detected by a state: Further, these commenters stated that they were not aware of Superfund recordkeeping and reporting requirements. One commenter stated that reporting requirements and compliance mechanisms during remedy implementation and O&M periods should be specified through Superfund mechanisms, as appropriate. One commenter contended that if Superfund insists on this distinction, a determination whether a requirement is substantive or administrative must be documented.

EPA has reviewed these comments, but concludes, as stated in the preamble to the proposed NCP (53 FR 51443), that CERCLA response actions should be subject only to substantive, not administrative, requirements. EPA believes that this interpretation is most consistent with the terms of CERCLA and with the goals of the statute. Section 121(d)(2) provides that remedial actions should require "a level or standard of control" which attains ARARs; only substantive standards set levels or standards of control. Moreover, Congress made clear in sections 121 (d)(2) and (d)(4) that the "standards" or "requirements" of other laws that are ARARs should be applied to actions conducted on-site, and specifically provided in section 121(e)(1) that federal and state permits would not be required for such on-site response actions. These subsections reflect Congress' judgment that CERCLA actions should not be delayed by time-consuming and duplicative administrative requirements such as permitting, although the remedies should achieve the substantive standards of applicable or relevant and appropriate laws. Indeed, CERCLA has its own comparable procedures for remedy selection and state and community involvement. EPA's approach is wholly consistent with the overall goal of the Superfund program, to achieve expeditious cleanups, and reflects an understanding of the uniqueness of the CERCLA program, which directly impacts more than one medium (and thus overlaps with a number of other regulatory and statutory programs). Accordingly, it would be inappropriate to formally subject CERCLA response actions to the multitude of administrative requirements of other federal and state offices and agencies.

[20] The CERCLA off-site policy requires that receiving facilities are in compliance with "applicable laws." Note that many treatability study wastes are exempt from the permitting requirement under RCRA (see 40 CFR 261.4(e) and (f)).

At the same time, EPA recognizes the benefits of consultation, reporting, etc. To some degree, these functions are accomplished through the state involvement and public participation requirements in the NCP. In addition, EPA has already strongly recommended that its regional offices (and states when they are the lead agency) establish procedures, protocols or memoranda of understanding that, while not recreating the administrative and procedural aspects of a permit, will ensure early and continuous consultation and coordination with other EPA programs and other agencies. CERCLA Compliance with Other Laws Manual, OSWER Directive No. 9234.1-01 (August 8, 1988). In working with states, EPA generally will coordinate and consult with the state Superfund office. That state superfund office should distribute to or obtain necessary information from other state offices interested in activities at Superfund sites.

The basis for this recommendation is a recognition that such coordination and consultation is often useful to determine how substantive requirements implemented under other EPA programs and by other agencies should be applied to a Superfund action. For example, although the Superfund office will make the final decisions on using ARARs, a water office may provide information helpful in determining ARARs when a surface water discharge is part of the Superfund remedy. Such information may include surface water classifications, existing use designations, technology-based requirements, and water quality standards. A water office may also be able to provide advice during the detailed analysis of alternatives on the effectiveness and implementability of treatment alternatives and the likely environmental fate and effects of surface or ground-water discharges. Other offices or agencies with different environmental responsibilities may similarly provide useful information, if it is given in a timely manner.

EPA also recognizes the importance of providing information to other programs and agencies that maintain environmental data bases. This is particularly true where the remedy includes releases of substances into the air or water and the extent of such releases is integral for air and water programs to maintain accurate information on ambient air and surface water quality in order to set statutorily-specified standards. Monitoring requirements themselves are considered substantive requirements and are necessary in order to document attainment of cleanup levels and compliance with emission limitations or discharge requirements identified as ARARs in the decision document. EPA strongly encourages its OSCs or RPMs, or the agency that is responsible for maintaining the operation and maintenance of an action (e.g., pump and treat system), to provide reports on monitoring activities to other offices in a form usable to those offices.

In summary, cleanup standards must be complied with; although administrative procedures such as consultation are not required, they should be observed when, for example, they are useful in determining the cleanup standards for a site. EPA believes that in order to ensure that Superfund actions proceed as rapidly as possible it must maintain a distinction between substantive and administrative requirements.

Final rule: EPA is promulgating the reference to "substantive" in the § 300.5 definitions of "applicable" and "relevant and appropriate" as proposed.

Name: Section 300.430(f)(1)(ii)(B). Consideration of newly promulgated or modified requirements.

Proposed rule: The preamble to the proposed rule discussed how new requirements or other information developed subsequent to the initiation of the remedial action should be addressed (53 FR 51440). It explained that new requirements or other information should be considered as part of the five-year review (as provided for in § 300.430(f)(3)(v)) (renumbered as final § 300.430(f)(5)(iii)(C)) to ensure that the remedial action is still protective of human health and the environment. That is, if a requirement that would be applicable or relevant and appropriate to the remedy is promulgated after the initiation of remedial action, the remedy will be evaluated in light of the new requirement to ensure that the remedy is still protective.

Response to comments: Several commenters objected to EPA's policy requiring consideration of new requirements on the grounds that the statute requires the five-year review only to determine that a remedy is still protective. These commenters were concerned that consideration of new requirements would require additional analysis and perhaps drastic changes in design; would impose an open-ended liability on PRPs; and would violate PRPs' right to due process. Two commenters suggested that making new requirements part of a negotiation process based on a reopener in the settlement agreement could alleviate the second and third concern.

Based on the comments and its experience in carrying out remedies, EPA is modifying its policy on considering newly promulgated or modified requirements to address those requirements that are promulgated or modified after the ROD is signed, rather than those requirements promulgated or modified after the initiation of remedial action, as discussed in the proposal. Once a ROD is signed and a remedy chosen, EPA will not reopen that decision unless the new or modified requirement calls into question the protectiveness of the selected remedy. EPA believes that it is necessary to "freeze ARARs" when the ROD is signed rather than at initiation of remedial action because continually changing remedies to accommodate new or modified requirements would, as several commenters noted, disrupt CERCLA cleanups, whether the remedy is in design, construction, or in remedial action. Each of these stages represents significant time and financial investments in a particular remedy. For instance, the design of the remedy (treatment plant, landfill, etc.) is based on ARARs identified at the signing of the ROD. If ARARs were not frozen at this point, promulgation of a new or modified requirement could result in a reconsideration of the remedy and a re-start of the lengthy design process, even if protectiveness is not compromised. This lack of certainty could adversely affect the operation of the CERCLA program, would be inconsistent with Congress' mandate to expeditiously cleanup sites and could adversely affect PRP negotiations, as noted by commenters. The policy of freezing ARARs will help avoid constant interruption, re-evaluation, and re-design during implementation of selected remedies.

EPA believes that this policy is consistent with CERCLA section 121(d)(2)(A), which provides that "the remedial action selected * * * shall require, at the completion of the remedial action," attainment of ARARs. EPA interprets this language as requiring attainment of ARARs identified at remedy selection (i.e., those identified in the ROD), not those that may come into existence by the completion of the remedy.[21] Neither the explicit statutory language nor the legislative history supports a conclusion that a ROD may be subject to indefinite revision as a result of shifting

[21] No commenters objected to the position in the preamble to the proposed rule that CERCLA remedial actions should attain ARARs identified at the initiation—versus completion—of the action.

requirements. Rather, given the need to ensure finality of remedy selection in order to achieve expeditious cleanup of sites, and given the length of time often required to design, negotiate, and implement remedial actions, EPA believes that this is the most reasonable interpretation of the statute.

As EPA discusses elsewhere in this preamble, one variation to this policy occurs when a component of the remedy was not identified when the ROD is signed. In that situation, EPA will comply with ARARs in effect when that component is identified (e.g., during remedial design), which could include requirements promulgated both before and after the ROD was signed. EPA notes that newly promulgated or modified requirements may directly apply or be more relevant and appropriate to certain locations, actions or contaminants than existing standards and, thus, may be potential ARARs for future responses.

It is important to note that a policy of freezing ARARs at the time of the ROD signing will not sacrifice protection of human health and the environment, because the remedy will be reviewed for protectiveness every five years, considering new or modified requirements at that point, or more frequently, if there is reason to believe that the remedy is no longer protective of health and environment.

In response to the specific comments received, EPA notes that under this policy, EPA does not intend that a remedy must be modified solely to attain a newly promulgated or modified requirement. Rather, a remedy must be modified if necessary to protect human health and the environment; newly promulgated or modified requirements contribute to that evaluation of protectiveness. For example, a new requirement for a chemical at a site may indicate that the cleanup level selected for the chemical corresponds to a cancer risk of 10^{-2} rather than 10^{-5}, as originally thought. The original remedy would then have to be modified because it would result in exposures outside the acceptable risk range that generally defines what is protective.

This policy that newly promulgated or modified requirements should be considered during protectiveness reviews of the remedy, but should not require a reopening of the ROD during implementation every time a new state or federal standard is promulgated or modified, was discussed in the preamble to the proposed rule (53 FR at 51440) but not in the rule section itself. For the reasons outlined above, EPA believes that this concept is critical to the expeditious and cost-effective accomplishment of remedies duly selected under CERCLA and the NCP, and thus is appropriate for inclusion in § 300.430(f)(1)(ii)(B) of the final NCP. This will afford both the public and implementing agencies greater clarity as to when and how requirements must be considered during CERCLA responses, and thus will allow the CERCLA program to carry out selected remedies with greater certainty and efficiency. Of course, off-site CERCLA remedial actions are subject to the substantive and procedural requirements of applicable federal, state, and local laws at the time of off-site treatment, storage or disposal.

Final rule: EPA is adding the following language to the rule at § 300.430(f)(1)(ii)(B):

(B) On-site remedial actions selected in a ROD must attain those ARARs that are identified at the time of ROD signature or provide grounds for invoking a waiver under § 300.430(f)(1)(ii)(C)(*3*).

(*1*) Requirements that are promulgated or modified after ROD signature must be attained (or waived) only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment.

(*2*) Components of the remedy not described in the ROD must attain (or waive) requirements that are identified as applicable or relevant and appropriate at the time the amendment to the ROD or the explanation of significant differences describing the component is signed.

Name: Applicability of RCRA requirements.

Proposed rule: The preamble to the proposed rule discussed when RCRA subtitle C requirements will be applicable for site cleanups (53 FR 51443). It described the prerequisites for "applicability" at length, which are that: (1) The waste must be a listed or characteristic RCRA hazardous waste and (2) treatment, storage or disposal occurred after the effective date of the RCRA requirements under consideration (for example, because the activity at the CERCLA site constitutes treatment, storage, or disposal, as defined by RCRA).

The preamble explained how EPA will determine when a waste at a CERCLA site is a listed RCRA hazardous waste. It noted that it is often necessary to know the origin of the waste to determine whether it is a listed waste and that, if such documentation is lacking, the lead agency may assume it is not a listed waste.

The preamble discussed how EPA will determine that a waste is a characteristic hazardous waste under RCRA. It stated that EPA can test to determine whether a waste exhibits a characteristic or can use best professional judgment to determine whether testing is necessary, "applying knowledge of the hazard characteristic in light of the materials or process used."

The preamble also discussed when a CERCLA action constitutes "land disposal," defined as placement into a land disposal unit under section 3004(k) of RCRA, which triggers several significant requirements, including RCRA land disposal restrictions (LDRs) and closure requirements (when a unit is closed). It equated an area of contamination (AOC), consisting of continuous contamination of varying amounts and types at a CERCLA site, to a single RCRA land disposal unit, and stated that movement within the unit does not constitute placement. It also stated that placement occurs when waste is redeposited after treatment in a separate unit (e.g., incinerator or tank), or when waste is moved from one AOC to another. Placement does not occur when waste is consolidated within an AOC, when it is treated in situ, or when it is left in place.

Response to comments: EPA received many comments on its discussion of when RCRA requirements can be applicable to CERCLA response actions. On the issue of compliance with RCRA in general, most of these commenters argued that RCRA requirements are not intended for site cleanup actions, that such compliance will result in delays and that RCRA requirements are often unnecessary to protect human health and the environment at CERCLA sites. Other commenters argued, however, that EPA is trying to avoid compliance with RCRA requirements. Most of the comments, however, focused on when LDRs are applicable to CERCLA actions and on EPA's discussion of what actions associated with remediation trigger LDRs.

Some commenters opposed EPA's interpretation of "land disposal" or "placement" as too lenient, believing that EPA is trying to avoid compliance with RCRA laws, particularly LDRs. These commenters argued that LDRs should be applicable when hazardous wastes are managed, excavated, or moved in any way. One argued that ARARs waivers are available to address situations when the LDR levels cannot be achieved and should be used as necessary, rather than trying to narrowly define the universe of ARARs to avoid waivers. This commenter was also concerned with EPA's use of the term "unit," calling it an inappropriate concept for Superfund sites because it

will allow the excavation and redeposition of waste within very large areas without ever meeting RCRA design and operating standards and LDR. One commenter asserted that EPA concerns on LDRs stem from an unjustifiable belief that LDR cleanup levels cannot be achieved.

Other commenters believed that the definition of "placement" should provide more flexibility. One asserted that replacement of treated residuals in the proximate area should not constitute placement. The commenter argued that Congress intended to address, preventively or prospectively, the original act of disposal, and that an innocent government or public entity should not be required to assume the entire environmental responsibility of the original disposers. The commenter also argued that establishing that replacement of treated waste triggers LDRs will be a serious disincentive to treating wastes. Some commenters argued that LDRs should not be relevant and appropriate where the CERCLA waste to be disposed on land is merely similar in composition to RCRA banned waste.

Other commenters argued that LDRs are inappropriate for CERCLA remedial actions. They noted an inherent conflict between LDRs, which require treatment to BDAT levels, and the CERCLA process, and claimed that LDRs will supplant CERCLA's "carefully articulated and balanced approach to remedy selection." Commenters asserted that compliance with LDRs will create technical problems because of differences between CERCLA wastes and those evaluated for LDRs. The solutions recommended by these commenters primarily focused on narrowing or eliminating RCRA applicability, but included suggestions for creating treatability groups for CERCLA-type waste and seeking legislative waivers from LDRs, e.g., a waiver from LDRs for Superfund actions at NPL sites.

One commenter believed that the concept of "unit" is not readily transferable to CERCLA sites due to the age and former uses of many of the sites undergoing remediation. Given the ramifications of LDRs, the commenter argued, it may be more reasonable to create a presumption of treating the entire site as one "unit," even if remediation includes a series of operable units.

Some comments were received on EPA's statements on consolidating waste. One stated that consolidation of small amounts of waste across units should not be considered placement, because that will lead to less environmentally sound and less cost-effective solutions, particularly if LDRs are triggered. Another recommended that EPA should allow consolidation of small volumes of waste anywhere on-site, for purposes of storage or treatment, without triggering otherwise applicable RCRA standards. Another commenter requested clarification that consolidation within a unit included normal earthmoving and grading operations.

1. *Actions constituting land disposal.* EPA disagrees with commenters who considered EPA's interpretation of the definition of "land disposal" under RCRA section 3004(k) to be too narrow. These commenters argued that any movement of waste should be considered "placement" of waste, and thus "land disposal" under RCRA section 3004(k).

The definition of "land disposal" is central to determining whether the RCRA LDRs are applicable to a hazardous waste which is being managed as part of a CERCLA response action, or RCRA closure or corrective action. The term "land disposal" is defined under RCRA section 3004(k) as including, but not limited to, "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." The terms "landfill", "surface impoundment," and the others, refer to specific types of units defined under RCRA regulations. Thus, Congress generally defined the scope of the LDR program as the placement of hazardous waste in a land disposal unit, as those units are defined under RCRA regulations.

EPA has consistently interpreted the phrase "placement * * * in" one of these land disposal units to mean the placement of hazardous wastes into one of these units, not the movement of waste within a unit. See e.g., 51 FR 40577 (Nov. 7, 1986) and 54 FR 41566–67 (October 10, 1989)(supplemental proposal of possible alternative interpretations of "land disposal"). EPA believes that its interpretation that the "placement * * * in" language refers to a transfer of waste into a unit (rather than simply any movement of waste) is not only consistent with a straightforward reading of section 3004(k), but also with the Congressional purpose behind the LDRs. The central concern of Congress in establishing the LDR program was to reduce or eliminate the practice of disposing of untreated hazardous waste at RCRA hazardous waste facilities. The primary aim of Congress was prospective rather than directed at already-disposed waste within a land disposal unit. See 51 FR 40577 (Nov. 7, 1986). Moreover, interpreting section 3004(k) to require application of the LDRs to any movement of waste could be difficult to implement and could interfere with necessary operations at an operating RCRA facility. For instance, when hazardous waste is disposed of in a land disposal unit at an operating RCRA facility, there may well be some "movement" of the waste already in the unit. Under the commenters' approach, such movement without pretreatment of the moved waste could be in violation of the LDRs. Thus, under the commenters' interpretation, virtually no operational activities could occur at any RCRA land disposal unit containing hazardous waste without pretreatment of any waste disturbed by the operation; clearly an infeasible approach.

EPA also believes that this interpretation of section 3004(k) is supported by the legislative history for this provision (see 129 Cong. Rec. H8139 (Oct. 6, 1983)(statement of Rep. Breaux)), and by the Congressional choice to define "land disposal" more narrowly for purposes of application of the LDRs than the already-existing term "disposal", which has a much broader meaning under RCRA. Under RCRA section 1004(3), the term "disposal" is very broadly defined and includes any "discharge, deposit, injection, dumping, spilling, leaking, or placing" of waste into or on any land or water. Thus, "disposal" (in a statutory, rather than the regulatory subtitle C meaning of the term) would include virtually any movement of waste, whether within a unit or across a unit boundary. In fact, the RCRA definition of "disposal" has been interpreted by numerous courts to include passive leaking, where no active management is involved (see, e.g., *U.S. v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984)). However, Congress did not use the term "disposal" as its trigger for the RCRA land disposal restrictions, but instead specifically defined the new, and more narrow, term "land disposal" in section 3004(k). The broader "disposal" language continues to be applicable to RCRA provisions other than those in subtitle C, such as section 7003. Thus, for the reasons outlined above, EPA believes that the existing interpretation, that movement of waste within a unit does not constitute "land disposal" for purposes of application of the RCRA LDRs, is reasonable.

With respect to the commenter who asked whether normal earthmoving and grading operations within a land disposal unit constitute "placement into

the unit", under EPA's interpretation of RCRA section 3004(k), such activity would not be "placement into the unit" and thus the RCRA LDRs and other subtitle C disposal requirements would not be applicable (nor would the requirement to obtain a permit under RCRA or minimum technology requirements in RCRA section 3004(o) apply).

Given this interpretation of section 3004(k), EPA does not believe that it is necessary to invoke ARAR waivers of LDRs for any movement of waste within a unit, which was the alternative suggested by the commenters. Nor does EPA believe that the widespread use of such waivers would be practical or desirable. 54 FR 41568–69 (October 10, 1989).

EPA also does not fully agree with the commenters who argued that the RCRA concept of "unit" does not apply to CERCLA sites. The commenters who criticized the application of the RCRA "unit" to the CERCLA area of contamination for purposes of section 3004(k) believed it to be either too broad, allowing large areas to escape the LDRs, or too narrow, not allowing entire CERCLA sites to be considered a single "unit". In contrast to hazardous waste management units at a RCRA facility, CERCLA sites often do not involve discrete waste management units, but rather involve land areas on or in which there can be widespread areas of generally dispersed contamination. Thus, determining the boundaries of the RCRA land disposal "unit," for which section 3004(k) would require application of the LDRs at these sites, is not always self-evident.

EPA generally equates the CERCLA area of contamination with a single RCRA land-based unit, usually a landfill. 54 FR 41444 (December 21, 1988). The reason for this is that the RCRA regulatory definition of "landfill" is generally defined to mean a land disposal unit which does not meet the definition of any other land disposal unit, and thus is a general "catchall" regulatory definition for land disposal units. As a result, a RCRA "landfill" could include a non-discrete land area on or in which there is generally dispersed contamination. Thus, EPA believes that it is appropriate generally to consider CERCLA areas of contamination as a single RCRA land-based unit, or "landfill". However, since the definition of "landfill" would not include discrete, widely separated areas of contamination, the RCRA "unit" would not always encompass an entire CERCLA site.

Waste consolidation from different units or AOCs at a CERCLA site are subject to any applicable RCRA requirements regardless of the volume of the waste or the purpose of the consolidation. Thus, EPA disagrees with those commenters that asserted that small volumes of hazardous waste at a CERCLA site can be consolidated anywhere on-site for storage or treatment purposes without consideration of any applicable RCRA requirements. Such requirements may, however, be subject to ARAR waivers in appropriate circumstances.

The remaining comments received with respect to EPA's interpretation of section 3004(k) discussed the achievability of LDR cleanup levels, questioned the appropriateness of applying the LDRs to remedial actions, and requested more flexibility regarding the LDRs. These comments were the basis for EPA's supplemental notice and proposed reinterpretation of section 3004(k), which is discussed below.

In light of the numerous comments received on the interpretation of "land disposal" in RCRA section 3004(k), as it relates to removal, treatment, and redeposition of hazardous wastes generated by CERCLA and RCRA remedial and other activities, and in view of the important policy decisions that RCRA LDRs pose for the CERCLA and RCRA programs, EPA decided to separately and more fully discuss the issue, the interpretation outlined in the proposed NCP, and possible alternative interpretations of "land disposal". In a supplemental notice to the proposed NCP (54 FR 41566 (Oct. 10, 1989)), EPA outlined several technical, policy, and legal issues concerning LDR applicability to removal, treatment, and redeposition of hazardous wastes, and requested comment on two alternative interpretations of "land disposal". The first alternative would allow the excavation and replacement of previously disposed hazardous wastes in the same unit or area of contamination; since the same wastes would remain in the same unit, this activity would not constitute "land disposal". Under the second alternative, hazardous wastes could be excavated and redeposited either within the original unit or area of contamination, or elsewhere at the site in a new or existing unit. These interpretations would allow greater flexibility in remedial decision-making, in the context of both CERCLA actions and RCRA corrective actions and closures.

On November 6 and 7, 1989, EPA held a forum on contaminated soil and groundwater ("Contaminated Media Forum") to provide an opportunity for interested groups to further address these issues. The Contaminated Media Forum was attended by representatives from EPA, states, environmental groups, Congress, and the regulated community. A summary of the concerns raised and suggested solutions appears in the public docket for this rulemaking.

2. *Selection of LDR treatment standards.* Upon further examination, EPA believes that many of the problems discussed in the supplemental notice, and raised by commenters, result from treatment standards developed pursuant to the RCRA LDR program that are generally inappropriate or infeasible when applied to contaminated soil and debris. As discussed in the October 1989 notice, EPA's experience under CERCLA has been that treatment of large quantities of soil and debris containing relatively low levels of contamination using LDR "best demonstrated available technology" (BDAT) is often inappropriate. 54 FR 41567, 41568 (October 10, 1989). EPA noted that:

> Experience with the CERCLA program has shown that many sites will have large quantities—in some cases, many thousands of cubic meters—of soils that are contaminated with relatively low concentrations of hazardous wastes. These soils often should be treated, but treatment with the types of technologies that would meet the standard of BDAT may yield little if any environmental benefit over other treatment based remedial options.

54 FR 41568 (October 10, 1989). Examples of these and other situations reflecting EPA's experience concerning the inappropriateness of incinerating contaminated soil and debris are included in the record for this rule. In addition, as discussed below, EPA has experienced problems in achieving the current noncombustion LDRs for contaminated soil and debris. Based on EPA's experience to date and the virtually unanimous comments supporting this conclusion, EPA has determined that, until specific standards for soils and debris are developed, current BDAT standards are generally inappropriate or unachievable for soil and debris from CERCLA response actions and RCRA corrective actions and closures. Instead, EPA presumes that, because contaminated soil and debris is significantly different from the wastes evaluated in establishing the BDAT standards, it cannot be treated in accordance with those standards and thus qualifies for a treatability variance from those standards under 40 CFR 268.44.

Accordingly, persons seeking a treatability variance from LDR treatment standards for contaminated soil and debris do not need to demonstrate on a case-by-case basis

that BDAT standards for prohibited hazardous wastes are inappropriate or not achievable. As an alternative, persons seeking a treatability variance for soil and debris may meet the appropriate levels or percentage reductions in the currently available guidance (Superfund LDR Guidance #6A, "Obtaining a Soil and Debris Treatability Variance for Remedial Actions", EPA OSWER Directive 9347.3-06FS, July 1989). In the context of Superfund Records of Decision (ROD), this means that EPA will generally include such a variance in the proposed plan and ROD when treatment of contaminated soil and debris is an element of the remedial action. Further, EPA intends to issue guidance supplementing the Superfund Guidance #6A to expedite the processing of such treatability variances in conjunction with established remedy selection procedures.

Treatment standards for prohibited hazardous wastes are based on performance achievable by application of BDAT. 51 FR at 40578 (Nov. 7, 1986). BDAT, however, is not a technology-forcing program, nor does it always require the lowest possible levels of waste treatment achievable with any technology. See 130 Cong. Rec. S9178 (July 25, 1984) (Statement of Sen. Chaffee introducing the amendment that became RCRA section 3004(m)). Rather, what Congress contemplated is a scheme whereby hazardous wastes are to be treated using the technology (or technologies) generally considered to be suitable for the waste and that substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration. Id.; see also H. Rep. No. 198, 98th Cong. 1st Sess. 33; S. Rep. No. 284, 98th Cong. 1st Sess. 16–17.

EPA's rules developing treatment standards likewise recognize that the treatment standards be based on appropriate technologies even if more stringent treatment methods are technically feasible. 51 FR at 40588–592 (Nov. 7, 1986). For example, EPA has generally based treatment standards for organic contaminants in wastewaters (normally defined as aqueous materials containing less than 1% total organic compound (TOC) and total suspended solids (TSS)) on technologies other than incineration (or other combustion), even though such organics could be treated to lower levels if the wastewaters were incinerated. This is because incineration (or other combustion) is not normally an appropriate technology for wastewaters, notwithstanding its capability of performing to lower levels than conventional wastewater treatment. More generally, EPA's rules on treatability variances recognize that prohibited wastes be treated by appropriate technologies. The rules thus state that a petitioner may request a treatability variance "where the treatment technology is not appropriate to the waste". 40 CFR 268.44(a).

Similarly, treatability variances are warranted where the applicable numerical treatment standard for the waste cannot be achieved. 40 CFR 268.44(a). For this reason, EPA has found that current BDAT standards based on noncombustion technology also warrant a treatability variance for soil and debris. The complex matrices often present in soil and debris may reduce the effectiveness of stabilization and other noncombustion technologies in treating these wastes. For example, the presence of oil and grease or sulfites in the mixture may substantially interfere with the stabilization process. More generally, stabilization is a complex treatment process and its application to unique soil and debris mixtures is not yet well understood. EPA's development of alternative treatment levels in the Superfund Guidance #6A noted above was based on available data for soil and debris mixtures and thus is more tailored with respect to achievability than the existing BDAT standards for these waste mixtures. The difference between these levels and the existing BDAT standards for these wastes demonstrates the feasibility of achieving the current BDAT standards for soil and debris. These alternative numbers thus support EPA's presumption that the BDAT standards are generally inappropriate or not achievable for soil and debris.

This presumption is supported by the commenters on the December, 1988 and October, 1989 proposals. EPA received numerous comments from a wide range of commenters discussing the inappropriateness or infeasibility of applying BDAT standards to contaminated soil and debris. The principal reason given for the inappropriateness of the current BDAT standards was the complexity of soil and debris mixtures and the interference with treatability caused by unique matrices of contaminants in the soil and debris. Moreover, commenters noted that wastestream-derived BDATs have not been fully demonstrated for many contaminated soils and debris and that the presence of trace quantities of one waste in soil and debris may inappropriately require use of a treatment method that would not otherwise be applicable to the other wastes present. These comments were further supported by comments made at the Contaminated Media Forum.

The Agency's experience also supports this conclusion of general inappropriateness or infeasibility of current BDAT standards for soil and debris. For example, as indicated above, EPA has developed alternative treatment levels for soil and debris in the Superfund #6A guidance which are based on the application of the specific treatment technologies to soil and debris, rather than industrial process wastes. Thus, these alternative levels, which are better tailored to the treatability of the complex soil and debris mixtures found at Superfund sites, reflect Agency experience concerning the inappropriateness or infeasibility of current BDAT for soil and debris.

EPA has long indicated its intention to develop separate treatment standards for contaminated soil and debris (without regard, incidentally, to the origin of such waste, so that the treatment standards would apply whether the soil and debris is generated from a CERCLA action or some other activity). 51 FR 40577 (Nov. 7, 1986). Although the Agency has already expended considerable effort on such standards, it has not been able to propose or promulgate regulations because of the more pressing need to implement the rest of the land disposal prohibition statutory provisions before the various statutory deadlines. See RCRA sections 3004 (d), (e), and (g). EPA does not expect that the same level of treatment performance will be required for soil and debris as for industrial process wastes.

In the interim period until EPA promulgates these treatment standards, contaminated soil and debris are subject to the same treatment standards as the prohibited hazardous wastes that they contain, unless a variance is appropriate and is approved according to 40 CFR 268.44. 53 FR at 31146–149 (Aug. 17, 1988) and *Chemical Waste Management* v. EPA, 869 F.2d 1526, 1535–46, 1538–40 (D.C. Cir. 1989). Where standards for the underlying waste are based on the performance of incineration, EPA has granted national capacity variances for the contaminated soils and debris because there is insufficient national capacity to treat these wastes. 40 CFR 268.30(c), 268.31(a)(1), 268.32(d)(1), 268.33(b), and 268.34(d). Where BDAT treatment standards are in effect, it is possible to petition for a treatability variance based on the inappropriateness of the BDAT standards to treat the contaminated soil and debris. 40 CFR 268.44(a). As discussed earlier, EPA

believes that it is unnecessary for petitioners (or the lead Agency in CERCLA response actions) to make site-specific demonstrations that BDAT standards are inappropriate for contaminated soil and debris. The numerous comments and Agency experience supporting a presumption that the BDAT standards are inappropriate or not achievable is clearly warranted at this time because the criteria in 40 CFR 268.44 for treatability variances are generally met for soil and debris. As a result, under EPA's established treatability variance procedures (40 CFR 268.44), variance applications for contaminated soil and debris do not need to demonstrate that the physical and chemical properties differ significantly from wastes analyzed in developing the treatment standard and that, therefore, the waste cannot be treated to specified levels or by specified methods. Petitions need only focus on justifying the proposed alternative levels of performance, using existing interim guidance containing suggested treatment levels for soil and debris (Superfund LDR Guidance #6A, "Obtaining a Soil and Debris Treatability Variance for Remedial Actions", EPA OSWER Directive 9347.3-06FS, July 1989) as a benchmark.

Although the presumption is that BDAT standards are not appropriate for soil and debris, there may be special circumstances where EPA determines that the existing BDAT standards are appropriate for contaminated soils and debris at a particular site, such as where high levels of combustible organics in soil are present. In these circumstances, the Agency would make a determination that treatment to the BDAT standards was appropriate and would require such treatment.

EPA regulations provide that treatability variances may be issued on a site-specific basis. 40 CFR 268.44(h).[22] Thus, they may be approved simultaneously with the issuance of a RCRA permit, the approval of a RCRA closure plan, or the selection of a remedy in a CERCLA response action in the ROD. In the case of an on-site CERCLA response action, the procedural requirements of the variance process do not apply. See CERCLA sections 121(e)(1) and 121(d)(2). The variance decision will be made as part of EPA's remedy selection process, during which data justifying alternative treatment levels will be included in the administrative record files, and public participation opportunities and Agency response to comment will be afforded as appropriate under this rule.

In EPA's view, the Agency's determination that the BDAT standards are generally inappropriate for contaminated soil and debris addresses many of the practical concerns raised by commenters in the supplemental notice on the Agency's interpretation of the term "land disposal". For this reason, and because EPA has had insufficient time to review and evaluate the many lengthy and complex issues raised by commenters on the supplemental notice, EPA is deferring any final decision to modify that interpretation. (EPA will respond to comments on the alternatives in the supplemental notice when the Agency makes a final decision on the proposed reinterpretation of land disposal.) Until a final decision is made, the interpretation announced in the preamble to the proposed NCP and discussed in section 1 above will remain in effect.

Final rule: There is no rule language on this issue.

Name: Determination of whether a waste is a hazardous waste.

Proposed rule: The preamble to the proposed rule discussed how to determine whether hazardous waste regulated under RCRA Subtitle C was present at a site (53 FR 51444).

Response to comments: Some commenters raised questions about EPA's discussion about determining whether a waste exhibits a hazardous characteristic. One argued that EPA cannot assume a waste is not a characteristic waste in the absence of testing and should therefore adopt a liberal and inclusive approach to determining whether RCRA applies to avoid expensive and time-consuming testing. Another commenter asked for clarification on who was responsible for applying "process knowledge" to determine whether a waste was a hazardous waste in the absence of testing. The commenter asserted that, under RCRA, EPA exercises prosecutorial discretion if a generator, acting in good faith, decides incorrectly that his waste is not hazardous. EPA notes that when it determines that there is a violation there will normally be some kind of enforcement action taken; the level and type of prosecutorial response will depend on a number of factors, for example, the size of the company, the significance of the violation, the intent, etc.

Under RCRA rules, a generator is not required to test, but may use knowledge of the waste and its constituents to judge whether the waste exhibits a characteristic. (See 40 CFR 262.11(c).) EPA believes this should also apply if the lead agency or PRP at a CERCLA site is the "generator." EPA wants to make clear, however, that a decision that a waste is not characteristic in the absence of testing may not be arbitrary, but must be based on site-specific information and data collected on the constituents and their concentrations during investigations of the site. Based on site data, it will be very clear in some cases that a waste cannot be characteristic; for example, if a waste does not contain a constituent regulated as EP toxic, a decision that the waste does not exhibit this characteristic can reliably be made without testing for EP toxicity. EPA does not expect to undertake testing when it can otherwise be determined with reasonable certainty whether or not the waste will exhibit a characteristic.

In response to the second concern, the determination whether a waste is a hazardous waste may be made by EPA, the state, or a PRP, depending on the nature of the action. EPA will take any necessary or appropriate action if decisions about the hazardous nature of the waste are in error or are made without proper basis.

Several commenters discussed the question of whether RCRA requirements can be applicable to RCRA hazardous waste disposed of before the RCRA requirements went into effect in 1980. One commenter argued that they could not be, unless the waste exhibited a characteristic at the time of the CERCLA action. However, as one commenter noted, EPA has consistently maintained in enforcement actions that RCRA requirements apply to any waste

[22] In light of today's determination, the application of this rule requires clarification in two respects. First, although EPA is today establishing a general presumption that BDAT standards are inappropriate or not achievable for treating soil and debris, the Agency does not believe that this presumption triggers the rulemaking variance procedures in 40 CFR 268.44(a). Even with the presumption, treatment levels will be determined on a case-by-case basis, and commenters may submit information contending that the presumption is not applicable in a particular case. Thus, it is EPA's view that the site-specific, non-rulemaking procedures in 40 CFR 268.44(h) are entirely appropriate. See 53 FR 31199-31200 (August 17, 1988).

Second, EPA does not interpret its site specific variance procedures as invariably requiring applicants to demonstrate that they cannot meet applicable treatment levels or methods. The first sentence of 40 CFR 268.44(h) makes it clear that an applicant may make one of *two* demonstrations to qualify for a variance: he may show either that he cannot meet a treatment standard, *or* that a treatment method (or the method underlying the standard is inappropriate for his waste. The final sentence of § 268.44(h), identifying the showing an applicant must include in his variance application, on its terms applies only to applications submitted under the first criterion. EPA's presumption, however, applies to soil and debris regardless of which of the two types of variances apply.

materials disposed of prior to 1980 when those materials are managed or disposed of today. EPA agrees with this latter comment and believes that this policy applies to CERCLA actions as well. This was also upheld in a recent DC Court of Appeals decision, *Chemical Waste Management* v. *EPA*, 869 F.2d 1526 (DC Cir. 1989). RCRA requirements can apply when the CERCLA action constitutes treatment, storage or disposal of RCRA hazardous waste. Note that RCRA requirements may also be relevant and appropriate to pre-1980 waste.

One commenter suggested that EPA allow consolidation, for purposes of storage or treatment, of small volumes of wastes without triggering RCRA standards. In response, while EPA appreciates the concerns with meeting substantive storage and treatment requirements for small amounts of waste, EPA believes that waste should be managed according to standards when those standards are ARARs unless a waiver (such as for interim measures) can be justified. It should be noted that RCRA may not be applicable for small quantity generators, as defined under RCRA; however, a determination would still have to be made about whether any RCRA requirements would be relevant and appropriate to small quantities.

Final rule: There is no rule language on this issue.

Name: When RCRA requirements are relevant and appropriate to CERCLA actions.

Proposed rule: The preamble to proposed § 300.400(g)(2)(i), identification of applicable or relevant and appropriate requirements, criteria for relevant and appropriate, stated that RCRA requirements may be relevant and appropriate when a waste is similar in composition to a RCRA listed waste (53 FR 51446).

Response to comments: 1. *RCRA requirements as relevant and appropriate for wastes similar to RCRA hazardous waste.* Several commenters expressed concern that RCRA requirements may be potentially relevant and appropriate for waste that is not a RCRA hazardous waste, but is similar to a RCRA hazardous waste. Commenters argued that virtually any waste or CERCLA substance is similar to a RCRA hazardous waste in some way, either in chemical composition, in toxicity, in mobility, or in persistence, and were concerned that this policy represented an enormous expansion of the RCRA program.

EPA believes that RCRA requirements can potentially be relevant and appropriate to wastes other than those that are known to be hazardous waste. For example, some information or records must be available that identify the source of the waste in order to determine that the waste is a listed hazardous waste. As a result, two separate wastes could be identical in composition, but only one identified as a RCRA hazardous waste because manifests are available that identify it as a listed waste. RCRA requirements would be applicable for the manifested waste, but not for the other, even though the two wastes are physically the same. EPA believes that RCRA requirements can be potentially relevant and appropriate when the waste cannot be definitively identified as a listed hazardous waste.

EPA wants to emphasize, however, that a number of the factors identified in § 300.400(g)(2) should be considered in determining whether a RCRA requirement is relevant and appropriate. The similarity of the waste to RCRA hazardous waste or the presence of a RCRA constituent alone does not create a presumption that a RCRA requirement will be relevant and appropriate. Nor is it always necessary or useful to conduct an in-depth, constituent-by-constituent comparison of a CERCLA waste with RCRA hazardous wastes, because most RCRA requirements are the same regardless of the specific composition of the hazardous waste. Indeed, the statute requires attainment of those requirements that are relevant and appropriate under the circumstances of the release. Thus, the decision about whether a RCRA requirement is relevant and appropriate is based on consideration of a variety of factors, including the nature of the waste and its hazardous properties, other site characteristics, and the nature of the requirement itself.

EPA anticipates that it will often find some RCRA requirements to be relevant and appropriate at a site and others not, even for the same waste. This is because certain waste characteristics shared with RCRA hazardous wastes may be more important than others when evaluating whether a given requirement is relevant and appropriate. For example, the mobility of the waste, among other factors, may be a key concern in evaluating whether the RCRA requirement that the cap used in closing a landfill be less permeable than the bottom liner (40 CFR 264.310(a)(5)) is relevant and appropriate. Other properties of the waste might be more important in evaluating the relevance and appropriateness of other RCRA requirements.

2. *RCRA requirements as relevant and appropriate for mining wastes.* Several commenters asked EPA to state in the NCP or its preamble that RCRA subtitle C requirements will not be relevant and appropriate to mining wastes. They noted that, recognizing the unique characteristics of mining wastes, Congress exempted certain mining wastes from regulation as hazardous wastes under RCRA until EPA completed studies on these wastes to determine specifically whether such regulation was appropriate. On July 3, 1986, EPA published its determination for beneficiation and extraction wastes which found that regulation under subtitle C was not warranted for these wastes, because EPA believes such requirements, " * * * if universally applied, would be either unnecessary to protect human health and the environment, technically infeasible, or economically impracticable to implement." (51 FR 24496.) The commenters argue, therefore, that subtitle C requirements, which are not legally applicable to these mining wastes, also cannot be relevant and appropriate, since EPA has formally made the determination that these requirements are not appropriate for such wastes.

The commenters emphasized that mining waste sites differ in a number of ways from industrial wastes sites. They argue that mining wastes are of enormous volume and generally of lower toxicity, that the sites typically cover extremely large areas and may present less hazard because they tend to be in drier climates, reducing leaching potential, or contain constituents that are less mobile. For these reasons, which formed the basis of EPA's decision under RCRA, RCRA requirements would not be relevant and appropriate for mining sites remediated under CERCLA. Commenters requested that EPA give guidance specifically in the NCP to ensure consistent decisions on ARARs at mining sites.

EPA agrees that RCRA requirements for hazardous waste will not be applicable to those mining wastes excluded from regulation by the statute. (Note, however, that EPA has recently removed certain mineral processing wastes from the mining waste exclusion, making them subject to subtitle C, 54 FR 36592, September 1, 1989; 55 FR 2322, January 23, 1990. EPA has also promulgated regulations listing certain wastes from mineral processing operations as hazardous, 53 FR 35412, September 13, 1988.) In addition, EPA agrees that RCRA subtitle C requirements will generally not be

relevant and appropriate for those mining wastes for which EPA has specifically determined that such regulation is not warranted. The reason is that the factors that caused EPA not to regulate these wastes as hazardous include many of the same factors that EPA considers in judging whether a requirement is relevant and appropriate at a particular site.

However, EPA does not agree that RCRA requirements for hazardous waste can never be relevant and appropriate for CERCLA remediation of mining sites. In its determination for beneficiation and extraction wastes, EPA found that, *"if universally applied,"* subtitle C requirements would not be appropriate for mining wastes. (51 FR 24500.) However, a decision about whether a requirement is relevant and appropriate is made on a case-by-case basis, based on the specific characteristics of the site and the release. There may be some sites where the site circumstances differ significantly from those which caused EPA to decide that subtitle C regulation is not warranted and where certain requirements are appropriate and well-suited to the site or portions of the site. In such a situation, some RCRA requirements may be relevant and appropriate.

EPA is developing regulations under subtitle D of RCRA designed specifically for mining wastes that will not be regulated as hazardous waste. When promulgated, these regulations are likely to be either applicable or relevant and appropriate for remediation of mining sites.

Another commenter stated that EPA needs to develop a long-term initiative to simplify the use of RCRA ARARs. EPA recognizes that the interaction between the two laws can be very complicated and continues to work to resolve and give guidance on issues involving CERCLA compliance with RCRA laws.

Final rule: There is no rule language on this issue.

Name: Examples of potential federal and state ARARs and TBCs.

Potential ARARs and TBCs include, but are not limited to, the following:

1. *Federal requirements which may be potential applicable or relevant and appropriate requirements.* i. EPA's Office of Solid Waste administers, inter alia, the Resource Conservation and Recovery Act of 1976, as amended, (42 U.S.C. 6901). Potentially applicable or relevant and appropriate requirements pursuant to that Act are:

a. Open Dump Criteria—Pursuant to RCRA subtitle D criteria for classification of solid waste disposal facilities (40 CFR part 257).

Note: Only relevant to nonhazardous wastes.

b. RCRA subtitle C requirements governing standards for owners and operators of hazardous waste treatment, storage, and disposal facilities: (40 CFR part 264, for permitted facilities, and 40 CFR part 265, for interim status facilities):

(1) Ground-Water Protection and Monitoring (40 CFR 264.90–264.109).

(2) Closure and Post Closure (40 CFR 264.110–264.120).

(3) Containers (40 CFR 264.170–264.178).

(4) Tanks (40 CFR 264.190–264.199).

(5) Surface Impoundments (40 CFR 264.220–264.249).

(6) Waste Piles (40 CFR 264.250–264.269).

(7) Land Treatment (40 CFR 264.270–264.299).

(8) Landfills (40 CFR 264.300–264.339).

(9) Incinerators (40 CFR 264.340–264.999).

(10) Land Disposal Restrictions (40 CFR 268.1–268.50).

(11) Dioxin-containing wastes (50 FR 1978).

(12) Standards of performance for storage vessels for petroleum liquids (40 CFR part 60, subparts K and K(a)).

(13) Codification rule for 1984 RCRA amendments (50 FR 28702, July 15, 1985; 52 FR 45788, December 1, 1987).

ii. EPA's Office of Water administers several potentially applicable or relevant and appropriate statutes and regulations issued thereunder:

a. Section 14.2 of the Public Health Service Act as amended by the Safe Drinking Water Act, as amended, (42 U.S.C. 300(f)).

(1) Maximum Contaminant Levels (for all sources of drinking water exposure). (40 CFR 141.11–141.16).

(2) Maximum Contaminant Level Goals (40 CFR 141.50–141.52, 50 FR 46936).

(3) Underground Injection Control Regulations (40 CFR parts 144, 145, 146, 147).

b. Clean Water Act, as amended, (33 U.S.C. 1251).

(1) Requirements established pursuant to sections 301, 302, 303 (including state water quality standards), 304, 306, 307, (including federal pretreatment requirements for discharge into a publicly owned treatment works), 308, 402, 403 and 404 of the Clean Water Act. (33 CFR parts 320–330, 40 CFR parts 122, 123, 125, 131, 230, 231, 233, 400–469).

(2) Available federal water quality criteria documents are listed at 45 FR 79318, November 28, 1980; 49 FR 5831, February 15, 1984; 50 FR 30784, July 29, 1985; 51 FR 8012, March 7, 1986; 51 FR 22978, June 28, 1986; 51 FR 43665, December 3, 1986; 52 FR 6213, March 2, 1987; 53 FR 177, January 5, 1988; 53 FR 19028, May 26, 1988; 53 FR 33177, August 30, 1988; 54 FR 19227, May 4, 1989.

(3) Clean Water Act section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR part 230).

(4) Procedures for Denial or Restriction of Disposal Sites for Dredged Material (Clean Water Act section 404(c) Procedures, 33 CFR parts 320–330, 40 CFR part 231).

c. Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1401). (1) Incineration at sea requirements (40 CFR parts 220–225, 227–229. See also 40 CFR 125.120–125.124).

iii. EPA's Office of Pesticides and Toxic Substances administers the Toxic Substances Control Act (15 U.S.C. 2601). Potentially applicable or relevant and appropriate requirements pursuant to that Act are:

PCB requirements generally: 40 CFR part 761; Manufacturing, Processing, Distribution in Commerce, and Use of PCBs and PCB Items (40 CFR 761.20–761.30); Markings of PCBs and PCB Items (40 CFR 761.40–761.45); Storage and Disposal (40 CFR 761.60–761.79); Records and Reports (40 CFR 761.180–761.185, 761.187 and 761.193). See also 40 CFR 129.105, 750.

iv. EPA's Office of External Affairs administers potentially applicable or relevant and appropriate requirements regarding requirements for floodplains and wetlands (40 CFR part 6, Appendix A).

v. EPA's Office of Air and Radiation administers several potentially applicable or relevant and appropriate statutes and regulations issued thereunder:

a. The Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 2022) and Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings (40 CFR part 192).

b. Clean Air Act (42 U.S.C. 7401). (1) National Primary and Secondary Ambient Air Quality Standards (40 CFR part 50).

(2) Standards for Protection Against Radiation (10 CFR part 20). See also 10 CFR parts 10, 40, 60, 61, 72, 960, 961.

(3) National Emission Standards for Hazardous Air Pollutants (40 CFR part 61). See also 40 CFR 427.110–427.116, 763.

(4) New source performance standards (40 CFR part 60).

vi. Other Federal Requirements:

a. National Historic Preservation Act (16 U.S.C. 470). Compliance with NHPA

required pursuant to 7 CFR part 650. Protection of Archaeological Resources: Uniform Regulations—Department of Defense (32 CFR part 229), Department of the Interior (43 CFR part 7).

b. DOT Rules for the Transportation of Hazardous Materials, 49 CFR parts 107, 171, 172.

c. The following requirements are also potentially ARAR:

(1) Endangered Species Act of 1973 (16 U.S.C. 1531). Generally, 50 CFR parts 81, 225, 402.

(2) Wild and Scenic Rivers Act (16 U.S.C. 1271).

(3) Fish and Wildlife Coordination Act (16 U.S.C. 661).

(4) Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136), 40 CFR part 165.

(5) Wilderness Act (16 U.S.C. 1131).

(6) Coastal Barriers Resources Act (16 U.S.C. 3501).

(7) Surface Mining Control and Reclamation Act (30 U.S.C. 1201).

(8) Coastal Zone Management Act of 1972 (16 U.S.C. 1451). Generally, 15 CFR part 930 and 15 CFR 923.45 for Air and Water Pollution Control Requirements.

(9) Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

(10) Marine Mammal Protection Act (16 U.S.C. 1361 et seq.).

2. *Examples of potential state ARARs.* i. State requirements for disposal and transport of radioactive wastes.

ii. State approval of water supply system additions or developments.

iii. State ground-water withdrawal approvals.

iv. Requirements of authorized (subtitle C of RCRA) state hazardous waste programs.

v. State Implementation Plans (SIPs) and delegated programs under the Clean Air Act.

vi. Approved state NPDES program under the Clean Water Act.

vii. Approved state underground injection control (UIC) programs under the Safe Drinking Water Act.

viii. Approved state wellhead protection programs.

ix. State water quality standards.

x. State air toxics regulations.

3. *Other federal criteria, advisories, and guidance, to be considered.* i. Federal Criteria, Advisories, and Procedures.

a. Health Effects Assessments (HEAs) and Proposed HEAs ("Health Effects Assessment Summary Tables," updated quarterly).

b. Reference Doses (RfDs) ("Health Effects Assessment Summary Tables," updated quarterly, or "Integrated Risk Information System (IRIS)," updated monthly).

c. Slope Factors for Carcinogens ("Health Effects Assessment Summary Tables," updated quarterly, or "Integrated Risk Information System (IRIS)," updated monthly).

d. Pesticide registrations and registration data.

e. Pesticide and food additive tolerances and action levels.

Note: Germane portions of tolerances and action levels may be pertinent and therefore are to be considered in certain situations.

f. PCB Spill Cleanup Policy (52 FR 10688, April 2, 1987).

g. Waste load allocation procedures (40 CFR parts 125, 130).

h. Federal sole source aquifer requirements (52 FR 6873, March 5, 1987).

i. Public health basis for the decision to list pollutants as hazardous under section 112 of the Clean Air Act.

j. EPA's Ground-Water Protection Strategy.

k. Guidance on Remedial Actions for Contaminated Ground Water at Superfund Sites (Draft, October 1986) establishes criteria for the use of background concentrations and ACLs.

l. Superfund Public Health Evaluation Manual.

m. TSCA health data.

n. TSCA chemical advisories.

o. ATSDR Toxicological Profiles.

p. Advisories issued by FWS and NWFS under the Fish and Wildlife Coordination Act.

q. TSCA Compliance Program Policy ("TSCA Enforcement Guidance Manual Policy Compendium," USEPA, OECM, OPTS, March 1985).

r. Health Advisories, EPA Office of Water.

s. EPA/DOT Guidance Manual on Hazardous Waste Transportation.

ii. USEPA RCRA Guidance Documents.

a. Alternate Concentration Limits (ACL) Guidance (draft).

b. EPA's RCRA Design Guidelines.

(1) Surface Impoundments—Liner Systems, Final Cover, and Freeboard Control.

(2) Waste Pile Design—Liner Systems.

(3) Land Treatment Units.

(4) Landfill Design—Liner Systems and Final Cover.

c. Permitting Guidance Manuals.

(1) Permit Applicant's Guidance Manual for Hazardous Waste Land Treatment, Storage, and Disposal Facilities.

(2) Permit Applicant's Guidance Manual for the General Facility Standards of 40 CFR 264.

(3) Permit Writer's Guidance Manual for Hazardous Waste Land Treatment, Storage, and Disposal Facilities.

(4) Permit Writer's Guidance Manual for the Location of Hazardous Waste Land Storage and Disposal Facilities: Phase I, Criteria for Location Acceptability and Existing Regulations for Evaluating Locations.

(5) Permit Writer's Guidance Manual for Subpart F.

(6) Permit Applicant's Guidance Manual for the General Facility Standards.

(7) Waste Analysis Plan Guidance Manual.

(8) Permit Writer's Guidance Manual for Hazardous Waste Tanks.

(9) Model Permit Application for Existing Incinerators.

(10) Guidance Manual for Evaluating Permit Applications for the Operation of Hazardous Waste Incinerator Units.

(11) A Guide for Preparing RCRA Permit Applications for Existing Storage Facilities.

(12) Guidance Manual on Closure and Post-Closure Interim Status Standards.

d. Technical Resource Documents (TRDs).

(1) RCRA Ground-Water Monitoring Technical Enforcement Guidance Document.

(2) Evaluating Cover Systems for Solid and Hazardous Waste.

(3) Hydrologic Simulation of Solid Waste Disposal Sites.

(4) Landfill and Surface Impoundment Performance Evaluation.

(5) Lining of Water Impoundment and Disposal Facilities.

(6) Management of Hazardous Waste Leachate.

(7) Guide to the Disposal of Chemically Stabilized and Solidified Waste.

(8) Closure of Hazardous Waste Surface Impoundments.

(9) Hazardous Waste Land Treatment.

(10) Soil Properties, Classification, and Hydraulic Conductivity Testing.

e. Test Methods for Evaluating Solid Waste.

(1) Solid Waste Leaching Procedure Manual.

(2) Methods for the Prediction of Leachate Plume Migration and Mixing.

(3) Hydrologic Evaluation of Landfill Performance (HELP) Model Hydrologic Simulation and Solid Waste Disposal Sites.

(4) Procedures for Modeling Flow Through Clay Liners to Determine Required Liner Thickness.

(5) Test Methods for Evaluating Solid Wastes.

(6) A Method for Determining the Compatability of Hazardous Wastes.

(7) Guidance Manual on Hazardous Waste Compatability.

iii. USEPA Office of Water Guidance Documents.

a. Pretreatment Guidance Documents. (1) 304(g) Guidance Document on Revised Pretreatment Guidelines (3 volumes).

b. Water Quality Guidance Documents. (1) Ecological Evaluation of Proposed Discharge of Dredged Material into Ocean Waters (1977).

(2) Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses (1983).

(3) Water-Related Environmental Fate of 129 Priority Pollutants (1979).

(4) Water Quality Standards Handbook (1983).

(5) Technical Support Document for Water Quality-Based Toxics Control.

(6) Developing Requirements for Direct and Indirect Discharges of CERCLA Wastewater (1987).

c. NPDES Guidance Documents. (1) NPDES Best Management Practices Guidance Manual (June 1981).

(2) Case studies on toxicity reduction evaluation (May 1983).

d. Ground Water/UIC Guidance Documents. (1) Designation of a USDW.

(2) Elements of Aquifer Identification.

(3) Definition of major facilities.

(4) Corrective action requirements.

(5) Requirements applicable to wells injecting into, through, or above an aquifer that has been exempted pursuant to 40 CFR 146.104(b)(4).

(6) Guidance for UIC implementation on Indian lands.

e. Clean Water Act Guidance Documents.

f. Guidance for Applicants for State Well Head Protection Program Assistance Funds under the Safe Drinking Water Act (Office of Ground-Water Protection, June 1987).

iv. USEPA Manuals from the Office of Research and Development.

a. EW 846 methods—laboratory analytic methods.

b. Lab protocols developed pursuant to Clean Water Act section 304(h).

v. Other.

a. Data Quality Objectives, Volumes I and II.

b. Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA (Draft).

c. Guidance on Preparing Superfund Decision Document: The Proposed Plan and Record of Decision (Draft).

d. Standard Operating Safety Guides.

Community Relations

Name: Sections 300.430(c), 300.430(f)(2), (3) and (6). Community relations during RI/FS and selection of remedy.

Existing rule: Sections 300.67(a) and (c) require the lead agency to develop and implement a community relations plan (CRP) at NPL sites prior to initiation of field activities. In the case of removal actions or other short-term actions, § 300.67(b) requires that a spokesperson be designated and a CRP prepared if the action exceeds 45 days. Section 300.67(d) states that the lead agency must provide the public with not less than 21 calendar days to review and comment on the feasibility study (FS). Public meetings should be held during the comment period and the lead agency may also provide the public with an opportunity to comment during the development of the FS. A document summarizing major issues raised by the public is required by § 300.67(e). The summary must include how the issues are addressed. Section 300.67(f) indicates that in enforcement actions, the CRP and public review of the FS may be modified or adjusted at the direction of the court. Section 300.67(g) states that when responsible parties implement site remedies, the lead agency shall provide public notice and a 30-day comment period. In addition, a document summarizing the major issues raised by the public and how they are addressed must be prepared.

Proposed rule: In the 1986 amendments to CERCLA, Congress added a new section 117 to provide for involvement by the public in Superfund decision-making. The NCP incorporates these new statutory requirements and those in existing policy, as well as several additional requirements based on program experience.

Proposed § 300.430(c) requires the lead agency, to the extent practicable prior to commencing field work for the remedial investigation (RI), to conduct community interviews, prepare a formal CRP, and to establish a local information repository. Section 300.430(f) requires that a proposed plan be prepared. After preparation of the proposed plan, § 300.430(f)(2) requires the lead agency to publish a notice of availability and brief analysis of the proposed plan, make the proposed plan available in the administrative record, provide a public comment period of not less than 30 calendar days on the proposed plan and supporting analysis and information, including the RI/FS, provide an opportunity for a public meeting, keep a transcript of the public meeting and make it available to the public, prepare a written summary of significant comments submitted along with the lead agency response, and make the summary available with the record of decision (ROD). When the ROD is signed, § 300.430(f)(5) (§ 300.430(f)(6) in the final rule) requires the lead agency to publish a notice of availability and make the ROD available for public inspection prior to the start of remedial action. Section 300.815(a) requires the lead agency to make the administrative record file available for public inspection when the RI begins.

General discussion: CERCLA establishes the basic framework for community relations activities during response actions. Consistent with the flexibility provided by CERCLA and to allow public participation activities to be tailored to site-specific circumstances, the NCP specifies the minimum level of public involvement but does not preclude the lead agency from undertaking additional public involvement activities where appropriate. EPA has implemented a variety of additional public involvement activities at Superfund sites over the past nine years that have proven helpful to affected communities in understanding and participating in response action decision-making.

Shortly after the completion of the public comment period on the proposed NCP last year, EPA issued "A Management Review of the Superfund Program," William K. Reilly, Administrator, U.S. Environmental Protection Agency. One aspect of the study was community involvement. The study includes a series of recommendations, some of which reinforce existing practices while others present new ideas. Many specific recommendations in this report are consistent with requirements in the final rule. Other ideas discussed in the management review are highlighted in today's preamble as further examples of good program practice that encourage public involvement.

Public participation and involvement is also a major focus of administrative record requirements under subpart I. Requirements and recommendations on subparts E and I on public participation interrelate to a large degree. Therefore, there is some discussion in this section of today's preamble on the administrative record.

Response to comments: Many comments were received on the community relations requirements in the NCP. Some commenters addressed the organization of community relations requirements in the proposed NCP. One commenter supported the reorganization of community relations requirements with the actions to which they apply. Another commenter stated that the requirements should be in a separate subpart with subsections corresponding to the phases of the process.

EPA disagrees that community relations should be in a separate subpart. EPA purposely reorganized the placement of community relations requirements in order to ensure a clearer and more orderly integration of community relations into each appropriate phase of the Superfund process.

Several commenters recommended increased opportunities for public participation, while one commenter suggested that the proposed community relations procedures that exceed those required by CERCLA may hinder timely cleanup efforts. The commenters recommending increased participation asserted that the NCP should specify formal public involvement throughout the entire process, beginning with notification to communities at the preliminary assessment/site inspection (PA/SI) stage and continuing through site closure and deletion. A commenter stated that the Superfund process should include regular input from the community and another commenter suggested that the public should be informed about the project and any problems that may arise in the short and long term. Several commenters stated that investigators should use citizens as a source of information about sites in their communities.

In response, EPA does not agree that the proposed community relations requirements will hinder timely cleanups because such requirements have been carefully integrated into the response process so as not to interfere with other activities necessary for cleanup. EPA encourages the lead agency to involve the interested public through all stages of the cleanup process and to be responsive to the communications needs of communities near Superfund sites. It is EPA's experience, however, that not all communities desire or request a multitude of public involvement activities. Moreover, the degree of appropriate involvement will vary with the characteristics of the site and the nature of the response. Therefore, EPA believes that it is inappropriate to specify in a general rule, such as the NCP, a detailed regimen of all potential public involvement activities that may be appropriate or desirable in certain situations. Thus, EPA believes that the provisions in the NCP which incorporate statutory requirements and basic community relations activities which EPA has found through experience to be necessary, establish adequate minimum public involvement requirements for all Superfund sites.

If, however, members of a community desire more opportunities for participation or involvement than specified in the NCP, for example, public involvement activities as early as the PA/SI stage, they may request that the lead agency conduct such activities. Informal contact with interested community members and local officials during the early stages of the response process may be desirable, for example, in communities where it is suspected that the site presents a high risk to the population or where there is significant citizen interest. A mailing list of interested community members could be compiled at this stage as necessary to implement public involvement activities. Moreover, a fact sheet could be prepared during the SI to explain the purpose of the SI and its possible outcomes.

EPA agrees that interviews of residents of the community can be a major source of information about conditions at and the history of a site. Through such interviews, the lead agency can also identify community-specific interests and concerns and may also gather information helpful in identifying PRPs. The NCP includes community interviews as part of the public involvement activities to be conducted at Superfund sites.

Another commenter suggested that the public should be involved through meetings and comment periods before the proposed plan is issued. One commenter suggested that the lead agency be required to hold a public meeting on the work plan for the RI and that the community should be allowed to review the RI report. The commenter further suggested that written responsiveness summaries be prepared by the lead agency for the comments raised at the public meeting on the RI. Another commenter felt that the public should receive more education about the ramifications of investigation results. In addition, a commenter asserted that information on risk should be included in RI/FS reports and should be explained to the public.

The NCP provides one formal comment period on the proposed response action at all sites (except certain time-critical removals). In addition, the administrative record is available for public review prior to, and following, the formal comment period. While EPA agrees that additional comment periods and meetings, both formal and informal, may be appropriate and desirable at certain sites, decisions on what type of additional formal public involvement activities are warranted must be made on a site-specific basis, and thus are not mandated in the NCP. If a person needs more information about a site, he/she may, at any time in the remedial process, review the ongoing compilation of documents in the administrative record file or request that the lead agency conduct a public briefing or workshop in addition to that required by the NCP. EPA may conduct a public briefing on the RI work plan or provide some other type of public information meeting when there is sufficient public interest. EPA encourages all lead agencies to consider such activities. Similarly, if a person needs more explanation concerning the RI and risk assessment and ramifications associated with them (a description of the risk posed by a site generally is included in the RI report), he/she can request that the lead agency conduct a public briefing. Lead agencies are encouraged but not required to prepare a responsiveness summary for any comments submitted outside of formal comment periods.

Several commenters addressed the development of CRPs. One commenter argued that the start of community interviews should be publicized and should include mention of the availability of technical assistance grants (TAGs). Another commenter objected to the limited, nonsubstantive nature of community interviews. Other commenters said there should be more community involvement in developing CRPs and that they should be a "two-way communications tool", rather than a "one-way dialogue" or "sell job" from the agency to the community. Additional commenters suggested that the community should review drafts of the CRP.

EPA does not agree that the lead agency must publish a notice in a newspaper on the initiation of community interviews. The lead agency generally will give notice to key community leaders that interviews are being conducted. Every effort is made to obtain a broad representation of the community in selecting individuals to interview and additional names may be gathered during the interview process. The NCP identifies local officials, community residents, public interest groups, or other interested or affected parties as individuals to interview, but this is not meant to be an all inclusive list. EPA believes that any and all interested parties are potential interviewees. EPA has added the requirement that the lead agency inform the members of the community of the availability of technical assistance grants (TAGs). In response to comments that the community should review drafts

of the CRP, generally it is not EPA's practice to publicly release draft documents in order to protect the lead agency's deliberative process. However, persons may submit comments on the final CRP to the lead agency, which may, as appropriate, revise the CRP in response to these comments. And, in fact, since the CRP is itself a public involvement tool, lead agencies may modify public outreach activities based on the interviews or other information obtained through implementation of the CRP.

During the community interviews, the lead agency is required to determine "how and when citizens would like to be involved in the Superfund program." Once this is known, the public participation activities desired can be planned and implemented on a site-specific basis appropriate to the level of interest within that community. These activities will be described in the CRP that is developed for each site. Therefore, because the interviews are the primary source of information to the lead agency about community concerns, and such information is used to develop the CRP, EPA does not agree with the commenters' description of the CRP as a "one-way dialogue" or "sell job." EPA intends that there be extensive public involvement in developing the CRP, namely in identifying community concerns about the site and in determining the appropriate opportunities for community involvement in site activities.

However, because such comments were received revealing an apparent misunderstanding of the CRP, EPA is revising § 300.430(c) to clarify the purpose of the CRP which is: (1) To ensure that the public receives appropriate opportunities for involvement in a wide variety of site-related decisions, including during site analysis and characterization, alternatives analysis, and selection of remedy; (2) to determine, based on community interviews, appropriate activities to ensure such public involvement; and (3) to provide appropriate opportunities for the community to learn about the site.

One commenter claimed that while potentially responsible parties (PRPs) are involved at every step of the remedial process, citizens are shut out of decision-making concerning the scope of the sampling programs, definitions of affected populations, assumptions made during risk assessments, establishment of remedial action objectives, and many other issues that are central to the final selection of remedy. Other comments were received on the availability and accessibility of information. One commenter observed that information repositories should be locally available. Several commenters suggested that free copies of documents should be made available and the repository should include an index to facilitate document retrieval. One commenter stated that there should be citizen review of contractor reports.

EPA agrees that the lead agency should provide citizens and PRPs with access to the same technical information about the site throughout the cleanup process and believes that the NCP provides this access. As required by the statute, the NCP provides for the establishment and public availability of the administrative record files for each response action. These files generally will become available early in the decision-making process and will include the types of documents mentioned by the commenter. Members of the public are provided an opportunity and are encouraged to review the documents prior to or during the comment period. In addition, citizen understanding of complex, technical issues will be improved if lead agencies and PRPs, where conducting response actions, produce clear and understandable summaries of technical documents. EPA intends to work with PRPs in the preparation of summaries of technical documents for the public to the extent that summaries are not already included in fact sheets, updates, and the proposed plan. Lead agencies should provide copies of these summaries in the information repository and, where appropriate, the administrative record file.

In addition to the administrative record file discussed above, the NCP further requires that the lead agency establish an information repository before field work for the RI begins. Like the administrative record, the information repository is located at or near the site. This repository should contain a copy of items made available to the public, including, unlike the administrative record file, those not directly related to selecting a remedy. EPA generally provides for reasonable access to documents by making information repositories convenient to the interested public, in terms of location, operating hours and copying facilities, and by indexing the materials. Lead agency staff should complete any necessary reviews of documents as quickly as possible so they can be released to the public and placed in the information repository and the administrative record file. The public should receive notice of the availability of documents through fact sheets or other mailings.

In response to the comment that citizens should be able to review contractor reports, EPA stresses that the lead agency creates an administrative record file containing those documents that form the basis for the selection of a response action. Reports developed by contractors that are relevant to response selection will be included in the administrative record file. EPA is not requiring, however, that all contractor reports be made available to the public. Contractor reports that are not relevant to response selection decision-making are not part of the administrative record (see subpart I of the NCP for a discussion of the administrative record).

Another commenter asserted that EPA should notify the public of meetings with PRPs and allow a citizen representative to be present. Related to this issue, another commenter requested clarification of the provision in the proposed NCP allowing the lead agency to conduct technical discussions with PRPs and the public separately from, but contemporaneously with, negotiation/settlement discussions. One commenter recommended that citizen advisory committees be created as a part of the Superfund community relations process to facilitate a partnership between EPA and community representatives.

The rule does allow for technical discussions involving responsible parties and the public. They are, however, to be held separately from settlement negotiation discussions in which information on liability of a party and other enforcement sensitive issues are discussed. Lead agencies should, however, bring citizens into technical discussions early in the RI/FS process. Some mechanisms, such as community work groups, task groups and information committees, have proven successful in bringing together citizens, local government officials, and PRPs. EPA encourages communities to form work groups and to keep these work groups informed about lead agency actions. EPA, however, is not revising the NCP to require the establishment of more formal groups such as citizen advisory committees. Such committees may not be necessary or appropriate for every site. Further, if EPA were to establish formal citizen advisory committees, they may be subject to the Federal Advisory Committee Act which sets specific restrictions on the composition and conduct of such committees.

Several commenters indicated that the language in subpart I on administrative record, stating that EPA is not required

to respond to comments submitted before the public comment period, sends the wrong message regarding EPA's interest in public participation. The commenters urged EPA to encourage response to early comments, thereby improving decision-making. Another commenter asked that the public be provided not only a summary of the support agency's comments on the proposed plan but the lead agency's response to those comments as well.

Although EPA agrees that a prompt response to comments is desirable in most cases, EPA is only requiring a formal response to comments to be prepared after the close of the public comment period on the proposed plan. EPA is not requiring that comments received before the public comment period be responded to before the comment period for several reasons. First, it is likely that the lead agency would not have enough information to sufficiently respond to some comments early in the process of investigating and analyzing sites or prior to receipt and consideration of all public comments. Second, if the NCP required comments (e.g., PRP volumes of comments and studies) to be responded to as they were received, site managers could continually be diverted from their site cleanup tasks to spend time responding to comments. The NCP, therefore, requires that comments must be responded to only during specific times in the process. The NCP requires that the lead agency summarize the comments received during the comment period on the proposed plan and provide its response to these comments. This document, the "responsiveness summary," is part of the record of decision, and is placed in the administrative record file. Site managers may respond to comments received at other times at their discretion. However, as discussed in the preamble to subpart I, EPA has revised the rule to encourage lead agencies to respond to significant comments submitted prior to the formal comment period.

Other commenters said there should be additional communication with the public, such as more public meetings, direct mailings, and an improved notification system. A commenter suggested that the lead agency should be required to compile a site mailing list. EPA encourages such additional communication with the public in order to respond to their information requests. The lead agency will determine what is the most effective notification system for a particular site. Therefore, EPA believes that it is not appropriate or necessary in the NCP to require such activities, e.g., a site mailing list, at all sites.

Some commenters suggested that the NCP require the lead agency to make available at public meetings conducted to discuss the proposed plan, those consultants or lead agency representatives who prepared the RI/FS and selected the response.

EPA does not agree that it is necessary for the NCP to require at every site that the consultants who aided in the development of the proposed plan or RI/FS attend public meetings on the proposed plan. The lead agency is responsible for conducting such meetings and the presence of consultants is not always necessary in order for the lead agency to explain the proposed remedy and the supporting analyses and to respond to questions asked by the public.

A series of commenters addressed the specifics of the technical assistance grant (TAG) program, the timing of TAG awards in the remedial process, and how TAGs should be implemented. One commenter stated that TAG should be integrated into the community relations provisions of the NCP. Another commenter recommended that TAGs be referenced or directly incorporated in the NCP in order to assist in promoting participation in the TAG program. A commenter offered specific language to be inserted into the NCP, which would include stating that EPA would encourage citizens to apply for TAGs.

Specific comments on the TAG program will be addressed in the TAG final rule. However, EPA does agree that TAGs also should be discussed in the NCP. Specifically, the availability of TAGs is now referenced in § 300.430(c). By including a reference to TAGs in the NCP, EPA intends to encourage citizens to apply for TAGs.

Additionally, EPA encourages PRPs to provide grants to communities to enable them to obtain independent technical assistance as a complement to, and separate from, the EPA TAG program. EPA can provide information and advice to PRPs and communities regarding how such PRP grants have been used successfully at other Superfund sites.

A commenter stated that the cleanup process in general, from the RI/FS to remedy selection, is hindered by a lack of a free flow of information between lead agencies and PRPs. Commenters argued that PRPs need increased opportunity to participate in the decision-making process. They recommended that the NCP provide an opportunity for PRPs to receive copies of and to formally comment on all key EPA decision documents, including the work plan, sampling results, the risk assessment, and the detailed remedial studies. One commenter contended that allowing PRPs to comment only on the proposed plan limited PRPs from developing the administrative record in a meaningful way, violated their due process rights, and was contrary to the intent of CERCLA. Another commenter suggested that there should be a formal mechanism for PRPs to participate in the development of the administrative record with regard to the selection of remedy.

In response to the comments suggesting more PRP involvement, EPA believes that the NCP provides numerous opportunities for PRP involvement. When the lead agency identifies PRPs, they are presented with the opportunity to undertake the remedial investigation and feasibility study and cleanup under lead agency oversight. If PRPs choose not to undertake these tasks, they are provided with the same opportunities for involvement in site cleanup decisions that the general public is afforded. The regulations promulgated today require that some of the documents specifically requested by some commenters (sampling results, risk assessments, and others) are placed in the administrative record file as soon as they are available for public review. Such documents may be commented on during the comment period on the proposed plan. The NCP provides PRPs with a full opportunity to comment on key decision documents, not just the proposed plan, and to participate in the development of the administrative record. Thus, public involvement opportunities provided by the NCP are fully consistent with congressional intent and any due process requirements. Subpart I also includes a discussion of the development of the administrative record.

One commenter asserted that states should have discretion to vary the community relations process, for example, substituting news releases for paid advertisements to announce the proposed plan, comment periods, and public meetings; substituting a tape recording for a written transcript of public meetings; and shortening the public comment period in some cases to less than 30 days.

EPA does not agree that lead agencies should have discretion to vary the community relations requirements set out in the NCP. In order to ensure adequate minimum public participation at all sites across the nation, EPA maintains that the lead agency must

comply with the community relations requirements specified in the NCP.

Final rule: The following additions are made to proposed § 300.430(c):

1. The purpose of the community relations plan is described in § 300.430(c)(2)(ii).

2. A statement on the availability of technical assistance grants (TAGs) has been added to § 300.430(c)(2)(iv).

Name: Sections 300.415(m)(2)(ii), 300.430(f)(3)(i)(C) and 300.435(c)(2)(ii)(C). Length of public comment period.

Existing rule: Section 300.67 requires a minimum 21-calendar day public comment period on feasibility studies that outline alternative remedial measures.

Proposed rule: Proposed § 300.415(n)(2)(ii) (§ 300.415(m)(2)(ii) in the final rule) required a minimum 30-day public comment period on the administrative record, as appropriate, for time-critical and non-time-critical removal actions. Proposed § 300.430(f)(2)(i)(C) (§ 300.430(f)(3)(i)(C) in the final rule) and § 300.435(c)(2)(ii)(C) required a minimum 30-calendar day public comment period on the proposed plan and other documents for remedial actions.

Response to comments: Several commenters requested that the minimum duration of the public comment period for remedial actions be increased. Most commenters recommended a 60-day minimum and some recommended at least a 90- or 120-day period. A few commenters requested that the minimum public comment period for non-time-critical removal actions be increased from 30 to 60 days. One commenter requested such an increase for time-critical and non-time-critical removal actions.

Many reasons were given for increasing the minimum comment period, including that it would allow more time to review large volumes of technical information and complex issues and to obtain technical assistance in reviewing such information. Some commenters noted the importance of the comment period because it is the only meaningful opportunity to provide input on the proposed remedial action. One commenter asserted that selection of a remedy typically represents an expenditure of millions of dollars and that a full airing of the alternatives with a meaningful opportunity to evaluate and comment on the alternatives is warranted to avoid the squandering of public and private resources. Another commenter added that a longer comment period would not threaten the environment because EPA retains its ability to respond to imminent threats. One commenter suggested that a comment period of less than 30 days may be adequate for emergency actions or when the community agrees with the remedy.

There is no question that the public comment period should be long enough to allow sufficient review of the proposed plan and key documents in the administrative record file, and should take into account the length and complexity of the information under review at such time. EPA notes that some if not most of these lengthy technical documents are placed in the administrative record file and made available for public review well before the start of the comment period, thus allowing a longer time for review of key supporting documents. Also, the NCP does not preclude the lead agency from extending the period upon request and such requests have been typically granted. EPA believes, however, that because of the importance of the public comment period to response selection decision-making, further time for comment should be explicitly specified in the NCP. Therefore, EPA has revised the public comment period for remedial actions to state that the minimum comment period to be provided is 30 days but that this period will be extended an additional 30 days upon timely request (in order to be "timely," a request generally must be received within 2 weeks after the initiation of the public comment period). The lead agency may extend the comment period on its own initiative when it is appropriate or necessary to do so or announce from the outset that the comment period will be longer than 30 days. EPA has also revised the language on non-time-critical removal actions to provide that an additional 15 days to the public comment period will be granted upon timely request. EPA believes that a longer (i.e., 30-day) extension for removal actions is not necessary because the documents involved generally are not as lengthy or complex as for a remedial action. Any further extensions are within the discretion of the lead agency. This change is also consistent with the Superfund management review referenced above, which specifically recommended extending the comment period for remedial actions an additional 30 days, upon request.

Final rule: The final rule will be revised as follows:

1. Add to § 300.415(m)(4)(iii): "Upon timely request, the lead agency will extend the public comment period by a minimum of 15 additional days."

2. Add to §§ 300.430(f)(3)(i)(C) and 300.435(c)(2)(ii)(C): "Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days."

Name: Section 300.435(c). Community relations during remedial design/remedial action.

Existing rule: Section 300.67 addresses community relations in general, but does not include community relations requirements during the RD/RA stage.

Proposed rule: CERCLA section 117(c) requires publication of an explanation of significant differences (ESD) if the action differs in significant respects from the final plan. Proposed § 300.435(c) provides for revision of the community relations plan prior to initiation of remedial design if necessary to address new concerns. It also specifies procedures for publishing an explanation of significant differences (ESD) from the ROD and for amending a ROD. The lead agency is required to provide an opportunity for public comment only when it proposes to amend a ROD.

Response to comments: Many commenters requested the opportunity for increased public participation throughout the post-ROD period. Several commenters strongly recommended keeping the public informed about changes and accomplishments during design and construction of the remedy. Some suggested that the states should continue to be provided with opportunities for substantial and meaningful participation through the post-ROD period. Others stated that the lead agency should be required to seek out and respond to observations of residents near the site during remedial action. One commenter recommended that public involvement be mandated in the NCP until final closure, stating that such action would encourage teamwork and reduce adversarial relationships and distrust during cleanups.

Some commenters objected to the proposed requirement for revising the community relations plan because it is not required by statute and will further slow down the cleanup process. One suggested that press releases will satisfy information needs of the community.

Some commenters stated that community relations activities during RD/RA other than those specified should be determined on a site-by-site basis at the discretion of the lead agency. Such activities should reflect the degree of public concern communicated through the community interviews and the revision of the CRP.

Another commenter recommended that a fact sheet be issued or a public meeting be held prior to completion of

remedial design, that the information repository should continue to be maintained and that interviews be conducted when revising the community relations plan.

EPA agrees that public participation throughout the remedial design/remedial action (RD/RA) stage of the remedial response is important. It is EPA's intent to continue to undertake activities during RD/RA that involve affected communities and interested parties in actions taken at a site to ensure that the concerns of interested parties are addressed. The proposed rule provided for revision to the community relations plan (CRP) during RD/RA in cases where community concerns are not already addressed by the CRP. The final rule requires the lead agency to review the CRP prior to the initiation of the remedial design. This revision is more proactive than the proposed rule because it ensures that the lead agency will reevaluate at every site the adequacy of the CRP for the RD/RA phase of response. If further public involvement activities during RD/RA are not already described in the CRP, the CRP will be revised so that an appropriate level of public involvement will be maintained. EPA believes that it is necessary to reassess citizens' concerns after selection of the remedy in order to evaluate the effectiveness of EPA's communications efforts to date and to determine whether public involvement concerns have changed as a result of changes in the community. EPA recognizes that during the Superfund process, elected officials may change and new people may move into the area. The review of the CRP at the RD/RA phase will allow the lead agency to take into account concerns raised by these new members of the community.

Additionally, in response to comment, EPA has revised the NCP to require lead agencies to conduct further public involvement activities during RD/RA, including distributing a fact sheet on the final engineering design to the community and other interested persons. The fact sheet will enable the lead agency to inform the public about activities related to the final design, including the schedule for implementing the remedy, what the site will look like during operation of the remedy and an explanation, if appropriate, of the roles of the various government agencies that may be involved in the remedial action, e.g., EPA, the state or the Corps of Engineers. A fact sheet generally can contain more information than a press release so it is preferred as a means of communication with the public. Site contingency plans and any potential inconveniences that may occur, such as excess traffic or noise, should also be explained.

EPA is also requiring that a public briefing be provided, as appropriate, near the site prior to initiation of the remedial action. A public briefing could address issues such as construction schedules, changes in traffic patterns, location of monitors, and ways in which the public will be informed of progress at the site. EPA believes that these types of activities can keep the community fully informed of activities at the site throughout remedial design and remedial action.

EPA encourages lead agencies to develop additional public involvement activities, in response to the specific needs of a community. Activities may include fact sheets on the status of negotiations with PRPs, continuing to maintain information repositories, as well as workshops to assist the public in understanding how the cleanup technology will work.

EPA does not agree that such activities will necessarily lead to substantial delays at sites. EPA places high value on full and deliberate public involvement because EPA believes it is important that the public is aware of what is being done in the community. In addition, the information received from the public may be helpful in designing and conducting cleanup activities and in avoiding misunderstandings that may, in the long term, disrupt or delay cleanup efforts.

In response to the comment requesting that the NCP specify opportunities for state involvement after the ROD is signed, the amount of state participation with respect to an explanation of significant differences (ESD) is discussed in the next preamble section. State involvement during RD/RA will be specified in site-specific cooperative agreements or Superfund state contracts rather than in the NCP (see preamble section below corresponding to § 300.515(g)).

Final rule: Proposed § 300.435(c) is revised as follows:

1. Under § 300.435(c), the lead agency is required to review the CRP prior to the initiation of remedial design to determine whether the CRP should be revised to describe further public involvement activities.

2. Section 300.435(c)(3) is added requiring the lead agency after the completion of final engineering design to distribute a fact sheet and to provide, as appropriate, a public briefing prior to the initiation of the remedial action.

Name: Section 300.435(c)(2). Changes to the ROD after its adoption.

Proposed rule: Proposed § 300.435(c)(2) incorporated the requirements of section 117(c) of CERCLA that the lead agency publish an explanation of the significant differences when significant changes in the remedy occur after the ROD is signed, and the section 117(d) requirement that such publication include publication in a major local newspaper of general circulation. In addition, this section distinguishes between an explanation of significant differences, which announces a significant change in the selected remedy, and a ROD amendment, which fundamentally alters the remedy selected in the ROD.

Section 122(d)(1)(A) of CERCLA provides that whenever EPA enters into an agreement under section 122 with any PRP to undertake a remedial action, the agreement shall be entered as a judicial consent decree. Section 122(d)(2) requires that the Department of Justice (DOJ) provide the public with an opportunity to comment on the proposed consent decree at least 30 days prior to its entry. Where the proposed consent decree fundamentally alters the ROD, EPA contemplates that it will issue a proposed ROD amendment concurrent with the proposed consent decree, and that the public comment period provided pursuant to section 122(d)(2) will satisfy the requirements for additional public comment for a ROD amendment.

EPA believes that the appropriate threshold for amending a ROD is when a fundamentally different approach to managing hazardous wastes at a site is proposed. As a result, EPA has determined that a change in remedial approach sufficiently significant to require ROD amendment should have the benefit of consideration of public comments and should, therefore, undergo the same public and support agency involvement as the original ROD, including the publication of a proposed plan and a public comment period.

Response to comments: EPA received several comments requesting clarification of the different responses to changes in the remedy after the ROD is signed during the RD/RA process; specifically, commenters wanted clarification of the distinctions between a significant difference, which requires an ESD but no public comment, and fundamental change from the ROD, which requires a ROD amendment with public comment.

A number of commenters addressed the procedures when there are changes to the ROD after its adoption. Some commented that it is important to seek

out public input before proposing to amend the ROD because public comments are of little use after a decision has been made. Others argued that reopening a final decision for additional public comment can lead to additional delay and cost in completing remedial actions. A commenter stated that CERCLA does not require a ROD amendment to be subject to public comment. Several commenters requested that the lead and support agencies should concur on proposed significant changes and ROD amendments before proposed changes are announced to the public. One of these commenters recommended that the lead agency be required to respond to a support agency's disagreement with a proposed ROD amendment in the notice of availability and in the new proposed plan.

Many commenters contended that the distinction between significant difference and ROD amendment was not clear and requested clarification. One commenter recommended that the public be given the opportunity to comment on significant changes. Another commenter recommended that PRPs have an opportunity to comment on proposed significant changes.

One commenter recommended that the preamble to the final NCP state that the lead agency will reconsider its remedy when new information indicates that the selected remedy may not be cost-effective or is otherwise inconsistent with the NCP.

EPA responds to the above comments by clarifying changes to the ROD after the ROD has been signed. After the ROD is signed, new information may be generated during the RD/RA process that could affect the remedy selected in the ROD. Three types of changes can occur: (1) Nonsignificant changes; (2) significant changes; and (3) fundamental changes. The lead agency must identify when a remedial action, settlement, or decree differs significantly from the ROD.

Nonsignificant changes are minor changes that usually arise during design and construction, when modifications are made to the functional specifications of the remedy to optimize performance and minimize cost. This may result in minor changes to the type and/or cost of materials, equipment, facilities, services and supplies used to implement the remedy. The lead agency need not prepare an ESD for minor changes. These changes should be documented in the post-ROD file, such as the RD/RA case file.

Significant changes to a remedy are generally incremental changes to a component of a remedy that do not fundamentally alter the overall remedial approach. For example, the lead agency may determine that the attainment of a newly promulgated requirement is necessary, based on new scientific evidence, because the existing ARAR is no longer protective. Where this new requirement would affect a basic feature of the remedy, such as timing or cost, but not fundamentally alter the remedy specified in the ROD (i.e., change the selected technology), the lead agency would need to issue an explanation of significant differences announcing the change. Another example would be when sampling during the remedial design phase indicates the need to increase the volume of waste material to be removed and incinerated by 50 percent, requiring an increase in cost, in order to meet remediation goals. This increase in the scope of the action represents a significant change and requires an ESD. Similarly, the lead agency may decide to use carbon adsorption instead of air stripping to conduct ground-water treatment. This change requires an ESD to notify the public of the change; however, the basic pump and treat remedy remains unaltered and the performance level specified in the ROD will be met by the new technology, so a ROD amendment is not necessary.

If the action, decree, or settlement fundamentally alters the ROD in such a manner that the proposed action, with respect to scope, performance, or cost, is no longer reflective of the selected remedy in the ROD, the lead agency will propose an amendment to the ROD. For example, the lead agency may have selected an innovative technology as the waste management approach in the ROD. Studies conducted during remedial design may subsequently indicate that the innovative technology will not achieve the remediation goals specified as protective of human health and the environment in the ROD. The lead agency, based on this information, may determine that a more conventional technology, such as thermal destruction, should be used at the site. In this event, the lead agency will propose to amend the ROD. The public will have a full opportunity to comment on the proposed amendment. Thus, contrary to the commenters' suggestion, the final decision to amend is not made until after consideration of public comment, as in the original ROD.

EPA also disagrees with the commenter who suggested that public comment should not be provided for ROD amendments because CERCLA does not require it. This comment apparently is based on the interpretation that once EPA selects a final remedial plan, any further changes, even those not contemplated in the proposed plan or ROD and thus never subject to public comment, would need no public comment. EPA agrees that CERCLA section 117 expressly provides for public comment only on the proposed plan and provides only a notice requirement for significant changes. However, EPA disagrees with the commenter's interpretation that the lack of an explicit requirement in the statute means that no public comment is necessary for any changes to the ROD. The public comment on the original proposed plan required under section 117(a) could be rendered meaningless by a revision which is fundamentally different from the remedies suggested in the proposed or final remedial plan. EPA does not believe that Congress intended that the critical public involvement opportunities provided in section 117 could be made irrelevant in such a manner. Moreover, because ROD amendments are as important a part of the remedial decision-making process as the selection of the original remedy, EPA believes that the public comment opportunities on changes to the ROD should be treated with equal importance.

One commenter stated that the public should have the opportunity to comment on the ESD, arguing that to do otherwise would deny PRPs their due process unless they were allowed to add to the administrative record. EPA disagrees with this comment.

EPA has attempted to develop an administrative process which balances the public's continuing need for information about, and input into, post-ROD remedial action decisions, with the lead agency's need to move forward expeditiously with design and implementation of the remedy after fundamental decisions have been made in the ROD. Thus, § 300.435(c) of the final rule provides that where EPA plans to make a fundamental alteration in a selected remedy, EPA is required to modify the ROD, and to follow a public comment process similar to the development of the original ROD. However, where the change to the action is "significant"—such that the public should be notified of it—but is not a fundamental alteration of the selected remedy with respect to "scope, performance, or cost," the lead agency may publish an ESD without triggering a new round of comment, as provided in § 300.435(c) and section 117(c) of CERCLA.

This is not to say that the public is excluded from the administrative process when ESDs are issued; rather,

they have notice and a limited opportunity to comment. Specifically, EPA is required to document the rationale for the changes contained in an ESD, and to include such rationale in the administrative record for public review, pursuant to §§ 300.435(c) and 300.825(a). Then, if a commenter presents new information which substantially supports the need for significant changes to the remedy (as modified by the ESD), the lead agency is required to consider such comments. Section 300.825(c). EPA believes that these provisions provide ample opportunities for public participation, and that a separate comment period for each ESD (plus a period for response to comment) is not necessary or consistent with the need to take prompt action, especially where the change is not a fundamental one. It should be noted that, although Congress provided for a comment period on the proposed plan, it did not require one for an ESD.

It is also important to note that at the time of an ESD, the public will already have had an opportunity to comment on the alternative remedial options for the site (including the recommended remedial option) during the comment period on the FS and proposed plan; it is at that time that commenters may bring to EPA's attention fundamental issues concerning the remedial action that should be taken. When an ESD is issued, after remedy selection, EPA is simply modifying the remedy to enhance its protectiveness, effectiveness, or cost; by definition, it is not a "fundamental" reconsideration of the basic remedy selection decision on which comment was taken. Just as EPA may initially select a remedy that differs somewhat from those proposed without triggering a new round of comment each time (indeed, the changes may be a direct result of the comments), so may EPA issue an ESD that reflects a nonfundamental change or refinement in the remedy without requiring a separate round of comment.

Commenters also requested more information on the procedures for executing an ESD, specifically on the roles of lead and support agencies. Commenters also recommended that the lead agency seek the approval of the support agency before releasing the ESD. When an ESD is issued; the lead agency should consult with the support agency (unless a SMOA, cooperative agreement, or Superfund state contract requires concurrence) prior to notifying the public in a major local newspaper of general circulation. The lead and support agency will generally reach agreement on the proposed significant change. If agreement cannot be reached, and dispute resolution processes are not effective, then the support agency's comments should be summarized in the ESD and placed in the administrative record files. The public notice of the ESD will summarize the explanation of significant differences by identifying the significant changes and the reasons for the changes. The lead agency will also place the explanation of significant differences and information supporting the decision in the information repository and administrative record file. Further information concerning issuance of ESDs on ROD amendments is available in "EPA's Guidance on Preparing Superfund Decision Documents," OSWER Directive 9355.3-02, October 1989 (Interim Final).

One commenter requested EPA to remove the institutional bias against reopening the ROD, especially in the light of new monitoring data developed in the design phase or in studies on other operable units, that indicate the site is less hazardous than previously thought. EPA recognizes that new information may warrant rethinking a remedy selected for a site. EPA has designed procedures, described in § 300.435(c), for amending the ROD if it is warranted by new information.

Final rule: EPA is promulgating the rule as proposed.

Name: Other community relations requirements.

Proposed rule: Section 300.155 is a new section in the proposed NCP outlining the purpose, applicability and general procedures for establishing community relations at a site, as well as cross-referencing community relations components of the removal, RI/FS, and remedial design sections of the regulations. Sections 300.415, 300.430 and 300.435 govern community relations procedures for the removal, RI/FS, and remedial design phases, respectively.

Response to comments: Several of those submitting comments requested a general description of the enforcement community relations process in the preamble to the proposed NCP.

While the sections cited above and the preceding discussion detail the processes governing community relations at various stages in a Superfund cleanup, including an enforcement action, the following discussion is intended to assist in giving an overview of the role of community relations as it relates specifically to enforcement actions.

In response to citizen concerns, EPA has made an effort to foster better two-way dialogue between communities and those designing and conducting a site cleanup. EPA believes that responsible and timely communication with the public is essential both to improving site responses through citizen input, and to improving the public's understanding of a site response in their community. Accordingly, EPA feels that community relations during an enforcement action is an integral part of the process. In fostering community involvement during enforcement actions, regional community relations coordinators (CRCs) follow the same steps as they would for Fund-financed actions: Conducting community interviews, developing community relations plans, sending out public notices periodically and conducting public information meetings. The lead agency at any site develops a community relations plan taking into account the concerns of the community. In enforcement cases, the plan should describe how the lead agency will keep the public apprised of the nature of the discussion with PRPs. EPA retains control over developing, writing and implementing these plans at "PRP-lead" sites, but PRPs can assist in the development of a plan at the discretion of the regional office.

Community relations activities in the form of meetings with groups of citizens, local officials and other interested persons in the community, often occur before the RI/FS special notice is sent (see preamble to the proposed NCP on special notice and moratoria, 53 FR 51432). Discussions of PRP liability and possible settlement terms will generally be reserved for confidential negotiation sessions, but the lead agency will attempt to explain these issues in general terms to the public. Lead agencies should bring citizens into technical discussions early in the RI/FS process, and aid members of the public seeking to apply for technical assistance grants.

EPA received a comment asking that federal agencies conducting a response action be granted greater flexibility when implementing public participation requirements, as long as they meet the overall public participation objectives.

Section 120(a)(2) of CERCLA holds federal agencies to the same NCP standards and requirements as any other party. In addition, the public participation requirements in the NCP establish basic minimum public participation requirements. Exempting federal agencies from, or granting them discretion in, following specific public participation requirements would run contrary to Congressional intent to institutionalize certain public participation activities in response actions and EPA's experience

concerning what requirements for public involvement are essential. Subpart K of the NCP will address in greater detail the role of federal agencies other than EPA in carrying out a response action.

Final rule: See other preamble sections on community relations for descriptions of changes to the proposed rule.

Enforcement

Name: Superfund enforcement program strategy.

Proposed rule: The preamble to the proposed NCP includes a brief discussion of the 1986 SARA amendments to CERCLA enforcement provisions. This discussion states that the SARA amendments added provisions "intended to facilitate responsible party financing of response actions. CERCLA section 122, for example, provides mechanisms by which settlements between responsible parties and EPA can be made, and allows for 'mixed funding' of response actions, with both EPA and responsible parties contributing to response costs" (53 FR 51395).

Response to comments: One commenter stated that EPA should minimize Fund depletion through less stringent cleanups at many sites in favor of increased use of administrative orders and penalties to force PRP cleanup wherever viable PRPs are located.

Since the 1986 amendments were passed, EPA has embarked on a course that increasingly seeks PRP funding of response actions and relies less on Fund expenditures. In addition, EPA's recently completed internal management review of the Superfund program ("A Management Review of the Superfund Program," June 1989) ranked the increased use of enforcement capabilities to encourage PRP-funded cleanups as one of EPA's highest priorities. The comment above reflects a need for clearer articulation of what is already a well-established EPA policy to emphasize enforcement.

EPA will use the fact and threat of enforcement, encompassing a broad range of administrative and legal tools, to increase the proportion of cleanups undertaken by private parties.

Final rule: There is no rule language on this issue.

Name: Special notice and moratoria.

Proposed rule: There is a general discussion of special notice in the preamble to the proposed NCP and an overview of the Superfund program and response process (53 FR 51432).

Response to comments: Several of those who submitted comments believe that the discussion of special notice and moratoria in the preamble to the proposed NCP provides a good introduction to the Superfund program, but asked for more specific language articulating EPA's enforcement strategy for the program clarifying a priority for enforcement responses over Fund-financed responses. One commenter requested language stating that formal negotiations are not the only vehicle for reaching a settlement with PRPs, and that informal negotiations can and do extend beyond the 60-day formal negotiation period if "sufficient progress has been made."

EPA believes that a clear articulation of its goals for program enforcement is necessary and appropriate, but that this articulation belongs in the form of guidance documents on general policy goals and not as part of these regulations. The preamble to the proposed NCP discussion of § 300.430, special notice and moratoria, already articulates EPA's preference for enforcement responses clearly: "A fundamental goal of the CERCLA enforcement program is to facilitate settlements, i.e., agreements securing voluntary performance or financing of response actions by PRPs" (53 FR 51432). The discussion also recognizes the important role of informal negotiations: " 'formal' negotiations should not be viewed as the sole vehicle for reaching settlement * * * * [F]requent interaction between EPA and PRPs, through exchange and 'informal' discussions may be appropriate outside of the 'formal' special notice moratorium" (53 FR 51432). The discussion specifies that negotiations can continue beyond the 60-day negotiations period if EPA receives a "good faith offer," a stipulation more specific than the broader "sufficient progress" language proposed by the commenter and reflective of statutory directives under section 122(e)(2)(b).

Final rule: There is no rule language on this issue.

Name: Exemptions for federal facilities.

Proposed rule: Section 300.2 outlines the statutory requirement for NCP revision to reflect changes made to CERCLA by the 1986 SARA amendments. Section 300.3 describes the NCP as applying to federal agencies and states for responses governed under CERCLA and in cases of oil discharges and other hazardous releases. The preamble to the proposed NCP describes the applicability of the NCP to federal facilities (53 FR 51395–96).

Response to comments: One commenter proposed that a general "grandfather" clause be added to the proposed NCP exempting federal agencies from complying with new NCP regulations for actions and studies on federal facilities already in progress and initiated under preexisting NCP regulations. A related comment asked that a grandfather clause exempt any party who has initiated response actions at a site under the provisions of the preexisting NCP. A commenter argued that any other policy would be "disruptive to environmental progress."

EPA disagrees, and believes that the new NCP provisions should take effect 30 days after promulgation, as provided herein. The commenter's suggestion would result in a situation where response actions "initiated" before this rule would be exempt. However, many response actions—especially remediation of contaminated ground water—can take years to complete; it would not be appropriate to exempt from this rule actions that will continue for long periods of time. EPA did consider the option of making the rule effective for those "phases" of response actions begun after the effective date; however, it is difficult to divide response actions into distinct phases, especially in the case of long-term remedial actions. On the general issue of whether the new requirements will be burdensome, several points are worth noting. First, EPA's stated policy has been to use the proposed NCP revisions as guidance, and in fact, EPA has done so; thus, the majority of provisions in today's rule are well known. Second, to a large degree, today's rule implements the SARA statutory requirements, which have been in effect since 1986; ongoing actions are already required to meet those requirements.

With regard to the suggestion that generally applicable NCP requirements should apply to federal facilities on a different schedule than would apply to others, EPA notes that CERCLA section 120(a) is very clear in prohibiting special treatment for federal facilities:

> All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments * * *, applicable to such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States *in the same manner and to the same extent as such guidelines, rules, regulations, and criteria are applicable to other facilities* (emphasis added).

EPA will, however, after a notice and comment rulemaking, issue a new

subpart K to the NCP that will address some of the special concerns of the federal facilities, and problems unique to federal facility cleanups.

Final rule: See preamble section on § 300.3 for revisions to proposed rule.

Name: Sections 300.420, 300.430 and 300.435. Early notification and involvement.

Proposed rule: Section 300.420 describes the methods, procedures and criteria used during remedial site evaluation. Section 300.430 describes the specific tasks and activities of the RI/FS process and selection of remedy, including a preamble to the proposed NCP discussion section on special notice and moratoria pursuant to CERCLA section 122(e) that describes how EPA can issue special notice letters to PRPs in pursuit of a settlement agreement. Section 300.435 describes RD/RA activities, including procedures for public and PRP notification when remedial actions differ significantly from those outlined in the ROD.

Response to comments: Several of those who commented believe that the NCP should explicitly identify opportunities for early PRP notification and involvement, and agreed that notification should be made to all parties as soon as practicable after site discovery, both to facilitate settlements and information gathering, and to help EPA make an informed decision on deferred listing. One suggested that the proposed NCP state that EPA regional staff should involve "willing" PRPs in project scoping, resulting in less remedial alternatives to evaluate. The comment did not specify whether "willing" referred to settling PRPs or cooperative, nonsettling PRPs, or both. The comment added a request to include an overall site remediation management plan as part of the RI/FS in the proposed NCP. Another comment suggested that introductions to all three sections at issue above should state EPA's commitment to issue general and special notice letters to known PRPs before taking any action at the site. Finally, one comment outlined a revised process to better involve PRPs in remedial action: PRPs should be notified of selection of an RI/FS contractor and be given copies (with an opportunity to comment) of project scoping and work plans, sampling plans and all sampling results as they become available, a list of ARARs, a list of potential alternatives for the FS, and copies of the risk assessment.

Section 300.415(a)(2) adds language articulating EPA's commitment to contact known PRPs "to the extent practicable" in order to "determine whether they can and will perform the necessary removal action" (53 FR 51500). EPA believes that it must preserve its discretion regarding timing of PRP notification provided in the statute to protect its enforcement and response flexibility. The preamble to the proposed NCP already reflects EPA's commitment to early notification and early PRP involvement at a site in the discussion of § 300.430: "EPA believes that settlements are most likely to occur and will be most effective when EPA interacts frequently and early in the process with PRPs" (53 FR 51432). Specific regulations would restrict EPA discretion and the use of incentives in enforcement activities to bring about a settlement. Finally, the statute already provides PRPs with an opportunity for further involvement in the RI/FS process by entering into an agreement with EPA and conducting the RI/FS and/or the response action.

Final rule: EPA is promulgating the rule as proposed.

Subpart F—State Involvement in Hazardous Substance Response

Subpart F is completely new. It combines concepts described in separate sections in the existing NCP on state role and involvement into one subpart, which codifies all regulatory requirements for state participation and involvement in CERCLA-authorized response actions. It also includes the minimum requirements EPA will follow to ensure that all states are provided an opportunity for "substantial and meaningful" involvement in the initiation, development, and selection of remedial actions as mandated by CERCLA section 121(f)(1). Following are summaries of major comments on the proposed subpart F and EPA's responses.

Name: Section 300.5. Definitions of cooperative agreement and Superfund state contract.

Proposed rule: The proposed NCP, § 300.5, includes definitions of two terms not previously defined: Cooperative agreement and Superfund state contract. Cooperative agreement means a federal assistance agreement in which substantial federal involvement is anticipated during the project. Superfund state contract means a joint agreement between EPA and a state that documents any required cost share and assurances necessary to conduct a response action.

Response to comments: Some comments were received on the definition of cooperative agreement. One commenter argued that the definition should be revised to recognize the availability of state cooperative agreements under section 311 of the Clean Water Act and the Coast Guard's authority to enter into such agreements under the Clean Water Act and CERCLA section 104(d). Another commenter stated that the recipient of a cooperative agreement should already have been determined to be qualified and responsible to conduct the response actions described in the cooperative agreement without substantial EPA involvement. "Substantial EPA involvement" was also disputed by another commenter who suggested that cooperative agreement be defined as a federal assistance agreement which authorizes the performance of federal duties and responsibilities within a prescribed scope.

Cooperative agreements under CERCLA are subject to the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301–8, which defines cooperative agreement as a legal instrument in which substantial federal involvement is anticipated. This definition applies as well to CERCLA cooperative agreements. Moreover, EPA believes that there will be substantial federal involvement or oversight under most CERCLA cooperative agreements.

In 1988, the Office of Management and Budget revised Circular–A102 and established a government-wide "common rule" for all federal agencies which prescribed the administrative requirements for federal assistance to states, local governments, and federally recognized Indian tribes. EPA implemented this common rule through 40 CFR part 31, which was developed at the time the NCP was proposed. As a supplement to 40 CFR part 31, EPA also promulgated separate implementing regulations for Superfund, 40 CFR part 35 subpart O, Cooperative Agreements and Superfund state contracts for Superfund Response Actions. Either a cooperative agreement or a Superfund state contract must be used to obtain the necessary CERCLA section 104 assurances.

The definitions of cooperative agreement and Superfund state contract in 40 CFR part 35 subpart O are somewhat more detailed than the definitions for the same terms in the proposed NCP. The final NCP incorporates the 40 CFR part 35 subpart O definitions. The final NCP also cross-references parts 31 and 35 subpart O where appropriate. EPA acknowledges the United States Coast Guard's authority to enter into cooperative agreements under section 311 of the Clean Water Act and that E.O. 12580 provides the Coast Guard and other

federal agencies with certain authorities under CERCLA. However, EPA believes that it is not appropriate to include this in the definition of cooperative agreement since the definition of this term is already prescribed by the Federal Grant and Cooperative Agreement Act of 1977.

Final rule: 1. Proposed definitions in § 300.5 are revised as follows:

Cooperative agreement is a legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

Superfund state contract means a joint, legally binding agreement between EPA and a state to obtain the necessary assurances before a federal-lead remedial action can begin at a site. In the case of a political subdivision-lead remedial response, a three-party Superfund state contract among EPA, the state, and political subdivision thereof, is required before a political subdivision takes the lead for any phase of remedial response to ensure state involvement pursuant to section 121(f)(1) of CERCLA. The Superfund state contract may be amended to provide the state's CERCLA section 104 assurances before a political subdivision can take the lead for remedial action.

2. Cross-references to the relevant portions of 40 CFR part 31 and part 35, subpart O, have been added to the NCP in the following sections of subpart F: 300.500(b), 300.505(c), 300.510(a), 300.510(b)(2), 300.515(a), 300.515(g), and 300.525(a).

Name: Section 300.500. General. Section 300.505. EPA/state Superfund memorandum of agreement (SMOA). Section 300.515(h). Requirements for state involvement in absence of SMOA.

Proposed rule: Proposed § 300.505 established general guidelines for developing and implementing a SMOA between EPA and a state (see preamble discussion in 53 FR 51455). A SMOA is an operating agreement that details how EPA and a state shall conduct business for remediating sites within that state. This section further described the ways in which a SMOA can provide a framework for the EPA/state partnership and how a SMOA may be used to establish the nature and extent of EPA/state interaction during response activities, to define the roles and responsibilities of each agency, and to describe the general requirements for EPA oversight.[23] Proposed § 300.505(a) also specified that a SMOA is not required unless a state requests to be designated as a lead agency for non-Fund-financed response actions at NPL sites, or to recommend a remedy for EPA concurrence for Fund-financed response actions. As proposed, the regulation would have established a SMOA as a prerequisite for both types of state involvement.

Section 300.515(h) described categories of requirements for state involvement in the absence of a SMOA, or in the event that the SMOA did not address all the major requirements for state involvement in remedial and enforcement responses. This section required that, in the absence of a SMOA, the support agency was responsible for providing the lead agency with potential ARARs and TBCs by the time site characterization data were available. The potential ARARs shall be communicated in writing within 30 working days of the lead agency's request. After the initial screening of alternatives, and before comparative analyses are conducted, the support agency has the opportunity to communicate additional requirements that are relevant and appropriate within 30 working days of receiving the request. Finally, the lead and support agencies shall remain in consultation so that ARARs and TBCs are updated, as necessary, until the ROD is signed.

Response to comments: 1. *SMOA as prerequisite.* Two commenters agreed that a SMOA should be required if a state requests to be designated as lead agency for non-Fund-financed actions at NPL sites or to recommend a remedy for EPA concurrence for Fund-financed actions. One of these commenters stated that, if EPA requires a state to sign a SMOA for these purposes, EPA must reach agreement with the state on the SMOA within one year. Other commenters objected to linking the ability of a state to recommend a remedy for Fund-financed response to the existence of a SMOA. One commenter stated that delegation of program components should not be linked to the existence of a SMOA. Several commenters expressed the view that such requirements undermine the goal of a true partnership between EPA and the state. Commenters noted several concerns regarding this subject.

They argued that CERCLA section 121(f) mandates that EPA provide states with meaningful and substantial involvement in implementing Superfund. Since the SMOA is a voluntary, nonlegally binding document, commenters asserted that the lack of a SMOA should not prevent states from participating meaningfully in the program. Commenters further argued that the existence of a SMOA will not improve the ability of states to select and recommend a remedy, particularly for those states already assuming lead roles. Degree of involvement should be a function of interest and ability, not of the existence of a SMOA at a particular moment in time. One commenter stressed that requiring a state to have a SMOA in order to be a contributing member in the Superfund program could create a serious problem for a state, particularly if the region declines to enter into a SMOA.

Several commenters stressed that a SMOA should not be a prerequisite for a state to recommend a remedy for EPA concurrence at a Fund-financed site. In such cases, a cooperative agreement would already be in existence and would address many of the issues otherwise contained in a SMOA. Furthermore, as lead agency, the state will have extensively analyzed the response needs and will be well qualified to select and recommend a remedy.

Many commenters mentioned that EPA can accept, reject, or modify any state recommendation for Fund-financed actions. This final authority over the state's remedy recommendation makes having a SMOA as a prerequisite unnecessary. Finally, several commenters asserted that EPA's decision to concur or not concur with the state's recommended remedy should be based on whether the recommendation is sound and satisfies the nine remedy selection criteria, not on the existence of a SMOA.

Another concern expressed by commenters regarding concurrence is one of timing. Several commenters were worried that the process of negotiating a SMOA can take a significant amount of time and could delay designation of sites for state-lead cleanup in the meantime. States that have demonstrated experience in Superfund implementation should not be restricted from recommending a remedy until negotiations are completed and a SMOA is in place.

Commenters generally did not agree with requiring a SMOA as a prerequisite for state lead during non-Fund-financed response actions at NPL sites for two reasons. First, commenters asserted that lead agency designation should be based on a state's ability to manage the necessary response activities, not on the existence of a SMOA. Second, commenters stated that if the SMOA was required for the state to be designated the lead agency, some states could be denied the opportunity to

[23] The term "partnership" does not imply that EPA and a state enter into a formal legal partnership agreement.

assume the lead if regions declined to enter into SMOAs. A few commenters mentioned that so far it appears that EPA has not placed a priority on finalizing a SMOA even when the state has initiated the drafting and development process. A few commenters were concerned that imposing a prerequisite for non-Fund-financed state leads may pose a hardship for smaller states, which desire only limited participation in lead activities. The commenters point out that a SMOA does not contain any provisions that could not otherwise be provided in a site-specific cooperative agreement.

EPA agrees with commenters that the SMOA should not be a prerequisite for certain program activities, and has modified the final rule accordingly. EPA will not require states to negotiate SMOAs in order to recommend remedies for EPA concurrence at Fund-financed sites, or to be designated as lead agencies for non-Fund-financed actions at NPL sites. A SMOA is not the appropriate mechanism to designate sites for which a state will recommend a remedy. EPA and a state will agree in a cooperative agreement that the state may recommend a remedy at a site for which the state has been designated as the lead agency. EPA has decided to remove the SMOA as a prerequisite for these activities in order to emphasize the primary purpose of SMOAs as voluntary agreements through which EPA and a state can agree on communication and coordination processes throughout the remedial process. This approach will be more conducive to expanding the EPA/state partnership in the Superfund program. EPA will enter into SMOA discussions if requested by a state.

EPA agrees that the absence of a SMOA should not in itself limit the level of participation by a state in the Superfund program, nor does the existence of a SMOA improve the ability of a state to participate more fully in the program. A SMOA can, however, act as an effective management tool and lead to a more effective EPA/state partnership through better defining roles and distributing responsibilities according to each party's resources and experience. Thus, SMOAs may contribute to more consistent program implementation nationwide, while providing EPA and states flexibility in conducting certain program activities. Lead designations for both Fund-financed and non-Fund-financed sites should be determined based on interest, capability, and available resources.

2. *ARAR review times.* Several commenters supported the 30-day deadline for support agencies to identify ARARs, which applies to states without a SMOA. In addition, a few commenters stressed that timely ARAR identification is important for sites in states with and without a SMOA to achieve rapid response actions, and suggested that states with a SMOA also be subject to the 30-day deadline. One commenter specifically stated that review times set forth in the proposed rule do not provide a sufficient amount of time to identify and communicate ARARs to the lead agency. A minimum of 30 days is necessary to give support agencies the opportunity to review the information located in various documents adequately.

EPA agrees that timely ARAR identification is important in expediting response actions. The 30-working day timeframe in § 300.515(h)(2) generally will apply to all lead and support agencies in the absence of a SMOA. However, EPA believes it is also important to allow EPA and states flexibility to agree on site-specific ARAR identification timeframes. A SMOA may reference the language of § 300.515(h)(2), or specify a mutually agreed upon alternative; however, to be legally binding, any alternative timeframes negotiated in a SMOA must be documented in site-specific agreements.

3. *Impact of SMOA on response agreements.* Several commenters expressed concern that entering into a SMOA could impact agreements already in place to which the state and/or EPA is a party. In particular, this conflict could raise issues of due process, especially when existing agreements involve potentially responsible parties. To eliminate the possibility of this problem, commenters recommended that a provision be added to § 300.505 to ensure that a SMOA will not impact existing enforcement orders, consent orders, or cooperative agreements. EPA agrees with the commenters and will revise the NCP accordingly. The SMOA is a non-binding document, and therefore cannot alter existing legally binding response agreements.

4. *Removal coordination and SMOAs.* See preamble discussion to § 300.415 on state involvement in removal actions.

Final rule: Proposed § 300.505 is revised as follows:

1. Language has been reordered and modified to better describe the purpose and contents of SMOAs.

2. The final rule states in § 300.505(a) that EPA shall enter into SMOA discussions if requested by a state.

3. Language in the proposed rule making the SMOA a prerequisite in order for a state to recommend a remedy for EPA concurrence at a Fund-financed site or to be designated as the lead agency at a non-Fund-financed NPL site has been deleted.

4. Proposed § 300.505(a)(4)(i) (renumbered as final § 300.505(a)(3)) is revised to state that review times established in a SMOA must also be documented in a site-specific cooperative agreement or Superfund state contract to be legally binding.

5. Proposed § 300.505(a)(4)(ii) (renumbered as final § 300.505(c)) has been revised to state that site-specific agreements entered into pursuant to CERCLA section 104(d)(1) shall be developed in accordance with 40 CFR part 35 subpart O and that the SMOA does not supersede any site-specific legal agreements.

6. A new § 300.505(d)(2)(viii) has been included to add other CERCLA implementation activity discussions to the SMOA process.

7. Language is added to § 300.515(d)(2) stating that even though alternative timeframes for ARAR identification may be established in the SMOA, such timeframes must also be documented in a site-specific agreement to be binding.

8. In final rule §§ 300.5 (definition of "SMOA"), 300.500(a), 300.505(a)(1), (a)(3) and (d)(1), the word "removal" is being added before the word "pre-remedial" (see preamble discussion on § 300.415, "State involvement in removal actions").

9. Language on advisories, criteria or guidance in § 300.505(d)(2)(iii) has been modified (see preamble section on TBCs).

Name: Sections 300.510(c)(1) and (c)(2) and (e). State assurances—operation and maintenance and waste capacity.

Existing rule: 1985 NCP § 300.68(b)(2) provided that states must have met the requirements of CERCLA section 104(c)(3) prior to initiation of a Fund-financed remedial action. CERCLA section 104(c)(3)(A) required a state to assure all future maintenance of the remedial action for the expected life of such action. CERCLA section 104(c)(3)(C) provided that the state would pay or assure payment of 10 percent of the cost of the remedial action, including all future maintenance.

Proposed rule: Proposed § 300.510(c)(1) restated the requirements of the 1985 NCP (53 FR 51455–56). It indicated that, pursuant to CERCLA section 104(c), the state must provide assurance, prior to the remedial action, that it will assume responsibility for operation and maintenance (O&M) of

the implemented remedial action for the expected life of such action. Proposed § 300.510(c)(2) stated that EPA may share, for up to one year, in the cost of operation of the remedial action to ensure that the remedy is operational and functional. Proposed § 300.435(f) provided, pursuant to CERCLA section 104(c)(6), that EPA will fund for up to 10 years measures to restore ground or surface water quality. Proposed § 300.510(e) described requirements for states providing a waste capacity assurance.

Response to comments: Several state commenters argued that CERCLA section 104(c)(3)(C) requires that 90 (or, in some cases, 50) percent of the cost of O&M will be federally funded. Some of the commenters also cite CERCLA section 104(c)(7), which refers to federal funding of O&M pursuant to CERCLA sections 104(c)(3)(i) and (6) and S. Rep. No. 96–848 (1980). One commenter claimed that requiring a state to fund O&M costs entirely biases EPA's selection process to favor remedies that are less permanent and less effective, by minimizing short-term expenditures at the expense of greater state-funded O&M. Another commented that states have agreed to operation and maintenance of remedies.

EPA has followed a general policy of requiring states to assure the payment of operation and maintenance costs for Fund-financed remedial actions. Operation and maintenance costs are generally identified in the ROD and remedial design so that states have an opportunity to comment and recommend revisions to such costs. This policy is consistent with section 104(c)(3) of CERCLA, which provides that Fund-financed response actions may not take place until "the state assure[s] all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President * * *." EPA further believes that Congress has implicitly accepted this policy by providing in CERCLA section 104(c)(6) that a certain *class* of activities, namely those to operate and maintain treatment and other measures necessary to restore surface or ground water for up to 10 years, are remedial action and, therefore, are subject to the general 90/10 or 50/50 cost share requirements. The statute goes on to provide that activities to maintain the effectiveness of those restoration measures, once protective levels are achieved or up to 10 years, whichever is earlier, are to be considered O&M (for which the state pays 100 percent under a long-standing policy) (see preamble discussion on § 300.435(f)).

CERCLA section 104(c)(3)(A) provides that "the state will *assure* all future maintenance of the removal and remedial action provided [in section 104] *for the expected life* of such actions as determined by the President" (emphasis added). EPA believes that this language places this responsibility for the operation and maintenance of response actions—including the funding aspect—on the states. Indeed, Congress implicitly acknowledged this by carving out only a limited exception from O&M in CERCLA section 104(c)(6). As the House Committee on Public Works and Transportation noted in a discussion of the precursor to section 104(c)(6), "* * * ground or surface water cleanup will be completed as part of the remedial action, and not be left to operation and maintenance activities *which must be funded by a state.*" H. Rep. 253, 99th Cong. 1st Sess., part 5 at 10 (1985) (emphasis added). In addition, although a bill to require EPA to pay a cost share for O&M was considered during the SARA reauthorization process, it was not reported out of the 98th Congress. (See H. Rep. 890, 98th Cong., 2nd Sess., part 1 at 4,445 (1984), Report of the House Committee on Energy and Commerce.)

In addition, as noted under § 300.430(a)(1)(ii)(D), institutional controls may be required to provide for the protectiveness of human health and such institutional controls have a valid role in the remediation of a site when active treatment of a site is not practicable. Where institutional controls are employed as part of a response action, care must be taken to ensure that such controls are reliable and will remain in place. Therefore, when appropriate, as part of the O&M assurance required by CERCLA section 104(c)(3) and § 300.510(c) of this regulation, the state must assure that any institutional controls implemented as part of a remedial action at a site are in place, reliable, and will remain in place after the initiation of O&M. The final rule has been changed to reflect the need to maintain institutional controls when appropriate.

Further, the experience of the Superfund program has been that EPA's selection process does not favor remedies that are less permanent and less effective, by minimizing short-term expenditures at the expense of greater state-funded O&M. On the contrary, current data reveal that the trend has been toward the use of more permanent technologies. CERCLA section 121(b)(1) requires that EPA select a remedial action that is protective of human health and the environment, is cost-effective, and utilizes permanent technologies to the maximum extent practicable. In order to formulate a more consistent approach in selecting remedies at sites, nine selection criteria are used (see § 300.430). A remedy is not selected based on cost share alone, rather the selection of remedy process is based on a balancing approach of the nine criteria. In fact, EPA has modified the proposed approach to encourage selection of treatment alternatives by emphasizing the criteria of long-term effectiveness and permanence and reduction of toxicity, mobility, or volume through treatment in the final rule (see § 300.430(f)(1)(ii)(E)).

In another change in this section, the language in § 300.510(e) describing the requirements for providing the waste capacity assurance has been revised to codify language from CERCLA section 104(c)(9) and to reflect the passage of the October 17, 1989 date for applicability of this assurance under CERCLA section 104(c)(9). EPA generally will use the following to determine the adequacy of the state's assurance: (1) The plan submitted to EPA documenting the waste capacity availability, (2) the state's written commitment to implement the plan, and (3) the state's written commitment to implement any additional measures EPA deems necessary to provide for adequate waste capacity (see Assurance of Hazardous Waste Capacity Guidance, OSWER Directive No. 9010.00 (December 1988) and OSWER Directive No. 9010.00a (October 1989)).

Final rule: 1. EPA has revised § 300.510(c)(1) to state that any institutional controls associated with response actions are a part of the required CERCLA section 104(c) assurances.

2. EPA has revised § 300.510(e) to codify language in CERCLA section 104(c)(9) and to reflect the passage of the October 17, 1989 date for applicability of the waste capacity assurance. Also, the rule notes that the issue of whether or not Indian tribes are states for purposes of CERCLA section 104(c)(9) has not yet been decided by EPA.

Name: Section 300.510(f). State assurances—acquisition of real property.

Proposed rule: Section 300.510(f) proposed that if an interest in real property was to be acquired in order to conduct a response action, as a general rule, the state in which the property was located must have agreed to acquire and

hold the necessary property interest. If it was necessary for the United States to acquire the interest in property to permit implementation of the response, the state must have agreed to accept transfer of the acquired interest on or before the completion of the response action.

Response to comments: Several commenters contended that CERCLA section 104(j)(2) provides that a state is required to assure that it will accept transfer of the interest following completion of the remedial action. They argue that states do not have to accept title to property until the remedial response is completed, not earlier, and that the determination of whether such property must be acquired does not lie solely with EPA, but must be made in consultation with the affected state. The commenters also object to the proposed rule's application to "response actions" instead of "remedial actions" as provided by CERCLA section 104(j)(2) because EPA does not have the authority to force a state to accept title to contaminated property after a removal action. Some commenters suggest that other mechanisms to implement response actions, such as voluntary consent, search warrants or court orders, should be used to implement response actions.

EPA agrees that other mechanisms such as voluntary consent, search warrants, and court orders may be used to implement response actions. However, in some circumstances it may be necessary to acquire an interest in real property for implementation of the response action. As stated in the proposed rule, the state in which the property is located must agree to acquire and hold the necessary property interest.

If the state intends to acquire property directly, but lacks authority to condemn or otherwise acquire it or is unable to do so in an expeditious manner, it may be necessary for the United States to acquire the interest in the property to permit implementation of the response. In such instances, the state must accept transfer of the acquired interest on or before completion of the response action. EPA would prefer that a state accept transfer of the acquired interest prior to completion of the response action. Of course, the state may pass title to its interest to another entity such as a political subdivision to hold, as the state deems appropriate. While ownership of such interest would not result in CERCLA liability pursuant to CERCLA section 104(j)(3), EPA understands that states are concerned about common law liability that could result from ownership (e.g., arising from injuries to persons coming on the property) and that they would prefer not to take title to such property until completion of the response action. EPA believes that it is not going beyond the statutory language to require a state to accept title "on or before" completion of the response action; the section merely gives the states the option to accept title prior to completion of the response action.

Although Indian tribes are not required to provide the CERCLA section 104(c) assurances, federally recognized Indian tribes are not exempt from providing the CERCLA section 104(j) assurance. However, EPA will consider, on a case-by-case basis, what assurances are necessary where there are legal barriers to a tribe's taking title to property rather than having it held in trust for the tribe by the United States.

Final rule: EPA is revising § 300.510(f) to state that the state must also accept transfer of any interest in acquired property that is needed to ensure the reliability of institutional controls restricting use of that property (see discussion above on § 300.510(c)(1)).

Name: Section 300.515(a). Requirements for state involvement in remedial and enforcement response.

Proposed rule: Proposed § 300.515(a)(1) stated that EPA would designate a state agency as the lead agency for a response action on the basis of whether or not it had "the capability to undertake such action." Language in the preamble to the proposed NCP (53 FR 51456) stated that EPA was currently considering more specific criteria, including: Overall expertise, legal authorities, administrative and contracting capability, financial management systems, site complexity, availability of site-specific resources, past federal or state actions at the site, and past state cleanup activities.

Proposed § 300.515(a)(2) stated that for EPA-lead Fund-financed remedial planning activities, the state agency acceptance of the support agency role during an EPA-lead response shall be documented in a letter or a SMOA.

Section 300.515(a)(3) proposed that site-specific agreements were generally unnecessary for non-Fund-financed response actions unless a state intended to later seek credit for its actions.

Response to comments: 1. *Section 300.515(a)(1).* Commenters stated that the criteria stated in the proposed preamble should be revised to include: Desire of the state to do the work, minimum legal ability to issue and enforce orders, a history of state involvement with federal Superfund activities in the state, and an ability to demonstrate adequate resources, including experienced personnel.

Criteria for lead agency designation were suggested by EPA in the preamble to the proposed rule (53 CFR 51394) but were not proposed as regulatory requirements. EPA continues to believe it appropriate to suggest, rather than require, that these criteria, along with the criteria suggested by the commenters, be considered during EPA and state discussions on designating a lead agency. Since conditions may differ among sites, EPA prefers to decide upon lead agency status by entering into separate discussions with the state for each response. If the state is chosen as the lead agency, 40 CFR part 35 subpart O contains the appropriate regulations regarding criteria for eligibility and award of funding for state involvement in Superfund response actions. Therefore, criteria for designating a lead agency have not been added to today's rule. A cross-reference to subpart O has been added in § 300.515(a).

Another comment stated that regulations governing Fund-financed response actions are silent on whether or not states are allowed to perform enforcement response activities the commenter contended were clearly allowed under CERCLA section 104. The comment proposed adding language to § 300.515(a)(2) clarifying that states are allowed to perform enforcement response activities.

EPA has modified § 300.515(e)(2)(i) to explicitly acknowledge the authority of states to conduct response actions at NPL sites under state law. The language specifies that a state will prepare the ROD (i.e., select the remedy), and may seek EPA's concurrence for non-Fund-financed state-lead enforcement actions. Such actions are conducted under authority of state law, not CERCLA. Additionally, revised § 300.505(b)(2)(iv) describes enforcement activities that may be conducted by states.

2. *Section 300.515(a)(2).* One commenter stated that the NCP should also permit support agency acceptance to be documented through a cooperative agreement. EPA agrees that state acceptance of the support agency role may also be documented in a cooperative agreement. EPA allows states to enter into support agency cooperative agreements to defray the cost of their participation in EPA-lead response, pursuant to 40 CFR part 35 subpart O. The support agency cooperative agreement is the most appropriate place to document the

state's acceptance of the support agency role.

3. *Section 300.515(a)(3).* Since EPA has decided to not require the signing of a SMOA for specific state involvement activities, e.g., recommending a remedy to EPA, the language in this section needs to clearly define when a cooperative agreement may be signed. In all cases, EPA may enter into a cooperative agreement only at Fund-financed sites unless a state intends to seek credit pursuant to § 300.515. As defined at 40 CFR part 35 subpart O, cooperative agreements are intended to implement CERCLA-funded response and should not be used to aid cleanup at non-Fund-financed sites.

Final rule: 1. A statement has been added at § 300.515(a)(1) to clarify that 40 CFR part 35 subpart O contains further information regarding state involvement in response.

2. Section 300.515(a)(2) is revised to state that the state may document its acceptance of the support agency role in a letter, SMOA, or cooperative agreement.

3. Language in § 300.515(a)(3) is changed to clarify that cooperative agreements and Superfund state contracts are only appropriate for non-Fund-financed actions if a state intends to seek credit under § 300.510.

Name: Section 300.515(b). Indian tribe involvement during response.

Proposed rule: EPA proposed to provide for interaction with federally recognized Indian tribes whenever a CERCLA site was within Indian jurisdiction. As stated in proposed § 300.515(b), federally recognized Indian tribes generally may have the same roles and responsibilities under the NCP as do states. Indian tribes may be authorized to take the lead role for Fund-financed response activities through a cooperative agreement based on the following criteria: (1) The Indian tribe is federally recognized; (2) the tribe currently performs governmental functions to promote the health, safety, and welfare of its population or environment; (3) the tribe demonstrates the ability to carry out the necessary response actions according to the priorities and criteria established by the NCP; (4) the tribe can demonstrate that the necessary actions are within the scope of its jurisdiction; and (5) the tribe can demonstrate a reasonable ability to effectively administer a cooperative agreement.

Response to comments: Several commenters expressed concern that the criteria used to judge states' ability to be a lead agency seem to be different from the criteria used to judge the ability of Indian tribes to fulfill the same role. The requirement that tribes establish jurisdictional authority is not required of states, and has not been consistently applied to states in the past. Several commenters asserted that this is "blatant discrimination" and undermines EPA's efforts to work effectively with Indian tribes. Many commenters requested that EPA address the apparent disparity between criteria applied to states and Indian tribes.

A few commenters were also concerned about the criteria requiring Indian tribes to be federally recognized in order to undertake the lead role and identified a need to clarify which agency has the authority to govern cleanup activities at sites within the jurisdiction of an Indian tribe that is not federally recognized. Similarly, commenters were concerned about how EPA expects to resolve hazardous substance releases from sites on Indian land when the release extends beyond the boundary of the reservation. One commenter requested clarification about whether EPA will allow a state agency to work with these tribal councils under two-party agreements.

In response, EPA proposed criteria in § 300.515(b) for evaluating whether Indian tribes had the capability to take the lead for Fund-financed response activities through a cooperative agreement. After reconsidering the criteria based on public comment, EPA believes that a distinction should be made in the final rule between criteria for Indian tribes to be treated substantially the same as states and for the eligibility of Indian tribal governments to receive funding, which is described in 40 CFR part 35 subpart O, for involvement through a Superfund cooperative agreement.

For an Indian tribe to assume the same responsibility as a state in Superfund response actions, the Indian tribe must be federally recognized and must currently perform governmental functions to promote the health, safety, and welfare of its population or environment. In addition, the tribe must have jurisdiction over the site at which response is contemplated, including pre-remedial activities. A similar jurisdictional requirement was not considered to be necessary for states whose jurisdiction clearly covers the entire state. However, the extent of Indian tribal jurisdiction may be less clear. A determination of whether a tribe has jurisdiction over a site should be made by EPA based on documentation submitted by the governing body of an Indian tribe. However, by making a determination that an Indian tribal government has jurisdiction for purpose of CERCLA response, EPA is not making a determination regarding jurisdiction for any other purpose.

When a hazardous substance release affects lands both within and beyond the boundaries of lands within the jurisdiction of an Indian tribal government, state participation is necessary. EPA will encourage coordination between states and Indian tribes when releases originate in the jurisdiction of one and affect the other. There is nothing to prohibit the tribe and state from entering into a two-party agreement to identify roles and responsibilities. The region will evaluate requests for lead agency designation to undertake response at such sites on a case-by-case basis in consultation with the affected governing body of the tribe and state. Federal-lead may be appropriate in such situations. A three-party Memorandum of Understanding (MOU) among EPA, the state, and governing body of the Indian tribe is recommended to define and coordinate roles, and ensure compliance with the requirements of section 121 of CERCLA for response activities prior to remedial action.

A federally recognized Indian tribe can apply for Fund monies through a Superfund cooperative agreement to defray the cost of its participation as a lead or support agency (the eligibility criteria to receive funding under a cooperative agreement are discussed at 40 CFR part 35 subpart O).

Final rule: The criteria in § 300.515(b) are modified and renumbered to enable an Indian tribe to assume the same responsibility as a state in Superfund response actions, if the tribe is federally recognized and currently performs governmental functions to promote the health, safety, and welfare of its population or environment. The tribe must also have jurisdiction over the site at which response is contemplated.

Name: Sections 300.425(e)(2), 300.515 (c)(2) and (c)(3). State involvement in PA/SI and NPL process. Section 300.515(h)(3). State review of EPA-lead documents.

Proposed rule: Proposed § 300.515(c)(2) provided that states have a minimum of 20 calendar days and a maximum of 30 calendar days to review releases to be proposed to be listed on the NPL. Sections 300.425(e)(2) and 300.515(c)(3) provided the same minimum/maximum timrframes for states to review notices of intent to delete releases from the NPL. Section 300.515(h)(3) provided, in the absence of a SMOA, that states have a minimum of

10 working days and a maximum of 15 working days to provide comments on EPA-prepared RI/FSs, RODs, ARAR/TBC determinations, and RDs. States were provided a minimum of 5 working days and a maximum of 10 working days to comment on the proposed plan (see preamble to proposed rule at 53 FR 51456–57).

Response to comments: Several commenters disagreed with the minimum/maximum timeframes for review of EPA-lead documents. One stated that some of these documents, such as the RI/FS and ROD, are incredibly long and complex and such deadlines would be impossible to meet. The commenter argued that more time for review and comment must be provided but did not specify minimum/maximum timeframes. Another commenter argued that because reviewing state agencies generally have to coordinate with other state agencies, the timeframe for state review of EPA-lead documents should be 25 to 30 working days for RI/FSs, RODs, and ARAR/TBC determinations. One commenter stated that the proposed five to 10 day timeframe for review of a proposed plan is too tight and that 10 to 15 days would be more realistic. Another commenter stated that a minimum of 20 working days should be provided for state review of NPL listings and deletions, ARAR/TBC determinations, RODs, and RDs. The commenter also recommended a minimum of 30 working days on the final RI/FS and proposed plan. The commenter further suggested that all review times be expressed in terms of working and not calendar days.

Other commenters stated that EPA should be held to the same review times as states, and that EPA regions should be authorized to approve and extend the state review period without regulatory limitations. One comment stated that EPA should be bound by the same requirements for response and concurrence at state-lead sites as states are at EPA-lead sites. The commenter added that the rule should be revised so that if EPA fails to meet its deadline for comment, this will be considered a concurrence.

Further, several commenters made suggestions specifically regarding the procedures for state review of HRS packages. Two commenters stated that states should be given the opportunity to comment on and review sites before the listing decision has been made. Another commenter contended that 20 days is not sufficient time to review sites and that the minimum period for review should be extended to 30 days.

EPA accepts the recommendation that it be held to the same review times as states when it reviews state-lead documents. EPA believes that such review times should be the same for each phase of response regardless of lead agency designation. However, failure of either the state or EPA to respond shall not be construed as concurrence. While EPA intends to make all efforts necessary to meet agreed-upon deadlines, if EPA does not act within specified timeframes, it should not be interpreted as EPA's approval of an action.

With regard to the comments that the review times should be revised, EPA has decided not to revise the number of days specified in § 300.515(h)(3) of the NCP for review of lead agency prepared documents by the support agency; such review times can be modified by a SMOA and made legally binding in a site-specific agreement, such as a cooperative agreement or Superfund state contract (the SMOA cannot be used to alter review times on a site-specific basis). If a different timeframe agreement is not agreed to in the site-specific agreement, EPA and the state will be required to meet the deadlines stated in the NCP. EPA also has decided to use working days for all review time periods and has changed the rule accordingly.

With regard to the pre-remedial process, states already are active partners, and indeed, it is often the state environmental agency that performs the PA/SI. Even when the state does not perform a PA/SI, it often provides essential information concerning a release to EPA. Thus, states generally do provide input on potential NPL sites before the listing decision has been made. However, EPA is willing to work with states to develop procedures for receiving more input on the listing decision itself. EPA believes that two considerations must be kept in mind. First, it may not be appropriate to provide draft HRS packages to those states that would be required by their state law to release such documents to the public upon request. EPA considers these documents predecisional, and does not release them to the public during the rulemaking process. Second, EPA believes that state review of NPL sites should come toward the beginning, rather than the end, of the HRS process; in this way, new information provided by states could be incorporated without delaying a proposed NPL update.

In the deletion process, where state concurrence on notices of intent to delete are required, EPA is revising the duration of review in §§ 300.435(e)(2) and 300.515(c)(3) to 30 working days.

Final rule: Proposed §§ 300.425(e)(2), 300.515 (c) and (h) are revised as follows:

1. EPA is changing the language in §§ 300.425(e)(2), 300.515(c) (2) and (3) regarding the time limit for review of releases considered for listing on the NPL and for review of notices of intent to delete releases from the NPL. The timeframe is changed from a minimum of 20 and a maximum of 30 calendar days to 30 working days. The language also notes that this timeframe will be followed to the extent feasible.

2. Section 300.515(h)(3) is renamed to refer to "support agency" and "lead agency" and revised to read that the lead agency shall provide the support agency an opportunity to review and comment on the RI/FS, proposed plan, ROD, RD, and any proposed determinations on potential ARARs and TBCs. The support agency shall have a minimum of 10 working days and a maximum of 15 working days to provide comments to the lead agency on the RI/FS, ROD, ARAR/TBC determinations, and RD. The support agency shall have a minimum of five working days and a maximum of 10 working days to comment on the proposed plan.

Name: Sections 300.505 and 300.515(d). Resolution of disputes.

Proposed rule: The preamble to proposed subpart F stated that a region and a state may adopt a dispute resolution process to be used to resolve any differences that might impede the response process (53 FR 51457). Differences should be addressed at the staff level first and raised to management if a mutually acceptable solution is not attained. The preamble further stated that a region and a state could jointly raise the dispute to the Assistant Administrator for Solid Waste and Emergency Response for a final determination. Alternatively, a region and a state may establish a different dispute resolution process in a SMOA.

Proposed § 300.515(d) stated that if EPA intended to waive any state-identified ARARs or did not agree with the state that a certain state standard was an ARAR, EPA shall formally notify the state when it submitted the RI/FS report for state review or responded to the state's submission of the RI/FS report. The preamble also stated that EPA, operating in its oversight role for CERCLA enforcement actions, would resolve ARARs disputes between the lead agency and PRPs.

Response to comments: Commenters expressed dissatisfaction with the role

of EPA as the final judge in ARAR disputes. One commenter suggested the use of an "alternate dispute resolution" process, with a third party offering a non-binding opinion. Another commenter proposed the incorporation of a state/EPA dispute resolution into a SMOA to be binding on both parties.

In response, EPA believes that its responsibility to ensure that remedies conform to the mandates of CERCLA justify EPA's role in resolving ARARs disputes. ARARs determinations are a significant component of selecting such remedies. Moreover, ARARs determinations may directly affect the cost of a remedy and EPA is required by CERCLA to ensure consistent use of Fund monies. EPA concludes, therefore, that it is necessary and appropriate that EPA, rather than a third party, will resolve ARARs disputes.

EPA encourages, but does not require, inclusion of dispute resolution clauses in their SMOAs. Any resolution process should encourage timely resolution of disputes which could impede the response process. EPA is currently developing guidance on dispute resolution procedures.

One commenter favored the resolution of all disagreements with states regarding ARARs waivers before the RI/FS report is completed and before the proposed plan is made available to the public. EPA believes, as a policy matter, this is an appropriate suggestion and will, to the extent practicable, attempt to resolve all ARARs disputes before the proposed plan is issued to the public. Because some ARARs may still be unknown at the time of the RI/FS, it may not be possible to resolve all ARARs disputes by this time.

Another commenter recommended the inclusion of PRPs into the dispute resolution process when a PRP disagrees with EPA's assessment of a site's ARARs. This commenter suggested an informal meeting between PRPs and the EPA Regional Administrator to discuss disagreements, followed by a written decision by the appropriate Regional Administrator. EPA believes that this is not necessary because PRPs have the opportunity to express disagreement over ARARs decisions in their comments on the proposed plan. Further, if the PRP conducts an RI/FS pursuant to a consent order or decree, procedures for resolving ARARs disputes are usually contained in such orders or decrees.

Final rule: EPA is promulgating the rule as proposed except that the language on advisories, criteria or guidance in §§ 300.515(d), (d)(1) and (2) and 300.515(h)(2) has been modified (see preamble section on TBCs above).

Name: Section 300.515(e)(1) and (2). State involvement in selection of remedy.

Proposed rule: Proposed § 300.515(e) discussed the roles of EPA and the state in the selection of remedy process. It reflected the evolution of the EPA/state partnership in recent years by providing the state, when it was the lead agency, with responsibilities in the selection of remedy process. This new concept would be applicable to both Fund-financed and non-Fund-financed actions in which the state as lead agency would recommend the remedy and provide EPA an opportunity to concur with and adopt the remedy. This recommendation/concurrence approach was in keeping with the statutory requirement to provide substantial and meaningful involvement in the initiation, development, and selection of remedial actions (see preamble to proposed NCP at 53 FR 51456–59).

Specifically, § 300.515(e)(1) described how EPA and the state will interact during the development and concurrence of the proposed plan. The lead agency shall prepare a proposed plan upon conclusion of the RI/FS. Once completed the support agency shall be given an opportunity to comment and concur; however, if agreement cannot be reached the proposed plan shall be published with a statement explaining the support agency's concerns regarding the plan.

Section 300.515(e)(2) provided further information regarding EPA and state involvement in the preparation of a ROD. For all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy. For Fund-financed state-lead sites, EPA and the state shall designate sites for which the state shall prepare the ROD and seek EPA's concurrence and adoption of the remedy specified therein and sites for which EPA shall prepare the ROD and seek the state's concurrence. For non-Fund-financed state-lead enforcement response actions taken at NPL sites, EPA and the state may designate sites for which the state shall prepare the ROD and seek EPA's concurrence in and adoption of the remedy specified therein.[24] Either EPA or the state may choose not to designate a site as state-lead.

Response to comments: 1. *Review and publication of proposed plan.* In cases where the state has the lead, one commenter questioned whether the state should be allowed to publish a proposed plan without EPA's prior approval.

EPA agrees that in Fund-financed state-lead remedial response, EPA shall always be given the opportunity to review the proposed plan before it is published. Whenever possible EPA and the state shall try to come to agreement; however, if no concurrence can be reached, the state shall not publish the plan and EPA may assume the lead for completing the proposed plan and ROD. At non-Fund-financed state-lead sites, the state may publish the proposed plan without EPA's approval; however, EPA still retains the right to proceed under its own CERCLA authorities if necessary to ensure compliance with section 121 and other pertinent provisions of CERCLA. If the site is EPA-lead or EPA resumes the lead from the state, the EPA may publish the proposed plan without state approval; however, as discussed below the state must still provide its CERCLA 104(c) assurances before remedial action can begin. As presented in the proposed and final regulation, when agreement cannot be reached the lead agency shall include a statement describing the support agency's concerns with the proposed plan.

2. *Development and selection of the ROD.* Many commenters strongly supported concurrence by the support agency for remedies recommended by the lead agency, regardless of whether the state or EPA has the lead. Several commenters strongly supported this concurrence as an important sign of progress toward smoothing the relationship between EPA and the states by placing them on more equal ground. These commenters stressed that concurrence indicates that EPA understands that the state is the ultimate caretaker of Superfund sites, and, therefore, must have a strong voice in what happens at a site. Several commenters emphasized that concurrence should be based on the principle that the lead agency is just that and support agency oversight should be minimized. Most commenters stressed that this is the best process to maximize the use of limited government resources and facilitate the timely cleanup of Superfund sites.

A few commenters emphasized the distinction between giving the state the "opportunity to concur" and having concurrence as a prerequisite in various stages of EPA-lead actions. One commenter gave the example that state concurrence is not a prerequisite in the issuance of a ROD by EPA. However, EPA's concurrence is required in the

[24] Non-Fund-financed state-lead response action means that a state is responding to a release pursuant to state law, not CERCLA. CERCLA enforcement functions may not be delegated to states, except as specifically authorized under CERCLA.

issuance of a ROD for state-lead Fund-financed actions. One commenter stated that "concurrence," as set forth in § 300.515(e), was contrary to the meaning of the word. The commenter noted that if the state does not concur with the remedy, EPA should not go forward with it.

EPA's intention in this section of the proposed rule on concurrence was to stress the opportunity for dialogue between EPA and the state in the remedy selection process. Although, as a matter of policy, EPA retains responsibility for selecting the remedy, it is important for both parties to concur in the selected remedy, whenever possible, to avoid problems during implementation of the remedy.

EPA has decided not to revise the requirement that EPA's concurrence is required before a state may proceed with a Fund-financed response action. However, this does not prevent a state from attempting to proceed with the response action using their own funds or enforcement authorities, except as limited by CERCLA section 122(e)(6). If a state decides to pursue this avenue, it may not claim credit pursuant to § 300.510(b)(2) for remedial action expenses since EPA never concurred with the selected remedy, and the state action may be subject to possible preemption under CERCLA section 122(e)(6) if the state uses its own enforcement authorities to implement such action. EPA will not be bound by a state action or any EPA/state agreed-upon action since new information may arise and create the need for additional response at the site in order for the remedy to protect human health and the environment.

Regardless of whether concurrence was obtained on the selected remedy at this stage in the response process, both EPA and the state have another opportunity available to them to express disapproval of the selected remedy. The state's CERCLA section 104 assurances are required prior to the implementation of remedial action conducted under section 104 of CERCLA. If the state, at this time, still disagrees with the selected remedy, it may demonstrate nonconcurrence with the remedy by withholding its assurances. Likewise, if EPA disagrees with the selected remedy, EPA may withhold Fund money for implementation of the remedial action or section 122(e) approval for a PRP remedial action. For state-lead sites, if no agreement can be reached, the state has the option of attempting to proceed with implementation of the remedy using its own funds, although EPA is not bound by that action. EPA may not proceed with a Fund-financed action without the state's assurances.

Some comments received regarding the criteria for lead agency designation (53 FR 51456) also identified the need to address the criteria used to designate the lead in the preparation of the ROD since the determination of whether the state has the capability to prepare the ROD is closely linked to this issue. As discussed earlier, EPA is not incorporating in today's rule any criteria for lead agency designation. Instead a decision regarding preparation of the ROD shall be made in consultation with EPA and the state on a case-by-case basis. All agreements and decisions shall be documented in a site-specific agreement and not in a SMOA.

Final rule: Proposed § 300.515(e) is revised as follows:

1. Language is added in final § 300.515(e)(1) to clarify that the state may not publish a proposed plan which EPA has not approved. In such event, EPA may assume the lead from the state at Fund-financed sites if EPA and the state cannot agree on a proposed plan.

2. EPA is adding a clause in § 300.515(e)(2)(i) to designate the site-specific agreement as the proper place to identify whether EPA or the state shall prepare the ROD at Fund-financed state-lead sites.

3. EPA clarifies in § 300.515(e)(2) that EPA must concur in writing with a state-prepared ROD in order for EPA to be deemed to have approved the state's decision.

Name: Whether states should be authorized to select the remedy at NPL sites.

Proposed rule: Although the preamble to the proposed revised NCP did not solicit comments on the appropriateness of authorizing states to select remedies at NPL sites, many commenters submitted comments calling for EPA to authorize states to select remedies at NPL sites, going further than the proposed concurrence concept.

Response to comments: Comments were received from states or state organizations on this topic. Many commenters believed that CERCLA section 104(d)(1) currently allows EPA to authorize states to select the remedy at NPL sites. One commenter argued that the NCP should spell out procedures and criteria used to authorize states to select a remedy under existing CERCLA section 104(d)(1). Another commenter stated that unless states are provided the authority and responsibility to select remedies at NPL sites, states believe that their time and effort is better spent working on non-NPL sites where they are not duplicating effort with EPA. States would be more reluctant to request lead agency designation at an NPL site.

One commenter contended that authorizing states to select remedies is consistent with CERCLA section 104(d)(1). If, however, EPA will not completely authorize states to select remedies, this commenter recommended granting authority to states for sites where remedial actions will cost up to $10 million.

Another commenter stated that the agency making a remedy recommendation or actually selecting the remedy should be a function of which agency conducted the RI/FS at the site.

In response, EPA acknowledges that several states have their own "superfund" programs and is encouraged by their willingness to take on an even greater role in cleaning up sites. EPA believes, however, that it is not appropriate at this time to turn over the final decision-making authority on remedy selection to states. While Congress appeared to contemplate an increased role for states in the remedial process through enactment of CERCLA section 121(f), EPA believes that it should retain primary responsibility for the federal Superfund program. EPA intends, however, that the concurrence process provide a significant and meaningful role for state involvement in the cleanup process. EPA believes that if the state is the lead agency for the RI/FS, it generally should recommend a remedy for EPA's adoption. Further, keeping the final responsibility for remedy selection within EPA (rather than dividing it among the 50 states and EPA) furthers the goal of ensuring consistency among remedies implemented at sites.

EPA notes, however, that for non-Fund-financed state-lead enforcement sites, the state may select the remedy (§ 300.515(e)(2)(ii)), although EPA shall not be deemed to have approved of the remedy absent formal concurrence. In such cases, the state is proceeding under the authority of state law and could take a similar action whether or not the site was the subject of CERCLA action.

Final rule: There is no rule language on this issue.

Name: Section 300.515(f). Enhancement of remedy.

Proposed rule: Section 300.515(f) provided that if a state determined that a proposed Fund-financed remedial action should comply with substantive state standards that EPA has determined are not ARARs, or with state ARARs which EPA has determined

to waive pursuant to CERCLA section 121(d)(4), the state shall fund the entire additional cost associated with compliance with such ARARs. The state may be required to continue the lead for the RD/RA or for the additional requirements if it is a state-lead Fund-financed project or to assume the lead for remedial design and construction, or for the additional requirements only, if the project is federal-lead.

The proposed rule further provided that if a state determines that a Fund-financed remedial action should exceed the scope of the selected remedy, i.e., an enhancement of the selected remedy, the state shall fund the entire additional cost associated with such enhancement. The state may be required to assume the lead for the remedial design and construction of the remedy or only for the state-funded enhancement if that enhancement can be conducted as a separate phase or activity.

The proposed rule also reflected CERCLA section 121(f)(2) which provides that if a state determines that a remedial action under sections 106 and 122 of CERCLA should attain state requirements that EPA and a federal district court have determined need not be met in accordance with criteria in CERCLA section 121(d)(4), the state shall fund, and may be required to undertake, the additional work.

Response to comments: Several commenters questioned the authority of EPA to require states to pay for enhancements or to assume the lead in cleanups when state ARARs are waived or state standards are deemed not to be ARARs. Commenters argued that EPA has no authority under CERCLA to impose these requirements on states, even if a state rejects the EPA-selected remedy in favor of a more extensive cleanup.

In response, as a threshold matter, no state is "required" to seek an enhancement of a remedy selected under CERCLA. The issue is, where a state wishes to enhance or supplement an EPA-selected remedy, under what circumstances may it do so, and who should pay for and supervise the supplemental action. The answers to these questions are complicated, and require a thorough discussion of the situations in which enhancements may be appropriate, and EPA's view on state and federal responsibilities for enhancements.

It is important to note at the outset that states already have significant opportunities during the RI/FS process leading up to remedy selection to suggest to EPA that a proposed remedy should attain certain standards, or that the proposed remedy should be expanded in scope. As explained earlier in this preamble, the states may either act as the lead or support agency for Fund-financed actions (§ 300.500(b)), and have a clear opportunity to identify their potential ARARs—i.e., promulgated state requirements that are more stringent than federal requirements (§ 300.400(g)(4))—early in the process (§ 300.400(g)(1) and (5)). The lead agency will then seek agreement from the support agency on a proposed ROD; certain requirements will then be found to be ARARs, and others may be found not to be ARARs, or to be appropriate for waiver under one of the limited waiver categories set out in § 300.430(f)(1)(ii)(C). The proposed plan will then be issued for public comment, and after consideration of state and public comments, EPA will select the final remedy.

Through this process, EPA hopes to reach agreement with the affected state both on the appropriate scope of the selected remedy, and on those state law standards that should be met. EPA has specifically discussed in this rule a procedure for dispute resolution with the states in order to foster agreement on ARARs (§ 300.525(d)(3) and (4)). Thus, EPA contemplates that in many cases, state ARARs issues, and extent of remedy issues generally, will be resolved during the remedial evaluation and selection process outlined in the NCP. Where such requirements do become part of the EPA-selected remedy, they would be paid for according to the appropriate cost share in CERCLA section 104 (for Fund-financed actions).[25]

Even after the ROD has been signed, the state may ask EPA to make changes in the selected remedy, or to expand the scope of the remedy. If EPA agrees that the state's suggestions are appropriate and necessary to protect human health and the environment, EPA may include the changes in the selected remedy through a ROD amendment or explanation of significant differences (consistent with final rule § 300.435(c)(2)); in the case of a Fund-financed remedy, EPA would share in the costs of the modified or additional activity. If EPA concludes that the state-suggested changes or expansions are not necessary to the selected remedial action, then EPA will not modify the ROD or pay for (or order) the additional action; however, EPA may still decide to allow the additional action to proceed concurrent with the EPA-selected remedy.

Where EPA finds that the proposed change[26] or expansion is not necessary to the EPA-selected remedy, but would not conflict or be inconsistent with it, EPA may agree to integrate the proposed change or expansion into the planned CERCLA remedial work, but only if the state agrees to fund all necessary changes or additions, and to assume the lead for supervising the state-funded component of the remedy (or, if EPA determines that the state-funded component cannot be conducted as a separate phase or activity, for the remedial design and construction of the entire remedy).[27] Although one commenter questioned the propriety of having the state pay for such changes, EPA believes that it is both reasonable and appropriate for the states to pay for and supervise tasks that they have requested and that EPA has not selected as part of its remedy. Placing these responsibilities on states is also consistent with the approach set out by Congress in CERCLA section 121(f)(2)(B), when a state seeks to implement an ARAR that has been waived by EPA.

For example, the state may want the cleanup of ground water to attain water quality levels beyond those required under CERCLA, and thus may wish to maintain a pump-and-treat system longer than deemed necessary in the ROD. Similarly, the state may request additional work that falls outside the scope of the design and construction at the site, such as the extension of a water line outside the Superfund site. Such changes or expansions that would not conflict or be inconsistent with the EPA-selected remedy would generally be accommodated, on the condition that the state fund and supervise the change or expansion. (EPA would provide notice to the public where such accommodations affect the selected remedy.)

However, in cases where EPA concludes that a state-proposed change or expansion would conflict or be inconsistent with the EPA-selected

[25] Where EPA and the state disagree on a remedy selection, a state has the option of withholding its state assurances, thereby preventing the remedy from proceeding as a Fund-financed action (although EPA could initiate an enforcement action), and for EPA enforcement actions, a process is available for states to challenge a decision by EPA to waive an ARAR (CERCLA section 121(f)(2)(B)). These are, however, extreme measures, and EPA's goal is to reach agreement with states through the normal remedy selection process.

[26] These proposed "changes" could include the attainment of a particular state standard that EPA found not to be an ARAR, or waived.

[27] Often the state is the most appropriate entity to take the lead for such combinations of Fund-financed and non-Fund-financed actions because of contracting issues.

remedy, the suggested change should not go forward.

EPA does not believe it would be appropriate to allow the state to proceed with proposed changes to EPA's lawfully selected remedy without EPA approval. Indeed, to do so would be tantamount to giving the states a veto power over EPA remedial action decisions, contrary to Agency policy (discussed earlier in this preamble) that EPA should retain the final authority to select CERCLA remedies. Further, allowing states to go forward with actions inconsistent with those being implemented by EPA would likely result in delays in the cleanup of Superfund sites, and could potentially create unsafe working conditions for remedial action contractors.

Consistent with this discussion, final rule § 300.515(f) has been revised to better reflect the conditions under which state-suggested changes to, or expansions of, EPA-selected remedial actions should go forward.

Finally, as noted above, there is a process provided for in CERCLA section 121(f)(2) for states to seek to require remedial actions secured under CERCLA section 106 to conform to waived ARARs. EPA believes it is appropriate for the final rule simply to reference the procedures set out in the statute, rather than attempt to characterize them. Thus, the final rule on this point has also been changed.

Final rule: Section 300.515(f) is revised as follows:

(f) *Enhancement of remedy.* (1) A state may ask EPA to make changes in or expansions of a remedial action selected under subpart E.

(i) If EPA finds that the proposed change or expansion is necessary and appropriate to the EPA-selected remedial action, the remedy may be modified (consistent with § 300.435(c)(2)) and any additional costs paid as part of the remedial action.

(ii) If EPA finds that the proposed change or expansion is not necessary to the selected remedial action, but would not conflict or be inconsistent with the EPA-selected remedy, EPA may agree to integrate the proposed change or expansion into the planned CERCLA remedial work if:

(A) The state agrees to fund the entire additional cost associated with the change or expansion; and

(B) The state agrees to assume the lead for supervising the state-funded component of the remedy or, if EPA determines that the state-funded component cannot be conducted as a separate phase or activity, for supervising the remedial design and construction of the entire remedy.

(2) Where a state does not concur in a remedial action secured by EPA under CERCLA section 106, and the state desires to have the remedial action conform to an ARAR that has been waived under § 300.430(f)(1)(ii)(C), a state may seek to have that remedial action so conform, in accordance with the procedures set out in CERCLA section 121(f)(2).

Name: Section 300.515(g). State involvement in remedial design/remedial action.

Proposed rule: Proposed § 300.515(g) read that for Fund-financed remedial actions, the lead and support agencies shall conduct a joint inspection to determine that the remedy has been constructed in accordance with the ROD and the remedial design.

Response to comments: Several state commenters contended that the states' interest in cleaning up sites and their participation in 10 percent of the costs of remedial actions demands a much larger role in remedial design/remedial action than just a final joint inspection. Therefore, more detailed and specific language should be provided in the final NCP as it pertains to state role in the implementation of remedial actions. Specific recommendations included that both EPA and a state, regardless of whether the action is EPA or state-lead, should review and comment on the 30, 60, and 95 percent designs, as well as agree on the final design and specifications.

Also, commenters recommended that both parties should discuss significant changes and must consult prior to reopening a ROD. Other suggested areas for EPA and state interaction were bid procurement, review of contract prior to award, construction progress meetings, construction oversight, change order negotiations and approvals above limits specified in the cooperative agreement. One of the commenters stated that while these issues may be addressed in a SMOA, minimum requirements should be specified in the NCP in the absence of a SMOA.

EPA agrees that the state role during remedial design and remedial action is very important. However, rather than specify the minimum requirements for state involvement during remedial design and remedial action in the final rule, the final rule will specify that state/EPA interaction during remedial action will be described in site-specific agreements: either a cooperative agreement or Superfund state contract. This will provide flexibility on a site-by-site basis. The range of responsibilities assumed by states under site-specific agreements or SMOAs is necessarily constrained by the legal limits on delegation of EPA authority, e.g., limitations on delegating enforcement authority.

Final rule: Section 300.515(g) will be retitled as "State involvement in remedial design and remedial action." The following sentence is added to § 300.515(g): "The extent and nature of state involvement during remedial design and remedial action shall be specified in site-specific cooperative agreements or Superfund state contracts, consistent with 40 CFR part 35 subpart O."

Name: Section 300.520(a) and (c). State involvement in EPA-lead enforcement negotiations.

Proposed rule: Section 300.520(a) stated that "EPA shall notify states of response action negotiations to be conducted by EPA with potentially responsible parties during each fiscal year." Section 300.520(c) stated: "The state may be a party to such settlements in which it is a participant in the negotiations."

Response to comments: One comment proposed revising § 300.520(c) so that states may become a party to a settlement whether or not they first participate in the negotiations. Another comment asked that § 300.520(a) be expanded to require EPA to notify states not only that PRP negotiations are going to be held, but where and when. One commenter stated that notice is frequently too late for states to participate meaningfully.

EPA recognizes that there may be circumstances where the state is involved in initial negotiations, decides not to be heavily involved in all sessions, but may want to sign the negotiated decree without modifying it. EPA agrees that the proposed revision would better reflect the statutory intent of CERCLA section 121(f)(1)(F), which requires: "Notice to the state of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the state and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement." However, it is also important to note that while it may be appropriate to allow states to join settlements at any time, EPA may conclude settlement negotiations with PRPs without state concurrence (CERCLA section 121(f)(2)(C)).

Final rule: Proposed § 300.520(c) is revised as follows: "The state is not foreclosed from signing a consent decree if it does not participate substantially in the negotiations."

Name: Dual enforcement standards.

Proposed rule: Subpart F discussed provisions for "substantial and meaningful state involvement" in the cleanup process. The subpart introduces the EPA/state Superfund memorandum of agreement (SMOA), a non-binding agreement between EPA and a state to

define respective governmental roles for state participation in pre-remedial, remedial and enforcement response actions. The SMOA recognized state leadership while preserving EPA review and concurrence powers, and EPA's right to proceed under CERCLA to ensure compliance with section 121 and other provisions of CERCLA. At EPA-lead sites, the state may disagree with EPA's choice of remedy. Section 300.505 described the procedures to develop SMOAs. Section 300.515 outlined state involvement in remedial actions, including a discussion of what options are available when states and EPA disagree on cleanup standards.

Response to comments: EPA received comments stating that the proposed NCP was unclear on whether states have the right to require PRPs to meet more stringent state requirements in addition to CERCLA-specified ARARs for a Fund-financed or an enforcement action. The large number of comments EPA received on this issue reflects a strong concern that dual and potentially conflicting standards will be enforced by EPA and states. EPA acknowledges that this is an area requiring further review and evaluation. EPA believes, however, that mechanisms in the final NCP can be used to minimize the possibility of conflicting standards imposed upon PRPs.

One such mechanism is the SMOA. An important purpose of SMOAs is to establish a working relationship between EPA and a state on coordinating their respective involvement in remedy selection and enforcement strategies at sites throughout that state. Another mechanism is the concurrence process described in the NCP. The degree to which EPA (or another federal agency) and a state can concur on each other's remedies will reduce the need for EPA to take a separate action at a site or for the state to challenge remedies selected by EPA which are covered by CERCLA sections 121(f)(2) or (3). The final NCP places great emphasis on the concurrence process (see § 300.515(e)(2)) and on dispute resolution (see preamble section above) to encourage EPA, other federal agencies and states to resolve differences among them and select the single remedy for a site that will fulfill the objectives and requirements of each agency.

A commenter objected to the statement that EPA silence on a state-lead remedy (selected under state law) cannot be construed as concurrence and that EPA retains the right to proceed with a remedy under CERCLA. In response, EPA may not be an active participant in negotiations between a state and PRPs at state-lead sites but EPA encourages states to notify EPA of such negotiations and seek EPA concurrence on the remedy selected. In the preamble to the proposed NCP, however, EPA cautioned that EPA will not be bound to any decisions made by a state if EPA does not concur on the remedy (see 53 FR 31458). EPA believes that it has a responsibility to bring an action under CERCLA when necessary to protect human health and the environment. EPA intends that the processes established in the final NCP will reduce the need for such action but EPA must maintain its ability to perform statutory mandates.

Other commenters contended that states should not be allowed to contest an EPA-lead remedy if they did not participate in negotiations, and suggested that some mechanism be included in the NCP to require EPA and state participation and concurrence in all remedial action settlements at NPL sites. A similar comment recommended that EPA and states be joint signatories on more settlements. In response, EPA encourages concurrence by both EPA and a state but does not believe that it is necessary to require such concurrence on all settlements or remedies. EPA and states are encouraged to plan ahead and decide on the extent of their involvement in the work necessary to reach settlements and decide on remedies. EPA and the state can also agree that even if one agency is not substantially involved in the work, that agency may still sign or concur on the settlement or the ROD. In fact, § 300.520(c) of the final NCP provides that a state is not foreclosed from signing a consent decree if it does not participate substantially in the negotiations. In addition, a state is not required to participate in settlement negotiations in order to challenge a remedy under CERCLA section 121(f)(2) or (3). EPA believes, however, that involving the state in such negotiations may reduce the circumstances under which a state would resort to a statutory challenge.

Finally, a commenter recommended that the NCP grant states that participate in settlement negotiations for actions taken under CERCLA sections 106 or 122, the right to review, comment on and approve/disapprove work undertaken by PRPs. In response, a state may participate in settlement discussions for actions to be taken under sections 106 or 122. The oversight activities that may be conducted by a state, however, are limited by the extent to which EPA can delegate enforcement responsibilities under CERCLA section 106. States may approve or disapprove work by PRPs when conducting an enforcement action under state law.

Final rule: There is no rule language on this issue.

Subpart G—Trustees for Natural Resources

Section 107(a)(4)(C) of CERCLA imposes liability for the injury, destruction, or loss of a natural resource, including the costs of a natural resources damage assessment, resulting from the release of hazardous substances. Section 107(f)(1) of CERCLA provides that only properly designated federal trustees, authorized representatives of an affected state, or Indian tribes can pursue a section 107(a)(4)(C) action. Clean Water Act (CWA) section 311(f) imposes similar liability for discharges of oil and hazardous substances into navigable waters of the United States.

Pursuant to section 1(c) of Executive Order 12580 (52 FR 2923, January 29, 1987), and in accord with CERCLA section 107(f)(2)(A) and section 311(f) of the Clean Water Act, the Secretaries of Defense, the Interior, Agriculture, Commerce, and Energy are among the agencies that are designated in the NCP as federal trustees for natural resources. Those federal trustees act on behalf of the President in assessing damages to natural resources from discharges of oil or releases of hazardous substances, pollutants, or contaminants. Subpart G outlines the designations of federal trustees under CERCLA. Although the 1986 amendments to CERCLA necessitated few changes to the NCP provisions on natural resources, the major objective for this proposed revision is to make the subpart more readable and understandable to those who are not familiar with trustee agency authorities. Because the primary purpose of this subpart is to list natural resource trustee agency designations so as to ensure prompt notification as required by CERCLA, the proposed changes reflect an overriding concern that trustee jurisdictions be described as accurately as possible.

Section 301(c) of CERCLA requires the promulgation of rules for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or a release of a hazardous substance under CERCLA and the Clean Water Act. Pursuant to Executive Order 12580, section 11(d), the responsibility to promulgate these regulations has been delegated to the Department of the Interior (DOI). DOI has promulgated rules for the

assessment of damages for the injury to, destruction of, or loss of natural resources (see 43 CFR part 11). Parts of those rules were struck down by the U.S. Court of Appeals for the District of Columbia Circuit on July 14, 1989, and remanded to the Department of the Interior for further consideration. See *State of Ohio* v. *U.S. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989), and *State of Colorado* v. *U.S. Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989).

The use of the procedures described in DOI's rule, 43 CFR part 11, is optional. However, the results of an assessment performed in accordance with the DOI rule by a federal or state trustee, or Indian tribe, if reviewed by a federal or state trustee, shall be given the status of a rebuttable presumption in an action to recover damages for injuries to, destruction of, or loss of natural resources. Whether or not the procedures in 43 CFR part 11 are followed, a trustee agency may decide to proceed with a range of information gathering and other trust-related activities.

The following are summaries of comments on the proposed subpart G and EPA's responses.

Name: Section 300.600. Designation of federal trustees.

Existing rule: Section 300.72 of the 1985 NCP designated those federal officials who are to act on behalf of the public as trustees of federal natural resources. It also described the types of resources that the agencies manage and gave examples of the resources that might be under their trusteeship.

Proposed rule: In the proposed rule (renumbered § 300.600), EPA attempted to clarify and define as accurately as possible the federal agencies responsible for specific resources. It did this by delineating in the paragraph headings the federal agency or type of federal agency responsible for natural resources. In addition, EPA proposed to change the narrative to describe in more detail the resources that agencies manage and to give examples of resources that might be under an agency's trusteeship.

The proposed rule designated the Secretary of Commerce as a trustee. The proposed rule also provided that the Secretary shall act with the concurrence of other federal agencies when the resources or authorities of other agencies are involved. The Secretary is, however, a trustee in his own right also, pursuant to various statutory authorities.

The proposed rule also described federal agency jurisdiction over certain natural resources. The 1985 NCP designated the Secretary of Commerce as the trustee for natural resources in or under "waters of the contiguous zone and parts of the high seas * * *." The proposed rule includes under the Secretary's jurisdiction, the natural resources "in or under tidally influenced waters, the waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf * * *."

The proposed rule also deleted the 1985 NCP's (§§ 300.72(a) and (b)) exclusion of lands or resources in or under U.S. waters. This was proposed because federal trusteeship derives primarily from authority to manage or protect affected resources regardless of where these resources are located.

Response to comments: 1. *Territorial sea—definition.* One commenter asked if subparts D and G will be revised to reflect the new definition of "territorial sea" in the January 1989 Presidential Proclamation.

The term "territorial sea" is used in the NCP only in the definition of "contiguous zone." "Territorial sea" is not defined in the NCP but is defined in CERCLA section 101(30) as having the same meaning provided in CWA section 502. This section defines the term "territorial sea" as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." On December 27, 1988, the President issued a Proclamation (No. 5928, 54 FR 777, January 9, 1989) extending the territorial sea of the United States to 12 nautical miles from the baselines of the United States determined in accordance with international law. However, the Presidential Proclamation provides that nothing therein "extends or otherwise alters existing federal or state law or any jurisdiction, rights, legal interests, or obligations derived therefrom * * *." Therefore, the CWA definition of territorial sea has not been revised by this proclamation. Accordingly, EPA believes that it is unnecessary to change the use of territorial sea in the NCP.

2. *Trustees' authority.* One commenter stated that trustee actions are authorized by CERCLA, but no specific responsibilities are delineated. The commenter stated that the main purpose of subpart G is to indicate the responsibilities of trustees, not to be a "plan" or other listing of their activities. However, one commenter recognized the merit of including in subpart G *examples* of the kinds of activities that OSC/RPMs and others could expect of trustees. The commenter thought that the purpose of the subpart was not clearly understood in the preamble and should be clarified.

Another commenter asserted that proposed § 300.600(b) could be construed as limiting trustees' activities to enumerated activities, and should be clarified, since trustees have many additional authorities other than those enumerated in that section.

The purpose of subpart G is not to be an exclusive listing of the responsibilities of natural resource trustees, but to better inform the public of natural resource trustee designations. Proposed § 300.615 outlines some responsibilities of all trustees in general and federal trustees in particular. However, those responsibilities listed are not exclusive. Proposed § 300.615(e) lists some actions which may be taken by any trustee. Those actions are described as including but not being limited to certain enumerated actions. Nowhere in the preamble to the proposed rule or in the proposed rule itself is the suggestion that the listed activities are the only activities which trustees may take. Trustees may act pursuant to any other authority they have besides the NCP. However, to clarify the issue, EPA has changed the final rule language in the introduction to § 300.615(c) to read "Upon notification or discovery of injury to, destruction of, loss of, or threat to natural resources, trustees may, pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act, take the following or other actions as appropriate:". The addition of "take the following or other actions as appropriate" is intended to highlight that the enumerated actions are not the only actions a trustee might take under CERCLA or the Clean Water Act, but are only examples of actions a trustee might take. EPA has also revised the final rule language in the introduction to § 300.615(e) to clarify that the trustee is acting pursuant to the Clean Water Act and CERCLA. The clarification is intended to highlight that trustees may also act pursuant to whatever authority they have and that the examples of responsibilities listed stem only from CERCLA and the Clean Water Act. EPA has also revised the introduction to § 300.615(d) to specify that the trustees' authority includes, but is not limited to the enumerated actions.

As to the comment concerning § 300.600(b), EPA believes that nothing in that proposed or final section limits the trustees' authority to act in the proper circumstances. The section does not enumerate all the activities which the trustees may undertake, it merely describes situations under which they may act pursuant to CERCLA and the

Clean Water Act. Those situations are when "there is injury to, destruction of, loss of, or threat to natural resources as a result of a release of a hazardous substance or a discharge of oil." However, to clarify that the rule does not limit trustees to act under other authorities, EPA is changing the rule language in § 300.600(b) to read that trustees are authorized to act "pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act" in the listed instances.

3. *Authority of Secretary of Commerce.* One commenter believed that proposed § 300.600(b)(1) implied that the Secretary of Commerce acts on behalf of other federal agencies with authorities to manage or protect natural resources in coastal or marine areas but has no management or protection authorities himself and suggested that the rule language be changed to reflect that the Secretary is a trustee in his own right.

Another commenter questioned whether the requirement in § 300.600(b)(1) that the Secretary of Commerce (through NOAA) obtain the concurrence of other federal agencies before it acts is lawful. The commenter noted that this is particularly important where a federal agency may be a PRP, and may have the incentive to diminish the actions of the Department of Commerce and therefore reduce its potential liability. The commenter urged that the "concurrence" requirement be dropped.

Certain natural resources (e.g., within coastal and marine areas) are indeed under the jurisdiction of the Department of Commerce. EPA has clarified final § 300.600(b)(1) to read: "*Secretary of Commerce.* The Secretary of Commerce shall act as trustee for natural resources managed or protected by the Department of Commerce or by other federal agencies and that are found in or under waters navigable by deep draft vessels, * * * (remainder as proposed)."

Specific natural resources in areas under the trusteeship of DOC may also be managed or protected under statutes administered by other federal agencies. Therefore, it is appropriate that the Secretary of Commerce shall, whenever practicable, seek the concurrence of the other agency when there is overlapping jurisdiction. Such concurrence is not required by law, however, and therefore, EPA will revise § 300.600(b)(1) to eliminate the requirement of mandatory concurrence of another federal agency before the Secretary of Commerce takes an action with respect to an affected resource under the management or protection of that agency. Instead the revised rule provides that the Secretary of Commerce shall, whenever practicable, seek such concurrence.

Final rule: EPA is revising proposed § 300.600 as follows:

1. EPA is revising the introduction to § 300.600(b) to make it clear that trustees are authorized to act "pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act" given the listed circumstances. Trustees may also act pursuant to whatever other authority they may possess.

2. Section 300.600(b)(1) is being revised to clarify that some natural resources are managed or protected by the Secretary of Commerce. It is being further revised to eliminate the requirement of concurrence of another federal agency before the Secretary of Commerce acts with respect to an affected natural resource under the management or protection of the other federal agency. Concurrence of the other federal agency shall be sought whenever practicable, pursuant to the revised rule.

Name: Section 300.610. Indian tribes as trustees for natural resources under CERCLA.

Proposed rule: For purposes of a release or threatened release of a hazardous substance which causes the incurrence of response costs, the 1986 amendments to CERCLA provide that an Indian tribe may bring an action for injury to, destruction of, or loss of natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a restriction on alienation. The proposed rule provided that the tribal chairmen (or heads of the governing bodies), or other person designated by tribal officials, are trustees for those natural resources. The proposed rule provided that the tribe, if it designated a person other than the chairman (or head of the tribal governing body), notify the President of the trustee designation. The tribal trustee would have similar responsibilities to state and federal trustees under the proposed rule.

Response to comments: 1. *Notification—timeliness of notice.* A commenter noted that tribal resources, either on or off-reservation, may be affected by off-reservation Superfund sites. The commenter suggested that the NCP should clearly state that tribal natural resources trustees must be notified when a tribe's resources are injured by an oil discharge or a release of hazardous substances because early and proper notice will help Indian tribes protect their limited resource base by assuring timely assessments and maximum protective efforts.

EPA realizes that tribal resources, like other natural resources, may be affected by off-reservation Superfund sites. Pursuant to § 300.615(b), trustees are responsible for designating to the Regional Response Teams (RRTs), for inclusion in the Regional Contingency Plan, appropriate contacts to receive notifications from the on-scene coordinators (OSCs)/remedial project managers (RPMs) of potential damages to natural resources. Therefore, under the final rule, if tribal trustees (or the Secretary of the Interior, as appropriate) have notified the RRT of an appropriate contact, they will likely receive the early notification they seek.

2. *Trustee designation.* A commenter wanted EPA to contact affected tribes to determine who will serve as tribal trustee for Superfund activities. The final rule provides that the tribal chairmen (or heads of the governing bodies) of Indian tribes, or a person designated by tribal officials to act on behalf of Indian tribes are natural resources trustees for certain categories of natural resources. For other categories of resources, the Secretary of the Interior continues to function as trustee.

Normally the tribal chairman (or head of the governing body of the tribe) will be the natural resource trustee. However, tribal officials may choose to designate another person as trustee. When those officials designate another person as trustee, the final rule provides that the tribal chairman or heads of the tribal governing bodies notify the President of the trustee designation. EPA in the past has contacted states to learn of state trustee designations and will contact federally recognized Indian tribes to learn of tribal trustee designations.

In contrast to CERCLA, under CWA section 311, Indian tribes are not trustees and thus may not bring actions for injury to natural resources pursuant to that Act. For purposes of the Clean Water Act and for certain circumstances under CERCLA, where the United States continues to act as trustee on behalf of an Indian tribe, the Secretary of the Interior will function as trustee of those natural resources for which the Indian tribe would otherwise act as trustee. Therefore, § 300.610 is being revised to eliminate the reference to authority to act of an Indian tribe when there is a discharge of oil.

3. *Tribal resources.* A commenter thought that the proposed rule failed to recognize the scope of tribal resources, e.g., hunting, fishing, and water rights.

EPA's description of natural resources in proposed § 300.600 was not intended to be an exclusive list, but only to give some examples of natural resources. It would be impossible to list every type of natural resource. CERCLA section 101(16) defines "natural resources" as including land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to the federal government, a state, or local government, or an Indian tribe, or if such resources are subject to a trust restriction on alienation, to any member of an Indian tribe.

As to the commenter's specific concern about hunting, fishing, and water rights, EPA believes that those rights are not themselves natural resources. The game to be hunted, the fish to be caught, and the water to be used are the resources, not the rights to those resources. Therefore, no change to rule language is necessary.

4. *Natural resource damage assessments.* One commenter suggested that the language in the preamble to the proposed rule (at 53 FR 51460) stating that a natural resource damage assessment performed by an Indian tribe, when reviewed by federal or state natural resource trustees, will be allowed the rebuttable presumption, should be changed.[28] The commenter suggested that the language should be changed to reflect that damage assessments performed by Indian tribes jointly with federal or state natural resource trustees would qualify for the rebuttable presumption. The commenter noted that similar language is found in the preamble to the natural resource damage assessment regulations at 53 FR 5168 (February 22, 1988).

EPA agrees with the commenter. When federal and state trustees and Indian tribes work closely together on assessments, such assessments may qualify for a rebuttable presumption.

Final rule: Proposed § 300.610 is revised as follows:

1. The second sentence is revised to read: "When the tribal chairman or head of the tribal governing body designates another person as trustee, the tribal chairman or head of the tribal governing body shall notify the President of such designation."

2. The last sentence is revised to read: "Such officials are authorized to act when there is injury to, destruction of, loss of, or threat to natural resources as a result of a release of a hazardous substance."

Name: Section 300.615. Responsibilities of trustees.

Proposed rule: The proposed rule reorganized and substantively changed § 300.74 of the 1985 NCP. It sought to provide better information on the actions trustees may take to carry out their responsibilities. The proposed rule required cooperation and coordination when there are multiple trustees because of coexisting or contiguous natural resources or concurrent jurisdiction. It also described the responsibilities of all trustees in general, and of federal trustees in particular. Finally, in accord with the amendment of CERCLA, the proposed rule deleted the option of pursuing claims against the Fund for natural resource damage assessment and restoration of natural resources.

Response to comments: 1. *Coordination— a. Multiple trustees.* One commenter suggested that the final rule should discuss "lead trustee" designation and exactly what responsibilities and authority the lead trustee has for the coordination of assessment activities by multiple trustees. Another commenter asked if three-party agreements among the appropriate federal agency, the Indian tribe, and the state will be available in promoting cooperation.

EPA believes that it is important that only one person (i.e., the lead agency OSC or RPM) manage activities at the site of a release or potential release. When there are multiple trustees, EPA recommends that a lead authorized official be designated to coordinate all aspects of the natural resource damage assessment, investigation, and planning, including federal trustees' participation in negotiations with PRPs as provided under CERCLA section 122(j)(1). This coordination is designed to ensure efficient response actions and avoid duplication of efforts.

An *authorized official* is a federal or state official to whom is delegated the authority to act on behalf of the federal or state agency designated as trustee, or an official designated by an Indian tribe, to perform a natural resource damage assessment. (See the Department of the Interior natural resource damage assessment rules at 43 CFR 11.14(d).) A *lead authorized official* is a federal or state official authorized to act on behalf of all federal or state agencies, or an official designated by multiple tribes when there are multiple tribes, affected because of coexisting or contiguous natural resources or concurrent jurisdiction (43 CFR 11.14(w)). The DOI damage assessment rules encourage the cooperation and coordination of assessments that involve multiple trustees because of coexisting or contiguous natural resources or concurrent jurisdiction. The DOI regulations also contain examples of a lead authorized official's responsibilities in a damage assessment. He acts as coordinator and contact regarding all aspects of the assessments and acts as final arbitrator of disputes if consensus among the trustees cannot be reached regarding the development, implementation or any other aspect of the Assessment Plan. The lead authorized official is designated by mutual agreement of all the natural resource trustees. Pursuant to the damage assessment regulations (at 43 CFR 11.32(a)(1)(ii)(A)–(D)), if consensus cannot be reached on a lead authorized official: (1) When the natural resources being assessed are located on lands or waters subject to the administrative jurisdiction of a federal agency, a designated official of the federal agency shall act as the lead official; (2) when the natural resources being assessed are located on lands or waters of an Indian tribe, an official designated by the Indian tribe shall act as the lead official; and (3) for all other natural resources for which a state may assert trusteeship, a designated official of the state agency shall act as lead official.

The final rule suggests that where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out their responsibilities as trustees. EPA has substituted the words "should coordinate and cooperate" for the words "shall coordinate and cooperate" in final § 300.615(a). EPA has made this change because one trustee cannot compel another trustee to coordinate and cooperate in carrying out trust responsibilities, no matter how desirable that coordination and cooperation might be. However, EPA wishes to encourage such coordination.

Three-party agreements are not excluded by the NCP. Therefore, coordination and cooperation may include three-party agreements if necessary to facilitate the responsibilities of the trustees.

b. *Investigations.* One commenter suggested that biological assessment groups or technical assistance groups formed in various EPA regions provide a model for coordination that could be

[28] Section 107(f)(2)(C) of CERCLA provides that any determination or assessment of damages for purposes of CERCLA or section 311 of the Clean Water Act has the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under CERCLA or section 311 of the Clean Water Act if made by a federal or state trustee in accordance with the regulations promulgated under CERCLA section 301(c).

valuable nationwide, and the preamble might include mention of these as mechanisms to implement CERCLA section 104(b)(2).

Regional planning and coordination of preparedness and response actions is accomplished through the Regional Response Team (RRT). Such coordination may include biological assessment groups or other technical groups. Several EPA regional offices already include biological and technical assistance groups. Typically the groups are comprised of representatives from the Department of the Interior, U.S. Fish and Wildlife Service, the Department of Commerce (NOAA), and state departments of environmental conservation under the direction of an EPA chairman.

c. *Mandatory coordination.* One commenter suggested that language in proposed §§ 300.615(c), 300.410(g), and 300.430(b)(7) should be changed to delete the words "as appropriate" referring to coordination of trustees' efforts. This language should be strengthened to be consistent with CERCLA section 104(b)(2). Such coordination would minimize duplicative efforts and costs in natural resource damage assessments and RI/FSs, and would lead to more settlements under section 122(j).

Section 104(b)(2) of CERCLA provides that the "[P]resident shall * * * seek to coordinate the assessments, investigations, and planning under this section with such federal and state trustees." EPA agrees that in most places in the final rule the term "as appropriate" is not necessary. The term is not in section 104(b)(2) and is not needed to implement that section. EPA will eliminate the term "as appropriate" from §§ 300.410(g) and 300.430(b)(7), as the commenter requested, as well as in §§ 300.135(j) and 300.305(d). However, EPA will retain the term "as appropriate" in § 300.615(c). That section discusses the types of actions which a trustee may take under CERCLA. The trustee may have already taken the action or the action may not be necessary or desirable. Therefore, it is necessary to retain the term "as appropriate" in that section.

EPA has also revised § 300.315(c) to require the OSC to make available to the trustee information and documentation that can assist the trustee in determination of actual or potential natural resource injury from oil discharges. EPA has added the following sentence to the end of § 300.315(c): "The OSC shall make available to the trustees of the affected natural resources information and documentation that can assist the trustee in the determination of actual or potential natural resource injuries." EPA has revised § 300.315(c) to facilitate coordination between the OSC and the trustee, and to make the provision on oil discharges consistent with the provision on release of hazardous substances (see § 300.160(a)(3)).

As an editorial change, EPA is also adding the words "the trustee" in § 300.160(a)(3), so that it reads: "The lead agency shall make available to the trustees of affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries." The addition of the words "the trustees" does not substantively change the meaning of the section, but emphasizes that the trustees make the determination of injury to natural resources.

2. *Notification—a. Criteria.* A commenter suggested that the section on trustees should also provide criteria for notifying them.

CERCLA section 104(b)(2) and final NCP § 300.615(c) provide criteria for notification of trustees. The statute requires the President to promptly notify appropriate federal and state natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to section 104(b). Pursuant to § 300.135(c) of the final rule, the OSC/RPM shall collect pertinent facts about the release, including the potential impact on natural resources. This information is in turn used to comply with § 300.135(j) and (k).

b. *Not dependent on OSC/RPM.* One commenter noted that natural resource trustee notification should not be dependent upon a decision by the OSC/RPM as to whether resources are affected by the release. The federal and state trustee agencies should be notified of the release; trustee agencies have both the expertise to determine the likelihood of injury to their resources and the responsibility for making the determination. The commenter suggested that this issue should be clarified in the preamble to the final rule by incorporating the following language: "The OSC or lead agency is responsible for ensuring that state and federal trustees are notified promptly of natural resources that may be exposed to, may be at risk from, or may be injured by discharges or releases."

EPA agrees that natural resource trustee notification should not be dependent upon a decision by the OSC/RPM as to whether resources are affected by the release. EPA also agrees that the lead trustee should make the determination of whether resources under its jurisdiction are affected. The final rule is unchanged in this regard because EPA believes that the final rule § 300.135(j) and (k) adequately address the commenter's concern.

c. *Duty to notify mandatory.* One commenter argued that "as appropriate" or other phrases qualifying either the responsibility to notify, or the timing of notification, incorrectly lead OSCs and RPMs to view trustee notification as discretionary. The commenter suggested that language in the preamble briefly explain the intent or limitations of "as appropriate" or similar qualifying phrases, such as is done for those same phrases in the preamble of subpart J on dispersants, to make it clear that the intent of the NCP provision is that trustees be notified.

EPA agrees that the OSC/RPM has the mandatory duty to notify the trustee of discharges or releases that are injuring or may injure natural resources under a trustee's jurisdiction. Final § 300.135(j) codifies this requirement. The phrase "as appropriate" has been deleted from the second sentence of § 300.135(j). EPA also inadvertently omitted necessary language and included unnecessary language in the second sentence in proposed § 300.135(j). Therefore, EPA has revised that sentence to read: "The OSC or RPM shall seek to coordinate all response activities with natural resource trustees." The words "seek to" coordinate were added to track the language of section 104(b)(2). The words "* * * should consult with the natural resources trustee in determining such effects and * * *" were deleted from the second sentence because those words may have implied that the OSC had a role in determining whether there was injury or potential injury to natural resources, when in fact that is a sole determination of the trustee.

3. *Damage assessments—a. Qualifications of assessor.* One commenter suggested that pursuant to § 300.615(c)(4), EPA should identify the qualifications that must be demonstrated for an individual to assess damages following 43 CFR part 11.

The qualifications that must be demonstrated for an individual to assess damages are determined by the trustee. The Department of the Interior regulations specify how to conduct a damage assessment in order to qualify for the rebuttable presumption, but the qualifications of the person conducting that assessment is a question for each trustee to determine according to the needs of the trustee for the injured resources in question.

b. *Negotiations.* One commenter suggested that the following language,

which is similar to DOI's natural resource damage assessment rules, be included in § 300.615: "State and federal trustees are not required to conduct a natural resource damage assessment to effectively participate in settlement negotiations. State and federal trustees need not conduct a natural resource damage assessment in order to agree to a covenant not to sue for natural resource damages."

The preamble to the DOI regulations (at 53 FR 5169, February 22, 1988) concerning natural resource damage assessments contains language noting that it is not necessary to conduct a damage assessment in order to effectively participate in settlement negotiations. EPA agrees with the DOI position and further believes that such an assessment is not a prerequisite to a covenant not to sue. Therefore, since the preamble to the DOI regulations provides the requested change already no change to the NCP rule language is necessary.

c. *Duty to perform.* A commenter felt that the statements in the subpart that the federal trustees "will" or "may" act pursuant to CERCLA section 107 and Clean Water Act (CWA) section 311(f)(5) attempt to water down the direct statutory command in those provisions that the trustees "shall" assess damages and carry out other trusteeship obligations. Another commenter suggested that the language in §§ 300.600(a) and 300.615(c) that is discretionary or unclear should be changed to state that the trustees "shall" carry out their duties established in CERCLA section 107(f) and CWA section 311(f)(5).

Section 107(f)(2)(A) confers authority on federal trustees to "act on behalf of the public as trustees for natural resources under this Act and under section 311" of the Clean Water Act and to "assess damages" for federal natural resource injury, destruction or loss for purposes of CERCLA and section 311 of the Clean Water Act. Neither CERCLA nor the Clean Water Act require trustees to perform any other function. Other actions which the trustees may perform pursuant to CERCLA and the Clean Water Act are discretionary, to be performed as necessary on a case-specific basis.

The language in CERCLA section 107(f) and section 311(f)(5) of the Clean Water Act providing that the trustee "shall" act as trustee or "shall" assess damages does not require action by the trustee. Such language merely means that the trustee or his delegee are the only persons authorized to act as trustees or to assess damages. Performance of the functions of a trustee is discretionary under CERCLA and the Clean Water Act, based on case-specific circumstances. Therefore, final § 300.615(c)(3) provides that trustees "may, pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act, take the following or other actions as appropriate", including carrying out damage assessments. And as noted earlier, a trustee may choose to act under other authority in addition to sections 107 and 311.

d. *Coordination.* A commenter urged EPA to insert additional language that encourages the lead agency to coordinate cleanup levels with natural resource damage assessments to the greatest extent possible.

EPA has already done much of what the commenter asks in § 300.430(b)(7) (proposed as § 300.430(b)(6)). Pursuant to that section the lead agency shall, if natural resources are or may be injured by the release, ensure that state and federal trustees are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The subsection further requires the lead agency to seek to coordinate necessary assessments, evaluations, investigations, and planning with state and federal trustees. As to coordination of cleanup levels, EPA believes that the decision as to whether selected cleanup levels satisfy natural resource trustee concerns is a decision for the trustee to make.

4. *Funding.* A commenter suggested that EPA, consistent with legal obligations, should construe sections 111(b)(2)(B) and 517(c) of SARA to allow funding of natural resource damage assessments. The commenter urged EPA to seek amendment of section 517, if it is not possible to provide funding under current law. The commenter also noted that many states cannot carry out this responsibility without financial support from the Fund.

Section 517(c) of SARA prohibits expenditures from the Fund to pay trustees' claims for natural resources damage assessment and restoration of natural resources. The SARA conference report states, "[T]he conference agreement follows the House bill in deleting natural resource damage and assessment claims as a Superfund expenditure purpose." H.R. 99-962, 99th Congress, 2d Session, at 321 (October 3, 1986).

As to the commenter's request that EPA seek amendment of SARA to permit funding of natural resource damage assessments, EPA does not take positions on proposed amendments to statutes in rulemaking proceedings.

5. *Federal trustees—covenant not to sue.* A commenter asserted that while the preamble to the proposed rule mentions that the OSC/RPMs "shall coordinate the federal trustees' participation in negotiations with PRPs as provided under section 122(j)(1)" (53 FR 51461), the proposed rule does not reflect the language in section 122(j)(1). The commenter suggested that a new provision be included in § 300.615 to provide for: (1) Notification to trustees by OSC/RPMs of negotiations with PRPs, and (2) covenants not to sue for damages to natural resources under the trusteeship of a federal trustee. The commenter asserted that the proposed NCP does not cover section 122 settlement provisions, but that consideration should be given to including the requirement in section 122(j) regarding federal natural resource trustee notification of proposed settlements with PRPs. The commenter added that early decisions as to the nature and amount of involvement must be made on the basis of available information, and that late notification and involvement may interfere with the ability to pursue natural resource trust authorities under CERCLA.

CERCLA section 122(j)(1) provides that "[W]here a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations." The final rule (§ 300.615(d)(2)) already provides for trustee participation in negotiations between the United States and PRPs to obtain PRP-financed or PRP-conducted assessments and restorations for injured resources or protection for threatened resources. The final rule is consistent with statutory requirements in CERCLA section 122(j).

The authority of the federal trustees contained in proposed and final NCP § 300.615(d)(2) to negotiate with a PRP already includes discretionary authority to agree to a covenant not to sue for natural resource damages. However, to clarify that authority EPA will revise § 300.615(d)(2) to read that federal trustees have authority to agree to covenants not to sue, as appropriate. CERCLA section 122(j)(2) provides for such discretionary covenants if the PRP agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by the release or threatened release of hazardous substances.

6. *States.* A commenter suggested that the lead agency should have the responsibility for notifying state trustees of negotiations with PRPs, and encouraging state trustees to participate in settlement negotiations. The commenter suggested that § 300.615(c) should be revised to acknowledge that state trustees may participate in negotiations as well.

Section 300.520 of the NCP implements CERCLA section 121(f)(1)(F). Section 300.520(a) of the NCP already requires EPA to notify states of response action negotiations to be conducted by EPA with PRPs during each fiscal year. After notification, the state then has the responsibility to notify its trustees of such negotiations and to encourage their participation. Pursuant to § 300.520(b), the state, in turn, must notify EPA of such negotiations in which it intends to participate. Finally, pursuant to § 300.520(c), the state may be a party to such settlements. Given the foregoing provisions, EPA believes the recommended rule change is not necessary.

7. *Damages.* A commenter suggested that the word "damage" should be changed to "injury" when referring to "damage" to natural resources. While the relevant statutes and regulations use the terms "damages" and "injury" in different contexts, EPA uses the terms as follows for purposes of the NCP. "Damages" means the amount of money sought by the natural resource trustees as compensation for injury to, destruction of, or loss of natural resources, as set forth in section 107(a) or 111(b) of CERCLA. Pursuant to CERCLA section 107(a), damages also include the reasonable costs of assessing injury, destruction or loss of natural resources. "Injury" means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or the release of a hazardous substance. "Injury" encompasses injury, destruction, or loss of natural resources.

Final rule: Proposed §§ 300.615, 300.135(j), 300.160(a)(3), 300.305(d), 300.315(c), 300.410(g) and 300.430(b)(7) are revised as follows:

1. Section 300.615(a) has been revised to read: "Where there are multiple trustees * * * they should coordinate and cooperate in carrying out these responsibilities."

2. In final § 300.615(b), the word "damages" has been changed to "injuries."

3. The introduction to § 300.615(c) has been changed to read as follows: "Upon notification * * * trustees may * * * pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act take the following or other actions as appropriate: * * *."

4. The introduction to § 300.615(d) is revised to read: "The authority of federal trustees includes, but is not limited to the following actions: * * *."

5. Section 300.615(d)(2) has been revised to read: "Participate in negotiations * * * threatened resources and to agree to covenants not to sue, where appropriate."

6. The introduction to § 300.615(e) has been revised to read: "Actions which may be taken by any trustee pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act include, but are not limited to, any of the following: * * *."

7. Sections 300.135(j), 300.305(d), 300.410(g) and 300.430(b)(7) are revised to delete the phrase "as appropriate" and to state that "the OSC or RPM shall seek to coordinate all response activities with the natural resource trustees."

8. A new sentence is added to the end of § 300.315(c) on OSCs making information available to trustees.

9. The word "trustees" is added to § 300.160(a)(3).

Subpart H—Participation by Other Persons

The focus of this subpart is on those authorities of CERCLA that allow persons other than governments to respond to releases and to recover those response costs. Although this subpart is new, it revises and consolidates provisions from current NCP § 300.25 on Nongovernment Participation and § 300.71 on Other Party Responses into one place in the NCP. Subpart H also incorporates the new authorities from CERCLA, as amended, which address participation by other persons. The following discusses comments received on the proposed Subpart H and EPA's responses.

Name: Section 300.700(c). Consistent with the NCP.

Proposed rule: The proposed section revised and consolidated provisions from the 1985 NCP (§§ 300.25 and 300.71). The proposed section provided that any person may undertake a response action to reduce or eliminate a release of a hazardous substance. It also set out a list of those NCP provisions for which compliance would be required in order for a response action by "other persons" (i.e., persons who are not the federal government, a state, or an Indian tribe) to be considered "consistent with the NCP" for purposes of cost recovery actions under CERCLA section 107.

Response to comments: 1. *Substantial compliance.* EPA received diverse comments on its proposal to set out requirements that must be met by private parties in order for their actions to be "consistent with the NCP" for the purposes of cost recovery under CERCLA section 107. Some commenters approved of the list of requirements, noting that such a list affords parties some certainty as to what type of response actions will qualify for cost recovery under section 107; indeed, commenters suggested that they would not undertake cost recovery actions if they did not have clear guidance on what constitutes "consistency with the NCP."

On the other hand, an even greater number of commenters objected to EPA's proposal to define "consistency with the NCP" as a long list of largely procedural requirements, and urged EPA not to address the issue. A large number of commenters expressed the concern that defendants in private cost recovery litigation will seize on EPA's list as the definitive criteria for evaluating consistency with the NCP, and search for even minor discrepancies between a private party's actions and the criteria in an effort to block a cost recovery action. The effect will be to discourage private party cleanups. They request that EPA leave the question of "consistency with the NCP" to case-by-case adjudication in the federal courts. However, assuming the NCP does address this issue, they suggested that the rule should be clear that all of the listed elements of NCP consistency need not necessarily be met in a given case, and that substantial compliance with a given element is sufficient.

Several other commenters argued that EPA's criteria do not belong in the NCP as binding rules. A more appropriate forum is a non-binding guidance document, which can be applied to the facts of a particular action. Another commenter suggested that "consistency with the NCP" does not require the replication of the entire governmental cleanup process. Activities that contribute to an effective response action should qualify for reimbursement, even if they do not follow precisely each of the requirements listed in subpart H or do not result in a complete cleanup.

In response, EPA is sympathetic to the perspectives expressed in the comments. EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the

parties that are liable for the contamination. At the same time, EPA believes it is important to establish a standard against which to measure cleanups that qualify for cost recovery under CERCLA, so that only CERCLA-quality cleanups are encouraged. EPA has attempted to accomplish both of these somewhat divergent goals.

EPA has continued the tradition of identifying the universe of requirements which are potentially relevant to private party actions (this would not include requirements that apply to intergovernmental consultation, the waiver of applicable requirements of other laws, and other provisions that are not appropriate for consideration by private parties).[29] However, EPA agrees with commenters that this list should not be construed as a fixed list of requirements that must be met in order for a party to qualify for cost recovery under CERCLA section 107(a)(4)(B). Thus, in the final rule (§ 300.700(c)(3)), strict compliance with that list of NCP provisions is not required in order to be "consistent with the NCP"; the list is provided in § 300.700(c)(5)-(7) as guidance to private parties on those requirements that may be pertinent to a particular site.

Instead, in evaluating whether or not a private party should be entitled to cost recovery under CERCLA section 107(a)(4)(B), EPA believes that "consistency with the NCP" should be measured by whether the private party cleanup has, when evaluated as a whole, achieved "substantial compliance" with potentially applicable requirements, and resulted in a CERCLA-quality cleanup. (CERCLA section 107(a)(4)(B) requires that the private party also show that the costs incurred were "necessary" cleanup costs.)

EPA believes that this formulation achieves two critical goals. First, it responds to commenters' concerns that rigid adherence to a detailed set of procedures should not be required in order to recover costs under CERCLA for private party cleanups. In addition, the approach taken today protects EPA's interest in ensuring that the benefit of a right of action under CERCLA section 107(a)(4)(B) should only be available for environmentally sound cleanups consistent with CERCLA requirements; in essence, the more lenient "substantial compliance" test should not be an invitation to perform low quality cleanups.

In order to achieve a "CERCLA-quality cleanup," the action must satisfy the three basic remedy selection requirements of CERCLA section 121(b)(1)—i.e., the remedial action must be "protective of human health and the environment," utilize "permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable," and be "cost-effective"—attain applicable and relevant and appropriate requirements (ARARs)(CERCLA section 121(d)(4)), and provide for meaningful public participation (section 117). EPA believes that these statutory requirements are necessary to the achievement of a CERCLA-quality cleanup. (Although public participation is not an explicit requirement in section 121 on remedy selection, EPA believes that it is integral to ensuring the proper completion part of any CERCLA cleanup action, as discussed below.) These requirements are not new additions from the proposed rule. Under the proposal, private parties were required to strictly comply with the detailed provisions of the NCP, including provisions codifying these statutory mandates (see final rule § 300.430(f)(1)(ii)(A) (protectiveness), (B) (ARARs), (D) (cost-effectiveness), (E) (permanence/treatment), and § 300.430(f)(3) (public participation)). EPA has simply issued a substantial compliance test while at the same time identifying several requirements that must be met in order to achieve substantial compliance.

EPA's decision to require only "substantial" compliance with potentially applicable requirements is based, in large part, on the recognition that providing a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action. For example, EPA does not believe that the failure of a private party to provide a public hearing should serve to defeat a cost recovery action if the public was afforded an ample opportunity for comment. A substantial compliance test is appropriate as well in light of the difficulty of judging which potentially relevant NCP provisions must be met in any given case. For example, in most cases, a full range of alternative remedial options should be analyzed in detail as part of the feasibility study ("FS"), yet in appropriate cases, a "focused" FS—under which fewer alternative options would be studied—may be performed, consistent with the NCP (see § 300.430(e)(1)). EPA also recognizes that private parties generally will have limited experience in performing cleanups under the NCP, and thus may be unfamiliar with the detailed practices and procedures in this rather long and complex rule; an omission based on lack of experience with the Superfund program should not be grounds for defeating an otherwise valid cost recovery action, assuming the omission does not affect the quality of the cleanup.[30]

The decision to define a substantial compliance standard for private party cost recovery actions under CERCLA section 107(a)(4)(B) is within EPA's discretion. CERCLA section 107(a)(4)(B) provides that private persons may recover only those costs "incurred * * * consistent with the NCP," and section 105(c) provides that the President shall promulgate and revise the NCP; thus, the statute directs the President to establish requirements for private cost recovery actions. In exercising that authority, EPA could have taken several different approaches in the NCP: Establish identical requirements for private and governmental actions; establish a subset of NCP provisions with which private party cleanups must comply; or alternatively, set a general standard of compliance (e.g., "substantial compliance") with certain requirements for private party cleanups. In response to comments, EPA has today elected to pursue the third option.

EPA attempted to identify those NCP provisions with which compliance would not be necessary to meet the "substantial compliance" test, but concluded that a hard line cannot be drawn on these questions, given the considerable variability in types of response actions, potential ARARs, communities, etc. EPA found that what may be a significant deviation from procedures under one set of circumstances may be less serious in another (for example, some types of contaminants may be susceptible to only a limited number of remedial technologies, resulting in a more limited

[29] There are a number of NCP requirements that do not make sense for private parties, such as the requirements for state assurances (§ 300.510), or other provisions related to use of the Fund; similarly, there are self-imposed restrictions on governmental action that are not relevant to private actions, such as the requirement that a site be listed on the NPL before Fund-financed remedial action may be taken (§ 300.425(b)(1)).

[30] EPA does not believe that this substantial compliance standard will lead to low quality cleanups, especially in light of the express requirement for a "CERCLA-quality cleanup." However, it should be noted that even where a site has been cleaned up "consistent with the NCP," EPA has the authority under CERCLA to take appropriate action at the site should future releases be discovered or future conditions so warrant. See CERCLA sections 104(a)(1), 105(e), 121(c) and 122(f).

analysis of alternatives, and some communities may express no interest in a site, resulting in fewer public meetings). Thus, this determination is best left to the courts for a case-by-case determination. A private party can, of course, eliminate any risk or uncertainty by meeting the full set of requirements identified by EPA as potentially relevant to private actions (see § 300.700(c)(5)–(7)).

2. *Not inconsistent with the NCP.* One commenter asked why § 300.700(c) retains the language "not inconsistent with the NCP" when EPA attempted to revise this language elsewhere. Other commenters opposed EPA's proposal to delete the requirement in the current NCP (§ 300.71(a)(2)) that government response actions must comply with the same list of NCP provisions as private parties in order to be "not inconsistent with the NCP." They argued that private party "consistency" requirements should be streamlined and apply to both private parties and governmental entities. Another commenter suggested that a section in the NCP on the meaning of the phrase "not inconsistent with the NCP," would offer significant clarification on what constitutes CERCLA responses and lead to the most effective use of limited federal funds at all sites. Several commenters claimed that EPA applies a double standard by specifying steps a private party must take but not those that a governmental body must take.

In response, CERCLA section 107(a)(4) specifies a different burden of proof for actions brought by the federal government, states, or Indian tribes than for actions brought by private parties. Governmental response costs may be recovered from responsible parties unless they are shown to have been incurred "not consistent with the NCP." CERCLA section 107(a)(4)(A). By contrast, private parties may only recover other "necessary" costs incurred "consistent with the NCP." The final rule reflects this statutory distinction.

As to the commenters' request that EPA further define when costs are "not inconsistent with the NCP," several points are important to note. First, the CERCLA statute itself confirms that the President should not be held to a standard of strict adherence to all provisions of the NCP. Section 121(a) states:

> The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 or secured under section 106 which are in accordance with this section and, *to the extent practicable, the national contingency plan,* and which provide for cost-effective response. * * * [Emphasis added.]

The legislative history confirms that this section has special meaning in the context of the government's right to recover costs "not inconsistent with the NCP." As Senator Chafee stated in the debate over the 1986 SARA Amendments,

> The legislation states that remedial actions selected by the President shall, to the extent practicable, comply with the National Contingency Plan [NCP]. *This language is intended to assure that alleged failures to comply with the NCP shall not be available as a defense to any liability in an enforcement proceeding brought under section 106 or 107. [Emphasis added.]*

132 Cong. Rec. S14925 (daily ed., Oct. 3, 1986).[31]

Consistent with this language, EPA does not believe that immaterial or insubstantial deviations from the detailed set of NCP provisions should serve to defeat a cost recovery action, *whether federal or private* (although it may influence the amount of costs allowed). At the same time, EPA believes that given the variability of circumstances at Superfund sites, it is impossible to define all cases (or to establish a fixed rule) for which non-compliance would be material. Thus, whether or not governmental costs can be shown to be "not inconsistent with the NCP" should be judged by a review of the cleanup action as a whole, not based on a simple review of the cleanup against the list of NCP provisions. EPA believes that the application of these principles is properly reserved to the courts for resolution on a case-by-case basis.

The concept that *de minimis* and harmless deviations from specific NCP provisions should not defeat a cost recovery action is consistent with long-standing judicial principles of harmless error and materiality. It is also consistent with the tenor and intent of the CERCLA statute, that parties who are liable for the contamination should be held responsible for remediating it; where a governmental or private party undertakes the cleanup (in the face of a lack of action by the responsible party), it would be inequitable to allow the responsible party to use minor procedural discrepancies to defeat reimbursement for an environmentally sound cleanup.

3. *Role of the courts.* Several commenters asserted that the criteria proposed by EPA attempted to limit the discretion of federal courts in determining what constitutes substantial compliance with the NCP for making CERCLA cost recovery awards. They argue that EPA should not by regulation attempt to establish matters that may be in dispute entirely between private parties.

In response, section 105 of CERCLA provides EPA with considerable discretion in establishing its plan for responding to releases of hazardous substances, pollutants and contaminants. There is no requirement that EPA promulgate a rule that would contain identical standards for governmental and private party response actions, and indeed, as discussed above, that would not make sense in areas such as intergovernmental coordination and Fund balancing. EPA has also noted that due to the variability of site circumstances, some provisions may or may not be applicable in specific cases, and the failure to comply with one or more provisions may or may not be material. Thus, this rule defines actions as "consistent with the NCP" for the purposes of section 107(a)(4)(B), when the private party cleanup, evaluated as a whole, is found to have achieved "substantial compliance" with specified requirements and resulted in a CERCLA-quality cleanup; although a provision-by-provision comparison is not required, EPA has provided a list of those NCP sections that are potentially relevant to private persons. Thus, the final rule provides a standard against which to measure "consistency with the NCP," but does not eliminate the very important role of the courts in deciding, on a case-specific basis, what costs should be awarded to the party that has undertaken the cleanup.

As to the comment that EPA should not issue regulations on this matter, EPA disagrees that the interpretation of section 107(a)(4)(B) is a matter "entirely between private parties." First, the government has a strong interest in ensuring that cleanup actions that derive a benefit from CERCLA section 107(a)(4)(B)—a statute under the charge of EPA—are performed in an environmentally sound manner; thus, it is appropriate to provide a standard or measure of consistency with the NCP. EPA also believes that it is an important public policy to encourage private parties to voluntarily clean up sites, and to remove unnecessary obstacles to their recovery of costs. Further, as noted above, CERCLA directs the President to promulgate and revise NCP requirements (section 105(c)), and then directs that those requirements should be used as the standard for private cost

[31] The statement by Sen. Chafee goes on to note that "[t]he language is not intended to provide any independent authority to EPA or other agencies to fail to apply, to overlook, ignore or waive any standard, requirement, criteria or limitation established under the law." *Id.*

recovery (section 107(a)(4)); thus, Congress contemplated that EPA would issue standards to be used for cost recovery actions.

4. *Retroactivity.* Some commenters expressed the concern that PRPs may attempt to impose the new definition of "consistency with the NCP" on private cleanups that are already complete or underway. They assert that it should be made clear that the rule does not apply to private response actions initiated prior to the effective date of the revised NCP.

In response, EPA does not believe that it is appropriate to grandfather cleanups that are already "underway." Such a position would result in an exemption from this rule for actions that were initiated prior to the effective date, but which may continue for years (such as long-term ground-water remediation actions). Further, EPA does not believe that this issue will pose a serious problem to private parties for several reasons. First, the rule's requirement of "substantial compliance" with potentially applicable NCP requirements affords private parties some latitude in meeting the full set of revised NCP provisions. Second, private parties have been on notice for over a year that EPA intended to require compliance with the principal mandates of CERCLA—those required for a "CERCLA-quality cleanup," as discussed above—as a condition for being "consistent with the NCP." (See CERCLA section 105(b), directing EPA to incorporate the SARA requirements into the NCP; and the December 21, 1988 proposed NCP (at § 300.700(c)(3)(i)(H), 53 FR at 51513), *proposing* to list among the requirements for "consistency with the NCP" compliance with § 300.430(f)(3)(ii) (protectiveness and ARAR compliance), (f)(3)(iii) (permanence and treatment, and cost-effectiveness), and (f)(2) (public participation) (53 FR at 51507)).

Finally, the requirement for "consistency with the NCP" has been a precondition to cost recovery under CERCLA section 107 since the passage of the statute in 1980, and pursuant to the 1985 NCP, consistency with the NCP was measured by compliance with a detailed list of NCP requirements; thus, on-going actions should already comply with the 1985 provisions.

5. *Public participation.* One commenter asserted that EPA is misapplying statutory requirements by stating that private parties must engage in the full panoply of public participation procedures under CERCLA, even though the statute imposes these requirements only on EPA. Because no governmental actions are involved, no public process should be required as a precondition of cost recovery.

EPA disagrees. Public participation is an important component of a CERCLA-quality cleanup, and of consistency with the NCP. The public—both PRPs and concerned citizens—have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups—which are performed without governmental supervision —are carried out in an environmentally sound manner. Thus, EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA. The rule does not, however, require rigid adherence to a set of procedural requirements. For instance, § 300.700(c)(6) (proposed NCP § 300.700(c)(3)(ii)(B)) provides that state or local public participation procedures may be followed, consistent with the NCP, if they provide a substantially equivalent opportunity for public involvement.

6. *CERCLA section 103 reporting requirement.* Another commenter suggested that EPA has misapplied the statutory notification requirements in the proposed NCP. According to the commenter, the proposal implies that any violation of CERCLA's requirement to report certain hazardous substance releases to the National Response Center (NRC) under CERCLA section 103(a) is grounds for holding a subsequent response action inconsistent with the NCP. The commenter suggests that there is no substantive connection between the reporting requirement and the adequacy of a response action.

In response, the NCP requires any person in charge of a facility or vessel to notify the NRC of any releases of hazardous substances into the environment over a defined reportable quantity (see § 300.405(b)). EPA believes that this NCP requirement is integral to EPA's decision as to whether a government-funded or -supervised cleanup is necessary at a site. Thus, the failure to report such releases to the NRC is an appropriate factor to consider in evaluating whether a private party has acted consistent with the NCP.

7. *Specific comments on consistency with the NCP.* One commenter suggested that rather than cross-referencing overly broad sections of the NCP to describe compliance for cost recovery purposes, § 300.700(c)(3) should repeat or paraphrase each requirement that must be met.

As explained above, the rule attempts to aid private parties by identifying those provisions that may be relevant to voluntary cleanup actions. Repeating each such provision in § 300.700 would significantly complicate and lengthen the section unnecessarily, as the reader is clearly referred to the appropriate sections by citation. Further, EPA has made clear that rigid adherence to every potentially relevant provision is not required in order to be consistent with the NCP.

Another commenter noted that for several of the cross-referenced sections, determining which subsection is "pertinent to the particular response chosen for the particular facility" is very difficult.

In response, two general points require clarification. First, as a threshold matter, it appears that the commenter may be confused by the roles and responsibilities of "other persons" and the "lead agency." In a private party response action, the private party may perform most of the functions of a lead agency, except of course, waivers of applicable laws, permit waivers, and functions related to use of the Fund (EPA has identified those sections of the NCP that are potentially relevant to private party cleanups in § 300.700(c)(5)–(7)); there is no support agency in a private party cleanup action.

It is also important to repeat that rigid compliance with every potentially applicable NCP provision is not required to establish that a private cleanup action was "consistent with the NCP"; rather, the substantial compliance test outlined above should be applied. With these two caveats, EPA has attempted to respond to the commenters' concerns regarding the potential applicability of particular sections of the NCP to private party cleanup actions.

The following are specific examples raised by the commenter where more specificity on what is required for recovery under section 107 is requested. EPA's response is included in each section.

a. *Natural resource trustees.* Must private parties coordinate with trustees of affected natural resources to determine the injury to these resources (§ 300.160(a)(3)) or to initiate appropriate actions (§ 300.410(g))?

In response, § 300.160(a)(3) requires the communication of information to natural resource trustees that may assist in the determination of actual or potential injury to the resources. Section 300.410(g) requires notification to the trustees when natural resources have been or are likely to be damaged, and requires the OSC or lead agency to seek to coordinate, as appropriate, with trustees for the performance of natural resource damage assessments, evaluations, investigations, and

planning. Both sections are within the universe of requirements that may potentially apply to private party cleanup actions, and compliance with them may be important to ensuring a cleanup consistent with the NCP.

b. *Technology.* What precisely must private parties do to "encourage the involvement and sharing of technology by industry and other experts" (§ 300.400(c)(7))?

In response, § 300.400(c)(7) requires the lead agency, to the extent practicable, to encourage the involvement and sharing of technology by industry and other experts. EPA believes that other persons should seek the most appropriate technology and expertise for a response action.

c. *ARARs and TBCs.* Must private parties coordinate with the lead and support agencies to identify ARARs, and ensure that the two agencies notify each other of the ARARs they identified (§ 300.400(g)(1) and (5))? What about TBCs (§ 300.400(g)(3))?

In response, § 300.400(g)(1) and (2) require the identification of applicable requirements, and relevant and appropriate requirements, respectively, and specify the criteria upon which to determine whether requirements are ARARs. Section 300.400(g)(5) requires the lead agency and support agencies to notify each other as to identified ARARs. Although these sections provide no specific consultation process for coordination of ARARs where there is no support agency, EPA encourages private parties to notify the agency responsible for oversight, if any, of the ARARs they have identified, in order to ensure that such requirements have been properly identified, and in order to ensure that a CERCLA-quality cleanup will be achieved (which includes the attainment of ARARs). Section 300.400(g)(3) simply states that lead and support agencies may, as appropriate, identify TBCs for a particular release and defines what TBCs are; here again, however, it may be advisable for private parties to seek the advice of the relevant agency as to which guidance documents should usually be followed.

d. *Engineering evaluation/cost analysis (EE/CA).* If PA and SI reports are required for removals, why isn't an EE/CA also required (§ 300.415(b)(4))?

In response, the preamble to the proposed rule correctly excluded § 300.415(b)(5)—relating to time and dollar limitations on removal actions—from the list of sections that may be relevant to cleanups by other persons (53 FR at 51461). However, due to a typographical error, proposed rule § 300.700(c)(3)(i)(F) mistakenly excluded § 300 415(b)(4)—relating to EE/CAs—from the list of potentially relevant provisions. This error has been corrected in today's final § 300.700(c)(5)(vi).

e. *ARARs—exigencies.* How does the private party determine that the "exigencies of the situation" prevent the attainment of ARARs during removals (§ 300.415(j) (renumbered as § 300.415(i) in the final rule)?

In response, one of the requirements for cost recovery under CERCLA section 107(a)(4)(B), as set out in today's rule, is to attain a CERCLA-quality cleanup, which includes the requirement to attain ARARs—both "applicable requirements" and "relevant and appropriate requirements." However, the NCP allows governmental agencies to attain or waive ARARs; in the private context, this possibility is more limited.

Governmental actions are taken under the authority of CERCLA, and therefore may invoke ARARs waivers under CERCLA section 121(d)(4). However, private party actions are not carried out under CERCLA authority but simply seek to take advantage of a right of cost recovery provided under CERCLA section 107 for certain types of actions; therefore, waivers of applicable requirements of federal or state law are unavailable in such private party cleanups. Similarly, the concept of complying with applicable requirements to the extent practicable for removal actions, applies only to actions taken or secured by the President (or his authorized representative). (In emergency situations where an immediate response action is required by a private party, noncompliance with an applicable requirement should not necessarily bar a claim for cost recovery.)

Private parties shall also comply with relevant and appropriate requirements. However, relevant and appropriate requirements do not legally apply of their own force to the private party actions (see § 300.5); thus, where one of the waivers in § 300.430(f)(1)(ii)(C) can be justified, it may be appropriate for a private party to waive a relevant and appropriate requirement. Similarly, when undertaking removal actions, a private party need only comply with relevant and appropriate requirements "to the extent practicable"; best professional judgment should be used in determining which relevant and appropriate requirements can practicably be met. Private parties also have some discretion to decide whether requirements are relevant and appropriate under the circumstances of the release, using the criteria set out in § 300.400(g)(2).

8. *Recovery pursuant to other federal or state law.* A commenter suggested that it should be made clear in §§ 300.700(c)(1) and (2) that those sections only apply to section 107(a) cost recovery actions and not to cost recovery actions taken pursuant to other federal or state law. The commenter believes that the requirement of consistency with the NCP for tens of thousands of non-NPL, non-CERCLA sites and spills for entitlement to cost recovery from responsible parties will discourage many cleanups normally performed under state statutes.

Another commenter believed that the NCP should recognize that cleanups done pursuant to non-CERCLA federal or state authority can be consistent with the NCP. This could be accomplished in one or more of the following ways. First, as part of its deferral policies, the NCP could state that cleanups qualifying for deferral are presumptively consistent with the NCP. The commenter stated that deferral of an NPL site to a state government should mean that the remedial action is considered to be in conformance with the NCP for the purpose of cost recovery. This approach would provide an incentive for prompt settlement. Second, § 300.700(c) could be revised to clarify that the list of NCP provisions with which a private cost recovery plaintiff must comply includes the substantially similar provisions of other authorities.

In response to the first comment, it is important to note that CERCLA section 107(a)(4)(B) does not require private parties to conduct cleanups consistent with the NCP; rather, it establishes a right of action under CERCLA for cost recovery in those cases where non-governmental parties have incurred necessary response costs consistent with the NCP. The result of not meeting this standard is that cost recovery under CERCLA may not be available; however, this does not mean that the action may not proceed, or that cost recovery may not be available under other federal or state law. Of course, even if a party takes a cleanup action under an authority other than CERCLA (e.g., RCRA corrective action), it may have a right of cost recovery under CERCLA section 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the NCP.

On the deferral issue, the decision by EPA to defer a site from listing on the NPL for attention by another authority does not represent a determination that the response action to be taken will presumptively be consistent with the NCP. Indeed, EPA policy on deferral

contemplates situations in which sites that have been deferred may still be listed on the NPL for attention under CERCLA, e.g., if the owner/operator proves to be unwilling or unable to accomplish the cleanup. See, e.g., 53 FR 30005 (August 9, 1988). Each response action taken under another authority (e.g., RCRA) for which cost recovery is sought under section 107(a)(4)(B) must be justified on a case-by-case basis. As to specific comments on a policy of deferral to states, EPA has not made a decision as to whether, or under what circumstances, current deferral policies should be expanded to include deferral to states. EPA will consider all comments concerning deferral to a state authority or a non-CERCLA federal authority separately from the NCP.

9. *Compliance with state standards/non-ARARs.* A commenter asked, if a state seeks to require additional remediation, in excess of that required by EPA (for example, in a section 106 order or a section 122 consent decree), will such remediation be deemed to be excessive, inconsistent with the NCP, and not available for cost recovery under CERCLA section 107(a)(4)(A)?

In response, there may be situations in which additional remediation, while not "required" by the NCP, is "not inconsistent with the NCP"; at the same time, there may be cases where such additional remediation is inconsistent with the NCP. Such a determination must be made on a case-by-case basis, considering the facts of each case. The issue is too complex to be resolved by a simple statement in the final NCP rule.

10. *Consistency with the NCP—section 106/section 122 consent decrees.* A commenter alleged that there is a double standard for site cleanups' consistency with the NCP, one for section 106 orders or section 122 consent decrees, another for other persons to be consistent with the NCP, with extensive technical and public participation requirements, many of which may not be a part of a potential section 106 order or section 122 consent decree. Another commenter charged that the proposal would create a non-rebuttable presumption that severely disadvantages defendants in private cost recovery actions.

In response, the final rule requires only "substantial compliance" with those potentially applicable NCP requirements, and a CERCLA-quality cleanup, in order for a private party action to be consistent with the NCP for cost recovery purposes; thus, the commenters' concerns (regarding non-rebuttable presumptions and a stricter standard for private party actions) have largely been addressed. As to section 106/122 orders or decrees, those documents implement remedies that have been selected in accordance with CERCLA and the NCP, and they contain the cleanup standards necessary for consistency with the NCP. EPA believes that defendants will have acted "consistent with the NCP" when they comply with a section 106 order or a section 122 consent decree.

11. *Preauthorization.* Section 300.700(d) provides a process under which EPA may, in its discretion, preauthorize Fund reimbursement for necessary response costs incurred by private parties as a result of carrying out the NCP. In order to qualify for preauthorization, the requesting party must establish, *inter alia,* that the action will be "consistent with the NCP"; this showing should be site-specific, based on an evaluation of the list of potentially applicable NCP provisions. Further, where a *PRP* seeks preauthorization, the rule provides that the action must be carried out pursuant to an order or settlement agreement with EPA. In both cases, EPA's interpretation of "consistency with the NCP" for the purpose of CERCLA section 107(a)(4)(B) would not override any site-specific requirement as part of the preauthorization or enforcement processes.

12. *Waivers.* As discussed above, certain provisions of the NCP (and of the statute) are not appropriate to private party response actions for which cost recovery may be sought under CERCLA. These include the permit waiver in CERCLA section 121(e)(1) (§ 300.400(e)) and the waiver of applicable federal or state requirements in CERCLA section 121(d)(4) (NCP § 300.430(f)(1)(ii)(B)). The statute makes clear that those waiver provisions are reserved for actions carried out by the President (or his delegate) or by a state or tribe under CERCLA section 104(d)(1), or by a party pursuant to an order or decree under CERCLA section 106 or 122. The final rule has been revised to make clear that private parties that qualify for cost recovery under CERCLA section 107 are not entitled to the permit waiver of CERCLA section 121(e)(1), and may not invoke the waivers in CERCLA section 121(d)(4) for applicable requirements, although "relevant and appropriate" requirements may be waived upon a proper showing under § 300.430(f)(1)(ii)(C) of this rule.

Final rule: The proposed rule has been revised as follows:

1. In order to more accurately reflect the language of CERCLA sections 107(a)(4)(A) and (B), §§ 300.700(c)(1) and (2) are revised to read:

(1) Responsible parties shall be liable for all response costs incurred by the United States government or a state or an Indian tribe not inconsistent with the NCP.

(2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.

2. Consistent with the response to comment discussed above, the list of NCP provisions that are potentially applicable to private parties has been placed in new § 300.700(c)(5)–(7), and consistency with the NCP has been defined in revised § 300.700(c)(3) and new § 300.700(c)(4). Revised § 300.700(c)(3) through (8) are as follows:

(3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (e)(5) and (6) of this seciton, and results in a CERCLA-quality cleanup;

(ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

(4) Actions under § 300.700(c)(1) will not be considered "inconsistent with the NCP," and actions under § 300.700(c)(2) will not be considered not "consistent with the NCP," based on immaterial or insubstantial deviations from the provisions of 40 CFR part 300.

(5) The following provisions of this part are potentially applicable to private party response actions:

(i) Section 300.150 (on worker health and safety);

(ii) Section 300.160 (on documentation and cost recovery);

(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;

(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(v) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6);

(vi) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f); and including § 300.415(i) with regard to meeting ARARs where practicable except that private party-removal actions must always comply with the requirements of applicable law;

(vii) Section 300.420 (on remedial site evaluation);

(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(*6*) and that applicable requirements of federal or state law may not be waived by a private party;

(ix) Section 300.435 (on RD/RA and operation and maintenance).

(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements. The following provisions of this part regarding public participation are potentially applicable to private party response actions, with the exception of administrative record and information repository requirements stated therein:

(i) Section 300.155 (on public information and community relations);

(ii) Section 300.415(m) (on community relations during removal actions);

(iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);

(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and

(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

(7) When selecting the appropriate remedial action, the methods of remedying releases listed in Appendix D of this part may also be appropriate to a private party response action.

(8) Except for actions taken pursuant to CERCLA sections 104 or 106 or response actions for which reimbursement from the Fund will be sought, any action to be taken by the lead agency listed in paragraphs (c)(5) through (c)(7) may be taken by the person carrying out the response action.

Name: Section 300.700(c). Actions under CERCLA section 107(a).

Proposed rule: The proposed rule summarized the various authorities under CERCLA that are available to recover the costs of response actions, including a section 107(a) cost recovery action. Proposed § 300.700(g) also provided that implementation of response measures by PRPs or by any other person does not release those parties from liability under section 107(a), except as provided in a settlement under section 106 or 122 of CERCLA or a federal court judgment.

Response to comments: 1. *Settlement policies—a. Mixed funding.* One commenter suggested that EPA should become more forthcoming in providing mixed funding in support of settlement agreements. Greater use of this authority would encourage settlement of cases by cooperative parties, even where they do not make up a majority of the PRPs.

EPA supports mixed funding arrangements and is sympathetic to the commenter's concern that greater use be made of mixed funding to accelerate settlements. EPA plans increased use of mixed funding in appropriate cases.

b. *De minimis parties.* A commenter suggested that EPA should revise its existing *de minimis* buyout provisions to allow earlier resolution of claims against *de minimis* parties. EPA supports settlements with *de minimis* parties and plans increased use of settlements with *de minimis* parties in appropriate cases.

2. *Notice.* One commenter urged that EPA should specifically note in the NCP that it is EPA's position that a private party need not provide notice to the government before instituting a cost recovery action because a notice requirement serves no significant policy goals and can only obstruct private cleanups.

EPA agrees that a private party need not provide notice to the government before instituting a cost recovery action against another private party, but such party must provide concurrent notice to the government. Pursuant to CERCLA section 113(l), whenever any action is brought under CERCLA in a federal court by a plaintiff other than the United States, the plaintiff must provide a copy of the complaint to the Attorney General of the United States and to the Administrator of EPA.

3. *Ripeness.* According to one commenter, EPA should urge (in the NCP) that plaintiffs should not be required to have incurred *all* of the cleanup costs at a site before being entitled to bring a section 107 cost recovery action. The commenter acknowledged that while it is logical to require completion of cleanup actions in order to protect public health, requiring completion as a prior condition to the bringing of a cost recovery action could have an adverse effect on parties' willingness to undertake costly cleanups of hazardous waste releases. A party may be reluctant to assume *all* of the costs without some judicial assurance on the issue of the ultimate liability for cost recovery purposes. Few companies, the commenter added, have the resources necessary to completely fund a large, unilateral cleanup, even if they expect to be reimbursed.

In response, EPA agrees with the commenter that a cost recovery action need not await the incurring of all response costs before it may be brought. This interpretation is consistent with CERCLA section 113(g)(2), which allows courts to enter "declaratory judgments" on liability that are binding on subsequent cost recovery actions under CERCLA section 107. Further, as the commenter noted, requiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up expeditiously.

4. *Recoverable costs.* One commenter stated that the NCP should expressly provide that the only limitation on the nature of recoverable private response costs deemed appropriate by EPA is that they be consistent with the NCP. Because the plaintiff in a cost recovery action must bear the initial out-of-pocket expenses itself, there is sufficient private incentive to conduct cost-effective response actions.

EPA disagrees with the commenter that the only limitation on appropriate recovery be that the costs have been incurred consistent with the NCP. Pursuant to CERCLA section 107(a)(4)(B), a person may be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Therefore, plaintiffs must prove that costs are both "necessary" and "incurred consistent with the NCP."

5. *Standard of liability.* One commenter stated that the proposed NCP fails to specify the standard of liability that ought to be applied by the courts in private actions, although courts have agreed that strict liability is appropriate for government cleanup actions under Superfund. The commenter alleged that the Act does not suggest that differing standards of liability are appropriate under the statute. The commenter argued that as long as strict liability is applied in government-initiated cases, it should be applied as well to private cost recovery claims.

EPA has long taken the position that the liability of potentially responsible parties is strict, joint, and several, unless they can clearly demonstrate that the harm at the site is divisible. This standard of liability applies no matter whether the plaintiff is governmental or private.

6. *Consistency with NCP—political subdivisions.* One commenter asserted that EPA's inclusion of political subdivisions of states as parties whose actions are presumed to be consistent with the NCP is contrary to the statute. The plain words of the statute indicate that only federal and state governments and Indian tribes fall within section 107(a)(4)(A). EPA appears to be assuming that local governments are subsumed within the definition of states, and thus are subject to the same cost recovery presumption as states. However, there are numerous provisions in CERCLA in which states and local governments are both separately referred to—an illogical result if Congress did not truly intend for the latter to be considered legally different entities from the former. Furthermore, these provisions always referred to these two entities as states or local governments (or political subdivisions of states), thereby reinforcing the presumption that Congress intentionally

differentiated between these two levels of government. Therefore, the commenter urged, EPA should revise proposed § 300.700(c)(1) by deleting the text "including political subdivisions thereof * * *." Such a change will retain the presumption of consistency with the NCP only for those parties for whom Congress intended such a preference.

EPA is revising the rule to be consistent with the language in section 107(a)(4)(A). The issue of whether political subdivisions can be treated like states for purposes of cost recovery actions under section 107 is a matter to be left to the courts.

7. *Not inconsistent with NCP—governmental response actions.* One commenter asserted that EPA should not delete language that defines what NCP provisions constitute actions to be not inconsistent with the NCP (see 53 FR 51462). The commenter suggested EPA should be clear in delineating the "not inconsistent with" standard for all to see and use on a case-by-case basis consistent with the statute.

EPA believes that it is not necessary to define what actions are "not inconsistent with the NCP," and would leave those determinations to case-by-case decision-making. The "not inconsistent" standard applies only to removal or remedial actions conducted by an agency of the federal government, a state, or an Indian tribe. Governmental bodies, particularly states, may have programs similar to the NCP, that achieve the same objectives, but are not congruent with the NCP in every respect. EPA believes that these governmental bodies, consistent with the statute, should have flexibility to implement response actions and bring cost recovery actions for those response actions as long as the response actions are not inconsistent with the NCP, even if achieved by different methods.

8. *Treble damages.* A commenter noted that CERCLA section 107(c)(3) currently contains a provision for the collection of punitive damages "in an amount of at least equal to, and not more than, three times" against individuals who "without sufficient cause" fail to carry out a CERCLA section 104 or 106 administrative order. The commenter asserted that this provision has not been used by EPA to recover damages from recalcitrant parties who do not respond and participate in the cleanup of wastes that they are responsible for at a given site. The commenter urged that recalcitrant parties should not be led to believe that the government will not seek to extract punitive damages, or they may choose to wait for government action at the expense of delaying a voluntary cleanup.

The commenter said that treble punitive damages are especially important where the identifiable incremental cost of a response action (assumed by a proactive company) related to recalcitrant waste volumes may be minimal. These damages, when compared to a minimal total response cost represent an incentive for early cooperation by the potential recalcitrant, and an incentive for EPA to acquire funds to apply to a site remediation project. The need for mixed funding Superfund financing requirements should also be reduced by recalcitrant participation.

The commenter added that EPA's use of treble damages in cost recovery actions will provide further incentive for prompt response actions before and after waste sites or other areas are listed on the NPL. Such action would help to limit the number of sites listed on the NPL and encourage independent action by both government (e.g., municipal) and private parties.

It has been and continues to be EPA's policy that seeking treble damages in cost recovery actions against recalcitrant parties who fail to comply with administrative orders under sections 104 or 106 is an important tool and EPA considers its use in appropriate cases.

Final rule: Proposed § 300.700(c)(1) is revised to delete the reference to political subdivisions.

Name: Section 300.700(e). Recovery under CERCLA section 106(b).

Proposed rule: The proposed section provided that any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant or contaminant. It also summarized the various authorities under CERCLA that are available to recover the costs of response actions. Those mechanisms include section 106(b)—wherein any person who has complied with a section 106(a) order may petition the Fund for the reimbursement of reasonable costs, plus interest.

Response to comments: 1. *Petitions for reimbursement.* One commenter noted an error in the rule language in § 300.700(e). The preamble and the rule language have conflicting dates. The preamble uses an October 17, 1986 date, while the rule language uses an October 10, 1986 date. Final § 300.700(e) has been revised to read "* * * after October 16, 1986 * * *."

2. *Effective date and waiver in section 106(b)(2).* One commenter noted that proposed § 300.700(e) would provide that persons who have complied with an order "issued after October 17, 1986" may petition the Fund for reimbursement "unless the person has waived that right." The commenter stated that neither of the quoted limitations is in CERCLA, and both are inappropriate attempts to narrow the rights of PRPs to claim against the Fund. The commenter alleged that the reimbursement provision was effective as of October 17, 1986, and applied to "any order" issued under section 106(a). The commenter believed that as long as the recipient of the order petitions EPA for reimbursement within 60 days after completion of the required action, reimbursement is potentially available under the law. The commenter requested that EPA delete the two phrases quoted above.

EPA interpretation of section 106(b)(2) is that it applies only to orders issued after the date of enactment of SARA, i.e., on or after October 17, 1986. That interpretation has been upheld in court as a reasonable interpretation. (See *Wagner Seed Co.* v. *Bush,* 709 F.Supp. 249 (D.D.C. 1989).)

Pursuant to section 106(a), the President may issue orders unilaterally or on consent. Administrative orders issued on consent generally contain a waiver of a respondent's rights pursuant to section 106(b)(2), therefore the reference to "unless the person has waived that right."

Final rule: Proposed § 300.700(e) is revised to include the date of October 16, 1986.

Subpart I—Administrative Record for Selection of Response Action

Subpart I of the NCP is entirely new. It implements CERCLA requirements concerning the establishment of an administrative record for selection of a response action. Section 113(k)(1) of CERCLA requires the establishment of "an administrative record upon which the President shall base the selection of a response action." Thus, today's rule requires the establishment of an administrative record that contains documents that form the basis for the selection of a CERCLA response action. In addition, section 113(k)(2) requires the promulgation of regulations establishing procedures for the participation of interested persons in the development of the administrative record.

These regulations regarding the administrative record include procedures for public participation. Because one purpose of the administrative record is to facilitate public involvement, procedures for

establishing and maintaining the record are closely related to the procedures governing public participation. General community relations provisions found in other parts of the proposed NCP are addressed elsewhere in this preamble.

The following sections discuss the major comments received on the proposed subpart I and EPA's responses.

Name: General comments.

Proposed rule: Subpart I details how the administrative record is assembled, maintained and made available to the public.

Response to comments: Comments on the administrative record regulations included the suggestion that the preamble provide a general statement differentiating between the administrative record and the information repository.

EPA agrees that while subpart I includes ample information on the requirements of the administrative record, a brief clarification would help to differentiate the record from the information repository.

The information repository includes a diverse group of documents that relate to a Superfund site and to the Superfund program in general, including documents on site activities, information about the site location, and background program and policy guides. EPA requires an information repository at all remedial action sites and any site where a removal action is likely to extend beyond 120 days. The purpose of the information repository is to allow open and convenient public access to documents explaining the actions taking place at a site.

The administrative record discussed in this subpart, by contrast, is the body of documents that forms the basis of the agency's selection of a particular response at a site, i.e., documents relevant to a response selection that the lead agency relies on, as well as relevant comments and information that the lead agency considers but may reject in the ultimate response selection decision. Thus, the record will include documents the lead and support agency generate, PRP and public comments, and technical and site-specific information. These documents occasionally overlap with those included in the information repository. The administrative record includes such information as site-specific data and comments, guidance documents and technical references used in the selection of the response action. The information repository may include guides to the Superfund process, background information, fact sheets press releases, maps, and other information to aid public understanding of a site response, regardless of whether the information has bearing on the eventual response selection at that site.

One commenter felt that there was no mechanism for PRPs to participate in the development of the administrative record. In response, PRPs are given a chance to participate in the development of the administrative record throughout its compilation. EPA will make available information considered in selecting the response action to PRPs and others through the administrative record file. Interested persons may peruse the record file, submit information to be included in the administrative record file, or may comment on its contents during the ensuing public comment period.

Name: Section 300.800(a). Establishment of an administrative record. Section 300.810(a). Contents of the administrative record.

Proposed rule: Section 113(k)(1) of CERCLA states that the "President shall establish an administrative record upon which the President shall base the selection of a response action." EPA used similar language in § 300.800(a) of the proposed rule: "The lead agency shall establish an administrative record that contains the documents that *form the basis* for the selection of a response action." (Emphasis added.) Section 300.810(a) states that the "administrative record file for selection of a response action typically, but not in all cases, will contain the following types of documents * * *," followed by an enumeration of those documents.

Response to comments: EPA's choice of the phrase "form the basis" in § 300.800(a) drew many comments. The comments expressed concern that the lead agency would have the discretion to include in the administrative record only those documents that support EPA's selected remedy.

These comments appear to be based on a misunderstanding of what the phrase "forms the basis of" means as it was used in the proposed rule. The statute defines the administrative record as the "record upon which the President shall base the selection of a response action." EPA's intent in defining the record as the file that "contains the documents that form the basis for the selection of a response action" was simply to reflect the statutory language. For example, an administrative record will contain the public comments submitted on the proposed action, even if the lead agency rejects the comments, because the lead agency is required to consider these comments and respond to significant comments in making a final decision. Thus, these comments also "form the basis of" the final response selection decision. EPA intends that the regulatory language defining the administrative record file embody general principles of administrative law concerning what documents are included in an "administrative record" for an agency decision. As a result, contrary to the suggestion of the commenters, the proposed definition of the administrative record does not mean that the record will contain only those documents supporting the selected response action.

A commenter asked that the phrase "but not in all cases" be deleted from § 300.810(a), or specify the cases where documents are excluded from the administrative record. EPA believes it is better not to attempt to list excluded documents in the NCP since EPA cannot possibly anticipate all the types of documents that will be generated for a site or for future sites, and which of these documents should be excluded except as generally described in § 300.810(b). It should be noted, for example, that although a health assessment done by ATSDR would normally be included in the administrative record, it would not be if the assessment was generated by ATSDR after the response is selected.

Others commented that certain documents should always be included in the administrative record. EPA believes that only a small group of documents will always be generated for every type of CERCLA site, since each site is unique. Other documents may or may not be generated or relevant to the selection of a particular response action at a site. EPA understands that a definitive list of required documents would assist parties in trying to assess the completeness of the administrative record, but such a list would not be practical. Different sites require different documents.

A related group of comments asked that the administrative record always include certain documents, including, specifically, "verified sampling data," draft and "predecisional" documents, and technical studies. One comment stated that "invalidated" sampling data and drafts must be part of the administrative record in some situations. Verified sampling data, i.e., data that have gone through the quality assurance and quality control process, will be included in the record when they have been used in the selection of a response action. "Invalidated" data, i.e., data which have been found to be incorrectly gathered, are not used by EPA in selecting the response action and should therefore not be included in the

record. These should be distinguished from unvalidated data—data that have not been through the quality control process—which may in limited circumstances be considered by the agency in selecting the response action. It is EPA's policy to avoid using unvalidated data whenever possible. Nonetheless, there are times when the need for action and the lack of validated data requires the consideration of such data in selecting an emergency removal action. If such data are used, they will be included in the record.

In general, only final documents are included in the administrative record files. Draft documents are not part of the record for a decision because they generally are revised or superseded by subsequent drafts and thus are not the actual documents upon which the decision-maker relies. However, drafts (or portions of them) generally will be included in the administrative record for response selection if there is no final document generated at the time the response is selected and the draft is the document relied on. In addition, a draft which has been released to the public for the purpose of receiving comments is also part of the record, along with any comments received.

Similarly, predecisional and deliberative documents, such as staff notes or staff policy recommendations or options papers, do not generally belong in the administrative record because they merely reflect internal deliberations rather than final decisions or factual information upon which the response selection is based. However, pertinent factual information or documents stating final decisions on response selection issues for a site generally would be included in the record.

Technical studies are also part of the record, again, if considered by the lead agency in selecting the response action. The commenter seems to have misinterpreted EPA's intent by assuming that only factual portions of a technical study are part of the record. The entire study, or relevant part of the study, should be part of the record.

Another comment stated that the administrative record should include any studies on cost, cost-effectiveness, permanence, and treatment that underlie the record of decision. These studies are already part of the remedial investigation and feasibility study, which is always included in the record. Another party stated that sampling protocols should be in the administrative record. Sampling protocols are part of the RI/FS work plan, which is also part of the administrative record. And because sampling protocols, like chain of custody documents, are generally grouped together, EPA has provided in this rulemaking that such grouped or serial documents may be listed as a group in the index to the administrative record file.

A related comment requested that all documents generated by contractors should be included in the record. In response, *any* document that forms the basis of a response selection decision will be included in the administrative record. It is immaterial who develops the document—it can be a contractor, the public (including a PRP), a state or EPA.

One commenter asked that ARAR disputes involving a disagreement over whether a requirement is substantive or administrative be documented in the record. Other comments stated that EPA must ensure that complete ARAR documentation and documentation of all remedial options, not just the selected remedy, be placed in the record. Where ARAR issues are relevant to response selection, lead and support agency-generated documents and public information submitted to the lead agency on this issue would be part of the record. The record will include documentation of each alternative remedy and ARAR studied during the RI/FS process, and the criteria used to select the preferred remedy during the remedy selection process.

EPA also received several comments stating that every document contributing to decision-making should be part of the administrative record. EPA cannot concur in this formulation of the administrative record since it is unclear what "contributing to" means and that phrase may be overly broad. For instance, the term "contributing to" could be interpreted to include all draft documents leading up to a final product. These draft documents do not generally form the basis of the response selection. However, because the administrative record includes documents which form the basis for the decision to select the response action, EPA believes that most "contributing" documents will be included.

One comment stated that the hazard ranking system (HRS) information should be included in the administrative record for selection of the response action. Specifically, they suggested that internal memoranda, daily notes, and the original HRS score should be made available. The National Priorities List (NPL) docket is a public docket, and already contains the relevant ranking information. The information generally relevant to the listing of a site on the NPL is preliminary and not necessarily relevant to the selection of the response action. If, however, there is information in the NPL docket that is relied on in selecting the response action, it will be included in the administrative record.

Another commenter stated that all materials developed and received during the remedy selection process should be made a part of the record, and stated that the NCP currently omits inclusion of transcripts. As noted above, certain documents simply will not be relevant to the selection of response actions. EPA will, as required by the statute, include in the record all those materials, including transcripts, that form the basis for the selection of a response action, whether or not the materials support the decision.

Several commenters asked that the lead agency be required to mail them individual copies of documents kept in the administrative record. These requests included copies of sampling data, a copy of any preliminary assessment petitions, potential remedies, the risk assessment, a list of ARARs, and notification of all future work to be done. Commenters also asked to be notified by mail when a lead agency begins sampling at a site and when a contractor is chosen for a response action. In addition, many asked for the opportunity to comment on the documents mentioned above. A related comment suggested that EPA maintain a mailing list for each site and mail copies of key documents in the record to every party on the list.

EPA believes that maintaining an administrative record file in two places, in addition to a more general information repository, with provisions for copying facilities reflects EPA's strong commitment to keeping the affected public, including PRPs, informed and providing the opportunity for public involvement in response decision-making. Requiring EPA to mail individual copies of documents available in the record file is beyond any statutory requirements, unnecessary due to the ready availability of the documents in the file, and a severe burden on Agency staff and resources. Most of the documents requested above will generally be available in the administrative record for public review and copying. Additionally, the lead agency should maintain a mailing list of interested persons to whom key site information and notice of site activities can be mailed as part of their community relations plan for a site.

One commenter asked that all PRP comments and comments by other interested parties be included in the record, regardless of their

"significance." EPA will include all comments received during the comment period in the administrative record, regardless of their significance. When the lead agency considers comments submitted after the decision document has been signed, the "significance" of a comment has a bearing on whether it will be included in the administrative record, as specified in § 300.825(c). In addition, while EPA is under no legal obligation to place in the record or consider comments submitted prior to the comment period, EPA will generally, as a matter of policy, consider significant comments submitted prior to the comment period, place them into the record, and respond to them at an appropriate time. However, persons who wish to ensure that the comments they submitted prior to the comment period are included in the record must resubmit such comments during the comment period.

Final rule: Section 300.800(a) is promulgated as proposed.

Name: Section 300.800(b). Administrative record for federal facilities.

Proposed rule: Section 300.800(b) states that the lead agency for a federal facility, whether EPA, the U.S. Coast Guard, or any other federal agency, shall compile and maintain an administrative record for that facility. When federal agencies other than EPA are the lead at a federal facility site, they must furnish EPA with copies of the record index, in addition to other specified documents included in the record. The preamble to the proposed NCP discussion of § 300.800(b) (53 FR 51464) states that EPA will establish procedures for interested parties to participate in the administrative record development, and that EPA may furnish documents which the federal agency is required to place in the record.

Response to comments: One comment stated that EPA should be the custodian for administrative records for federal facilities, especially where the federal facility is a PRP, to avoid any conflict of interest in questions of liability or litigation. Another comment stated that the requirements in § 300.800(b) of the proposed rule would be burdensome to federal agencies in compiling and maintaining the record.

Executive Order 12580 grants federal agencies the authority to "establish the administrative record for selection of response actions for federal facilities under their jurisdiction, custody or control." To avoid the potential for conflicts of interest by federal agencies who are PRPs and in charge of compiling and maintaining the record, EPA retains control over the development of the record by specifying what goes into the record, by supplementing the record and by requiring an accounting of what is in the record through a report of the indexed contents. EPA believes that these requirements represent sufficient Agency oversight to avoid potential conflicts of interest at federal facilities while ensuring that federal lead agencies remain responsible for compiling and maintaining their own administrative record.

EPA is making a minor editorial change in § 300.800(b)(1) to reflect that the federal agency compiles and maintains an administrative record *for* a facility, and not *at* a facility, since § 300.800(a) already provides that the record will be located at or near that facility.

Final rule: EPA is promulgating the rule as proposed, except for the following minor editorial change in the first sentence of § 300.800(b)(1): "If a federal agency other than EPA is the lead agency for a federal facility, the federal agency shall compile and maintain the administrative record for the selection of the response action for that facility in accordance with this subpart."

Name: Section 300.800(c). Administrative record for state-lead sites.

Proposed rule: Section 113(k) of CERCLA states that the President "shall establish an administrative record upon which the President shall base the selection of a response action." Section 300.800(c), entitled "Administrative record for state-lead sites," requires that states compile administrative records for state-lead sites in accordance with the NCP.

Response to comments: Several commenters believe that the new administrative record procedures place an onerous burden on the state, and request that state requirements such as Open Records Acts should be allowed as a substitute for compliance with subpart I. Another commenter recommended that states be allowed to determine whether a complete administrative record is needed at or near the site when a site is state-lead. Where a response is taken under CERCLA at a state-lead site, EPA is ultimately responsible for the selection of a response action. Therefore, under section 113(k), EPA must establish an administrative record for the CERCLA response action at the site, and must, at a minimum, comply with subpart I. There may be many different ways of compiling administrative records and involving the public in the development of the record. Subpart I states the minimum requirements for section 113(k). Lead agencies, including states, may provide additional public involvement opportunities at a site. In response to whether or not states should maintain a complete administrative record at or near the site, EPA believes that states must have such a record in order to meet CERCLA section 113(k) requirements.

EPA has included a minor editorial change in § 300.800(c) to reflect that a state compiles and maintains an administrative record for rather than at a given site.

Final rule: EPA is promulgating § 300.800(c) as proposed, except for a minor editorial change in the first sentence as follows: "If a state is the lead agency for a site, the state shall compile and maintain the administrative record for the selection of the response action *for* that site in accordance with this subpart."

Name: Sections 300.800(d) and 300.800(e). Applicability.

Proposed rule: Section 300.800(d) states that the provisions of subpart I apply to all remedial actions where the remedial investigation began after the promulgation of these rules, and for all removals where the action memorandum is signed after the promulgation of these rules. Section 300.800(d) also proposes that "[T]his subpart applies to all response actions taken under section 104 of CERCLA or sought, secured, or ordered administratively or judicially under section 106 of CERCLA." Section 300.800(e) states that the lead agency will apply subpart I to all response actions not included in § 300.800(d) "to the extent practicable."

Response to comments: One commenter argued that the applicable provisions of subpart I should be amended to require agencies to comply with the subpart for all sites where the remedy selection decision was made more than 90 days after proposal of the revised NCP for comment. Another comment stated that § 300.800(e) be revised to state that lead agencies must comply with subpart I in any future actions they take, and that all lead agency actions must comply with subpart I "to the maximum extent practicable."

In response, EPA will adhere as closely as possible to subpart I for sites where the remedial investigation began before these regulations are promulgated. EPA will not, however, require that these sites comply with requirements which, because of the

timing of the response action relative to the promulgation of these rules, cannot be adhered to. For example, under the final rule the administrative record file must be available at the beginning of the remedial investigation phase. If these regulations are promulgated when a site is in the middle of the remedial investigation process, and the administrative record is not yet available, the lead agency cannot at this point comply with these regulations. Additionally, EPA believes that adding language to proposed NCP § 300.800(e) to state that lead agencies will comply with provisions of subpart I in any future action after promulgation of the new rule is unnecessary and redundant; compliance will be legally required, and applicability to all future response actions is implicit in the rule. Likewise, insertion of the word "maximum" before the phrase "extent practicable" is unnecessary since it would give additional emphasis but would not substantively change the requirement or the meaning of the rule.

One comment agreed with EPA's interpretation that subpart I applies to all response actions "sought, secured or ordered administratively or judicially," but others disagreed. Several stated that the term "judicially" should be deleted from § 300.800(d) because they argue that response actions ordered judicially would receive *de novo* adjudication, instead of administrative record review. CERCLA section 113(j)(1) states: "In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record." Commenters contend that this section does not apply to injunctive actions under CERCLA section 106 because these are not actions "taken or ordered by the President." To the contrary, the selection of a response action is a "response action taken * * * by the President." Accordingly, section 113(j)(1) requires that judicial review of the response action selected by the agency is "limited to the administrative record." Further, section 113(j)(2) stipulates that, "in any judicial action under this chapter"—whether for injunctive relief, enforcement of an administrative order or recovery of response costs or damages—a party objecting to "the President's decision in selecting the response action" must demonstrate, "on the administrative record, that the decision was arbitrary or capricious or otherwise not in accordance with law."

EPA received several comments objecting to EPA's determination that judicial review of an endangerment assessment be limited to the administrative record. They stated that as a matter of administrative and constitutional law, a finding of imminent and substantial endangerment is not an issue concerning "the adequacy of the response action," as stated in CERCLA section 113(j), and therefore must receive *de novo* review by a court. A second comment requested that EPA state in the regulation that review of EPA's expenditures in the implementation of a remedy is *de novo*.

An assessment of endangerment at a site is a factor highly relevant to the selection of a response action, and is in fact part of the remedial investigation (RI) process central to the decision to select a response action. Therefore, the determination of endangerment (which will generally be included in the decision document) will be included in the administrative record for selection of a response action and should be reviewed as part of that record. (EPA notes that the term "endangerment assessment" document has been superseded by the term "risk assessment" document, and while assessments of endangerment at a site are still conducted during the RI, it is the "risk assessment" document that becomes part of the record.) In response to the comment that Agency expenditures on a response action should receive *de novo* review, EPA notes that this issue was not raised in the proposed NCP, and is therefore not addressed in the final rule.

Final rule: EPA is promulgating the rule as proposed.

Name: Section 300.805. Location of the administrative record file.

Proposed rule: Section 113(k)(1) of CERCLA states that "the administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location." Section 300.805 of the proposed NCP provides five exemptions for information which need not be placed at or near the facility at issue: Sampling and testing data, guidance documents, publicly available technical literature, documents in the confidential portion of the file, and emergency removal actions lasting less than 30 days.

Response to comments: One commenter supported limiting the amount of information which must be located at or near the site, but many commenters stated that every document contributing to decision-making, including confidential documents which are part of the record, should be located at or near the site and agency convenience is not a sufficient reason to exclude documents from the site. They asserted that such exclusions undermine active public involvement at the site and are contrary to statutory intent. Another comment stated that requiring the administrative record to be kept in two places, at a central location and at or near the site, runs counter to the statutory requirement of keeping a record only "at or near the facility at issue." One commenter asked that EPA acknowledge that Indian tribal headquarters may be a logical place to keep the administrative record when a Superfund site is located on or near an Indian reservation. A final comment requested that EPA endorse through regulatory language that administrative records can be kept on microfiche or other record management technologies, and have the equivalent legal validity to paper records.

Requiring sampling data and guidance documents to be placed at the site is both unnecessary and, in many cases, very costly. Administrative records are often kept at public libraries where space is limited and cannot accommodate voluminous sampling data for large, complex sites. Summaries of the data are included in the RI/FS, which is located at or near the site. In addition, requiring publicly available technical literature at the site will require copying copyrighted material, an additional expenditure of limited Superfund dollars. Moreover, Agency experience is that, as yet, relatively few people view the administrative record file at or near the site or request review of the sampling data or general guidance documents listed in the index to the site file.

However, EPA has revised the rule to specify that, if an individual wishes to review a document listed in the index but not available in the file located at or near the site, such document, if not confidential, will be provided for inclusion in the file *upon request*. The individual will not need to submit a Freedom of Information Act Request in order to have the information made available for review in the file near the site. EPA believes that provision of such documents in the file near the site upon request meets the requirement of CERCLA section 113(k) that the record be "available" at or near the site. In addition, this rule does not bar lead agencies from deciding to place this information in the site file without waiting for a request. Lead agencies are encouraged to place as much of this information at or near the site as practical, and to automatically place information at sites where there is a

high probability that the information will be in demand or the information is central to the response selection decision.

The confidential portion of the file need not be located at or near the site, and will not be available upon request either at the site or at the central location, since the information is not available for public review.

EPA believes that requiring that the record be located in two places is necessary to ensure both adequate public access to the record files and better lead-agency control over the record documents. The statutory requirement in CERCLA section 113(k)(1) states that the President may also place duplicates of the administrative record at any other location. This section clearly provides authority to maintain a second administrative record at a central location. Section 300.805 of the proposed NCP (53 FR 51515) reflects EPA's decision to make this statutory option a regulatory requirement. A centrally located record may offer easier access to interested parties located far from the response site.

EPA agrees with the commenter that housing the centrally located copy of the record at Indian tribal headquarters may be appropriate when a Superfund site is located at or near an Indian reservation. In the 1986 amendments to CERCLA, Indian tribes are accorded status equivalent to states, and can be designated lead agencies for response actions, in which case they would also be required to compile and maintain the administrative record at or near the site.

Finally, as EPA stated in the preamble to the proposed NCP, maintaining the administrative record on microfiche is already recognized as a legally valid and effective practice: "EPA may make the administrative record available to the public in microform. EPA may microform-copy documents that form the basis for the selection of a CERCLA response action in the regular course of business" (53 FR 51465). EPA agrees that this should be specified in the rule and has added § 300.805(c) accordingly, providing that the lead agency may make the record available in microform.

Final rule: Section 300.805 is modified as follows:

1. Section 300.805(b) is added to the rule as follows: "Where documents are placed in the central location but not in the file located at or near the site, such documents shall be added to the file located at or near the site upon request, except for documents included in paragraph (a)(4) of this section."

2. Section 300.805(c) is added to the rule as follows: "The lead agency may make the administrative record file available to the public in microform."

3. The section has been renumbered accordingly.

Name: Sections 300.810(a)–(d). Documents not included in the administrative record file.

Proposed rule: Section 300.810(b) discusses which documents may be excluded from the administrative record. Section (c) discusses privileged information that is not included in the administrative record. Section 300.810(d) discusses confidential information that is placed in the confidential portion of the administrative record.

Response to comments: One commenter argued that § 300.810 should specifically include an exemption for classified documents related to national security. While the NCP currently does not address the potential conflict between national security concerns and the requirement to establish a publicly accessible administrative record, it is not clear that such an exemption could be adequately specified by rule or that an exemption would appropriately resolve this conflict. Section 121(j) provides a national security waiver by Presidential order of any requirements under CERCLA, which can be invoked in certain circumstances. Under this provision, protection of national security interests requires case-by-case review under section 121(j) and not a blanket exemption in the NCP. Nothing in the NCP limits the availability of this waiver.

Another comment received by EPA stated that the treatment of privileged and confidential documents in the records is unfair, because it denies access to documents that may be critical to the selection of a remedy. EPA has provided for a confidential portion of the administrative record where documents containing, for example, trade secrets of companies that have developed patented cleanup technologies being considered as a response selection alternative can be kept confidential. To maintain a fair balance between the need for confidentiality and the public's right of review of the record, the lead agency must summarize or redact a document containing confidential information to make available to the greatest extent possible critical, factual information relevant to the selection of a response action in the nonconfidential portion of the record.

A final comment proposed that an index to the privileged documents should be included in the nonconfidential portion of the administrative record. EPA agrees, believing that an index will let interested parties know in general terms what documents are included in the record without compromising the confidential nature of the information contained in those documents.

Finally, EPA is adding a sentence to § 300.810(a)(6) to clarify that the index can include a reference to a group of documents, if documents are customarily grouped. This will simplify EPA's task without compromising the integrity of the record.

Final rule: 1. EPA is promulgating §§ 300.810(b), (c) and (d) as proposed with a minor editorial change to clarify the first sentence of § 300.810(d).

2. The following language is added to § 300.810(a)(6) to provide for listing grouped documents in the administrative record file index: "If documents are customarily grouped together, as with sampling data chain of custody documents, they may be listed as a group in the index to the administrative record file."

Name: Section 300.815. Administrative record file for a remedial action.

Proposed rule: The term "administrative record file" is used throughout the proposed NCP. Section 300.815(a) proposes that the administrative record file be made available for public inspection at the beginning of the remedial investigation phase.

Response to comments: EPA received several comments objecting to the concept of an administrative record file. They objected because there is no statutory authority for establishing a file, and because they were concerned that the lead agency could edit the file, specifically by deleting public and PRP comments and information that do not support the response action ultimately chosen by EPA, and that these comments and information would not remain a part of the final administrative record.

The statute requires the President to establish an administrative record. Under subpart I of the NCP, the administrative record file is the mechanism for compiling, and will contain, the administrative record required by section 113(k). One reason EPA adopted the concept of an administrative record file is that EPA felt that it may be confusing or misleading to refer to an ongoing compilation of documents as an "administrative record" until the compilation is complete. Until the response action has been selected, there

is no complete administrative record for that decision. Thus, to avoid creating the impression that the record is complete at any time prior to the final selection decision, the set of documents is referred to as the administrative record file rather than the administrative record.

However, this does not mean, as the comments appear to suggest, that the lead agency may "edit" the administrative record file in a manner that removes comments and technical data simply because they are not supportive of the final selection decision. Any comments and technical information placed in the record file for a proposed response action and relevant to the selection of that response action, whether in support of, or in opposition to, the selected response action, become part of the administrative record for the final response selection decision. Such materials will remain in the administrative record file, and will become part of the final administrative record. However, EPA believes that as a matter of law documents that are erroneously placed in the administrative record file (e.g., documents that have no relevance to the response selection or that pertain to an entirely different site) would not necessarily become part of the final administrative record.

EPA received additional comments stating that the administrative record file should be available before the beginning of the remedial investigation phase. These comments suggested that the file be available: When a site is entered into the CERCLIS data base; when the HRS score is calculated; when proposed for inclusion on the NPL; after the preliminary assessment report; and after the remedial site investigation.

EPA believes that the point at which a site is entered into the CERCLIS data base is too early to put any information which would be relevant to a selection of a response action into a record file because at this point there has been no site evaluation and therefore little factual information about the site upon which to base a response decision. Interested parties can already find any information on a site that would be included at the point of the HRS scoring and placement on the NPL in the NPL docket, which is publicly available. The preliminary assessment and remedial investigation stages of a response are premature for making the administrative record available; at these points there is little information relevant to response selection on which to comment or to review. Once the RI/FS work plan is approved, and the RI/FS study begins—including such activities as project scoping, data collection, risk assessment and analysis of alternatives—there is a coherent body of site-specific information with relevance to the response selection upon which to comment. EPA believes that the beginning of the RI/FS phase is the point in the process when it makes sense to start a publicly available record of information relevant to the response selection.

One comment suggested that interested persons would have no chance to comment on the formation of the RI/FS work plan. The comment suggested that the record file should be available before the RI/FS work plan is approved, e.g., with a draft work plan or statement of work. EPA disagrees. Approved work plans are often amended. An interested person may comment on the scope or formation of the work plan, and such comments can be taken into account by the lead agency and incorporated into a final or amended work plan. Such comments must be considered if submitted during the comment period on the proposed action.

Final rule: EPA is promulgating § 300.815(a) as proposed.

Name: Section 300.815. Administrative record file for a remedial action. Section 300.820(a). Administrative record file for a removal action.

Proposed rule: Subpart I requires that the administrative record for a remedial action be available for public review when the remedial investigation begins. Thereafter, relevant documents are placed in the record as generated or received. The proposed regulations also require that the lead agency publish a newspaper notice announcing the availability of the record files, and a second notice announcing that the proposed plan has been issued. A public comment period of at least 30 days is required on the proposed plan. Section 300.820(a) outlines the steps for the availability of the record and public comment for a non-time-critical removal action. EPA solicited comments on a proposal currently under consideration to require quarterly or semi-annual notification of record availability and the initiation of public comment in the **Federal Register**.

Response to comments: Some commenters suggested that the use of the **Federal Register** to announce the availability of the administrative record is too costly or of little or no benefit. Several commenters requested clarification on how and when the lead agency should respond to comments. Another stated that lead agencies should be encouraged—though not required—to respond to early comments before the formal comment period begins.

EPA chose not to require a notice of availability of the administrative record in the **Federal Register** in this rulemaking because it is still unclear whether the benefits of this additional notice outweigh its costs. EPA may decide in the future to require this additional notice if it determines that such notice would improve notification.

EPA agrees with commenters that clarification is needed as to when the lead agency should respond to comments. We also agree that the lead agency should be encouraged to respond to comments submitted before the public comment period. EPA generally will consider any timely comments containing significant information, even if they are not received during the formal comment period, and encourages other lead agencies to do so. EPA will strive to respond to comments it receives as early as possible, and to encourage other lead agencies to follow suit. However, any lead agency is required to consider and respond to only those comments submitted during a formal comment period. Any other comments are considered at the lead agency's discretion. EPA has revised the language of these sections to reflect the policy on consideration of public comments submitted prior to public comment periods.

One comment recommended that the regulations should provide how long the administrative record must be available, and suggested EPA coordinate efforts with the National Archives about retaining the record as a historical record. Another felt that materials were not always placed into the record in a timely manner, and that the record was not always available to the working public during evenings and weekends or accompanied by a copying machine. Similarly, one commenter felt that documents should be placed in the record when they are generated or in a prescribed timeframe of two weeks. Another asked that free copies of key documents be included in the record.

EPA believes that the length of time a record must be available at or near the site will be dependent on site-specific considerations such as ongoing activity, pending litigation and community interest. EPA also believes that difficulties sometimes encountered by the working public require resolution on a site-by-site basis and do not merit a change in the proposed NCP language. Special provisions may have to be made by the records coordinator, with the aid of other site team members, including

the community relations coordinator or regional site manager, to ensure that the record location chosen is convenient to the public and that copying facilities are made available. Using public libraries to house the record should promote better availability of the record during non-working hours and on weekends. In response to mandating deadlines for lead agencies to place documents into the administrative record file, Agency guidance already directs record compilers to place documents into the record file as soon as they are received. Agency policy additionally prescribes a suggested timeframe for placing documents in the record file. EPA believes that mandatory deadlines in the NCP would do little to increase the rate at which records are already compiled. The decision to place free copies of key documents in the record at or near the site will be a site-specific decision based on the level of community interest in these documents. Those who wish to make copies of key documents or any document contained in the administrative record file should already have access to copying facilities.

EPA received a comment requesting that it publish a joint notice of availability of the administrative record with a notice of availability of Technical Assistance Grants. Another comment stated that the removal site evaluation and engineering evaluation/cost analysis (EE/CA) must be included in the record for a non-time-critical removal action.

Publishing notice of the availability of the record in tandem with announcements of the availability of Technical Assistance Grants (TAGs) is a good idea where TAGs are available for a removal action. The TAGs, however, are generally designed to support citizen involvement in technical issues for sites undergoing remedial actions. The one-year, $2 million limitations on removals and the limited number of alternatives usually reviewed make further expense on a technical advisor less beneficial than it might be for a long-term remedial action. As for placing the removal site evaluation and EE/CA in the administrative record, EPA agrees that generally such documents would be part of the administrative record for the removal action.

Finally, EPA is making a minor change to the language of § 300.820(a)(4). EPA is substituting the term "decision document" in place of action memorandum to allow for situations where the agency's decision document for a removal action is not named an action memorandum.

Final rule: 1. The second sentences of §§ 300.815(b), 300.820(a)(2) and 300.820(b)(2) are revised to reflect the new language on responding to comments as follows: "The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period."

2. In § 300.820(a)(4), the term "decision document" is substituted for "action memorandum."

3. The remainder of § 300.820(a) is promulgated as proposed.

Name: Section 300.820(b). Administrative record file for a removal action—time-critical and emergency.

Proposed rule: Section 300.820(b) outlines steps for public participation and administrative record availability for time-critical and emergency removal responses (53 FR 51516): "Documents included in the administrative record file shall be made available for public inspection no later than 60 days after initiation of on-site removal activity," at which point notification of the availability of the record must be published. The lead agency then, as appropriate, will provide a public comment period of not less than 30 days on the selection of the response action.

Response to comments: Several comments suggested that public comment requirements under § 300.820(b) were unnecessary and burdensome, especially the requirement to publish a notice of the availability of the record. One comment argued that requiring public notification of both record availability and of a site's inclusion on the NPL was unnecessary and duplicative. Another comment stated that the requirements for public notification and public comment are not appropriate for all time-critical removal actions, and recommended that the administrative record be available for review only for those time-critical removal actions that do require public notice and comment. A related comment stated that the requirement to publish a notice of availability of the administrative record for all time-critical removal actions be eliminated in favor of making the record available but not requiring an advertisement or comment period, since some time-critical removal actions are completed before a public comment period could be held. Others asked that the public comment period become mandatory, or at least mandatory for removal activities not already completed at the time the record is made available. Another comment requested that the record become available sooner—at least 30 days after initiation of on-site removal activity—because the current 60-day period prevented the consideration of any pre-work comments. A second comment supported the 60-day period. Finally, a commenter argued that it made little sense to make the record available after 60 days for an emergency response because the on-scene coordinator (OSC) report containing most of the response information isn't required to be completed until one year following the response action.

In general, the public participation requirements under § 300.820(b) are designed to preserve both the flexibility and discretion required by the lead agency in time-critical removal action situations as well as EPA's commitment to encouraging public participation and to keeping an affected community well-informed. EPA believes the notification and comment periods required in § 300.820(b) provide for both Agency flexibility and meaningful public involvement. The regulatory language stating that "The lead agency shall, as appropriate, provide a public comment period of not less than 30 days" provides the lead agency needed flexibility when the emergency nature of circumstances makes holding a comment period infeasible.

While EPA believes that it is necessary to announce the availability of the administrative record for time-critical and emergency removal actions as well as non-time-critical actions, EPA believes that requiring establishment of the administrative record and publishing a notice of its availability 30 days after initiating a removal action in all cases, instead of "no later than 60 days after initiating a removal action," as proposed, would be somewhat premature. It has been EPA's experience that it often takes 60 days to stabilize a site (i.e., those activities that help to reduce, retard or prevent the spread of a hazardous substance release and help to eliminate an immediate threat). EPA believes that the overriding task of emergency response teams during this critical period must be the undertaking of necessary stabilization, rather than administrative duties. Compiling and advertising the record before a site has become stabilized would divert emergency response teams from devoting their full attention to a response. EPA believes that such administrative procedures are better left for after site stabilization.

Public notice requirements for announcing the availability of the administrative record and for a site's inclusion on the NPL are not duplicative,

but notify the public of two very different decisions. Removal actions do not always take place at sites on the NPL, therefore, the notice requirements are obviously not duplicative for these removal actions. For remedial sites that are on the NPL, the administrative record need not be established for some time after listing on the NPL, so publishing a notice of the availability of the record would be essential to make the affected public cognizant of site progress and their opportunity for review of documents included in the record.

Lastly, the procedures specified in § 300.820(b) are applicable to an emergency removal that starts and finishes within 60 days. However, as provided in § 300.820(b)(2), a comment period is held only where the lead agency deems it appropriate. But because the administrative record is an avenue for public information as well as for public comment, EPA also believes that even if the action is completed before the record file is made available, it is still appropriate to make the record available to the public. There is also no inherent contradiction in the OSC report being available one year after completion of the response action while the administrative record becomes available 60 days after initiation of on-site activities. Since the OSC report is a summary of the site events and is not a document which is considered in the selection of response action, it is not generally included in the administrative record.

Final rule: EPA is promulgating § 300.820(b) as proposed, except that:

1. The second sentence of § 300.820(b)(2) is revised on responding to public comments as described above.

2. Section 300.820(b)(3) is revised consistent with § 300.820(a)(4); the term "action memorandum" is changed to "decision document."

Name: Section 300.825. Record requirements after decision document is signed.

Proposed rule: Section 300.825 describes situations where documents may be added to the administrative record after the decision document is signed. Documents may be added to a record in the following circumstances: When the document addresses a portion of the decision which the decision document does not address or reserves for later; when the response action changes and an explanation of significant differences or an amended decision document is issued; when the agency holds additional public comment periods after the decision is signed; and when the agency receives comments containing "significant information not contained elsewhere in the record which could not have been submitted during the public comment period which substantially support the need to significantly alter the response action" (53 FR 51516). In addition, subpart E of the proposed NCP discusses ROD amendments and Explanations of Significant Differences. Explanations of Significant Differences may be used for significant changes which do not fundamentally change the remedy, and do not require public comment. ROD amendments must be used for fundamental changes, and require a public comment period.

Response to comments: One commenter asked that subpart I reflect the factors consistently applied by courts when determining whether the record should be supplemented, including such criteria as Agency reliance on factors not included in the record, an incomplete record, and strong evidence that EPA engaged in improper behavior or acted in bad faith. A related comment stated that since general principles of administrative law apply to administrative record restrictions and supplementing the record, language limiting supplementing the record should be deleted from the NCP. EPA believes that including specific tenets of administrative law governing supplementing of the record in the NCP itself is unnecessary. These tenets apply to record review of response actions whether or not they are included in the NCP. The requirements of § 300.825(c) do not supplant principles on supplementing administrative records.

Another comment recommended that EPA permit the record to be supplemented with any issue contested by a PRP, while granting an objective third party the ability to accept or reject record supplements. EPA already requires that any documents concerning remedy selection submitted by PRPs within the public comment period be included in the record. All significant evidence submitted after the decision document is complete is already included in the record, so long as it meets the requirements of § 300.825(c), is not included elsewhere in the record, could not have been submitted during the public comment period, and supports the need to significantly alter the response action. EPA believes these criteria are reasonable and do not require the use of a third-party arbitrator.

One comment stated that all PRP submissions must be placed in the record in order to protect a party's due-process right to be heard. EPA disagrees that all PRP submissions to the lead agency must be placed in the record in order to protect the party's due process rights. The process provided in the rules—including the notice of availability of the proposed plan and the administrative record for review, the availability of all documents underlying the response selection decision for review throughout the decision-making process, the opportunity to comment on the proposed plan and all documents in the administrative record file, the requirement that the lead agency consider and respond to all significant PRP comments raised during the comment period, the notice of significant changes to the response selection, and the opportunity to submit, and requirement that the lead agency consider, any new significant information that may substantially support the need to significantly alter the response selection even after the selection decision—is sufficient to satisfy due process. Moreover, the opportunity provided for PRP and public involvement in response selection exceeds the minimum public participation requirements set forth by the statute. Placing a reasonable limit on the length of time in which comments must be submitted, and providing for case-by-case acceptance of late comments through § 300.825(c), does not infringe upon procedural rights of PRPs.

One commenter asked that the permissive "may" in § 300.825(a) be changed so there is no lead-agency discretion over whether to add to the administrative record documents submitted after the remedy selection, and stated that additional public comment periods as outlined in § 300.825(b) should not be only at EPA's option. A related comment stated that the multiple qualifiers in § 300.825(c), including the phrases "substantially support the need" and "significantly alter the response action" (53 FR 51516), grant EPA overly broad discretionary powers over what documents may be added to the record. The commenter suggests deleting the word "substantially," as well as stating that all comments, even those disregarded by EPA, should be included in the record for the purpose of judicial review. EPA disagrees that the word "may" in either § 300.825(a) or § 300.825(b) is too permissive. Section 300.825(b) of the proposal was simply intended to clarify the lead agency's implicit authority to hold additional public comment periods, in addition to those required under subpart E for ROD amendments, whenever the lead agency decides it would be appropriate. Because these additional comment periods are not

required by statute or regulation, the "permissive" language simply reflects the lead agency's discretion with respect to these additional public involvement opportunities. Similarly, lead-agency discretion to add to the administrative record documents submitted after a decision document has been signed provides the lead agency the option to go beyond the minimum requirements for public participation outlined in the statute. In response to requests to delete the qualifiers in § 300.825(c), this language is intentionally designed to define carefully the circumstances in which EPA must consider comments submitted after the response action has been selected. This standard recognizes CERCLA's mandate to proceed expeditiously to implement selected response actions, but also recognizes that there will be certain instances in which significant new information warrants reconsideration of the selected response action. Section 300.825(c) is intended to provide a reasonable limit on what comments EPA must review or consider after a decision has been made.

Several commenters requested that PRPs not identified until after the close of the public comment period should be allowed an opportunity to comment on the record within 60 days of EPA's notification of potential liability. EPA makes significant efforts to involve PRPs as early in the process as possible. When PRPs are identified late in the process, they may provide EPA with comments at that time. EPA will consider comments which are submitted after the decision document is signed in accordance with the criteria of § 300.825(c). This is true no matter when the PRP is identified in the process. EPA believes that the current rule is sufficient for granting these late-identified PRPs the opportunity for submitting late comments for the record.

One commenter stated that new information that confirms or substantiates prior public comment should be made part of the record, even after a ROD is signed. EPA is not required by statute or regulation to consider these comments, although a lead agency may, and frequently does, consider post-ROD comments it considers to be significant—in which case both the comment and the lead agency's response are part of the record.

Finally, EPA is making a minor change to § 300.825(b) on additional public comment periods to clarify that, in addition to comments and responses to comments, documents supporting the request for an additional comment period, and any decision documents would be placed in the administrative record file. Although this is what EPA intended in the proposal, a clarification is necessary to ensure consistency.

Final rule: EPA is promulgating § 300.825 as proposed except for an addition to the last sentence of section (b) as follows: "All additional comments submitted during such comment periods that are responsive to the request, and any response to these comments, along with documents supporting the request and any final decision with respect to the issue, shall be placed in the administrative record file."

Subpart J—Use of Dispersants and Other Chemicals

The following sections discuss comments received on subpart J and EPA's responses.

Name: Sections 300.900–300.920. General.

Existing rule: Section 300.81 described the purpose and applicability of existing subpart H (now subpart J), and § 300.82 defines the key terms used in the regulation. Section 300.83 provides that EPA shall maintain a schedule of dispersants and other chemical or biological products that may be authorized for use on oil discharges called the "NCP Product Schedule."

Section 300.84 sets forth the procedures by which an OSC may authorize the use of products listed on the NCP Product Schedule. The section provides that an OSC, with concurrence of the EPA representative to the RRT and the concurrence of the state(s) with jurisdiction over the navigable waters (as defined by the CWA) polluted by the oil discharge, may authorize the use of dispersants, surface collecting agents, and biological additives listed on the NCP Product Schedule.

This section also provides that if the OSC determines that the use of a dispersant, surface collecting agent, or biological additive is necessary to prevent or substantially reduce a hazard to human life, and there is insufficient time to obtain the needed concurrences, the OSC may unilaterally authorize the use of any product, including a product not on the NCP Product Schedule. In such instances, the OSC must inform the EPA RRT representative and the affected states of the use of a product as soon as possible and must obtain their concurrence for the continued use of the product once the threat to human life has subsided. This provision eliminates delays in potentially life-threatening situations, such as spills of highly flammable petroleum products in harbors or near inhabited areas. Although they will not be listed on the Schedule, this section also provides for authorization of the use of burning agents on a case-by-case basis. The use of sinking agents is prohibited.

Section 300.84 explicitly encourages advance planning for the use of dispersants and other chemicals. The OSC is authorized to approve the use of dispersants and other chemicals without the concurrence of the EPA representative to the RRT and the affected states if these parties have previously approved a plan identifying the products that may be used and the particular circumstances under which their use is preauthorized.

Section 300.85 details the data that must be submitted before a dispersant, surface collecting agent, or biological additive may be placed on the NCP Product Schedule. Section 300.86 describes the procedures for placing a product on the Product Schedule and also sets forth requirements designed to avoid possible misrepresentation or misinterpretation of the meaning of the placement of a product on the Schedule, including the wording of a disclaimer to be used in product advertisements or technical literature referring to placement on the Product Schedule.

Appendix C details the methods and types of apparatus to be used in carrying out the revised standard dispersant effectiveness and aquatic toxicity tests. Appendix C also sets forth the format required for summary presentation of product test data.

Proposed rule: Proposed subpart J is very similar to subpart H and contains only minor revisions. Section numbers and references to other sections and subparts have been changed where appropriate. Technical changes and minor wording changes to improve clarity have also been made.

Definitions formerly presented in subpart H have been moved to subpart A, and a new definition has been added for miscellaneous oil spill control agents. Accordingly, a list of data requirements for miscellaneous spill control agents is proposed to be added to § 300.915. The definition for navigable waters is as defined in 40 CFR 110.1.

Section 300.910, which addressed "Authorization of use," was modified slightly in the proposed regulation to emphasize the importance of obtaining concurrence for the use of dispersants and other chemicals from the appropriate state representatives to the Regional Response Team (RRT) and the DOC/DOI natural resource trustees "as appropriate."

Response to comments:—1. *Involvement of DOC/DOI trustees.* Many commenters opposed the inclusion of the DOC/DOI trustees in

the authorization of use procedure, § 300.910(a). Noting that dispersants must be used quickly to be effective, commenters asserted that the decision-making process for responding to an oil spill is already too time-consuming and requires too many people to make a timely decision. At most, several commenters suggested, the DOC/DOI trustees should be consulted rather than having a concurrence. Other commenters recommended that the OSC be able to act unilaterally or be required to obtain concurrences from only one other entity such as the affected state RRT representative or the National Oceanic and Atmospheric Administration (NOAA) Scientific Support Coordinator (SSC).

In response, as discussed in the preamble to the proposal, the decision to use a chemical is highly dependent upon specific circumstances, locations and conditions which must be assessed by the OSC, and the EPA and the state RRT representative and DOC/DOI trustees are in a unique position to understand local conditions and to collect and coordinate quickly the necessary local information. Further, to facilitate a timely decision, the preamble urged early involvement of the EPA and state RRT representatives and DOC/DOI trustees, as appropriate. The intention of the addition of the DOC/DOI trustees was not to make the process more cumbersome, but to reflect the concurrence procedures that are already actually applied. However, EPA believes that the many comments concerning this issue have raised a significant distinction regarding concurrence during an emergency, which should be a streamlined procedure, and concurrence during a planning procedure. The final rule will be revised, therefore, to recognize that distinction. It will return to the authorization language of the previous subpart H with the addition of the provision that DOC/DOI trustees be consulted, as appropriate. Language has been added to § 300.910(e), however, to require that the DOC/DOI trustees concur with advance authorizations of the use of dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents and the use of burning agents. EPA believes that this change reflects the current concurrence process that is actually used in both preplanning and operational approval situations and retains for the OSC the obligation to seek the consultation, when practicable, of the natural resource trustees in an emergency situations, but retains the flexibility to authorize the use of chemicals in such situations by a streamlined procedure when necessary.

Some commenters supported the extension of the concurrence authority granted in § 300.910(a) to the DOC/DOI trustee agencies to include pre-planning for the use of chemical and biological agents outlined in paragraph (e) of this section. Although the DOC/DOI concurrence requirement has been deleted from paragraph (a) of the Authorization of use section, concurrence of the DOC/DOI trustee agencies will be required before a chemical or biological agent can be pre-authorized.

2. *Approval and concurrence.* Several commenters supported the concept of "pre-approval" of dispersants suggesting that the EPA encourage advance planning, and several commenters implied that this provision had been removed in proposed subpart J. EPA believes that § 300.910(e) continues to endorse the concept that RRTs make preauthorization determinations. This section is essentially unchanged from the previous subpart H.

Some commenters suggested that the responder be able to unilaterally authorize the use of surface collecting agents or similar compounds which limit the spread of oil or can enhance its recoverability. EPA does not believe and has been provided with no substantial evidence to support a determination that there is any reason to exempt surface collecting agents or similar products from the general requirement for state and RRT concurrence. EPA intends that RRT advance planning under § 300.910(e) be used to address where the use of such agents should be encouraged or restricted on a regional basis.

3. *Dispersants.* Several commenters supported a requirement that dispersants be considered on an equal basis with other spill management tools or be considered as a first response option. Conversely, two commenters recommended that the NCP state a clear policy to the effect that dispersants are a less desirable choice and should be considered only when the threat to human life and property will not allow for containment and removal. EPA believes that the circumstances surrounding oil spills to navigable waters and the factors influencing the choice of a response method or methods are many and that the NCP should not indicate a preference for one cleanup method over another. Section 300.310(b) states that of the numerous chemical or physical methods that may be used to recover spilled oil or mitigate its effects, the chosen methods shall be the most consistent with protecting public health and welfare and the environment.

4. *NCP Product Schedule.* Commenters suggested that the listing of a product on the NCP Product Schedule should constitute "pre-approval" for the use of those products, subject to a series of well-defined guidelines such as those developed by American Society of Testing and Materials (ASTM) Committee F-20. As an alternative, they suggested that Subpart J should include an additional section containing those products that are "preapproved." Placement of a product on the NCP Product Schedule currently does not mean that EPA has confirmed the safety or effectiveness of the product or in any way endorses the product. The purpose of the standardized testing procedures set out in Appendix C is to ensure that OSCs have comparable data regarding the effectiveness and toxicity of different products. The circumstances under which dispersants and other chemicals may be used are many. It is inappropriate, therefore, to establish generic criteria that could be used to determine whether a product is or is not appropriate for a particular use under all circumstances. As discussed earlier, therefore, EPA believes that the RRTs deliberations provide the best forum to make determinations as to whether the use of a dispersant or other chemical should be approved for use in a particular situation under all the circumstances of the spill and its location.

A commenter noted that California, as well as other states, has promulgated more restrictive lists of permitted oil spill cleanup agents and recommended that this fact should be noted in the NCP. EPA believes that the RCP is the appropriate document to recognize these products. In situations that pose a threat to human life, this same commenter objected to the provision that permits the OSC to authorize products not listed on the NCP Product Schedule and products that have not passed state tests which evaluate performance and safety. The commenter also questioned the efficacy of stockpiling such products in sufficient volumes and close enough to potential spill locations to be of any use. EPA does not agree with this recommendation. A life-threatening oil discharge such as a spill of highly flammable petroleum products in harbors or near inhabited areas may occur at a location where chemical agents on the Schedule or state lists are not immediately available for a wide variety of reasons. In such a case, EPA believes that the OSC must have the discretion to use any products that, in

his professional judgement, would effectively and expeditiously mitigate the threat to human life.

Another commenter suggested that dispersant test applications be conducted on a spill concurrently with th deliberations of the RRT regarding the authorization of a dispersant in a specific situation. EPA believes that such a procedure could undermine the role of the RRT. Instead, EPA believes that the most effective way to streamline the decision to use or not to use chemical countermeasures, is for the RRTs to continue moving forward with pre-authorization planning efforts.

A commenter asserted that acceptance of a proposed oil spill control agent for inclusion in the NCP Product Schedule must be predicated on EPA's judgement that the agent meets some minimum criteria for the proposed use. Currently, the data requirements for placement of a product on the Schedule are designed to provide sufficient data for OSCs to judge whether and in what quantities a dispersant may safely be used to control a particular discharge. As noted earlier, the standardized testing procedures in Appendix C are intended to ensure that OSCs have comparable data regarding the product's effectiveness, toxicity and other characteristics. EPA has historically recognized this situation by providing the type of case-specific approval that has been the NCP policy regarding the use of chemical countermeasures for a great many years. EPA, however, recognizes the value of establishing minimum criteria that would limit which such products could be considered by the Responsible Party and/or the OSC on spills into navigable waters. Therefore, EPA is in the process of examining the dispersant authorization policies of other countries, particularly with regard to the application of minimum criteria or standards. A study to re-evaluate the toxicity test in light of state-of-the-art developments is also underway. EPA believes that defining minimum criteria should be considered and invites recommendations from interested parties regarding threshold criteria for effectiveness and toxicity of dispersants and other chemical agents.

5. *Other comments.* Several commenters suggested that the NCP include a requirement to use the EPA's Computerized Decision Tree (CDT) for oil spill response. EPA recognizes that the CDT is a tool to assist in making dispersant use or non-use decisions but EPA believes that mandating its use in all situations is inappropriate.

Some commenters suggested that all parties to a dispersant use decision be required to have hands-on training in oil spill containment, recovery, cleanup, and dispersants and other chemical countermeasures from a recognized authority. While this appears to be a worthy goal, it would be difficult to regulate on a national basis, both from the perspective of certifying training programs and monitoring RRT members who have or have not received training. EPA believes that these types of training requirements are best addressed on a regional basis and not by regulation.

A commenter suggested that there should be a rapid and simplified way to obtain local approval to carry out field exercises and tests on real oil with real dispersants in limited quantities. EPA believes that the NCP does not need to be amended to address this point and refers the commenter to 40 CFR 110.9. State RRT representatives can offer advice about compliance with their regulations on the authorization of intentional spills for research and demonstration purposes.

One commenter recommended that the third sentence in § 300.910(e) should be changed to read: "If the RRT representative with jurisdiction over the waters of the area to which a RCP applies approves in advance the use of products as described in the NCP Product Schedule, the OSC may authorize the use of the products without obtaining the specific concurrences described in paragraph (a) of this section." EPA disagrees with this recommendation. While the addition to the inclusion of the DOC/DOI trustee agencies in any pre-authorization decision has been addressed earlier, EPA would like to emphasize the importance of obtaining the concurrence of the affected states in pre-planning agreements and believes that specific mention of the state role will accomplish this.

Final rule: Proposed subpart J has been revised as follows:

1. "Hazardous Substance Releases [Reserved]" has been added to § 300.905(b) to clarify that § 300.905(a) applies only to oil discharges.

2. Sections 300.910 (a), (b), and (c) have been revised to state that the OSC should consult with the DOC and DOI natural resource trustee, rather than receive their concurrence, on the use of dispersants, burning agents, etc.

3. Section 300.910(e) has been revised to add a reference to the DOC and DOI natural resource trustees.

4. The references to ASTM standards in § 300.915 have been revised.

Appendix C to Part 300—Revised Standard Dispersant Effectiveness and Toxicity Tests

No comments were received on the proposed revisions to Appendix C to part 300. The two proposed technical corrections have been made to Appendix C. First, in the calculations sections, 2.5 and 2.6, the formulas of equations (2), (3), and (5) for concentration of oil (C_{do}) in the sample, dispersant blank correction (D), and oil blank correction (OBC) have been corrected. Second, the units of viscosity (item 3, part IX in section 4.0) have been changed from furol seconds to centistokes. Last, the new 1988 ASTM standards have been cited for reference to viscosity in centistokes.

Appendix D to Part 300—Appropriate Actions and Methods of Remedying Releases

No comments were received on the proposed Appendix D to part 300. EPA is promulgating Appendix D as proposed. Appendix D includes materials from existing § 300.68(j) on appropriate actions at remedial sites and existing § 300.70 on methods for remedying releases. The appendix describes general approaches and lists specific techniques but is not intended to be inclusive of all possible methods of addressing releases. A lead agency may respond to types of releases and employ techniques other than those that are listed, depending on the particular circumstances. EPA believes that the provisions in existing §§ 300.68(j) and 300.70 are not appropriate for inclusion in proposed subpart E, which has been structured to focus on the sequence of response procedures. Because the materials do not impose any requirements or restrictions, they are appropriate for an appendix. It is intended that parties conducting response actions should consider the information provided in Appendix D.

III. Summary of Supporting Analyses

A. Regulatory Impact Analysis of Revisions to CERCLA and the NCP

There are two economic documents supporting today's final rule. The first (the September 1988 RIA) was prepared in September 1988 and supported the proposed rule (53 FR 51394).[32] EPA has

[32] Environmental Protection Agency, "Regulatory Impact Analysis in Support of the Proposed Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan," Office of Solid Waste and Emergency Response, September 1988.

since updated several of the key assumptions used in the September 1988 economic analysis and has prepared a second economic document entitled, "Regulatory Impact Analysis of Revisions to CERCLA and the National Contingency Plan" (November 1989 RIA). Both the September 1988 RIA and the November 1989 RIA are available in the Superfund Document Room of the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460.

Both RIAs estimate total and incremental costs to the Fund, states, federal agencies, and responsible parties of implementing the remedial program during the period FY87 through FY91, the duration of reauthorization of the Superfund program. EPA has focused its analyses on four provisions with incremental costs and benefits attributable directly to the 1986 CERCLA amendments: (1) Selection of remedy; (2) removals; (3) water restoration; and (4) publicly-operated sites. The impacts of these provisions are attributable directly to the 1986 CERCLA amendments, rather than to the NCP revisions, because in these areas EPA chose to retain the flexibility of the statutory language; the NCP essentially codifies the statutory requirements. The RIAs estimate the incremental costs of the provisions against a baseline defined by the requirements of CERCLA as specified in the 1985 NCP. The 1985 NCP is the proper baseline for the analysis of changes attributable to the statutory amendments because the 1985 NCP is the legal framework that defines response activities in the absence of the amendments to CERCLA.

The November 1989 RIA updates estimates for only the selection of remedy and water restoration provisions in today's final regulation. The analyses of the other provisions have not been updated because they did not rely on quantitative analyses, and no new data have been developed that would allow a quantitative analysis. In addition, the November 1989 RIA provides a new analysis of the costs of narrowing the range of risks to be considered in developing and selecting remedies. A brief summary of the analyses presented in the November 1989 RIA is provided below.

1. *Selection of remedy.* The new CERCLA preference for reducing mobility, toxicity, and volume of contaminants at a site is assumed to be a preference for remedies that use treatment as a principal element. The analysis of the overall cost of the selection of remedy incorporates several assumptions:

- The estimated costs of treatment and containment remedies have not been updated since the September 1988 RIA. The estimates of selection of remedy costs were developed using cost data from 30 RODs, signed during the FY82 to FY86 period, that contained information on capital and operation and maintenance (O&M) costs for both treatment-based remedies and containment-based remedies at a site.
- The percentage of remedial action (RA) starts in FY87 and FY88 selecting treatment over containment was assumed to be the same as the percentage of RODs signed that selected treatment alternatives in the same year. Because of the time lag between ROD signature and the actual RA start, this assumption leads to an overestimate of the cost over the period studied, but provides a more accurate estimate of the potential impacts beyond the reauthorization period of CERCLA.
- The estimated number of RA starts in FY87 and FY88 was based on actual RA starts as reported in the CERCLA Information System (CERCLIS).
- The number of RA starts in FY89 through FY91 were estimated based on the mandatory schedules in section 116 of CERCLA for 175 RA starts by the end of FY89 and an additional 200 starts by FY91.
- The fraction of RA starts in FY89 through FY91 that would have treatment as the selected option was assumed to rise to 66 percent in FY89 and 80 percent in FY90 and FY91 as a consequence of the selection of remedy provisions in the 1986 CERCLA amendments.

EPA estimates that the total cost of the selection of remedy provisions in the 1986 amendments to CERCLA, during the FY87 through FY91 period, is $8.7 billion: $3.95 billion to the Fund; $0.58 billion to states; $3.15 billion to responsible parties; and $1.03 billion to federal agencies. The 5-year present value of the estimated incremental cost of the selection of remedy provisions over the costs imposed already by the 1985 NCP is $2.9 billion: $1.32 billion to the Fund; $0.14 billion to states; $1.05 billion to responsible parties; and $0.41 billion to federal agencies. Changes in program administrative costs are not included in these estimates.

A sensitivity analysis was included in the September 1988 RIA to determine how the cost estimates change if the most important assumptions used to derive the estimates are altered. In addition to varying the cost parameters used in the analysis, the frequency of use of treatment under the 1986 CERCLA amendments is varied between 50 percent of sites or operable units using treatment to 100 percent using treatment for the period FY89 through FY91. In the November 1989 RIA, the analysis of the effects of the frequency of use of treatment has been updated; the results of the sensitivity analysis estimates the total incremental costs of the selection of remedy provisions to be between $1.3 and $4.3 billion, with a best estimate of $2.9 billion.

The 1986 amendments to CERCLA require RAs to comply with state applicable or relevant and appropriate requirements (ARARs) that are more stringent than federal ARARs. To the extent possible, therefore, cost estimates used in the November 1989 RIA are for remedies expected to comply with federal ARARs and those state ARARs more stringent than the federal standards. The September 1988 RIA concluded that compliance with more stringent state ARARs may increase the costs of an RA by about $6.6 million. However, EPA does not believe that an additional $6.6 million will be incurred to meet state ARARs for every RA under CERCLA because many RODs signed prior to the 1986 CERCLA amendments already showed evidence of compliance with state ARARs and many states do not have relevant standards more stringent than federal standards.

2. *Water restoration provisions.* Under the 1985 NCP, states held primary responsibility for financing O&M costs associated with an RA at a Fund-lead site. During the first fiscal year after completion of the capital expenditure at a site, the Fund financed a maximum of 90 percent of the operational costs until EPA was assured that the remedy was operational and functional. In each subsequent year, the state financed 100 percent of O&M costs. The 1986 amendments to CERCLA change this funding relationship for RAs involving treatment to restore ground water or surface water. Long-term costs of treatment of contaminated ground water or surface water now are defined to be a component of the RA when treatment is being used to restore an aquifer or surface-water body. Hence, this provision transfers financing responsibilities at Fund-lead sites using water restoration as part of the selected remedy from the states to the Fund. Under the new provision, the Fund finances 90 percent of the costs of water restoration for up to 10 years; states finance the remaining 10 percent of costs during these years. As discussed in the November 1989 RIA, EPA estimates that approximately $50.5 million in obligations to pay for water

restoration will be transferred from states to the Fund over the FY87–91 period as a result of the provisions on ground-water and surface-water restoration in the 1986 amendments to CERCLA. Because the provision results only in transfers of obligations to pay from states to the Fund, it does not give rise to real economic costs or real economic benefits.

3. *Use of risk range.* As part of its continuing analysis, EPA has evaluated the incremental costs between remedies selected at the 10^{-6} and the 10^{-7} risk levels. EPA identified two potential activities that would likely be affected: (1) Evaluation of remedies capable of achieving a 10^{-7} risk level; and (2) selection of such a remedy.

Most feasibility studies (FSs) and Records of Decision (RODs) completed to date include estimates of costs of achieving some stated threshold goal (e.g., MCLs, ARARs); other FSs and RODs are more detailed and estimate the effectiveness of various remedial alternatives in achieving specific risk target levels (e.g., 10^{-6} risk, "high," "medium," or "low" risk). Only a few FSs or RODs completed to date, however, actually contain cost estimates associated with achieving different risk levels or with achieving a risk level as low as 10^{-7}.

Because of the sparsity of data, EPA could not perform a detailed analysis of the incremental cost or cost savings attributable to different acceptable cleanup levels and, in particular, to establishing a broader or narrower acceptable risk level. In analyzing the costs incurred to date in developing different FSs, however, it became clear that generally the incremental cost of conducting a detailed evaluation of an alternative at one risk level versus "n" risk levels is minor relative to the cost of the FS. Essentially, the risk assessment and costing exercise relies on some sunk (i.e., fixed) costs associated with developing relationships (e.g., curves) that relate the amount of material to be treated to the risk levels that can be achieved. Once the relationship is developed, it is a relatively simple matter to generate estimates for one or any number of risk levels. EPA acknowledges, however, that the broader risk range may, in certain instances, result in an increased level of effort expended to evaluate additional alternatives or to do a more detailed analysis of existing alternatives.

EPA believes the greatest cost attributable to a broader risk range is associated with the implementation of a remedy that can achieve a 10^{-7} risk level. Based on data from the few sites that evaluated different alternatives at a range of risk levels, EPA estimates that the incremental cost of cleaning up to a 10^{-7} versus a 10^{-6} risk level ranges from approximately $700,000 to $10.4 million per site. These incremental costs represent a percentage cost increase from 13 to 50 percent. Because the survey was limited, there may be other sites where the percentage cost increase associated with cleanup to 10^{-7} rather than 10^{-6} may be lower or higher than 13 to 50 percent.

B. Executive Order No. 12291

Regulations must be classified as major or nonmajor to satisfy the rulemaking protocol established by Executive Order (E.O.) No. 12291. This Executive Order establishes the following criteria for a regulation to qualify as a major rule.

1. An annual effect on the economy of $100 million or more;

2. A major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies or geographic regions; or

3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Based on the economic analyses summarized above, the revised NCP is a major rule because it will have an annual effect on the economy of $100 million or more. This regulation has been submitted to the Office of Management and Budget for review under Executive Order Nos. 12291 and 12580.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, agencies must evaluate the effects of a regulation on small entities. If the rule is likely to have a "significant impact on a substantial number of small entities," then a Regulatory Flexibility Analysis must be performed. EPA certifies that today's rule will not have a significant impact on a substantial number of small entities.

Small businesses generally will be affected only by the changes that address selection of remedy. The cost of a Superfund cleanup, whether using containment-based remedies or treatment-based remedies, can be quite large and, in some cases, may be beyond the financial resources of a responsible party (RP). Because RPs can be in different industry sectors and face different market structures, each RP's ability to finance Superfund response actions could be very different. The analytical framework used in Chapter 8 of the September 1988 RIA to estimate the economic effects of the CERCLA provisions on typical RPs relies heavily on publicly-available financial information and makes the conservative assumption that each RP would be solely responsible for the entire RA cost. The analysis includes two financial tests performed on a sample of 15 firms selected randomly and varying in size. One test (the net income test) compares average response costs to the sample firm's net income or cash flow. The second test (a modified Beaver ratio) compares the sample firm's cash flow to its total liabilities, including response costs. On the basis of this analysis, EPA has determined that the revisions to the NCP will not result in a significant additional impact on a substantial number of small businesses. That is, to the extent that small businesses are significantly impacted under the revisions to the NCP, they were already significantly impacted under the 1985 NCP.

Municipalities also could be affected by the revisions to the selection of remedy provisions in the NCP because municipalities can be RPs. NPL sites owned by municipalities tend to be municipal wellfields and landfills. The cleanup of wellfields is undertaken to restore drinking water to a community either by pumping and treating a contaminant plume or building an alternative water distribution system. The contaminant plume usually has not been created by municipality actions; instead, the plume may have migrated from a nearby industrial waste site. As a result, the municipality is not likely to be liable for the costs of response actions. At municipal landfill sites, or other landfill sites that have accepted municipal wastes, the municipality also is not likely to be liable for 100 percent of response costs, because other entities typically have contributed to the site problem. The range of capital costs of cleanups at municipally-owned sites with RODs signed over the FY82 to FY86 period is from $304,000 for construction of an alternative water supply system to $23.2 million to cap a 90 acre landfill site.

The level of involvement of small municipalities in the Superfund program is not expected to change under the 1986 CERCLA amendments. The sites at which municipalities are most likely to be involved are not expected to be affected greatly by the new CERCLA selection of remedy provisions. The costs of cleaning up municipal landfills in particular are not expected to increase substantially as a result of the

CERCLA amendments because the typical size of such sites limits the feasibility of implementing treatment-based remedies.

D. Paperwork Reduction Act

The information collection requirements contained in today's rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2050-0096.

Public reporting burden for this collection of information is estimated to be a weighted average of 2,620 hours per respondent, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Respondent means states and other entities (excluding the federal government) conducting required activities associated with remedial actions.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, 20503, marked "Attention: Desk Officer for EPA."

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Hazardous substances, Incorporation by reference, Intergovernmental relations, Natural resources, Occupational safety and health, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: February 2, 1990.

William K. Reilly,

Administrator.

Therefore, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 is revised to read as follows:

Authority: 42 U.S.C. 9601-9657; 33 U.S.C. 1321(c)(2); E.O. 11735, 38 FR 21243; E.O. 12580, 52 FR 2923.

2. Subparts A through H of part 300 are revised, subparts I and J are added, and subpart K is added and reserved to read as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

Subpart A—Introduction

Sec.
300.1 Purpose and objectives.
300.2 Authority and applicability.
300.3 Scope.
300.4 Abbreviations.
300.5 Definitions.
300.6 Use of number and gender.
300.7 Computation of time.

Subpart B—Responsibility and Organization for Response

300.100 Duties of President delegated to federal agencies.
300.105 General organization concepts.
300.110 National Response Team.
300.115 Regional Response Teams.
300.120 On-scene coordinators and remedial project managers: general responsibilities.
300.125 Notification and communications.
300.130 Determinations to initiate response and special conditions.
300.135 Response operations.
300.140 Multi-regional responses.
300.145 Special teams and other assistance available to OSCs/RPMs.
300.150 Worker health and safety.
300.155 Public information and community relations.
300.160 Documentation and cost recovery.
300.165 OSC reports.
300.170 Federal agency participation.
300.175 Federal agencies: additional responsibilities and assistance.
300.180 State and local participation in response.
300.185 Nongovernmental participation.

Subpart C—Planning and Preparedness

300.200 General.
300.205 Planning and coordination structure.
300.210 Federal contingency plans.
300.215 Title III local emergency response plans.
300.220 Related Title III issues.

Subpart D—Operational Response Phases for Oil Removal

300.300 Phase I—Discovery or notification.
300.305 Phase II—Preliminary assessment and initiation of action.
300.310 Phase III—Containment, countermeasures, cleanup, and disposal.
300.315 Phase IV—Documentation and cost recovery.
300.320 General pattern of response.
300.330 Wildlife conservation.
300.335 Funding.

Subpart E—Hazardous Substance Response

300.400 General.
300.405 Discovery or notification.
300.410 Removal site evaluation.
300.415 Removal action.
300.420 Remedial site evaluation.
300.425 Establishing remedial priorities.
300.430 Remedial investigation/feasibility study and selection of remedy.
300.435 Remedial design/remedial action, operation and maintenance.
300.440 Procedures for planning and implementing off-site response actions. [Reserved]

Subpart F—State Involvement in Hazardous Substance Response

300.500 General.
300.505 EPA/State Superfund Memorandum of Agreement (SMOA).
300.510 State assurances.
300.515 Requirements for state involvement in remedial and enforcement response.
300.520 State involvement in EPA-lead enforcement negotiations.
300.525 State involvement in removal actions.

Subpart G—Trustees for Natural Resources

300.600 Designation of federal trustees.
300.605 State trustees.
300.610 Indian tribes.
300.615 Responsibilities of trustees.

Subpart H—Participation by Other Persons

300.700 Activities by other persons.

Subpart I—Administrative Record for Selection of Response Action

300.800 Establishment of an administrative record.
300.805 Location of the administrative record file.
300.810 Contents of the administrative record file.
300.815 Administrative record file for a remedial action.
300.820 Administrative record file for a removal action.
300.825 Record requirements after the decision document is signed.

Subpart J—Use of Dispersants and Other Chemicals

300.900 General.
300.905 NCP Product Schedule.
300.910 Authorization of use.
300.915 Data requirements.
300.920 Addition of products to schedule.

Subpart K—Federal Facilities [Reserved]

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Subpart A—Introduction

§ 300.1 Purpose and objectives.

The purpose of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.

§ 300.2 Authority and applicability.

The NCP is required by section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9605, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. 99-499, (hereinafter CERCLA), and by section 311(c)(2) of the Clean Water Act (CWA), as amended, 33

U.S.C. 1321(c)(2). In Executive Order (E.O.) 12580 (52 FR 2923, January 29, 1987), the President delegated to the Environmental Protection Agency (EPA) the responsibility for the amendment of the NCP. Amendments to the NCP are coordinated with members of the National Response Team (NRT) prior to publication for notice and comment. This includes coordination with the Federal Emergency Management Agency and the Nuclear Regulatory Commission in order to avoid inconsistent or duplicative requirements in the emergency planning responsibilities of those agencies. The NCP is applicable to response actions taken pursuant to the authorities under CERCLA and section 311 of the CWA.

§ 300.3 Scope.

(a) The NCP applies to and is in effect for:

(1) Discharges of oil into or upon the navigable waters of the United States and adjoining shorelines, the waters of the contiguous zone, and the high seas beyond the contiguous zone in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act). (See sections 311(b)(1) and 502(7) of the CWA.)

(2) Releases into the environment of hazardous substances, and pollutants or contaminants which may present an imminent and substantial danger to public health or welfare.

(b) The NCP provides for efficient, coordinated, and effective response to discharges of oil and releases of hazardous substances, pollutants, and contaminants in accordance with the authorities of CERCLA and the CWA. It provides for:

(1) The national response organization that may be activated in response actions. It specifies responsibilities among the federal, state, and local governments and describes resources that are available for response.

(2) The establishment of requirements for federal regional and on-scene coordinator (OSC) contingency plans. It also summarizes state and local emergency planning requirements under SARA Title III.

(3) Procedures for undertaking removal actions pursuant to section 311 of the CWA.

(4) Procedures for undertaking response actions pursuant to CERCLA.

(5) Procedures for involving state governments in the initiation, development, selection, and implementation of response actions.

(6) Designation of federal trustees for natural resources for purposes of CERCLA and the CWA.

(7) Procedures for the participation of other persons in response actions.

(8) Procedures for compiling and making available an administrative record for response actions.

(9) National procedures for the use of dispersants and other chemicals in removals under the CWA and response actions under CERCLA.

(c) In implementing the NCP, consideration shall be given to international assistance plans and agreements, security regulations and responsibilities based on international agreements, federal statutes, and executive orders. Actions taken pursuant to the NCP shall conform to the provisions of international joint contingency plans, where they are applicable. The Department of State shall be consulted, as appropriate, prior to taking any action which may affect its activities.

§ 300.4 Abbreviations.

(a) *Department and Agency Title Abbreviations:*

ATSDR—Agency for Toxic Substances and Disease Registry
DOC—Department of Commerce
DOD—Department of Defense
DOE—Department of Energy
DOI—Department of the Interior
DOJ—Department of Justice
DOL—Department of Labor
DOS—Department of State
DOT—Department of Transportation
EPA—Environmental Protection Agency
FEMA—Federal Emergency Management Agency
HHS—Department of Health and Human Services
NIOSH—National Institute for Occupational Safety and Health
NOAA—National Oceanic and Atmospheric Administration
RSPA—Research and Special Programs Administration
USCG—United States Coast Guard
USDA—United States Department of Agriculture

Note: Reference is made in the NCP to both the Nuclear Regulatory Commission and the National Response Center. In order to avoid confusion, the NCP will spell out Nuclear Regulatory Commission and use the abbreviation "NRC" only with respect to the National Response Center.

(b) *Operational Abbreviations:*

ARARs—Applicable or Relevant and Appropriate Requirements
CERCLIS—CERCLA Information System
CRC—Community Relations Coordinator
CRP—Community Relations Plan
ERT—Environmental Response Team
FCO—Federal Coordinating Officer
FS—Feasibility Study
HRS—Hazard Ranking System
LEPC—Local Emergency Planning Committee
NCP—National Contingency Plan
NPL—National Priorities List
NRC—National Response Center
NRT—National Response Team
NSF—National Strike Force
O&M—Operation and Maintenance
OSC—On-Scene Coordinator
PA—Preliminary Assessment
PIAT—Public Information Assist Team
RA—Remedial Action
RAT—Radiological Assistance Team
RCP—Regional Contingency Plan
RD—Remedial Design
RI—Remedial Investigation
ROD—Record of Decision
RPM—Remedial Project Manager
RRC—Regional Response Center
RRT—Regional Response Team
SAC—Support Agency Coordinator
SERC—State Emergency Response Commission
SI—Site Inspection
SMOA—Superfund Memorandum of Agreement
SSC—Scientific Support Coordinator

§ 300.5 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA.

Activation means notification by telephone or other expeditious manner or, when required, the assembly of some or all appropriate members of the RRT or NRT.

Alternative water supplies as defined by section 101(34) of CERCLA, includes, but is not limited to, drinking water and household water supplies.

Applicable requirements means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable.

Biological additives means microbiological cultures, enzymes, or nutrient additives that are deliberately introduced into an oil discharge for the specific purpose of encouraging

biodegradation to mitigate the effects of the discharge.

Burning agents means those additives that, through physical or chemical means, improve the combustibility of the materials to which they are applied.

CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986.

CERCLIS is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions. Sites that EPA decides do not warrant moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation in CERCLIS. This means that no additional federal steps under CERCLA will be taken at the site unless future information so warrants. Sites are not removed from the data base after completion of evaluations in order to document that these evaluations took place and to preclude the possibility that they be needlessly repeated. Inclusion of a specific site or area in the CERCLIS data base does not represent a determination of any party's liability, nor does it represent a finding that any response action is necessary. Sites that are deleted from the NPL are not designated NFRAP sites. Deleted sites are listed in a separate category in the CERCLIS data base.

Chemical agents means those elements, compounds, or mixtures that coagulate, disperse, dissolve, emulsify, foam, neutralize, precipitate, reduce, solubilize, oxidize, concentrate, congeal, entrap, fix, make the pollutant mass more rigid or viscous, or otherwise facilitate the mitigation of deleterious effects or the removal of the pollutant from the water.

Claim as defined by section 101(4) of CERCLA, means a demand in writing for a sum certain.

Coastal waters for the purposes of classifying the size of discharges, means the waters of the coastal zone except for the Great Lakes and specified ports and harbors on inland rivers.

Coastal zone as defined for the purpose of the NCP, means all United States waters subject to the tide, United States waters of the Great Lakes, specified ports and harbors on inland rivers, waters of the contiguous zone, other waters of the high seas subject to the NCP, and the land surface or land substrata, ground waters, and ambient air proximal to those waters. The term coastal zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/USCG agreements and identified in federal regional contingency plans.

Community relations means EPA's program to inform and encourage public participation in the Superfund process and to respond to community concerns. The term "public" includes citizens directly affected by the site, other interested citizens or parties, organized groups, elected officials, and potentially responsible parties.

Community relations coordinator means lead agency staff who work with the OSC/RPM to involve and inform the public about the Superfund process and response actions in accordance with the interactive community relations requirements set forth in the NCP.

Contiguous zone means the zone of the high seas, established by the United States under Article 24 of the Convention on the Territorial Sea and Contiguous Zone, which is contiguous to the territorial sea and which extends nine miles seaward from the outer limit of the territorial sea.

Cooperative agreement is a legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

Discharge as defined by section 311(a)(2) of the CWA, includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil, but excludes discharges in compliance with a permit under section 402 of the CWA, discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the CWA, and subject to a condition in such permit, or continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the CWA, that are caused by events occurring within the scope of relevant operating or treatment systems. For purposes of the NCP, discharge also means threat of discharge.

Dispersants means those chemical agents that emulsify, disperse, or solubilize oil into the water column or promote the surface spreading of oil slicks to facilitate dispersal of the oil into the water column.

Drinking water supply as defined by section 101(7) of CERCLA, means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act) or as drinking water by one or more individuals.

Environment as defined by section 101(8) of CERCLA, means the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act; and any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

Facility as defined by section 101(9) of CERCLA, means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area, where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Feasibility study (FS) means a study undertaken by the lead agency to develop and evaluate options for remedial action. The FS emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI), using data gathered during the RI. The RI data are used to define the objectives of the response action, to develop remedial action alternatives, and to undertake an initial screening and detailed analysis of the alternatives. The term also refers to a report that describes the results of the study.

First federal official means the first federal representative of a participating agency of the National Response Team to arrive at the scene of a discharge or a release. This official coordinates activities under the NCP and may initiate, in consultation with the OSC, any necessary actions until the arrival of the predesignated OSC. A state with primary jurisdiction over a site covered by a cooperative agreement will act in the stead of the first federal official for any incident at the site.

Fund or *Trust Fund* means the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986.

Ground water as defined by section 101(12) of CERCLA, means water in a saturated zone or stratum beneath the surface of land or water.

Hazard Ranking System (HRS) means the method used by EPA to evaluate the relative potential of hazardous substance releases to cause health or safety problems, or ecological or environmental damage.

Hazardous substance as defined by section 101(14) of CERCLA, means: Any substance designated pursuant to section 311(b)(2)(A) of the CWA; any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA; any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress); any toxic pollutant listed under section 307(a) of the CWA; any hazardous air pollutant listed under section 112 of the Clean Air Act; and any imminently hazardous chemical substance or mixture with respect to which the EPA Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance in the first sentence of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Indian tribe as defined by section 101(36) of CERCLA, means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Inland waters, for the purposes of classifying the size of discharges, means those waters of the United States in the inland zone, waters of the Great Lakes, and specified ports and harbors on inland rivers.

Inland zone means the environment inland of the coastal zone excluding the Great Lakes and specified ports and harbors on inland rivers. The term inland zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/USCG agreements and identified in federal regional contingency plans.

Lead agency means the agency that provides the OSC/RPM to plan and implement response action under the NCP. EPA, the USCG, another federal agency, or a state (or political subdivision of a state) operating pursuant to a contract or cooperative agreement executed pursuant to section 104(d)(1) of CERCLA, or designated pursuant to a Superfund Memorandum of Agreement (SMOA) entered into pursuant to subpart F of the NCP or other agreements may be the lead agency for a response action. In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) or Department of Energy (DOE), then DOD or DOE will be the lead agency. Where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of a federal agency other than EPA, the USCG, DOD, or DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies. The federal agency maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120. The lead agency will consult with the support agency, if one exists, throughout the response process.

Management of migration means actions that are taken to minimize and mitigate the migration of hazardous substances or pollutants or contaminants and the effects of such migration. Measures may include, but are not limited to, management of a plume of contamination, restoration of a drinking water aquifer, or surface water restoration.

Miscellaneous oil spill control agent is any product, other than a dispersant, sinking agent, surface collecting agent, biological additive, or burning agent, that can be used to enhance oil spill cleanup, removal, treatment, or mitigation.

National Priorities List (NPL) means the list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response.

Natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone defined by the Magnuson Fishery Conservation and Management Act of 1976), any state or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

Navigable waters, as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Offshore facility as defined by section 101(17) of CERCLA and section 311(a)(11) of the CWA, means any facility of any kind located in, on, or under any of the navigable waters of the United States and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

Oil as defined by section 311(a)(1) of the CWA, means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

Oil pollution fund means the fund established by section 311(k) of the CWA.

On-scene coordinator (OSC) means the federal official predesignated by EPA or the USCG to coordinate and direct federal responses under subpart

D, or the official designated by the lead agency to coordinate and direct removal actions under subpart E of the NCP.

Onshore facility as defined by section 101(18) of CERCLA, means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under any land or non-navigable waters within the United States; and, as defined by section 311(a)(10) of the CWA, means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under any land within the United States other than submerged land.

On-site means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

Operable unit means a discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

Operation and maintenance (O&M) means measures required to maintain the effectiveness of response actions.

Person as defined by section 101(21) of CERCLA, means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, state, municipality, commission, political subdivision of a state, or any interstate body.

Pollutant or contaminant as defined by section 101(33) of CERCLA, shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under section 101(14) (A) through (F) of CERCLA, nor does it include natural gas, liquified natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas). For purposes of the NCP, the term pollutant or contaminant means any pollutant or contaminant that may present an imminent and substantial danger to public health or welfare.

Post-removal site control means those activities that are necessary to sustain the integrity of a Fund-financed removal action following its conclusion. Post-removal site control may be a removal or remedial action under CERCLA. The term includes, without being limited to, activities such as relighting gas flares, replacing filters, and collecting leachate.

Preliminary assessment (PA) means review of existing information and an off-site reconnaissance, if appropriate, to determine if a release may require additional investigation or action. A PA may include an on-site reconnaissance, if appropriate.

Public participation, see the definition for community relations.

Public vessel as defined by section 311(a)(4) of the CWA, means a vessel owned or bareboat-chartered and operated by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Quality assurance project plan (QAPP) is a written document, associated with all remedial site sampling activities, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance (QA) and quality control (QC) activities designed to achieve the data quality objectives of a specific project(s) or continuing operation(s). The QAPP is prepared for each specific project or continuing operation (or group of similar projects or continuing operations). The QAPP will be prepared by the responsible program office, regional office, laboratory, contractor, recipient of an assistance agreement, or other organization. For an enforcement action, potentially responsible parties may prepare a QAPP subject to lead agency approval.

Release as defined by section 101(22) of CERCLA, means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes: Any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons; emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 104 of CERCLA or any other response action, any release of source, byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978; and the normal application of fertilizer. For purposes of the NCP, release also means threat of release.

Relevant and appropriate requirements means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site. Only those state standards that are identified in a timely manner and are more stringent than federal requirements may be relevant and appropriate.

Remedial design (RD) means the technical analysis and procedures which follow the selection of remedy for a site and result in a detailed set of plans and specifications for implementation of the remedial action.

Remedial investigation (RI) is a process undertaken by the lead agency to determine the nature and extent of the problem presented by the release. The RI emphasizes data collection and site characterization, and is generally performed concurrently and in an interactive fashion with the feasibility study. The RI includes sampling and monitoring, as necessary, and includes the gathering of sufficient information to determine the necessity for remedial action and to support the evaluation of remedial alternatives.

Remedial project manager (RPM) means the official designated by the lead agency to coordinate, monitor, or

direct remedial or other response actions under subpart E of the NCP.

Remedy or remedial action (RA) means those actions consistent with permanent remedy taken instead of, or in addition to, removal action in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment and, where appropriate, post-removal site control activities. The term includes the costs of permanent relocation of residents and businesses and community facilities (including the cost of providing "alternative land of equivalent value" to an Indian tribe pursuant to CERCLA section 126(b)) where EPA determines that, alone or in combination with other measures, such relocation is more cost-effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or secure disposition off-site of such hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes off-site transport and off-site storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials. For the purpose of the NCP, the term also includes enforcement activities related thereto.

Remove or removal as defined by section 311(a)(8) of the CWA, refers to removal of oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare or to the environment. As defined by section 101(23) of CERCLA, remove or removal means the cleanup or removal of released hazardous substances from the environment; such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances; the disposal of removed material; or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of CERCLA, post-removal site control, where appropriate, and any emergency assistance which may be provided under the Disaster Relief Act of 1974. For the purpose of the NCP, the term also includes enforcement activities related thereto.

Respond or response as defined by section 101(25) of CERCLA, means remove, removal, remedy, or remedial action, including enforcement activities related thereto.

SARA is the Superfund Amendments and Reauthorization Act of 1986. In addition to certain free-standing provisions of law, it includes amendments to CERCLA, the Solid Waste Disposal Act, and the Internal Revenue Code. Among the free-standing provisions of law is Title III of SARA, also known as the "Emergency Planning and Community Right-to-Know Act of 1986" and Title IV of SARA, also known as the "Radon Gas and Indoor Air Quality Research Act of 1986." Title V of SARA amending the Internal Revenue Code is also known as the "Superfund Revenue Act of 1986."

Sinking agents means those additives applied to oil discharges to sink floating pollutants below the water surface.

Site inspection (SI) means an on-site investigation to determine whether there is a release or potential release and the nature of the associated threats. The purpose is to augment the data collected in the preliminary assessment and to generate, if necessary, sampling and other field data to determine if further action or investigation is appropriate.

Size classes of discharges refers to the following size classes of oil discharges which are provided as guidance to the OSC and serve as the criteria for the actions delineated in subpart D. They are not meant to imply associated degrees of hazard to public health or welfare, nor are they a measure of environmental injury. Any oil discharge that poses a substantial threat to public health or welfare or the environment or results in significant public concern shall be classified as a major discharge regardless of the following quantitative measures:

(a) Minor discharge means a discharge to the inland waters of less than 1,000 gallons of oil or a discharge to the coastal waters of less than 10,000 gallons of oil.

(b) Medium discharge means a discharge of 1,000 to 10,000 gallons of oil to the inland waters or a discharge of 10,000 to 100,000 gallons of oil to the coastal waters.

(c) Major discharge means a discharge of more than 10,000 gallons of oil to the inland waters or more than 100,000 gallons of oil to the coastal waters.

Size classes of releases refers to the following size classifications which are provided as guidance to the OSC for meeting pollution reporting requirements in subpart B. The final determination of the appropriate classification of a release will be made by the OSC based on consideration of the particular release (e.g., size, location, impact, etc.):

(a) Minor release means a release of a quantity of hazardous substance(s), pollutant(s), or contaminant(s) that poses minimal threat to public health or welfare or the environment.

(b) Medium release means a release not meeting the criteria for classification as a minor or major release.

(c) Major release means a release of any quantity of hazardous substance(s), pollutant(s), or contaminant(s) that poses a substantial threat to public health or welfare or the environment or results in significant public concern.

Source control action is the construction or installation and start-up of those actions necessary to prevent the continued release of hazardous substances or pollutants or contaminants (primarily from a source on top of or within the ground, or in buildings or other structures) into the environment.

Source control maintenance measures are those measures intended to maintain the effectiveness of source control actions once such actions are operating and functioning properly, such as the maintenance of landfill caps and leachate collection systems.

Specified ports and harbors means those ports and harbor areas on inland rivers, and land areas immediately adjacent to those waters, where the USCG acts as predesignated on-scene coordinator. Precise locations are determined by EPA/USCG regional agreements and identified in federal regional contingency plans.

State means the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any other territory or possession over which the United States has jurisdiction. For purposes of the NCP, the term includes Indian tribes as defined in the NCP except where specifically noted. Section 126 of CERCLA provides that the governing body of an Indian tribe shall be afforded substantially the same treatment as a state with respect to certain provisions of CERCLA. Section 300.515(b) of the NCP describes the requirements pertaining to Indian tribes that wish to be treated as states.

Superfund Memorandum of Agreement (SMOA) means a nonbinding, written document executed by an EPA Regional Administrator and the head of a state agency that may establish the nature and extent of EPA and state interaction during the removal, pre-remedial, remedial, and/or enforcement response process. The SMOA is not a site-specific document although attachments may address specific sites. The SMOA generally defines the role and responsibilities of both the lead and the support agencies.

Superfund state contract is a joint, legally binding agreement between EPA and a state to obtain the necessary assurances before a federal-lead remedial action can begin at a site. In the case of a political subdivision-lead remedial response, a three-party Superfund state contract among EPA, the state, and political subdivision thereof, is required before a political subdivision takes the lead for any phase of remedial response to ensure state involvement pursuant to section 121(f)(1) of CERCLA. The Superfund state contract may be amended to provide the state's CERCLA section 104 assurances before a political subdivision can take the lead for remedial action.

Support agency means the agency or agencies that provide the support agency coordinator to furnish necessary data to the lead agency, review response data and documents, and provide other assistance as requested by the OSC or RPM. EPA, the USCG, another federal agency, or a state may be support agencies for a response action if operating pursuant to a contract executed under section 104(d)(1) of CERCLA or designated pursuant to a Superfund Memorandum of Agreement entered into pursuant to subpart F of the NCP or other agreement. The support agency may also concur on decision documents.

Support agency coordinator (SAC) means the official designated by the support agency, as appropriate, to interact and coordinate with the lead agency in response actions under subpart E of this part.

Surface collecting agents means those chemical agents that form a surface film to control the layer thickness of oil.

Threat of discharge or release, see definitions for discharge and release.

Threat of release, see definition for release.

Treatment technology means any unit operation or series of unit operations that alters the composition of a hazardous substance or pollutant or contaminant through chemical, biological, or physical means so as to reduce toxicity, mobility, or volume of the contaminated materials being treated. Treatment technologies are an alternative to land disposal of hazardous wastes without treatment.

Trustee means an official of a federal natural resources management agency designated in subpart G of the NCP or a designated state official or Indian tribe who may pursue claims for damages under section 107(f) of CERCLA.

United States when used in relation to section 311(a)(5) of the CWA, means the states, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, the United States Virgin Islands, and the Pacific Island Governments. United States, when used in relation to section 101(27) of CERCLA, includes the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

Vessel as defined by section 101(28) of CERCLA, means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water; and, as defined by section 311(a)(3) of the CWA, means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

Volunteer means any individual accepted to perform services by the lead agency which has authority to accept volunteer services (examples: See 16 U.S.C. 742f(c)). A volunteer is subject to the provisions of the authorizing statute and the NCP.

§ 300.6 Use of number and gender.

As used in this regulation, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 300.7 Computation of time.

In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

Subpart B—Responsibility and Organization for Response

§ 300.100 Duties of President delegated to federal agencies.

In Executive Order 11735 and Executive Order 12580, the President delegated certain functions and responsibilities vested in him by the CWA and CERCLA, respectively.

§ 300.105 General organization concepts.

(a) Federal agencies should:

(1) Plan for emergencies and develop procedures for addressing oil discharges and releases of hazardous substances, pollutants, or contaminants;

(2) Coordinate their planning, preparedness, and response activities with one another;

(3) Coordinate their planning, preparedness, and response activities with affected states and local governments and private entities; and

(4) Make available those facilities or resources that may be useful in a response situation, consistent with agency authorities and capabilities.

(b) Three fundamental kinds of activities are performed pursuant to the NCP:

(1) Preparedness planning and coordination for response to a discharge of oil or release of a hazardous substance, pollutant, or contaminant;

(2) Notification and communications; and

(3) Response operations at the scene of a discharge or release.

(c) The organizational elements created to perform these activities are:

(1) The National Response Team (NRT), responsible for national response and preparedness planning, for coordinating regional planning, and for providing policy guidance and support to the Regional Response Teams. NRT membership consists of representatives from the agencies specified in § 300.175.

(2) Regional Response Teams (RRTs), responsible for regional planning and preparedness activities before response

actions, and for providing advice and support to the on-scene coordinator (OSC) or remedial project manager (RPM) when activated during a response. RRT membership consists of designated representatives from each federal agency participating in the NRT together with state and (as agreed upon by the states) local government representatives.

(3) The OSC and the RPM, primarily responsible for directing response efforts and coordinating all other efforts at the scene of a discharge or release. The other responsibilities of OSCs and RPMs are described in § 300.135.

(d)(1) The organizational concepts of the national response system are depicted in the following Figure 1:

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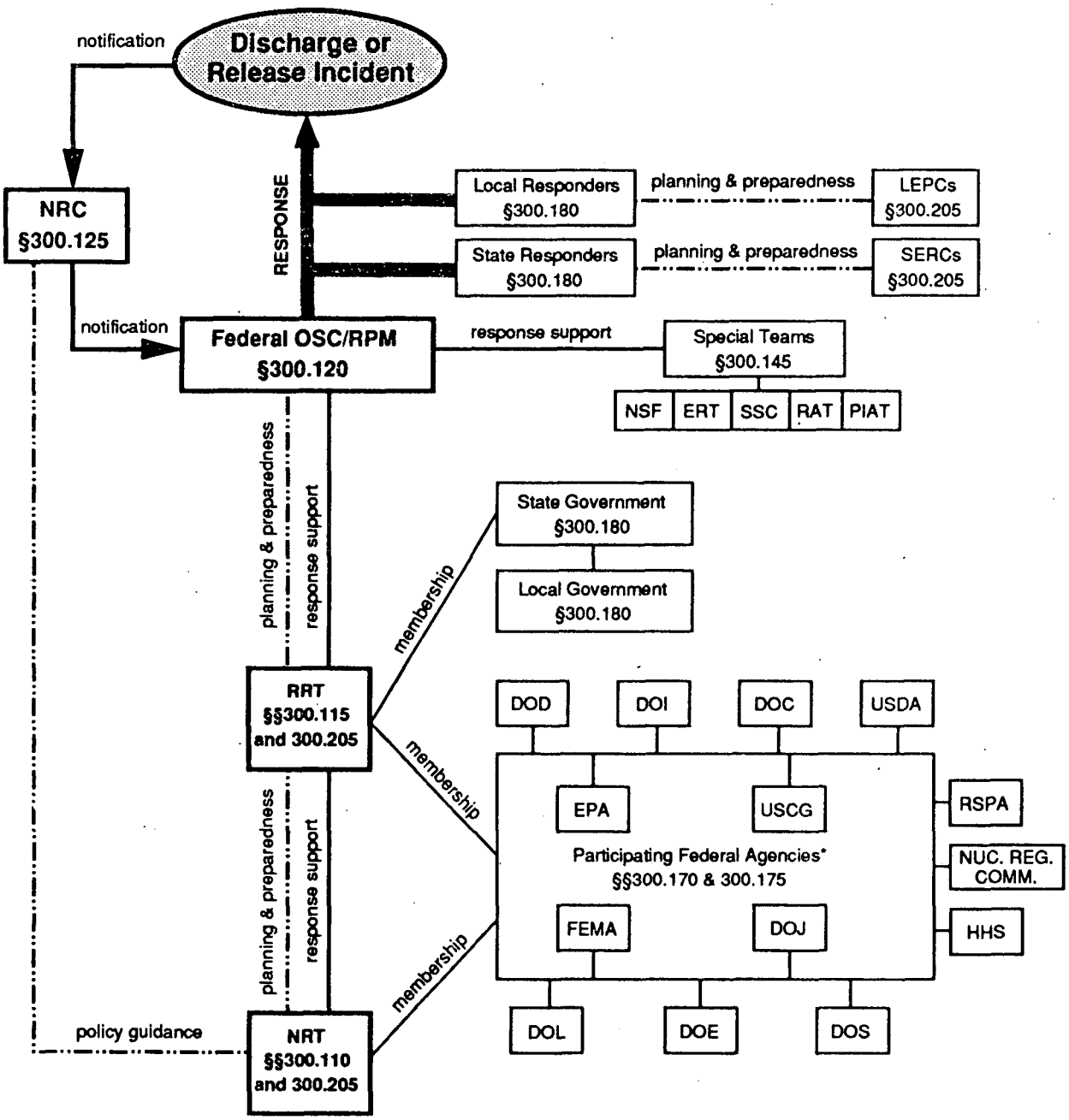
Figure 1

National Response System Concepts



*The same federal agencies participate on both the National Response Team (NRT) and the Regional Response Team (RRT). Federal agencies on the RRT are represented by regional staff. Abbreviations used in this figure are explained in §300.4.

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(2) The standard federal regional boundaries (which are also the geographic areas of responsibility for the Regional Response Teams) are shown in the following Figure 2:

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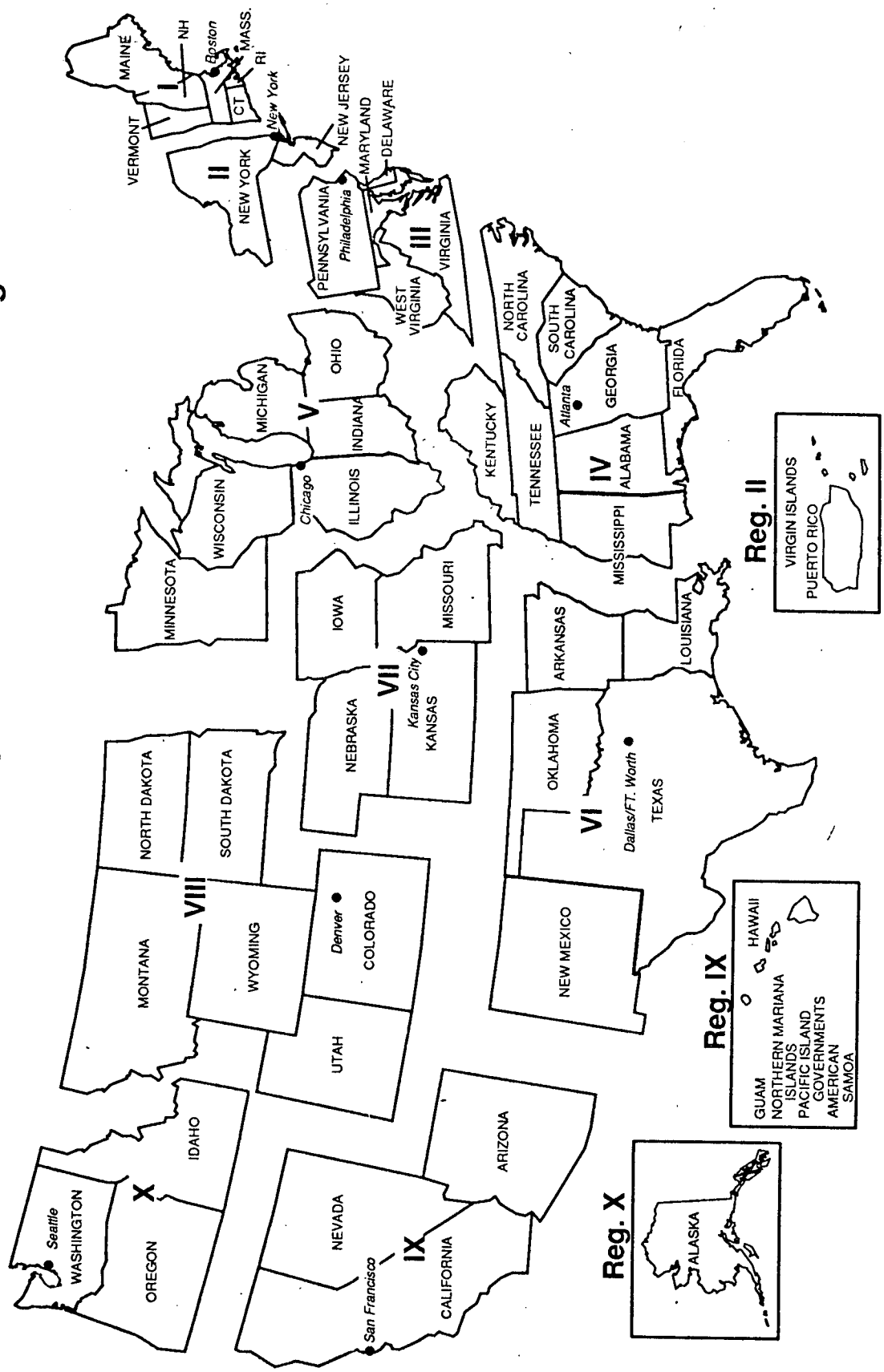
Figure 2 -- Standard Regional Boundaries for Ten Regions



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(3) The USCG District boundaries are shown in the following Figure 3:

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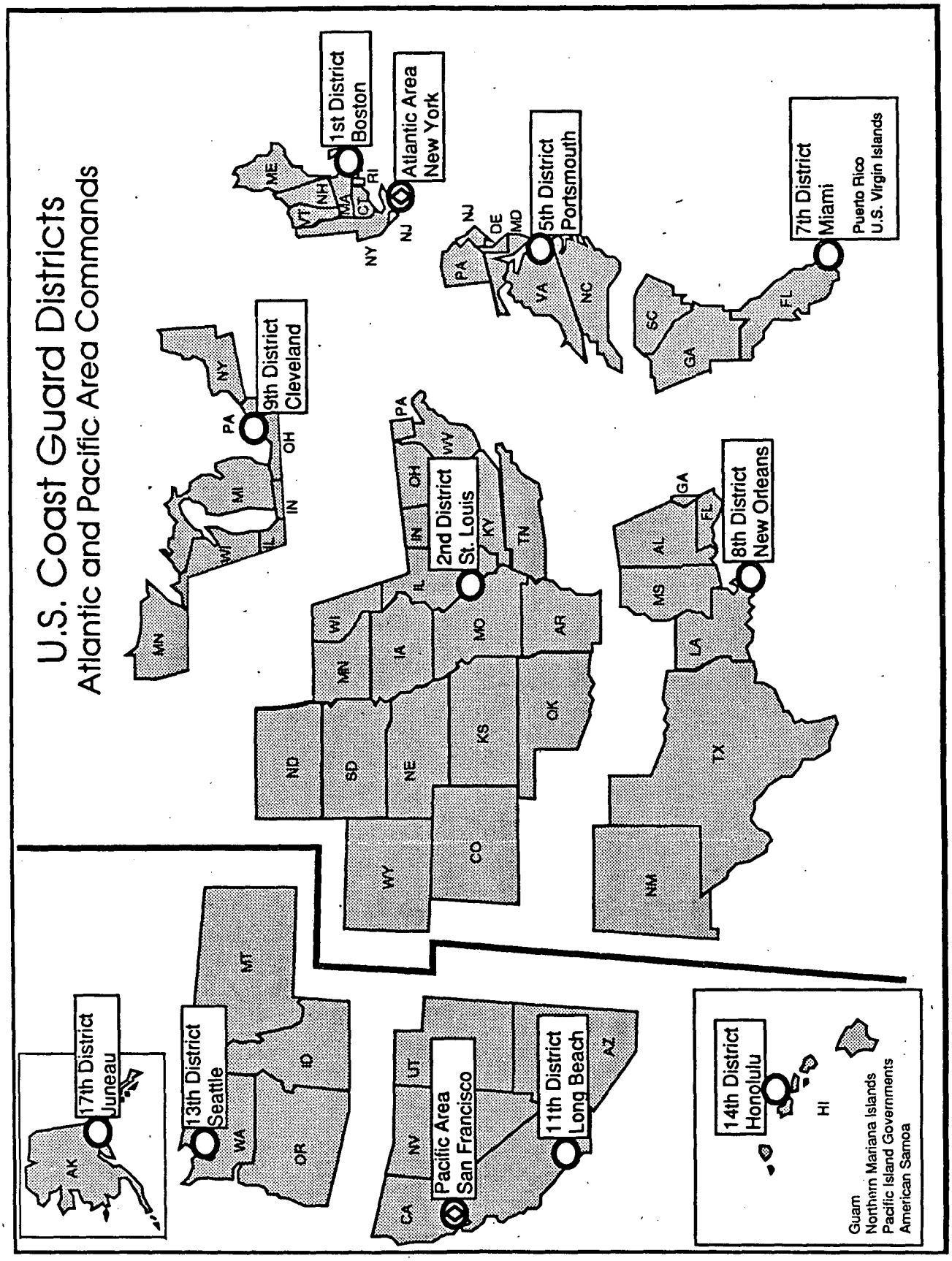

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§ 300.110 National Response Team.

National planning and coordination is accomplished through the National Response Team (NRT).

(a) The NRT consists of representatives from the agencies named in § 300.175. Each agency shall designate a member to the team and sufficient alternates to ensure representation, as agency resources permit. The NRT will consider requests for membership on the NRT from other agencies. Other agencies may request membership by forwarding such requests to the chair of the NRT.

(b) The chair of the NRT shall be the representative of EPA and the vice chair shall be the representative of the USCG, with the exception of periods of activation because of response action. During activation, the chair shall be the member agency providing the OSC/RPM. The vice chair shall maintain records of NRT activities along with national, regional, and OSC plans for response actions.

(c) While the NRT desires to achieve a consensus on all matters brought before it, certain matters may prove unresolvable by this means. In such cases, each agency serving as a participating agency on the NRT may be accorded one vote in NRT proceedings.

(d) The NRT may establish such bylaws and committees as it deems appropriate to further the purposes for which it is established.

(e) The NRT shall evaluate methods of responding to discharges or releases, shall recommend any changes needed in the response organization, and may recommend revisions to the NCP.

(f) The NRT shall provide policy and program direction to the RRTs.

(g) The NRT may consider and make recommendations to appropriate agencies on the training, equipping, and protection of response teams and necessary research, development, demonstration, and evaluation to improve response capabilities.

(h) Direct planning and preparedness responsibilities of the NRT include:

(1) Maintaining national preparedness to respond to a major discharge of oil or release of a hazardous substance, pollutant, or contaminant that is beyond regional capabilities;

(2) Publishing guidance documents for preparation and implementation of SARA Title III local emergency response plans;

(3) Monitoring incoming reports from all RRTs and activating for a response action, when necessary;

(4) Coordinating a national program to assist member agencies in preparedness planning and response, and enhancing coordination of member agency preparedness programs;

(5) Developing procedures to ensure the coordination of federal, state, and local governments, and private response to oil discharges and releases of hazardous substances, pollutants, or contaminants;

(6) Monitoring response-related research and development, testing, and evaluation activities of NRT agencies to enhance coordination and avoid duplication of effort;

(7) Developing recommendations for response training and for enhancing the coordination of available resources among agencies with training responsibilities under the NCP; and

(8) Reviewing regional responses to oil discharges and hazardous substance, pollutant, or contaminant releases, including an evaluation of equipment readiness and coordination among responsible public agencies and private organizations.

(i) The NRT will consider matters referred to it for advice or resolution by an RRT.

(j) The NRT should be activated as an emergency response team:

(1) When an oil discharge or hazardous substance release:

(i) Exceeds the response capability of the region in which it occurs;

(ii) Transects regional boundaries; or

(iii) Involves a significant threat to public health or welfare or the environment, substantial amounts of property, or substantial threats to natural resources; or

(2) If requested by any NRT member.

(k) When activated for a response action, the NRT shall meet at the call of the chair and may:

(1) Monitor and evaluate reports from the OSC/RPM and recommend to the OSC/RPM, through the RRT, actions to combat the discharge or release;

(2) Request other federal, state, and local governments, or private agencies, to provide resources under their existing authorities to combat a discharge or release, or to monitor response operations; and

(3) Coordinate the supply of equipment, personnel, or technical advice to the affected region from other regions or districts.

§ 300.115 Regional Response Teams.

(a) Regional planning and coordination of preparedness and response actions is accomplished through the RRT. The RRT agency membership parallels that of the NRT, as described in § 300.110, but also includes state and local representation. The RRT provides the appropriate regional mechanism for development and coordination of preparedness activities before a response action is taken and for coordination of assistance and advice to the OSC/RPM during such response actions.

(b) The two principal components of the RRT mechanism are a standing team, which consists of designated representatives from each participating federal agency, state governments, and local governments (as agreed upon by the states); and incident-specific teams formed from the standing team when the RRT is activated for a response. On incident-specific teams, participation by the RRT member agencies will relate to the technical nature of the incident and its geographic location.

(1) The standing team's jurisdiction corresponds to the standard federal regions, except for Alaska, Oceania in the Pacific, and the Caribbean area, each of which has a separate standing RRT. The role of the standing RRT includes communications systems and procedures, planning, coordination, training, evaluation, preparedness, and related matters on a regionwide basis.

(2) The role of the incident-specific team is determined by the operational requirements of the response to a specific discharge or release. Appropriate levels of activation and/or notification of the incident-specific RRT, including participation by state and local governments, shall be determined by the designated RRT chair for the incident, based on the Regional Contingency Plan (RCP). The incident-specific RRT supports the designated OSC/RPM. The designated OSC/RPM directs response efforts and coordinates all other efforts at the scene of a discharge or release.

(c) The representatives of EPA and the USCG shall act as co-chairs of RRTs except when the RRT is activated. When the RRT is activated for response actions, the chair shall be the member agency providing the OSC/RPM.

(d) Each participating agency should designate one member and at least one alternate member to the RRT. Agencies whose regional subdivisions do not correspond to the standard federal regions may designate additional representatives to the standing RRT to ensure appropriate coverage of the standard federal region. Participating states may also designate one member and at least one alternate member to the RRT. Indian tribal governments may arrange for representation with the RRT appropriate to their geographical location. All agencies and states may also provide additional representatives as observers to meetings of the RRT.

(e) RRT members should designate representatives and alternates from their agencies as resource personnel for RRT activities, including RRT work planning, and membership on incident-specific teams in support of the OSCs/RPMs.

(f) Federal RRT members or their representatives should provide OSCs/RPMs with assistance from their respective federal agencies commensurate with agency responsibilities, resources, and capabilities within the region. During a response action, the members of the RRT should seek to make available the resources of their agencies to the OSC/RPM as specified in the RCP and OSC contingency plan.

(g) RRT members should designate appropriately qualified representatives from their agencies to work with OSCs in developing and maintaining OSC contingency plans, described in § 300.210, that provide for use of agency resources in responding to discharges and releases.

(h) Affected states are encouraged to participate actively in all RRT activities. Each state governor is requested to assign an office or agency to represent the state on the appropriate RRT; to designate representatives to work with the RRT and OSCs in developing RCPs and OSC contingency plans; to plan for, make available, and coordinate state resources; and to serve as the contact point for coordination of response with local government agencies, whether or not represented on the RRT. The state's RRT representative should keep the State Emergency Response Commission (SERC), described in § 300.205(c), apprised of RRT activities and coordinate RRT activities with the SERC. Local governments and Indian tribes are invited to participate in activities on the appropriate RRT as provided by state law or as arranged by the state's representative.

(i) The standing RRT shall recommend changes in the regional response organization as needed, revise the RCP as needed, evaluate the preparedness of the participating agencies and the effectiveness of OSC contingency plans for the federal response to discharges and releases, and provide technical assistance for preparedness to the response community. The RRT should:

(1) Review and comment, to the extent practicable, on local emergency response plans or other issues related to the preparation, implementation, or exercise of such plans upon request of a local emergency planning committee;

(2) Evaluate regional and local responses to discharges or releases on a continuing basis, considering available legal remedies, equipment readiness, and coordination among responsible public agencies and private organizations, and recommend improvements;

(3) Recommend revisions of the NCP to the NRT, based on observations of response operations;

(4) Review OSC actions to ensure that RCPs and OSC contingency plans are effective;

(5) Encourage the state and local response community to improve its preparedness for response;

(6) Conduct advance planning for use of dispersants, surface collection agents, burning agents, biological additives, or other chemical agents in accordance with subpart J of this part;

(7) Be prepared to provide response resources to major discharges or releases outside the region;

(8) Conduct or participate in training and exercises as necessary to encourage preparedness activities of the response community within the region;

(9) Meet at least semiannually to review response actions carried out during the preceding period and consider changes in RCPs and OSC contingency plans; and

(10) Provide letter reports on RRT activities to the NRT twice a year, no later than January 31 and July 31. At a minimum, reports should summarize recent activities, organizational changes, operational concerns, and efforts to improve state and local coordination.

(j)(1) The RRT may be activated by the chair as an incident-specific response team when a discharge or release:

(i) Exceeds the response capability available to the OSC/RPM in the place where it occurs;

(ii) Transects state boundaries; or

(iii) May pose a substantial threat to the public health or welfare or the environment, or to regionally significant amounts of property. RCPs shall specify detailed criteria for activation of RRTs.

(2) The RRT will be activated during any discharge or release upon a request from the OSC/RPM, or from any RRT representative, to the chair of the RRT. Requests for RRT activation shall later be confirmed in writing. Each representative, or an appropriate alternate, should be notified immediately when the RRT is activated.

(3) During prolonged removal or remedial action, the RRT may not need to be activated or may need to be activated only in a limited sense, or may need to have available only those member agencies of the RRT who are directly affected or who can provide direct response assistance.

(4) When the RRT is activated for a discharge or release, agency representatives shall meet at the call of the chair and may:

(i) Monitor and evaluate reports from the OSC/RPM, advise the OSC/RPM on the duration and extent of response, and recommend to the OSC/RPM specific actions to respond to the discharge or release;

(ii) Request other federal, state, or local governments, or private agencies, to provide resources under their existing authorities to respond to a discharge or release or to monitor response operations;

(iii) Help the OSC/RPM prepare information releases for the public and for communication with the NRT;

(iv) If the circumstances warrant, make recommendations to the regional or district head of the agency providing the OSC/RPM that a different OSC/RPM should be designated; and

(v) Submit pollution reports to the NRC as significant developments occur.

(5) At the regional level, a Regional Response Center (RRC) may provide facilities and personnel for communications, information storage, and other requirements for coordinating response. The location of each RRC should be provided in the RCP.

(6) When the RRT is activated, affected states may participate in all RRT deliberations. State government representatives participating in the RRT have the same status as any federal member of the RRT.

(7) The RRT can be deactivated when the incident-specific RRT chair determines that the OSC/RPM no longer requires RRT assistance.

(8) Notification of the RRT may be appropriate when full activation is not necessary, with systematic communication of pollution reports or other means to keep RRT members informed as to actions of potential concern to a particular agency, or to assist in later RRT evaluation of regionwide response effectiveness.

(k) Whenever there is insufficient national policy guidance on a matter before the RRT, a technical matter requiring solution, or a question concerning interpretation of the NCP, or there is a disagreement on discretionary actions among RRT members that cannot be resolved at the regional level, it may be referred to the NRT, described in § 300.110, for advice.

§ 300.120 On-scene coordinators and remedial project managers: general responsibilities.

(a) The OSC/RPM directs response efforts and coordinates all other efforts

at the scene of a discharge or release. As part of the planning and preparedness for response, OSCs shall be predesignated by the regional or district head of the lead agency. EPA and the USCG shall predesignate OSCs for all areas in each region, except as provided in paragraphs (b) and (c) of this section. RPMs shall be assigned by the lead agency to manage remedial or other response actions at NPL sites, except as provided in paragraphs (b) and (c) of this section.

(1) The USCG shall provide OSCs for oil discharges, including discharges from facilities and vessels under the jurisdiction of another federal agency, within or threatening the coastal zone. The USCG shall also provide OSCs for the removal of releases of hazardous substances, pollutants, or contaminants into or threatening the coastal zone, except as provided in paragraph (b) of this section. The USCG shall not provide predesignated OSCs for discharges or releases from hazardous waste management facilities or in similarly chronic incidents. The USCG shall provide an initial response to discharges or releases from hazardous waste management facilities within the coastal zone in accordance with DOT/EPA Instrument of Redelegation (May 27, 1988) except as provided by paragraph (b) of this section. The USCG OSC shall contact the cognizant RPM as soon as it is evident that a removal may require a follow-up remedial action, to ensure that the required planning can be initiated and an orderly transition to an EPA or state lead can occur.

(2) EPA shall provide OSCs for discharges or releases into or threatening the inland zone and shall provide RPMs for federally funded remedial actions, except in the case of state-lead federally funded response and as provided in paragraph (b) of this section. EPA will also assume all remedial actions at NPL sites in the coastal zone, even where removals are initiated by the USCG, except as provided in paragraph (b) of this section.

(b) For releases of hazardous substances, pollutants, or contaminants, when the release is on, or the sole source of the release is from, any facility or vessel, including vessels bareboat-chartered and operated, under the jurisdiction, custody, or control of DOD, DOE, or other federal agency:

(1) In the case of DOD or DOE, DOD or DOE shall provide OSCs/RPMs responsible for taking all response actions; and

(2) In the case of a federal agency other than EPA, DOD, or DOE, such agency shall provide OSCs for all removal actions that are not emergencies and shall provide RPMs for all remedial actions.

(c) DOD will be the removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody, or control of DOD.

(d) The OSC is responsible for developing any OSC contingency plans for the federal response in the area of the OSC's responsibility. The planning shall, as appropriate, be accomplished in cooperation with the RRT, described in § 300.115, and designated state and local representatives. The OSC coordinates, directs, and reviews the work of other agencies, responsible parties, and contractors to assure compliance with the NCP, decision document, consent decree, administrative order, and, lead agency-approved plans applicable to the response.

(e) The RPM is the prime contact for remedial or other response actions being taken (or needed) at sites on the proposed or promulgated NPL, and for sites not on the NPL but under the jurisdiction, custody, or control of a federal agency. The RPM's responsibilities include:

(1) Fund-financed response: The RPM coordinates, directs, and reviews the work of EPA, states and local governments, the U.S. Army Corps of Engineers, and all other agencies and contractors to assure compliance with the NCP. Based upon the reports of these parties, the RPM recommends action for decisions by lead-agency officials. The RPM's period of responsibility begins prior to initiation of the remedial investigation/feasibility study (RI/FS), described in § 300.430, and continues through design, remedial action, deletion of the site from the NPL, and the CERCLA cost recovery activity. When a removal and remedial action occur at the same site, the OSC and RPM should coordinate to ensure an orderly transition of responsibility.

(2) Federal-lead non-Fund-financed response: The RPM coordinates, directs, and reviews the work of other agencies, responsible parties, and contractors to assure compliance with the NCP, ROD, consent decree, administrative order, and lead agency-approved plans applicable to the response. Based upon the reports of these parties, the RPM shall recommend action for decisions by lead agency officials. The RPM's period of responsibility begins prior to initiation of the RI/FS, described in § 300.430, and continues through design and remedial action and the CERCLA cost recovery activity. The OSC and RPM shall ensure orderly transition of responsibilities from one to the other.

(3) The RPM shall participate in all decision-making processes necessary to ensure compliance with the NCP, including, as appropriate, agreements between EPA or other federal agencies and the state. The RPM may also review responses where EPA has preauthorized a person to file a claim for reimbursement to determine that the response was consistent with the terms of such preauthorization in cases where claims are filed for reimbursement.

(f)(1) Where a support agency has been identified through a cooperative agreement, SMOA, or other agreement, that agency may designate a support agency coordinator (SAC) to provide assistance, as requested, by the OSC/RPM. The SAC is the prime representative of the support agency for response actions.

(2) The SAC's responsibilities may include:

(i) Providing and reviewing data and documents as requested by the OSC/RPM during the planning, design, and cleanup activities of the response action; and

(ii) Providing other assistance as requested.

(g)(1) The lead agency should provide appropriate training for its OSCs, RPMs, and other response personnel to carry out their responsibilities under the NCP.

(2) OSCs/RPMs should ensure that persons designated to act as their on-scene representatives are adequately trained and prepared to carry out actions under the NCP, to the extent practicable.

§ 300.125 Notification and communications.

(a) The National Response Center (NRC), located at USCG Headquarters, is the national communications center, continuously manned for handling activities related to response actions. The NRC acts as the single point of contact for all pollution incident reporting, and as the NRT communications center. Notice of discharges must be made telephonically through a toll free number or a special local number (Telecommunication Device for the Deaf (TDD) and collect calls accepted). (Notification details appear in §§ 300.300 and 300.405.) The NRC receives and immediately relays telephone notices of discharges or releases to the appropriate predesignated federal OSC. The telephone report is distributed to any interested NRT member agency or federal entity that has established a written agreement or understanding

with the NRC. The NRC evaluates incoming information and immediately advises FEMA of a potential major disaster or evacuation situation.

(b) The Commandant, USCG, in conjunction with other NRT agencies, shall provide the necessary personnel, communications, plotting facilities, and equipment for the NRC.

(c) Notice of an oil discharge or release of a hazardous substance in an amount equal to or greater than the reportable quantity must be made immediately in accordance with 33 CFR part 153, subpart B, and 40 CFR part 302, respectively. Notification shall be made to the NRC Duty Officer, HQ USCG, Washington, DC, telephone (800) 424-8802 or (202) 267-2675. All notices of discharges or releases received at the NRC will be relayed immediately by telephone to the OSC.

§ 300.130 Determinations to initiate response and special conditions.

(a) In accordance with CWA and CERCLA, the Administrator of EPA or the Secretary of the Department in which the USCG is operating, as appropriate, is authorized to act for the United States to take response measures deemed necessary to protect the public health or welfare or environment from discharges of oil or releases of hazardous substances, pollutants, or contaminants except with respect to such releases on or from vessels or facilities under the jurisdiction, custody, or control of other federal agencies.

(b) The Administrator of EPA or the Secretary of the Department in which the USCG is operating, as appropriate, is authorized to initiate appropriate response activities when the Administrator or Secretary determines that:

(1) Any oil is discharged from any vessel or offshore or onshore facility into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under exclusive management authority of the United States;

(2) Any hazardous substance is released or there is a threat of such a release into the environment, or there is a release or threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare; or

(3) A marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare because of a discharge or release, or an imminent discharge or release, from a vessel of large quantities of oil or hazardous substances designated pursuant to section 311(b)(2)(A) of the CWA.

(c) Whenever there is such a marine disaster, the Administrator of EPA or Secretary of the Department in which the USCG is operating may:

(1) Coordinate and direct all public and private efforts to abate the threat; and

(2) Summarily remove and, if necessary, destroy the vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds.

(d) In addition to any actions taken by a state or local government, the Administrator of EPA or the Secretary of the Department in which the USCG is operating may request the U.S. Attorney General to secure the relief necessary to abate a threat if the Administrator or Secretary determines:

(1) That there is an imminent and substantial threat to the public health or welfare or the environment because of discharge of oil from any offshore or onshore facility into or upon the navigable waters of the United States; or

(2) That there may be an imminent and substantial endangerment to the public health or welfare or the environment because of a release of a hazardous substance from a facility.

(e) Response actions to remove discharges originating from operations conducted subject to the Outer Continental Shelf Lands Act shall be in accordance with the NCP.

(f) Where appropriate, when a discharge or release involves radioactive materials, the lead or support federal agency shall act consistent with the notification and assistance procedures described in the appropriate Federal Radiological Plan. For the purpose of the NCP, the Federal Radiological Emergency Response Plan (FRERP) (50 FR 46542, November 8, 1985) is the appropriate plan.

(g) Removal actions involving nuclear weapons should be conducted in accordance with the joint Department of Defense, Department of Energy, and Federal Emergency Management Agency Agreement for Response to Nuclear Incidents and Nuclear Weapons Significant Incidents (January 8, 1981).

(h) If the situation is beyond the capability of state and local governments and the statutory authority of federal agencies, the President may, under the Disaster Relief Act of 1974, act upon a request by the governor and declare a major disaster or emergency and appoint a Federal Coordinating Officer (FCO) to coordinate all federal disaster assistance activities. In such cases, the OSC/RPM would continue to carry out OSC/RPM responsibilities under the NCP, but would coordinate those activities with the FCO to ensure consistency with other federal disaster assistance activities.

§ 300.135 Response operations.

(a) The OSC/RPM, consistent with §§ 300.120 and 300.125, shall direct response efforts and coordinate all other efforts at the scene of a discharge or release. As part of the planning and preparation for response, the OSCs/RPMs shall be predesignated by the regional or district head of the lead agency.

(b) The first federal official affiliated with an NRT member agency to arrive at the scene of a discharge or release should coordinate activities under the NCP and is authorized to initiate, in consultation with the OSC, any necessary actions normally carried out by the OSC until the arrival of the predesignated OSC. This official may initiate federal Fund-financed actions only as authorized by the OSC or, if the OSC is unavailable, the authorized representative of the lead agency.

(c) The OSC/RPM shall, to the extent practicable, collect pertinent facts about the discharge or release, such as its source and cause; the identification of potentially responsible parties; the nature, amount, and location of discharged or released materials; the probable direction and time of travel of discharged or released materials; the pathways to human and environmental exposure; the potential impact on human health, welfare, and safety and the environment; the potential impact on natural resources and property which may be affected; priorities for protecting human health and welfare and the environment; and appropriate cost documentation.

(d) The OSC's/RPM's efforts shall be coordinated with other appropriate federal, state, local, and private response agencies. OSCs/RPMs may designate capable persons from federal, state, or local agencies to act as their on-scene representatives. State and local governments, however, are not authorized to take actions under subparts D and E of the NCP that involve expenditures of CWA section 311(k) or CERCLA funds unless an appropriate contract or cooperative agreement has been established.

(e) The OSC/RPM should consult regularly with the RRT in carrying out the NCP and keep the RRT informed of activities under the NCP.

(f) The OSC/RPM shall advise the support agency as promptly as possible of reported releases.

(g) The OSC/RPM shall immediately notify FEMA of situations potentially requiring evacuation, temporary housing, or permanent relocation. In addition, the OSC/RPM shall evaluate incoming information and immediately advise FEMA of potential major disaster situations.

(h) In those instances where a possible public health emergency exists, the OSC/RPM should notify the HHS representative to the RRT. Throughout response actions, the OSC/RPM may call upon the HHS representative for assistance in determining public health threats and call upon the Occupational Safety and Health Administration (OSHA) and HHS for advice on worker health and safety problems.

(i) All federal agencies should plan for emergencies and develop procedures for dealing with oil discharges and releases of hazardous substances, pollutants, or contaminants from vessels and facilities under their jurisdiction. All federal agencies, therefore, are responsible for designating the office that coordinates response to such incidents in accordance with the NCP and applicable federal regulations and guidelines.

(j) The OSC/RPM shall promptly notify the trustees for natural resources of discharges or releases that are injuring or may injure natural resources under their jurisdiction. The OSC or RPM shall seek to coordinate all response activities with the natural resource trustees.

(k) Where the OSC/RPM becomes aware that a discharge or release may adversely affect any endangered or threatened species, or result in destruction or adverse modification of the habitat of such species, the OSC/RPM should consult with the DOI or DOC (NOAA).

(l) The OSC/RPM is responsible for addressing worker health and safety concerns at a response scene, in accordance with § 300.150.

(m) The OSC shall submit pollution reports to the RRT and other appropriate agencies as significant developments occur during response actions, through communications networks or procedures agreed to by the RRT and covered in the RCP.

(n) OSCs/RPMs should ensure that all appropriate public and private interests are kept informed and that their concerns are considered throughout a response, to the extent practicable, consistent with the requirements of § 300.155 of this part.

§ 300.140 Multi-regional responses.

(a) If a discharge or release moves from the area covered by one RCP or OSC contingency plan into another area, the authority for response actions should likewise shift. If a discharge or release affects areas covered by two or more RCPs, the response mechanisms of both may be activated. In this case, response actions of all regions concerned shall be fully coordinated as detailed in the RCPs.

(b) There shall be only one OSC and/or RPM at any time during the course of a response operation. Should a discharge or release affect two or more areas, EPA, the USCG, DOD, DOE, or other lead agency, as appropriate, shall give prime consideration to the area vulnerable to the greatest threat, in determining which agency should provide the OSC and/or RPM. The RRT shall designate the OSC and/or RPM if the RRT member agencies who have response authority within the affected areas are unable to agree on the designation. The NRT shall designate the OSC and/or RPM if members of one RRT or two adjacent RRTs are unable to agree on the designation.

(c) Where the USCG has initially provided the OSC for response to a release from hazardous waste management facilities located in the coastal zone, responsibility for response action shall shift to EPA or another federal agency, as appropriate.

§ 300.145 Special teams and other assistance available to OSCs/RPMs.

(a) Strike Teams, collectively known as the National Strike Force (NSF), are established by the USCG on the Pacific coast and Gulf coast (covering the Atlantic and Gulf coast regions), to provide assistance to the OSC/RPM.

(1) Strike Teams can provide communications support, advice, and assistance for oil and hazardous substances removal. These teams also have knowledge of shipboard damage control, are equipped with specialized containment and removal equipment, and have rapid transportation available. When possible, the Strike Teams will provide training for emergency task forces to support OSCs/RPMs and assist in the development of RCPs and OSC contingency plans.

(2) The OSC/RPM may request assistance from the Strike Teams. Requests for a team may be made directly to the Commanding Officer of the appropriate team, the USCG member of the RRT, the appropriate USCG Area Commander, or the Commandant of the USCG through the NRC.

(b) Each USCG OSC manages emergency task forces trained to evaluate, monitor, and supervise pollution responses. Additionally, they have limited "initial aid" response capability to deploy equipment prior to the arrival of a cleanup contractor or other response personnel.

(c)(1) The Environmental Response Team (ERT) is established by EPA in accordance with its disaster and emergency responsibilities. The ERT has expertise in treatment technology, biology, chemistry, hydrology, geology, and engineering.

(2) The ERT can provide access to special decontamination equipment for chemical releases and advice to the OSC/RPM in hazard evaluation; risk assessment; multimedia sampling and analysis program; on-site safety, including development and implementation plans; cleanup techniques and priorities; water supply decontamination and protection; application of dispersants; environmental assessment; degree of cleanup required; and disposal of contaminated material.

(3) The ERT also provides both introductory and intermediate level training courses to prepare response personnel.

(4) OSC/RPM or RRT requests for ERT support should be made to the EPA representative on the RRT; EPA Headquarters, Director, Emergency Response Division; or the appropriate EPA regional emergency coordinator.

(d) Scientific support coordinators (SSCs) are available, at the request of OSCs/RPMs, to assist with actual or potential responses to discharges of oil or releases of hazardous substances, pollutants, or contaminants. The SSC will also provide scientific support for the development of RCPs and OSC contingency plans. Generally, SSCs are provided by NOAA in coastal and marine areas, and by EPA in inland regions. In the case of NOAA, SSCs may be supported in the field by a team providing, as necessary, expertise in chemistry, trajectory modeling, natural resources at risk, and data management.

(1) During a response, the SSC serves under the direction of the OSC/RPM and is responsible for providing scientific support for operational decisions and for coordinating on-scene scientific activity. Depending on the nature of the incident, the SSC can be expected to provide certain specialized scientific skills and to work with governmental agencies, universities, community representatives, and

industry to compile information that would assist the OSC/RPM in assessing the hazards and potential effects of discharges and releases and in developing response strategies.

(2) If requested by the OSC/RPM, the SSC will serve as the principal liaison for scientific information and will facilitate communications to and from the scientific community on response issues. The SSC, in this role, will strive for a consensus on scientific issues surrounding the response but will also ensure that any differing opinions within the community are communicated to the OSC/RPM.

(3) The SSC will assist the OSC/RPM in responding to requests for assistance from state and federal agencies regarding scientific studies and environmental assessments. Details on access to scientific support shall be included in the RCPs.

(e) For marine salvage operations, OSCs/RPMs with responsibility for monitoring, evaluating, or supervising these activities should request technical assistance from DOD, the Strike Teams, or commercial salvors as necessary to ensure that proper actions are taken. Marine salvage operations generally fall into five categories: Afloat salvage; offshore salvage; river and harbor clearance; cargo salvage; and rescue towing. Each category requires different knowledge and specialized types of equipment. The complexity of such operations may be further compounded by local environmental and geographic conditions. The nature of marine salvage and the conditions under which it occurs combine to make such operations imprecise, difficult, hazardous, and expensive. Thus, responsible parties or other persons attempting to perform such operations without adequate knowledge, equipment, and experience could aggravate, rather than relieve, the situation.

(f) Radiological Assistance Teams (RATs) have been established by EPA's Office of Radiation Programs (ORP) to provide response and support for incidents or sites containing radiological hazards. Expertise is available in radiation monitoring, radionuclide analysis, radiation health physics, and risk assessment. Radiological Assistance Teams can provide on-site support including mobile monitoring laboratories for field analyses of samples and fixed laboratories for radiochemical sampling and analyses. Requests for support may be made 24 hours a day to the Radiological Response Coordinator in the EPA Office of Radiation Programs. Assistance is also available from the Department of Energy and other federal agencies.

(g) The USCG Public Information Assist Team (PIAT) is available to assist OSCs/RPMs and regional or district offices to meet the demands for public information and participation. Its use is encouraged any time the OSC/RPM requires outside public affairs support. Requests for the PIAT may be made through the NRC.

§ 300.150 Worker health and safety.

(a) Response actions under the NCP will comply with the provisions for response action worker safety and health in 29 CFR 1910.120.

(b) In a response action taken by a responsible party, the responsible party must assure that an occupational safety and health program consistent with 29 CFR 1910.120 is made available for the protection of workers at the response site.

(c) In a response taken under the NCP by a lead agency, an occupational safety and health program should be made available for the protection of workers at the response site, consistent with, and to the extent required by, 29 CFR 1910.120. Contracts relating to a response action under the NCP should contain assurances that the contractor at the response site will comply with this program and with any applicable provisions of the OSH Act and state OSH laws.

(d) When a state, or political subdivision of a state, without an OSHA-approved state plan is the lead agency for response, the state or political subdivision must comply with standards in 40 CFR part 311, promulgated by EPA pursuant to section 126(f) of SARA.

(e) Requirements, standards, and regulations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) (OSH Act) and of state laws with plans approved under section 18 of the OSH Act (state OSH laws), not directly referenced in paragraphs (a) through (d) of this section, must be complied with where applicable. Federal OSH Act requirements include, among other things, Construction Standards (29 CFR part 1926), General Industry Standards (29 CFR part 1910), and the general duty requirement of section 5(a)(1) of the OSH Act (29 U.S.C. 654(a)(1)). No action by the lead agency with respect to response activities under the NCP constitutes an exercise of statutory authority within the meaning of section 4(b)(1) of the OSH Act. All governmental agencies and private employers are directly responsible for the health and safety of their own employees.

§ 300.155 Public information and community relations.

(a) When an incident occurs, it is imperative to give the public prompt, accurate information on the nature of the incident and the actions underway to mitigate the damage. OSCs/RPMs and community relations personnel should ensure that all appropriate public and private interests are kept informed and that their concerns are considered throughout a response. They should coordinate with available public affairs/community relations resources to carry out this responsibility.

(b) An on-scene news office may be established to coordinate media relations and to issue official federal information on an incident. Whenever possible, it will be headed by a representative of the lead agency. The OSC/RPM determines the location of the on-scene news office, but every effort should be made to locate it near the scene of the incident. If a participating agency believes public interest warrants the issuance of statements and an on-scene news office has not been established, the affected agency should recommend its establishment. All federal news releases or statements by participating agencies should be cleared through the OSC/RPM.

(c) The community relations requirements specified in §§ 300.415, 300.430, and 300.435 apply to removal, remedial, and enforcement actions and are intended to promote active communication between communities affected by discharges or releases and the lead agency responsible for response actions. Community Relations Plans (CRPs) are required by EPA for certain response actions. The OSC/RPM should ensure coordination with such plans which may be in effect at the scene of a discharge or release or which may need to be developed during follow-up activities.

§ 300.160 Documentation and cost recovery.

(a) For releases of a hazardous substance, pollutant, or contaminant, the following provisions apply:

(1) During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery. In general, documentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state, or private party costs incurred for response

actions, and impacts and potential impacts to the public health and welfare and the environment. Where applicable, documentation shall state when the NRC received notification of a release of a reportable quantity.

(2) The information and reports obtained by the lead agency for Fund-financed response actions shall, as appropriate, be transmitted to the chair of the RRT. Copies can then be forwarded to the NRT, members of the RRT, and others as appropriate. In addition, OSCs shall submit reports as required under § 300.165.

(3) The lead agency shall make available to the trustees of affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries.

(b) For discharges of oil, documentation and cost recovery provisions are described in § 300.315.

(c) Response actions undertaken by the participating agencies shall be carried out under existing programs and authorities when available. Federal agencies are to make resources available, expend funds, or participate in response to discharges and releases under their existing authority. Interagency agreements may be signed when necessary to ensure that the federal resources will be available for a timely response to a discharge or release. The ultimate decision as to the appropriateness of expending funds rests with the agency that is held accountable for such expenditures. Further funding provisions for discharges of oil are described in § 300.335.

(d) The Administrator of EPA and the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) shall assure that the costs of health assessment or health effect studies conducted under the authority of CERCLA section 104(i) are documented in accordance with standard EPA procedures for cost recovery. Documentation shall include information on the nature of the hazardous substances addressed by the research, information concerning the locations where these substances have been found, and any available information on response actions taken concerning these substances at the location.

§ 300.165 OSC reports.

(a) Within one year after completion of removal activities at a major discharge of oil, a major release of a hazardous substance, pollutant, or contaminant, or when requested by the RRT, the OSC/RPM shall submit to the RRT a complete report on the removal operation and the actions taken. The OSC/RPM shall at the same time send a copy of the report to the Secretary of the NRT. The RRT shall review the OSC report and send to the NRT a copy of the OSC report with its comments or recommendations within 30 days after the RRT has received the OSC report.

(b) The OSC report shall record the situation as it developed, the actions taken, the resources committed, and the problems encountered.

(c) The format for the OSC report shall be as follows:

(1) Summary of Events—a chronological narrative of all events, including:

(i) The location of the hazardous substance, pollutant, or contaminant release or oil discharge, including, for oil discharges, an indication of whether the discharge was in connection with activities regulated under the Outer Continental Shelf Lands Act (OCSLA), the Trans-Alaska Pipeline Authorization Act, or the Deepwater Port Act;

(ii) The cause of the discharge or release;

(iii) The initial situation;

(iv) Efforts to obtain response by responsible parties;

(v) The organization of the response, including state participation;

(vi) The resources committed;

(vii) Content and time of notice to natural resource trustees relating injury or possible injury to natural resources;

(viii) Federal or state trustee damage assessment activities and efforts to replace or restore damaged natural resources;

(ix) Details of any threat abatement action taken under CERCLA or under section 311(c) or (d) of the CWA;

(x) Treatment/disposal/alternative technology approaches pursued and followed; and

(xi) Public information/community relations activities.

(2) Effectiveness of removal actions taken by:

(i) The responsible party(ies);

(ii) State and local forces;

(iii) Federal agencies and special teams; and

(iv) Contractors, private groups, and volunteers, if applicable.

(3) Difficulties Encountered—A list of items that affected the response, with particular attention to issues of intergovernmental coordination.

(4) Recommendations—OSC/RPM recommendations, including at a minimum:

(i) Means to prevent a recurrence of the discharge or release;

(ii) Improvement of response actions; and

(iii) Any recommended changes in the NCP, RCP, OSC contingency plan, and, as appropriate, plans developed under section 303 of SARA and other local emergency response plans.

§ 300.170 Federal agency participation.

Federal agencies listed in § 300.175 have duties established by statute, executive order, or Presidential directive which may apply to federal response actions following, or in prevention of, the discharge of oil or release of a hazardous substance, pollutant, or contaminant. Some of these agencies also have duties relating to the rehabilitation, restoration, or replacement of natural resources injured or lost as a result of such discharge or release as described in subpart G of this part. The NRT and RRT organizational structure, and the NCP, federal regional contingency plans (RCPs), and OSC contingency plans, described in § 300.210, provide for agencies to coordinate with each other in carrying out these duties.

(a) Federal agencies may be called upon by an OSC/RPM during response planning and implementation to provide assistance in their respective areas of expertise, as described in § 300.175, consistent with the agencies' capabilities and authorities.

(b) In addition to their general responsibilities, federal agencies should:

(1) Make necessary information available to the Secretary of the NRT, RRTs, and OSCs/RPMs.

(2) Provide representatives to the NRT and RRTs and otherwise assist RRTs and OSCs, as necessary, in formulating RCPs and OSC contingency plans.

(3) Inform the NRT and RRTs, consistent with national security considerations, of changes in the availability of resources that would affect the operations implemented under the NCP.

(c) All federal agencies are responsible for reporting releases of hazardous substances from facilities or vessels under their jurisdiction or control in accordance with section 103 of CERCLA.

(d) All federal agencies are encouraged to report releases of pollutants or contaminants or discharges of oil from vessels under their jurisdiction or control to the NRC.

§ 300.175 Federal agencies: additional responsibilities and assistance.

(a) During preparedness planning or in an actual response, various federal agencies may be called upon to provide assistance in their respective areas of expertise, as indicated in paragraph (b)

of this section, consistent with agency legal authorities and capabilities.

(b) The federal agencies include:

(1) The United States Coast Guard (USCG), as provided in 14 U.S.C. 1–3, is an agency in the Department of Transportation (DOT), except when operating as an agency in the United States Navy in time of war. The USCG provides the NRT vice chair, co-chairs for the standing RRTs, and predesignated OSCs for the coastal zone, as described in § 300.120(a)(1). The USCG maintains continuously manned facilities which can be used for command, control, and surveillance of oil discharges and hazardous substance releases occurring in the coastal zone, The USCG also offers expertise in domestic and international fields of port safety and security, maritime law enforcement, ship navigation and construction, and the manning, operation, and safety of vessels and marine facilities. The USCG may enter into a contract or cooperative agreement with the appropriate state in order to implement a response action.

(2) The Environmental Protection Agency (EPA) chairs the NRT and co-chairs, with the USCG, the standing RRTs; provides predesignated OSCs for the inland zone and RPMs for remedial actions except as otherwise provided; and generally provides the SSC for responses in the inland zone. EPA provides expertise on environmental effects of oil discharges or releases of hazardous substances, pollutants, or contaminants, and environmental pollution control techniques. EPA also provides legal expertise on the interpretation of CERCLA and other environmental statutes. EPA may enter into a contract or cooperative agreement with the appropriate state in order to implement a response action.

(3) The Federal Emergency Management Agency (FEMA) provides guidance, policy and program advice, and technical assistance in hazardous materials and radiological emergency preparedness activities (planning, training, and exercising). In a response, FEMA provides advice and assistance to the lead agency on coordinating relocation assistance and mitigation efforts with other federal agencies, state and local governments, and the private sector. FEMA may enter into a contract or cooperative agreement with the appropriate state or political subdivision in order to implement relocation assistance in a response. In the event of a hazardous materials incident at a major disaster or emergency declared by the President, the lead agency shall coordinate hazardous materials response with the Federal Coordinating Officer (FCO) appointed by the President.

(4) The Department of Defense (DOD) has responsibility to take all action necessary with respect to releases where either the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of DOD. DOD may also, consistent with its operational requirements and upon request of the OSC, provide locally deployed United States Navy oil spill equipment and provide assistance to other federal agencies on request. The following two branches of DOD have particularly relevant expertise:

(i) The United States Army Corps of Engineers has specialized equipment and personnel for maintaining navigation channels, for removing navigation obstruction, for accomplishing structural repairs, and for performing maintenance to hydropower electric generating equipment. The Corps can also provide design services, perform construction, and provide contract writing and contract administrative services for other federal agencies.

(ii) The United States Navy (USN) is the federal agency most knowledgeable and experienced in ship salvage, shipboard damage control, and diving. The USN has an extensive array of specialized equipment and personnel available for use in these areas as well as specialized containment, collection, and removal equipment specifically designed for salvage-related and open-sea pollution incidents.

(5) The Department of Energy (DOE) generally provides designated OSCs/RPMs that are responsible for taking all response actions with respect to releases where either the release is on, or the sole source of the release is from, any facility or vessel under its jurisdiction, custody, or control, including vessels bareboat-chartered and operated. In addition, under the Federal Radiological Emergency Response Plan (FRERP), DOE provides advice and assistance to other OSCs/RPMs for emergency actions essential for the control of immediate radiological hazards. Incidents that qualify for DOE radiological advice and assistance are those believed to involve source, by-product, or special nuclear material or other ionizing radiation sources, including radium, and other naturally occurring radionuclides, as well as particle accelerators. Assistance is available through direct contact with the appropriate DOE Radiological Assistance Coordinating Office.

(6) The Department of Agriculture (USDA) has scientific and technical capability to measure, evaluate, and monitor, either on the ground or by use of aircraft, situations where natural resources including soil, water, wildlife, and vegetation have been impacted by fire, insects and diseases, floods, hazardous substances, and other natural or man-caused emergencies. The USDA may be contacted through Forest Service emergency staff officers who are the designated members of the RRT. Agencies within USDA have relevant capabilities and expertise as follows:

(i) The Forest Service has responsibility for protection and management of national forests and national grasslands. The Forest Service has personnel, laboratory, and field capability to measure, evaluate, monitor, and control as needed, releases of pesticides and other hazardous substances on lands under its jurisdiction.

(ii) The Agriculture Research Service (ARS) administers an applied and developmental research program in animal and plant protection and production; the use and improvement of soil, water, and air; the processing, storage, and distribution of farm products; and human nutrition. The ARS has the capabilities to provide regulation of, and evaluation and training for, employees exposed to biological, chemical, radiological, and industrial hazards. In emergency situations, the ARS can identify, control, and abate pollution in the areas of air, soil, wastes, pesticides, radiation, and toxic substances for ARS facilities.

(iii) The Soil Conservation Service (SCS) has personnel in nearly every county in the nation who are knowledgeable in soil, agronomy, engineering, and biology. These personnel can help to predict the effects of pollutants on soil and their movements over and through soils. Technical specialists can assist in identifying potential hazardous waste sites and provide review and advice on plans for remedial measures.

(iv) The Animal and Plant Health Inspection Service (APHIS) can respond in an emergency to regulate movement of diseased or infected organisms to prevent the spread and contamination of nonaffected areas.

(v) The Food Safety and Inspection Service (FSIS) has responsibility to prevent meat and poultry products contaminated with harmful substances from entering human food channels. In emergencies, the FSIS works with other federal and state agencies to establish acceptability for slaughter of exposed or potentially exposed animals and their products. In addition they are charged

with managing the Federal Radiological Emergency Response Program for the USDA.

(7) The Department of Commerce (DOC), through NOAA, provides scientific support for response and contingency planning in coastal and marine areas, including assessments of the hazards that may be involved, predictions of movement and dispersion of oil and hazardous substances through trajectory modeling, and information on the sensitivity of coastal environments to oil and hazardous substances; provides expertise on living marine resources and their habitats, including endangered species, marine mammals and National Marine Sanctuary ecosystems; provides information on actual and predicted meteorological, hydrological, ice, and oceanographic conditions for marine, coastal, and inland waters, and tide and circulation data for coastal and territorial waters and for the Great Lakes.

(8) The Department of Health and Human Services (HHS) is responsible for providing assistance on matters related to the assessment of health hazards at a response, and protection of both response workers and the public's health. HHS is delegated authorities under section 104(b) of CERCLA relating to a determination that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant. HHS programs and services may be carried out through grants, contracts, or cooperative agreements. The basic research programs shall be coordinated with the Superfund research, demonstration, and development program conducted by EPA and DOD through the mechanisms provided for in CERCLA. Agencies within HHS have relevant responsibilities, capabilities, and expertise as follows:

(i) The Agency for Toxic Substances and Disease Registry (ATSDR), under section 104(i) of CERCLA, is required to: Establish appropriate disease/exposure registries; provide medical care and testing of exposed individuals in cases of public health emergencies; develop, maintain, and provide information on health effects of toxic substances; maintain a list of areas restricted or closed because of toxic substances contamination; conduct research to determine relationships between exposure to toxic substances and illness; conduct health assessments at all NPL sites; conduct a health assessment in response to a petition or provide a written explanation why an assessment will not be conducted; together with EPA, identify the most hazardous substances related to CERCLA sites; together with EPA, develop guidelines for toxicological profiles for hazardous substances; develop a toxicological profile for all such substances; and develop educational materials related to health effects of toxic substances for health professionals.

(ii) The National Institutes for Environmental Health Sciences (NIEHS) has been given the responsibilities under section 311(a) of CERCLA, to conduct and support programs of basic research, development, and demonstration; and to establish short course and continuing education programs, and graduate or advanced training. In addition, section 126(g) of SARA authorizes NIEHS to administer grants for training and education of workers who are or may be engaged in activities related to hazardous waste removal, containment, or emergency responses.

(9) The Department of the Interior (DOI) may be contacted through Regional Environmental Officers (REOs), who are the designated members of RRTs. Department land managers have jurisdiction over the national park system, national wildlife refuges and fish hatcheries, the public lands, and certain water projects in western states. In addition, bureaus and offices have relevant expertise as follows:

(i) Fish and Wildlife Service: Anadromous and certain other fishes and wildlife, including endangered and threatened species, migratory birds, and certain marine mammals; waters and wetlands; contaminants affecting habitat resources; and laboratory research facilities.

(ii) Geological Survey: Geology, hydrology (ground water and surface water), and natural hazards.

(iii) Bureau of Land Management: Minerals, soils, vegetation, wildlife, habitat, archaeology, and wilderness; and hazardous materials.

(iv) Minerals Management Service: Manned facilities for Outer Continental Shelf (OCS) oversight.

(v) Bureau of Mines: Analysis and identification of inorganic hazardous substances and technical expertise in metals and metallurgy relevant to site cleanup.

(vi) Office of Surface Mining: Coal mine wastes and land reclamation.

(vii) National Park Service: Biological and general natural resources expert personnel at park units.

(viii) Bureau of Reclamation: Operation and maintenance of water projects in the West; engineering and hydrology; and reservoirs.

(ix) Bureau of Indian Affairs: Coordination of activities affecting Indian lands; assistance in identifying Indian tribal government officials.

(x) Office of Territorial Affairs: Assistance in implementing the NCP in American Samoa, Guam, the Pacific Island Governments, the Northern Mariana Islands, and the Virgin Islands.

(10) The Department of Justice (DOJ) can provide expert advice on complicated legal questions arising from discharges or releases, and federal agency responses. In addition, the DOJ represents the federal government, including its agencies, in litigation relating to such discharges or releases.

(11) The Department of Labor (DOL), through the Occupational Safety and Health Administration (OSHA) and the states operating plans approved under section 18 of the Occupational Safety and Health Act of 1970 (OSH Act), has authority to conduct safety and health inspections of hazardous waste sites to assure that employees are being protected and to determine if the site is in compliance with:

(i) Safety and health standards and regulations promulgated by OSHA (or the states) in accordance with section 126 of SARA and all other applicable standards; and

(ii) Regulations promulgated under the OSH Act and its general duty clause. OSHA inspections may be self-generated, consistent with its program operations and objectives, or may be conducted in response to requests from EPA or another lead agency. OSHA may also conduct inspections in response to accidents or employee complaints. OSHA may also conduct inspections at hazardous waste sites in those states with approved plans that choose not to exercise their jurisdiction to inspect such sites. On request, OSHA will provide advice and assistance to EPA and other NRT/RRT agencies as well as to the OSC/RPM regarding hazards to persons engaged in response activities. Technical assistance may include review of site safety plans and work practices, assistance with exposure monitoring, and help with other compliance questions. OSHA may also take any other action necessary to assure that employees are properly protected at such response activities. Any questions about occupational safety and health at these sites should be referred to the OSHA Regional Office.

(12) The Department of Transportation (DOT) provides response expertise pertaining to transportation of

oil or hazardous substances by all modes of transportation. Through the Research and Special Programs Administration (RSPA), DOT offers expertise in the requirements for packaging, handling, and transporting regulated hazardous materials.

(13) The Department of State (DOS) will lead in the development of international joint contingency plans. It will also help to coordinate an international response when discharges or releases cross international boundaries or involve foreign flag vessels. Additionally, DOS will coordinate requests for assistance from foreign governments and U.S. proposals for conducting research at incidents that occur in waters of other countries.

(14) The Nuclear Regulatory Commission will respond, as appropriate, to releases of radioactive materials by its licensees, in accordance with the NRC Incident Response Plan (NUREG–0728) to monitor the actions of those licensees and assure that the public health and environment are protected and adequate recovery operations are instituted. The Nuclear Regulatory Commission will keep EPA informed of any significant actual or potential releases in accordance with procedural agreements. In addition, the Nuclear Regulatory Commission will provide advice to the OSC/RPM when assistance is required in identifying the source and character of other hazardous substance releases where the Nuclear Regulatory Commission has licensing authority for activities utilizing radioactive materials.

(15) The National Response Center (NRC), located at USCG Headquarters, is the national communications center, continuously manned for handling activities related to response actions. The NRC acts as the single federal point of contact for all pollution incident reporting and as the NRT communications center. These response actions include: Oil and hazardous substances, radiological, biological, etiological, surety materials, munitions, and fuels. Notice of discharges must be made telephonically through a toll free number or a special local number (Telecommunication Device for the Deaf (TDD) and collect calls accepted.) The telephone report is distributed to any interested NRT member agency or federal entity that has established a written agreement or understanding with the NRC. Each telephone notice is magnetically voice recorded and manually entered into an on-line computer data base. The NRC tracks medium, major, and potential, major spills and provides incident summaries to all NRT members and other interested parties. The NRC evaluates incoming information and immediately advises FEMA of a potential major disaster or evacuations situation. The NRC provides facilities for the NRT to use in coordinating a national response action, when required; assists in arrangements for regular as well as special NRT meetings and maintains information on the time and place of such meetings; and sends representatives to RRT meetings as appropriate. The NRC is available to assist all NRT agencies as needed.

§ 300.180 State and local participation in response.

(a) Each state governor is requested to designate one state office/representative to represent the state on the appropriate RRT. The state's office/representative may participate fully in all activities of the appropriate RRT. Each state governor is also requested to designate a lead state agency that will direct state-lead response operations. This agency is responsible for designating the OSC/RPM for state-lead response actions, designating SACs for federal-lead response actions, and coordinating/communicating with any other state agencies, as appropriate. Local governments are invited to participate in activities on the appropriate RRT as may be provided by state law or arranged by the state's representative. Indian tribes wishing to participate should assign one person or office to represent the tribal government on the appropriate RRT.

(b) In addition to meeting the requirements for local emergency plans under SARA section 303, state and local government agencies are encouraged to include contingency planning for responses, consistent with the NCP and the RCP, in all emergency and disaster planning.

(c) For facilities not addressed under CERCLA, states are encouraged to undertake response actions themselves or to use their authorities to compel potentially responsible parties to undertake response actions.

(d) States are encouraged to enter into cooperative agreements pursuant to section 104(c)(3) and (d) of CERCLA to enable them to undertake actions authorized under subparts D and E of the NCP. Requirements for entering into these agreements are included in subpart F of the NCP. A state agency that acts pursuant to such agreements is referred to as the lead agency. In the event there is no cooperative agreement, the lead agency can be designated in a SMOA or other agreement.

(e) Because state and local public safety organizations would normally be the first government representatives at the scene of a discharge or release, they are expected to initiate public safety measures that are necessary to protect public health and welfare and that are consistent with containment and cleanup requirements in the NCP, and are responsible for directing evacuations pursuant to existing state or local procedures.

§ 300.185 Nongovernmental participation.

(a) Industry groups, academic organizations, and others are encouraged to commit resources for response operations. Specific commitments should be listed in the RCP and OSC contingency plans.

(b) The technical and scientific information generated by the local community, along with information from federal, state, and local governments, should be used to assist the OSC/RPM in devising response strategies where effective standard techniques are unavailable. The SSC may act as liaison between the OSC/RPM and such interested organizations.

(c) OSC contingency plans shall establish procedures to allow for well organized, worthwhile, and safe use of volunteers, including compliance with § 300.150 regarding worker health and safety. OSC contingency plans should provide for the direction of volunteers by the OSC/RPM or by other federal, state, or local officials knowledgeable in contingency operations and capable of providing leadership. OSC contingency plans also should identify specific areas in which volunteers can be used, such as beach surveillance, logistical support, and bird and wildlife treatment. Unless specifically requested by the OSC/RPM, volunteers generally should not be used for physical removal or remedial activities. If, in the judgment of the OSC/RPM, dangerous conditions exist, volunteers shall be restricted from on-scene operations.

(d) Nongovernmental participation must be in compliance with the requirements of subpart H of this part if any recovery of costs will be sought.

Subpart C—Planning and Preparedness

§ 300.200 General.

This subpart summarizes emergency preparedness activities relating to discharges of oil and releases of hazardous substances, pollutants, or contaminants; describes the federal, state, and local planning structure; provides for three levels of federal contingency plans; and cross-references state and local emergency preparedness

activities under SARA Title III, also known as the "Emergency Planning and Community Right-to-Know Act of 1986" but referred to herein as "Title III." Regulations implementing Title III are codified at 40 CFR subchapter J.

§ 300.205 Planning and coordination structure.

(a) *National.* As described in § 300.110, the NRT is responsible for national planning and coordination.

(b) *Regional.* As described in § 300.115, the RRTs are responsible for regional planning and coordination.

(c) *State.* As provided by sections 301 and 303 of SARA, the state emergency response commission (SERC) of each state, appointed by the Governor, is to designate emergency planning districts, appoint local emergency planning committees (LEPCs), supervise and coordinate their activities, and review local emergency response plans, which are described in § 300.215. The SERC also is to establish procedures for receiving and processing requests from the public for information generated by Title III reporting requirements and to designate an official to serve as coordinator for information.

(d) *Local.* As provided by sections 301 and 303 of SARA, emergency planning districts are designated by the SERC in order to facilitate the preparation and implementation of emergency plans. Each LEPC is to prepare a local emergency response plan for the emergency planning district and establish procedures for receiving and processing requests from the public for information generated by Title III reporting requirements. The LEPC is to appoint a chair and establish rules for the LEPC. The LEPC is to designate an official to serve as coordinator for information.

§ 300.210 Federal contingency plans.

There are three levels of federal contingency plans: The National Contingency Plan, regional contingency plans (RCPs), and OSC contingency plans. These plans are available for inspection at EPA regional offices or USCG district offices. Addresses and telephone numbers for these offices may be found in the United States Government Manual, issued annually, or in local telephone directories.

(a) *The National Contingency Plan.* The purpose and objectives, authority, and scope of the NCP are described in §§ 300.1 through 300.3.

(b) *Regional contingency plans.* The RRTs, working with the states, shall develop federal RCPs for each standard federal region, Alaska, Oceania in the Pacific, and the Caribbean to coordinate timely, effective response by various federal agencies and other organizations to discharges of oil or releases of hazardous substances, pollutants, or contaminants. RCPs shall, as appropriate, include information on all useful facilities and resources in the region, from government, commercial, academic, and other sources. To the greatest extent possible, RCPs shall follow the format of the NCP and coordinate with state emergency response plans, OSC contingency plans, which are described in § 300.210(c), and Title III local emergency response plans, which are described in § 300.215. Such coordination should be accomplished by working with the SERCs in the region covered by the RCP. RCPs shall contain lines of demarcation between the inland and coastal zones, as mutually agreed upon by USCG and EPA.

(c)(1) *OSC contingency plans.* In order to provide for a coordinated, effective federal, state, and local response, each OSC, in consultation with the RRT, may develop an OSC contingency plan for response in the OSC area of responsibility. OSC contingency plans shall be developed in all areas in the coastal zone, because OSCs in the coastal zone have responsibility for discharges and releases offshore, which often exceed the jurisdiction and capabilities of other responders. Boundaries for OSC contingency plans shall coincide with those agreed upon among EPA, USCG, DOE, and DOD, subject to functions and authorities delegated in Executive Order 12580, to determine OSC areas of responsibility and should be clearly indicated in the RCP. Jurisdictional boundaries of local emergency planning districts established by states, described in § 300.205(c), shall, as appropriate, be considered in determining OSC areas of responsibility. OSC areas of responsibility may include several such local emergency planning districts, or parts of such districts. In developing the OSC contingency plan, OSCs shall coordinate with SERCs and LEPCs affected by the OSC area of responsibility.

(2) The OSC contingency plan shall provide for a well-coordinated response that is integrated and compatible with all appropriate response plans of state, local, and other nonfederal entities, and especially with Title III local emergency response plans, described in § 300.215, or in the OSC area of responsibility. The OSC contingency plan shall, as appropriate, identify the probable locations of discharges or releases; the available resources to respond to multi-media incidents; where such resources can be obtained; waste disposal methods and facilities consistent with local and state plans developed under the Solid Waste Disposal Act, 42 U.S.C. 6901 et seq.; and a local structure for responding to discharges or releases.

§ 300.215 Title III local emergency response plans.

This section describes and cross-references the regulations that implement Title III of SARA. These regulations are codified at 40 CFR part 355.

(a) Each LEPC is to prepare an emergency response plan in accordance with section 303 of SARA Title III and review the plan once a year, or more frequently as changed circumstances in the community or at any subject facility may require. Such Title III local emergency response plans should be closely coordinated with applicable federal OSC contingency plans and state emergency response plans.

(b) A facility, as defined in 40 CFR part 355, is subject to emergency planning requirements if an extremely hazardous substance, as defined in 40 CFR part 355, is present at the facility in an amount equal to or in excess of the threshold planning quantity established for such substance. In addition, for the purposes of emergency planning, a Governor or SERC may designate additional facilities that shall be subject to planning requirements, if such designation is made after public notice and opportunity for comment. EPA may revise the list of extremely hazardous substances and threshold planning quantities, taking into account the toxicity, reactivity, volatility, dispersability, combustibility, or flammability of a substance. Facility owners or operators are to name a facility representative who will participate in the planning process as a facility emergency coordinator.

(c) In accordance with section 303 of SARA, each local emergency response plan is to include, but is not limited to, the following:

(1) Identification of facilities subject to Title III emergency planning requirements that are within the emergency planning district; routes likely to be used for the transportation of substances on the list of extremely hazardous substances; and any additional facilities, such as hospitals or natural gas facilities, contributing or subjected to additional risk due to their proximity to facilities subject to Title III emergency planning requirements;

(2) Methods and procedures to be followed by facility owners and operators and local emergency and medical personnel to respond to any

release, as defined in 40 CFR part 355, of extremely hazardous substances;

(3) Designation of a community emergency coordinator and a facility emergency coordinator for each facility subject to Title III emergency planning requirements, who will make determinations necessary to implement the emergency response plan;

(4) Procedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency response plan, and to the public, that a release has occurred;

(5) Methods for determining the occurrence of a release and the area or population likely to be affected by such a release;

(6) A description of emergency equipment and facilities in the community and at each facility in the community subject to Title III emergency planning requirements, including an identification of the persons responsible for such equipment and facilities;

(7) Evacuation plans, including provisions for precautionary evacuation and alternative traffic routes;

(8) Training programs, including schedules for training of local emergency response and medical personnel; and

(9) Methods and schedules for exercising the emergency response plan.

(d) In accordance with section 303 of SARA, the SERC of each state is to review the emergency response plan developed by the LEPC of each emergency planning district and make recommendations to the LEPC on revisions that may be necessary to ensure coordination of the plan with emergency response plans of other emergency planning districts. RRTs may review a local emergency response plan at the request of the LEPC. This request should be made by the LEPC, through the SERC and the state representative on the RRT.

(e) Title III establishes reporting requirements that provide useful information in developing emergency plans.

(1) Upon request from the LEPC, facility owners or operators shall provide promptly to such LEPC information necessary for developing and implementing the emergency response plan.

(2) Facilities required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical, as defined in 40 CFR part 370, under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., and regulations promulgated under that Act, shall submit a MSDS for each hazardous chemical or a list of hazardous chemicals to the appropriate SERC, LEPC, and local fire department in accordance with 40 CFR part 370.

(3) Facilities subject to the requirements of paragraph (e)(2) of this section shall also submit an inventory form to the SERC, LEPC, and the local fire department, which contains an estimate of the maximum amount of hazardous chemicals present at the facility during the preceding year, an estimate of the average daily amount of hazardous chemicals at the facility, and the location of these hazardous chemicals at the facility, in accordance with 40 CFR part 370.

(4) Certain facilities with 10 or more employees and which manufacture, process, or use a toxic chemical, as defined in 40 CFR part 372, in excess of a statutorily prescribed quantity, shall submit annual information on the chemical and releases of the chemical into the environment to EPA and the state in accordance with 40 CFR part 372.

(f) Immediately after a release of an extremely hazardous substance, or a hazardous substance subject to the notification requirements of CERCLA section 103(a), the owner or operator of a facility, as defined in 40 CFR part 355, shall notify the community emergency coordinator for the appropriate LEPC and the appropriate SERC in accordance with 40 CFR part 355. As soon as practicable after such a release has occurred, the facility owner or operator shall provide a written follow-up emergency notice, or notices, if more information becomes available, setting forth and updating the information contained in the initial release notification and including additional information with respect to response actions taken, health risks associated with the release, and, where appropriate, advice regarding medical attention necessary for exposed individuals. For releases of hazardous substances subject to the notification requirements of CERCLA section 103(a), immediate notification must also be made to the NRC, as provided in § 300.405(b).

(g) Title III requires public access to information submitted pursuant to its reporting requirements. Each emergency response plan, MSDS, inventory form, toxic chemical release form, and follow-up emergency release notification is to be made available to the general public during normal working hours at the location(s) designated by the EPA Administrator, Governor, SERC, or LEPC, as appropriate.

§ 300.220 Related Title III issues.

Other related Title III requirements are found in 40 CFR part 355.

Subpart D—Operational Response Phases for Oil Removal

§ 300.300 Phase I—Discovery or notification.

(a) A discharge of oil may be discovered through:

(1) A report submitted by the person in charge of a vessel or facility, in accordance with statutory requirements;

(2) Deliberate search by patrols;

(3) Random or incidental observation by government agencies or the public; or

(4) Other sources.

(b) Any person in charge of a vessel or a facility shall, as soon as he or she has knowledge of any discharge from such vessel or facility in violation of section 311(b)(3) of the Clean Water Act, immediately notify the NRC. If direct reporting to the NRC is not practicable, reports may be made to the USCG or EPA predesignated OSC for the geographic area where the discharge occurs. The EPA predesignated OSC may also be contacted through the regional 24-hour emergency response telephone number. All such reports shall be promptly relayed to the NRC. If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made immediately to the nearest Coast Guard unit. In any event such person in charge of the vessel or facility shall notify the NRC as soon as possible.

(c) Any other person shall, as appropriate, notify the NRC of a discharge of oil.

(d) Upon receipt of a notification of discharge, the NRC shall promptly notify the OSC. The OSC shall proceed with the following phases as outlined in the RCP and OSC contingency plan.

§ 300.305 Phase II—Preliminary assessment and initiation of action.

(a) The OSC is responsible for promptly initiating a preliminary assessment.

(b) The preliminary assessment shall be conducted using available information, supplemented where necessary and possible by an on-scene inspection. The OSC shall undertake actions to:

(1) Evaluate the magnitude and severity of the discharge or threat to public health or welfare or the environment;

(2) Assess the feasibility of removal;

(3) To the extent practicable, identify potentially responsible parties; and

(4) Ensure that authority exists for undertaking additional response actions.

(c) The OSC, in consultation with legal authorities when appropriate, shall make a reasonable effort to have the discharger voluntarily and promptly perform removal actions. The OSC shall ensure adequate surveillance over whatever actions are initiated. If effective actions are not being taken to eliminate the threat, or if removal is not being properly done, the OSC shall, to the extent practicable under the circumstances, so advise the responsible party. If the responsible party does not take proper removal actions, or is unknown, or is otherwise unavailable, the OSC shall, pursuant to section 311(c)(1) of the CWA, determine whether authority for a federal response exists, and, if so, take appropriate response actions. Where practicable, continuing efforts should be made to encourage response by responsible parties.

(d) If natural resources are or may be injured by the discharge, the OSC shall ensure that state and federal trustees of affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G. The OSC shall seek to coordinate assessments, evaluations, investigations, and planning with state and federal trustees.

§ 300.310 Phase III—Containment, countermeasures, cleanup, and disposal.

(a) Defensive actions shall begin as soon as possible to prevent, minimize, or mitigate threat(s) to public health or welfare or the environment. Actions may include but are not limited to: Analyzing water samples to determine the source and spread of the oil; controlling the source of discharge; measuring and sampling; source and spread control or salvage operations; placement of physical barriers to deter the spread of the oil and to protect natural resources; control of the water discharged from upstream impoundment; and the use of chemicals and other materials in accordance with subpart J of this part to restrain the spread of the oil and mitigate its effects.

(b) As appropriate, actions shall be taken to recover the oil or mitigate its effects. Of the numerous chemical or physical methods that may be used, the chosen methods shall be the most consistent with protecting public health and welfare and the environment. Sinking agents shall not be used.

(c) Oil and contaminated materials recovered in cleanup operations shall be disposed of in accordance with the RCP and OSC contingency plan and any applicable laws, regulations, or requirements.

§ 300.315 Phase IV—Documentation and cost recovery.

(a) Documentation shall be collected and maintained to support all actions taken under the CWA and to form the basis for cost recovery. Whenever practicable, documentation shall be sufficient to prove the source and circumstances of the incident, the responsible party or parties, and impact and potential impacts to public health and welfare and the environment. When appropriate, documentation shall also be collected for scientific understanding of the environment and for the research and development of improved response methods and technology. Damages to private citizens, including loss of earnings, are not addressed by the NCP. Evidentiary and cost documentation procedures are specified in the USCG Marine Safety Manual (Commandant Instruction M16000.11) and further provisions are contained in 33 CFR part 153.

(b) OSCs shall submit OSC reports to the RRT as required by § 300.165.

(c) OSCs shall ensure the necessary collection and safeguarding of information, samples, and reports. Samples and information shall be gathered expeditiously during the response to ensure an accurate record of the impacts incurred. Documentation materials shall be made available to the trustees of affected natural resources. The OSC shall make available to trustees of the affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries.

(d) Information and reports obtained by the EPA or USCG OSC shall be transmitted to the appropriate offices responsible for follow-up actions.

§ 300.320 General pattern of response.

(a) When the OSC receives a report of a discharge, actions normally should be taken in the following sequence:

(1) When the reported discharge is an actual or potential major discharge, immediately notify the RRT, including the affected state, if appropriate, and the NRC.

(2) Investigate the report to determine pertinent information such as the threat posed to public health or welfare or the environment, the type and quantity of polluting material, and the source of the discharge.

(3) Officially classify the size of the discharge and determine the course of action to be followed.

(4) Determine whether a discharger or other person is properly carrying out removal. Removal is being done properly when:

(i) The cleanup is fully sufficient to minimize or mitigate threat(s) to public health and welfare and the environment. Removal efforts are improper to the extent that federal efforts are necessary to minimize further or mitigate those threats; and

(ii) The removal efforts are in accordance with applicable regulations, including the NCP.

(5) Determine whether a state or political subdivision thereof has the capability to carry out response actions and whether a contract or cooperative agreement has been established with the appropriate fund administrator for this purpose.

(6) Notify the trustees of affected natural resources in accordance with the applicable RCP.

(b) The preliminary inquiry will probably show that the situation falls into one of four categories. These categories and the appropriate response to each are outlined below:

(1) If the investigation shows that no discharge occurred, or it shows a minor discharge with no removal action required, the case may be closed for response purposes.

(2) If the investigation shows a minor discharge with the responsible party taking proper removal action, contact shall be established with the party. The removal action shall, whenever possible, be monitored to ensure continued proper action.

(3) If the investigation shows a minor discharge with improper removal action being taken, the following measures shall be taken:

(i) An immediate effort shall, as appropriate, be made to stop further pollution and remove past and ongoing contamination.

(ii) The responsible party shall be advised of what action will be considered appropriate.

(iii) If the responsible party does not properly respond, the party shall be notified of potential liability for federal response performed under the CWA. This liability includes all costs of removal and may include the costs of assessing and restoring, rehabilitating, replacing, or acquiring the equivalent of damaged natural resources, and other actual or necessary costs of a federal response.

(iv) The OSC shall notify appropriate state and local officials, keep the RRT advised, and initiate Phase III operations, as described in § 300.310, as conditions warrant.

(v) Information shall be collected for possible recovery of response costs in accordance with § 300.315.

(4) When the investigation shows that an actual or potential medium or major oil discharge exists, the OSC shall follow the same general procedures as for a minor discharge. If appropriate, the OSC shall recommend activation of the RRT.

§ 300.330 Wildlife conservation.

The Department of the Interior, Department of Commerce, and state representatives to the RRT shall arrange for the coordination of professional and volunteer groups permitted and trained to participate in wildlife dispersal, collection, cleaning, rehabilitation, and recovery activities, consistent with 16 U.S.C. 703–712 and applicable state laws. The RCP and OSC contingency plans shall, to the extent practicable, identify organizations or institutions that are permitted to participate in such activities and operate such facilities. Wildlife conservation activities will normally be included in Phase III response actions, described in § 300.310.

§ 300.335 Funding.

(a) If the person responsible for the discharge does not act promptly or take proper removal actions, or if the person responsible for the discharge is unknown, federal discharge removal actions may begin under section 311(c)(1) of the CWA. The discharger, if known, is liable for costs of federal removal in accordance with section 311(f) of the CWA and other federal laws.

(b) Actions undertaken by the participating agencies in response to pollution shall be carried out under existing programs and authorities when available. Federal agencies will make resources available, expend funds, or participate in response to oil discharges under their existing authority. Authority to expend resources will be in accordance with agencies' basic statutes and, if required, through interagency agreements. Where the OSC requests assistance from a federal agency, that agency may be reimbursed in accordance with the provisions of 33 CFR 153.407. Specific interagency reimbursement agreements may be signed when necessary to ensure that the federal resources will be available for a timely response to a discharge of oil. The ultimate decisions as to the appropriateness of expending funds rest with the agency that is held accountable for such expenditures.

(c) The OSC shall exercise sufficient control over removal operations to be able to certify that reimbursement from the following funds is appropriate:

(1) The oil pollution fund, administered by the Commandant, USCG, that has been established pursuant to section 311(k) of the CWA or any other spill response fund established by Congress. Regulations governing the administration and use of the section 311(k) fund are contained in 33 CFR part 153.

(2) The fund authorized by the Deepwater Port Act is administered by the Commandant, USCG. Governing regulations are contained in 33 CFR part 137.

(3) The fund authorized by the Outer Continental Shelf Lands Act, as amended, is administered by the Commandant, USCG. Governing regulations are contained in 33 CFR parts 135 and 136.

(4) The fund authorized by the Trans-Alaska Pipeline Authorization Act is administered by a Board of Trustees under the purview of the Secretary of the Interior. Governing regulations are contained in 43 CFR part 29.

(d) Response actions other than removal, such as scientific investigations not in support of removal actions or law enforcement, shall be provided by the agency with legal responsibility for those specific actions.

(e) The funding of a response to a discharge from a federally operated or supervised facility or vessel is the responsibility of the operating or supervising agency.

(f) The following agencies have funds available for certain discharge removal actions:

(1) EPA may provide funds to begin timely discharge removal actions when the OSC is an EPA representative.

(2) The USCG pollution control efforts are funded under "operating expenses." These funds are used in accordance with agency directives.

(3) The Department of Defense has two specific sources of funds that may be applicable to an oil discharge under appropriate circumstances. This does not consider military resources that might be made available under specific conditions.

(i) Funds required for removal of a sunken vessel or similar obstruction of navigation are available to the Corps of Engineers through Civil Works Appropriations, Operations and Maintenance, General.

(ii) The U.S. Navy may conduct salvage operations contingent on defense operational commitments, when funded by the requesting agency. Such funding may be requested on a direct cite basis.

(4) Pursuant to section 311(c)(2)(H) of the CWA, the state or states affected by a discharge of oil may act where necessary to remove such discharge and may, pursuant to 33 CFR part 153, be reimbursed from the oil pollution fund for the reasonable costs incurred in such a removal.

(i) Removal by a state is necessary within the meaning of section 311(c)(2)(H) of the CWA when the OSC determines that the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs does not effect removal properly, or is unknown, and that:

(A) State action is required to minimize or mitigate significant threat(s) to the public health or welfare or the environment that federal action cannot minimize or mitigate; or

(B) Removal or partial removal can be done by the state at a cost that is less than or not significantly greater than the cost that would be incurred by the federal agencies.

(ii) State removal actions must be in compliance with the NCP in order to qualify for reimbursement.

(iii) State removal actions are considered to be Phase III actions, described in § 300.310, under the same definitions applicable to federal agencies.

(iv) Actions taken by local governments in support of federal discharge removal operations are considered to be actions of the state for purposes of this section. The RCP and OSC contingency plan shall show what funds and resources are available from participating agencies under various conditions and cost arrangements. Interagency agreements may be necessary to specify when reimbursement is required.

Subpart E—Hazardous Substance Response

§ 300.400 General.

(a) This subpart establishes methods and criteria for determining the appropriate extent of response authorized by CERCLA:

(1) When there is a release of a hazardous substance into the environment; or

(2) When there is a release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare.

(b) *Limitations on response.* Unless the lead agency determines that a release constitutes a public health or environmental emergency and no other person with the authority and capability to respond will do so in a timely manner, a removal or remedial action under section 104 of CERCLA shall not be undertaken in response to a release:

(1) Of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(2) From products that are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(3) Into public or private drinking water supplies due to deterioration of the system through ordinary use.

(c) *Fund-financed action.* In determining the need for and in planning or undertaking Fund-financed action, the lead agency shall, to the extent practicable:

(1) Engage in prompt response;

(2) Provide for state participation in response actions, as described in subpart F of this part;

(3) Conserve Fund monies by encouraging private party response;

(4) Be sensitive to local community concerns;

(5) Consider using treatment technologies;

(6) Involve the Regional Response Team (RRT) in both removal and remedial response actions at appropriate decision-making stages;

(7) Encourage the involvement and sharing of technology by industry and other experts; and

(8) Encourage the involvement of organizations to coordinate responsible party actions, foster site response, and provide technical advice to the public, federal and state governments, and industry.

(d) *Entry and access.* (1) For purposes of determining the need for response, or choosing or taking a response action, or otherwise enforcing the provisions of CERCLA, EPA, or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), has the authority to enter any vessel, facility, establishment or other place, property, or location described in paragraph (d)(2) of this section and conduct, complete, operate, and maintain any response actions authorized by CERCLA or these regulations.

(2)(i) Under the authorities described in paragraph (d)(1) of this section, EPA, or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), may enter:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from;

(B) Any vessel, facility, establishment, or other place or property from which, or to which, a hazardous substance or pollutant or contaminant has been, or may have been, released or where such release is or may be threatened;

(C) Any vessel, facility, establishment, or other place or property where entry is necessary to determine the need for response or the appropriate response or to effectuate a response action; or

(D) Any vessel, facility, establishment, or other place, property, or location adjacent to those vessels, facilities, establishments, places, or properties described in paragraphs (d)(2)(i)(A), (B), or (C) of this section.

(ii) Once a determination has been made that there is a reasonable basis to believe that there has been or may be a release, EPA, or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), is authorized to enter all vessels, facilities, establishments, places, properties, or locations specified in paragraph (d)(2)(i) of this section, at which the release is believed to be, and all other vessels, facilities, establishments, places, properties, or locations identified in paragraph (d)(2)(i) of this section that are related to the response or are necessary to enter in responding to that release.

(3) The lead agency may designate as its representative solely for the purpose of access, among others, one or more potentially responsible parties, including representatives, employees, agents, and contractors of such parties. EPA, or the appropriate federal agency, may exercise the authority contained in section 104(e) of CERCLA to obtain access for its designated representative. A potentially responsible party may only be designated as a representative of the lead agency where that potentially responsible party has agreed to conduct response activities pursuant to an administrative order or consent decree.

(4)(i) If consent is not granted under the authorities described in paragraph (d)(1) of this section, or if consent is conditioned in any manner, EPA, or the appropriate federal agency, may issue an order pursuant to section 104(e)(5) of CERCLA directing compliance with the request for access made under § 300.400(d)(1). EPA or the appropriate federal agency may ask the Attorney General to commence a civil action to compel compliance with either a request for access or an order directing compliance.

(ii) EPA reserves the right to proceed, where appropriate, under applicable authority other than CERCLA section 104(e).

(iii) The administrative order may direct compliance with a request to enter or inspect any vessel, facility, establishment, place, property, or location described in paragraph (d)(2) of this section.

(iv) Each order shall contain:

(A) A determination by EPA, or the appropriate federal agency, that it is reasonable to believe that there may be or has been a release or threat of a release of a hazardous substance or pollutant or contaminant and a statement of the facts upon which the determination is based;

(B) A description, in light of CERCLA response authorities, of the purpose and estimated scope and duration of the entry, including a description of the specific anticipated activities to be conducted pursuant to the order;

(C) A provision advising the person who failed to consent that an officer or employee of the agency that issued the order will be available to confer with respondent prior to effective date of the order; and

(D) A provision advising the person who failed to consent that a court may impose a penalty of up to $25,000 per day for unreasonable failure to comply with the order.

(v) Orders shall be served upon the person or responsible party who failed to consent prior to their effective date. Force shall not be used to compel compliance with an order.

(vi) Orders may not be issued for any criminal investigations.

(e) *Permit requirements.* (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term "on-site" means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

(2) Permits, if required, shall be obtained for all response activities conducted off-site.

(f) *Health assessments.* Health assessments shall be performed by ATSDR at facilities on or proposed to be listed on the NPL and may be performed at other releases or facilities in response to petitions made to ATSDR. Where available, these health assessments may be used by the lead agency to assist in determining whether response actions should be taken and/or to identify the need for additional studies to assist in the assessment of potential human health effects associated with releases

or potential releases of hazardous substances.

(g) *Identification of applicable or relevant and appropriate requirements.* (1) The lead and support agencies shall identify requirements applicable to the release or remedial action contemplated based upon an objective determination of whether the requirement specifically addresses a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site.

(2) If, based upon paragraph (g)(1) of this section, it is determined that a requirement is not applicable to a specific release, the requirement may still be relevant and appropriate to the circumstances of the release. In evaluating relevance and appropriateness, the factors in paragraphs (g)(2)(i) through (viii) of this section shall be examined, where pertinent, to determine whether a requirement addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site, and therefore is both relevant and appropriate. The pertinence of each of the following factors will depend, in part, on whether a requirement addresses a chemical, location, or action. The following comparisons shall be made, where pertinent, to determine relevance and appropriateness:

(i) The purpose of the requirement and the purpose of the CERCLA action;

(ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site;

(iii) The substances regulated by the requirement and the substances found at the CERCLA site;

(iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site;

(v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site;

(vi) The type of place regulated and the type of place affected by the release or CERCLA action;

(vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action;

(viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site.

(3) In addition to applicable or relevant and appropriate requirements, the lead and support agencies may, as appropriate, identify other advisories, criteria, or guidance to be considered for a particular release. The "to be considered" (TBC) category consists of advisories, criteria, or guidance that were developed by EPA, other federal agencies, or states that may be useful in developing CERCLA remedies.

(4) Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. For purposes of identification and notification of promulgated state standards, the term "promulgated" means that the standards are of general applicability and are legally enforceable.

(5) The lead agency and support agency shall identify their specific requirements that are applicable or relevant and appropriate for a particular site. These agencies shall notify each other, in a timely manner as described in § 300.515(d), of the requirements they have determined to be applicable or relevant and appropriate. When identifying a requirement as an ARAR, the lead agency and support agency shall include a citation to the statute or regulation from which the requirement is derived.

(6) Notification of ARARs shall be according to procedures and timeframes specified in § 300.515 (d)(2) and (h)(2).

(h) *Oversight.* The lead agency may provide oversight for actions taken by potentially responsible parties to ensure that a response is conducted consistent with this part. The lead agency may also monitor the actions of third parties preauthorized under subpart H of this part. EPA will provide oversight when the response is pursuant to an EPA order or federal consent decree.

(i) *Other.* (1) This subpart does not establish any preconditions to enforcement action by either the federal or state governments to compel response actions by potentially responsible parties.

(2) While much of this subpart is oriented toward federally funded response actions, this subpart may be used as guidance concerning methods and criteria for response actions by other parties under other funding mechanisms. Except as provided in subpart H of this part, nothing in this part is intended to limit the rights of any person to seek recovery of response costs from responsible parties pursuant to CERCLA section 107.

(3) Activities by the federal and state governments in implementing this subpart are discretionary governmental functions. This subpart does not create in any private party a right to federal response or enforcement action. This subpart does not create any duty of the federal government to take any response action at any particular time.

§ 300.405 Discovery or notification.

(a) A release may be discovered through:

(1) A report submitted in accordance with section 103(a) of CERCLA, i.e., reportable quantities codified at 40 CFR part 302;

(2) A report submitted to EPA in accordance with section 103(c) of CERCLA;

(3) Investigation by government authorities conducted in accordance with section 104(e) of CERCLA or other statutory authority;

(4) Notification of a release by a federal or state permit holder when required by its permit;

(5) Inventory or survey efforts or random or incidental observation reported by government agencies or the public;

(6) Submission of a citizen petition to EPA or the appropriate federal facility requesting a preliminary assessment, in accordance with section 105(d) of CERCLA; and

(7) Other sources.

(b) Any person in charge of a vessel or a facility shall report releases as described in paragraph (a)(1) of this section to the National Response Center (NRC). If direct reporting to the NRC is not practicable, reports may be made to the United States Coast Guard (USCG) on-scene coordinator (OSC) for the geographic area where the release occurs. The EPA predesignated OSC may also be contacted through the regional 24-hour emergency response telephone number. All such reports shall be promptly relayed to the NRC. If it is not possible to notify the NRC or predesignated OSC immediately, reports may be made immediately to the nearest USCG unit. In any event, such person in charge of the vessel or facility shall notify the NRC as soon as possible.

(c) All other reports of releases described under paragraph (a) of this section, except releases reported under paragraphs (a) (2) and (6) of this section, shall, as appropriate, be made to the NRC.

(d) The NRC will generally need information that will help to characterize the release. This will include, but not be limited to: Location of the release; type(s) of material(s) released; an estimate of the quantity of material released; possible source of the release; and date and time of the release. Reporting under paragraphs (b)

and (c) of this section shall not be delayed due to incomplete notification information.

(e) Upon receipt of a notification of a release, the NRC shall promptly notify the appropriate OSC. The OSC shall notify the Governor, or designee, of the state affected by the release.

(f)(1) When the OSC is notified of a release that may require response pursuant to § 300.415(b), a removal site evaluation shall, as appropriate, be promptly undertaken pursuant to § 300.410.

(2) When notification indicates that removal action pursuant to § 300.415(b) is not required, a remedial site evaluation shall, if appropriate, be undertaken by the lead agency pursuant to § 300.420, if one has not already been performed.

(3) If radioactive substances are present in a release, the EPA Radiological Response Coordinator should be notified for evaluation and assistance, consistent with §§ 300.130(f) and 300.145(f).

(g) Release notification made to the NRC under this section does not relieve the owner/operator of a facility from any obligations to which it is subject under SARA Title III or state law. In particular, it does not relieve the owner/operator from the requirements of section 304 of SARA Title III and 40 CFR part 355 and § 300.215(f) of this part for notifying the community emergency coordinator for the appropriate local emergency planning committee of all affected areas and the state emergency response commission of any state affected that there has been a release. Federal agencies are not legally obligated to comply with the requirements of Title III of SARA.

§ 300.410 Removal site evaluation.

(a) A removal site evaluation includes a removal preliminary assessment and, if warranted, a removal site inspection.

(b) A removal site evaluation of a release identified for possible CERCLA response pursuant to § 300.415 shall, as appropriate, be undertaken by the lead agency as promptly as possible. The lead agency may perform a removal preliminary assessment in response to petitions submitted by a person who is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant pursuant to § 300.420(b)(5).

(c)(1) The lead agency shall, as appropriate, base the removal preliminary assessment on readily available information. A removal preliminary assessment may include, but is not limited to:

(i) Identification of the source and nature of the release or threat of release;

(ii) Evaluation by ATSDR or by other sources, for example, state public health agencies, of the threat to public health;

(iii) Evaluation of the magnitude of the threat;

(iv) Evaluation of factors necessary to make the determination of whether a removal is necessary; and

(v) Determination of whether a nonfederal party is undertaking proper response.

(2) A removal preliminary assessment of releases from hazardous waste management facilities may include collection or review of data such as site management practices, information from generators, photographs, analysis of historical photographs, literature searches, and personal interviews conducted, as appropriate.

(d) A removal site inspection may be performed if more information is needed. Such inspection may include a perimeter (i.e., off-site) or on-site inspection, taking into consideration whether such inspection can be performed safely.

(e) A removal site evaluation shall be terminated when the OSC or lead agency determines:

(1) There is no release;

(2) The source is neither a vessel nor a facility as defined in § 300.5 of the NCP;

(3) The release involves neither a hazardous substance, nor a pollutant or contaminant that may present an imminent and substantial danger to public health or welfare;

(4) The release consists of a situation specified in § 300.400(b)(1) through (3) subject to limitations on response;

(5) The amount, quantity, or concentration released does not warrant federal response;

(6) A party responsible for the release, or any other person, is providing appropriate response, and on-scene monitoring by the government is not required; or

(7) The removal site evaluation is completed.

(f) The results of the removal site evaluation shall be documented.

(g) If natural resources are or may be injured by the release, the OSC or lead agency shall ensure that state and federal trustees of the affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The OSC or lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(h) If the removal site evaluation indicates that removal action under § 300.415 is not required, but that remedial action under § 300.430 may be necessary, the lead agency shall, as appropriate, initiate a remedial site evaluation pursuant to § 300.420.

§ 300.415 Removal action.

(a)(1) In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

(3) This section does not apply to removal actions taken pursuant to section 104(b) of CERCLA. The criteria for such actions are set forth in section 104(b) of CERCLA.

(b)(1) At any release, regardless of whether the site is included on the National Priorities List, where the lead agency makes the determination, based on the factors in paragraph (b)(2) of this section, that there is a threat to public health or welfare or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.

(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and

(viii) Other situations or factors that may pose threats to public health or welfare or the environment.

(3) If the lead agency determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare or the environment. The lead agency shall, at the earliest possible time, also make any necessary determinations pursuant to paragraph (b)(4) of this section.

(4) Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate:

(i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site.

(ii) If environmental samples are to be collected, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(A) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and

(B) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in planning and documenting the removal action.

(5) Fund-financed removal actions, other than those authorized under section 104(b) of CERCLA, shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless the lead agency determines that:

(i) There is an immediate risk to public health or welfare or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or

(ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

(c) Removal actions shall, to the extent practicable, contribute to the efficient performance of any anticipated long-term remedial action with respect to the release concerned.

(d) The following removal actions are, as a general rule, appropriate in the types of situations shown; however, this list is not exhaustive and is not intended to prevent the lead agency from taking any other actions deemed necessary under CERCLA or other appropriate federal or state enforcement or response authorities, and the list does not create a duty on the lead agency to take action at any particular time:

(1) Fences, warning signs, or other security or site control precautions—where humans or animals have access to the release;

(2) Drainage controls, for example, run-off or run-on diversion—where needed to reduce migration of hazardous substances or pollutants or contaminants off-site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;

(3) Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons—where needed to maintain the integrity of the structures;

(4) Capping of contaminated soils or sludges—where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

(5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects—where the use of such chemicals will reduce the spread of the release;

(6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas—where such actions will reduce the spread of, or direct contact with, the contamination;

(7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants—where it will reduce the likelihood of spillage; leakage; exposure to humans, animals, or food chain; or fire or explosion;

(8) Containment, treatment, disposal, or incineration of hazardous materials—where needed to reduce the likelihood of human, animal, or food chain exposure; or

(9) Provision of alternative water supply—where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

(e) Where necessary to protect public health or welfare, the lead agency shall request that FEMA conduct a temporary relocation or that state/local officials conduct an evacuation.

(f) If the lead agency determines that the removal action will not fully address the threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.

(g) Removal actions conducted by states under cooperative agreements, described in subpart F of this part, shall comply with all requirements of this section.

(h) Facilities operated by a state or political subdivision at the time of disposal require a state cost share of at least 50 percent of Fund-financed response costs if a Fund-financed remedial action is conducted.

(i) Fund-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall, to the extent practicable considering the exigencies of the situation, attain applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws. Waivers described in § 300.430(f)(1)(ii)(C) may be used for removal actions. Other federal and state advisories, criteria, or guidance may, as appropriate, be considered in formulating the removal action (see § 300.400(g)(3)). In determining whether compliance with ARARs is practicable, the lead agency may consider appropriate factors, including:

(1) The urgency of the situation; and

(2) The scope of the removal action to be conducted.

(j) Removal actions pursuant to section 106 or 122 of CERCLA are not subject to the following requirements of this section:

(1) Section 300.415(a)(2) requirement to locate responsible parties and have them undertake the response;

(2) Section 300.415(b)(2)(vii) requirement to consider the availability of other appropriate federal or state response and enforcement mechanisms to respond to the release;

(3) Section 300.415(b)(5) requirement to terminate response after $2 million has been obligated or 12 months have elapsed from the date of the initial response; and

(4) Section 300.415(f) requirement to assure an orderly transition from removal to remedial action.

(k) To the extent practicable, provision for post-removal site control following a Fund-financed removal action at both NPL and non-NPL sites is encouraged to be made prior to the initiation of the removal action. Such post-removal site control includes actions necessary to ensure the effectiveness and integrity of the removal action after the completion of the on-site removal action or after the $2 million or 12-month statutory limits are reached for sites that do not meet the

exemption criteria in paragraph (b)(5) of this section. Post-removal site control may be conducted by:

(1) The affected state or political subdivision thereof or local units of government for any removal;

(2) Potentially responsible parties; or

(3) EPA's remedial program for some federal-lead Fund-financed responses at NPL sites.

(l) OSCs/RPMs conducting removal actions shall submit OSC reports to the RRT as required by § 300.165.

(m) *Community relations in removal actions.* (1) In the case of all removal actions taken pursuant to § 300.415 or CERCLA enforcement actions to compel removal response, a spokesperson shall be designated by the lead agency. The spokesperson shall inform the community of actions taken, respond to inquiries, and provide information concerning the release. All news releases or statements made by participating agencies shall be coordinated with the OSC/RPM. The spokesperson shall notify, at a minimum, immediately affected citizens, state and local officials, and, when appropriate, civil defense or emergency management agencies.

(2) For actions where, based on the site evaluation, the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin, the lead agency shall:

(i) Publish a notice of availability of the administrative record file established pursuant to § 300.820 in a major local newspaper of general circulation within 60 days of initiation of on-site removal activity;

(ii) Provide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to § 300.820(b)(2); and

(iii) Prepare a written response to significant comments pursuant to § 300.820(b)(3).

(3) For removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities, the lead agency shall by the end of the 120-day period:

(i) Conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns, information needs, and how or when citizens would like to be involved in the Superfund process;

(ii) Prepare a formal community relations plan (CRP) based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the response; and

(iii) Establish at least one local information repository at or near the location of the response action. The information repository should contain items made available for public information. Further, an administrative record file established pursuant to subpart I for all removal actions shall be available for public inspection in at least one of the repositories. The lead agency shall inform the public of the establishment of the information repository and provide notice of availability of the administrative record file for public review. All items in the repository shall be available for public inspection and copying.

(4) Where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists prior to initiation of the on-site removal activities, the lead agency shall at a minimum:

(i) Comply with the requirements set forth in paragraphs (m)(3)(i), (ii), and (iii) of this section, prior to the completion of the engineering evaluation/cost analysis (EE/CA), or its equivalent, except that the information repository and the administrative record file will be established no later than when the EE/CA approval memorandum is signed;

(ii) Publish a notice of availability and brief description of the EE/CA in a major local newspaper of general circulation pursuant to § 300.820;

(iii) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments after completion of the EE/CA pursuant to § 300.820(a). Upon timely request, the lead agency will extend the public comment period by a minimum of 15 days; and

(iv) Prepare a written response to significant comments pursuant to § 300.820(a).

§ 300.420 Remedial site evaluation.

(a) *General.* The purpose of this section is to describe the methods, procedures, and criteria the lead agency shall use to collect data, as required, and evaluate releases of hazardous substances, pollutants, or contaminants. The evaluation may consist of two steps: a remedial preliminary assessment (PA) and a remedial site inspection (SI).

(b) *Remedial preliminary assessment.* (1) The lead agency shall perform a remedial PA on all sites in CERCLIS as defined in § 300.5 to:

(i) Eliminate from further consideration those sites that pose no threat to public health or the environment;

(ii) Determine if there is any potential need for removal action;

(iii) Set priorities for site inspections; and

(iv) Gather existing data to facilitate later evaluation of the release pursuant to the Hazard Ranking System (HRS) if warranted.

(2) A remedial PA shall consist of a review of existing information about a release such as information on the pathways of exposure, exposure targets, and source and nature of release. A remedial PA shall also include an off-site reconnaissance as appropriate. A remedial PA may include an on-site reconnaissance where appropriate.

(3) If the remedial PA indicates that a removal action may be warranted, the lead agency shall initiate removal evaluation pursuant to § 300.410.

(4) In performing a remedial PA, the lead agency may complete the EPA Preliminary Assessment form, available from EPA regional offices, or its equivalent, and shall prepare a PA report, which shall include:

(i) A description of the release;

(ii) A description of the probable nature of the release; and

(iii) A recommendation on whether further action is warranted, which lead agency should conduct further action, and whether an SI or removal action or both should be undertaken.

(5) Any person may petition the lead federal agency (EPA or the appropriate federal agency in the case of a release or suspected release from a federal facility), to perform a PA of a release when such person is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant. Such petitions shall be addressed to the EPA Regional Administrator for the region in which the release is located, except that petitions for PAs involving federal facilities should be addressed to the head of the appropriate federal agency.

(i) Petitions shall be signed by the petitioner and shall contain the following:

(A) The full name, address, and phone number of petitioner;

(B) A description, as precisely as possible, of the location of the release; and

(C) How the petitioner is or may be affected by the release.

(ii) Petitions should also contain the following information to the extent available:

(A) What type of substances were or may be released;

(B) The nature of activities that have occurred where the release is located; and

(C) Whether local and state authorities have been contacted about the release.

(iii) The lead federal agency shall complete a remedial or removal PA within one year of the date of receipt of a complete petition pursuant to paragraph (b)(5) of this section, if one has not been performed previously, unless the lead federal agency determines that a PA is not appropriate. Where such a determination is made, the lead federal agency shall notify the petitioner and will provide a reason for the determination.

(iv) When determining if performance of a PA is appropriate, the lead federal agency shall take into consideration:

(A) Whether there is information indicating that a release has occurred or there is a threat of a release of a hazardous substance, pollutant, or contaminant; and

(B) Whether the release is eligible for response under CERCLA.

(c) *Remedial site inspection.* (1) The lead agency shall perform a remedial SI as appropriate to:

(i) Eliminate from further consideration those releases that pose no significant threat to public health or the environment;

(ii) Determine the potential need for removal action;

(iii) Collect or develop additional data, as appropriate, to evaluate the release pursuant to the HRS; and

(iv) Collect data in addition to that required to score the release pursuant to the HRS, as appropriate, to better characterize the release for more effective and rapid initiation of the RI/FS or response under other authorities.

(2) The remedial SI shall build upon the information collected in the remedial PA. The remedial SI shall involve, as appropriate, both on- and off-site field investigatory efforts, and sampling.

(3) If the remedial SI indicates that removal action may be appropriate, the lead agency shall initiate removal site evaluation pursuant to § 300.410.

(4) Prior to conducting field sampling as part of site inspections, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples, and the type of analyses, and

(ii) The quality assurance project plan (QAPP), which describes policy, organization, and functional activities, and the data quality objectives and measures necessary to achieve adequate data for use in site evaluation and hazard ranking system activities.

(5) Upon completion of a remedial SI, the lead agency shall prepare a report that includes the following:

(i) A description/history/nature of waste handling;

(ii) A description of known contaminants;

(iii) A description of pathways of migration of contaminants;

(iv) An identification and description of human and environmental targets; and

(v) A recommendation on whether further action is warranted.

§ 300.425 Establishing remedial priorities.

(a) *General.* The purpose of this section is to identify the criteria as well as the methods and procedures EPA uses to establish its priorities for remedial actions.

(b) *National Priorities List.* The NPL is the list of priority releases for long-term remedial evaluation and response.

(1) Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action. Removal actions (including remedial planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b)) are not limited to NPL sites.

(2) Inclusion of a release on the NPL does not imply that monies will be expended, nor does the rank of a release on the NPL establish the precise priorities for the allocation of Fund resources. EPA may also pursue other appropriate authorities to remedy the release, including enforcement actions under CERCLA and other laws. A site's rank on the NPL serves, along with other factors, including enforcement actions, as a basis to guide the allocation of Fund resources among releases.

(3) Federal facilities that meet the criteria identified in paragraph (c) of this section are eligible for inclusion on the NPL. Except as provided by CERCLA sections 111(e)(3) and 111(c), federal facilities are not eligible for Fund-financed remedial actions.

(4) Inclusion on the NPL is not a precondition to action by the lead agency under CERCLA sections 106 or 122 or to action under CERCLA section 107 for recovery of non-Fund-financed costs or Fund-financed costs other than Fund-financed remedial construction costs.

(c) *Methods for determining eligibility for NPL.* A release may be included on the NPL if the release meets one of the following criteria:

(1) The release scores sufficiently high pursuant to the Hazard Ranking System described in Appendix A to this part.

(2) A state (not including Indian tribes) has designated a release as its highest priority. States may make only one such designation; or

(3) The release satisfies all of the following criteria:

(i) The Agency for Toxic Substances and Disease Registry has issued a health advisory that recommends dissociation of individuals from the release;

(ii) EPA determines that the release poses a significant threat to public health; and

(iii) EPA anticipates that it will be more cost-effective to use its remedial authority than to use removal authority to respond to the release.

(d) *Procedures for placing sites on the NPL.* Lead agencies may submit candidates to EPA by scoring the release using the HRS and providing the appropriate backup documentation.

(1) Lead agencies may submit HRS scoring packages to EPA anytime throughout the year.

(2) EPA shall review lead agencies' HRS scoring packages and revise them as appropriate. EPA shall develop any additional HRS scoring packages on releases known to EPA.

(3) EPA shall compile the NPL based on the methods identified in paragraph (c) of this section.

(4) EPA shall update the NPL at least once a year.

(5) To ensure public involvement during the proposal to add a release to the NPL, EPA shall:

(i) Publish the proposed rule in the **Federal Register** and solicit comments through a public comment period; and

(ii) Publish the final rule in the **Federal Register**, and make available a response to each significant comment and any significant new data submitted during the comment period.

(6) Releases may be categorized on the NPL when deemed appropriate by EPA.

(e) *Deletion from the NPL.* Releases may be deleted from or recategorized on the NPL where no further response is appropriate.

(1) EPA shall consult with the state on proposed deletions from the NPL prior to developing the notice of intent to delete. In making a determination to delete a release from the NPL, EPA shall consider, in consultation with the state, whether any of the following criteria has been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

(2) Releases shall not be deleted from the NPL until the state in which the release was located has concurred on the proposed deletion. EPA shall provide the state 30 working days for review of the deletion notice prior to its publication in the **Federal Register.**

(3) All releases deleted from the NPL are eligible for further Fund-financed remedial actions should future conditions warrant such action. Whenever there is a significant release from a site deleted from the NPL, the site shall be restored to the NPL without application of the HRS.

(4) To ensure public involvement during the proposal to delete a release from the NPL, EPA shall:

(i) Publish a notice of intent to delete in the **Federal Register** and solicit comment through a public comment period of a minimum of 30 calendar days;

(ii) In a major local newspaper of general circulation at or near the release that is proposed for deletion, publish a notice of availability of the notice of intent to delete;

(iii) Place copies of information supporting the proposed deletion in the information repository, described in § 300.430(c)(2)(iii), at or near the release proposed for deletion. These items shall be available for public inspection and copying; and

(iv) Respond to each significant comment and any significant new data submitted during the comment period and include this response document in the final deletion package.

(5) EPA shall place the final deletion package in the local information repository once the notice of final deletion has been published in the **Federal Register.**

§ 300.430 Remedial investigation/feasibility study and selection of remedy.

(a) *General*—(1) *Introduction.* The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment. Remedial actions are to be implemented as soon as site data and information make it possible to do so. Accordingly, EPA has established the following program goal, expectations, and program management principles to assist in the identification and implementation of appropriate remedial actions.

(i) *Program goal.* The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.

(ii) *Program management principles.* EPA generally shall consider the following general principles of program management during the remedial process:

(A) Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of total site cleanup.

(B) Operable units, including interim action operable units, should not be inconsistent with nor preclude implementation of the expected final remedy.

(C) Site-specific data needs, the evaluation of alternatives, and the documentation of the selected remedy should reflect the scope and complexity of the site problems being addressed.

(iii) *Expectations.* EPA generally shall consider the following expectations in developing appropriate remedial alternatives:

(A) EPA expects to use treatment to address the principal threats posed by a site, wherever practicable. Principal threats for which treatment is most likely to be appropriate include liquids, areas contaminated with high concentrations of toxic compounds, and highly mobile materials.

(B) EPA expects to use engineering controls, such as containment, for waste that poses a relatively low long-term threat or where treatment is impracticable.

(C) EPA expects to use a combination of methods, as appropriate, to achieve protection of human health and the environment. In appropriate site situations, treatment of the principal threats posed by a site, with priority placed on treating waste that is liquid, highly toxic or highly mobile, will be combined with engineering controls (such as containment) and institutional controls, as appropriate, for treatment residuals and untreated waste.

(D) EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.

(E) EPA expects to consider using innovative technology when such technology offers the potential for comparable or superior treatment performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated technologies.

(F) EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. When restoration of ground water to beneficial uses is not practicable, EPA expects to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction.

(2) *Remedial investigation/feasibility study.* The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered.

(b) *Scoping.* In implementing this section, the lead agency should consider the program goal, program management principles, and expectations contained in this rule. The investigative and analytical studies should be tailored to site circumstances so that the scope and detail of the analysis is appropriate to the complexity of site problems being addressed. During scoping, the lead and support agencies shall confer to identify the optimal set and sequence of actions necessary to address site problems. Specifically, the lead agency shall:

(1) Assemble and evaluate existing data on the site, including the results of any removal actions, remedial

preliminary assessment and site inspections, and the NPL listing process.

(2) Develop a conceptual understanding of the site based on the evaluation of existing data described in paragraph (b)(1) of this section.

(3) Identify likely response scenarios and potentially applicable technologies and operable units that may address site problems.

(4) Undertake limited data collection efforts or studies where this information will assist in scoping the RI/FS or accelerate response actions, and begin to identify the need for treatability studies, as appropriate.

(5) Identify the type, quality, and quantity of the data that will be collected during the RI/FS to support decisions regarding remedial response activities.

(6) Prepare site-specific health and safety plans that shall specify, at a minimum, employee training and protective equipment, medical surveillance requirements, standard operating procedures, and a contingency plan that conforms with 29 CFR 1910.120 (l)(1) and (l)(2).

(7) If natural resources are or may be injured by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(8) Develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and

(ii) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in selecting the appropriate remedy.

(9) Initiate the identification of potential federal and state ARARs and, as appropriate, other criteria, advisories, or guidance to be considered.

(c) *Community relations.* (1) The community relations requirements described in this section apply to all remedial activities undertaken pursuant to CERCLA section 104 and to section 106 or section 122 consent orders or decrees, or section 106 administrative orders.

(2) The lead agency shall provide for the conduct of the following community relations activities, to the extent practicable, prior to commencing field work for the remedial investigation:

(i) Conducting interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs, and to learn how and when citizens would like to be involved in the Superfund process.

(ii) Preparing a formal community relations plan (CRP), based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the remedial response. The purpose of the CRP is to:

(A) Ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy;

(B) Determine, based on community interviews, appropriate activities to ensure such public involvement, and

(C) Provide appropriate opportunities for the community to learn about the site.

(iii) Establishing at least one local information repository at or near the location of the response action. Each information repository should contain a copy of items made available to the public, including information that describes the technical assistance grants application process. The lead agency shall inform interested parties of the establishment of the information repository.

(iv) Informing the community of the availability of technical assistance grants.

(3) For PRP actions, the lead agency shall plan and implement the community relations program at a site. PRPs may participate in aspects of the community relations program at the discretion of and with oversight by the lead agency.

(4) The lead agency may conduct technical discussions involving PRPs and the public. These technical discussions may be held separately from, but contemporaneously with, the negotiations/settlement discussions.

(5) In addition, the following provisions specifically apply to enforcement actions:

(i) Lead agencies entering into an enforcement agreement with de minimis parties under CERCLA section 122(g) or cost recovery settlements under section 122(h) shall publish a notice of the proposed agreement in the Federal Register at least 30 days before the agreement becomes final, as required by section 122(i). The notice must identify the name of the facility and the parties to the proposed agreement and must allow an opportunity for comment and consideration of comments; and

(ii) Where the enforcement agreement is embodied in a consent decree, public notice and opportunity for public comment shall be provided in accordance with 28 CFR 50.7.

(d) *Remedial investigation.* (1) The purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. To characterize the site, the lead agency shall, as appropriate, conduct field investigations, including treatability studies, and conduct a baseline risk assessment. The RI provides information to assess the risks to human health and the environment and to support the development, evaluation, and selection of appropriate response alternatives. Site characterization may be conducted in one or more phases to focus sampling efforts and increase the efficiency of the investigation. Because estimates of actual or potential exposures and associated impacts on human and environmental receptors may be refined throughout the phases of the RI as new information is obtained, site characterization activities should be fully integrated with the development and evaluation of alternatives in the feasibility study. Bench- or pilot-scale treatability studies shall be conducted, when appropriate and practicable, to provide additional data for the detailed analysis and to support engineering design of remedial alternatives.

(2) The lead agency shall characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent to which the release poses a threat to human health or the environment or to support the analysis and design of potential response actions by conducting, as appropriate, field investigations to assess the following factors:

(i) Physical characteristics of the site, including important surface features, soils, geology, hydrogeology, meteorology, and ecology;

(ii) Characteristics or classifications of air, surface water, and ground water;

(iii) The general characteristics of the waste, including quantities, state, concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;

(iv) The extent to which the source can be adequately identified and characterized;

(v) Actual and potential exposure pathways through environmental media;

(vi) Actual and potential exposure routes, for example, inhalation and ingestion; and

(vii) Other factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives.

(3) The lead and support agency shall identify their respective potential ARARs related to the location of and contaminants at the site in a timely manner. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner (see § 300.400(g)(3)).

(4) Using the data developed under paragraphs (d) (1) and (2) of this section, the lead agency shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain. The results of the baseline risk assessment will help establish acceptable exposure levels for use in developing remedial alternatives in the FS, as described in paragraph (e) of this section.

(e) *Feasibility study.* (1) The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. The lead agency may develop a feasibility study to address a specific site problem or the entire site. The development and evaluation of alternatives shall reflect the scope and complexity of the remedial action under consideration and the site problems being addressed. Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation described in paragraph (d) of this section. The lead agency shall include an alternatives screening step, when needed, to select a reasonable number of alternatives for detailed analysis.

(2) Alternatives shall be developed that protect human health and the environment by recycling waste or by eliminating, reducing, and/or controlling risks posed through each pathway by a site. The number and type of alternatives to be analyzed shall be determined at each site, taking into account the scope, characteristics, and complexity of the site problem that is being addressed. In developing and, as appropriate, screening the alternatives, the lead agency shall:

(i) Establish remedial action objectives specifying contaminants and media of concern, potential exposure pathways, and remediation goals. Initially, preliminary remediation goals are developed based on readily available information, such as chemical-specific ARARs or other reliable information. Preliminary remediation goals should be modified, as necessary, as more information becomes available during the RI/FS. Final remediation goals will be determined when the remedy is selected. Remediation goals shall establish acceptable exposure levels that are protective of human health and the environment and shall be developed by considering the following:

(A) Applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws, if available, and the following factors:

(*1*) For systemic toxicants, acceptable exposure levels shall represent concentration levels to which the human population, including sensitive subgroups, may be exposed without adverse effect during a lifetime or part of a lifetime, incorporating an adequate margin of safety;

(*2*) For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-4} and 10^{-6} using information on the relationship between dose and response. The 10^{-6} risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure;

(*3*) Factors related to technical limitations such as detection/quantification limits for contaminants;

(*4*) Factors related to uncertainty; and

(*5*) Other pertinent information.

(B) Maximum contaminant level goals (MCLGs), established under the Safe Drinking Water Act, that are set at levels above zero, shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCLGs are relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2). If an MCLG is determined not to be relevant and appropriate, the corresponding maximum contaminant level (MCL) shall be attained where relevant and appropriate to the circumstances of the release.

(C) Where the MCLG for a contaminant has been set at a level of zero, the MCL promulgated for that contaminant under the Safe Drinking Water Act shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCL is relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2).

(D) In cases involving multiple contaminants or pathways where attainment of chemical-specific ARARs will result in cumulative risk in excess of 10^{-4}, criteria in paragraph (e)(2)(i)(A) of this section may also be considered when determining the cleanup level to be attained.

(E) Water quality criteria established under sections 303 or 304 of the Clean Water Act shall be attained where relevant and appropriate under the circumstances of the release.

(F) An alternate concentration limit (ACL) may be established in accordance with CERCLA section 121(d)(2)(B)(ii).

(G) Environmental evaluations shall be performed to assess threats to the environment, especially sensitive habitats and critical habitats of species protected under the Endangered Species Act.

(ii) Identify and evaluate potentially suitable technologies, including innovative technologies;

(iii) Assemble suitable technologies into alternative remedial actions.

(3) For source control actions, the lead agency shall develop, as appropriate:

(i) A range of alternatives in which treatment that reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants is a principal element. As appropriate, this range shall include an alternative that removes or destroys hazardous substances, pollutants, or contaminants to the maximum extent feasible, eliminating or minimizing, to the degree possible, the need for long-term management. The lead agency also shall develop, as appropriate, other alternatives which, at a minimum, treat the principal threats posed by the site but vary in the degree of treatment employed and the quantities and characteristics of the treatment residuals and untreated waste that must be managed; and

(ii) One or more alternatives that involve little or no treatment, but provide protection of human health and

the environment primarily by preventing or controlling exposure to hazardous substances, pollutants, or contaminants, through engineering controls, for example, containment, and, as necessary, institutional controls to protect human health and the environment and to assure continued effectiveness of the response action.

(4) For ground-water response actions, the lead agency shall develop a limited number of remedial alternatives that attain site-specific remediation levels within different restoration time periods utilizing one or more different technologies.

(5) The lead agency shall develop one or more innovative treatment technologies for further consideration if those technologies offer the potential for comparable or superior performance or implementability; fewer or lesser adverse impacts than other available approaches; or lower costs for similar levels of performance than demonstrated treatment technologies.

(6) The no-action alternative, which may be no further action if some removal or remedial action has already occurred at the site, shall be developed.

(7) As appropriate, and to the extent sufficient information is available, the short- and long-term aspects of the following three criteria shall be used to guide the development and screening of remedial alternatives:

(i) *Effectiveness.* This criterion focuses on the degree to which an alternative reduces toxicity, mobility, or volume through treatment, minimizes residual risks and affords long-term protection, complies with ARARs, minimizes short-term impacts, and how quickly it achieves protection. Alternatives providing significantly less effectiveness than other, more promising alternatives may be eliminated. Alternatives that do not provide adequate protection of human health and the environment shall be eliminated from further consideration.

(ii) *Implementability.* This criterion focuses on the technical feasibility and availability of the technologies each alternative would employ and the administrative feasibility of implementing the alternative. Alternatives that are technically or administratively infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration.

(iii) *Cost.* The costs of construction and any long-term costs to operate and maintain the alternatives shall be considered. Costs that are grossly excessive compared to the overall effectiveness of alternatives may be considered as one of several factors used to eliminate alternatives. Alternatives providing effectiveness and implementability similar to that of another alternative by employing a similar method of treatment or engineering control, but at greater cost, may be eliminated.

(8) The lead agency shall notify the support agency of the alternatives that will be evaluated in detail to facilitate the identification of ARARs and, as appropriate, pertinent advisories, criteria, or guidance to be considered.

(9) *Detailed analysis of alternatives.* (i) A detailed analysis shall be conducted on the limited number of alternatives that represent viable approaches to remedial action after evaluation in the screening stage. The lead and support agencies must identify their ARARs related to specific actions in a timely manner and no later than the early stages of the comparative analysis. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner.

(ii) The detailed analysis consists of an assessment of individual alternatives against each of nine evaluation criteria and a comparative analysis that focuses upon the relative performance of each alternative against those criteria.

(iii) *Nine criteria for evaluation.* The analysis of alternatives under review shall reflect the scope and complexity of site problems and alternatives being evaluated and consider the relative significance of the factors within each criteria. The nine evaluation criteria are as follows:

(A) *Overall protection of human health and the environment.* Alternatives shall be assessed to determine whether they can adequately protect human health and the environment, in both the short- and long-term, from unacceptable risks posed by hazardous substances, pollutants, or contaminants present at the site by eliminating, reducing, or controlling exposures to levels established during development of remediation goals consistent with § 300.430(e)(2)(i). Overall protection of human health and the environment draws on the assessments of other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness, and compliance with ARARs.

(B) *Compliance with ARARs.* The alternatives shall be assessed to determine whether they attain applicable or relevant and appropriate requirements under federal environmental laws and state environmental or facility siting laws or provide grounds for invoking one of the waivers under paragraph (f)(1)(ii)(C) of this section.

(C) *Long-term effectiveness and permanence.* Alternatives shall be assessed for the long-term effectiveness and permanence they afford, along with the degree of certainty that the alternative will prove successful. Factors that shall be considered, as appropriate, include the following:

(*1*) Magnitude of residual risk remaining from untreated waste or treatment residuals remaining at the conclusion of the remedial activities. The characteristics of the residuals should be considered to the degree that they remain hazardous, taking into account their volume, toxicity, mobility, and propensity to bioaccumulate.

(*2*) Adequacy and reliability of controls such as containment systems and institutional controls that are necessary to manage treatment residuals and untreated waste. This factor addresses in particular the uncertainties associated with land disposal for providing long-term protection from residuals; the assessment of the potential need to replace technical components of the alternative, such as a cap, a slurry wall, or a treatment system; and the potential exposure pathways and risks posed should the remedial action need replacement.

(D) *Reduction of toxicity, mobility, or volume through treatment.* The degree to which alternatives employ recycling or treatment that reduces toxicity, mobility, or volume shall be assessed, including how treatment is used to address the principal threats posed by the site. Factors that shall be considered, as appropriate, include the following:

(*1*) The treatment or recycling processes the alternatives employ and materials they will treat;

(*2*) The amount of hazardous substances, pollutants, or contaminants that will be destroyed, treated, or recycled;

(*3*) The degree of expected reduction in toxicity, mobility, or volume of the waste due to treatment or recycling and the specification of which reduction(s) are occurring;

(*4*) The degree to which the treatment is irreversible;

(*5*) The type and quantity of residuals that will remain following treatment, considering the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents; and

(*6*) The degree to which treatment reduces the inherent hazards posed by principal threats at the site.

(E) *Short-term effectiveness.* The short-term impacts of alternatives shall be assessed considering the following:

(*1*) Short-term risks that might be posed to the community during implementation of an alternative;

(*2*) Potential impacts on workers during remedial action and the effectiveness and reliability of protective measures;

(*3*) Potential environmental impacts of the remedial action and the effectiveness and reliability of mitigative measures during implementation; and

(*4*) Time until protection is achieved.

(F) *Implementability.* The ease or difficulty of implementing the alternatives shall be assessed by considering the following types of factors as appropriate:

(*1*) Technical feasibility, including technical difficulties and unknowns associated with the construction and operation of a technology, the reliability of the technology, ease of undertaking additional remedial actions, and the ability to monitor the effectiveness of the remedy.

(*2*) Administrative feasibility, including activities needed to coordinate with other offices and agencies and the ability and time required to obtain any necessary approvals and permits from other agencies (for off-site actions);

(*3*) Availability of services and materials, including the availability of adequate off-site treatment, storage capacity, and disposal capacity and services; the availability of necessary equipment and specialists, and provisions to ensure any necessary additional resources; the availability of services and materials; and availability of prospective technologies.

(G) *Cost.* The types of costs that shall be assessed include the following:

(*1*) Capital costs, including both direct and indirect costs;

(*2*) Annual operation and maintenance costs; and

(*3*) Net present value of capital and O&M costs.

(H) *State acceptance.* Assessment of state concerns may not be completed until comments on the RI/FS are received but may be discussed, to the extent possible, in the proposed plan issued for public comment. The state concerns that shall be assessed include the following:

(*1*) The state's position and key concerns related to the preferred alternative and other alternatives; and

(*2*) State comments on ARARs or the proposed use of waivers.

(I) *Community acceptance.* This assessment includes determining which components of the alternatives interested persons in the community support, have reservations about, or oppose. This assessment may not be completed until comments on the proposed plan are received.

(f) *Selection of remedy*—(1) Remedies selected shall reflect the scope and purpose of the actions being undertaken and how the action relates to long-term, comprehensive response at the site.

(i) The criteria noted in paragraph (e)(9)(iii) of this section are used to select a remedy. These criteria are categorized into three groups.

(A) *Threshold criteria.* Overall protection of human health and the environment and compliance with ARARs (unless a specific ARAR is waived) are threshold requirements that each alternative must meet in order to be eligible for selection.

(B) *Primary balancing criteria.* The five primary balancing criteria are long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost.

(C) *Modifying criteria.* State and community acceptance are modifying criteria that shall be considered in remedy selection.

(ii) The selection of a remedial action is a two-step process and shall proceed in accordance with § 300.515(e). First, the lead agency, in conjunction with the support agency, identifies a preferred alternative and presents it to the public in a proposed plan, for review and comment. Second, the lead agency shall review the public comments and consult with the state (or support agency) in order to determine if the alternative remains the most appropriate remedial action for the site or site problem. The lead agency, as specified in § 300.515(e), makes the final remedy selection decision, which shall be documented in the ROD. Each remedial alternative selected as a Superfund remedy will employ the criteria as indicated in paragraph (f)(1)(i) of this section to make the following determination:

(A) Each remedial action selected shall be protective of human health and the environment.

(B) On-site remedial actions selected in a ROD must attain those ARARs that are identified at the time of ROD signature or provide grounds for invoking a waiver under § 300.430(f)(1)(ii)(C).

(*1*) Requirements that are promulgated or modified after ROD signature must be attained (or waived) only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment.

(*2*) Components of the remedy not described in the ROD must attain (or waive) requirements that are identified as applicable or relevant and appropriate at the time the amendment to the ROD or the explanation of significant difference describing the component is signed.

(C) An alternative that does not meet an ARAR under federal environmental or state environmental or facility siting laws may be selected under the following circumstances:

(*1*) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement;

(*2*) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives;

(*3*) Compliance with the requirement is technically impracticable from an engineering perspective;

(*4*) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach;

(*5*) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state; or

(*6*) For Fund-financed response actions only, an alternative that attains the ARAR will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment.

(D) Each remedial action selected shall be cost-effective, provided that it first satisfies the threshold criteria set forth in § 300.430(f)(1)(ii) (A) and (B). Cost-effectiveness is determined by evaluating the following three of the five balancing criteria noted in § 300.430(f)(1)(i)(B) to determine overall effectiveness: long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. Overall effectiveness is then compared to cost to ensure that the remedy is cost-effective. A remedy shall be cost-effective if its costs are proportional to its overall effectiveness.

(E) Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum

extent practicable. This requirement shall be fulfilled by selecting the alternative that satisfies paragraph (f)(1)(ii) (A) and (B) of this section and provides the best balance of trade-offs among alternatives in terms of the five primary balancing criteria noted in paragraph (f)(1)(i)(B) of this section. The balancing shall emphasize long-term effectiveness and reduction of toxicity, mobility, or volume through treatment. The balancing shall also consider the preference for treatment as a principal element and the bias against off-site land disposal of untreated waste. In making the determination under this paragraph, the modifying criteria of state acceptance and community acceptance described in paragraph (f)(1)(i)(C) of this section shall also be considered.

(2) *The proposed plan.* In the first step in the remedy selection process, the lead agency shall identify the alternative that best meets the requirements in § 300.430(f)(1), above, and shall present that alternative to the public in a proposed plan. The lead agency, in conjunction with the support agency and consistent with § 300.515(e), shall prepare a proposed plan that briefly describes the remedial alternatives analyzed by the lead agency, proposes a preferred remedial action alternative, and summarizes the information relied upon to select the preferred alternative. The selection of remedy process for an operable unit may be initiated at any time during the remedial action process. The purpose of the proposed plan is to supplement the RI/FS and provide the public with a reasonable opportunity to comment on the preferred alternative for remedial action, as well as alternative plans under consideration, and to participate in the selection of remedial action at a site. At a minimum, the proposed plan shall:

(i) Provide a brief summary description of the remedial alternatives evaluated in the detailed analysis established under paragraph (e)(9) of this section;

(ii) Identify and provide a discussion of the rationale that supports the preferred alternative;

(iii) Provide a summary of any formal comments received from the support agency; and

(iv) Provide a summary explanation of any proposed waiver identified under paragraph (f)(1)(ii)(C) of this section from an ARAR.

(3) *Community relations to support the selection of remedy.* (i) The lead agency, after preparation of the proposed plan and review by the support agency, shall conduct the following activities:

(A) Publish a notice of availability and brief analysis of the proposed plan in a major local newspaper of general circulation;

(B) Make the proposed plan and supporting analysis and information available in the administrative record required under subpart I of this part;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments on the proposed plan and the supporting analysis and information located in the information repository, including the RI/FS. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the site at issue regarding the proposed plan and the supporting analysis and information;

(E) Keep a transcript of the public meeting held during the public comment period pursuant to CERCLA section 117(a) and make such transcript available to the public; and

(F) Prepare a written summary of significant comments, criticisms, and new relevant information submitted during the public comment period and the lead agency response to each issue. This responsiveness summary shall be made available with the record of decision.

(ii) After publication of the proposed plan and prior to adoption of the selected remedy in the record of decision, if new information is made available that significantly changes the basic features of the remedy with respect to scope, performance, or cost, such that the remedy significantly differs from the original proposal in the proposed plan and the supporting analysis and information, the lead agency shall:

(A) Include a discussion in the record of decision of the significant changes and reasons for such changes, if the lead agency determines such changes could be reasonably anticipated by the public based on the alternatives and other information available in the proposed plan or the supporting analysis and information in the administrative record; or

(B) Seek additional public comment on a revised proposed plan, when the lead agency determines the change could not have been reasonably anticipated by the public based on the information available in the proposed plan or the supporting analysis and information in the administrative record. The lead agency shall, prior to adoption of the selected remedy in the ROD, issue a revised proposed plan, which shall include a discussion of the significant changes and the reasons for such changes, in accordance with the public participation requirements described in paragraph (f)(3)(i) of this section.

(4) *Final remedy selection.* (i) In the second and final step in the remedy selection process, the lead agency shall reassess its initial determination that the preferred alternative provides the best balance of trade-offs, now factoring in any new information or points of view expressed by the state (or support agency) and community during the public comment period. The lead agency shall consider state (or support agency) and community comments regarding the lead agency's evaluation of alternatives with respect to the other criteria. These comments may prompt the lead agency to modify aspects of the preferred alternative or decide that another alternative provides a more appropriate balance. The lead agency, as specified in § 300.515(e), shall make the final remedy selection decision and document that decision in the ROD.

(ii) If a remedial action is selected that results in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure, the lead agency shall review such action no less often than every five years after initiation of the selected remedial action.

(iii) The process for selection of a remedial action at a federal facility on the NPL, pursuant to CERCLA section 120, shall entail:

(A) Joint selection of remedial action by the head of the relevant department, agency, or instrumentality and EPA; or

(B) If mutual agreement on the remedy is not reached, selection of the remedy is made by EPA.

(5) *Documenting the decision.* (i) To support the selection of a remedial action, all facts, analyses of facts, and site-specific policy determinations considered in the course of carrying out activities in this section shall be documented, as appropriate, in a record of decision, in a level of detail appropriate to the site situation, for inclusion in the administrative record required under subpart I of this part. Documentation shall explain how the evaluation criteria in paragraph (e)(9)(iii) of this section were used to select the remedy.

(ii) The ROD shall describe the following statutory requirements as they relate to the scope and objectives of the action:

(A) How the selected remedy is protective of human health and the

environment, explaining how the remedy eliminates, reduces, or controls exposures to human and environmental receptors;

(B) The federal and state requirements that are applicable or relevant and appropriate to the site that the remedy will attain;

(C) The applicable or relevant and appropriate requirements of other federal and state laws that the remedy will not meet, the waiver invoked, and the justification for invoking the waiver;

(D) How the remedy is cost-effective, i.e., explaining how the remedy provides overall effectiveness proportional to its costs;

(E) How the remedy utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable; and

(F) Whether the preference for remedies employing treatment which permanently and significantly reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants as a principal element is or is not satisfied by the selected remedy. If this preference is not satisfied, the record of decision must explain why a remedial action involving such reductions in toxicity, mobility, or volume was not selected.

(iii) The ROD also shall:

(A) Indicate, as appropriate, the remediation goals, discussed in paragraph (e)(2)(i) of this section, that the remedy is expected to achieve. Performance shall be measured at appropriate locations in the ground water, surface water, soils, air, and other affected environmental media. Measurement relating to the performance of the treatment processes and the engineering controls may also be identified, as appropriate;

(B) Discuss significant changes and the response to comments described in paragraph (f)(3)(i)(F) of this section;

(C) Describe whether hazardous substances, pollutants, or contaminants will remain at the site such that a review of the remedial action under paragraph (f)(4)(ii) of this section no less often than every five years shall be required; and

(D) When appropriate, provide a commitment for further analysis and selection of long-term response measures within an appropriate time-frame.

(6) *Community relations when the record of decision is signed.* After the ROD is signed, the lead agency shall:

(i) Publish a notice of the availability of the ROD in a major local newspaper of general circulation; and

(ii) Make the record of decision available for public inspection and copying at or near the facility at issue prior to the commencement of any remedial action.

§ 300.435 Remedial design/remedial action, operation and maintenance.

(a) *General.* The remedial design/remedial action (RD/RA) stage includes the development of the actual design of the selected remedy and implementation of the remedy through construction. A period of operation and maintenance may follow the RA activities.

(b) *RD/RA activities.* (1) All RD/RA activities shall be in conformance with the remedy selected and set forth in the ROD or other decision document for that site. Those portions of RD/RA sampling and analysis plans describing the QA/QC requirements for chemical and analytical testing and sampling procedures of samples taken for the purpose of determining whether cleanup action levels specified in the ROD are achieved, generally will be consistent with the requirements of § 300.430(b)(8).

(2) During the course of the RD/RA, the lead agency shall be responsible for ensuring that all federal and state requirements that are identified in the ROD as applicable or relevant and appropriate requirements for the action are met. If waivers from any ARARs are involved, the lead agency shall be responsible for ensuring that the conditions of the waivers are met.

(c) *Community relations.* (1) Prior to the initiation of RD, the lead agency shall review the CRP to determine whether it should be revised to describe further public involvement activities during RD/RA that are not already addressed or provided for in the CRP.

(2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:

(i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

(A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under § 300.815 and the information repository; and

(B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or

(ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost. To amend the ROD, the lead agency, in conjunction with the support agency, as provided in § 300.515(e), shall:

(A) Issue a notice of availability and brief description of the proposed amendment to the ROD in a major local newspaper of general circulation;

(B) Make the proposed amendment to the ROD and information supporting the decision available for public comment;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written or oral comments on the amendment to the ROD. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the facility at issue;

(E) Keep a transcript of comments received at the public meeting held during the public comment period;

(F) Include in the amended ROD a brief explanation of the amendment and the response to each of the significant comments, criticisms, and new relevant information submitted during the public comment period;

(G) Publish a notice of the availability of the amended ROD in a major local newspaper of general circulation; and

(H) Make the amended ROD and supporting information available to the public in the administrative record and information repository prior to the commencement of the remedial action affected by the amendment.

(3) After the completion of the final engineering design, the lead agency shall issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action.

(d) *Contractor conflict of interest.* (1) For Fund-financed RD/RA and O&M activities, the lead agency shall:

(i) Include appropriate language in the solicitation requiring potential prime contractors to submit information on their status, as well as the status of their subcontractors, parent companies, and

affiliates, as potentially responsible parties at the site.

(ii) Require potential prime contractors to certify that, to the best of their knowledge, they and their potential subcontractors, parent companies, and affiliates have disclosed all information described in § 300.435(d)(1)(i) or that no such information exists, and that any such information discovered after submission of their bid or proposal or contract award will be disclosed immediately.

(2) Prior to contract award, the lead agency shall evaluate the information provided by the potential prime contractors and:

(i) Determine whether they have conflicts of interest that could significantly impact the performance of the contract or the liability of potential prime contractors or subcontractors.

(ii) If a potential prime contractor or subcontractor has a conflict of interest that cannot be avoided or otherwise resolved, and using that potential prime contractor or subcontractor to conduct RD/RA or O&M work under a Fund-financed action would not be in the best interests of the state or federal government, an offeror or bidder contemplating use of that prime contractor or subcontractor may be declared nonresponsible or ineligible for award in accordance with appropriate acquisition regulations, and the contract may be awarded to the next eligible offeror or bidder.

(e) *Recontracting.* (1) If a Fund-financed contract must be terminated because additional work outside the scope of the contract is needed, EPA is authorized to take appropriate steps to continue interim RAs as necessary to reduce risks to public health and the environment. Appropriate steps may include extending an existing contract for a federal-lead RA or amending a cooperative agreement for a state-lead RA. Until the lead agency can reopen the bidding process and recontract to complete the RA, EPA may take such appropriate steps as described above to cover interim work to reduce such risks, where:

(i) Additional work is found to be needed as a result of such unforeseen situations as newly discovered sources, types, or quantities of hazardous substances at a facility; and

(ii) Performance of the complete RA requires the lead agency to rebid the contract because the existing contract does not encompass this newly discovered work.

(2) The cost of such interim actions shall not exceed $2 million.

(f) *Operation and maintenance.* (1) Operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground- or surface-water restoration actions covered under § 300.435(f)(4). A state must provide its assurance to assume responsibility for O&M, including, where appropriate, requirements for maintaining institutional controls, under § 300.510(c).

(2) A remedy becomes "operational and functional" either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period, as appropriate.

(3) For Fund-financed remedial actions involving treatment or other measures to restore ground- or surface-water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the 10-year period, or after remedial action is complete, whichever is earlier, shall be considered O&M. For the purposes of federal funding provided under CERCLA section 104(c)(6), a restoration activity will be considered administratively "complete" when:

(i) Measures restore ground- or surface-water quality to a level that assures protection of human health and the environment;

(ii) Measures restore ground or surface water to such a point that reductions in contaminant concentrations are no longer significant; or

(iii) Ten years have elapsed, whichever is earliest.

(4) The following shall not be deemed to constitute treatment or other measures to restore contaminated ground or surface water under § 300.435(f)(3):

(i) Source control maintenance measures; and

(ii) Ground- or surface-water measures initiated for the primary purpose of providing a drinking-water supply, not for the purpose of restoring ground water.

§ 300.440 Procedures for planning and implementing off-site response actions [Reserved].

Subpart F—State Involvement in Hazardous Substance Response

§ 300.500 General.

(a) EPA shall ensure meaningful and substantial state involvement in hazardous substance response as specified in this subpart. EPA shall provide an opportunity for state participation in removal, pre-remedial, remedial, and enforcement response activities. EPA shall encourage states to enter into an EPA/state Superfund Memorandum of Agreement (SMOA) under § 300.505 to increase state involvement and strengthen the EPA/state partnership.

(b) EPA shall encourage states to participate in Fund-financed response in two ways. Pursuant to § 300.515(a), states may either assume the lead through a cooperative agreement for the response action or may be the support agency in EPA-lead remedial response. Section 300.515 sets forth requirements for state involvement in EPA-lead remedial and enforcement response and also addresses comparable requirements for EPA involvement in state-lead remedial and enforcement response. Section 300.520 specifies requirements for state involvement in EPA-lead enforcement negotiations. Section 300.525 specifies requirements for state involvement in removal actions. In addition to the requirements set forth in this subpart, 40 CFR part 35, subpart O, "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions," contains further requirements for state participation during response.

§ 300.505 EPA/State Superfund Memorandum of Agreement (SMOA).

(a) The SMOA may establish the nature and extent of EPA and state interaction during EPA-lead and state-lead response (Indian tribes meeting the requirements of § 300.515(b) may be treated as states for purposes of this section). EPA shall enter into SMOA discussions if requested by a state. The following may be addressed in a SMOA:

(1) The EPA/state or Indian tribe relationship for removal, pre-remedial, remedial, and enforcement response, including a description of the roles and the responsibilities of each.

(2) The general requirements for EPA oversight. Oversight requirements may be more specifically defined in cooperative agreements.

(3) The general nature of lead and support agency interaction regarding the

review of key documents and/or decision points in removal, pre-remedial, remedial, and enforcement response. The requirements for EPA and state review of each other's key documents when each is serving as the support agency shall be equivalent to the extent practicable. Review times agreed to in the SMOA must also be documented in site-specific cooperative agreements or Superfund state contracts in order to be binding.

(4) Procedures for modification of the SMOA (e.g., if EPA and a state agree that the lead and support agency roles and responsibilities have changed, or if modifications are required to achieve desired goals).

(b) The SMOA and any modifications thereto shall be executed by the EPA Regional Administrator and the head of the state agency designated as lead agency for state implementation of CERCLA.

(c) Site-specific agreements entered into pursuant to section 104(d)(1) of CERCLA shall be developed in accordance with 40 CFR part 35, subpart O. The SMOA shall not supersede such agreements.

(d)(1) EPA and the state shall consult annually to determine priorities and make lead and support agency designations for removal, pre-remedial, remedial, and enforcement response to be conducted during the next fiscal year and to discuss future priorities and long-term requirements for response. These consultations shall include the exchange of information on both Fund- and non-Fund-financed response activities. The SMOA may describe the timeframe and process for the EPA/state consultation.

(2) The following activities shall be discussed in the EPA/state consultations established in the SMOA, or otherwise initiated and documented in writing in the absence of a SMOA, on a site-specific basis with EPA and the state identifying the lead agency for each response action discussed:

(i) Pre-remedial response actions, including preliminary assessments and site inspections;

(ii) Hazard Ranking System scoring and NPL listing and deletion activities;

(iii) Remedial phase activities, including remedial investigation/feasibility study, identification of potential applicable or relevant and appropriate requirements (ARARs) under federal and state environmental laws and, as appropriate, other advisories, criteria, or guidance to be considered (TBCs), proposed plan, ROD, remedial design, remedial action, and operation and maintenance;

(iv) Potentially responsible party (PRP) searches, notices to PRPs, response to information requests, PRP negotiations, oversight of PRPs, other enforcement actions pursuant to state law, and activities where the state provides support to EPA;

(v) Compilation and maintenance of the administrative record for selection of a response action as required by subpart I of this part;

(vi) Related site support activities;

(vii) State ability to share in the cost and timing of payments; and

(viii) General CERCLA implementation activities.

(3) If a state is designated as the lead agency for a non-Fund-financed action at an NPL site, the SMOA shall be supplemented by site-specific enforcement agreements between EPA and the state which specify schedules and EPA involvement.

(4) In the absence of a SMOA, EPA and the state shall comply with the requirements in § 300.515(h). If the SMOA does not address all of the requirements specified in § 300.515(h), EPA and the state shall comply with any unaddressed requirements in that section.

§ 300.510 State assurances.

(a) A Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) cannot proceed unless a state provides its applicable required assurances. The assurances must be provided by the state prior to the initiation of remedial action pursuant to a Superfund state contract for EPA-lead (or political subdivision-lead) remedial action or pursuant to a cooperative agreement for a state-lead remedial action. The SMOA may not be used for this purpose. Federally recognized Indian tribes are not required to provide CERCLA section 104(c)(3) assurances for Fund-financed response actions. Further requirements pertaining to state, political subdivision, and federally recognized Indian tribe involvement in CERCLA response are found in 40 CFR part 35, subpart O.

(b)(1) The state is not required to share in the cost of state- or EPA-lead Fund-financed removal actions (including remedial planning activities associated with remedial actions) conducted pursuant to CERCLA section 104 unless the facility was operated by the state or a political subdivision thereof at the time of disposal of hazardous substances therein and a remedial action is ultimately undertaken at the site. Such remedial planning activities include, but are not limited to, remedial investigations (RIs), feasibility studies (FSs), and remedial design (RD). States shall be required to share 50 percent, or greater, in the cost of all Fund-financed response actions if the facility was publicly operated at the time of the disposal of hazardous substances. For other facilities, except federal facilities, the state shall be required to share 10 percent of the cost of the remedial action.

(2) CERCLA section 104(c)(5) provides that EPA shall grant a state credit for reasonable, documented, direct, out-of-pocket, non-federal expenditures subject to the limitations specified in CERCLA section 104(c)(5). For a state to apply credit toward its cost share, it must enter into a cooperative agreement or Superfund state contract. The state must submit as soon as possible, but no later than at the time CERCLA section 104 assurances are provided for a remedial action, its accounting of eligible credit expenditures for EPA verification. Additional credit requirements are contained in 40 CFR part 35, subpart O.

(3) Credit may be applied to a state's future cost share requirements at NPL sites for response expenditures or obligations incurred by the state or a political subdivision from January 1, 1978 to December 11, 1980, and for the remedial action expenditures incurred only by the state after October 17, 1986.

(4) Credit that exceeds the required cost share at the site for which the credit is granted may be transferred to another site to offset a state's required remedial action cost share.

(c)(1) Prior to a Fund-financed remedial action, the state must also provide its assurance in accordance with CERCLA section 104(c)(3)(A) to assume responsibility for operation and maintenance of implemented remedial actions for the expected life of such actions. In addition, when appropriate, as part of the O&M assurance, the state must assure that any institutional controls implemented as part of the remedial action at a site are in place, reliable, and will remain in place after the initiation of O&M. The state and EPA shall consult on a plan for operation and maintenance prior to the initiation of a remedial action.

(2) After a joint EPA/state inspection of the implemented Fund-financed remedial action under § 300.515(g), EPA may share, for a period of up to one year, in the cost of the operation of the remedial action to ensure that the remedy is operational and functional. In the case of the restoration of ground or surface water, EPA shall share in the cost of the state's operation of ground- or surface-water restoration remedial actions as specified in § 300.435(f)(3).

(d) In accordance with CERCLA sections 104 (c)(3)(B) and 121(d)(3), if the remedial action requires off-site storage,

destruction, treatment, or disposal, the state must provide its assurance before the remedial action begins on the availability of a hazardous waste disposal facility that is in compliance with CERCLA section 121(d)(3) and is acceptable to EPA.

(e)(1) In accordance with CERCLA section 104(c)(9), EPA shall not provide any remedial action pursuant to CERCLA section 104 until the state in which the release occurs enters into a cooperative agreement or Superfund state contract with EPA providing assurances deemed adequate by EPA that the state will assure the availability of hazardous waste treatment or disposal facilities which:

(i) Have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state during the 20-year period following the date of such cooperative agreement or Superfund state contract and to be destroyed, treated, or disposed;

(ii) Are within the state, or outside the state in accordance with an interstate agreement or regional agreement or authority;

(iii) Are acceptable to EPA; and

(iv) Are in compliance with the requirements of Subtitle C of the Solid Waste Disposal Act.

(2) This rule does not address whether or not Indian tribes are states for purposes of this paragraph (e).

(f) EPA may determine that an interest in real property must be acquired in order to conduct a response action. As a general rule, the state in which the property is located must agree to acquire and hold the necessary property interest, including any interest in acquired property that is needed to ensure the reliability of institutional controls restricting the use of that property. If it is necessary for the United States government to acquire the interest in property to permit implementation of the response, the state must accept transfer of the acquired interest on or before the completion of the response action.

§ 300.515 Requirements for state involvement in remedial and enforcement response.

(a) *General.* (1) States are encouraged to undertake actions authorized under subpart E. Section 104(d)(1) of CERCLA authorizes EPA to enter into cooperative agreements or contracts with a state, political subdivision, or a federally recognized Indian tribe to carry out Fund-financed response actions authorized under CERCLA, when EPA determines that the state, the political subdivision, or federally recognized Indian tribe has the capability to undertake such actions. EPA will use a cooperative agreement to transfer funds to those entities to undertake Fund-financed response activities. The requirements for states, political subdivisions, or Indian tribes to receive funds as a lead or support agency for response are addressed at 40 CFR part 35, subpart O.

(2) For EPA-lead Fund-financed remedial planning activities, including, but not limited to, remedial investigations, feasibility studies, and remedial designs, the state agency acceptance of the support agency role during an EPA-lead response shall be documented in a letter, SMOA, or cooperative agreement. Superfund state contracts are unnecessary for this purpose.

(3) Cooperative agreements and Superfund state contracts are only appropriate for non-Fund-financed response actions if a state intends to seek credit for remedial action expenses under § 300.510.

(b) *Indian tribe involvement during response.* To be afforded substantially the same treatment as states under section 104 of CERCLA, the governing body of the Indian tribe must:

(1) Be federally recognized; and

(2) Have a tribal governing body that is currently performing governmental functions to promote the health, safety, and welfare of the affected population or to protect the environment within a defined geographic area; and

(3) Have jurisdiction over a site at which Fund-financed response, including pre-remedial activities, is contemplated.

(c) *State involvement in PA/SI and National Priorities List process.* EPA shall ensure state involvement in the listing and deletion process by providing states opportunities for review, consultation, or concurrence specified in this section.

(1) EPA shall consult with states as appropriate on the information to be used in developing HRS scores for releases.

(2) EPA shall, to the extent feasible, provide the state 30 working days to review releases which were scored by EPA and which will be considered for placement on the National Priorities List (NPL).

(3) EPA shall provide the state 30 working days to review and concur on the Notice of Intent to Delete a release from the NPL. Section 300.425 describes the EPA/state consultation and concurrence process for deleting releases from the NPL.

(d) *State involvement in RI/FS process.* A key component of the EPA/state partnership shall be the communication of potential federal and state ARARs and, as appropriate, other pertinent advisories, criteria, or guidance to be considered (TBCs).

(1) In accordance with §§ 300.400(g) and 300.430, the lead and support agencies shall identify their respective potential ARARs and communicate them to each other in a timely manner, i.e., no later than the early stages of the comparative analysis described in § 300.430(e)(9), such that sufficient time is available for the lead agency to consider and incorporate all potential ARARs without inordinate delays and duplication of effort. The lead and support agencies may also identify TBCs and communicate them in a timely manner.

(2) When a state and EPA have entered into a SMOA, the SMOA may specify a consultation process which requires the lead agency to solicit potential ARARs at specified points in the remedial planning and remedy selection processes. At a minimum, the SMOA shall include the points specified in § 300.515(h)(2). The SMOA shall specify timeframes for support agency response to lead agency requests to ensure that potential ARARs are identified and communicated in a timely manner. Such timeframes must also be documented in site-specific agreements. The SMOA may also discuss identification and communication of TBCs.

(3) If EPA in its statement of a proposed plan intends to waive any state-identified ARARs, or does not agree with the state that a certain state standard is an ARAR, it shall formally notify the state when it submits the RI/FS report for state review or responds to the state's submission of the RI/FS report.

(4) EPA shall respond to state comments on waivers from or disagreements about state ARARs, as well as the preferred alternative when making the RI/FS report and proposed plan available for public comment.

(e) *State involvement in selection of remedy.* (1) Both EPA and the state shall be involved in preliminary discussions of the alternatives addressed in the FS prior to preparation of the proposed plan and ROD. At the conclusion of the RI/FS, the lead agency, in conjunction with the support agency, shall develop a proposed plan. The support agency shall have an opportunity to comment on the plan. The lead agency shall publish a notice of availability of the RI/FS report and a brief analysis of the proposed

plan pursuant to § 300.430(e) and (f). Included in the proposed plan shall be a statement that the lead and support agencies have reached agreement or, where this is not the case, a statement explaining the concerns of the support agency with the lead agency's proposed plan. The state may not publish a proposed plan that EPA has not approved. EPA may assume the lead from the state if agreement cannot be reached.

(2)(i) EPA and the state shall identify, at least annually, sites for which RODs will be prepared during the next fiscal year, in accordance with § 300.515(h)(1). For all EPA-lead sites, EPA shall prepare the ROD and provide the state an opportunity to concur with the recommended remedy. For Fund-financed state-lead sites, EPA and the state shall designate sites, in a site-specific agreement, for which the state shall prepare the ROD and seek EPA's concurrence and adoption of the remedy specified therein, and sites for which EPA shall prepare the ROD and seek the state's concurrence. EPA and the state may designate sites for which the state shall prepare the ROD for non-Fund-financed state-lead enforcement response actions (i.e., actions taken under state law) at an NPL site. The state may seek EPA's concurrence in the remedy specified therein. Either EPA or the state may choose not to designate a site as state-lead.

(ii) State concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, i.e., signing a ROD, nor is EPA's concurrence a prerequisite to a state's selecting a remedy at a non-Fund-financed state-lead enforcement site under state law. Unless EPA's Assistant Administrator for Solid Waste and Emergency Response or Regional Administrator concurs in writing with a state-prepared ROD, EPA shall not be deemed to have approved the state decision. A state may not proceed with a Fund-financed response action unless EPA has first concurred in and adopted the ROD. Section 300.510(a) specifies limitations on EPA's proceeding with a remedial action without state assurances.

(iii) The lead agency shall provide the support agency with a copy of the signed ROD for remedial actions to be conducted pursuant to CERCLA.

(iv) On state-lead sites identified for EPA concurrence, the state generally shall be expected to maintain its lead agency status through the completion of the remedial action.

(f) *Enhancement of remedy.* (1) A state may ask EPA to make changes in or expansions of a remedial action selected under subpart E.

(i) If EPA finds that the proposed change or expansion is necessary and appropriate to the EPA-selected remedial action, the remedy may be modified (consistent with § 300.435(c)(2)) and any additional costs paid as part of the remedial action.

(ii) If EPA finds that the proposed change or expansion is not necessary to the selected remedial action, but would not conflict or be inconsistent with the EPA-selected remedy, EPA may agree to integrate the proposed change or expansion into the planned CERCLA remedial work if:

(A) The state agrees to fund the entire additional cost associated with the change or expansion; and

(B) The state agrees to assume the lead for supervising the state-funded component of the remedy or, if EPA determines that the state-funded component cannot be conducted as a separate phase or activity, for supervising the remedial design and construction of the entire remedy.

(2) Where a state does not concur in a remedial action secured by EPA under CERCLA section 106, and the state desires to have the remedial action conform to an ARAR that has been waived under § 300.430(f)(1)(ii)(C), a state may seek to have that remedial action so conform, in accordance with the procedures set out in CERCLA section 121(f)(2).

(g) *State involvement in remedial design/remedial action.* The extent and nature of state involvement during remedial design and remedial action shall be specified in site-specific cooperative agreements or Superfund state contracts, consistent with 40 CFR part 35, subpart O. For Fund-financed remedial actions, the lead and support agencies shall conduct a joint inspection at the conclusion of construction of the remedial action to determine that the remedy has been constructed in accordance with the ROD and with the remedial design.

(h) *Requirements for state involvement in absence of SMOA.* In the absence of a SMOA, EPA and the state shall comply with the requirements in § 300.515(h). If the SMOA does not address all of the requirements specified in § 300.515(h), EPA and the state shall comply with any unaddressed requirements in that section.

(1) *Annual consultations.* EPA shall conduct consultations with states at least annually to establish priorities and identify and document in writing the lead for remedial and enforcement response for each NPL site within the state for the upcoming fiscal year. States shall be given the opportunity to participate in long-term planning efforts for remedial and enforcement response during these annual consultations.

(2) *Identification of ARARs and TBCs.* The lead and support agencies shall discuss potential ARARs during the scoping of the RI/FS. The lead agency shall request potential ARARs from the support agency no later than the time that the site characterization data are available. The support agency shall communicate in writing those potential ARARs to the lead agency within 30 working days of receipt of the lead agency request for these ARARs. The lead and support agencies may also discuss and communicate other pertinent advisories, criteria, or guidance to be considered (TBCs). After the initial screening of alternatives has been completed but prior to initiation of the comparative analysis conducted during the detailed analysis phase of the FS, the lead agency shall request that the support agency communicate any additional requirements that are applicable or relevant and appropriate to the alternatives contemplated within 30 working days of receipt of this request. The lead agency shall thereafter consult the support agency to ensure that identified ARARs and TBCs are updated as appropriate.

(3) *Support agency review of lead agency documents.* The lead agency shall provide the support agency an opportunity to review and comment on the RI/FS, proposed plan, ROD, and remedial design, and any proposed determinations on potential ARARs and TBCs. The support agency shall have a minimum of 10 working days and a maximum of 15 working days to provide comments to the lead agency on the RI/FS, ROD, ARAR/TBC determinations, and remedial design. The support agency shall have a minimum of five working days and a maximum of 10 working days to comment on the proposed plan.

(i) *Administrative record requirements.* The state, where it is the lead agency for a Fund-financed site, shall compile and maintain the administrative record for selection of a response action under subpart I of this part unless specified otherwise in the SMOA.

§ 300.520 State involvement in EPA-lead enforcement negotiations.

(a) EPA shall notify states of response action negotiations to be conducted by EPA with potentially responsible parties during each fiscal year.

(b) The state must notify EPA of such negotiations in which it intends to participate.

(c) The state is not foreclosed from signing a consent decree if it does not participate substantially in the negotiations.

§ 300.525 State involvement in removal actions.

(a) States may undertake Fund-financed removal actions pursuant to a cooperative agreement with EPA. State-lead removal actions taken pursuant to cooperative agreements must be conducted in accordance with § 300.415 on removal actions, and 40 CFR part 35, subpart O.

(b) States are not required under section 104(c)(3) of CERCLA to share in the cost of a Fund-financed removal action, unless the removal is conducted at an NPL site that was operated by a state or political subdivision at the time of disposal of hazardous substances therein and a Fund-financed remedial action is ultimately undertaken at the site. In this situation, states are required to share, 50 percent or greater, in the cost of all removal (including remedial planning) and remedial action costs at the time of the remedial action.

(c) States are encouraged to provide for post-removal site control as discussed in § 300.415(k) for all Fund-financed removal actions.

(d) States shall be responsible for identifying potential state ARARs for all Fund-financed removal actions and for providing such ARARs to EPA in a timely manner for all EPA-lead removal actions.

(e) EPA shall consult with a state on all removal actions to be conducted in that state.

Subpart G—Trustees for Natural Resources

§ 300.600 Designation of federal trustees.

(a) The President is required to designate in the National Contingency Plan those federal officials who are to act on behalf of the public as trustees for natural resources. Federal officials so designated will act pursuant to section 107(f) of CERCLA and section 311(f)(5) of the Clean Water Act. Natural resources include:

(1) Natural resources over which the United States has sovereign rights; and

(2) Natural resources within the territorial sea, contiguous zone, exclusive economic zone, and outer continental shelf belonging to, managed by, held in trust by, appertaining to, or otherwise controlled (hereinafter referred to as "managed or protected") by the United States.

(b) The following individuals shall be the designated trustee(s) for general categories of natural resources. They are authorized to act pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act when there is injury to, destruction of, loss of, or threat to natural resources as a result of a release of a hazardous substance or a discharge of oil. Notwithstanding the other designations in this section, the Secretaries of Commerce and the Interior shall act as trustees of those resources subject to their respective management or protection.

(1) *Secretary of Commerce.* The Secretary of Commerce shall act as trustee for natural resources managed or protected by the Department of Commerce or by other federal agencies and that are found in or under waters navigable by deep draft vessels, in or under tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf, and in upland areas serving as habitat for marine mammals and other protected species. However, before the Secretary takes an action with respect to an affected resource under the management or protection of another federal agency, he shall, whenever practicable, seek to obtain the concurrence of that other federal agency. Examples of the Secretary's trusteeship include marine fishery resources and their supporting ecosystems; anadromous fish; certain endangered species and marine mammals; and National Marine Sanctuaries and Estuarine Research Reserves.

(2) *Secretary of the Interior.* The Secretary of the Interior shall act as trustee for natural resources managed or protected by the Department of the Interior. Examples of the Secretary's trusteeship include migratory birds; certain anadromous fish, endangered species, and marine mammals; federally owned minerals; and certain federally managed water resources. The Secretary of the Interior shall also be trustee for those natural resources for which an Indian tribe would otherwise act as trustee in those cases where the United States acts on behalf of the Indian tribe.

(3) *Secretary for the land managing agency.* For natural resources located on, over, or under land administered by the United States, the trustee shall be the head of the Department in which the land managing agency is found. The trustees for the principal federal land managing agencies are the Secretaries of the Department of the Interior, the Department of Agriculture, the Department of Defense, and the Department of Energy.

(4) *Head of authorized agencies.* For natural resources located in the United States but not otherwise described in this section, the trustee shall be the head of the federal agency or agencies authorized to manage or protect those resources.

§ 300.605 State trustees.

State trustees shall act on behalf of the public as trustees for natural resources within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state. For the purposes of subpart G of this part, the definition of the term "state" does not include Indian tribes.

§ 300.610 Indian tribes.

The tribal chairmen (or heads of the governing bodies) of Indian tribes, as defined in § 300.5, or a person designated by the tribal officials, shall act on behalf of the Indian tribes as trustees for the natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe, or held in trust for the benefit of such Indian tribe, or belonging to a member of such Indian tribe, if such resources are subject to a trust restriction on alienation. When the tribal chairman or head of the tribal governing body designates another person as trustee, the tribal chairman or head of the tribal governing body shall notify the President of such designation. Such officials are authorized to act when there is injury to, destruction of, loss of, or threat to natural resources as a result of a release of a hazardous substance.

§ 300.615 Responsibilities of trustees.

(a) Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities.

(b) Trustees are responsible for designating to the RRTs, for inclusion in the Regional Contingency Plan, appropriate contacts to receive notifications from the OSCs/RPMs of potential injuries to natural resources.

(c) Upon notification or discovery of injury to, destruction of, loss of, or threat to natural resources, trustees may, pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act, take the following or other actions as appropriate:

(1) Conduct a preliminary survey of the area affected by the discharge or release to determine if trust resources under their jurisdiction are, or potentially may be, affected;

(2) Cooperate with the OSC/RPM in coordinating assessments, investigations, and planning;

(3) Carry out damage assessments; or

(4) Devise and carry out a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. In assessing damages to natural resources, the federal, state, and Indian tribe trustees have the option of following the procedures for natural resource damage assessments located at 43 CFR part 11.

(d) The authority of federal trustees includes, but is not limited to the following actions:

(1) Requesting that the Attorney General seek compensation from the responsible parties for the damages assessed and for the costs of an assessment and of restoration planning; and

(2) Participating in negotiations between the United States and potentially responsible parties (PRPs) to obtain PRP-financed or PRP-conducted assessments and restorations for injured resources or protection for threatened resources and to agree to covenants not to sue, where appropriate.

(3) Requiring, in consultation with the lead agency, any person to comply with the requirements of CERCLA section 104(e) regarding information gathering and access.

(e) Actions which may be taken by any trustee pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act include, but are not limited to, any of the following:

(1) Requesting that an authorized agency issue an administrative order or pursue injunctive relief against the parties responsible for the discharge or release; or

(2) Requesting that the lead agency remove, or arrange for the removal of, or provide for remedial action with respect to, any hazardous substances from a contaminated medium pursuant to section 104 of CERCLA.

Subpart H—Participation by Other Persons

§ 300.700 Activities by other persons.

(a) *General.* Any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant.

(b) *Summary of CERCLA authorities.* The mechanisms available to recover the costs of response actions under CERCLA are, in summary:

(1) Section 107(a), wherein any person may receive a court award of his or her response costs, plus interest, from the party or parties found to be liable;

(2) Section 111(a)(2), wherein a private party, a potentially responsible party pursuant to a settlement agreement, or certain foreign entities may file a claim against the Fund for reimbursement of response costs;

(3) Section 106(b), wherein any person who has complied with a section 106(a) order may petition the Fund for reimbursement of reasonable costs, plus interest; and

(4) Section 123, wherein a general purpose unit of local government may apply to the Fund under 40 CFR part 310 for reimbursement of the costs of temporary emergency measures that are necessary to prevent or mitigate injury to human health or the environment associated with a release.

(c) *Section 107(a) cost recovery actions.* (1) Responsible parties shall be liable for all response costs incurred by the United States government or a State or an Indian tribe not inconsistent with the NCP.

(2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.

(3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup;

(ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

(4) Actions under § 300.700(c)(1) will not be considered "inconsistent with the NCP," and actions under § 300.700(c)(2) will not be considered not "consistent with the NCP," based on immaterial or insubstantial deviations from the provisions of 40 CFR part 300.

(5) The following provisions of this part are potentially applicable to private party response actions:

(i) Section 300.150 (on worker health and safety);

(ii) Section 300.160 (on documentation and cost recovery);

(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;

(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(v) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6);

(vi) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f); and including § 300.415(i) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;

(vii) Section 300.420 (on remedial site evaluation);

(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(*6*) and that applicable requirements of federal or state law may not be waived by a private party; and

(ix) Section 300.435 (on RD/RA and operation and maintenance).

(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements. The following provisions of this part regarding public participation are potentially applicable to private party response actions, with the exception of administrative record and information repository requirements stated therein:

(i) Section 300.155 (on public information and community relations);

(ii) Section 300.415(m) (on community relations during removal actions);

(iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);

(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and

(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

(7) When selecting the appropriate remedial action, the methods of remedying releases listed in Appendix D of this part may also be appropriate to a private party response action.

(8) Except for actions taken pursuant to CERCLA sections 104 or 106 or response actions for which reimbursement from the Fund will be sought, any action to be taken by the lead agency listed in paragraphs (c)(5) through (c)(7) may be taken by the person carrying out the response action.

(d) *Section 111(a)(2) claims.* (1) Persons, other than those listed in paragraphs (d)(1)(i) through (iii) of this section, may be able to receive reimbursement of response costs by means of a claim against the Fund. The categories of persons excluded from pursuing this claims authority are:

(i) Federal government;

(ii) State governments, and their political subdivisions, unless they are potentially responsible parties covered by an order or consent decree pursuant to section 122 of CERCLA; and

(iii) Persons operating under a procurement contract or an assistance agreement with the United States with respect to matters covered by that contract or assistance agreement, unless specifically provided therein.

(2) In order to be reimbursed by the Fund, an eligible person must notify the Administrator of EPA or designee prior to taking a response action and receive prior approval, i.e., "preauthorization," for such action.

(3) Preauthorization is EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP. All applications for preauthorization will be reviewed to determine whether the request should receive priority for funding. EPA, in its discretion, may grant preauthorization of a claim. Preauthorization will be considered only for:

(i) Removal actions pursuant to § 300.415;

(ii) CERCLA section 104(b) activities; and

(iii) Remedial actions at National Priorities List sites pursuant to § 300.435.

(4) To receive EPA's prior approval, the eligible person must:

(i) Demonstrate technical and other capabilities to respond safely and effectively to releases of hazardous substances, pollutants, or contaminants; and

(ii) Establish that the action will be consistent with the NCP in accordance with the elements set forth in paragraphs (c)(5) through (8) of this section.

(5) EPA will grant preauthorization to a claim by a party it determines to be potentially liable under section 107 of CERCLA only in accordance with an order issued pursuant to section 106 of CERCLA, or a settlement with the federal government in accordance with section 122 of CERCLA.

(6) Preauthorization does not establish an enforceable contractual relationship between EPA and the claimant.

(7) Preauthorization represents EPA's commitment that if funds are appropriated for response actions, the response action is conducted in accordance with the preauthorization decision document, and costs are reasonable and necessary, reimbursement will be made from the Superfund, up to the maximum amount provided in the preauthorization decision document.

(8) For a claim to be awarded under section 111 of CERCLA, EPA must certify that the costs were necessary and consistent with the preauthorization decision document.

(e) *Section 106(b) petition.* Subject to conditions specified in CERCLA section 106(b), any person who has complied with an order issued after October 16, 1986 pursuant to section 106(a) of CERCLA, may seek reimbursement for response costs incurred in complying with that order unless the person has waived that right.

(f) *Section 123 reimbursement to local governments.* Any general purpose unit of local government for a political subdivision that is affected by a release may receive reimbursement for the costs of temporary emergency measures necessary to prevent or mitigate injury to human health or the environment subject to the conditions set forth in 40 CFR part 310. Such reimbursement may not exceed $25,000 for a single response.

(g) *Release from liability.* Implementation of response measures by potentially responsible parties or by any other person does not release those parties from liability under section 107(a) of CERCLA, except as provided in a settlement under section 122 of CERCLA or a federal court judgment.

Subpart I—Administrative Record for Selection of Response Action

§ 300.800 Establishment of an administrative record.

(a) *General requirement.* The lead agency shall establish an administrative record that contains the documents that form the basis for the selection of a response action. The lead agency shall compile and maintain the administrative record in accordance with this subpart.

(b) *Administrative records for federal facilities.* (1) If a federal agency other than EPA is the lead agency for a federal facility, the federal agency shall compile and maintain the administrative record for the selection of the response action for that facility in accordance with this subpart. EPA may furnish documents which the federal agency shall place in the administrative record file to ensure that the administrative record includes all documents that form the basis for the selection of the response action.

(2) EPA or the U.S. Coast Guard shall compile and maintain the administrative record when it is the lead agency for a federal facility.

(3) If EPA is involved in the selection of the response action at a federal facility on the NPL, the federal agency acting as the lead agency shall provide EPA with a copy of the index of documents included in the administrative record file, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents EPA may request on a case-by-case basis.

(c) *Administrative record for state-lead sites.* If a state is the lead agency for a site, the state shall compile and maintain the administrative record for the selection of the response action for that site in accordance with this subpart. EPA may require the state to place additional documents in the administrative record file to ensure that the administrative record includes all documents which form the basis for the selection of the response action. The state shall provide EPA with a copy of the index of documents included in the administrative record file, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, any public comments received on the RI/FS and proposed plan, and any other documents EPA may request on a case-by-case basis.

(d) *Applicability.* This subpart applies to all response actions taken under section 104 of CERCLA or sought, secured, or ordered administratively or judicially under section 106 of CERCLA, as follows:

(1) Remedial actions where the remedial investigation commenced after the promulgation of these regulations; and

(2) Removal actions where the action memorandum is signed after the promulgation of these regulations.

(e) For those response actions not included in paragraph (d) of this section, the lead agency shall comply with this subpart to the extent practicable.

§ 300.805 Location of the administrative record file.

(a) The lead agency shall establish a docket at an office of the lead agency or other central location at which documents included in the administrative record file shall be located and a copy of the documents included in the administrative record file shall also be made available for public inspection at or near the site at issue, except as provided below:

(1) Sampling and testing data, quality control and quality assurance documentation, and chain of custody forms, need not be located at or near the site at issue or at the central location, provided that the index to the administrative record file indicates the location and availability of this information.

(2) Guidance documents not generated specifically for the site at issue need not be located at or near the site at issue, provided that they are maintained at the central location and the index to the administrative record file indicates the location and availability of these guidance documents.

(3) Publicly available technical literature not generated for the site at issue, such as engineering textbooks, articles from technical journals, and toxicological profiles, need not be located at or near the site at issue or at the central location, provided that the literature is listed in the index to the administrative record file or the literature is cited in a document in the record.

(4) Documents included in the confidential portion of the administrative record file shall be located only in the central location.

(5) The administrative record for a removal action where the release or threat of release requires that on-site removal activities be initiated within hours of the lead agency's determination that a removal is appropriate and on-site removal activities cease within 30 days of initiation, need be available for public inspection only at the central location.

(b) Where documents are placed in the central location but not in the file located at or near the site, such documents shall be added to the file located at or near the site upon request, except for documents included in paragraph (a)(4) of this section.

(c) The lead agency may make the administrative record file available to the public in microform.

§ 300.810 Contents of the administrative record file.

(a) *Contents.* The administrative record file for selection of a response action typically, but not in all cases, will contain the following types of documents:

(1) Documents containing factual information, data and analysis of the factual information, and data that may form a basis for the selection of a response action. Such documents may include verified sampling data, quality control and quality assurance documentation, chain of custody forms, site inspection reports, preliminary assessment and site evaluation reports, ATSDR health assessments, documents supporting the lead agency's determination of imminent and substantial endangerment, public health evaluations, and technical and engineering evaluations. In addition, for remedial actions, such documents may include approved workplans for the remedial investigation/feasibility study, state documentation of applicable or relevant and appropriate requirements, and the RI/FS;

(2) Guidance documents, technical literature, and site-specific policy memoranda that may form a basis for the selection of the response action. Such documents may include guidance on conducting remedial investigations and feasibility studies, guidance on determining applicable or relevant and appropriate requirements, guidance on risk/exposure assessments, engineering handbooks, articles from technical journals, memoranda on the application of a specific regulation to a site, and memoranda on off-site disposal capacity;

(3) Documents received, published, or made available to the public under § 300.815 for remedial actions, or § 300.820 for removal actions. Such documents may include notice of availability of the administrative record file, community relations plan, proposed plan for remedial action, notices of public comment periods, public comments and information received by the lead agency, and responses to significant comments;

(4) Decision documents. Such documents may include action memoranda and records of decision;

(5) Enforcement orders. Such documents may include administrative orders and consent decrees; and

(6) An index of the documents included in the administrative record file. If documents are customarily grouped together, as with sampling data chain of custody documents, they may be listed as a group in the index to the administrative record file.

(b) *Documents not included in the administrative record file.* The lead agency is not required to include documents in the administrative record file which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file.

(c) *Privileged documents.* Privileged documents shall not be included in the record file except as provided in paragraph (d) of this section or where such privilege is waived. Privileged documents include but are not limited to documents subject to the attorney-client, attorney work product, deliberative process, or other applicable privilege.

(d) *Confidential file.* If information which forms the basis for the selection of a response action is included only in a document containing confidential or privileged information and is not otherwise available to the public, the information, to the extent feasible, shall be summarized in such a way as to make it disclosable and the summary shall be placed in the publicly available portion of the administrative record file. The confidential or privileged document itself shall be placed in the confidential portion of the administrative record file. If information, such as confidential business information, cannot be summarized in a disclosable manner, the information shall be placed only in the confidential portion of the administrative record file. All documents contained in the confidential portion of the administrative record file shall be listed in the index to the file.

§ 300.815 Administrative record file for a remedial action.

(a) The administrative record file for the selection of a remedial action shall be made available for public inspection at the commencement of the remedial investigation phase. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(b) The lead agency shall provide a public comment period as specified in § 300.430(f)(3) so that interested persons may submit comments on the selection of the remedial action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond as appropriate to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(c) The lead agency shall comply with the public participation procedures required in § 300.430(f)(3) and shall document such compliance in the administrative record.

(d) Documents generated or received after the record of decision is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.820 Administrative record file for a removal action.

(a) If, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists before on-site removal activities must be initiated:

(1) The administrative record file shall be made available for public inspection when the engineering evaluation/cost

analysis (EE/CA) is made available for public comment. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(2) The lead agency shall provide a public comment period as specified in § 300.415 so that interested persons may submit comments on the selection of the removal action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) The lead agency shall comply with the public participation procedures of § 300.415(m) and shall document compliance with § 300.415(m)(3)(i) through (iii) in the administrative record file.

(4) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

(b) For all removal actions not included in paragraph (a) of this section:

(1) Documents included in the administrative record file shall be made available for public inspection no later than 60 days after initiation of on-site removal activity. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of availability of the administrative record file.

(2) The lead agency shall, as appropriate, provide a public comment period of not less than 30 days beginning at the time the administrative record file is made available to the public. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.825 Record requirements after the decision document is signed.

(a) The lead agency may add documents to the administrative record file after the decision document selecting the response action has been signed if:

(1) The documents concern a portion of a response action decision that the decision document does not address or reserves to be decided at a later date; or

(2) An explanation of significant differences required by § 300.435(c), or an amended decision document is issued, in which case, the explanation of significant differences or amended decision document and all documents that form the basis for the decision to modify the response action shall be added to the administrative record file.

(b) The lead agency may hold additional public comment periods or extend the time for the submission of public comment after a decision document has been signed on any issues concerning selection of the response action. Such comment shall be limited to the issues for which the lead agency has requested additional comment. All additional comments submitted during such comment periods that are responsive to the request, and any response to these comments, along with documents supporting the request and any final decision with respect to the issue, shall be placed in the administrative record file.

(c) The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action. All such comments and any responses thereto shall be placed in the administrative record file.

Subpart J—Use of Dispersants and Other Chemicals

§ 300.900 General.

(a) Section 311(c)(2)(G) of the Clean Water Act requires that EPA prepare a schedule of dispersants and other chemicals, if any, that may be used in carrying out the NCP. This subpart makes provisions for such a schedule.

(b) This subpart applies to the navigable waters of the United States and adjoining shorelines, the waters of the contiguous zone, and the high seas beyond the contiguous zone in connection with activities under the Outer Continental Shelf Lands Act, activities under the Deepwater Port Act of 1974, or activities that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States, including resources under the Magnuson Fishery Conservation and Management Act of 1976.

(c) This subpart applies to the use of any chemical agents or other additives as defined in subpart A of this part that may be used to remove or control oil discharges.

§ 300.905 NCP Product Schedule.

(a) *Oil Discharges.* (1) EPA shall maintain a schedule of dispersants and other chemical or biological products that may be authorized for use on oil discharges in accordance with the procedures set forth in § 300.910. This schedule, called the NCP Product Schedule, may be obtained from the Emergency Response Division (OS-210), U.S. Environmental Protection Agency, Washington, DC 20460. The telephone number is 1-202-382-2190.

(2) Products may be added to the NCP Product Schedule by the process specified in § 300.920.

(b) *Hazardous Substance Releases* [Reserved].

§ 300.910 Authorization of use.

(a) The OSC, with the concurrence of the EPA representative to the RRT and, as appropriate, the concurrence of the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, and in consultation with the DOC and DOI natural resource trustees, when practicable, may authorize the use of dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents on the oil discharge, provided that the dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents are listed on the NCP Product Schedule.

(b) The OSC, with the concurrence of the EPA representative to the RRT and, as appropriate, the concurrence of the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, and in consultation with the DOC and DOI natural resource trustees, when practicable, may authorize the use of burning agents on a case-by-case basis.

(c) The OSC may authorize the use of any dispersant, surface collecting agent, other chemical agent, burning agent, biological additive, or miscellaneous oil spill control agent, including products not listed on the NCP Product Schedule, without obtaining the concurrence of the EPA representative to the RRT, the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, when, in the judgment of the OSC, the use of the product is necessary to prevent or substantially reduce a hazard to human life. The OSC is to inform the

EPA RRT representative and, as appropriate, the RRT representatives from the affected states and, when practicable, the DOC/DOI natural resource trustees of the use of a product not on the Schedule as soon as possible and, pursuant to the provisions in paragraph (a) of this section, obtain their concurrence or their comments on its continued use once the threat to human life has subsided.

(d) Sinking agents shall not be authorized for application to oil discharges.

(e) RRTs shall, as appropriate, consider, as part of their planning activities, the appropriateness of using the dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents listed on the NCP Product Schedule, and the appropriateness of using burning agents. Regional Contingency Plans (RCPs) shall, as appropriate, address the use of such products in specific contexts. If the RRT representatives from the states with jurisdiction over the waters of the area to which an RCP applies and the DOC and DOI natural resource trustees approve in advance the use of certain products under specified circumstances as described in the RCP, the OSC may authorize the use of the products without obtaining the specific concurrences described in paragraphs (a) and (b) of this section.

§ 300.915 Data requirements.

(a) *Dispersants.* (1) Name, brand, or trademark, if any, under which the dispersant is sold.

(2) Name, address, and telephone number of the manufacturer, importer, or vendor.

(3) Name, address, and telephone number of primary distributors or sales outlets.

(4) Special handling and worker precautions for storage and field application. Maximum and minimum storage temperatures, to include optimum ranges as well as temperatures that will cause phase separations, chemical changes, or other alterations to the effectiveness of the product.

(5) Shelf life.

(6) Recommended application procedures, concentrations, and conditions for use depending upon water salinity, water temperature, types and ages of the pollutants, and any other application restrictions.

(7) Dispersant Toxicity. Use standard toxicity test methods described in Appendix C to part 300.

(8) Effectiveness. Use standard effectiveness test methods described in Appendix C to part 300. Manufacturers are also encouraged to provide data on product performance under conditions other than those captured by these tests.

(9) The following data requirements incorporate by reference standards from the 1988 Annual Book of ASTM Standards. American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19103. 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.[1]

(i) Flash Point—Select appropriate method from the following:

(A) ASTM—D 56–87, "Standard Test Method for Flash Point by Tag Closed Tester";

(B) ASTM—D 92–85, "Standard Test Method for Flash and Fire Points by Cleveland Open Cup";

(C) ASTM—D 93–85, "Standard Test Methods for Flash Point by Pensky-Martens Closed Tester";

(D) ASTM—D 1310–86, "Standard Test Method for Flash Point and Fire Point of Liquids by Tag Open-Cup Apparatus"; or

(E) ASTM—D 3278–82, "Standard Test Methods for Flash Point of Liquids by Setaflash Closed-Cup Apparatus."

(ii) Pour Point—Use ASTM—D 97–87, "Standard Test Method for Pour Point of Petroleum Oils."

(iii) Viscosity—Use ASTM—D 445–86, "Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and the Calculation of Dynamic Viscosity)."

(iv) Specific Gravity—Use ASTM—D 1298–85, "Standard Test Method for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method."

(v) pH—Use ASTM—D 1293–84, "Standard Test Methods for pH of Water."

(10) Dispersing Agent Components. Itemize by chemical name and percentage by weight each component of the total formulation. The percentages will include maximum, minimum, and average weights in order to reflect quality control variations in manufacture or formulation. In addition to the chemical information provided in response to the first two sentences, identify the major components in at least the following categories: surface active agents, solvents, and additives.

(11) Heavy Metals, Cyanide, and Chlorinated Hydrocarbons. Using standard test procedures, state the concentrations or upper limits of the following materials:

(i) Arsenic, cadmium, chromium, copper, lead, mercury, nickel, zinc, plus any other metals that may be reasonably expected to be in the sample. Atomic absorption methods should be used and the detailed analytical methods and sample preparation shall be fully described.

(ii) Cyanide. Standard calorimetric procedures should be used.

(iii) Chlorinated hydrocarbons. Gas chromatography should be used and the detailed analytical methods and sample preparation shall be fully described.

(12) The technical product data submission shall include the identity of the laboratory that performed the required tests, the qualifications of the laboratory staff, including professional biographical information for individuals responsible for any tests, and laboratory experience with similar tests. Laboratories performing toxicity tests for dispersant toxicity must demonstrate previous toxicity test experience in order for their results to be accepted. It is the responsibility of the submitter to select competent analytical laboratories based on the guidelines contained herein. EPA reserves the right to refuse to accept a submission of technical product data because of lack of qualification of the analytical laboratory, significant variance between submitted data and any laboratory confirmation performed by EPA, or other circumstances that would result in inadequate or inaccurate information on the dispersing agent.

(b) *Surface collecting agents.* (1) Name, brand, or trademark, if any, under which the product is sold.

(2) Name, address, and telephone number of the manufacturer, importer, or vendor.

(3) Name, address, and telephone number of primary distributors or sales outlets.

(4) Special handling and worker precautions for storage and field application. Maximum and minimum storage temperatures, to include optimum ranges as well as temperatures that will cause phase separations, chemical changes, or other alterations to the effectiveness of the product.

(5) Shelf life.

(6) Recommended application procedures, concentrations, and conditions for use depending upon water salinity, water temperature, types and ages of the pollutants, and any other application restrictions.

[1] Copies of these standards may be obtained from the publisher. Copies may be inspected at the U.S. Environmental Protection Agency, 401 M St., SW., Room LG, Washington, DC, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

(7) Toxicity. Use standard toxicity test methods described in Appendix C to Part 300.

(8) The following data requirements incorporate by reference standards from the 1988 Annual Book of ASTM Standards. American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19103. 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.[2]

(i) Flash Point—Select appropriate method from the following:

(A) ASTM—D 56–87, "Standard Test Method for Flash Point by Tag Closed Tester";

(B) ASTM—D 92–85, "Standard Test Method for Flash and Fire Points by Cleveland Open Cup";

(C) ASTM—D 93–85, "Standard Test Methods for Flash Point by Pensky-Martens Closed Tester";

(D) ASTM—D 1310–86, "Standard Test Method for Flash Point and Fire Point of Liquids by Tag Open-Cup Apparatus"; or

(E) ASTM—D 3278–82, "Standard Test Methods for Flash Point of Liquids by Setaflash Closed-Cup Apparatus."

(ii) Pour Point—Use ASTM—D 97–87, "Standard Test Method for Pour Point of Petroleum Oils."

(iii) Viscosity—Use ASTM—D 445–86, "Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and the Calculation of Dynamic Viscosity)."

(iv) Specific Gravity—Use ASTM—D 1298–85, "Standard Test Method for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method."

(v) pH—Use ASTM—D 1293–84, "Standard Test Methods for pH of Water."

(9) Test to Distinguish Between Surface Collecting Agents and Other Chemical Agents.

(i) Method Summary—Five milliliters of the chemical under test are mixed with 95 milliliters of distilled water and allowed to stand undisturbed for one hour. Then the volume of the upper phase is determined to the nearest one milliliter.

(ii) Apparatus.

(A) Mixing Cylinder: 100 milliliter subdivisions and fitted with a glass stopper.

(B) Pipettes: Volumetric pipette, 5.0 milliliter.

(C) Timers.

(iii) Procedure—Add 95 milliliters of distilled water at 22 °C, plus or minus 3 °C, to a 100 milliliter mixing cylinder. To the surface of the water in the mixing cylinder, add 5.0 milliliters of the chemical under test. Insert the stopper and invert the cylinder five times in ten seconds. Set upright for one hour at 22 °C, plus or minus 3 °C, and then measure the chemical layer at the surface of the water. If the major portion of the chemical added (75 percent) is at the water surface as a separate and easily distinguished layer, the product is a surface collecting agent.

(10) Surface Collecting Agent Components. Itemize by chemical name and percentage by weight each component of the total formulation. The percentages should include maximum, minimum, and average weights in order to reflect quality control variations in manufacture or formulation. In addition to the chemical information provided in response to the first two sentences, identify the major components in at least the following categories: surface action agents, solvents, and additives.

(11) Heavy Metals, Cyanide, and Chlorinated Hydrocarbons. Follow specifications in paragraph (a)(15) of this section.

(12) Analytical Laboratory Requirements for Technical Product Data. Follow specifications in paragraph (a)(16) of this section.

(c) *Biological Additives.* (1) Name, brand, or trademark, if any, under which the additive is sold.

(2) Name, address, and telephone number of the manufacturer, importer, or vendor.

(3) Name, address, and telephone number of primary distributors or sales outlets.

(4) Special handling and worker precautions for storage and field application. Maximum and minimum storage temperatures.

(5) Shelf life.

(6) Recommended application procedures, concentrations, and conditions for use, depending upon water salinity, water temperature, types and ages of the pollutants, and any other application restrictions.

(7) Statements and supporting data on the effectiveness of the additive, including degradation rates, and on the test conditions under which the effectiveness data were obtained.

(8) For microbiological cultures, furnish the following information:

(i) Listing of all microorganisms by species.

(ii) Percentage of each species in the composition of the additive.

(iii) Optimum pH, temperature, and salinity ranges for use of the additive, and maximum and minimum pH, temperature, and salinity levels above or below which the effectiveness of the additive is reduced to half its optimum capacity.

(iv) Special nutrient requirements, if any.

(v) Separate listing of the following, and test methods for such determinations: Salmonella, fecal coliform, Shigella, Staphylococcus Coagulase positive, and Beta Hemolytic Streptococci.

(9) For enzyme additives furnish the following information:

(i) Enzyme name(s).

(ii) International Union of Biochemistry (I.U.B.) number(s).

(iii) Source of the enzyme.

(iv) Units.

(v) Specific Activity.

(vi) Optimum pH, temperature, and salinity ranges for use of the additive, and maximum and minimum pH, temperature, and salinity levels above or below which the effectiveness of the additive is reduced to half its optimum capacity.

(vii) Enzyme shelf life.

(viii) Enzyme optimum storage conditions.

(10) Laboratory Requirements for Technical Product Data. Follow specifications in paragraph (a)(16) of this section.

(d) *Burning Agents.* EPA does not require technical product data submissions for burning agents and does not include burning agents on the NCP Product Schedule.

(e) *Miscellaneous Oil Spill Control Agents.* (1) Name, brand, or trademark, if any, under which the miscellaneous oil spill control agent is sold.

(2) Name, address, and telephone number of the manufacturer, importer, or vendor.

(3) Name, address, and telephone number of primary distributors or sales outlets.

(4) Special handling and worker precautions for storage and field application. Maximum and minimum storage temperatures, to include optimum ranges as well as temperatures that will cause phase separations, chemical changes, or other alternatives to the effectiveness of the product.

(5) Shelf life.

(6) Recommended application procedures, concentrations, and conditions for use depending upon water salinity, water temperature, types and

[2] Copies of these standards may be obtained from the publisher. Copies may be inspected at the U.S. Environmental Protection Agency, 401 M St., SW., Room LG, Washington, DC, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

ages of the pollutants, and any other application restrictions.

(7) Toxicity. Use standard toxicity test methods described in Appendix C to part 300.

(8) The following data requirements incorporate by reference standards from the 1988 Annual Book of ASTM Standards. American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19103. 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.[3]

(i) Flash Point—Select appropriate method from the following:

(A) ASTM—D 56–87, "Standard Test Method for Flash Point by Tag Closed Tester";

(B) ASTM—D 92–85, "Standard Test Method for Flash and Fire Points by Cleveland Open Cup";

(C) ASTM—D 93–85, "Standard Test Methods for Flash Point by Pensky-Martens Closed Tester";

(D) ASTM—D 1310–86, "Standard Test Method for Flash Point and Fire Point of Liquids by Tag Open-Cup Apparatus"; or

(E) ASTM—D 3278–82, "Standard Test Methods for Flash Point of Liquids by Setaflash Closed-Cup Apparatus."

(ii) Pour Point—Use ASTM—D 97–87, "Standard Test Method for Pour Point of Petroleum Oils."

(iii) Viscosity—Use ASTM—D 445–86, "Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and the Calculation of Dynamic Viscosity)."

(iv) Specific Gravity—Use ASTM—D 1298–85, "Standard Test Method for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method."

(v) pH—Use ASTM—D 1293–84, "Standard Test Methods for pH of Water."

(9) Miscellaneous Oil Spill Control Agent Components. Itemize by chemical name and percentage by weight each component of the total formulation. The percentages should include maximum, minimum, and average weights in order to reflect quality control variations in manufacture or formulation. In addition to the chemical information provided in response to the first two sentences, identify the major components in at least the following categories: surface active agents, solvents, and additives.

(10) Heavy Metals, Cyanide, and Chlorinated Hydrocarbons. Follow specifications in paragraph (a)(15) of this section.

(11) For any miscellaneous oil spill control agent that contains microbiological cultures or enzyme additives, furnish the information specified in paragraphs (c)(8) and (c)(9) of this section, as appropriate.

(12) Analytical Laboratory Requirements for Technical Product Data. Follow specifications in paragraph (a)(16) of this section.

§ 300.920 Addition of products to schedule.

(a) To add a dispersant, surface collecting agent, biological additive, or miscellaneous oil spill control agent to the NCP Product Schedule, the technical product data specified in § 300.915 must be submitted to the Emergency Response Division (OS–210), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. If EPA determines that the required data were submitted, EPA will add the product to the schedule.

(b) EPA will inform the submitter in writing, within 60 days of the receipt of technical product data, of its decision on adding the product to the schedule.

(c) The submitter may assert that certain information in the technical product data submissions is confidential business information. EPA will handle such claims pursuant to the provisions in 40 CFR part 2, subpart B. Such information must be submitted separately from non-confidential information, clearly identified, and clearly marked "Confidential Business Information." If the submitter fails to make such a claim at the time of submittal, EPA may make the information available to the public without further notice.

(d) The submitter must notify EPA of any changes in the composition, formulation, or application of the dispersant, surface collecting agent, biological additive, or miscellaneous oil spill control agent. On the basis of this data, EPA may require retesting of the product if the change is likely to affect the effectiveness or toxicity of the product.

(e) The listing of a product on the NCP Product Schedule does not constitute approval of the product. To avoid possible misinterpretation or misrepresentation, any label, advertisement, or technical literature that refers to the placement of the product on the NCP Schedule must either reproduce in its entirety EPA's written statement that it will add the product to the NCP Product Schedule under § 300.920(b), or include the disclaimer shown below. If the disclaimer is used, it must be conspicuous and must be fully reproduced. Failure to comply with these restrictions or any other improper attempt to demonstrate the approval of the product by any NRT or other U.S. Government agency shall constitute grounds for removing the product from the NCP Product Schedule.

Disclaimer

[PRODUCT NAME] is on the U.S. Environmental Protection Agency's NCP Product Schedule. This listing does NOT mean that EPA approves, recommends, licenses, certifies, or authorizes the use of [product name] on an oil discharge. This listing means only that data have been submitted to EPA as required by subpart J of the National Contingency Plan, § 300.915.

Subpart K—Federal Facilities [Reserved]

3. Units 1.0, 2.0, and 4.0 of Appendix C to part 300 are amended by revising the first sentence of subunit 1.1, and subunits 2.5 (step 13), and 2.6 (steps 15 and 16) and IX, to read as follows:

Appendix C to Part 300—Revised Standard Dispersant Effectiveness and Toxicity Tests

* * * * *

1.0 Introduction

1.1 *Scope and Application.* These methods apply to "dispersants" involving subpart J (Use of Dispersants and Other Chemicals) in 40 CFR part 300 (National Oil and Hazardous Substances Pollution Contingency Plan). * * *

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2.0 Revised Standard Dispersant Effectiveness Test

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2.5 * * *

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13. Spectrophotometrically determine the absorbance of the extract using the identical wavelength and cell used to calibrate the spectrophotometer. From the calibration curve, determine the concentration of oil in the chloroform.

Compute the concentration of oil in the sample as follows:

$$C_{do} = \frac{C_i \times (\text{volume of chloroform used})}{(\text{volume of sample})} \quad (2)$$

where:

C_{do} is the concentration of dispersed oil in the sample and C_i is the measured concentration of oil in the chloroform extract.

Note that the standard sample volume is 500 ml and the volume of chloroform used should also be expressed in ml.

Repeat steps 1 through 13 at least three times for each of the three required volumes of dispersant.

[3] Copies of these standards may be obtained from the publisher. Copies may be inspected at the U.S. Environmental Protection Agency, 401 M St., SW., Room LG, Washington, DC, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

2.6 * * *

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15. Spectrophotometrically determine the absorbance of the extract using the identical wavelength and cell used to calibrate the spectrophotometer. From the calibration curve, determine the corresponding concentration of oil in the chloroform. Compute the dispersant blank correction for 25 ml of dispersant as follows:

$$D = \frac{C_2 \times (\text{volume of chloroform used})}{(\text{volume of sample})} \quad (3)$$

where:
D is the blank correction for 25 ml of dispersant, and C_2 is the measured concentration of oil in the chloroform extract.

Note that the standard sample volume is 500 ml and the volume of chloroform used should also be expressed in ml.

The Dispersant Blank Correction (DBC) for other volumes of dispersant used in a test may then be computed as:

$$DBC = \frac{D \times (\text{volume in ml of dispersants used})}{25\ \text{ml}} \quad (4)$$

16. Clean the test tank and prepare the synthetic seawater at 23±1 °C as described in Step 1. Do not install the containment cylinder. Prepare 100 ml of test oil as described in Steps 4 and 5, and add it to the test tank. Continue the test procedure as described in Steps 8 through 13. The Oil Blank Correction (OBC) is:

$$OBC = \frac{C_1 \times (\text{volume of chloroform used})}{(\text{volume of sample})} \quad (5)$$

* * * * *

4.0 Summary Technical Product Test Data Format

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IX. Physical Properties of Dispersant/Surface Collecting Agent:

1. Flash Point: (°F).
2. Pour Point: (°F).
3. Viscosity: _____ at _____ °F (centistokes).
4. Specific Gravity: _____ at _____ °F.
5. pH: (10 percent solution if hydrocarbon based).
6. Surface Active Agents (Dispersants).[1]
7. Solvents (Dispersants).[1]
8. Additives (Dispersants).
9. Solubility (Surface Collecting Agents).

* * * * *

4. Appendix D is being added to part 300 to read as follows:

[1] If the submitter claims that the information presented under this subheading is confidential, this information should be submitted on a separate sheet of paper clearly labeled according to the subheading and entitled "Confidential Information."

Appendix D to Part 300—Appropriate Actions and Methods of Remedying Releases

(a) This Appendix D to part 300 describes types of remedial actions generally appropriate for specific situations commonly found at remedial sites and lists methods for remedying releases that may be considered by the lead agency to accomplish a particular response action. This list shall not be considered inclusive of all possible methods of remedying releases and does not limit the lead agency from selecting any other actions deemed necessary in response to any situation.

(b) In response to contaminated soil, sediment, or waste, the following types of response actions shall generally be considered: removal, treatment, or containment of the soil, sediment, or waste to reduce or eliminate the potential for hazardous substances or pollutants or contaminants to contaminate other media (ground water, surface water, or air) and to reduce or eliminate the potential for such substances to be inhaled, absorbed, or ingested.

(1) Techniques for removing contaminated soil, sediment, or waste include the following:
(i) Excavation.
(ii) Hydraulic dredging.
(iii) Mechanical dredging.

(2) Techniques for treating contaminated soil, sediment, or waste include the following:
(i) Biological methods, including the following:
(A) Treatment via modified conventional wastewater treatment techniques.
(B) Anaerobic, aerated, and facultative lagoons.
(C) Supported growth biological reactors.
(D) Microbial biodegradation.
(ii) Chemical methods, including the following:
(A) Chlorination.
(B) Precipitation, flocculation, sedimentation.
(C) Neutralization.
(D) Equalization.
(E) Chemical oxidation.
(iii) Physical methods, including the following:
(A) Air stripping.
(B) Carbon absorption.
(C) Ion exchange.
(D) Reverse osmosis.
(E) Permeable bed treatment.
(F) Wet air oxidation.
(G) Solidification.
(H) Encapsulation.
(I) Soil washing or flushing.
(J) Incineration.

(c) In response to contaminated ground water, the following types of response actions will generally be considered: Elimination or containment of the contamination to prevent further contamination, treatment and/or removal of such ground water to reduce or eliminate the contamination, physical containment of such ground water to reduce or eliminate potential exposure to such contamination, and/or restrictions on use of the ground water to eliminate potential exposure to the contamination.

(1) Techniques that can be used to contain or restore contaminated ground water include the following:
(i) Impermeable barriers, including the following:
(A) Slurry walls.
(B) Grout curtains.
(C) Sheet pilings.
(ii) Permeable treatment beds.
(iii) Ground-water pumping, including the following:
(A) Water table adjustment.
(B) Plume containment.
(iv) Leachate control, including the following:
(A) Subsurface drains.
(B) Drainage ditches.
(C) Liners.

(2) Techniques suitable for the control of contamination of water and sewer lines include the following:
(i) Grouting.
(ii) Pipe relining and sleeving.
(iii) Sewer relocation.

(d)(1) In response to contaminated surface water, the following types of response actions shall generally be considered: Elimination or containment of the contamination to prevent further pollution, and/or treatment of the contaminated water to reduce or eliminate its hazard potential.

(2) Techniques that can be used to control or remediate surface water include the following:
(i) Surface seals.
(ii) Surface water diversions and collection systems, including the following:
(A) Dikes and berms.
(B) Ditches, diversions, waterways.
(C) Chutes and downpipes.
(D) Levees.
(E) Seepage basins and ditches.
(F) Sedimentation basins and ditches.
(G) Terraces and benches.
(iii) Grading.
(iv) Revegetation.

(e) In response to air emissions, the following techniques will be considered:
(1) Pipe vents.
(2) Trench vents.
(3) Gas barriers.
(4) Gas collection.
(5) Overpacking.
(6) Treatment for gaseous emissions, including the following:
(i) Vapor phase adsorption.
(ii) Thermal oxidation.

(f) Alternative water supplies can be provided in several ways, including the following:
(i) Individual treatment units.
(ii) Water distribution system.
(iii) New wells in a new location or deeper wells.
(iv) Cisterns.
(v) Bottled or treated water.
(vi) Upgraded treatment for existing distribution systems.

(g) Temporary or permanent relocation of residents, businesses, and community facilities may be provided where it is determined necessary to protect human health and the environment.

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federal register

Thursday
March 8, 1990

Part III

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

Formula Allocations for the Rental Rehabilitation Program for Fiscal Year 1990 and Deadlines for Submission of Program Descriptions; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-90-3003; FR-2751-N-01]

Formula Allocations for the Rental Rehabilitation Program for Fiscal Year 1990 and Deadlines for Submission of Program Descriptions

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice announces the allocation of Rental Rehabilitation Program grant funds for cities with populations of 50,000 or more, urban counties, consortia of units of general local governments, and States for Fiscal Year 1990. It also announces the dates by which Program Descriptions must be submitted to HUD for these potential grantees to be considered for actual grants based on these allocations.

FOR FURTHER INFORMATION CONTACT: Mary Kolesar, Director, Rehabilitation Management Division, room 7174, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, telephone (202) 755-5970. Hearing- or speech-impaired individuals may call HUD's TDD number (202) 755-3938. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Formula Allocations

The Rental Rehabilitation Program is authorized by section 17 of the United States Housing Act of 1937 (42 U.S.C. 1437o), as amended, hereafter referred to as section 17. The Program's regulations are published at 24 CFR part 511. Section 511.30 contains the formula for allocating Rental Rehabilitation Program funds. Cities having a population of 50,000 or more, urban counties, consortia of units of general local government having a combined population of 50,000 or more, and States are eligible to receive formula allocations. Since the amount of funding available for allocation in Fiscal Year 1990 is $126,508,000, a reduction from the $148.5 million that was allocated for the Program in Fiscal Year 1989, a number of localities that received a grant based on a formula allocation in Fiscal Year 1989 have a formula amount less than $50,000 in Fiscal Year 1990. Pursuant to § 511.31(b), such localities may choose to accept their less-than-$50,000 formula amounts as direct grants. Alternatively, they may decline their direct grants, but will be eligible to participate in their State's Program.

Appendix A to this Notice contains the formula allocations for cities and urban counties that receive an allocation of $50,000 or more. Appendix B to this Notice contains the minimum formula allocations for States. Appendix C to this Notice contains optional grant amounts for localities that participated in the Rental Rehabilitation Program last year as formula grantees that may elect to participate as formula grantees in Fiscal Year 1990, or may elect to participate in their State's Program.

The eligibility of cities with populations of 50,000 or more and urban counties for formula allocations is determined by whether they were so classified for purposes of the Community Development Block Grant Entitlement Program (24 CFR part 570) for Federal Fiscal Year 1989. Grant amounts have been rounded to the nearest thousand. The formula factors for allocating the Fiscal Year 1990 funds are the same as those used in prior Fiscal Years. Section 511.32 was suspended effective May 19, 1987 (52 FR 11466, April 9, 1987) and remains suspended. Thus, performance adjustments to potential grantees' formula allocations will not be made this year.

As noted above, the allocations indicated for States in Appendix B are the minimum amounts that they would receive. Amounts for those localities listed in Appendix C that do not elect to apply for grants based on their formula allocations will be added to the published allocations for the appropriate States. If a locality elects not to accept its formula allocation, there is no assurance that it will receive funding under the applicable State program, since funding in such programs is under procedures set by the State grantee (or HUD if the State's program is HUD-administered).

Program Descriptions

Deadline for Submitting Program Descriptions

Section 511.20(a) of the Program regulations states that cities, urban counties and consortia eligible to receive a grant based on a formula allocation must submit a Program Description to the appropriate HUD Field Office within 45 days of written notification of their Rental Rehabilitation fund allocation, and that States have 75 days from the date of written notification of their allocations to submit their Program Descriptions. Because HUD is publishing allocations this year, HUD regards the date of this Notice to be the date of written notification to all grantees of their fund allocations for the Program. However, since those entities listed in Appendix C that would receive less than $50,000 have the option this year of applying directly to HUD or participating in a State program, under § 511.31(b) they must notify the appropriate HUD Field Office of their decision within 30 days of publication of this Notice. This is necessary to allow HUD sufficient time to advise the affected States of any additional moneys that they will be allocated. However, if entities listed in Appendix C decide to participate as formula grantees, they still must submit a Program Description to the appropriate HUD Field Office within 45 days of the date of publication of this Notice. States that elect to participate in the Rental Rehabilitation Program must submit a Program Description to the appropriate HUD Field Office within 75 days of the date of publication of this Notice, and HUD will endeavor to notify States as soon as possible of any additional allocation amounts resulting from the elections of entities listed in Appendix C not to participate as direct grantees in Fiscal Year 1990. In addition, under § 511.50 HUD will administer the allocation of any State that does not notify the responsible HUD Field Office of its election to administer the Rental Rehabilitation Program within 30 days of the date of publication of this Notice.

Thus, all cities and urban counties receiving a formula allocation must deliver their Program Descriptions to the appropriate HUD Field Office or have them postmarked no later than April 23, 1990 to be considered for a grant. If a formula-eligible unit of general local government that would receive less than a $50,000 formula allocation chooses to participate as a formula grantee, it must notify HUD in writing of its decision as soon as possible, but no later than April 9, 1990 to facilitate HUD's notification to the affected State of the additional allocation. If a State elects to administer the Rental Rehabilitation Program in Fiscal Year 1990, it must notify HUD in writing of its intent to participate in the program by April 9, 1990 and must deliver its Program Description or have it postmarked by May 22, 1990 to be considered for a grant.

If a State chooses not to participate in the Rental Rehabilitation Program, eligible units of general local government located in the State that wish to participate in the HUD-Administered State Program must submit a Program Description to the responsible HUD Field Office within 45 days of the date stated in a written

notification from HUD to such potential grantees of fund availability under the program for the fiscal year. These notifications will be directly issued by HUD Field Offices when it is known which States, if any, are not participating in Fiscal Year 1990.

Two Additional Certifications Required

Section 511.20 of the program regulations requires potential grantees to submit a Program Description that includes the elements and certifications required by § 511.20 (b) and (c), respectively. There are two additional certifications that potential grantees must provide in addition to those stated in § 511.20(c).

Certification Regarding Drug-Free Workplace

The Drug-Free Workplace Act of 1988 requires grantees of Federal agencies to certify that they will provide drug-free workplaces. Thus, each potential grantee must certify that it will comply with the drug-free workplace requirements in accordance with 24 CFR part 24, subpart F.

Certification Regarding Lobbying

On December 20, 1989, the Department published a notice at 54 FR 52070 advising recipients and subrecipients of Federal contracts, grants, cooperative agreements and loans of a new prohibition recently mandated by Congress. Section 319 of the Department of the Interior Appropriations Act, Public Law 101-121, approved October 23, 1989, generally prohibits recipients of Federal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan.

Also on December 20, 1989 at 54 FR 52306, the Office of Management and Budget (OMB) issued interim final guidance to implement this prohibition. Effective December 23, 1989, this guidance generally prohibits the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. In addition the recipient must also file a disclosure if it has made or has agreed to make any payment with nonappropriated funds that would be prohibited if paid with appropriated funds.

The certification and disclosure requirements apply to all grants in excess of $100,000. However, since RRP grantees may receive additional RRP grant funds through reallocations, all potential grantees are required to submit this certification, and disclosure, if required. Potential grantees should refer to 54 FR 52321 (December 20, 1990) for the language for the certification and disclosure. As indicated in this certification and disclosure, the law provides substantial monetary penalties for failure to file the required certification or disclosure.

Security Authorizations

Beginning with December 31, 1989 and for each year thereafter, all security authorizations previously issued for access to project and administrative accounts in the C/MI System will automatically expire as of December 31. Grantees and State recipients authorized to access the C/MI System must follow the procedures described in the C/MI System Notice (CPD Notice 88-09) to obtain annual Security IDs and passwords. Annual security authorizations may be requested beginning in October of each year. However, the effective date of the annual Security ID and password will be January 1 through December 31. Grantees and States recipients should continue to follow procedures described in the C/MI System Notice to cancel Security IDs and passwords prior to the annual cancellation of IDs and passwords by the C/MI System.

Other Matters

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, room 10276, 451 Seventh Street, SW., Washington, DC 20410-0500.

The Catalog of Federal Domestic Assistance program number is 14.230, Rental Housing Rehabilitation.

The collection of information requirements contained in this Notice have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520) and have been assigned OMB Control No. 2506-0080.

Authority: Section 17, United States Housing Act of 1937, 42 U.S.C. 1437o. Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: February 26, 1990.

Anna Kondratas,

Assistant Secretary for Community Planning and Development.

BILLING CODE 4210-29-M

RENTAL REHABILITATION PROGRAM
FORMULA ALLOCATIONS
Fiscal Year 1990

Appendix A

STATE / LOCALITY	$ IN THOUSANDS
ALABAMA	
BIRMINGHAM	312
HUNTSVILLE	73
MOBILE	142
MONTGOMERY	131
TUSCALOOSA	80
JEFFERSON COUNTY	106
ALASKA	
ANCHORAGE	82
ARIZONA	
MESA	69
PHOENIX	455
TEMPE	66
TUCSON	265
MARICOPA COUNTY	66
PIMA COUNTY	53
ARKANSAS	
FORT SMITH	50
LITTLE ROCK	118
CALIFORNIA	
ALAMEDA	54
ALHAMBRA	59
ANAHEIM	145
BAKERSFIELD	73
BERKELEY	180
BURBANK	66
CHULA VISTA	68
COMPTON	65
COSTA MESA	68
EL CAJON	65
EL MONTE	78
FRESNO	204
FULLERTON	64
GARDEN GROVE	63
GLENDALE	144
HAWTHORNE	50
HAYWARD	55
HUNTINGTON BEACH	89
HUNTINGTON PARK	72
INGLEWOOD	106
LONG BEACH	427
LOS ANGELES	3626
MODESTO	67
MOUNTAIN VIEW	50
OAKLAND	460
OCEANSIDE	56
OXNARD	72
PASADENA	127
POMONA	66
RICHMOND	56
RIVERSIDE	109
SACRAMENTO	247
SALINAS	59
SAN BERNADINO	90
SAN DIEGO	751
SAN FRANCISCO	1070
SAN JOSE	325
SAN MATEO	52
SANTA ANA	152
SANTA BARBARA	91
SANTA CLARA	53
SANTA MONICA	125
SANTA ROSA	59
SOUTH GATE	55
STOCKTON	142
SUNNYVALE	56
TORRANCE	68
VENTURA	53
ALAMEDA COUNTY	88
CONTRA COSTA COUNTY	135
FRESNO COUNTY	129
KERN COUNTY	148
LOS ANGELES COUNTY	1224
MARIN COUNTY	128
ORANGE COUNTY	247
RIVERSIDE COUNTY	198
SACRAMENTO COUNTY	252
SAN BERNARDINO COUNTY	193
SAN DIEGO COUNTY	207
SAN JOAQUIN COUNTY	95
SAN MATEO COUNTY	143
SANTA CLARA COUNTY	122
SONOMA COUNTY	114
VENTURA COUNTY	84
COLORADO	
AURORA	60
BOULDER	80
COLORADO SPRINGS	139
DENVER	525
FORT COLLINS	61
GREELEY	51
PUEBLO	73
ADAMS COUNTY	64
CONNECTICUT	
BRIDGEPORT	215
HARTFORD	255
NEW BRITAIN	74
NEW HAVEN	225
STAMFORD	69
WATERBURY	116
DELAWARE	
WILMINGTON	87
NEW CASTLE COUNTY	119
DISTRICT OF COLUMBIA	
WASHINGTON	780
FLORIDA	
CLEARWATER	53
DAYTONA BEACH	72
FT LAUDERDALE	133
GAINESVILLE	92
HIALEAH	115
HOLLYWOOD	69
JACKSONVILLE	386
MIAMI	585
MIAMI BEACH	279
ORLANDO	117
ST PETERSBURG	191
TALLAHASSEE	111
TAMPA	28
WEST PALM BEACH	70
BREVARD COUNTY	57
BROWARD COUNTY	213
DADE COUNTY	531
ESCAMBIA COUNTY	75
HILLSBOROUGH COUNTY	147
ORANGE COUNTY	160
PALM BEACH COUNTY	169
PASCO COUNTY	51
PINELLAS COUNTY	113
POLK COUNTY	98
VOLUSIA COUNTY	81
GEORGIA	
ALBANY	80
ATLANTA	546
COLUMBUS	139
MACON	125
SAVANNAH	153
COBB COUNTY	80
DE KALB COUNTY	202
FULTON COUNTY	109
HAWAII	
HONOLULU	476
IDAHO	
BOISE	61
ILLINOIS	
CHAMPAIGN	65
CHICAGO	4508
CICERO	55
DECATUR	65
EVANSTON	63
JOLIET	51
PEORIA	94
ROCKFORD	90
SPRINGFIELD	77
COOK COUNTY	424
DU PAGE COUNTY	117
LAKE COUNTY	65
MADISON COUNTY	117
ST CLAIR COUNTY	91
INDIANA	
BLOOMINGTON	68
EVANSVILLE	103
FORT WAYNE	115
GARY	121
HAMMOND	58
INDIANAPOLIS	175
MUNCIE	73
SOUTH BEND	68
IOWA	
CEDAR RAPIDS	56
DAVENPORT	75
DES MOINES	141
IOWA CITY	59
SIOUX CITY	57
KANSAS	
KANSAS CITY	107
LAWRENCE	66
TOPEKA	75
WICHITA	178
KENTUCKY	
LEXINGTON-FAYETTE	171
LOUISVILLE	333
JEFFERSON COUNTY	99
LOUISIANA	
ALEXANDRIA	51
BATON ROUGE	214
LAFAYETTE	56
MONROE	58
NEW ORLEANS	885
SHREVEPORT	149
JEFFERSON PARISH	171
MAINE	
PORTLAND	104
MARYLAND	
BALTIMORE	1090
ANNE ARUNDEL COUNTY	79
BALTIMORE COUNTY	222
MONTGOMERY COUNTY	192
PRINCE GEORGES COUNTY	284
MASSACHUSETTS	
BOSTON	1009
BROCKTON	98
BROOKLINE	65
CAMBRIDGE	153
FALL RIVER	128
LAWRENCE	103
LOWELL	103
LYNN	106
MALDEN	52
NEW BEDFORD	140
QUINCY	67
SOMERVILLE	113
SPRINGFIELD	190
WORCESTER	184
MICHIGAN	
ANN ARBOR	112
BATTLE CREEK	50
DETROIT	1551
FLINT	130
GRAND RAPIDS	156
KALAMAZOO	53
LANSING	110
PONTIAC	65
SAGINAW	78
GENESEE COUNTY	74
MACOMB COUNTY	52
OAKLAND COUNTY	125
WAYNE COUNTY	140
MINNESOTA	
DULUTH	91
MINNEAPOLIS	248
ST PAUL	217
DAKOTA COUNTY	54
HENNEPIN COUNTY	120

STATE / LOCALITY	$ IN THOUSANDS
MISSISSIPPI	
JACKSON	[illegible]
MISSOURI	
COLUMBIA	63
KANSAS CITY	386
ST JOSEPH	59
ST LOUIS	672
SPRINGFIELD	105
ST LOUIS COUNTY	234
MONTANA	
BILLINGS	54
NEBRASKA	
LINCOLN	115
OMAHA	233
NEVADA	
LAS VEGAS	122
RENO	93
CLARK COUNTY	141
NEW HAMPSHIRE	
MANCHESTER	102
NEW JERSEY	
BAYONNE	66
CAMDEN	122
EAST ORANGE	117
ELIZABETH	136
IRVINGTON	86
JERSEY CITY	385
NEWARK	688
PASSAIC	109
PATERSON	241
TRENTON	126
UNION CITY	111
BERGEN COUNTY	344
BURLINGTON COUNTY	100
CAMDEN COUNTY	89
ESSEX COUNTY	165
GLOUCESTER COUNTY	75
HUDSON COUNTY	295
MIDDLESEX COUNTY	88
MONMOUTH COUNTY	145
MORRIS COUNTY	64
OCEAN COUNTY	78
SOMERSET COUNTY	57
UNION COUNTY	140
NEW MEXICO	
ALBUQUERQUE	216
NEW YORK	
ALBANY	165
BABYLON TOWN	61
BINGHAMTON	83
BUFFALO	634
ISLIP TOWN	83
MOUNT VERNON	100
NEW ROCHELLE	65
NEW YORK	13239
NIAGARA FALLS	78
ROCHESTER	342
SCHENECTADY	92
SYRACUSE	259
TROY	80
UTICA	108
YONKERS	204
DUTCHESS COUNTY	61
ERIE COUNTY	82
MONROE COUNTY	86
NASSAU COUNTY	358
ONONDAGA COUNTY	59
ORANGE COUNTY	78
ROCKLAND COUNTY	89
SUFFOLK COUNTY	154
WESTCHESTER COUNTY	206
NORTH CAROLINA	
ASHEVILLE	54
CHARLOTTE	222
DURHAM	120
FAYETTEVILLE	57
GREENSBORO	111
HIGH POINT	53
RALEIGH	116
WILMINGTON	58
WINSTON SALEM	121
NORTH DAKOTA	
FARGO	51
OHIO	
AKRON	205
CANTON	84
CINCINNATI	6[illegible]1
CLEVELAND	864
COLUMBUS	581
DAYTON	243
HAMILTON CITY	57
SPRINGFIELD	83
TOLEDO	304
YOUNGSTOWN	116
CUYAHOGA COUNTY	145
FRANKLIN COUNTY	79
HAMILTON COUNTY	133
MONTGOMERY COUNTY	94
STARK COUNTY	62
OKLAHOMA	
LAWTON	53
NORMAN	53
OKLAHOMA CITY	273
TULSA	229
OREGON	
EUGENE	115
PORTLAND	479
SALEM	72
CLACKAMAS COUNTY	73
MULTNOMAH COUNTY	65
WASHINGTON COUNTY	104
PENNSYLVANIA	
ALLENTOWN	97
ERIE	119
HARRISBURG	70
LANCASTER	69
PHILADELPHIA	1987
PITTSBURGH	587
READING	104
SCRANTON	90
ALLEGHENY COUNTY	413
BEAVER COUNTY	88
BERKS COUNTY	62
BUCKS COUNTY	104
CHESTER COUNTY	114
DELAWARE COUNTY	135
LANCASTER COUNTY	101
LUZERNE COUNTY	107
MONTGOMERY COUNTY	147
WASHINGTON COUNTY	111
WESTMORELAND COUNTY	109
YORK COUNTY	75
RHODE ISLAND	
PAWTUCKET	85
PROVIDENCE	292
SOUTH CAROLINA	
CHARLESTON	101
COLUMBIA	94
GREENVILLE	63
NORTH CHARLESTON	51
GREENVILLE COUNTY	94
SOUTH DAKOTA	
SIOUX FALLS	54
TENNESSEE	
CHATTANOOGA	153
KNOXVILLE	181
MEMPHIS	550
NASHVILLE-DAVIDSON	313
TEXAS	
ABILENE	52
AMARILLO	71
ARLINGTON	80
AUSTIN	357
BEAUMONT	81
BROWNSVILLE	68
CORPUS CHRISTI	147
DALLAS	723
EL PASO	315
FORT WORTH	246
GALVESTON	62
HOUSTON	1168
IRVING	51
LAREDO	74
LUBBOCK	117
PASADENA	51
SAN ANTONIO	563
TYLER	50
WACO	97
WICHITA FALLS	56
HARRIS COUNTY	130
HIDALGO COUNTY	87
TARRANT COUNTY	74
UTAH	
OGDEN	54
PROVO	66
SALT LAKE CITY	[illegible]
SALT LAKE COUNTY	81
VERMONT	
VIRGINIA	
ALEXANDRIA	84
HAMPTON	65
NEWPORT NEWS	107
NORFOLK	275
PORTSMOUTH	88
RICHMOND	265
ROANOKE	90
VIRGINIA BEACH	104
ARLINGTON COUNTY	122
FAIRFAX COUNTY	168
WASHINGTON	
EVERETT	51
SEATTLE	539
SPOKANE	191
TACOMA	155
CLARK COUNTY	88
KING COUNTY	208
PIERCE COUNTY	137
SNOHOMISH COUNTY	83
SPOKANE COUNTY	60
WEST VIRGINIA	
CHARLESTON	53
HUNTINGTON	69
WISCONSIN	
GREEN BAY	61
MADISON	121
MILWAUKEE	645
RACINE	54
MILWAUKEE COUNTY	62
WYOMING	
PUERTO RICO	
ARECIBO	52
BAYAMAON MUNICIPIO	86
CAGUAS MUNICIPIO	68
CAROLINA MUNICIPIO	82
MAYAGUEZ MUNICIPIO	407
PONCE MUNICIPIO	142
SAN JUAN MUNICIPIO	553

Appendix B

RENTAL REHABILITATION PROGRAM ALLOCATIONS BY STATE
FISCAL YEAR 1990
($ in thousands)

	CITY/COUNTY AMOUNT	MINIMUM STATE AMOUNT	CITY/COUNTY/STATE TOTAL AMOUNT
ALABAMA	878	760	1,638
ALASKA	82	52	134
ARIZONA	1,021	249	1,270
ARKANSAS	215	634	849
CALIFORNIA	14,607	2057	16,664
COLORADO	1,094	382	1,476
CONNECTICUT	1,077	646	1,723
DELAWARE	206	33	239
DISTRICT OF COLUMBIA	780	0	780
FLORIDA	4,361	974	5,335
GEORGIA	1,473	1100	2,573
HAWAII	476	67	543
IDAHO	61	245	306
ILLINOIS	6,045	1339	7,384
INDIANA	1,222	854	2,076
IOWA	468	559	1,027
KANSAS	472	452	924
KENTUCKY	603	720	1,323
LOUISIANA	1,629	629	2,258
MAINE	104	425	529
MARYLAND	1,867	308	2,175
MASSACHUSETTS	2,632	1561	4,193
MICHIGAN	2,741	1368	4,109
MINNESOTA	977	545	1,522
MISSISSIPPI	148	709	857
MISSOURI	1,519	680	2,199
MONTANA	95	227	322
NEBRASKA	348	221	569
NEVADA	356	94	450
NEW HAMPSHIRE	150	243	393
NEW JERSEY	3,867	850	4,717
NEW MEXICO	216	325	541
NEW YORK	16,877	1550	18,427
NORTH CAROLINA	912	1070	1,982
NORTH DAKOTA	51	142	193
OHIO	3,935	1581	5,516
OKLAHOMA	608	648	1,256
OREGON	908	487	1,395
PENNSYLVANIA	4,780	1622	6,402
RHODE ISLAND	410	349	759
SOUTH CAROLINA	403	708	1,111
SOUTH DAKOTA	54	175	229
TENNESSEE	1,229	702	1,931
TEXAS	5,041	1856	6,897
UTAH	389	172	561
VERMONT	0	193	193
VIRGINIA	1,464	691	2,155
WASHINGTON	1,512	628	2,140
WEST VIRGINIA	122	416	538
WISCONSIN	1,055	843	1,898
WYOMING	0	146	146
PUERTO RICO	1,182	499	1,681
TOTAL	92,722	33,786	126,508

RENTAL REHABILITATION OPTIONAL GRANTEES FY 1990

Appendix C

STATE	LOCALITY	$ IN THOUSANDS
ALABAMA	DOTHAN	34
		34
ARIZONA	GLENDALE	47
		47
ARKANSAS	PINE BLUFF	47
		47
CALIFORNIA	BELLFLOWER	45
	CONCORD	45
	DALY	39
	DOWNEY	47
	ESCONDIDO CITY	49
	FREMONT	44
	LYNWOOD	38
	MONTEBELLO	37
	MONTEREY PARK	32
	NATIONAL CITY	47
	NORWALK	35
	ONTARIO	46
	ORANGE	47
	PALO ALTO	35
	REDONDO BEACH	48
	REDWOOD CITY	42
	VALLEJO	44
	WHITTIER	42
		762
COLORADO	LAKEWOOD	41
		41
CONNECTICUT	DANBURY	37
	NORWALK	49
	WEST HAVEN	36
		122
FLORIDA	LAKELAND	39
	PENSACOLA	48
	POMPANO BEACH	40
	SARASOTA	41
		168
GEORGIA	GWINNETT COUNTY	39
		39
ILLINOIS	AURORA	43
	OAK PARK	39
	WAUKEGAN	39
	WILL COUNTY	42
		163
INDIANA	ANDERSON	42
	TERRE HAUTE	49
	LAKE COUNTY	48
		139
IOWA	COUNCIL BLUFFS	33
	WATERLOO	47
		80
KANSAS	JOHNSON COUNTY	46
		46
LOUISIANA	LAKE CHARLES	45
		45
MASSACHUSETTS	CHICOPEE	38
	FRAMINGHAM	39
	MEDFORD	39
		116
MINNESOTA	RAMSEY COUNTY	47
		47
MONTANA	GREAT FALLS	41
		41
NEW HAMPSHIRE	NASHUA	48
		48
NEW JERSEY	CLIFTON	40
		40
NEW YORK	AMHERST TOWN	33
	HUNTINGTON TOWN	37
	UNION TOWN	41
		111
OHIO	LAKEWOOD	49
	LORAIN	43
	MANSFIELD	46
	WARREN	[illegible]
	LAKE COUNTY	49
	SUMMIT COUNTY	47
		274
PENNSYLVANIA	ALTOONA	46
	UPPER DARBY	45
		91
RHODE ISLAND	WARWICK	33
		33
TENNESSEE	CLARKSVILLE	32
		32
TEXAS	BAYTOWN CITY	33
	BRYAN	36
	DENTON	47
	GARLAND	38
	KILLEEN	43
	PORT ARTHUR	40
	SAN ANGELO	44
	BEXAR COUNTY	40
		321
VIRGINIA	CHESAPEAKE	48
	LYNCHBURG	48
		96
WISCONSIN	KENOSHA	39
		39
PUERTO RICO	AGUADILLA	47
	GUAYNABO MUNICIP	40
		87

[FR Doc. 90-5245 Filed 3-7-90; 8:45 am]
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federal register

Thursday
March 8, 1990

Part IV

Department of Education

Educational Research and Development Centers Program; Notice Inviting Applications for New Awards for Fiscal Years 1990 and 1991

DEPARTMENT OF EDUCATION

[CFDA No.: 84.117G and 84.117Q]

The Educational Research and Development Centers Program Invitation for Applications for New Awards for Fiscal Years (FY) 1990 and 1991

Purpose of program: To support research and development centers to conduct research and related activities.

Deadline for transmittal of applications: June 15, 1990.

Applications available: March 9, 1990.

Available funds: In fiscal year 1990, $1,000,000 is available for the Center for the Study of Teacher Performance Evaluation and Educational Accountability.

The Administration has requested $14,600,000 in FY 1991 for the other 17 research centers listed below. In addition, some individual center levels include funds requested for Education Summit Follow-up and funds from other Federal agencies, such as the Departments of Labor and Health and Human Services. The actual level of funding available for centers is contingent upon final congressional action. The table below indicates estimated funding levels over the five-year project periods and the type of awards (grant (G) or cooperative agreement (CA)) for the proposed research centers. The funding levels for years 2 through 5 are estimates depending upon the availability of funds and needs as reflected in the approved applications.

SUMMARY OF FUNDING FOR EDUCATIONAL RESEARCH AND DEVELOPMENT CENTERS

Office of Research

Proposed centers	First year funding	Second year funding	Third year funding	Fourth year funding	Fifth year funding	Five year total	Grant or coop agr
1. Research on Dissemination and Knowledge Utilization	.8	1.1	1.6	1.6	1.7	6.8	CA
2. Assessment, Evaluation, and Testing	1.9	2.7	2.9	3.4	3.4	14.3	CA
3. Families, Communities, and Children's Learning	.9	1.1	1.3	1.5	1.5	6.3	CA
4. Education in the Inner Cities	.9	1.0	1.5	2.0	2.0	7.4	CA
5. Cultural Diversity and Second Language Learning	.8	1.0	1.5	1.5	1.6	6.4	CA
6. Writing and Literacy	.7	1.0	1.0	1.1	1.1	4.9	G
7. Student Learning	1.1	1.5	1.5	1.5	1.6	7.2	G
8. Learning to Teach	1.0	1.2	1.5	1.5	1.6	6.8	CA
9. Postsecondary Learning, Teaching, and Assessment	1.0	1.2	1.2	1.2	1.3	5.9	G
10. Teacher Performance Evaluation and Educational Accountability	1.0	1.0	1.0	1.1	1.1	5.2	G
11. Education Policies and Student Learning	1.0	1.5	1.5	1.5	1.6	7.1	CA
12. Adult Literacy	1.2	2.0	2.0	2.5	2.5	10.2	CA
13. Education Quality of the Workforce	.9	1.0	1.5	1.5	1.6	6.5	G
14. Organization and Restructuring of Schools	1.0	1.3	1.6	1.6	1.7	7.2	G
15. Mathematics Teaching and Learning	.7	1.0	1.2	1.5	1.5	5.9	G
16. Science Teaching and Learning	.8	1.0	1.5	1.8	1.8	6.9	G
17. Education Finance and Productivity	.7	1.0	1.3	1.5	1.5	6.0	CA
18. Literature	.7	.8	.8	1.0	1.0	4.3	G
Totals	17.1	22.4	26.4	29.3	30.1	125.3	

Estimated number of awards: 18 (FY 1990—1 award; FY 1991—17 awards).

Project period: Up to 60 months.

Applicable regulations: (a) The Education Department General Administrative Regulations (EDGAR) 34 CFR parts 74, 75, 77, 81, and 85, and (b) The regulations for this program in 34 CFR parts 706 and 708.

Supplementary information: Based on the response to the September 12, 1989, **Federal Register** notice soliciting written comments on 12 proposed research and development centers, the President's Education Summit with the Governors, and a meeting of a Blue Ribbon Group to advise the Assistant Secretary on the centers competition, the Secretary has decided to increase the number of centers from 12 to 18. The 18 educational research and development centers are designed to reflect a comprehensive approach to education research, to encourage sustained basic and applied research, and to support timely practical responses to current needs.

All educational research and development centers are based entirely upon the priorities listed in the regulations for this program at 34 CFR 706.3(b) except for two, Education in the Inner Cities, and Cultural Diversity and Second Language Learning. The September 12, 1989 **Federal Register** notice proposed a center on Education in the Inner Cities and the Secretary received significant public response supporting a center on this topic. Therefore, this center is included in the list of 18 centers for this competition. Further, in the September 12, 1989 notice the Secretary proposed cultural diversity as a cross-cutting issue and indicated prospective centers would be encouraged to propose activities to address this issue. However, in light of public comment the Secretary has decided to fund a separate center focusing on Cultural Diversity and Second Language Learning.

Priorities: For each center competition listed below, the Secretary, under 34 CFR 75.105(c)(3) and 34 CFR 706.3(b), gives an absolute preference to applications that meet the priority or priorities specified for each center. The numbers following each priority correspond to the applicable priorities listed in the regulations for this program at CFR 706.3(b). The 18 individual mission statements describing the activities the Secretary is particularly interested in supporting will be found in the application package; however, these mission statements do not contain binding rules for the centers competition.

(1) *Research on Dissemination and Knowledge Utilization.* (Dissemination and knowledge utilization in education (Priority 11)).

(2) *Assessment, Evaluation, and Testing.* (Evaluation and indicator measures, including testing, measurement, and standards of performance (Priority 7)).

(3) *Families, Communities, and Children's Learning.* (Learning (Priority 1); Home, family, cultural, and community influences on education, including parental choice and involvement in schooling (Priority 14); Early childhood education (Priority 23)).

(4) *Education in the Inner Cities.* (Education of special populations, including the educationally disadvantaged or students-at-risk, those with limited English proficiency, the handicapped, immigrants, and the academically gifted and talented (Priority 38); Secondary education (Priority 29); Early adolescent education (Priority 30); Home, family, cultural, and community influences on education, including parental choice and involvement in schooling (Priority 14)).

(5) *Cultural Diversity and Second Language Learning.* (Education of special populations, including the educationally disadvantaged or students-at-risk, those with limited English proficiency, and immigrants (Priority 38)).

(6) *Writing and Literacy.* (English literacy, including reading, writing, and language skills (Priority 19)).

(7) *Student Learning.* (Learning (Priority 1); Student achievement, including students' motivation to learn, their failure to learn, and their failure to attend school and graduate (Priority 13)).

(8) *Learning to Teach.* (Teaching (Priority 2); Teachers (Priority 34); Learning (Priority 1)).

(9) *Postsecondary Learning, Teaching and Assessment.* (Postsecondary education (Priority 32); Learning (Priority 1); Teaching (Priority 2); Evaluation and indicator measures, including testing, measurement, and standards of performance (Priority 7)).

(10) *Teacher Performance Evaluation and Educational Accountability.* (Teaching (Priority 2); Evaluation and indicator measures, including testing, measurement, and standards of performance (Priority 7); Teachers (Priority 34); School professionals and personnel (Priority 35)).

(11) *Education Policies and Student Learning.* (Implementation and effects of educational policies (Priority 39); Learning (Priority 1); Improvement in education, including State and local reform initiatives (Priority 12)).

(12) *Adult Literacy.* (Adult and continuing education (Priority 33); English literacy, including reading, writing, and language skills (Priority 19); Postsecondary education (Priority 32)).

(13) *Education Quality of the Workforce.* (Education, work, and careers (Priority 15); Adult and continuing education (Priority 33); Postsecondary education (Priority 32)).

(14) *Organization and Restructuring of Schools.* (Organization and management of schools, including effective education leadership (Priority 6); Governance of education, including school policies and practices (Priority 8); Improvement in education, including State and local reform initiatives (Priority 12); Implementation and effects of educational policies (Priority 39)).

(15) *Mathematics Teaching and Learning.* (Mathematics (Priority 20); Learning (Priority 1); Teaching (Priority 2)).

(16) *Science Teaching and Learning.* (Science (Priority 21); Learning (Priority 1); Teaching (Priority 2)).

(17) *Education Finance and Productivity.* (Educational finance and productivity (Priority 9); Implementation and effects of educational policy (Priority 39)).

(18) *Literature Teaching and Learning.* (Literature (Priority 26); Learning (Priority 1); Teaching (Priority 2)).

Weighting for Selection Criteria: Under 34 CFR 706.20(d), the Secretary awards an additional 10 points among the selection criteria listed at § 780.11, as follows: 10 additional points to the criterion in § 708.11(c) (Plan of operation), bringing the total for this criterion to 25 points. The distribution of the 10 additional points is the same for all 18 educational research and development centers.

Information Conference: An information conference for prospective applicants will be held on April 2, from 9 a.m. to 1 p.m. in the U.S. Department of Health and Human Services, North Building Auditorium, 330 Independence Avenue, SW., Washington, DC.

Note: Use "C" Street entrance. Potential applicants who are unable to attend the Information Conference are invited to contact Dr. Joseph Conaty or Mr. Ned Chalker for a written report of the conference.

For Applications or Information Contact: Dr. Joseph Conaty, or Mr. Ned Chalker, U.S. Department of Education, OERI, Office of Research, Room 610, 555 New Jersey Avenue, NW., Washington, DC 20208–5573, (202) 357–6079.

Authority: 20 U.S.C. 1221e.

Dated: March 2, 1990.

Christopher T. Cross,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 90–5258 Filed 3–7–90; 8:45 am]

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federal register

Thursday
March 8, 1990

Part V

Department of Education

Secretary's Fund for Innovation in Education (FIE): Innovation in Education Program; Notices

DEPARTMENT OF EDUCATION

[CFDA No. 84.215A]

Innovation in Education Program; Applications for New Awards for Fiscal Year 1990

Purpose of Program: To provide assistance to State educational agencies, local educational agencies, institutions of higher education, private schools, and other public and private agencies, organizations and institutions for projects that show promise of identifying and disseminating innovative educational approaches at the preschool, elementary, and secondary levels.

Deadline for Transmittal of Applications: 5/4/90.

Deadline for Intergovernmental Review: 7/3/90.

Applications Available: 3/22/90.

Available Funds: $2,400,000 (est.).

Estimated Range of Awards: $50,000–$400,000.

Project Period: Up to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81 and 85, and the regulations concerning Student Rights in Research, Experimental Programs, and Testing in 34 CFR part 98.

Invitational Priorities: The Secretary is particularly interested in projects that:

(a) *Validate program models for underachieving students.* These projects would implement and evaluate a school-level model of services for underachieving students in three or more schools with differing demographic and administrative circumstances. The Secretary encourages models based on the findings of current research on educating underachieving students and achieving change in school organization and procedures. Projects that address this priority are encouraged to include evaluation plans that (1) will provide results that could lead to approval by the Department of Education's Program Effectiveness Panel and to subsequent dissemination through the National Diffusion Network; and (2) address the academic impact of the model on students, the cost of implementation and operation, and other aspects of implementation that would assist potential users to evaluate the utility and fit of the model in their school situations. The Secretary anticipates that these projects would cost from $200,000 to $400,000 per year.

(b) *Demonstrate school- or district-level strategies for serving underachieving students.* These projects would develop in a single school an approach to improving the education of underachieving students that reflects the findings of current research and the unique characteristics of the applicant's school. It is intended that these projects would allow schools and districts that can demonstrate a commitment to school improvement on the part of teachers, administrators, parents, and the general community to focus particular attention on underachieving students as a part of a larger reform or restructuring effort. Projects that address this priority are encouraged to include a plan to evaluate the impact of the model on students served. The Secretary anticipates that these projects would cost from $50,000 to $100,000 per year.

General Considerations: For applications that propose to either demonstrate or validate models for underachieving students, the Secretary is particularly interested in models that:

(a) Introduce underachieving students to higher academic standards such as those required to meet national goals for student achievement.

(b) Utilize comprehensive, school-wide approaches that avoid fragmenting services for underachieving students, including students eligible for categorical programs such as chapter 1 and Special Education.

(c) Provide alternatives to ability grouping or tracking—dividing classes into groups based on ability, or setting different curriculum goals for classes for the advanced, middle, and slowest students—for helping underachieving students maximize their potential.

(d) Involve teachers and parents in setting individual performance goals and individual learning plans for underachieving students that would result in higher levels of achievement.

(e) Provide alternatives to removing the underachieving student from the regular curriculum for remedial or supplemental classes by such strategies as providing voluntary on-site before or after school instruction and providing individual tutors.

(f) In those programs oriented to the secondary level, provide incentives and rewards to underachieving students with mediocre academic performance who make measurable progress toward improved achievement and readiness for college and work.

(g) Involve business and industry in programs to improve the academic achievement and college and work readiness of students, including obtaining financial and in-kind assistance from business and industry to support such projects.

However, under 34 CFR 75.105(c)(1) an application that meets one or more of the invitational priorities does not receive competitive or absolute preference over other applications.

Selection Criteria: Under EDGAR, 34 CFR 75.210(c), the Secretary is authorized to distribute an additional 15 points among the criteria to bring the total to a maximum of 100 points. For the purpose of this competition, the Secretary will distribute the additional points as follows:

Plan of Operation. (EDGAR, 34 CFR 75.210(b)(3)). Five (5) additional points will be included for a possible total of 20 points for this criterion; and

Evaluation Plan. (EDGAR, 34 CFR 75.210(b)(6)). Ten (10) additional points will be added for a possible total of 15 points for this criterion.

SUPPLEMENTARY INFORMATION: Although the Secretary has chosen to use the EDGAR selection criteria and invitational priorities for this competition, he may establish specific regulations and/or absolute priorities for future grant competitions.

FOR APPLICATIONS OR INFORMATION CONTACT: Shirley Steele, Fund for the Improvement and Reform of Schools and Teaching, U.S. Department of Education, 555 New Jersey Avenue NW., room 522, Washington, DC 20208–5524. Telephone (202) 357–6496.

Authority: 20 U.S.C. 3151.

Dated: March 2, 1990.

Christopher T. Cross,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 90–5266 Filed 3–7–90; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

[CFDA No. 84.215B]

National Program for Comprehensive School Health Education; Applications for New Awards for Fiscal Year 1990

Purpose: To encourage the provision of comprehensive school health education for elementary and secondary students through assistance to State educational agencies, local educational agencies, institutions of higher education, private schools, and other public and private agencies, organizations and institutions.

Deadline for Transmittal of Applications: 5/4/90.

Deadline for Intergovernmental Review: 7/3/90.

Applications Available: 3/22/90.

Available Funds: $1,515,000.

Estimated Range of Awards: $50,000 to $250,000.

Estimated Number of Awards: 15.

Estimated Average Size of Awards: $100,000.

Project Period: 12 to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, and 85, and the regulations concerning Student Rights in Research, Experimental Programs, and Testing in 34 CFR part 98.

Invitational Priorities: The Secretary is particularly interested in supporting projects that:

• Demonstrate and evaluate promising approaches to providing comprehensive school health education, and disseminate information to others who may wish to adopt or adapt such approaches.

• Provide inservice training related to the improvement of and implementation of a comprehensive school health education program, including training concerning personal health and fitness, nutrition, prevention of chronic diseases, and accident prevention and safety, for elementary and secondary school teachers and administrators.

For projects that address either of these priorities, the Secretary is interested in projects involving parents in the planning and implementation of comprehensive health education programs that include education about personal health and fitness, nutrition, prevention of chronic diseases, and accident prevention and safety.

The Secretary encourages projects that evaluate their programs in a manner that will permit assessment of project impact on both school practices and students. Evaluation plans that would lead to approval by the Department of Education's Program Effectiveness Panel and to subsequent dissemination through the National Diffusion Network are particularly encouraged.

Under 34 CFR 75.105(c)(1), however, an application that addresses the invitational priorities does not receive competitive or absolute preference over other applications.

Selection Criteria: Under EDGAR, 34 CFR 75.210(c), the Secretary is authorized to distribute an additional 15 points among the criteria to bring the total to a maximum of 100 points. For the purpose of this competition, the Secretary will distribute the additional points as follows:

Plan of Operation. (EDGAR, 34 CFR 75.210(b)(3)). Five (5) additional points will be included for a possible total of 20 points for this criterion; and,

Evaluation plan. (EDGAR, 34 CFR 75.210(b)(6)). Ten (10) additional points will be included for a possible total of 15 points for this criterion.

FOR APPLICATIONS OR INFORMATION CONTACT: Dr. Allen A. Schmieder, U.S. Department of Education, Fund for the Improvement and Reform of Schools and Teaching, 555 New Jersey Avenue NW., room 522, Washington, DC 20208–5524. Telephone (202) 357–6496.

Authority: 20 U.S.C. 3151, 3155.

Dated: March 12, 1990.

Christopher T. Cross,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 90–5267 Filed 3–7–90; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No. 84.215C]

Technology Education; Applications for New Awards for Fiscal Year 1990

Purpose of Program: To provide assistance to State educational agencies, local educational agencies, institutions of higher education, private schools, and other public and private agencies, organizations and institutions to develop materials for educational television and radio programming for use in elementary and secondary education together with programs that use telecommunications and video resources for the instruction of public and private elementary and secondary school students and for related teacher training programs for public and private school teachers. Telecommunications means the full range of technologies that can be used for educational instruction.

Deadline for Transmittal of Applications: 5/4/90.

Deadline for Intergovernmental Review: 7/3/90.

Applications Available: 3/22/90.

Available Funds: $650,000 (est.).

Estimated Range of Awards: $100,000–$400,000.

Estimated Average Size of Awards: $200,000.

Estimated Number of Awards: 3–4.

Project Period: 12 to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) 34 CFR parts 74, 75, 77, 79, 80, 81, and 85, and the regulations concerning Student Rights in Research, Experimental Programs, and Testing in 34 CFR part 98.

Invitational Priority: The Secretary is particularly interested in projects that demonstrate innovative uses of technologies used in educational instruction, including educational television, closed circuit television systems, cable television, radio broadcasts, and video and audio discs and tapes in ways that strengthen the school curriculum, particularly in the critical subjects of math, science, reading, and foreign languages. These projects are encouraged to include strong evaluation components to document the results and effectiveness of the projects in terms of student outcomes. Within this invitational priority, the Secretary is particularly interested in: (1) Projects that involve parents working cooperatively with teachers and schools; (2) projects that use technology to support alternatives to ability grouping, and (3) projects to substantially expand the use of innovations in the application of technology to improve elementary and secondary instruction.

Under 34 CFR 75.105(c)(1), however, an application that addresses this invitational priority does not receive competitive or absolute preference over other applications.

Selection Criteria: Under EDGAR, 34 CFR 75.210(c), the Secretary is authorized to distribute an additional 15 points among the criteria to bring the total to a maximum of 100 points. For the purpose of this competition, the Secretary will distribute the additional points as follows:

Plan of Operation: (EDGAR, 34 CFR 75.210(b)(3).) Five (5) additional points will be included for a possible total of 20 points for this criterion; and

Evaluation Plan: (EDGAR, 34 CFR 75.210(b)(6).) Ten (10) additional points will be added for a possible total of 15 points for this criterion.

SUPPLEMENTARY INFORMATION: Although the Secretary has chosen to use the EDGAR selection criteria and invitational priorities for this competition, he may establish specific regulations and/or absolute priorities for future grant competitions.

FOR APPLICATIONS OR INFORMATION CONTACT: Dr. Allen A. Schmieder, Fund for the Improvement and Reform of Schools and Teaching, U.S. Department of Education, 555 New Jersey Avenue NW., Room 522, Washington, DC 20208–5524. Telephone (202) 357–6496.

Authority: 20 U.S.C. 3151, 3153.

Dated: March 2, 1990.

Christopher T. Cross,

Assistant Secretary, Office of Educational Research and Improvement.

[FR Doc. 90–5268 Filed 3–7–90; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.: 84.215D]

Computer-Based Instruction Program; Applications for New Awards for Fiscal Year 1990

Purpose: To provide assistance to State educational agencies, local

educational agencies, institutions of higher education, private schools, and other public and private agencies, organizations and institutions for projects that strengthen and expand computer-based education resources in public and private elementary and secondary schools.

Deadline for Transmittal of Applications: 5/4/90.

Deadline for Intergovernmental Review: 7/3/90.

Applications Available: 3/22/90.

Available Funds: $900,000.

Estimated Range of Awards: $50,000 to $200,000.

Estimated Number of Awards: 5–8.

Project Period: Up to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) 34 CFR part; 74, 75, 77, 79, 80, 81 and 85, and the regulations concerning Student Rights in Research, Experimental Programs, and Testing in 34 CFR part 98.

Invitational Priority: The Secretary is particularly interested in projects to demonstrate model strategies for increasing computer-based instruction at the school site to help students meet more rigorous academic standards. Within this invitational priority, the Secretary is interested in strategies that:

- Have the potential to be replicated.
- Promote comprehensive, school-wide approaches that effectively utilize computers to improve instruction.
- Include school-wide teacher training programs to help teachers utilize and integrate computers in classroom instruction.
- Involve business and industry in efforts to expand computer-based instruction for elementary and secondary schools.

Under 34 CFR 75.105(c)(1), however, an application that meets this invitational priority does not receive competitive or absolute preference over other applications.

Selection Criteria: Under EDGAR, 34 CFR 75.210(c), the Secretary is authorized to distribute an additional 15 points among the criteria to bring the total to a maximum of 100 points. For the purpose of this competition, the Secretary will distribute the additional points as follows:

Plan of Operation. (EDGAR, 34 CFR 75.210(b)(3)). Five (5) additional points will be added for a possible total of 20 points for this criterion; and

Evaluation Plan. (EDGAR, 34 CFR 75.210(b)(6)). Ten (10) additional points will be added for a possible total of 15 points for this criterion.

SUPPLEMENTARY INFORMATION: Although the Secretary has chosen to use the EDGAR selection criteria and invitational priorities for this competition, he may establish specific regulations and/or absolute priorities for future grant competitions.

FOR APPLICATIONS OR INFORMATION CONTACT: Dr. Allen Schmieder, Fund for the Improvement and Reform of Schools and Teaching, U.S. Department of Education, 555 New Jersey Avenue, NW room 522, Washington, DC 20208–5524. Telephone (202) 357–6496.

Authority: 20 U.S.C. 3151, 3154.

Dated: March 2, 1990.

Christopher T. Cross,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 90–5269 Filed 3–7–90; 8:15 am]

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federal register

Thursday
March 8, 1990

Part VI

Department of Transportation

Research and Special Programs Administration

City of San Jose, California; Restrictions on Storage of Hazardous Materials; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Inconsistency Ruling No. IR-28; Docket IRA-45]

City of San Jose, California; Restrictions on Storage of Hazardous Materials

Applicant: Yellow Freight System, Inc.

Regulations Affected: Chapter 17.68 of the San Jose Municipal Code.

Applicable Federal Requirements: Hazardous Materials Transportation Act (HMTA) (Pub. L. 93-633, 49 U.S.C. App. 1801 *et seq.*) and the Hazardous Materials Regulations (HMR) (49 CFR parts 171-180) issued thereunder.

Mode Affected: Highway.

Issue Date: March 2, 1990.

Summary: This inconsistency ruling is the opinion of the Office of Hazardous Materials Transportation (OHMT) of the Department of Transportation (DOT) concerning whether chapter 17.68 of the San Jose, California Municipal Code is inconsistent with the HMTA and the HMR and thus preempted by section 112(a) of the HMTA. This ruling was applied for and is issued under the procedures set forth at 49 CFR 107.201-107.209.

Ruling: Insofar as they apply to the transportation of hazardous materials, including the loading, unloading and storage incidential to that transportation, the following provisions of chapter 17.68 of the City of San Jose's Code are inconsistent with the HMTA and the HMR and thus preempted under section 112(a) of the HMTA (49 U.S.C. App. 1811(a)):

(1) The definitions of "hazardous material" in §§ 17.68.040D and 17.68.100;

(2) The permitting and related information and documentation requirements throughout chapter 17.68;

(3) All other information and documentation requirements, including the emergency response information requirements, throughout chapter 17.68;

(4) The hazardous materials storage requirements of § 17.68.160;

(5) The hazardous materials loading and unloading requirements of § 17.68.210;

(6) The incident reporting requirements of § 17.68.450 insofar as they apply to incidents involving irradiated reactor fuel; and

(7) The civil penalty provisions of § 17.68.1050 insofar as they apply to inconsistent provisions of chapter 17.68.

Insofar as they apply to the transportation of hazardous materials, including the loading, unloading and storage incidental to that transportation, the following provisions of chapter 17.68 of the City of San Jose's Code are consistent with the HMTA and the HMR:

(1) The incident reporting requirements of § 17.68.450 except insofar as they apply to incidents involving irradiated reactor fuel; and

(2) The civil penalty provisions of § 17.68.1050 insofar as they apply to consistent provisions of chapter 17.68.

This ruling does not address the consistency of any provisions not described above. It also does not address the consistency of any provisions of chapter 17.68 as applied to any activities other than the transportation of hazardous materials, including the loading, unloading and storage incidental to such transportation.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590-0001 [Tel. (202) 366-4400].

I. Background

On September 9, 1988, Yellow Freight Systems, Inc. filed an inconsistency ruling application. That application requested a ruling concerning the consistency of chapter 17.68 of the San Jose Municipal Code with the HMTA and the HMR.

Yellow Freight alleges that the City's permitting system for hazardous materials storage facilities, contained in chapter 17.68 of its Municipal Code, is inconsistent with the HMTA and the HMR.

On October 5, 1988, OHMT published a Public Notice and Invitation to Comment (53 FR 39196) soliciting public comments on Yellow Freight's application. Comments in support of a finding of inconsistency were filed by the applicant and by Reactives Management Corporation of Chesapeake, Virginia. Opposing comments, supporting a finding of consistency, were filed by the City of San Jose; the City of Vernon, California; the City of Sunnyvale, California; the City of Palo Alto, California; the City of Morgan Hill, California; the City of Hayward, California Fire Department; and the County of Ventura, California Fire Protection District.

II. General Authority and Preemption Under the HMTA

The HMTA at § 112(a) (49 U.S.C. App. 1811(a)) preempts "* * * any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in the [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state and local requirements that are "consistent."

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" (S. Rep. 1192, 93rd Cong., 2d Sess., 37 (1974)). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR, issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity.

Although advisory in nature, inconsistency rulings issued by OHMT under 49 CFR part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision. If a state or political subdivision requirement is found to be inconsistent, the state or local government may apply to OHMT for a waiver of preemption. 49 U.S.C. App. 1811(b); 49 CFR 107.215-107-225.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the Federal statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978

Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption under the HMTA will be considered. A court might find a non-Federal requirement preempted for other reasons, such as statutory preemption under another Federal statute, preemption under state law, or preemption by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, OHMT does not make such determinations in an inconsistency ruling proceeding.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following criteria for determining whether a state or local requirement is consistent with, and thus not preempted by the HMTA:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

These criteria are based upon, and supported by, U.S. Supreme Court decisions on preemption. These include *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); and Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

The first criterion, the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirements causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, involves determining whether a state or local requirement is an obstacle to executing and accomplishing the purposes of the HMTA and the HMR: a requirement constituting such an obstacle is inconsistent. Application of this second criterion requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through OHMT's regulatory program.

III. The Application for Inconsistency Ruling

On September 12, 1988, Lawrence W. Bierlein, Attorney for Yellow Freight System, Inc. (Yellow Freight) of Overland Park, Kansas, filed an application under 49 CFR 107.203 for an inconsistency ruling concerning restrictions imposed by the City of San Jose, California (the City), on the storage of hazardous materials.

Yellow Freight alleges that it has expanded its trucking terminal in a commercial/industrial-zoned area of the City, it is ready to use the expended terminal for handling all types of packaged freight (including hazardous materials), but the City is denying use of the facility for transportation purposes.

Yellow Freight has submitted three City notices relating to the City's permitting system for hazardous materials storage facilities. A permit and a full Hazardous Materials Management Plan allegedly are required for a business storing hazardous materials consisting of 500 pounds of solids, 55 gallons of liquids or 200 cubic feet of compressed gases.

One City notice summarizes the City's Hazardous Materials Storage Ordinance, San Jose Municipal Code, chapter 17.68, which became effective July 1, 1983. It applies to explosives, flammable and combustible liquids, flammable solids, oxidizers, flammable and nonflammable gases, poisons, corrosives and other regulated materials.

That notice summarizes the required contents of the Hazardous Materials Management Plan (required to obtain a Hazardous Materials Storage Permit) as follows:

(1) General business information;
(2) General area map with specified details;
(3) Facility map with details concerning room uses, emergency equipment, and hazardous materials locations, quantities and tank capacities;
(4) Hazardous material inventory statement (names, hazard class and total quantity);
(5) Storage and container information;
(6) Separation of certain incompatible chemicals;
(7) Monitoring plan (leak detection procedures, including monthly monitoring of underground storage tanks); and
(8) Inspection and spill logs.

Yellow Freight's final enclosure is the City's Ordinance itself, chapter 17.68 of the San Jose Municipal Code. That Chaper, entitled Hazardous Materials Storage Permit, contains 13 parts: General Provisions, Materials Regulated, Containment Standards, Hazardous Materials Management Plan, Hazardous Materials Inventory, Responsibility, Inspections and Records, Application for Permit, Denial, Remedial Action, Hearing Procedure, Enforcement, and Miscellaneous.

Key definitions in § 17.68.040 of the Ordinance include:

C. Hazard class means explosives A, explosives B, explosives C, blasting agents, flammable liquids, combustible liquids, flammable solids, oxidizers, organic peroxides, corrosive materials, flammable gases, nonflammable gases, poisons A, poisons B, irritating materials, etiologic agents, radioactive materials, other regulated materials (ORM) A, B, C, D and E. For purposes of this chapter, the U.S. Department of Transportation (DOT) definitions in 49 CFR part 173 as amended shall be utilized; however, whenever the definitions in 49 CFR part 173 refer to transportation or hazards associated with transportation, they shall be deemed to refer to storage or other regulated activity under this chapter.

D. Hazardous material means any material which is subject to regulation pursuant to part 2 of this chapter. A mixture shall be deemed to be a hazardous material if it either is a waste and contains any material regulated pursuant to part 2 of this chapter, or is a nonwaste and contains one percent by volume or more of any material regulated pursuant to part 2 of this chapter.

The referenced part 2, in § 17.68.100, describes the materials regulated under the Ordinance, as follows:

A. Any material listed as a hazardous and/or extremely hazardous material or hazardous and/or extremely hazardous waste in sections 66680 and 66685 of title 22 of the California Administrative Code, as amended, whether such material is stored or handled in waste or nonwaste form; or

B. Any material which is listed on the list of Environmental Protection Agency (EPA) pollutants, 40 Code of Federal Regulations, § 401.15, as amended; or

C. Any material which is classified by the National Fire Protection Association (NFPA) as either a flammable liquid, a class II combustible liquid or a class IIIA combustible liquid; or

D. Any material which is listed by the director of the department of industrial relations in title 8, California Administrative Code, section 339, as amended, excluding all footnotes thereto and subject to the exclusions specified in this subsection. Such exclusions shall apply only to materials which are not otherwise regulated pursuant to this section 17.68.100. These exclusions shall be as follows:

* * * * *

E. Any material which has been determined to be hazardous based upon any appraisal or assessment by or on behalf of the party storing this material in compliance with the requirements of the EPA or the California Department of Health Services, or which should have been, but was not, determined to be hazardous due to the deliberate failure of the party storing the material to comply with the requirements of the EPA and/or the department of health services; or

F. Any material which has been determined by the party storing it, through testing or other objective means, to be likely to create a significant potential or actual hazard to public health, safety or welfare. This subsection shall not establish a requirement to test for the purpose of this chapter.

With respect to movement of hazardous materials, section 17.68.210 provides:

B. When hazardous materials are moved into or out of a storage facility, they shall remain in the travel path only for the time reasonably necessary to transport the hazardous material and such movement shall be in a manner which will not result in an unauthorized discharge.

Yellow Freight explains that the HMTA (49 U.S.C. App. 1802(b)) defines transportation under the HMTA as "any movement of property by any mode, *and any loading, unloading, or storage incidental thereto*" (emphasis added). It cites 49 CFR 171.15 and 171.16 as including temporary storage-related hazardous materials incidents which must be reported to OHMT.

The HMR, says Yellow Freight, defines hazardous materials in § 171.8, as well as in §§ 175.50, 173.88, 173.100, 173.115, 173.150, 173.151a, 173.240, 173.300, 173.325, 173.386, 173.403 and 173.500.

Yellow Freight also cites the following HMR provisions as possibly inconsistent with the City's requirements:

(1) Part 177 sections referencing storage and handling, including subpart B provisions on loading and unloading of motor vehicles;

(2) Section 177.834, which addresses the proximity of people or public facilities to the handling of certain poisons;

(3) Part 107 exemptions (e.g., DOT-E 8308) which impose storage and handling requirements;

(4) Section 177.848(f), which requires that hazardous materials not be loaded, transported or stored together except as provided in a detailed chart in that section;

(5) Part 177's provisions on disposition and handling of damaged freight, which include handling of materials in motor carriers' terminals;

(6) Section 177.853(b), which provides that undeliverable shipments, after 48 hours, must be returned to the shipper or stored in a suitable storage place; and

(7) Section 177.854(e), which requires proper storage of damaged containers.

Yellow Freight cites numerous prior inconsistency rulings and a court case for the proposition that the City's hazardous materials definitions and paperwork requirements invade an area of exclusive Federal regulation. It also alleges conflicts between the City's requirements and § 177.800(a) (training) and 177.853 (expedited handling and delivery).

Finally, Yellow Freight contends that the City's requirements are inconsistent because they involve unfettered discretion with respect to permitting, mandatory carrier development of emergency response plans, and written incident reporting—all of which it asserts have been found inconsistent in earlier inconsistency rulings and court decisions.

Yellow Freight concludes that the San Jose ordinance as it is applied to motor carrier terminal operations should be found inconsistent with the HMTA and the HMR and, therefore, preempted. It states that fundamental portions of the San Jose requirements fail both the dual compliance and obstacle tests of § 107.209(c) of the HMR and that, therefore, the City's permit program as applied in transportation must be found invalid in its entirety.

IV. Public Comments Against Consistency

One public commenter, other than the Applicant, supports a finding of inconsistency. Reactives Management Corporation contends that the City's Ordinance is inconsistent for two reasons. The first reason alleged is that the Ordinance impermissibly expands the HMR's definition of regulated hazardous materials by referring to other Federal regulations, to State codes, and to National Fire Protection Association (NFPA) standards. The second reason asserted is that the Ordinance will have a significant negative impact on the local movement and storage ("on corporate property, probably inside a terminal building") of hazardous materials.

In its own comment, Yellow Freight objects to language in the public notice on its application implying that land use requirements *per se* may not be inconsistent with the HMTA or the HMR. It says that the issue is whether the City's requirements are inconsistent as applied to hazardous materials transportation regardless of whether they are characterized as land use or transportation requirements. It asserts that the City's requirements are inconsistent with the storage, loading and unloading requirements of the HMR.

The Applicant contends that Congress envisioned a uniform set of regulations in order to avoid confusion concerning who and what are regulated by whom. Thus, it alleges, the avoidance of confusion is critical—an assertion it says is supported by the HMTA's legislative history, court decisions, inconsistency rulings and numerous studies on hazardous materials transportation.

Furthermore, Yellow Freight argues that its San Jose terminal facility employees all are involved in transportation and that the cargo at the facility is owned by shippers and consignees—not Yellow Freight—and is in commerce and transportation. It says that its employees are all trained to handle hazardous materials as defined and regulated in the HMR, including the use of HMR shipping names and classifications. The difficulty it foresees concerning compliance with the San Jose requirements is that it would have to create new tariff requirements compelling shippers to describe freight according to the San Jose definitions through appropriate shipping papers, markings or labels. Only in this way, it says, can it determine whether a package contains "Any material which is listed by the director of the department of industrial relations in Title 8, California Administrative Code, section 339, as amended, excluding all footnotes thereto * * *," or whether it "contains one percent by volume or more of any material regulated pursuant to part 2" of the San Jose Hazardous Materials Permit regulations. The Applicant claims that it would have to develop communications systems and training programs to comply with the San Jose requirements in order to comply with the City's requirements, particularly those mandating updates of the storage permit, hazardous materials management plan or the hazardous materials inventory.

Furthermore, Yellow Freight sees broader ramifications:

* * * DOT must recognize that if the San Jose restrictions are valid despite their deviation from DOT requirements, every city in every State could have its own terminology and requirements, totally destroying the uniform training programs an interstate motor carrier like Yellow Freight has put in place to meet DOT regulations in 49 CFR 177.800.

It also points out that RSPA has proposed, in Docket HM-126, to expand the detail of its existing training requirements. (See 54 FR 31144, July 26, 1989.) It says that additional local requirements would destroy the uniformity contemplated by RSPA. In addition, it asserts that this desire for uniformity led Congress, when it establishes emergency planning and community right-to-know requirements in SARA, title III, 42 U.S.C. 11001 *et seq.*, to include a provision in Section 11047 saying that generally none of the SARA, Title III requirements "apply to the transportation, *including the storage incident to transportation*, of any substance or chemical" otherwise subject to SARA, title III. (Emphasis added by Applicant.)

Yellow Freight further contends that the City's use and construction of the words "facility" and "storage" result in the application of its requirements to

freight brought onto Yellow Freight's terminal property in a truck and never removed from that truck. It argues that the City's permit essentially is a permit to function as a transportation facility and that failure to obtain such a permit necessarily would result in the transfer of Yellow Freight's operations to another jurisdiction. From this premise, it concludes:

> The permit is replete with all the ambiguities, paperwork burdens, and unfettered local discretion condemned in other DOT inconsistency rulings. Yellow Freight does not know what would have to be done to assure grant of a permit. We suggest that the City is intentionally exporting an existing transportation facility to another jurisdiction in the guise of local fire control—the exact result which section 1811(a) was intended to preclude.

The Applicant concludes its comments by asking that RSPA examine the impact of the City's requirements on operations covered by the HMR, particularly the communication and permit requirements of the City. It closes by asserting that the City's requirements are inconsistent because of direct conflicts and because they pose an obstacle to accomplishment of the purposes of Congress in establishing a nationally uniform set of hazardous materials transportation requirements.

V. Public Comments Supporting Consistency

The City of San Jose and six other local jurisdictions in California filed comments supporting the consistency of San Jose's requirements.

San Jose's initial argument is that OHMT should dismiss Yellow Freight's application because that Company contractually agreed to comply with the City's requirements and should be estopped to challenge them. Specifically, it alleges that Yellow Freight executed an acceptance agreement consenting to a permit condition stating:

> The use and/or storage of hazardous or toxic materials on, under, above, or within the site covered by this Plan Development permit shall conform to the City's "Hazardous Materials Ordinance" and all other relevant policies and regulations.

Thus, the City concludes that Yellow Freight is contractually obligated to comply with the City's requirements and that an OHMT finding of inconsistency would not relieve Yellow Freight of those obligations. The City adds that a constitutional right may be waived and argues that Yellow Freight had appropriate channels in which to challenge the terms of its permit.

San Jose's major argument, however, is that its Hazardous Materials Storage Ordinance (HMSO) is consistent with the HMTA. It contends that the HMSO is in complete harmony with the HMTA and is an appropriate exercise of the City's traditional local governmental functions of fire suppression and emergency response.

It says that protection of the public from fires involving toxins and hazardous materials is very relevant in San Jose because of the large concentration of such materials stored there. It explains the City's rationale as follows:

> The HMSO seeks to minimize the danger to the public from such a danger by mandating that buildings in which hazardous materials are stored are required to meet certain design requirements that include increased density sprinklers, separate storage rooms for flammable liquids, that incompatible chemicals be isolated or separated, and that secondary containment systems be utilized to prevent the release of toxic material into the environment.

The City states that the HMSO specifically utilizes the hazard classes defined in part 173 of the HMR. Also, it provides a statement from its Hazardous Materials Program Manager stating that there is no incompatibility between the HMTA and the City's HMSO.

San Jose argues that it is carrying out its local governmental emergency response responsibilities through the HMSO. It says "there is no regulation promulgated pursuant to the HMTA which speaks to, much less purports to preempt, local fire safety regulations for sprinkler systems, segregation of incompatible chemicals and secondary containment."

It cites Inconsistency Ruling No. IR-2 (IR-2), 44 FR 75565 at 75568 (Dec. 20, 1979) for the proposition that emergency response is a local responsibility. It cites two Federal court cases for the proposition that a local government need not seek an inconsistency ruling prior to enforcing its requirements and concludes:

> Should the OHMT rule that the City's land use, building code, sprinkler and secondary containment regulations may be enforced, a nationwise vacuum would be created in the absence of Federal regulations addressing these subjects. Nothing suggests that the Congress intended to create such a vacuum, or to substitute Federal zonig for building code requirements * * *

Addressing the "dual compliance" test for consistency, the City contends that compliance with both the HMTA and the HMSO is possible because the HMSO is consistent with Federal regulations and their underlying purposes. In addition, it argues that the HMSO regulates storage only and that it does not regulate transportation nor purport to do so. It also asserts that Yellow Freight has failed to articulate specifically how the dual compliance test is not met by the HMSO.

As to the "obsolete" test, San Jose states that there is no obstacle because the HMSO utilizes the HMR hazard class definitions. It does recognize that those definitions are exclusive and cites IR-5, 47 FR 51991 (Nov. 18, 1982), and IR-6, 48 FR 760 (Jan. 6, 1983), to that effect.

The City also cites *City of New York* v. *Ritter Transportation*, 515 F. Supp. 663 (S.D.N.Y. 1981), *affirmed in National Tank Truck Carriers* v. *City of New York*, 677 F. 2d 270 (2d Cir. 1982), as a precedent supporting consistency. The City says that the District Court in *Ritter* found consistent with the HMTA local fire department regulations concerning hazardous materials transportation because they were "based on a legitimate local safety interest and [did] not impose a disproportionate burden on interstate commerce." 515 F. Supp. at 672.

Furthermore, San Jose contends that the HMSO is a land use regulation presumed by the courts to be constitutional and valid if reasonably susceptible to an interpretation free from constitutional defect. The City concludes that the HMSO only attempts to regulate the storage of hazardous materials and, therefore, has no disqualifying defect.

The City of Sunnyvale, through its Fire Marshal, filed comments supporting the consistency of San Jose's requirements. It says that a finding of inconsistency would increase risks to the public, emergency response personnel and the environment. It notes that the application is filed under 49 App. U.S.C. 1811(a) but argues that no conflict exists and that the matter, therefore, should be viewed in the context of 49 App. U.S.C. 1811(b), which provides for waivers of preemption.

Sunnyvale indicates that the San Jose HMSO is the model for similar ordinances in Sunnyvale and about 50 other California communities. It states that these ordinances were intended to address hazardous materials storage—as distinguished from transportation—problems. It argues that the information obtained through such permit programs is critical to effective emergency response.

It also contends that San Jose's requirements either afford a greater level of safety than, or regulate aspects of hazardous materials storage not addressed by, the HMTA. As examples of this, it cites the HMSO's requirement of immediate reporting of releases and threatened releases, its protection of the

environment (as well as health and property), and its standards for underground storage of hazardous materials in line with 1988 EPA standards. It states that the Federal and local requirements are different in their language and intent and that no serious conflict precludes the "dual compliance" test from being met.

Finally, citing a paper it enclosed, Sunnyvale contends that Federal courts have ruled that the HMTA authorizes DOT "to set acceptability levels of safety," a floor below which states may not drop, but that there is a reasonable ceiling which local jurisdictions are allowed to seek.

The County of Ventura Fire District, through its Deputy Chief, argues against preemption of local fire and building regulations. The County does not believe that the HMR were intended to preempt such local requirements because they do not specifically say so and because they do not specify safety requirements for construction and on-site storage. It requests that OHMT consider the need for proper storage and construction standards to protect citizens, freight company employees and firefighters.

The City of Hayward, through its Fire Department's Hazardous Materials Coordinator, opposes exempting the trucking industry from local hazardous materials storage requirements because that would jeopardize the health and safety of the local populace and emergency responders—as well as the environment. The City contends that OHMT's ruling may have at least California-wide impact on local communities' ability to regulate the use and storage of hazardous materials and points to an incident, in which six of its firefighters were hospitalized from exposure to a released hazardous material on a trucking terminal loading dock, as evidence of the necessity for such local regulation. It concludes as follows:

> With the adoption of our local Hazardous Materials Storage Ordinance, we now assure ourselves of separate storage areas for incompatible hazardous materials, underground tank monitoring requirements and the annual submission of facility maps, hazardous materials emergency response plans and inventories and training preparedness for trucking terminal employees.
>
> We don't feel that these regulations overly burden the trucking industry. In fact, they would seem to lessen the potential for disaster and the resultant liability. We hope you concur.

The City of Vernon, through its Fire Chief and Director of Health and Environmental Control, supports a finding of consistency. The City says that it, like San Jose, has adopted local hazardous materials storage ordinances consistent with State law, reflecting national standards, and necessary to protect citizens from the threat of fire, explosion and environmental damage.

That City indicates that it sees no conflict between DOT regulating businesses in interstate commerce and the City protecting all its businesses, including freight terminals, from fire, explosion or the release of toxic materials. It, therefore, concludes that the "dual compliance" and "obstacle" tests under the HMTA and the HMR should not be applicable.

The final local commenter supporting the consistency of San Jose's requirements is the City of Morgan Hill. The City enclosed copies of two newspaper articles concerning the deaths of six Kansas City (Mo.) firemen due to an ammonium nitrate explosion at a construction site. One of the articles contended that the firefighters had been prevented from knowing of the existence of the explosives because the construction industry had obtained a court order temporarily exempting it from the Federal Community Right-To-Know Law, which otherwise would have required notice to local officials of the presence of those explosives. The City of Morgan Hill argues that consideration should be given to the Kansas City incident before a "categorical exemption" is given to Yellow Freight from any hazardous materials laws.

Finally, in a summary comment, the City of San Jose stresses that, as indicated in the letters supporting its position, its ordinance is a model provision which is the basis for current California law. The City states:

> The environmental clearance which is required under the California State Law (CEQA) was predicated on the assumption that the City's safety laws apply. If these laws are not applicable, the use may be inconsistent with surrounding uses.

VI. Rebuttal Comment Against Consistency

In a rebuttal comment, Yellow Freight contends that the commenters supporting the consistency of San Jose's ordinance are not familiar with transportation terminal operations, which involve short time-frame movement of materials across a concrete slab from arriving trucks to departing trucks. Yellow Freight says that it picks up packages from about 500 customers in the San Jose area, that it receives no advance notice of the nature of the contents of the packages, and that the San Jose "hazardous materials" definition terminology is "never" used to describe packages. It states that local shipments and those arriving at the terminal from around the world may move directly to another truck or be temporarily stored at the terminal until an appropriate outgoing truck is present. Yellow Freight adds that all these shipments are under active shipping papers prepared and certified by the shipper and using DOT-specified terminology.

Yellow Freight contends that the fluid nature of the commerce through its facility makes it impossible to comply with the City's inventory requirements and that this would be true even if the HMR and City definitions of hazardous materials were the same. It contends that requirements which might work at production facilities are not practicable at common carrier transportation operations, which involve an ever-changing array of commodities, including hazardous materials.

The Applicant also complains of difficulty in determining exactly what standards the City wants met as a prerequisite to issuance of a permanent occupancy permit. It states:

> At this time, what seems to be desired by San Jose is to have every shipment that is not moving directly across the dock into an immediately available vehicle moved instead into one of a series of specially constructed and segregated storage bunkers, with materials divided by hazard classification. These would be enclosed bunkers, with separate sumps or what San Jose calls "secondary containment." These bunkers do not exist at the Yellow Freight terminal or, to our knowledge, at any other motor carrier terminal in San Jose, or in the State of California, or anywhere else in the world.

It adds that the movement of these materials in and out of such bunkers would cause confusion, delay and safety problems for employees.

Yellow Freight further contends that such problems led Congress to exempt transportation, including storage incidental to transportation, from the emergency planning and community right-to-know requirements of the Superfund Amendments and Reauthorization Act (SARA III), Public Law 99–499, 100 Stat. 1757, at section 327 thereof (42 U.S.C. 11047). It quotes language from House Conference report No. 99–962 indicating that the transportation-related storage exemption applies to storage of materials moving under active shipping papers and not in the consignor's or consignee's facilities, specifically stating that storage in motor carrier warehouses is exempt, and adding that the SARA III exemption is "consistent with the manner in which storage facilities are

treated under the Hazardous Materials Transportation Act."

Rebutting comments that San Jose's definitions present no problem, Yellow Freight argues that the "hazardous material" definition is relied upon for all requirements except segregation and is defined so inconsistently with the Federal definition that it alone should compel a finding of inconsistency. It also cited language from IR-16, 50 FR 20872, May 20, 1985, discussing the problems resulting from local governments imposing requirements based on definitions of hazardous materials differing from those in the HMR.

The Applicant points out that a comment recommending consideration of this matter under 49 U.S.C. App. 1811(b), which provides for waivers of preemption, is premature in the absence of a finding of inconsistency. It adds that, therefore, discussions of burden on commerce also are premature.

An additional argument presented by Yellow Freight is that an inability to handle hazardous materials at its San Jose terminal would force it to transfer such operations to its Oakland facility, thereby causing transportation of larger quantities of hazardous materials for greater distances, as well as greater stockpiling of hazardous materials by businesses in San Jose which could not be as quickly served as they presently are.

Yellow Freight responds to the City of Sunnyvale's claim that Federal courts have interpreted the HMTA as establishing floors for state standards—as distinct from "the reasonable ceiling which local jurisdictions are allowed to seek." Yellow Freight says that this claim has no basis in any court decision or inconsistency ruling and is an inaccurate legal conclusion which should be ignored.

Yellow Freight also responds to the City of Morgan Hill's reference to a "categorical exemption from hazardous materials laws" cited in newspaper articles. It says that those articles referred to a judicial stay of an OSHA hazard communication standard applicable to the construction industry under 29 CFR 1910.1200, which has no bearing on this matter.

The Applicant alleges that the City is attempting, through the "guise" of a building occupancy permit, to close its terminal because it handles hazardous materials there. It concludes that the City requirements are inconsistent insofar as they apply to hazardous materials packages moving under active shipping papers.

It cites specific alleged conflicts with 49 CFR 177.853 (because of alleged delays) and 177.800 (because of the alleged impossibility of training employees to meet both Federal and City requirements) and with 49 CFR part 172 (because of documentation and/or package markings conflicts which allegedly would result). It also cites pro-uniformity language used in several inconsistency rulings.

Finally, Yellow Freight lists 12 reasons why the City's requirements should be found inconsistent:

(1) Varying definitions are confusing and detrimental to safety,

(2) Deviating definitions result in impacts on training, emergency response, shipping documentation and other communications,

(3) The unique segregated storage bunker handling procedures result in unnecessary delays,

(4) Permits required are subject to unfettered discretion by a local (and often-changing) official,

(5) Carrier-establishment of emergency response plans is inconsistent with their appropriate role relative to local authorities,

(6) Written incident reporting conflicts with DOT incident reporting,

(7) Inventories of an ever-changing pattern of freight are impossible,

(8) Paperwork to obtain permits is duplicative and unnecessarily time-consuming,

(9) Changes to plans, permits, etc., because of changes in circumstances and inventory involves unnecessary delay,

(10) Congress has vested DOT with the authority to regulate the transportation of hazardous materials, including the storage incident to transporting and, insofar as material moving under active shipping papers such as those in motor carrier terminals are concerned, that Congressional intent has been recently reiterated,

(11) The existing Federal regulations to address storage issues, as cited in the application, and

(12) The overall effect of the local law is to shift hazardous materials motor carrier operations to other jurisdictions contrary to the interests of those jurisdictions and the purposes of Congress.

VII. Late Comment and Rebuttal

With a late-filed comment, Yellow Freight submitted a 21-page communication from the City received by its facility manager after the comment period on its application had expired. The communication included a series of detailed forms constituting a Hazardous Materials Management Plan/Business Plan. Yellow Freight states that the forms demonstrate the problems inherent in application of the City's requirements to a terminal where the freight population changes hourly. Yellow Freight also states that only by creating an addendum to shipping papers can it answer the City's question on the form concerning storage of carcinogens since the HMR does not address carcinogenicity.

The City was provided an opportunity to respond and did so. It stated that the forms were for the convenience of facility managers and merely reflected State emergency response law, as well as for procurement of current data for the City's billing purposes. The City noted that the information on carcinogens is required by State law and pointed to a specific reference on the forms to the HMR's Hazardous Materials Table, 49 CFR 172.101.

VIII. Ruling

Preliminary Issue

The City argues that Yellow Freight's application for an inconsistency ruling should be dismissed because Yellow Freight contractually agreed to be bound by the City's requirements. Whether there is binding contract to that effect is a matter for those two parties and, if necessary, the courts to determine and is irrelevant to these proceedings.

Yellow Freight's application, however, raises significant preemption issues under the HMTA, and all parties engaged in hazardous materials transportation or the regulation of that transportation will be served by OHMT's addressing those issues.

Consistent with its policy of liberally construing the threshold requirements for obtaining inconsistency rulings, IR-21, 52 FR 37072 (Oct. 2, 1987), OHMT will address the preemption issues raised in Yellow Freight's application.

Loading, Unloading and Storage NOT Incidental to Transportation

This advisory ruling is limited to discussing whether the City's chapter 17.68 is inconsistent with the HMTA and the HMR. Thus, it does not discuss the application of chapter 17.68 to facilities and activities which are beyond the scope of the HMTA. Therefore, this ruling is limited to discussing the consistency of the City's chapter 17.68 as applied to the transportation-related loading, unloading, and storage of hazardous materials.

For purposes of this ruling, the critical HMTA "scope" issue is the HMTA's applicability to hazardous materials "transportation"; under section 103 of the HMTA (49 U.S.C. App. 1802), transportation means "any movement of property by any mode, an any loading, unloading, or storage incidental thereto."

Therefore, the applicability of chapter 17.68 to loading, unloading or storage of hazardous materials not incidental to transportation thereof is beyond the scope of the application and this ruling. Because storage of hazardous materials

by the consignor or original shipper thereof and by the consignee or ultimate recipient thereof is not incidental to transportation, the storage of hazardous materials at the facilities of such parties is beyond the scope of the HMTA and this ruling—unless those same facilities also are used by transporters of hazardous materials for storage incidental to transportation.

For example, this ruling does not address situations, such as the one in Kansas City involving the deaths of six firemen and cited in a comment, where explosives are stored on a construction site after transportation has been completed. Such storage is not incidental to transportation and, therefore, not subject to regulation under the HMTA and the HMR.

In summary, the City generally may apply its hazardous materials storage permit requirements to facilities which are not used for the storage of hazardous materials incidental to the transportation thereof without being inconsistent with the HMTA or the HMR. However, requirements which go beyond storage requisites and address loading, unloading, packaging and other aspects of transportation within the scope of the HMTA required additional inconsistency analysis. All of these issues are discussed in more detail below.

Definition of Hazardous Materials

The City's chapter 17.68, entitled "Hazardous Materials Storage Permit," consists of 26 printed pages of requirements and related procedures concerning the storage of "hazardous materials." As indicated in part III, *supra*, §§ 17.68.040D and 17.68.100 define "hazardous material" in a long and complex manner; the definition includes various Federal, State and private organization listings and also states: "A mixture shall be deemed to be a hazardous material if it either is a waste and contains any material regulated pursuant to part 2 of this chapter, or is a nonwaste and contains one percent by volume or more of any material regulated pursuant to part 2 of this chapter."

The result of the City's sweeping definition of "hazardous material" is the inclusion within that term, and regulation of, transportation-related storage of numerous materials not regulated under the HMTA and the HMR, as well as the exclusion of certain hazardous materials regulated thereunder.

Local hazardous materials definitions which result in regulation of more or different hazardous materials than the HMR are obstacles to uniformity in transportation regulation and thus are inconsistent with the HMTA and the HMR. IR-5 and IR-6, both *supra*. The specific problems with different hazardous materials definitions were discussed in, among others, two earlier inconsistency rulings:

> The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing State and local systems or hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulations.

IR-6, *supra* at 764.

> If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety.

IR-12, 49 FR 46650 at 46651 (Nov. 27, 1984).

For those reasons the Federal role in defining hazard classes and hazardous materials is exclusive with respect to hazardous materials transportation, and thus such state and local definitions differing from the HMR are inconsistent with the HMR. IR-18, 52 FR 200 (Jan. 2, 1987); IR-18 (Appeal), 53 FR 28850 (July 29, 1988); IR-19, 52 FR 24404 (June 30, 1987), correction, 52 FR 29468 (Aug. 7, 1987); IR-19 (Appeal), 53 FR 11600 (Apr. 7, 1988); IR-20, 52 FR 24396 (June 30, 1987), correction, 52 FR 29468 (Aug. 7, 1987); IR-21, *supra;* IR-21, 52 FR 37072 (Oct. 2, 1987); IR-21 (Appeal), 53 FR 46735 (Nov. 18, 1988); IR-26, 54 FR 16314 (Apr. 21, 1989), correction, 54 FR 21526 (May 19, 1989); *Missouri Pacific RR Co.* v. *Railroad Commission of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), *aff'd on other grounds* 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 794 (1989); *Union Pacific RR Co.* v. *City of Las Vegas*, CV-LV-85-932 HDM (D. Nev. 1986).

Because the City's definition of hazardous material significantly differs from the HMR definitions thereof, use of that definition as a basis for imposing certain prerequisites to the loading, unloading, or storage of hazardous materials incidental to their transportation is inconsistent with the HMR and, therefore, preempted.

Permit Requirements

The next issue for resolution is whether the City's permit requirement, aside from the hazardous materials definition issue, is consistent with the HMTA and the HMR. Section 17.68.150 of the City's Code provides: "No person, firm or corporation shall store any hazardous materials regulated by this chapter until a permit or approval has been issued pursuant to this chapter."

State and local permits for hazardous materials transportation are not *per se* inconsistent; their consistency depends upon the nature of their requirements. IR-2, *supra;* IR-3, 46 FR 18918 (Mar. 26, 1981); IR-3 (Appeal), 47 FR 18457 (Apr. 29, 1982); IR-20, *supra; New Hampshire Motor Transport Assn.* v. *Flynn*, 751 F.2d 43 (1st Cir. 1984); *Colorado Public Utilities Commission* v. *Harmon*, CV 88-Z-1524 (D. Colo. 1989).

The City's standard for granting a permit or approval for hazardous materials storage is set forth in § 17.68.150:

> No permit or approval shall be granted pursuant to this chapter unless permit application demonstrates to the satisfaction of city, by the submission of appropriate plans and other information, that the design and construction of the storage facility will result in a suitable manner of storage for the hazardous material or materials to be contained therein.

The type of unfetted discretion asserted by the City in this language with respect to approval or disapproval of storage of hazardous materials incidental to the transportation thereof is inconsistent with the HMTA and the HMR. IR-8 (Appeal), 52 FR 13000 (Apr. 20, 1987); IR-15 (Appeal), 52 FR 13062 (Apr. 20, 1987); IR-18, *supra;* IR-20, *supra*.

As indicated in IR-19, *supra*, and IR-19 (Appeal), *supra*, a state or local permitting system which prohibits or requires certain hazardous materials transportation activities depending upon whether a permit has been issued (regardless of whether the activity is in compliance with the HMR), applies to selected hazardous materials (discussed above), involves extensive information and documentation requirements (discussed below), and contains considerable discretion as to permit issuance, is inconsistent with the HMTA and the HMR.

"Cumulatively, these factors constitute unauthorized prior restraints on shipments of * * * hazardous materials that are presumptively safe based on their compliance with Federal regulations." IR-19, *supra* at 245407. Furthermore, the City's permit requirements are likely to cause unreasonable delays in highway transportation of hazardous materials; this constitutes a separate basis for a finding of inconsistency and is discussed below under the heading Transportation Delays.

In summary, the City's discretionary and burdensome permit/approval requirements for the storage of

hazardous materials incidental to their transportation (e.g., at motor carrier terminals) are inconsistent and thus preempted.

Information and Documentation Requirements

As a prerequisite to obtaining a City permit for the storage of hazardous materials, §§ 17.68.300–340 require the submission of a hazardous materials management plan (HMMP). The HMMP Is required to contain specific information about the facility's operations and the uses of adjacent properties; a very detailed map of the facility; a very detailed facilities storage map for each hazardous materials storage facility; specific information concerning each "nonwaste hazardous material" (above certain quantities) and each "waste hazardous material" (of any quantity) stored at the facility; a Hazardous Materials Inventory Statement (HMIS); "a description of the methods to be utilized to ensure separation and protection of stored hazardous materials from factors which may cause a fire or explosion, or the production of a flammable, toxic, or poisonous gas, or the deterioration of the primary or secondary containment"; a specific description of a facility monitoring program; an inspection, monitoring and corrective action log or check sheet; and a description of emergency equipment availability, testing and maintenance.

The HMIS, required as part of the HMMP, must contain, under §§ 17.68.350–360, the following information with respect to each hazardous material or mixture containing a hazardous material stored or handled at the facility where the aggregate quantity over one year equals or exceeds 500 pounds for solids, 55 gallons for liquids or 200 cubic feet at standard temperature and pressure for compressed gases:

1. For nonwastes: The general chemical name, common/trade name, major constituents for mixtures, the manufacturer, United Nations (UN) or North America (NA) number, if available, and the hazard class or classes and the material safety data sheet (MSDS) or equivalent information as required by city.

2. For wastes: The department of health services manifest for wastes or equivalent information, including the general chemical and mineral composition of the waste listed by probable maximum and minimum concentration, and the hazard class or classes.

3. A listing of the chemical name and common names of every other hazardous material or mixture containing a hazardous material handled by the business which is not otherwise listed pursuant to paragraph 1 or 2.

4. The maximum amount of each hazardous material or mixture containing a hazardous material disclosed in paragraph 1, 2 or 3 which is handled at any one time by the business over the course of the year.

5. Sufficient information on how and where the hazardous materials disclosed in paragraph 1, 2 or 3 are handled by the business to allow fire, safety, health and other appropriate personnel to prepare adequate emergency responses to potential releases of the hazardous materials.

6. The Standard Industrial Classification (SIC) code number of the business if applicable.

7. The name and twenty-four-hour phone number(s) of the person representing the business who is able to assist emergency personnel in the event of an emergency involving the business during nonbusiness hours.

The amounts which must be reported are allowed to be reported by ranges instead of specific amount, "as long as those ranges provide the information necessary to meet the needs of emergency rescue personnel, to determine the potential hazard from a release of the materials, and meets the purposes of this ordinance." § 17.68.360C.

In addition, § 17.68.360D requires that the HMIS contain a carcinogen identification form for the storage of any carcinogen listed in certain State regulations.

Finally, the HMMP Information requirements are open-ended. Section 17.68.310A2 states that "The city may also require information as to the location of wells, floodplains, earthquake faults, surface water bodies, and/or general land uses (schools, hospitals, institutions, residential areas) within one mile of the facility boundaries." Also, § 17.68.310G1 provides: "Additional information may be required for the HMMP where such information is reasonably necessary to meet the intent of this chapter."

Information and documentation requirements as prerequisites to hazardous materials transportation have been considered on many prior occasions. Where such requirements exceeded Federal requirements, they have been found to create potential delay or diversion of hazardous materials transportation, to constitute an obstacle to execution of the HMTA and the HMR, and thus to be inconsistent. IR–2, IR–6, IR–8 (Appeal), IR–15 (Appeal), IR–18 IR–18 (Appeal), IR–19 IR–19 (Appeal), IR–21 IR–26, all *supra;* IR–8, 49 FR 46637 (Nov. 27, 1984); IR–15, 49 FR 46660 (Nov. 27, 1964); IR–27, 54 FR 16326 (Apr. 21, 1989), correction, 54 FR 21526 (May 19, 1989); *Chem-Nuclear Systems, Inc.* v. *City of Missoula,* CV 80–18–M (D. Mont. 1984). *Contra: Colorado Public Utilities Commission* v. *Harmon* CV 88–Z–1524 (D. Colo. 1989); *Southern Pacific Transportation Co.* v. *Public Service Commission of Nevada,* CV–N–86–444–BRT (D. Nev. 1988) (discussed in IR–27, *supra,* at 54 FR 16332).

This issue was succinctly addressed in IR–19, *supra*:

In summary, the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implementation of the HMTA and HMR and thus are inconsistent with them.

52 FR 24408.

Here the City of San Jose has imposed extensive (practically exhaustive), extremely detailed, burdensome, open-ended, vague and impossible-to-comply-with information and documentation requirements as a condition precedent to, *inter alia,* the storage of hazardous materials incidential to the transportation thereof without regard to whether that transportation-related storage is in compliance with the HMR. For example, the detailed information required to be provided concerning the identity and quantity of hazardous materials (and other materials) which a transportation carrier might store at its facility during a given year is impossible to compile and provide in advance because a common carrier is at the mercy if its customers, including the general public, who may without advance notice offer to the carrier for transportation virtually any quantity of any of the thousands of hazardous materials listed in, or covered by, the HMR.

An additional problem with the City's information and documentation requirements, insofar as they relate to the hazardous materials to be stored at a facility incidental to transportation, is that they constitute an inconsistent advance notice requirement. IR–6, IR–8 (Appeal), R–16, all *supra.* IR–6, *supra,* indicated that local requirements for advance notice of hazardous materials transportation have potential to delay and redirect traffic and thus are inconsistent. IR–8 (Appeal), *supra,* specifically addressed this issue with respect to radioactive materials:

Through its rulemaking process and related studies, DOT has determined what prenotification (including information, documentation and certification) requirements are necessary for the safe transportation of radioactive materials. In the process of analyzing rulemaking comments and studies it has commissioned or

examined, DOT has determined what prenotification requirements are not necessary. This field has been totally occupied by the HMR. State and local provisions either authorizing less prenotification or requiring greater prenotification than the HMR, therefore, constitute obstacles to the accomplishment and execution of the objectives of the HMTA and the HMR, are inconsistent, and are preempted.

52 FR 13005.

Emergency Response Information

Furthermore, the City's information requirements are inconsistent with the HMR insofar as they require emergency response information as a prerequisite to the loading, unloading, and storage of hazardous materials incidental to their transportation.

During the pendency of Yellow Freight's application, RSPA significantly amended the HMR and culminated several years of rulemaking activity by promulgating Emergency Response Communication Standards for hazardous materials transportation. See Final Rule at 54 FR 27138 (June 27, 1989), correction, 54 FR 28750 (July 7, 1989); corrections in response to petitions for reconsideration, 55 FR 870 (Jan. 10, 1990). That rule becomes effective, and thus mandatory, on June 4, 1990, although compliance with it was authorized on July 31, 1989, and, as corrected, January 10, 1990.

As indicated in the June 27, 1989 **Federal Register** preamble, these new HMR provisions were intended to complement the Hazard Communication Standard (HCS) issued by OSHA at 52 FR 31852 (Aug. 24, 1987). The new HMR Emergency Response Communication Standards, at 49 CFR 172.201(d), require an emergency response telephone number (described in more detail below), on all hazardous materials shipping papers and prescribe emergency response information requirements during transporation and at facilities where hazardous materials are loaded for transportation, stored incidental to transportation or otherwise handled during any phase of transportation. 49 CFR part 172, subpart G.

The applicability of these HMR emergency response information requirements to facilities engaged in transportation activities and an obvious overlapping with the City of San Jose's chapter 17.68 can be seen in the general requirements language of 49 CFR 172.600(c):

No person * * * may offer for transportation, accept for transportation, transfer, store of otherwise handle during transportation a hazardous material unless:

(1) Emergency response information conforming to this subpart is immediately available for use at all times any hazardous material is present; and

(2) Emergency response information required by this subpart is immediately available to any person who, as a representative of a Federal, state of local government agency, responds to an incident involving a hazardous material, or is conducting an investigation which involves a hazardous material.

Section 172.602 of the new HMR regulations specifically requires that facility operators maintain the required emergency response information: "Each operator of a facility where a hazardous material is received, stored or handled during transportation, shall maintain the [required] information * * * whenever the hazardous material is present." That regulation also requires the information to be in a location immediately accessible to facility personnel in the event of an accident involving the hazardous material.

That same regulation specifies the minimum emergency response information:

(1) The basic description and technical name of the hazardous material as required by §§ 172.202 and 172.203(k), the ICAO Technical Instructions, the IMDG Code, or the TDG Regulations, as appropriate;
(2) Immediate hazards to health;
(3) Risks of fire or explosion;
(4) Immediate precautions to be taken in the event of an accident or incident;
(5) Immediate methods for handling fires;
(6) Initial methods for handling spills or leaks in the absence of fire; and
(7) Preliminary first aid measures.

Furthermore, § 172.602 mandates that the required information be printed legibly in English, be available away from the package containing the hazardous material and be presented on a shipping paper, in another document describing and naming the material and required emergency response information (e.g., a material safety data sheet [MSDS]), or in a separate document (e.g., an emergency response guidance document) cross-referenced to the hazardous material description on the shipping paper.

With the promulgation of these regulations, RSPA's emergency response information requirements for hazardous materials transportation, including the loading, unloading, or storage incidental to such transportation exclusively occupy that field. Therefore, state and local requirements not identical to these HMR provisions will cause confusion concerning the nature of such requirements, undermine compliance with the HMR requirements, constitute obstacles to implementation of th ose provisions, and thus be inconsistent and preempted.

Insofar as the City of San Jose's emergency response information requirements apply to hazardous materials transportation, including loading, unloading and storage incidental to that transportation, therefore, they are inconsistent with the HMR and thus preempted.

Transportation Delays

The burdensome and open-ended information requirements imposed by the City's chapter 17.68 also are inconsistent with the HMTA and the HMR because of the great likelihood that they will cause delay in hazardous materials transportation.

As indicated above, it is impossible for a common carrier to comply with the City's requirements concerning advance identification of hazardous materials and the quantities thereof. As a result, when the carrier/facility operator receives or is offered hazardous materials not previously identified or in quantities exceeding those projected, it faces a dilemma: Whether to comply with its obligations under the HMR to transport the materials without delay, to hold the materials pending an amended application to the City, to divert the materials to another jurisdiction for any necessary transportation-related storage, or to violate its common carrier obligations by refusing to accept any such materials.

Concerns about delays of hazardous materials transportation have been expressed in several inconsistency rulings:

The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation.

IR-2, 44 FR 75566 at 75571.

The mere threat of delay may redirect commercial hazardous materials traffic into other jurisdictions that may not be aware of or prepared for a sudden, possibly permanent, change in traffic patterns.

IR-3, 46 FR 18919 at 18921. See IR-20 and IR-21 (Appeal), both *supra*.

Since safety risks are "inherent in the transportation of hazardous materials in commerce" [49 U.S.C. 1801], an important aspect of transportation safety is that transit time be minimized. This precept has been incorporated in the HMR at 49 CFR 177.853, which directs highway shipments to proceed without unnecessary delay, and at 49 CFR 174.14, which directs rail shipments to be expedited within a stated time frame.

IR-6, 49 FR 760 at 765; see also IR-16, *supra*, at 20879 and IR-19, *supra* at 24409.

The burdensome and impossible-to-comply-with information and documentation requirements of the City are likely to cause unreasonable delays and diversions to other jurisdictions of hazardous materials transportation, particularly storage incidental to such transportation. Therefore, those requirements are inconsistent with the HMR under the "obstacle" test.

In addition, by causing common carrier terminal operators to choose between compliance with them or to comply with the "without unnecessary delay" requirements of the HMR, the City's information and documentation requirements also are inconsistent with the HMR under the "dual compliance" standard.

Storage Requirements

The City's storage requirements *per se* present consistency problems when they are applied to storage of hazardous materials incidental to their transportation. As indicated in IR-19, *supra*, state or local prohibition of transportation-related storage at places where, and at times when, the HMR allow such storage is inconsistent with the HMTA and the HMR.

Section 17.68.160C contains detailed primary and secondary storage requirements for hazardous liquids and solids. The requirement that "All primary containment shall be product-tight" conflicts with the exclusive Federal authority to regulate packaging and cargo containment design, construction, testing, accessories, equipment, certification and permit requirements. IR-2, IR-8, IR-8 (Appeal), IR-18, IR-18 (Appeal), all *supra*; IR-22, 52 FR 46574 (Dec. 8, 1987), correction, 52 FR 49107 (Dec. 29, 1987); IR-22 (Appeal), 54 FR 26698 (June 23, 1989).

The City's major secondary containment requirement is:

All secondary containment shall be constructed of materials of sufficient thickness, density, and composition so as not to be structurally weakened as a result of contact with the discharged hazardous materials and so as to be capable of containing hazardous materials discharged from a primary container for a period of time equal to or longer than the maximum anticipated time sufficient to allow recovery of the discharged hazardous material.

Furthermore, in § 17.68.160, the City provides segregation requirements for hazardous materials:

Separation of Materials. Materials that in combination may cause a fire or explosion, or the production of a flammable, toxic, or poisonous gas, or the deterioration of a primary or secondary container shall be separated in both the primary and secondary containment so as to avoid potential intermixing.

These strict but subjective secondary containment and segregation requirements require analysis in light of the HMR provisions addressing these issues. Most relevant is 49 CFR 177.848(f), which states: "Hazardous materials must not be loaded, transported, or stored together, except as provided in" a detailed Segregation and Separation Chart of Hazardous Materials, which is a part of that Section.

State or local imposition of containment or segregation requirements for the storage of hazardous materials incidental to the transportation thereof different from, or additional to those in, § 177.848(f) of the HMR create confusion concerning such requirements and the likelihood of noncompliance with § 177.848(f). Since such state or local requirements, therefore, are obstacles to the execution of an HMR provision, they are inconsistent with the HMR—insofar as they apply to transportation-related storage. Again, such requirements when applied to non-transportation-related storage are not inconsistent with the HMTA or the HMR.

Loading and Unloading Requirements

As indicated above, the HMTA defines transportation subject to jurisdiction thereunder as including loading and unloading of hazardous materials incidental to their transportation. 49 U.S.C. App. 1801. Such loading and unloading is not restricted to carrier operations and, therefore, includes loading of hazardous materials by shippers/consignors thereof and unloading of hazardous materials by recipients/consignees thereof. Thus, the application of the HMTA and the HMR is broader with respect to loading and unloading activities than it is with respect to storage activities, which are not regulated at consignors' or consignees' facilities.

§ 17.68.210 of the City's Code contains the following provisions regarding loading and unloading of hazardous materials:

A. Dispensing and mixing of hazardous materials must not be done in such a manner as substantially to increase the risk of an unauthorized discharge.

B. When hazardous materials are moved into or out of a storage facility, they shall remain in the travel path only for the time reasonably necessary to transport the hazardous material and such movement shall be in a manner which will not result in an unauthorized discharge.

Like the City's storage requirements, these dispensing and moving requirements are both strict and subjective. Compliance with them may be difficult because of their vagueness and subjectivity. Those characteristics affect the comparison of them with the HMR provisions governing the loading and unloading of hazardous materials incidental to their transportation by motor vehicle.

The relevant HMR provisions are found in 49 CFR part 177, Subpart B (§§ 177.834-.844), which is appropriately titled "Loading and Unloading." Unlike the City's general and subjective requirements, these approximately 14 pages of HMR provisions set forth specific loading and unloading requirements for explosives, flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, poisons, and radioactive materials, as well as for hazardous materials generally.

These HMR provisions adequately address the loading and unloading of hazardous materials incidental to the transportation thereof by motor vehicle. Any state or local requirements different from, or additional to, these provisions, particularly subjective requirements such as those at issue here, will create confusion about what standards must be met, and create a likelihood of noncompliance with the HMR. Therefore, such requirements, including those of the City at issue here, are inconsistent with the HMR under the "obstacle" test, and, therefore, are preempted.

Incident Reporting Requirements

§ 17.68.450 of the City Code contains several requirements for the immediate reporting to the City of "unauthorized discharges" of hazardous materials. Such requirements for immediate oral or telephonic notification for emergency response purposes generally are consistent with the HMTA and the HMR. IR-2, IR-3, both *supra; National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* F.2d 559 (1st Cir. 1983). Such state and local requirements supplement, and do not conflict with, the immediate reporting requirements in 49 CFR 171.15, and help to ensure immediate emergency response.

However, insofar as such requirements apply to irradiated reactor fuel, they have been determined to be inconsistent with the HMR. IR-8, IR-8 (Appeal), both *supra*. Two HMR provisions are relevant to this issue. First, 49 CFR 177.861 requires the "earliest practicable" notification to the

shipper of radioactive materials incidents. Second, 49 CFR 173.22(c) requires shippers of irradiated reactor fuel to provide physical protection in compliance with a plan established under Nuclear Regulatory Commission (NRC) requirements; those requirements include a 10 CFR 73.37 provision for notification to appropriate agencies in the event of a "safeguards emergency."

Therefore, the City's requirements for oral or telephonic notification concerning hazardous materials discharges are consistent except as they apply to HRCQ radioactive materials.

The City has additional requirements in § 17.68.450 for the recording of "unauthorized discharges" in the permittee's monitoring records. These are not the type of written incident/accident reports to state or local officials which have been determined to be inconsistent with 49 CFR 171.16. IR-2, IR-3, IR-3 (Appeal), all *supra*. However, as indicated above, the City's requirement for the maintenance of the monitoring records themselves as a prerequisite to the transportation of hazardous materials (including the loading, unloading and storage incidental thereto) is an inconsistent documentation requirement.

Civil Penalties

The City's § 17.68.1050 civil penalty provisions are consistent insofar as they apply to violations of consistent provisions of its Code. IR-3, IR-27, both *supra*. However, they are inconsistent insofar as they apply to violations of inconsistent provisions of its Code. IR-18, IR-18 (Appeal), IR-27, all *supra; Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103 (3rd Cir. 1985).

Summary

For the foregoing reasons and on the basis of this record, I make the following findings.

Insofar as they apply to the transportation of hazardous materials, including the loading, unloading and storage incidental to that transportation, the following provisions of chapter 17.68 of the City of San Jose's Code are inconsistent with the HMTA and the HMR and thus preempted under section 112(a) of the HMTA (49 U.S.C. 1811(a)):

(1) The definitions of hazardous material in §§ 17.68.040D and 17.68.100;

(2) The permitting and related information and documentation requirements throughout chapter 17.68;

(3) All other information and documentation requirements, including the emergency response information requirements, throughout chapter 17.68;

(4) The hazardous materials storage requirements of § 17.68.160;

(5) The hazardous materials loading and unloading requirements of § 17.68.210;

(6) The incident reporting requirements of § 17.68.450 insofar as they apply to incidents involving irradiated reactor fuel; and

(7) The civil penalty provisions of § 17.68.1050 insofar as they apply to inconsistent provisions of Chapter 17.68.

Insofar as they apply to the transportation of hazardous materials, including the loading, unloading and storage incidental to that transportation, the following provisions of chapter 17.68 of the City of San Jose's Code are consistent with the HMTA and the HMR:

(1) The incident reporting requirements of § 17.68.450 except insofar as they apply to incidents involving irradiated reactor fuel; and

(2) The civil penalty provisions of § 17.68.1050 insofar as they apply to consistent provisions of chapter 17.68.

This ruling does not address the consistency of any provisions not described above. It also does not address the consistency of any provisions of chapter 17.68 as applied to any activities other than the transportation of hazardous materials, including the loading, unloading and storage incidental to such transportation.

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

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federal register

Thursday
March 8, 1990

Part VII

Department of Health and Human Services

Alcohol, Drug Abuse, and Mental Health Administration

Current List of Laboratories Which Meet Standards To Engage in Urine Drug Testing for Federal Agencies; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: National Institute on Drug Abuse, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services notifies Federal agencies of the laboratories currently certified to meet standards of subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 FR 11986). A similar notice listing all currently certified laboratories will be published bi-monthly (every-other-month), and updated to include laboratories which subsequently apply and complete the certification process. If any listed laboratory fails to maintain its certification, it will be omitted from updated lists until such time as it is restored to full certification under the Guidelines.

FOR FURTHER INFORMATION CONTACT: Drug Testing Section, Division of Applied Research (formerly the Office of Workplace Initiatives), National Institute on Drug Abuse, Room 9-A-54, 5600 Fishers Lane, Rockville, Maryland 20857.

SUPPLEMENTARY INFORMATION: Mandatory Guidelines for Federal Workplace Drug Testing were developed in accordance with Executive Order 12564 and section 503 of Public Law 100-71. Subpart C of the Guidelines, "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies", sets strict standards which laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification a laboratory must participate in an every-other-month performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of NIDA certification are *not* to be considered as meeting the minimum requirements expressed in the NIDA Guidelines. A laboratory must have its letter of certification from HHS/NIDA which attests that it has met minimum standards.

In accordance with subpart C of the Guidelines, the following laboratories meet the minimum standards set forth in the Guidelines:

American BioTest Laboratories, Inc., Building 15, 3350 Scott Boulevard, Santa Clara, CA 95054, 408-727-5525

American Medical Laboratories, Inc., 11091 Main Street, P.O. Box 188, Fairfax, VA 22030, 703-691-9100

Associated Regional and University Pathologists, Inc. (ARUP), 500 Chipeta Way, Salt Lake City, UT 84108, 801-583-2787

Bio-Analytical Technologies, 2356 North Lincoln Avenue, Chicago, IL 60614, 312-880-6900

Cedars Medical Center, Department of Pathology, 1400 Northwest 12th Avenue, Miami, FL 33136, 305-325-5810

Center for Humnan Toxicology, 417 Wakara Way-Room 290, University Research Park, Salt Lake City, UT 84108, 801-581-5117

Chem-Bio Corporation, 140 East Ryan Road, Oak Creek, WI 53154, 800-365-3840

Clinical Reference Lab, 11850 West 85th Street, Lenexa, KS 66214, 800-445-6917

CompuChem Laboratories, Inc., 3308 Chapel Hill/Nelson Hwy., P.O. Box 12652, Research Triangle, NC 27709, 919-549-8263

CompuChem Laboratories, Inc., Western Division, 600 West North Market Boulevard, Sacramento, CA 95834, 916-923-0840 (name changed: formerly ChemWest Analytical Laboratories)

Doctors & Physicians Laboratory, 801 East Dixie Avenue, Leesburg, FL 32748, 904-787-9006

DrugScan Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974, 215-674-9310

ElSohly Laboratories, Inc., 1215-½ Jackson Ave., Oxford, MS 38655, 601-236-2609

Environmental Health Research & Testing, Inc., 1075 South 13th St., Birmingham, AL 35205-9998, 205-934-0985

General Medical Laboratories, 36 South Brooks Street, Madison, WI 53715, 608-267-6267

Harris Medical Laboratory, P.O. Box 2981, 1401 Pennsylvania Avenue, Forth Worth, TX 76104, 817-878-5600

HealthCare/Preferred Laboratory, 3011 W. Grand Boulevard, Detroit, MI 48202, 313-875-2112

Laboratory of Pathology of Seattle, Inc., 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 206-386-2672

Laboratory Specialists, Inc., P.O. Box 4350, Woodland Hills, CA 91365, 800-331-8670 (name changed: formerly Abused Drug Laboratories)

Massey Analytical Laboratories, Inc., 2214 Main Street, Bridgeport, CT 06606, 203-334-6187

Med Arts Lab, 5419 South Western, Oklahoma City, OK 73109, 800-251-0089

MedExpress/National Laboratory Center, 4022 Willow Lake Boulevard, Memphis, TN 38175, 901-795-1515

MedTox Laboratories, Inc., 402 W County Road D, St Paul, MN 55112, 612-636-7466

Mental Health Complex Laboratories, 9455 Watertown Plank Road, Milwaukee, WI 53226, 414-257-7439

Methodist Medical Center, 221 N.E. Glen Oak Avenue, Peoria, IL 61636, 309-672-4928

MetPath, Inc., 1355 Mittel Boulevard, Wood Dale, IL 60191, 312-595-3888 ext. 671

MetPath, Inc., One Malcolm Avenue, Teterboro, NJ 07608, 201-393-5000

National Center for Forensic Science, 1901 Sulphur Spring Road, Baltimore, MD 21227, 301-247-9100 (name changed: formerly Maryland Medical Laboratory, Inc.)

National Psychopharmacology Laboratory, Inc., 9320 Park W. Boulevard, Knoxville, TN 37923, 800-251-9492

Nichols Institute Substance Abuse Testing (NISAT), 8985 Balboa Avenue, San Diego, CA 92123, 800-446-4728/619-694-5050 (name changed: formerly Nichols Institute)

Northwest Toxicology, Inc., 1141 E 3900 South, Salt Lake City, UT 84124, 800-322-3361

PDLA, Inc., 100 Corporate Court, So. Plainfield, NJ 07080, 201-769-8500

PharmChem Laboratories, Inc., 1505-A O'Brien Drive, Menlo Park, CA 94025, 415-328-6200/800-446-5177

Poisonlab, Inc., 7272 Clairemont Mesa Road, San Diego, CA 92111, 619-279-2600

Roche Biomedical Laboratories, 6370 Wilcox Road, Dublin, OH 43017, 614-889-1061

Roche Biomedical Laboratories, 1801 First Avenue South, Birmingham, AL 35233, 205-581-3537

Roche Biomedical Laboratories, 1447 York Court, Burlington, NC 27216, 919-584-5171

SmithKline Beecham Clinical Laboratory, NIDA Section, 506 E. State Parkway, Schaumburg, IL 60173, 312-885-2010 (name changed: formerly International Toxicology Laboratories)

SmithKline Bio-Science Laboratories, 400 Egypt Road, Norristown, PA 19403, 800-523-5447

SmithKline Bio-Science Laboratories, 1777 Montreal Circle, Tucker, GA 30084, 404-934-9205

SmithKline Bio-Science Laboratories, 8000 Sovereign Row, Dallas, TX 75247, 214-638-1301 (name changed: formerly International Clinical Laboratories)

South Bend Medical Foundation, Inc., 530 North Lafayette Boulevard, South Bend, IN 46601, 219-234-4176

Southgate Medical Laboratory, Inc., 21100 Southgate Park Boulevard, Cleveland, OH 44137, 800-338-0166

St. Anthony Hospital (Toxicology Laboratory), P.O. Box 205, 1000 North Lee Street, Oklahoma City, OK 73102, 405-272-7052

Finally, DataChem, Inc. of Salt Lake City, previously listed as a certified laboratory has been sold and no longer offers drug testing services effective January 12, 1990.

Richard A. Millstein,

Deputy Director, National Institute on Drug Abuse.

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Reader Aids

Federal Register

Vol. 55, No. 46

Thursday, March 8, 1990

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-3447

Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	523-3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

The United States Government Manual

General information	523-5230

Other Services

Data base and machine readable specifications	523-3408
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Library	523-5240
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the deaf	523-5229

FEDERAL REGISTER PAGES AND DATES, MARCH

7289-7470 1
7471-7686 2
7687-7878 5
7879-8114 6
8115-8438 7
8439-8896 8

CFR PARTS AFFECTED DURING MARCH

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
6102 7467
6103 7683
6104 8439

Executive Orders:
12686 (Amended by EO 12705) 8113
12705 8113

7 CFR

272 8289
273 8289
274 8289
276 8289
354 7289
905 8441
907 7687
910 7471
918 7289
948 8443
959 7689
966 7879
1421 7690
1772 ..... 7867, 7880
1945 7471
1980 7471

Proposed Rules:
322 7499
959 7717
979 ..... 7903, 8146
1012 7718
1032 7904
1068 8472
1475 7905

8 CFR

214 7881

9 CFR

78 7882
92 7883
97 7289
309 7472
310 7472
317 7289
318 7294
381 7289

Proposed Rules:
312 7499
318 7339
329 7499
381 ..... 7339, 7499

10 CFR

Proposed Rules:
430 7719

12 CFR

5 7692
510 7694
563 7299
567 7475
600 7884
612 7884
614 7884
615 7884
618 7884
960 7479

Proposed Rules:
208 8147
225 8147

14 CFR

27 7992
29 7992
39 ..... 7300, 7696, 7703, 8115-8125, 8370-8374, 8445, 8446
73 8127
71 ..... 7301, 8448
97 7704
99 8390
121 ..... 8054, 8364
129 8364
133 7992
135 ..... 8054, 8364
382 8008

Proposed Rules:
13 ..... 7980, 7989
21 7724
25 7724
29 8474
39 ..... 7341, 7502, 7732, 8148, 8149, 8377-8384, 8474
71 ..... 7342, 7868, 8151
73 ..... 7867, 8151
91 7414
121 7414
125 7414
135 7414
382 ..... 8076, 8078

15 CFR

799 7867

16 CFR

305 7302

17 CFR

1 ..... 7884, 8127
30 7705
270 7706

Proposed Rules:
401 7733

18 CFR

16 7490

19 CFR

134 7303

20 CFR

404 ..... 7306, 7313, 8449
416 ..... 7311, 7411, 8449
422 7313

21 CFR

14 7315
168 8458
177 8139
510 ..... 8459, 8461
520 ..... 8459, 8461
522 8461
524 8461
540 ..... 8459, 8461
555 8461
558 ..... 8459, 8461
801 7491

Proposed Rules:

173 8476
175 8476
176 8476
177 8476
178 8476
179 8476
180 8476
181 8476

23 CFR

Proposed Rules:

172 7739

24 CFR

44 8462
201 8464
203 8464
234 8464

25 CFR

61 7492

26 CFR

1 ..... 7316, 7711, 7891
602 7891

Proposed Rules:

1 7343

29 CFR

517 ..... 7450, 7967
1612 8140
1910 7967

Proposed Rules:

1910 8152

30 CFR

202 7317
203 7317
206 7317

Proposed Rules:

250 8485
931 ..... 7919, 7920

31 CFR

215 7494

33 CFR

100 7711

Proposed Rules:

115 7744
117 8154

34 CFR

245 7711

36 CFR

217 7892
251 7892

Proposed Rules:

7 8487

38 CFR

3 ..... 8140, 8141

39 CFR

3001 8142

40 CFR

52 ..... 7712, 7713
61 8292
180 8142
271 ..... 7318, 7320, 7896
300 8666
799 7322

Proposed Rules:

52 ..... 7503, 8489
300 7507

41 CFR

101-17 8465
301-16 7327

42 CFR

Proposed Rules:

72 7678
411 8491

43 CFR

Public Land Orders:

6765 8289
6770 7898

44 CFR

207 7328

45 CFR

305 8465
1351 7967

46 CFR

Proposed Rules:

10 8155

47 CFR

13 7898
15 7494
22 7899
73 ..... 7330, 7332, 7495, 7498, 7714, 8468
80 7898
87 7332

Proposed Rules:

21 7344
43 7344
73 ..... 7345, 7509, 7745, 7746
74 7344
76 7509
78 7344
94 7344

48 CFR

35 7634
415 7333
528 7967
705 8469
706 8469
719 8469
726 8469
752 8469

Proposed Rules:

44 7870
52 7870

49 CFR

Proposed Rules:

27 8081
571 ..... 7346, 7510, 8497

50 CFR

23 7714
33 7334
611 8142
641 8143
656 7900
672 7902
675 ..... 7337, 7716, 8142, 8145

Proposed Rules:

17 ..... 7746, 7920
251 8157
641 8158
658 7747

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List March 2, 1990