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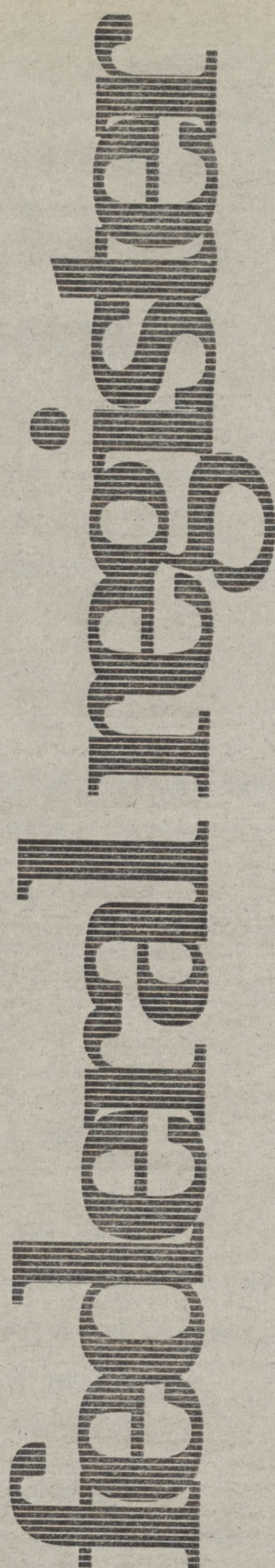
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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

Wyoming Permanent Regulatory Program

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

ACTION: Final rule; approval of amendments and modification of condition of program approval.

SUMMARY: The Secretary of the Interior is announcing the approval, with certain exceptions, of proposed amendments to the Wyoming permanent regulatory program (hereinafter, the "Wyoming program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), and the corresponding modification of the one remaining condition of program approval. The amendments primarily address the recovery of costs and expenses, including attorney's fees, incurred in connection with administrative review proceedings under the Wyoming program, but they also include provisions pertaining to formal and informal administrative reviews in general, intervention in administrative review proceedings, and the definition of toxic materials. The amendments are intended to revise the Wyoming program to be consistent with the corresponding Federal standards and to clarify State operating procedures.

EFFECTIVE DATE: January 24, 1994.

FOR FURTHER INFORMATION CONTACT: Guy V. Padgett, (307) 261-5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Program

On November 26, 1980, the Secretary of the Interior conditionally approved the Wyoming program. General background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Wyoming program can be found in the November 26, 1980, *Federal Register* (45 FR 78637). Subsequent actions concerning Wyoming's program and program amendments can be found at 30 CFR 950.11, 950.12, 950.15, and 950.16.

II. Submission of Amendments

On March 9, 1993 (Administrative Record No. WY-22-1), Wyoming submitted a proposed amendment comprised of (1) Enrolled Act No. 60 (1993 General Session), which, as signed into law on March 2, 1993, revised subsection (f) of section 35-11-437 of the Wyoming Statutes (W.S.) and added a new subsection (g) to this section, and (2) a number of changes to Chapter V of the Rules of Practice and Procedure of the Wyoming Department of Environmental Quality (DEQ). Both Enrolled Act No. 60 and the regulation changes pertain solely to the award of costs and expenses in connection with administrative and judicial proceedings under the approved State program.

The State submitted the amendment primarily to satisfy a condition the Secretary placed on the approval of the Wyoming program at 30 CFR 950.11(c) (hereinafter, condition "c"). This condition requires the State to amend its program to include provisions that are consistent with the Federal regulations at 43 CFR part 4 concerning intervention in administrative review proceedings and the recovery of costs and expenses, including attorney's fees, incurred in connection with participation in such proceedings.

Wyoming originally promulgated Chapter V of the DEQ Rules of Practice and Procedure on August 3, 1982, and submitted it to OSM as a program amendment by letter dated August 18, 1982. This amendment also included a revised version of section 7 of Chapter II of the DEQ Rules of Practice and Procedure; the revisions of this chapter were intended to satisfy the intervention portion of condition "c." Wyoming had

previously promulgated these rules in identical form as temporary emergency regulations, which were submitted to OSM on May 26, 1982. After reviewing the emergency regulations, OSM determined that they did not fully satisfy condition "c." Therefore, instead of acting upon these portions of the May 26, 1982, proposed amendment, OSM extended the deadline for Wyoming to meet the condition (47 FR 42351-52, September 27, 1982). Similarly, OSM never acted upon the corresponding portions of the August 18, 1982, submittal, which were identical to the May 26, 1982, submittal.

The August 18, 1982, submittal also included (1) a revised definition of "toxic materials" at Chapter I, section 2(99) of the Rules and Regulations of DEQ's Land Quality Division (LQD), and (2) a new Chapter VI to be added to the DEQ Rules of Practice and Procedure. The new chapter authorizes the Director of the DEQ to informally review and modify decisions of division administrators (including the Administrator of the LQD) and establishes procedures and requirements governing such reviews. OSM also did not act upon these portions of the proposed amendment at the time of submittal.

Because the March 9, 1993, submittal revises part of the August 18, 1982, submittal, OSM is taking this opportunity to announce a decision on both submittals. Except for recodification of the definition of toxic materials, no changes other than those contained in the March 9, 1993, submittal have been made in the regulations submitted on August 18, 1982. (See letter from Wyoming dated August 27, 1992 (Administrative Record No. WY-22-2).)

OSM announced receipt of the March 9, 1993, submittal in the March 30, 1993, *Federal Register* (57 FR 16637), and, in the same document, opened the public comment period and provided opportunity for a public hearing on the substantive adequacy of both the August 18, 1982, and the March 9, 1993, submittals. The public comment period closed on April 29, 1993. A public hearing was not held because no one requested an opportunity to testify.

III. Secretary's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Secretary's

findings concerning the proposed amendments submitted by Wyoming on August 18, 1982, and March 9, 1993.

1. Award of Costs and Expenses: General

Section 525(e) of SMCRA provides that:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review, or the Secretary, resulting from administrative proceedings, deems proper.

Although section 525(e) is not directly applicable to State programs, section 102(i) of SMCRA specifies that one of the purposes of the Act is to "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act." To implement this provision, the Federal regulations at 30 CFR 732.15(b)(10) require that State programs "[p]rovide for public participation in the development, revision and enforcement of State regulations and the State program, consistent with public participation requirements of the Act and this chapter." Furthermore, 30 CFR 732.15(b)(14) requires that State programs "[p]rovide for administrative review of State program actions, in accordance with section 525 of the Act and subchapter L of this chapter," and 30 CFR 840.15 specifies that "[e]ach State program shall provide for public participation in enforcement of the State program consistent with that provided by 30 CFR parts 842, 843 and 845 and 43 CFR part 4."

The preambles to both 30 CFR 732.15(b)(10) and 840.15 explain that these rules mean that the State program must authorize the award of costs and expenses incurred in connection with administrative and judicial proceedings as provided under sections 520 (d) and (f) and 525(e) of SMCRA and 43 CFR part 4 (44 FR 14965, 15297, March 13, 1979). In 1981 and 1982, OSM considered revising these two rules to modify this interpretation, but, ultimately, no changes were adopted (47 FR 26359-60, June 17, 1982; 47 FR 35625, August 16, 1982). Therefore, the 1979 preamble is still an authoritative

explanation of the Federal regulations currently in effect.

W.S. 35-11-902(e) and 35-11-901(p), the Wyoming program counterparts to paragraphs (d) and (f), respectively, of section 520 of SMCRA, are unaffected by the amendments under consideration in this rulemaking. These provisions, which authorize the award of costs and expenses incurred in connection with citizen suits to compel compliance with regulatory requirements or to recover damages for personal injury or property damage sustained as a result of a violation, are substantively identical to and consistent with their Federal counterparts.

However, Wyoming Enrolled Act No. 60, as submitted on March 9, 1993, extensively revises W.S. 35-11-437(f), the Wyoming counterpart to section 525(e) of SMCRA, which authorizes the award of costs and expenses incurred in connection with administrative proceedings and judicial review of agency actions. Enrolled Act No. 60 also adds W.S. 35-11-437(g), which further restricts awards of costs and expenses under subsection (f). As discussed below in this finding and in findings 3, 5, 6, and 7, the Secretary has determined that W.S. 35-11-437 (f) and (g) are not fully consistent with section 525(e) of SMCRA and the Federal regulations implementing that provision of SMCRA.

Chapter V of the DEQ Rules of Practice and Procedure is the Wyoming counterpart to the Federal rules at 43 CFR 4.1290 through 4.1296, which implement section 525(e) of SMCRA with respect to awards of costs and expenses incurred in connection with administrative review proceedings. Except as discussed below in this finding, these State rules, as submitted on August 18, 1982, and revised by submittal dated March 9, 1993, are substantively identical to the Federal rules. Finding 2 explains why Wyoming's use of the term "contested case" is not a substantive difference.

The Wyoming rules do not include a counterpart to either 43 CFR 4.1296, which provides that an administrative law judge's decision on a petition for an award of costs and expenses may be appealed to the Interior Board of Land Appeals, or that portion of 43 CFR 4.1291 that specifies where a petition for an award of costs and expenses must be filed. However, unlike the two-tiered Federal administrative review system, Wyoming has only one administrative review entity, the Environmental Quality Council (EQC or the Council). Therefore, neither of these provisions is needed since (1) there is no question as to the entity with which the petition

must be filed, and (2) no administrative review of an EQC decision is possible because no higher-level administrative review entity exists. Furthermore, both Sections 2 and 3.a.(2) of Chapter V clearly identify the Council as the entity responsible for the processing of petitions for the award of costs and expenses.

However, the statute is inconsistent with the regulations in that W.S. 35-11-437(f) vets the Director of the DEQ with the responsibility for processing petitions and determining awards, whereas Chapter V of the DEQ Rules of Practice and Procedure assigns this responsibility to the Council. Since 43 CFR 4.1291 requires that petitions be filed with and processed by the administrative review entity that decided the underlying case, the Secretary finds that W.S. 35-11-437(f) is inconsistent with the Federal regulations to the extent that it assigns this responsibility to the Director of the DEQ, who has no formal administrative review function, rather than the Council. Therefore, the Secretary is not approving the phrases "by the director" and "as the court or the director deems proper" in the first sentence of W.S. 35-11-437(f). Nothing in these actions shall be construed as eliminating the "deems proper" standard of review or as vesting the Council with the authority to review or decide petitions for the award of costs and expenses incurred in connection with judicial proceedings. The Secretary is disapproving the entire phrase "as the court or the director deems proper" to avoid creating a situation in which only the court would have the authority to assess awards under the Wyoming statute, as could be the case if only the clause "or the director" within that phrase was disapproved.

The Wyoming rules also lack a counterpart to 43 CFR 4.1294(a)(2), which allows an award of costs and expenses to any person from the permittee if the person initiates an application for review of alleged discriminatory acts pursuant to 30 CFR part 830 (since recodified as 30 CFR part 865) upon a finding of discriminatory discharge or other acts of discrimination. However, nothing in SMCRA or the Federal regulations requires that State programs include a counterpart to section 703 of the Act or its implementing regulations at 30 CFR part 865. Any person who believes they have been discriminated against in violation of this section of the Act has the right to file an application for review directly with OSM in accordance with 30 CFR part 865. Any resulting hearings would be held by the Office of Hearings

and Appeals of the Department of the Interior in accordance with 43 CFR part 4 and the applicant would have the right to file a petition for an award of costs and expenses under 43 CFR 4.1294(a)(2).

Therefore, the Secretary finds that Chapter V of the DEQ Rules of Practice and Procedure, as submitted on August 18, 1982, and revised on March 9, 1993, is not inconsistent with the Federal requirements concerning the award of costs and expenses incurred in connection with administrative proceedings, as set forth in section 525(e) of SMCRA and 43 CFR part 4. Accordingly, the Secretary is approving these State rules.

2. Award of Costs and Expenses: Contested Case Requirement

Wyoming has revised both W.S. 35-11-437(f) and Section 2.a.(3) of Chapter V of DEQ's Rules of Practice and Procedure to provide that participants in administrative proceedings may recover costs and expenses only if the proceeding is a "contested case" proceeding, although the regulations use this language only in connection with awards from the State, not awards from other parties. Section 525(e) of SMCRA provides for the award of costs and expenses incurred in connection with "any administrative proceeding." Prior to the State's adoption of the amendment under consideration in this rulemaking, W.S. 35-11-437(f) contained similar language.

Although neither the Wyoming Environmental Quality Act (EQA) nor the DEQ Rules of Practice and Procedure directly define "contested case," Chapter I, Section 2.a. of the DEQ Rules of Practice and Procedure indicates that all definitions contained in the Wyoming Administrative Procedure Act, which does define this term, are incorporated by reference. However, Sections 1 and 2.a.(4) of Chapter I of the DEQ Rules define the Wyoming Administrative Procedure Act as W.S. 9-4-101 through 9-4-115. These citations appear to be in error since Title 9 of the Wyoming Statutes does not pertain to administrative review of agency actions. The correct citation appears to be W.S. 16-3-101 through 16-3-115, which W.S. 16-3-101 (a) and (b)(xi) identify as the Wyoming Administrative Procedure Act. The Secretary encourages Wyoming to correct this citation error.

W.S. 16-3-101(b)(ii) defines "contested case" as "a proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law

to be determined by an agency after an opportunity for hearing but excludes designations under W.S. 9-2-1022(h)(i)."

The State has not clearly indicated how this definition would translate in practice to actions and proceedings under the Wyoming Environmental Quality Act and its implementing regulations. However, in an October 29, 1992, document entitled "Statement of Principal Reasons for Adoption" that accompanied the revised rules, the Council stated that "the words 'contested case' were added before the word 'proceeding' * * * to clarify that fees may be awarded only in contested cases, as opposed to rulemaking hearings."

Both the Interior Board of Land Appeals (IBLA or the Board) and the U.S. District Court for the Utah District declined to delineate the full reach of the phrase "any administrative proceeding" in section 525(e) of SMCRA when presented with an opportunity to do so. *Natural Resources Defense Council, Inc. (NRDC), et al. v. Office of Surface Mining Reclamation and Enforcement (OSM), et al.*, 107 IBLA 339, 356 n. 12 (1989); *Utah International, Inc. v. Department of Interior*, 643 F. Supp. 810, 825 n. 26 (D. Utah 1986). However, in deciding these cases, both the IBLA and the U.S. District Court held that this phrase should not be read literally, but rather must be interpreted in the context of the legislative history of SMCRA and case law concerning attorney fee and expense awards under other statutes. Both opinions contain extensive dicta suggesting that the phrase could or should be read to include only administrative proceedings of an adjudicatory nature, not proceedings that are part of the fact-finding process culminating in an initial agency decision, e.g., informal conferences on permit applications. *NRDC, supra*, at 354-360; *Utah International, supra*, at 820-825.

Furthermore, the Federal regulations at 43 CFR 4.1290 and 4.1291, which implement this section of SMCRA in part, provide for an award of costs and expenses only in connection with administrative proceedings resulting in the issuance of a final order by an administrative law judge or the IBLA. The preamble to these regulations notes that the Secretary rejected comments requesting that the scope of the rules be expanded to allow the award of costs and expenses in other types of administrative proceedings, such as rulemaking (43 FR 34385, August 3, 1978).

Therefore, the Secretary finds that the Wyoming statutory and regulatory provisions allowing the award of costs and expenses only in connection with a "contested case" proceeding are not inconsistent with section 525(e) of SMCRA and its implementing regulations, as interpreted by case law. However, the Secretary's approval is predicated upon Wyoming's interpretation of the term "contested case" to include all classes of actions in which participants would be eligible for an award of costs and expenses under 43 CFR 4.1290 through 4.1295, consistent with the discussion set forth above. At a minimum, the term must include all administrative proceedings of an adjudicatory nature. Additionally, as more case law develops, it may be necessary to further expand the interpretation to include other types of administrative proceedings.

3. Award of Costs and Expenses: Eligible Issues [W.S. 35-11-437(f)(i)]

Wyoming Enrolled Act No. 60 revises W.S. 35-11-437(f) to provide that a participant in a proceeding is eligible to receive an award of costs and expenses from the State only if the issues resolved in the contested proceeding were raised in the original complaint and within the statutory timeframes of W.S. 35-11-406(p) or within an enforcement action.

Section 525(e) of SMCRA does not provide a basis for a limitation of this nature. The purpose of section 525(e) is to facilitate public participation in the administrative and judicial review process, as required by section 102(i) of the Act. As stated in the preamble to 43 CFR 4.1290 through 4.1295 as originally proposed:

The legislative history of the Act is clear that section 525(e) of the Act is intended to encourage public participation in the administrative process. Such a provision is designed to encourage citizens to bring good faith actions to insure that the Act is being properly enforced. It is the intention of the Office that these proposed rules not be interpreted to discourage good faith actions on the part of interested citizens. 43 FR 15444, April 13, 1978.

Administrative and judicial review entities may not be obligated to accept untimely filings or amended complaints, but if they do there is no basis for excluding participants in the affected proceeding from eligibility for an award of costs and expenses. Such persons are entitled to all the rights and privileges accorded to other litigants.

Additionally, restricting awards under W.S. 35-11-437(f) to issues "raised within the statutory time frames of W.S. 35-11-406(p) or within an enforcement action" would improperly limit the type

of proceedings for which an award may be made. As previously noted, section 525(e) of SMCRA allows awards in connection with "any administrative proceeding under this Act."

Furthermore, the meaning of the new State statutory language is unclear since W.S. 35-11-406(p) does not establish timeframes for appealing agency actions. Instead, it merely specifies the time within which the regulatory authority must render a decision on a permit application. To be consistent with *NRDC*, *supra*, in which the IBLA found the plaintiffs eligible for an award of costs and expenses pursuant to section 525(e) of SMCRA as a result of their participation in an administrative appeal of a decision on a permit application, Wyoming must likewise authorize the award of costs and expenses incurred in connection with administrative review of regulatory authority decisions on permit applications.

Even if the State language were to be interpreted as including permit application decisions, restricting award eligibility to proceedings involving either enforcement actions or decisions on permit applications is inconsistent with *Utah International*, *supra*. Although the opinion accompanying the *Utah International* decision contains numerous statements that section 525(e) does not apply to nonenforcement administrative proceedings, the court ultimately awarded attorney fees to the plaintiffs in this case as a result of their participation in judicial proceedings concerning a designation of certain lands as unsuitable for surface coal mining operations. Decisions on petitions to designate lands as unsuitable for mining are not enforcement actions or proceedings. Therefore, the court clearly did not intend to limit attorney fee awards to proceedings concerning enforcement actions. In *NRDC*, the IBLA specifically rejected the argument that *Utah International* restricts the scope of section 525(e) in this fashion. 107 IBLA 359-60. The Board further stated that "[t]here is no question that Congress intended to encompass more than section 525 enforcement proceedings within the bounds of section 525(e)" (107 IBLA 356, emphasis in original), and that "[a]t best, the legislative history supports a limitation of section 525(e) to adjudicatory proceedings" (107 IBLA 357).

Therefore, the Secretary finds that W.S. 35-11-437(f)(i), which contains the provision in question, is inconsistent with section 525(e) of SMCRA, and he is not approving it.

The Secretary notes that the regulations submitted by the State do not contain this defect: Chapter V, Section 2.a.(3) of the DEQ Rules of Practice and Procedure allows the award of costs and expenses to any person who "initiates or participates in any contested case proceeding under the act" (emphasis added).

4. Award of Costs and Expenses: Requirement for Separate and Distinct Contribution [W.S. 35-11-437(f)(ii)]

Wyoming Enrolled Act No. 60 revises W.S. 35-11-437(f) to specify that a participant in an eligible proceeding who did not initiate the proceeding may receive an award of costs and expenses from the State only if that person's contribution is separate and distinct from the contribution made by the person initiating the proceeding. Neither section 525(e) of SMCRA nor the corresponding Federal regulations at 43 CFR 4.1294(b) contain a similar provision.

However, the preamble to 43 CFR 4.129(a)(1) clarifies that this requirement is implicit in the provision that, to be eligible for an award, the party must have made a substantial contribution to a full and fair determination of the issues (50 FR 47223, November 15, 1985). Since 43 CFR 4.1294(b) contains a "substantial contribution" provision identical to that of paragraph (a)(1), the same rationale would apply. Accordingly, the Secretary finds that W.S. 35-11-437(f)(ii), which adds the "separate and distinct" stipulation, is not inconsistent with SMCRA or the Federal regulations, and is approving it.

5. Award of Costs and Expenses: Requirement for Establishment of Existence of Violation [W.S. 35-11-437(f)(iii)]

Wyoming Enrolled Act No. 60 revises W.S. 35-11-437(f) to allow the award of costs and expenses from the State only if the person claiming eligibility for such an award establishes the existence of a specific violation of an applicable statute or rule. Neither section 525(e) of SMCRA nor the Federal regulations contain equivalent language.

Under 43 CFR 4.1294(b), the corresponding Federal regulation, a person is eligible for an award of costs and expenses from the regulatory authority if that person "made a substantial contribution to a full and fair determination of the issues" and "prevails in whole or in part, achieving at least some degree of success on the merits." While the preamble to 43 CFR 4.1294(a)(1) states that meeting a requirement for a finding that a

violation of the Act, regulations or permit has occurred is comparable to a showing of some degree of success on the merits (50 FR 47223, November 15, 1985), the reverse of this statement is not true. For example, a person involved in an administrative hearing on a permit decision can achieve at least some degree of success on the merits (imposition of a permit condition or issuance of a revision order) without establishing the existence of a specific violation of statute or rule. The same situation exists with respect to administrative proceedings that end in settlement agreements.

Furthermore, the proposed amendment is in direct conflict with the legislative history of section 525(e) of SMCRA:

Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. This section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in the finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated, prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 131 (1977).

The provision of H.R. 2 to which this passage applies was subsequently adopted by the conference committee as part of SMCRA with only minor changes. The accompanying committee report (H.R. Rep. No. 493, 95th Cong., 1st Sess. 111 (1977)) contains no language repudiating or modifying the portion of H.R. Rep. No. 218 quoted above.

Therefore, the Secretary finds that W.S. 35-11-437(f)(iii), which contains the provision in question, is inconsistent with section 525(e) of SMCRA and the Federal regulations at 43 CFR 4.1294(b), and is not approving it.

6. Award of Costs and Expenses: Applicability to Judicial Proceedings and Administrative Proceedings Under EQA Sections Other Than W.S. 35-11-437

Wyoming Enrolled Act No. 60 revises W.S. 35-11-437(f), the State counterpart to section 525(e) of SMCRA, by providing in part that costs and expenses (including attorney's fees) incurred by parties in connection with a proceeding under the Act may be assessed against one or more of those parties only if the proceeding is an

administrative proceeding. In relevant part, the revised statute reads as follows:

Whenever an order is issued under this section, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the director to have been reasonably incurred by the person for or in connection with his participation in the proceeding, including any judicial review of agency actions, may be assessed against either party as the court or the director deems proper. This subsection shall apply only to administrative contested case proceedings under the provisions of this act relating to the regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, as that law is worded on August 3, 1977. * * *

Although the first sentence of subsection (f), which is essentially unchanged, would appear to allow assessments in connection with judicial review proceedings, this provision is now negated by the second sentence, which has been revised to specify that "[t]his subsection shall apply only to administrative contested case proceedings * * *" (emphasis added). Therefore, the Secretary finds that W.S. 35-11-437(f) as revised is inconsistent with section 525(e) of SMCRA, which allows costs and expenses to be assessed in connection with both administrative and judicial proceedings.

In addition, the first sentence of subsection (f) ("Whenever an order is issued under this section, * * *"), authorizes the award of costs and expenses only in connection with proceedings concerning enforcement actions since W.S. 35-11-437 ("this section") pertains only to such actions. Section 525(e) of SMCRA, which applies "[w]henver an order is issued under this section, or as a result of any administrative proceeding under this Act," (emphasis added), is far more expansive in its coverage. Both the plain language of section 525(e) and pertinent case law (e.g., *NRDC and Utah International, supra*) extend the reach of paragraph (e) beyond section 525, which pertains only to administrative review of enforcement actions, to administrative and judicial review proceedings under other sections of SMCRA. Therefore, the Secretary finds that W.S. 35-11-437(f) is inconsistent with section 525(e) of SMCRA to the extent that the State statutory provision does not apply to proceedings under sections of the Wyoming Environmental Quality Act other than W.S. 35-11-437.

Based on the preceding discussion, the Secretary is not approving the introductory clause of the first sentence of W.S. 35-11-37(f) ("Whenever an order is issued under this section,"), or the words "only" and "administrative"

in the second sentence of this subsection ("This subsection shall apply only to administrative contested case proceedings * * *").

7. Award of Costs and Expenses: Cap on Fees and Costs [W.S. 35-11-437(g)]

Wyoming Enrolled Act No. 60 revises W.S. 35-11-437 by adding a new subsection (g), which provides that attorney's fees, expert witness fees or other fees or costs shall not exceed \$50.00 per hour. To the extent that this provision would apply to awards of costs and expenses under subsection (f) of W.S. 35-11-437, it is inconsistent with section 525(e) of SMCRA, which authorizes the award of all "reasonably incurred" costs and expenses. An inflexible cap on hourly rates is not in accordance with SMCRA's reasonable cost standard as interpreted by the courts, which generally use the prevailing community market rate to compute award amounts. See *NRDC and Utah International, supra*.

Therefore, the Secretary is not approving W.S. 35-11-437(g).

8. Right to Intervene in Administrative Proceedings: Chapter II, Section 7, DEQ Rules of Practice and Procedure

In findings 22.16 and 22.D (45 FR 20977, March 31, 1980; and 45 FR 78674, November 26, 1980, respectively) concerning Wyoming's original program submittal and subsequent resubmittal, the Secretary determined that the Wyoming rules governing intervention in administrative review proceedings did not afford citizens rights of intervention as broad as those in the Federal regulations at 43 CFR 4.1110. Accordingly, in the approval of the Wyoming program, the Secretary imposed a condition at 30 CFR 950.11(c) requiring the State to correct this deficiency.

On August 18, 1982, Wyoming submitted a fully promulgated revised version of Chapter II, Section 7 of the DEQ Rules of Practice and Procedure. The revised version includes a new subsection b. of Section 7 that is substantively identical to 43 CFR 4.1110. Therefore, the Secretary finds that the revised rules satisfy the intervention component of the program condition at 30 CFR 950.11(c), and is approving the submittal and modifying the condition accordingly.

9. DEQ Rules of Practice and Procedure, Chapter VI: Informal Review by Director

As submitted on August 18, 1982, this new chapter recognizes the authority of the Director of the DEQ to review and modify decisions of the administrators of the various divisions within the

Department, including the Land Quality Division. This arrangement is in accordance with standard managerial principles and is analogous to the authority of the Secretary of the Interior to review and modify decisions of the Director of OSM; therefore, it is not inconsistent with any Federal requirement under SMCRA.

The new rules grant individuals the right to request that the Director of the DEQ hold an informal conference to review decisions of the Administrator; they also establish procedural, notice and decision requirements to govern such conferences. There are no Federal counterparts to these provisions, but they are consistent with the purpose of SMCRA set forth in section 1029(i) of the Act; i.e., the development of procedures for public participation in the program and its enforcement.

Furthermore, Sections 4 and 5 of this chapter of the State regulations provide that (1) failure to seek informal review shall not be construed as a failure to exhaust administrative remedies, (2) no evidence as to statements made or evidence produced by one participant at an informal conference may be introduced by another participant at a subsequent formal proceeding, and (3) the Director of the DEQ cannot usurp the authority of the EQC. Therefore, the State rules will not compromise or encumber the formal administrative review process or the right to administrative review.

Accordingly, the Secretary finds that Chapter VI of the DEQ Rules of Practice and Procedure, as submitted on August 18, 1982, is not inconsistent with SMCRA or the Federal regulations, and is approving these rules.

10. Definition of "Toxic Materials"

On August 18, 1982, Wyoming submitted a permanent rule revising the definition of "toxic materials" at Chapter I, Section 2(99) of the LQD Rules and Regulations in a fashion identical to a temporary emergency rule submitted on May 26, 1982.

OSM approved the emergency rule on September 27, 1982 (47 FR 42351), and, in the same rulemaking document, removed the corresponding condition of State program approval at 30 CFR 950.11(b).

Wyoming has since recodified this definition as Chapter I, Section 2(cv) of the LQD Rules and Regulations, but no other changes have occurred. Similarly, the corresponding Federal definition of "toxic-forming materials" at 30 CFR 701.5 has not changed since it was first promulgated on March 13, 1979. Because the permanent State definition at Chapter I, Section 2(cv) of the LQD

Rules is identical to the temporary emergency definition approved by OSM on September 27, 1982, the Secretary finds it to be no less effective than the Federal definition, and is approving it.

IV. Summary and Disposition of Comments

Public Comments

OSM announced receipt of the March 9, 1993, submittal in the March 30, 1993, *Federal Register* (57 FR 16637), and, in the same document, opened the public comment period and provided opportunity for a public hearing on the substantive adequacy of both the August 18, 1982, and the March 9, 1993, submittals. The public comment period closed on April 29, 1993. A public hearing was not held because no one requested an opportunity to testify.

Written comments were received from the Wyoming Outdoor Council (WOC), The Powder River Basin Resource Council (PRBRC), and the National Wildlife Federation (NWF) (Administrative Record Nos. WY-22-12, WY-22-14, and WY-22-11, respectively). A summary of these comments and their disposition is set forth below:

1. WOC, PRBRC, and NWF stated that restricting awards of costs and expenses to "contested case" proceedings would be more limiting than and inconsistent with section 525(e) of SMCRA and 43 CFR 4.1294. In particular, several commenters argued that participants in informal conferences should be eligible for awards of costs and expenses. For the reasons discussed in finding 2, the Secretary does not agree with the commenters. Case law associated with implementation of section 525(e) of SMCRA indicates that petitions for awards of costs and expenses incurred in connection with administrative proceedings must be entertained only if the proceedings are adjudicatory in nature (although nothing in these decisions would prohibit the regulatory authority from voluntarily considering petitions submitted in connection with other types of administrative proceedings). Informal conferences are both predecisional and nonadjudicatory.

Neither *NRDC* nor *Utah International*, *supra*, supports awards of costs and expenses in connection with predecisional nonadjudicatory administrative proceedings. Therefore, by restricting awards to contested case proceedings, the Wyoming amendments do not inappropriately limit the scope of proceedings in which participants may be eligible for an award of costs and expenses. Additionally, as discussed in finding 2, the Secretary's approval is

predicated upon Wyoming's interpretation of the term "contested case" to include all classes of actions in which participants would be eligible for an award of costs and expenses under 43 CFR 4.1290 through 4.1295.

2. WOC, PRBRC, and NWF stated that W.S. 35-11-437(f)(i), which provides that, to receive an award of costs and expenses from the State, the issues resolved in the proceeding must be those raised in the original complaint within certain statutory timeframes or within an enforcement action, is inconsistent with section 525(e) of SMCRA and 43 CFR 4.1294(b) in that it would improperly narrow the type of proceedings for which an award could be made. As discussed in finding 3, the Secretary agrees, and is not approving this provision.

3. WOC, PRBRC, and NWF stated that W.S. 35-11-437(f)(ii), which provides that, to receive an award of costs and expenses from the State, the contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution of the person initiating the proceeding, is inconsistent with section 525(e) of SMCRA and 43 CFR 4.1294(b), which do not contain this provision. For the reasons set forth in detail in finding 4, the Secretary does not agree. NWF also objected to the lack of a definition for "initiate." However, the commenter provided no explanation of why such a definition is necessary. Since the Secretary is unaware of any confusion as to the meaning of this term, which appears to be clear on its face, the Secretary is not requiring that Wyoming provide the definition requested by the commenter.

NWF further stated that this Wyoming statutory provision is in conflict with the DEQ Rules of Practice and Procedure, which do not contain equivalent language. In response, the Secretary notes that, like the Federal rules at 43 CFR 4.1294(b), Section 2.a.(3) of chapter V of the Wyoming rules requires that a person make a substantial contribution to a full and fair determination of the issues to be eligible for an award of costs and expenses from the regulatory authority. The preamble to 43 CFR 4.1294 contains the following discussion:

One comment suggested that the initiator should be required to make a contribution separate and distinct from OSM in order to be eligible to recover an award of costs. The final regulation was not revised to accommodate this comment. However, the requirement that a contribution be "substantial" precludes an award if a contribution simply duplicates that of OSM. 50 FR 47223, November 15, 1985.

Therefore, as explained in finding 4, the Secretary finds that the "separate and distinct" requirement is an implicit component of the "substantial contribution" requirement, and that there is no conflict between the statute and the regulations on this matter.

4. WOC, PRBRC, and NWF stated that W.S. 35-11-437(f)(iii), which provides that, to receive an award of costs and expenses from the State, a person must establish the existence of a specific violation of applicable statute or rule, is inconsistent with section 525(e) of SMCRA and 43 CFR 4.1294(b). As discussed in detail in finding 5, the Secretary agrees, and is not approving this provision.

5. PRBRC stated that W.S. 35-11-437(f) is inconsistent with 43 CFR 4.1294(d) because it gives the court or the Director the discretion to assess awards against any person as deemed proper, without reference to whether the person participated in bad faith for the purpose of harassing or embarrassing the permittee. In response, the Secretary notes that the provision to which the commenter refers is included in Chapter V of the DEQ Rules of Practice and Procedure (see paragraphs (2)(a), (4), and (5) of Section 2.a.).

6. PRBRC noted that Chapter V, Section 1 of DEQ's Rules of Practice and Procedure does not clearly indicate whether a petition for an award of costs and expenses is to be filed with the EQC or the Director of the DEQ. While this statement is correct, Sections 2 and 3 of the DEQ Rules clearly assign responsibility for processing these petitions to the EQC. As discussed in finding 1, the Secretary agrees that language to the contrary in W.S. 35-11-437(f) is confusing and inconsistent with 43 CFR 4.1291, and is not approving the conflicting language.

7. PRBRC noted that DEQ's Rules of Practice and Procedure do not contain a counterpart to 43 CFR 4.1296. As discussed in finding 1, no State counterpart is needed since, unlike the two-tiered Federal administrative review system, Wyoming has only one administrative review entity, the EQC. Hence, administrative review of EQC decisions is not possible. Likewise, the Federal regulations at 43 CFR 4.1296 do not provide for administrative review of a petition originally decided by the Interior Board of Land Appeals, the higher-level administrative review body under the Federal system.

8. WOC objected to the lack of a State counterpart to 43 CFR 4.1294(a)(2). As discussed in detail in finding 1, no State counterpart is needed since affected parties have the right to file petitions directly with OSM; there is no

requirement to first exhaust any available State remedies.

9. PRBRC opposed OSM's decision to process the Wyoming submittals as program amendments under 30 CFR 732.17. The commenter stated that because these submittals pertain to a condition of program approval, the provisions of 30 CFR 732.13(j) apply instead. The Secretary cannot agree with the commenter. The Federal regulations at 30 CFR 732.17(g) specifically require that all changes to laws and regulations that make up the State program be submitted to OSM as a program amendment. Both the August 18, 1982, and the March 9, 1993, submittals fall into this category. Furthermore, the provisions of 30 CFR 732.13(j) apply only if the State has not initiated action to satisfy the condition of program approval, a situation which does not exist here.

Federal Agency Comments

Pursuant to section 503(b) of SMCRA and its implementing regulations at 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Wyoming program. None of these agencies provided any objection to approval of the submittals.

State Historic Preservation Office (SHPO) and Advisory Council on Historic Preservation (ACHP) Comments

As required by 30 CFR 732.17(h)(4), OSM provided the submittals to the SHPO and ACHP for comment. No comments were received.

Environmental Protection Agency Concurrence

Under 30 CFR 732.17(h)(11)(ii), OSM must obtain the written concurrence of the Administrator of the U.S. Environmental Protection Agency (EPA) before approving any provisions of a proposed State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). On October 25, 1993, the EPA concurred with Wyoming's proposed amendments (Administrative Record No. WY-22-16).

V. Secretary's Decision

Based on the above findings, the Secretary is approving Wyoming's proposed program amendments as submitted on August 18, 1992, and March 9, 1993, with the exception of W.S. 35-11-437(g) (see finding 7) and those provisions of W.S. 35-11-437(f) set forth in findings 1, 3, 5, and 6. The Secretary also is revising the cost

recovery component of the condition of program approval at 30 CFR 950.11(c) to reflect the statutory and regulatory changes made by the proposed amendments consider in this rulemaking. For the reasons discussed in finding 8, the Secretary is removing the intervention component of the condition.

The Federal regulations at 30 CFR Part 950 codifying decisions concerning the Wyoming program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal Standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

The Secretary acknowledges that the plaintiff in *Powder River Basin Resource Council v. Babbitt* ("Powder River"), No. 92-CV-1021-B (D. Wyo. September 29, 1993) (Order granting defendants' motions for summary judgement; notice of appeal filed November 22, 1993), included in its prayer for relief a request that the court compel the Secretary to make any amendments satisfying condition "c" retroactive to May 20, 1983, the deadline the Secretary had established for Wyoming to comply with the condition. The Secretary does not find the action requested by the plaintiff to be appropriate in this instance.

Retroactive application of SMCRA regulations is committed to the discretion of the Secretary. See *id.* at 13, n. 4. However, retroactive application is inconsistent with the traditional presumption that regulations are prospective, not retroactive, and that advance notice of their application must be provided. With respect to the current rulemaking, Wyoming did not propose to apply these amendments retroactively, and the Secretary is adverse to imposing such a requirement in the absence of a compelling reason to do so. The Powder River plaintiff appears to be the only party that would be affected positively by a retroactive application. This plaintiff did not rely to its detriment on the existence of cost recovery provisions in the Wyoming program, but has instead labored for their addition to the program. In addition, the underlying permit challenge was maintained despite the absence of the provisions sought by the plaintiff.

The Secretary is reluctant to impose upon Wyoming the obligation to pay past costs and expenses on the basis of retroactive application of provisions that, prior to this rulemaking, have not

been part of the State's approved program. However, the Secretary's decision not to require retroactive application of these amendments does not preclude Wyoming from paying all or part of the plaintiff's costs and expenses if the State is so inclined.

VI. Effect of Secretary's Decision

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

VII. Procedural Determinations

Compliance With Executive Order 12866

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

Compliance With Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsection (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 12550) and Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and

whether the requirements of 30 CFR Parts 730, 731, and 732 have been met.

Compliance With the National Environmental Policy Act

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

Paperwork Reduction Act

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

Compliance With the Regulatory Flexibility Act

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

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 14, 1994.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below.

PART 950—WYOMING

1. The authority citation for part 950 is revised to read:

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

2. In § 950.11, paragraph (c) is revised to read:

§ 950.11 Terms and conditions of State program approval.

* * * * *

(c) On or before June 1, 1994, Wyoming must revise section 35-11-437 of the Wyoming Statutes (W.S.) to be consistent with the Federal requirements at section 525(e) of SMCRA (30 U.S.C. 1275(e)) and 43 CFR 4.1290 through 4.1295 concerning the award of costs and expenses incurred in connection with administrative and judicial proceedings. Specifically, the State must revise this section to:

(1) Clearly authorize the award of costs and expenses incurred in connection with participation in judicial review proceedings concerning agency actions;

(2) With respect to awards from the State, clearly authorize the award of costs and expenses incurred in connection with participation in any administrative contested case proceedings under the approved program, not just proceedings concerning enforcement actions under W.S. 35-11-437 or actions taken under W.S. 35-11-406(p);

(3) Authorize the award of all reasonably incurred costs and expenses without placing any inflexible limits on the meaning of "reasonably incurred" or restricting awards to issues raised in the original complaint;

(4) With respect to administrative review proceedings, clarify that petitions for awards of costs and expenses must be filed with and reviewed and decided by the Environmental Quality Council, not the Director of the Department of Environmental Quality; and

(5) With respect to awards from the State, eliminate the requirement that the person establish the existence of a specific violation of applicable statute or rule.

3. In § 950.15, paragraph (r) is added to read:

§ 950.15 Approval of regulatory program amendments.

* * * * *

(r) Except for the language noted in paragraph (r)(1) of this section and the addition of paragraph (g), which would establish a maximum hourly rate for fee awards, to section 35-11-437 of the Wyoming Statutes, the following amendments to the laws, rules and regulations of the Wyoming Department of Environmental Quality, as submitted by Wyoming on August 18, 1982, and March 9, 1993, are approved effective January 24, 1994.

(1) Section 35-11-437(f) of the Wyoming Statutes as revised by Enrolled Act No. 60 and submitted on

March 9, 1993, except the following language appearing in italics:

(f) *Whenever an order is issued under this section, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the director to have been reasonably incurred by the person for or in connection with his participation in the proceeding, including any judicial review of agency actions, may be assessed against either party as the court or the director deems proper.* This subsection shall apply only to administrative contested case proceedings under the provisions of this act relating to the regulation of surface coal mining and reclamation operations in accordance with Pub. L. 95-87, as that law is worded on August 3, 1977. For payments from the department, the following shall apply:

(i) *The issues resolved in the contested proceeding are those in the original complaint that were raised within the statutory time frames under W.S. 35-406(p) or within an enforcement action;*

(ii) *The contribution of a person who did not initiate a proceeding shall be separate and distinct from the contribution made by a person initiating the proceeding;*

(iii) *The person shall establish the existence of a specific violation of applicable statute or rule.*

(2) Revisions to Chapter II, Section 7 of the Rules of Practice and Procedure of the Wyoming Department of Environmental Quality, as submitted on August 18, 1982, concerning rights of intervention in administrative review proceedings.

(3) The addition of Chapter V, as originally submitted on August 18, 1982, and modified by submittal dated March 9, 1993, to the Rules of Practice and Procedure of the Wyoming Department of Environmental Quality. This chapter pertains to the award of costs and expenses incurred in connection with administrative proceedings.

(4) The addition of Chapter VI, as submitted on August 18, 1982, to the Rules of Practice and Procedure of the Wyoming Department of Environmental Quality. This chapter pertains to informal review by the Director of the Wyoming Department of Environmental Quality of decisions made by division administrators.

(5) The definition of "toxic materials" at Chapter I, Section 2(cv) [formerly Section 2(99)] of the Rules and Regulations of the Land Quality Division of the Wyoming Department of Environmental Quality, as submitted on August 18, 1982.

[FR Doc. 94-1420 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-05-M

30 CFR Part 950**Wyoming Permanent Regulatory Program**

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

ACTION: Final rule; non-approval of amendment.

SUMMARY: OSM is announcing the non-approval with required amendments of a proposed amendment to the Wyoming permanent regulatory program (hereinafter, the "Wyoming program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment, submitted January 6, 1993, and April 13, 1993, pertains to shrub density standards. The proposed amendment was intended to revise the Wyoming program to be consistent with the corresponding Federal standards and to incorporate the additional flexibility afforded by the revised Federal rules.

EFFECTIVE DATE: January 24, 1994.

FOR FURTHER INFORMATION CONTACT: Guy V. Padgett, Telephone: (307) 261-5776.

SUPPLEMENTARY INFORMATION:**I. Background on the Wyoming Program**

On November 26, 1980, the Secretary of the Interior conditionally approved the Wyoming program. General background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Wyoming program can be found in the November 26, 1980, *Federal Register* (45 FR 78637). Subsequent actions concerning Wyoming's program and program amendments can be found at 30 CFR 950.11, 950.12, 950.15 and 950.16.

II. Submission of Amendment

By letter dated January 6, 1993, (Administrative Record No. WY-21-1) Wyoming submitted shrub density rules as a proposed amendment to its permanent program pursuant to SMCRA. The proposed Wyoming amendment revises the Land Quality Division (LQD) Rules at Chapter IV, Section 2(d)(x)(E), shrub density standard, and Appendix A, entitled "Vegetation Sampling Methods and Reclamation Success Standards for Surface Coal Mining Operations."

OSM published a notice in the March 22, 1993, *Federal Register* (58 FR 15318) announcing receipt of the amendment and inviting public comment on the adequacy of the

proposed amendment. The public comment period ended April 21, 1993. During this public comment period Wyoming submitted additional information regarding shrub density legislation, Enrolled Act No. 86 [Senate File No. 39] on April 13, 1993 (Administrative Record No. WY-21-21). This proposed legislation amended Wyoming Statute (W.S.) 35-11-103(e) by creating new paragraphs (xxviii) through (xxx), that define agricultural lands, critical habitat, and important or critical habitat; modified the paragraph at W.S. 35-11-402(b), that provides shrub density standards; and created a new subsection (c) at W.S. 35-11-402, that would provide shrub density standards on grazingland.

OSM published a second notice in the April 30, 1993, *Federal Register* (58 FR 26079) announcing receipt of this additional information, reopening and extending the comment period, and providing an opportunity for a public hearing. The public comment period closed on June 1, 1993.

A public meeting was requested and held on June 8, 1993. The summary notes for that meeting are available for public review (administrative record No. WY-21-49).

During its review of the amendment, OSM identified various concerns in the proposed regulations and legislation, including the conflicting nature of the proposed rules and statute. OSM notified Wyoming of these concerns by letter dated August 17, 1993 (Administrative Record No. WY-21-50).

Wyoming responded to these concerns by letter dated October 7, 1993, with additional information (Administrative Record No. WY-21-51). Wyoming's submittal included a table identifying the proposed statutes and rules that conflict with each other, those that complement one another, and discussions on some of the concerns in the issue letter.

OSM published a third notice in the October 22, 1993, *Federal Register* (58 FR 54540) announcing receipt of this additional information; reopening and extending the comment period. The public comment period closed on November 8, 1993.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the amendment submitted by Wyoming on January 6, 1993, and April 13, 1993, and subsequently clarified on October 7, 1993.

1. W.S. 35-11-103(e)(xxviii): Definition of Agricultural Lands

Wyoming proposes at W.S. 35-11-103(e)(xxviii) a definition as follows:

(e) (xxviii) "Agricultural lands" means cropland, pastureland, hayland, or grazingland;

Neither SMCRA nor the implementing Federal regulations include a definition of agricultural lands. Wyoming's proposed statutory definition appears to make explicit what land uses are considered agricultural in nature. Wyoming is combining specific land uses into a general category but still maintains the individual land use definitions in its program. Nothing in the Federal program would preclude such combining of land uses into a single category so long as it does not result in being inconsistent with the Federal and State program requirements.

In the August 17, 1993, letter, OSM cautioned the State regarding the exclusion of "agricultural lands" from lands that can contain habitat of unusually high value as proposed at W.S. 35-11-103(e)(xxx) (see discussion at Finding 3). Wyoming did not address this concern in its October 7, 1993, reply. It appears that the sole purpose of the proposed statutory definition of "Agricultural lands" is its use in the proposed statutory definition of "Important habitat or crucial habitat". Thus the proposed definition would cause the State program to be inconsistent with the Federal program requirements.

Therefore, the definition of "Agricultural lands" as is proposed to be used at W.S. 35-11-103(e)(xxx) would not be in accordance with the Federal requirements. The Director is: (1) not approving the definition; and (2) is requiring Wyoming to either clarify how the definition would not render its program less stringent than SMCRA requirements and less effective than the Federal regulation requirements or repeal the definition.

2. W.S. 35-11-103(e)(xxix): Definition of Critical Habitat

Wyoming proposes at W.S. 35-11-103(e) a new definition as follows:

(xxix) "Critical habitat" means only that fish and wildlife habitat designated as critical by the United States Secretary of the Interior or Secretary of Commerce, for the survival and recovery of listed threatened and endangered species;

Neither SMCRA nor the implementing Federal regulations define critical habitat. Wyoming's LQD rules at Chapter I, Section 2(v) already define

the term critical habitat. However, based on Wyoming's clarification submitted October 7, 1993, this rule definition is superseded by the proposed statutory definition (Administrative Record No. WY-21-51).

All references to critical habitat in the Federal regulations at 30 CFR 780/784.16 and 816/817.97 cite critical habitats listed by the Secretary under the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*). Under section 3 of ESA, a critical habitat is the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with provisions of Section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection; and (III) specific areas outside the geographical area occupied by the species at the time it is listed * * * that such areas are essential for the conservation of the species.

The ESA does not use the term "fish and wildlife habitat" in the definition of critical habitat. Instead, the ESA only refers to geographic areas with physical or biological features that are essential for the species. The ESA also defines the term "species" as including "any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature" (Emphasis added).

The proposed Wyoming definition of critical habitat appears to exclude plants. Also, Wyoming has not specified any State statutes or rules that identify State critical habitat or Threatened and Endangered Species as required by the Federal regulations at 30 CFR 780/784.16. Additionally, OSM cannot determine whether the term "fish and wildlife habitat" in this definition means fish and wildlife habitat for ESA purposes or fish and wildlife habitat as a land use. Finally, Wyoming also recognizes critical habitat designated by the "Secretary of Commerce." It is not clear if this requirement is in addition to the Secretary of the Interior's designation or is an option to use the "Secretary of Commerce" designation instead of the Secretary of Interior's.

Therefore, based on the above discussion, the Director finds that the proposed statutory definition at W.S. 35-11-103(e)(xxix) is not in accordance with and is less effective than the Federal program requirements and is not approving the proposed definition. Wyoming is required to either repeal this statutory definition or modify it to be in accordance with and no less

effective than the Federal program requirements.

3. W.S. 35-11-103(e)(xxx): Definition of Important and Crucial Habitat

Wyoming proposes at W.S. 35-11-103(e)(xxx) a definition as follows: (xxx) "Important habitat" or "crucial habitat" means that fish and wildlife habitat, exclusive of agricultural lands, which in limited availability, increases the species diversity of a localized area and fulfills one (1) or more of the essential living requirements of important wildlife species.

Neither SMCRA nor the implementing Federal regulations include a definition of important habitat or crucial habitat. However, the Federal regulation at 30 CFR 780/784.16(a)(2) requires permit applications to include site-specific resource information when the permit area or adjacent area is likely to include "habitats of unusually high value for fish and wildlife such as streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas."

These habitats of unusually high value would appear to be comparable to the State proposed definition for important or crucial habitat. Additionally, the State regulations at LQD Rule Chapter II, Section 2(a)(i)(E)(II) require permit applications to include specific information "if critical or important habitat or migration route disruption is likely." Wyoming's LQD Rule at Chapter II, Section 3(b)(iv)(B) is similar to the Federal regulation at 30 CFR 780.16(b)(3)(ii) in requiring protection and enhancement of "important habitat for fish and wildlife, such as wetlands, riparian areas, rimrocks, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas."

However, the Federal permitting and performance standard regulations do not exclude any land uses from consideration in meeting the requirements for protection and enhancement. Wetlands, riparian areas, migration and wintering areas can potentially occur within any land use including grazingland, pastureland, forestry, etc. Wyoming's proposed definition would appear to exclude consideration of important habitat or crucial habitat from those land uses included in the categorical definition of "agricultural lands." These would include the land uses of cropland, pastureland, hayland and grazingland.

In its August 17, 1993, letter to the State, OSM cautioned that such exclusion would render Wyoming's

statute less effective than the Federal regulations requirements and less stringent than the requirements of SMCRA. In its October 7, 1993, reply to OSM's concerns, Wyoming did not address this issue. Additionally, OSM cannot determine whether the use of the term "fish and wildlife habitat" in this definition means fish and wildlife habitat for ESA purposes or fish and wildlife habitat as a land use.

Based on the above discussion the Director finds that the proposed statutory definition at W.S. 35-11-103(e)(xxx) is not in accordance with and is less effective than the Federal program requirements and is not approving the proposed definition. Wyoming is required to either repeal this statutory definition or modify it to be in accordance with and no less effective than the Federal program requirements.

4. W.S. 35-11-402(b): Establishing Standards

Wyoming proposes to revise existing W.S. 35-11-402(b) as follows (proposed language in upper case):

(b) To the extent federal law or regulations require consultation and approval by state wildlife agencies regarding surface mining lands to be reclaimed for fish and wildlife habitat, the Wyoming game and fish department shall consider fish and wildlife habitat to mean as defined in W.S. 35-11-103(e)(xxvi) and does not include grazingland as defined in W.S. 35-11-103(e)(xxvii). IN ESTABLISHING RECLAMATION STANDARDS PURSUANT TO THIS SECTION AND APPLICABLE FEDERAL LAW OR REGULATION THE COUNCIL SHALL APPLY THE DEFINITIONS OF W.S. 35-11-103(e)(xxvi) THROUGH (xxx).

a. Proposed Statutory Provision

The proposed new language requires the Environmental Quality Council to use the following specific statutory definitions when establishing standards regarding required consultation and approval by State wildlife agencies when lands are to be reclaimed for fish and wildlife habitat: "Fish and wildlife habitat" land use (W.S. 35-11-103(e)(xxvi)); "Grazingland" land use (W.S. 35-11-103(e)(xxvii)); "Agricultural lands" (W.S. 35-11-103(e)(xxviii)); "Critical habitat" (W.S. 35-11-103(e)(xxix)); and, "Important habitat or crucial habitat" (W.S. 35-11-103(e)(xxx)). The statutory definitions for fish and wildlife habitat and grazingland are existing definitions that were previously approved by OSM. The statutory definitions for agricultural lands, critical habitat, and important

habitat or crucial habitat were proposed by Wyoming in this amendment.

As discussed in Findings 1, 2, and 3, the three proposed definitions referenced in this provision, W.S. 35-11-103(e)(xxviii), (xxix) and (xxx), are not being approved by OSM. This provision, if approved, would inappropriately reference the disapproved definitions.

Furthermore, the Environmental Quality Council is already required, by existing W.S. 35-11-402(b), to use the land use definitions of fish and wildlife habitat and grazingland at W.S. 35-11-103(e)(xxvi) and (xxvii) when developing reclamation standards for those two postmining land uses. The proposed additional language is redundant and confusing.

Based on the foregoing, the Director finds that the proposed revision to W.S. 35-11-402(b) is less stringent than SMCRA and less effective than the Federal regulations and is not approving it. The Director is requiring Wyoming to repeal this provision.

b. Existing Statutory Provision

On February 21, 1990, OSM required Wyoming, by letter, pursuant to 30 CFR 732 (required amendment), to revise its program to be no less effective than the Federal regulations at 30 CFR 816/817.116(b)(3)(i).

In the cover letter to this submittal, Wyoming specified that existing W.S. 35-11-402(b) and W.S. 35-11-103(e)(xxvi), approved by OSM on July 8, 1992 (57 FR 30121), satisfy the required amendment of February 21, 1990. Wyoming did not, at that time, identify the submission of proposed W.S. 35-11-402(b) and W.S. 35-11-103(e)(xxvi) as a response to the required amendment of February 21, 1990, but rather as a State-initiated amendment. OSM approved W.S. 35-11-402(b) and W.S. 35-11-103(e)(xxvi) as a State initiative, leaving the required amendment outstanding.

Wyoming now contends that the language approved in the previous program amendment was intended to address the portion of the February 21, 1990, required amendment pertaining to consultation and approval by the appropriate State agencies responsible for fish and wildlife habitat land uses. Accordingly, OSM has reviewed the State provision at W.S. 35-11-402(b), as well as the existing State provision at W.S. 35-11-103(e)(xxvi), to determine if Wyoming has satisfied the required program amendment.

The Federal regulations at 30 CFR 816/817.116(b)(3)(i) provide as follows:

(b) Standards for [revegetation] success shall be applied in accordance

with the approved postmining land use and, at a minimum, the following conditions: * * *

(3) For areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

(i) Minimum stocking and planting arrangements shall be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur on either a program-wide or a permit-specific basis.

The existing State statutory provisions at W.S. 35-11-402(b) and W.S. 35-11-103(e)(xxvi), respectively, provide as follows:

(b) To the extent federal law or regulations require consultation and approval by state wildlife agencies regarding surface mining lands to be reclaimed for fish and wildlife habitat, the Wyoming game and fish department shall consider fish and wildlife habitat to mean as defined in W.S. 35-11-103(e)(xxvi) and does not include grazingland as defined in W.S. 35-11-103(e)(xxvii).

(e) (xxvi) "Fish and wildlife habitat" means land designated wholly or partially to the production, protection, or management of species of fish or wildlife.

The quoted State provisions require the Wyoming Game and Fish Department to use the noted definition of "fish and wildlife habitat" when consulting on the revegetation of lands to be reclaimed to the fish and wildlife habitat land use. These provisions do not correspond to 30 CFR 816/817.116(b)(3)(i).

Additionally, the quoted provisions do not specify if the Wyoming Game and Fish Department would be the appropriate State agency responsible for the administration of forestry and wildlife programs for any of the land uses, other than fish and wildlife habitat, mentioned in the Federal regulations (recreation, shelterbelts, and forest products).

Therefore, without further clarifying information from Wyoming, the Director finds the statutory provision at W.S. 35-11-402(b) combined with the previously approved definition of fish and wildlife habitat at W.S. 35-11-103(e)(xxvi), does not satisfy OSM's February 21, 1990, required amendment.

5. W.S. 35-11-402(c): Grazingland Shrub Standard

Wyoming proposes at W.S. 35-11-402 establishment of standards as follows:

(c) For the reclamation of grazingland, operators shall be required to reestablish shrubs on ten percent (10%) of the affected surface at a density of one (1) shrub per nine (9) square meters, or to a pre-mine density, whichever is less. The shrubs used for reestablishment shall be those native to the general area, and shall include those found pre-mining, but the premining dominant shrub need not be the dominant shrub in the post-mining reclamation.

SMCRA, at section 515(b)(24), requires that the operator, to the extent possible, using the best technology currently available (BTCA), minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable. Further, the Federal regulations at 30 CFR 780/784.16 (Fish and wildlife information for permit applications) require resource information of which the scope and level of detail determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife shall be sufficient to design the protection and enhancement plan. This plan shall include a description of how, to the extent possible using BTCA, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values.

The State has failed to demonstrate through the submission of documentation and/or other materials, that the proposed shrub standard: (1) would minimize disturbances and adverse impacts on fish and wildlife and related environmental values; (2) represents BTCA; and (3) was developed in consultation with the Wyoming Game and Fish Department (WGFD).

Therefore, the Director finds the proposed statutory provision at W.S. 35-11-402(c) to be less stringent than SMCRA and less effective than the Federal regulation requirements. The Director is not approving the proposed statutory provision and is requiring Wyoming to either repeal this statutory provision, modify it to make it consistent with SMRA and no less effective than the Federal regulations, or provide the required documentation to show that the standard meets the Federal program requirements.

6. LQD Rules at Chapter IV, Section 2 and Appendix A—Shrub Density Rule and Revegetation Success Standards.

The State additionally proposes to revise LQD Rule Chapter IV, Section 2(d)(x)(E) to require a shrub density standard of 1 shrub per square meter over 20 percent of the affected surface (including fish and wildlife habitat land use) and excluding areas where the premining land use was pastureland or cropland. Additionally, the proposed standard can be reduced to the level of the premine shrub densities if premine shrub densities are less than the proposed success standard. The proposed rule requires establishment of shrubs in a mosaic pattern to optimize habitat interspersation and edge effect. A minimum shrub patch size of 0.05 acres is required. For areas of crucial or important habitat, the Wyoming Game and Fish Department (WGFD) must be consulted for recommended reclamation standards for shrub establishment. Specific criteria and procedures implementing this proposed rule were provided in modifications to Appendix A—Vegetation Sampling Methods and Reclamation Success Standards for Surface Coal Mining Operations. The modifications provide examples of acceptable shrub density standards on specific land uses, shrub composition, and acceptable species type.

Several portions of the Federal regulations place requirements with regard to revegetation standards involving fish and wildlife habitat. The Federal regulations at 30 CFR 780/784.16 require an operator to provide a protection and enhancement plan for fish and wildlife resources. The scope and level of premine resource information must be determined in consultation with State and Federal agencies responsible for fish and wildlife and be sufficient to develop the protection and enhancement plan that describes how, to the extent possible using BTCA, the operator will minimize disturbance and adverse impacts on fish and wildlife values. An element to be considered is the establishment of vegetation for wildlife food and cover. The Federal regulations at 30 CFR 816/817.116(a)(1) require that standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority and included in an approved regulatory program. Additionally, 30 CFR 816/817.116(b)(3)(i) require that minimum stocking and planting arrangements shall be specified by the regulatory authority on the basis of local and regional conditions after consultation with an approval by the State agencies

responsible for the administration of forestry and wildlife programs. Specific land uses include areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products. Consultation and approval may occur on either a program-wide or a permit-specific basis.

The proposed rule at Chapter IV, Section 2(d)(x)(E) was the result of an extensive coordination effort involving LQD, the WGFD, and the coal industry. Public meetings and hearings were also held. Therefore, all necessary processing was conducted that would allow the Director to render a decision on the proposed rule and appendix.

However, based on Wyoming's clarification submitted October 7, 1993, in the form of a table specifying rules that conflict with and rules that complement the statutory provisions, it was demonstrated that much of the proposed rule and modifications to appendix A, conflict with the proposed statutes (Administrative Record No. WY-21-51). Furthermore, in its October 7, 1993, reply to OSM's concerns, Wyoming clarified that the legislation (statutory language) prevails over the conflicting rule language. Consequently, the conflicting proposed rules and modifications to appendix A cannot be approved since they have been superseded by the statutory language.

Therefore, the Director finds the proposed regulations at LQD Rule Chapter IV, Section 2(d)(x)(E) and proposed modifications to Appendix A, are in conflict with and are superseded by the proposed statutory provision at W.S. 35-11-103(e) and W.S. 35-103-402 (b) and (c), and thus cannot be approved.

The Director is requiring Wyoming to amend its program to establish revegetation shrub density standards in compliance with Section 515(b)(24) of SMCRA and the Federal regulations at 30 CFR 780/784.16, 816/817.97 and 816/817.116.

IV. Summary and Disposition of Comments

Public Comments

OSM solicited public comment on the proposed amendment and provided opportunity for a public hearing. Numerous comments were received and a public meeting was held. Since OSM is not approving Wyoming's submittal for the reasons given in this rulemaking action and since most of the comments provided technical support for the proposed rule and modifications to Appendix A, that were superseded by the legislative changes; the merit of these comments becomes moot to this

rulemaking effort. However, general categories of comments included:

1. Most commenters supported the proposed rules (20% standard) as minimum standards or as reasonable standards. As discussed in Finding 6, the majority of the proposed rules conflict with the proposed statutory standard and therefore cannot be approved. The legislative standard (10%) is not being approved because of reasons discussed in Finding 5. Since neither standard can be approved the discussion of various technical merits provided by commenters in support of the two standards becomes irrelevant to this rulemaking action.

2. Several commenters recommended changes to the proposed rules and appendix. As previously stated OSM cannot approve the proposed rules and appendix for reasons discussed in Finding 6. Thus, detailed discussion of the comments recommending changes would be of no value to this rulemaking action.

3. Two commenters supported the proposed statutory standard (10%) and did not support the proposed rules and appendix. Additionally; they noted that the rules had been superseded by the statutory language and should not be considered in this amendment. OSM agrees that the proposed rules are superseded by the statutory standard as discussed in Finding 6, but OSM cannot approve the legislative standard (10%) for reasons discussed in Finding 5.

4. Several commenters supported, and several did not support, the proposed statutory language at W.S. 35-11-402(b) that provides direction to the Environmental Quality Council in establishing standards. As discussed in Finding 4.a., this provision is confusing and is redundant with Wyoming's approved program. The Director is not approving it and is requiring Wyoming to repeal this provision.

5. Most commenters did not support, and several supported, the proposed statutory definitions at W.S. 35-11-103(e) (xxviii) through (xxx) that define agricultural lands, critical habitat, and important or crucial habitat. OSM is not approving these proposed statutory definitions as discussed in Findings 1, 2, and 3. OSM does not agree with the few comments that supported these definitions as discussed in this rulemaking action.

Agency Comments

Pursuant to Section 503(b) of SMCRA and implementing regulations at 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Wyoming program. A summary of

the comments, and the Director's responses to them, appear below:

1. The U.S. Department of Interior (USDI)—Bureau of Indian Affairs, U.S. Army Corps of Engineers, USDI—Bureau of Mines, USDI—Bureau of Reclamation, U.S. Department of Labor—Mine Safety and Health Administration (MSHA)—Arlington, and U.S. Department of Labor—Mine Safety and Health District 9, responded with no comment (Administrative Record Nos. WY-21-7, WY-21-41, WY-21-65, WY-21-8, WY-21-12, WY-21-32, WY-21-59, WY-21-14, WY-21-4, WY-21-31, WY-21-56, and WY-21-28).

2. The USDI—Geological Survey responded to the rule portion of the amendment by praising the botanical approach to this portion of the Wyoming regulations (Administrative Record No. WY-21-11).

3. The U.S. Department of Agriculture—Soil Conservation Service commented that the SCS supports the proposed rule amendment and feels that it is quite workable (Administrative Record Nos. WY-21-9, WY-21-24, and WY-21-66).

4. U.S. Department of Agriculture—Forest Service—Rocky Mountain Region commented that the proposed rule plan is well written and well thought out. They additionally suggested that weed free native hay be required rather than preferred as proposed in Appendix A (Administrative Record No. WY-21-13). As previously noted, neither the proposed rule nor the modification to the appendix can be approved. Therefore, the suggested requirements for weed free native hay becomes moot to this rulemaking action.

5. U.S. Department of Agriculture—Agricultural Research Service—Northern Plains Area recommended changes to the proposed rules and appendix. As discussed in Finding 6, the Director is not approving the proposed rules and appendix. Thus changes to them need not be discussed at this time (Administrative Record No. WY-21-10).

6. The U.S. Department of Interior—U.S. Fish and Wildlife Service (USFWS or the Service) provided substantial comments on February 16, April 14, and November 22, 1993 (Administrative Record Nos. WY-21-5, WY-21-19, and WY-21-64). The comments supported the proposed rules and appendix but not the statutory language. They additionally recommended several changes to the proposed rules. As discussed above, the majority of the proposed rules conflict with the statutory language and OSM is not

approving either the proposed rules or statutory provisions.

7. The U.S. Department of Interior—Bureau of Land Management (BLM) provided substantial comments on March 10 and December 3, 1993 (Administrative Record Nos. WY-21-15 and WY-21-67). Again the comments supported the proposed rules and appendix, therefore discussion of BLM's comments would be of no merit.

State Historic Preservation Office (SHPO) and Advisory Council on Historic Preservation (ACHP) Comments

As required by 30 CFR 732.17(h)(4), OSM provided the proposed amendment to the SHPO and ACHP for comment. No comments were received from the ACHP. The Wyoming Division of Parks and Cultural Resources—State Historic Preservation Office commented by reminding OSM that management of cultural resources on OSM projects is conducted in accordance with Section 106 of the National Historic Preservation Act and Advisory Council regulations at 36 CFR 800. The SHPO had no objections to the proposed Wyoming amendment provided that OSM follows the procedures established in these regulations. The Director assures the SHPO that OSM will follow the procedures established in the Advisory Council rules at 36 CFR 800.

Environmental Protection Agency Concurrence

Under 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the Environmental Protection Agency (EPA) with respect to provisions of a State program amendment which relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On October 25, 1993, the EPA concurred without comment regarding Wyoming's proposed amendment (Administrative Record No. WY-21-57).

V. Director's Decision

Based on the above findings, the Director is not approving Wyoming's proposed program amendment as submitted January 6, 1993, and April 13, 1993, and clarified on October 7, 1993. The Director is requiring program amendments at 30 CFR 950.16 as discussed in Findings 1, 2, 3, 4.a., 5, and 6.

The Federal regulations at 30 CFR part 950 codifying decisions concerning the Wyoming program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State

program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undo delay. Consistency of State and Federal standards is required by SMCRA.

VI. Effect of Director's Decision

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

VII. Procedural Determination

Compliance With Executive Order 12866

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

Compliance With Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 12550) and Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the requirements of 30 CFR parts 730, 731, and 732 have been met.

Compliance With the National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

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

Compliance With the Regulatory Flexibility Act

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

whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR 950

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 13, 1994.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, Title 30, Chapter VII, SubChapter T, of the Code of Federal Regulations is amended as set forth below.

PART 950—WYOMING

1. The authority citation for Part 950 continues to read as follows:

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

2. In § 950.16, paragraphs (bb), (cc), (dd), (ee), (ff), and (gg) are added to read as follows.

§ 950.16 Required program amendments.

* * * * *

(bb) By March 25, 1994, Wyoming shall submit revisions to W.S. 35-11-103(e)(xxviii) to clarify how the definition of "Agricultural lands" would not render its program less stringent than SMCRA requirements and less effective than the Federal regulation requirements or repeal the definition.

(cc) By March 25, 1994, Wyoming shall submit revisions to W.S. 35-11-103(e) (xxix), that defines "Critical

habitat", to either repeal this statutory definition or modify it to be in accordance with no less effective than the Federal program requirements.

(dd) By March 25, 1994, Wyoming shall submit revisions to W.S. 35-11-103(e) (xxx), that defines "Important habitat or crucial habitat", to either repeal this statutory definition or modify it to be in accordance with and no less effective than the Federal program requirements.

(ee) By March 25, 1994, Wyoming shall repeal the provision at W.S. 35-11-402(b) that provides direction to the Environmental Quality Council to use specific statutory definitions.

(ff) By March 25, 1994, Wyoming shall submit revisions to W.S. 35-11-402(c), that provides for the reclamation of grazingland to either repeal this statutory provision, modify it to make it consistent with SMCRA and no less effective than the Federal regulations, or provide the required documentation to show that the standard meets the Federal program requirements.

(gg) By March 25, 1994, Wyoming shall submit revisions to amend its program at LQD Rule Chapter IV, Section 2(d)(x)(E) and Appendix A, to establish revegetation shrub density standards in compliance with Section 515(b)(24) of SMCRA and the Federal regulations at 30 CFR 780/784.16, 816/817.97 and 816/817.116.

[FR Doc. 94-1418 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-05-M

Proposed Rules

Federal Register

Vol. 59, No. 15

Monday, January 24, 1994

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93-NM-189-AD]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747 series airplanes. This proposal would require inspections to detect cracking in certain fuselage upper deck tension ties, and repair or modification of any cracked tension ties. This proposal is prompted by reports of fatigue cracking in tension ties. The actions specified by the proposed AD are intended to prevent failure of two or more tension ties and the resultant rapid decompression of the airplane.

DATES: Comments must be received by March 21, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 93-NM-189-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Steven C. Fox, Aerospace Engineer, Airframe Branch, ANM-120S, FAA,

Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2777; fax (206) 227-1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

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 shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered 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 postcard on which the following statement is made: "Comments to Docket Number 93-NM-189-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 93-NM-189-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

Recently, the FAA has received reports of fatigue cracking in the tension ties on several Boeing Model 747 series airplanes. Most of the cracks were found in the aft channel of the tension tie. These cracks usually occurred in the upper flange of the aft channel of the tension tie. Only one crack was found in the forward channel of the tension

tie. The cause of this fatigue cracking has been attributed to the tension ties bending under cabin pressurization loads. This condition, if not corrected, could result in rapid decompression of the airplane in the event of failure of two or more tension ties.

These reports of fatigue cracks were received in response to the Supplemental Structural Inspection Program, which was required to be implemented by AD 93-06-01, Amendment 39-8526 (58 FR 19571, April 15, 1993). The purpose of that AD is to implement an inspection program that detects the potential for cracking in specific areas of the airplane that are critical for flight safety. Whenever cracks are found in a Structural Significant Item, the FAA takes rulemaking action to correct these findings of an unsafe condition. This proposal is in response to such a finding.

On September 4, 1984, the FAA issued AD 84-19-01, amendment 39-4913 (49 FR 36365, September 17, 1984), to require inspections of the tension tie at body station (BS) 760 on a certain group of Model 747 series airplanes, and at BS 780 on certain other Model 747 series airplanes. The inspections proposed by this rulemaking action do not retract the inspection requirements of that AD.

The FAA has reviewed and approved Boeing Service Bulletin 747-53-2371, dated July 29, 1993, that describes procedures for repetitive detailed visual inspections of the outboard ends of certain tension ties, and repair or modification of cracked tension ties. This modification entails trimming the cracked portion of the channel of the tension tie.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require repetitive detailed visual inspections of the outboard ends of certain tension ties, and repair or modification of cracked tension ties. The actions would be required to be accomplished in accordance with the service bulletin described previously.

There are approximately 203 Boeing Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 113 airplanes of U.S. registry would be affected by this proposed AD, that it would take

approximately 5 work hours per airplane to accomplish the proposed actions, and that the average labor rate is \$55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be \$31,075, or \$275 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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 "significant regulatory action" under Executive Order 12866; (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 regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

Boeing; Docket 93-NM-189-AD.

Applicability: Model 747 series airplanes, as listed in Boeing Service Bulletin 747-53-2371, dated July 29, 1993, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent rapid decompression of the airplane due to failure of two or more tension ties, accomplish the following:

(a) Prior to the accumulation of 1,000 flight cycles after the effective date of this AD, unless accomplished previously within the last 2,000 flight cycles, perform a detailed visual inspection to detect cracking of the outboard end tension ties, in accordance with Boeing Service Bulletin 747-53-2371, dated July 29, 1993.

(1) If no cracking is detected, repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles until the repair or modification required by paragraph (a)(2) of this AD is accomplished.

(2) If any cracking is detected, prior to further flight, repair or modify the cracked tension tie in accordance with the service bulletin. Accomplishment of this repair or modification terminates the repetitive inspection requirement of paragraph (a) of this AD.

Note 1: Although AD 84-19-01, amendment 39-4913, requires inspections of the tension ties at body station (BS) 760 on a certain group of Model 747 series airplanes, and at BS 780 on certain other Model 747 series airplanes, the inspections required by this AD do not retract the inspection requirements of that AD.

(b) Prior to the accumulation of 10,000 flight cycles following repair or modification of any tension tie, perform a detailed visual inspection to detect cracking of the repaired or modified outboard end tension tie in accordance with Boeing Service Bulletin 747-53-2371, dated July 29, 1993.

(1) If no cracking is detected, repeat this inspection thereafter at intervals not to exceed 6,000 flight cycles.

(2) If any cracking is detected, prior to further flight, repair or modify in accordance with the service bulletin, and repeat the inspection required by paragraph (b) of this AD.

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

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on January 18, 1994.

John J. Hickey,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94-1542 Filed 1-21-94; 10:00 am]

BILLING CODE 4910-13-U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

Indiana Permanent Regulatory Program Amendment

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

ACTION: Proposed rule.

SUMMARY: OSM is announcing receipt of a proposed amendment submitted by Indiana as a modification to the State's permanent regulatory program (hereinafter referred to as the Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment (number 93-7) consists of proposed changes to the Indiana Surface Mining Rules provisions concerning OSM Regulatory Reform I, II, and III issues, required program amendments, and State initiatives. The primary focus of the amendments is on soil capability and restoration standards, individual civil penalties, significant/nonsignificant revisions, coal exploration, and performance bonds. The amendment is intended to resolve outstanding issues that remain present in the approved Indiana program resulting from changes to the Federal program. The amendment would also incorporate changes desired by the State that address various parts of the State rules.

This notice sets forth the times and locations that the Indiana program and the proposed amendment to that program will be available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed for a public hearing, if one is requested.

DATES: Written comments must be received on or before 4 p.m. on February 24, 1994; if requested, a public hearing on the proposed amendment is scheduled for 1 p.m. on February 18, 1994; and requests to present oral testimony at the hearing must be received on or before 4 p.m. on February 8, 1994.

ADDRESSES: Written comments and requests to testify at the hearing should be directed to Mr. Roger W. Calhoun, Director, Indianapolis Field Office, at the address listed below. If a hearing is requested, it will be held at the same address.

Copies of the Indiana program, the amendment, a listing of any scheduled public meetings, and all written comments received in response to this notice will be available for public review at the following locations, during normal business hours, Monday through Friday, excluding holidays:

Office of Surface Mining Reclamation and Enforcement, Indianapolis Field Office, Minton-Capehart Federal Building, 575 North Pennsylvania Street, room 301, Indianapolis, IN 46204. Telephone: (317) 226-6166.
Indiana Department of Natural Resources, 402 West Washington Street, room 295, Indianapolis, IN 46204. Telephone: (317) 232-1547.

Each requester may receive, free of charge, one copy of the proposed amendment by contacting the OSM Indianapolis Field Office.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Telephone (317) 226-6166; (FTS) 8-317-226-6166.

SUPPLEMENTARY INFORMATION:

I. Background on the Indiana Program

On July 29, 1982, the Indiana program was made effective by the conditional approval of the Secretary of the Interior. Information pertinent to the general background on the Indiana program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Indiana program can be found in the July 26, 1982, **Federal Register** (47 FR 32107). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 914.10, 914.15, and 914.16.

II. Discussion of the Proposed Amendments

Since July 29, 1982, (the date of conditional approval of the Indiana program), a number of changes have been made to the Federal regulations concerning surface coal mining and reclamation operations. Pursuant to the Federal regulations at 30 CFR 732.17, OSM informed Indiana on May 22, 1985 (Regulatory Reform I), on August 24, 1988 (Regulatory Reform II), and on September 20, 1989 (Regulatory Reform III), that a number of Indiana regulations are less effective than or inconsistent with the revised Federal requirements.

By letter date December 30, 1993 (Administrative Record No. IND-1322), the Indiana Department of Natural Resources (IDNR) submitted to OSM a State program amendment package (number 93-7) consisting of revisions to 38 sections of the Indiana rules. These revisions address changes to the Indiana program that were identified in the three letters referred to above, and certain required program amendments. The State has also proposed additional changes which Indiana believes will further improve the approved State program. The primary focus of the submittal is on soil capability and restoration standards, individual civil penalties, significant/non-significant revisions, coal exploration, and performance bonds.

The following rulemaking actions are being proposed by Indiana:

Rule No.	Subject (intended action)
310 IAC 12-0.5-32.25.	Definition of "crop-land capable land". (New)
310 IAC 12-0.5-69.5	Definition of "land capability". (New)
310 IAC 12-0.5-109.5.	Definition of "rooting media." (New)
310 IAC 12-0.5-110.5.	Definition of "shadow area." (New)
310 IAC 12-0.5-122.5.	Definition of "substantially disturb." (New)
310 IAC 12-1-5	Exemptions for coal extraction incidental to the extraction of other minerals. (Amend)
310 IAC 12-3-12	General requirements; coal exploration. (Amend)
310 IAC 12-3-31	Permit applications; geology description. (Amend)
310 IAC 12-3-37	Permit applications; land use information. (Amend)
310 IAC 12-3-48	Permit applications; postmining land uses. (Amend)
310 IAC 12-3-69	Underground permits; geology description. (Amend)
310 IAC 12-3-74	Underground permits; land use. (Amend)
310 IAC 12-3-78	Underground permits; general requirements. (Amend)
310 IAC 12-3-82	Underground permits; postmining land uses. (Amend)
310 IAC 12-3-97	Special category permits; approximate original contour variance. (Amend)
310 IAC 12-3-106	Review, public participation, and approval or disapproval of permit applications; responsibility. (Amend)
310 IAC 12-3-121	Permit revisions. (Amend)
310 IAC 12-4-5	Filing bonds; requirements. (Amend)
310 IAC 12-4-7	Period of liability. (Amend)
310 IAC 12-5-3	Coal exploration; performance standards. (Amend)
310 IAC 12-5-4	Coal exploration; permit requirements. (Amend)
310 IAC 12-5-12.1 ...	Surface mining; topsoil and subsoil. (Amend)
310 IAC 12-5-53	Contemporaneous reclamation. (Amend)
310 IAC 12-5-54.1 ...	Backfilling and grading; timing limitations. (Amend)
310 IAC 12-5-68	Repealed
310 IAC 12-5-68.5 ...	Postmining land capability. (New)
310 IAC 12-5-78.1 ...	Underground mining; topsoil and subsoil. (Amend)
310 IAC 12-5-117	Underground mining; contemporaneous reclamation. (Amend)
310 IAC 12-5-136	Repealed.
310 IAC 12-136.5	Underground mining; postmining land capability. (New)
310 IAC 12-5-156	Coal Preparation plants not within a permit area for a mine; special performance standards. (Amend)
310 IAC 12-5-159	Annual report. (New)
310 IAC 12-6-19	Individual civil penalties; definitions (New)
310 IAC 12-6-20	Individual civil penalties; timing for assessment. (New)
310 IAC 12-6-21	Individual civil penalties; amount of individual civil penalty. (New)
310 IAC 12-6-22	Individual civil penalties; procedure for assessment of individual civil penalty. (New)
310 IAC 12-6-23	Individual civil penalties; payment of penalty. (New)
310 IAC 12-7-4	Filing requirements. (Amend)
310 IAC 12-7-5	Filing dates. (Amend)
310 IAC 12-7-6	Filing locations. (Amend)

The full text of the proposed program amendment submitted by Indiana is available for public inspection at the addresses listed above. The Director now seeks public comment on whether the proposed amendment is no less effective than the Federal regulations. If approved, the amendment will become part of the Indiana program.

III. Public Comment Procedures

In accordance with provisions of 30 CFR 732.17(h), OSM is now seeking comment on whether the amendment proposed by Indiana satisfies the requirements of 30 CFR 732.15 for the approval of State program amendments. If the amendment is deemed adequate, it will become part of the Indiana program.

Written Comments

Written comments should be specific, pertain only to issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Indianapolis Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under "FOR FURTHER INFORMATION CONTACT" by the close of business on February 9, 1994. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons who desire to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting at the Indianapolis Field Office by contacting the person

listed under "FOR FURTHER INFORMATION CONTACT." All such meetings will be open to the public and, if possible, notices of meetings will be posted in advance at the locations listed above under "ADDRESSES." A summary of the meeting will be included in the Administrative Record.

Executive Order 12866

This proposed rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

National Environmental Policy Act

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

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3507 *et seq.*

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for

which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 18, 1994.

Carl C. Close,

Assistant Director, Eastern Support Center.
[FR Doc. 94-1547 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-05-M

30 CFR Part 944

Utah Permanent Regulatory Program

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

ACTION: Proposed rule; reopening and extension of public comment period on proposed amendment.

SUMMARY: OSM is announcing receipt of additional revisions pertaining to a previously proposed amendment to the Utah permanent regulatory program (hereinafter, the "Utah program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The additional revisions for Utah's proposed rules pertain to the scope of rulemaking and promulgation of rules, hearing requirements for designating areas unsuitable for coal mining, confidentiality of coal exploration information, and mining in special areas, specifically prime farmland. The amendment is intended to incorporate the additional flexibility afforded by the revised Federal regulations, clarify ambiguities, and improve operational efficiency.

This document sets forth the times and locations that the Utah program and proposed amendment to that program are available for public inspection and the dates and times of the reopened comment period during which interested persons may submit written comments on the proposed amendment.

DATES: Written comments must be received by 4 p.m., m.s.t., February 8, 1994.

ADDRESSES: Written comments should be mailed or hand delivered to Robert H. Hagen at the address listed below.

Copies of the Utah program, the proposed amendment, and all written comments received in response to this document will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSM's Albuquerque Field Office.

Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 505 Marquette Avenue NW., Suite 1200, Albuquerque, New Mexico 87102, Telephone: (505) 766-1486

Utah Division of Oil, Gas and Mining, 355 West North Temple, 3 Triad Center, Suite 350, Salt Lake City, Utah 84180-1203, Telephone: (801) 538-5340

FOR FURTHER INFORMATION CONTACT:

Robert H. Hagen, Telephone: (505) 766-1486.

SUPPLEMENTARY INFORMATION:

- I. Background on the Utah Program
- II. Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Utah Program

On January 21, 1981, the Secretary of the Interior conditionally approved the Utah program. General background information on the Utah program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Utah program can be found in the January 21, 1981, *Federal Register* (46 FR 5899). Subsequent actions concerning Utah's program and program amendments can be found at 30 CFR 944.15, 944.16, and 944.30.

II. Proposed Amendment

By letter dated August 2, 1993, Utah submitted a proposed amendment to its program pursuant to SMCRA (administrative record No. UT-851). Utah submitted the proposed amendment at its own initiative. Utah proposed revisions to the Utah Rules of Practice and Procedure of the Board of Oil, Gas and Mining (Board) at Utah Administrative Rules (Utah Admin. R.) 641-112-100, scope of rulemaking, and 641-112-200, promulgation of rules. Utah also proposed revisions to the Utah Coal Mining Rules at Utah Admin. R. 645-100-500, petitions to initiate rulemaking; 645-103-441, hearing requirements for designating areas unsuitable for coal mining and

reclamation operations; 645-203-200, confidentiality of coal exploration information; 645-301-524.661, permit application blasting level chart; 645-301-731.760, permit application cross sections and maps showing hydrologic information; and 645-302-314.110 and 645-302-323.310, special areas of mining, specifically prime farmland and alluvial valley floors.

OSM published a document in the August 27, 1993 *Federal Register* (58 FR 45305) announcing receipt of the amendment and inviting public comment on its adequacy (administrative record No. UT-865). The public comment period ended September 27, 1993.

During its review of the amendment, OSM identified concerns for (1) Utah Admin. R. 641-112, regarding the incorrect reference to its rulemaking authority at Utah Code Annotated (UCA) 40-9-3.5(2), which was repealed by Utah in 1993; (2) Utah Admin. R. 645-103-441, regarding the need for agreement between the petitioners and intervenors to change the location of a public hearing on a petition to designate lands unsuitable for mining; (3) Utah Admin. R. 645-203-200, regarding the proposed deletion of the phrase "and the information is confidential" which would impart a change in the criteria for determining coal exploration information that is or is not allowed to be held confidential under the Utah program, and the proposed reference to Utah's Government Records Access and Management Act (GRAMA) in that certain aspects of GRAMA were previously found to be less effective than the Federal regulations with regard to the restrictions it imposes on the availability of coal exploration information; and (4) Utah Admin. R. 645-302-314.110, regarding the need to use the prime farmland soil survey standards in U.S. Department of Agriculture (USDA) Handbook 436, as it existed on October 5, 1982, and USDA Handbook 18, as it existed on November 16, 1982.

OSM notified Utah of the concerns by letter dated December 9, 1993 (administrative record No. UT-878). Utah responded in a letter dated January 7, 1994, by submitting a revised amendment (administrative record No. UT-881).

Utah proposes the following additional revisions to its existing rules. At Utah Admin. R. 641-112, Utah proposes to reference UCA 40-8-6(1), which applies to rulemaking authority under the Utah Mined Land Reclamation Act. At Utah Admin. R. 645-103-441, Utah proposes (1) that unless the petitioners and intervenors

agree otherwise, the Board shall hold a public hearing within 10 months after receipt of a complete petition to designate lands unsuitable for mining; (2) if all petitioners and intervenors agree that a public hearing is not needed, the hearing need not be held; and (3) all hearings held under Utah Admin. R. 645-103-441 will be held in the locality of the area covered by the petition. At Utah Admin. R. 645-203-200, Utah proposes to require that the Utah Division of Oil, Gas and Mining will not make coal information available for public inspection if the person submitting it requests in writing, at the time of submission, that it not be disclosed and the information is confidential under the standards of the Federal Act (SMCRA). At Utah Admin. R. 645-302-314.110, Utah proposes to require that USDA soils Handbooks 436 and 18 are incorporated by reference as they respectively existed on October 5, 1982, and November 16, 1982.

III. Public Comment Procedures

OSM is reopening the comment period on the proposed Utah program amendment to provide the public an opportunity to reconsider the adequacy of the proposed amendment in light of the additional materials submitted. In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Utah program.

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Albuquerque Field Office will not necessarily be considered in the final rulemaking or included in the administrative record.

IV. Procedural Determinations

1. Executive Order 12866

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

2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a)

and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 12550) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

4. Paperwork Reduction Act

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

5. Regulatory Flexibility Act

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

List of Subjects in 30 CFR Part 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 14, 1994.

Raymond L. Lowrie,
Assistant Director, Western Support Center.
[FR Doc. 94-1558 Filed 1-21-94 10:00 am]
BILLING CODE 4310-05-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AG29

Claims Based on Chronic Effects of Exposure to Vesicant Agents

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its adjudication regulations concerning compensation for disabilities or deaths resulting from the chronic effects of in-service exposure to mustard gas and other vesicant agents. This proposed regulation is based on a National Academy of Sciences (NAS) study of the long-term health effects of exposure to vesicant agents, commissioned by VA, which found a relationship between such exposure and the subsequent development of certain conditions. The intended effect of this proposed amendment is to expand and extend compensation eligibility.

DATES: Comments must be received on or before March 25, 1994. Comments will be available for public inspection until April 4, 1994. This amendment is proposed to be effective the date of publication of the final rule.

ADDRESSES: Interested persons are invited to submit written comments, suggestions, or objections regarding this amendment to Secretary of Veterans Affairs (271A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Services Unit, room 170, at the above address between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays), until April 4, 1994.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, (202) 233-3005.

SUPPLEMENTARY INFORMATION: On July 31, 1992, VA published a final regulation (38 CFR 3.316) authorizing service connection in claims from veterans who underwent full-body exposure to mustard gas during field or chamber experiments to test protective clothing or equipment during World

War II, and who subsequently develop chronic forms of laryngitis, bronchitis, emphysema, asthma, conjunctivitis, keratitis, or corneal opacities (See 57 FR 1699-1700 and 57 FR 33875-77). The regulation was based on a review of the available English language medical literature dealing with the effects of exposure to mustard gas by Veterans Health Administration (VHA) personnel. VA also contracted with NAS to conduct a review of the world medical and scientific literature, including that published in languages other than English, to determine the long-term health effects of exposure to mustard agents and Lewisite. After reviewing almost 2,000 medical and scientific papers, consulting with outside experts, and conducting public hearings, NAS issued that report, entitled "Veterans at Risk: The Health Effects of Mustard Gas and Lewisite", on January 6, 1993. We are proposing to amend 38 CFR 3.316 based upon our review of that report.

NAS findings confirmed VA's prior determination that there is a relationship between exposure to mustard gas and the subsequent development of the seven conditions previously mentioned. NAS also found that the evidence indicated a causal relationship between exposure to mustard gas and the subsequent development of "recurrent corneal ulcerative disease" and "delayed recurrent keratitis of the eye." In our judgment the term "corneal opacities," used in the current regulation, is broad enough to include corneal ulcerative disease and we do not propose to change the language in the current regulation. For reasons discussed below, this regulation will cover specified conditions whether onset occurred immediately after exposure or was delayed, and we find no reason to modify the term "keratitis" which appears in the current regulation.

NAS also found that the evidence indicated a causal relationship between exposure to mustard gas and the subsequent development of nasopharyngeal, laryngeal, lung, and skin cancers, pigmentation abnormalities of the skin, and chronic skin ulceration and scar formation. We propose to add nasopharyngeal, laryngeal and lung cancer (except mesothelioma) to the list of conditions for which presumptive service connection may be granted based on exposure to mustard gas. We are proposing to exclude mesothelioma from the regulatory amendment, however, since the only known cause of that condition is asbestos exposure.

Although NAS used the term "skin cancer" in the summary of its findings, in our judgment the body of the report, which refers to squamous cell and basal cell carcinomas of the skin but not malignant melanomas, does not support so broad a presumption of service connection. Although basal cell skin cancers were noted in some animal studies, these studies constitute evidence of carcinogenicity rather than evidence of skin cancer because there is no good animal model for human skin response to mustard agents. Likewise, the one occupational study that described basal cell carcinomas, Bowen's disease, and other hyperkeratotic skin lesions was too seriously flawed to establish a causal relationship with exposure to mustard agents. As the report notes, the workers in that study were exposed to all types of gases, not just mustard gas and Lewisite. Also, those individuals who participated in chamber and field testing suffered acute rather than chronic exposure like the chemical plant workers in the occupational study, which occurred for many hours each week over many years. The report states that "cutaneous cancers following acute sulfur mustard exposure usually localize in scars," and scar cancers are squamous cell carcinomas, not basal cell carcinomas. Finally, since the 1973 Jackson and Adams study, which is cited in the NAS report in reference to the occurrence of basal cell carcinoma and which included two cases of basal cell carcinomas in World War I veterans, is not an epidemiologic study, it is difficult to draw conclusions as to whether the findings represent an unusual rate for basal cell carcinoma. For these reasons, we propose to include only squamous cell carcinomas of the skin.

In our judgment, there is no reason to establish presumptive service connection for "pigmentation abnormalities of the skin" because these abnormalities would be obvious from the time of the exposure to vesicant agents rather than occurring many years after exposure, as in the case of cancer. Also, because the usual places for mustard gas burns are areas of the body which are not visible, i.e., moist areas of the body such as the groin and axilla, rather than exposed areas as in the case of sunburn, most pigmentation abnormalities resulting from these burns would not be considered disabling, unless they interfered with the veteran's ability to function. In this regard, there is no mention in the NAS report of vitiligo-type lesions, which are usually considered to be disabling because they are disfiguring. Since compensation is

only payable for a disability resulting from an injury suffered or disease contracted in line of duty or from aggravation of a preexisting injury or disease contracted in line of duty (See 38 U.S.C. 1110, 1121, 1131, and 1310), and since exposure to vesicant agents does not cause a type of pigmentation abnormality which is disabling, we do not propose to include pigmentation abnormalities of the skin in the regulation. However, we propose to include scar formation in the regulation.

In addition to the respiratory conditions VA had previously recognized, NAS found that the evidence indicated a causal relationship between exposure to mustard gas and chronic obstructive pulmonary disease. NAS further found that all these respiratory conditions could also result from exposure to Lewisite, another vesicant agent. We are proposing to provide service connection for a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease, as a result of exposure to mustard gas or Lewisite.

Additionally, NAS determined that the evidence indicated a causal relationship exists between exposure to nitrogen mustard and the subsequent development of acute nonlymphocytic leukemia. Based on that information, we propose to provide service connection for acute nonlymphocytic leukemia as a result of exposure to nitrogen mustard only.

NAS also found evidence that indicates a causal relationship between mustard gas exposure and the subsequent development of bone marrow depression, immunosuppression, psychological disorders, and sexual dysfunction, but we do not propose to allow presumptive service connection for these conditions. Bone marrow depression and immunosuppression are acute effects that may have resulted in greater susceptibility to infections with a possibility of damage to vital organ systems. Since these acute effects would have resolved within a relatively short period, however, any related infection would have occurred in service or shortly thereafter and an adequate regulatory framework to establish direct service connection already exists. Psychological disorders may result from traumatic or stressful features of the exposure experience, but are not a toxic effect of the agents themselves. An adequate regulatory framework currently exists to establish service connection for post-traumatic stress disorder as a result of exposure to vesicant agents. Establishing a

presumption of service connection for sexual dysfunction would serve no purpose, since sexual dysfunction is not compensated under VA's Schedule for Rating Disabilities (38 CFR Part 4) but rather under 38 U.S.C. 1114(k), which provides special monthly compensation for the loss or loss of use of a creative organ. Special monthly compensation is a benefit established by Congress, not by VA regulation, and is therefore beyond the scope of this rulemaking.

There were two other categories of findings in the NAS report. NAS found that the evidence was "suggestive" of a causal relationship between exposure to mustard gas and reproductive dysfunction (genotoxicity, mutagenicity, etc.) and exposure to sulfur mustard and leukemia. NAS found insufficient evidence of a causal relationship between exposure to mustard gas and gastrointestinal diseases, hematologic diseases, neurological diseases, cardiovascular diseases, and for reproductive dysfunction as a result of exposure to Lewisite. As NAS itself indicates, further study in these areas is necessary and in our judgment, the scientific and medical evidence on the whole does not support the establishment of presumptions for these conditions.

Since the revised regulation will address the effects of Lewisite as well as mustard agents, we propose to revise the heading of 38 CFR 3.316 to indicate that the regulation addresses claims based on chronic effects of exposure to vesicant agents rather than mustard gas only. The current regulation applies only to those veterans exposed while participating in secret tests of protective equipment during World War II; we propose to expand it to cover any verified full-body exposure during military service, which will allow veterans exposed to mustard gas under battlefield conditions in World War I, those present at the German air raid on the harbor of Bari, Italy, in World War II, and those engaged in manufacturing and handling vesicant agents during their military service to be eligible for consideration under this regulation.

We are not proposing to include veterans who were exposed to vesicant agents via patch or drop testing. The literature upon which the NAS report is based covered animal studies and two types of human studies: (1) Industrial studies of workers in chemical factories which manufactured mustard gas; and (2) studies of soldiers exposed to mustard gas in warfare, primarily during World War I. These studies involved full-body exposure, not patch testing. The NAS report does not discuss any studies relevant to patch or drop testing.

However, the NAS report concluded that the exposure of many participants in chamber and field tests was equivalent to that of soldiers in World War I, and therefore the NAS report concluded that the World War I and chronic exposure studies were relevant to the experience in the chamber and field tests. Since the NAS report only considered studies involving full-body exposure, we believe that the NAS findings regarding specific diseases are linked only to full-body exposure, and not to patch or drop testing.

We also propose to amend 38 CFR 3.316 by adding a requirement that service connection will not be established if there is affirmative evidence that establishes a nonservice-related supervening condition or event as the cause of the claimed condition. The current regulation is based upon a literature search of the immediate and short-term effects of mustard gas exposure by the Veterans Health Administration, which revealed that nonfatal exposures to mustard gas result in an immediate acute injury. It was also reported that any chronic disability related to mustard gas exposure should appear shortly after the exposure and continue to the present. The NAS report, however, found that delayed effects of mustard gas exposure may appear even though no acute effects were noted. Because of this delay in manifestation of effects of mustard gas exposure reported by the NAS, during which time the veteran may have been exposed to other nonservice-related causative conditions or events, we have determined that it is reasonable to consider evidence of intervening cause which may exist, just as we do for other presumptive conditions (See 38 CFR 3.307(b)).

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

(The Catalog of Federal Domestic Assistance program numbers are 64.109 and 64.110.)

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved October 22, 1993.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is proposed to be amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. 38 CFR 3.316 is revised to read as follows:

§ 3.316 Claims based on chronic effects of exposure to vesicant agents.

(a) Except as provided in paragraph (b) of this section, exposure to the specified vesicant agents during active military service under the circumstances described below in paragraphs (a)(1) through (3) of this section together with the subsequent development of any of the indicated conditions is sufficient to establish service connection for that condition:

(1) Any verified full-body exposure to nitrogen or sulfur mustard during active military service together with the subsequent development of chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: nasopharyngeal; laryngeal; lung (except mesothelioma); or, squamous cell carcinoma of the skin.

(2) Any verified full-body exposure to nitrogen or sulfur mustard or Lewisite during active military service together with the subsequent development of a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease.

(3) Any verified full-body exposure to nitrogen mustard during active military service together with the subsequent development of acute nonlymphocytic leukemia.

(b) Service connection will not be established under this section if the claimed condition is due to the veteran's own willful misconduct (See § 3.301(c)) or there is affirmative evidence that establishes a nonservice-related supervening condition or event as the cause of the claimed condition (See § 3.303).

[FR Doc. 94-1484 Filed 1-21-94; 10:00 a.m.]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA-47-2-6094 FRL-4826-4]

Imposition of Statewide Sanctions on California Under Clean Air Act Section 110(m) for Failure to Submit a Complete SIP Revision for an Enhanced Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is proposing this action to impose sanctions on California under the discretionary sanction authority provided the Agency under the Clean Air Act, as amended in 1990, (CAA or Act) for failure by the State to submit a complete SIP revision for an enhanced motor vehicle inspection and maintenance (I/M) program as required by the Act for certain ozone and carbon monoxide (CO) nonattainment areas. On November 13, 1992, the California Air Resources Board (CARB), acting as the governor's designee, submitted a commitment (committal SIP) to adopt an I/M program by November 15, 1993. The committal SIP provides for the adoption and implementation of an enhanced I/M program meeting all requirements of EPA's I/M regulations and includes an implementation schedule. On June 28, 1993, EPA proposed to conditionally approve this committal SIP or alternatively to disapprove it if certain milestones contained in the schedule were missed. A full SIP revision including state legislative authority to implement the program was required by November 15, 1993. The State Legislature adjourned on September 10, 1993 without having enacted legislation providing authority for implementing the enhanced I/M program.

On November 15, 1993, the State submitted a document entitled "Vehicle Inspection and Maintenance Program SIP Revision" (the "proposed SIP revision"). The proposed SIP revision was missing critical elements required for compliance with section 182(c)(3) of the Act. On December 30, 1993, EPA Region 9 issued a letter finding that the State had failed to submit a complete SIP revision required under sections 110 and 182 of the Act. The letter dated December 30, 1993, notified the State that the proposed SIP revision was incomplete because it had not been subject to public notice. Due to the failure of the State to submit a complete

SIP revision fulfilling either the requirements of the Act or its commitment to adopt and implement an enhanced I/M program as promised in its committal SIP, EPA proposes to exercise its discretionary authority under the Act to apply a statewide highway funding limitation sanction and a 2 for 1 offset sanction in all areas required to have a permit program under the new source review provisions of the Act.

DATES: Comments must be received on or before March 15, 1994. EPA will hold a public hearing on this proposed action on Thursday, March 3, 1994.

ADDRESSES: EPA welcomes comments on all aspects of this proposal. Written comments should be addressed to: U.S. Environmental Protection Agency, Region 9, Air and Toxics Division (A-2-1), Attention: Docket No. CA-93-IM-3, 75 Hawthorne Street, San Francisco, CA 94105.

The public hearing will be held in the auditorium of the Los Angeles Department of Water and Power Building, 111 North Hope, Los Angeles, California 90012 (telephone: (415) 744-1500) from 1 p.m. to 5 p.m. and from 7 p.m. to 9 p.m.

A docket has been established and contains materials relevant to this action. A copy of the docket is available for public inspection during normal business hours at EPA's Region 9 office at the above address. A reasonable fee may be charged for copying portions of the docket.

FOR FURTHER INFORMATION CONTACT: David Calkins, Chief, Air Planning Branch, (A-2), U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744-1500.

SUPPLEMENTARY INFORMATION:

I. Requirements for Inspection and Maintenance Programs

A. Applicability of the Enhanced I/M Program in California

As amended in 1990, the Clean Air Act requires states to make changes to improve existing I/M programs or to implement new ones for certain nonattainment areas. Section 182(a)(2)(B) of the Act directed EPA to publish updated guidance for state I/M programs, taking into consideration findings of the Administrator's audits and investigations of these programs. The Act further requires each area required to have an I/M program to incorporate this guidance into the SIP. Based on these requirements, EPA promulgated I/M regulations on November 5, 1992 (57 FR 52950).

Under sections 182(c)(3) and 187(b)(1) of the Act, areas designated as serious and worse ozone nonattainment areas with 1980 populations of 200,000 or more and CO nonattainment areas with design classifications above 12.7 ppm and populations of 200,000 or more, in addition to metropolitan statistical areas with populations of 100,000 or more in the northeast ozone transport region, are required to meet EPA regulations for "enhanced" I/M programs. These areas were required to submit a SIP revision to incorporate an enhanced I/M program into the SIP by November 15, 1992. In California, the State must adopt and implement enhanced I/M programs for the following urbanized areas:

Bakersfield
Fresno
Los Angeles
Oxnard-Ventura
Riverside-San Bernardino
Sacramento
San Diego

The I/M regulation establishes minimum performance standards for basic and enhanced I/M programs as well as requirements for the following: Network type and program evaluation; adequate tools and resources; test frequency and convenience; vehicle coverage; test procedures and standards; test equipment; quality control; waivers and compliance via diagnostic inspection; motorist compliance enforcement; motorist compliance enforcement program oversight; quality assurance; enforcement against contractors, stations and inspectors; data collection; data analysis and reporting; inspector training and licensing or certification; public information and consumer protection; improving repair effectiveness; compliance with recall notices; on-road testing; SIP revisions; and implementation deadlines. For enhanced I/M programs, all requirements must be implemented by January 1, 1995 except that areas switching from an existing test-and-repair network to a test-only network may phase in that change between January 1995 and January 1996.

Each State required to implement an I/M program was required to submit by November 15, 1992, a SIP revision (here and after referred to as the "I/M committal SIP") including two elements: (1) A commitment from the Governor or his/her designee to the timely adoption and implementation of an I/M program meeting all requirements of the I/M regulation; and (2) a schedule for adoption of the program with interim milestones including passage of enabling statutory

or other legal authority and adoption of final regulations. Acceptance of I/M committal SIPs in lieu of full SIPs was justified by the fact that States could not have been expected to begin development of an I/M program meeting the requirements of the Act and the I/M regulation until the I/M regulation was adopted as a final rule, which did not occur until November 5, 1992. A complete SIP revision which contained all of the elements identified in the adoption schedule, including the authorizing legislation and implementing regulations, was required to be submitted no later than November 15, 1993.

B. I/M Program in California

1. California Committal SIP: The State of California submitted an I/M committal SIP on November 13, 1992. The committal SIP submittal became complete by operation of law under section 110(k)(1)(B) on May 13, 1993. The submittal includes a letter from the Executive Officer of the CARB and a copy of Resolution 92-74 which was adopted at a public hearing held by the CARB on November 13, 1992. The Resolution directs the Executive Officer to submit the committal letter to EPA as a revision to the SIP. The submittal included a commitment by the governor's designee, the CARB Executive Officer, to the timely adoption and implementation of I/M programs meeting all requirements of the I/M regulation and the Act in all nonattainment areas in California where these programs are required. A schedule of adoption was included in a letter sent by the CARB Executive Officer to EPA on January 15, 1993 clarifying certain details of the November 13, 1992 I/M committal SIP submittal. In the schedule California committed to passing legislation authorizing an I/M program by September 10, 1993. The committal SIP lists October 10, 1993 as the deadline for the legislation to be signed by the governor.

2. EPA Proposed Approval: On June 28, 1993 (58 FR 34553) EPA proposed to conditionally approve the committal SIP under section 110(k)(4) of the Act. In the alternative, however, EPA proposed that, if the State failed to adopt legislative authority or meet certain other applicable interim milestones in the commitment prior to EPA's final action on the submittal, EPA would disapprove the committal SIP. The basis for such disapproval would be a determination that California could not meet the November 15, 1993 SIP revision submission date if it failed to meet the interim milestones. Therefore, since the State could not meet its

commitment, final approval under section 110(k)(4) would not be appropriate.

3. **State Legislative Action:** On November 15, 1993 California failed to meet its commitment to EPA. By letter dated December 30, 1993, EPA Region 9 notified the State that the proposed SIP revision submitted on November 15, 1993, did not contain the critical elements required by statute and that the State had failed to submit a complete SIP revision as required by the Act. For example, the proposed SIP revision did not contain legislative authority for the State to implement the proposed SIP revision. In addition, EPA Region 9 notified the State that the proposed SIP revision was an incomplete SIP submittal because it was not subject to a public hearing.

Further, the State failed to meet the interim deadlines in its committal SIP. California was required to obtain legislative authority for the adoption and implementation of an enhanced I/M program during the 1993 legislative session under the November 15, 1992 I/M committal SIP submittal. Bills to change California's existing I/M program were introduced during the 1993 legislative session and hearings were held by the Senate and Assembly Transportation Committees. The legislature adjourned, however, on September 10, 1993 without having adopted I/M legislation. Failure to provide such authority prevented California from submitting a complete SIP revision by November 15, 1993.

Earlier this year, EPA anticipated the possibility that the California legislature would fail to adopt necessary legislation during the 1993 legislative session. On April 13, 1993, EPA and the U.S. Department of Transportation sent a joint letter to Governor Wilson advising him that EPA would exercise its discretionary authority under section 110(m) of the Act to impose sanctions if the legislature failed to adopt adequate legislation. On November 24, 1993, EPA issued a press statement indicating that EPA would temporarily halt the process of imposing sanctions to permit discussions between the parties to resolve the issue.

4. **Importance of Timely Implementation of Appropriate I/M Programs:** Beyond being a specific mandate of the Act, enhanced I/M programs play an important role in the ability of California areas to comply with the CAA requirements for achieving the National Ambient Air Quality Standards (NAAQS) for ozone and CO, as well as the Act's requirements for reasonable further progress (RFP) reductions for ozone.

The Act provides that each state in which all or part of an ozone and/or CO nonattainment area are located is required to provide an attainment demonstration showing that its SIP, as revised, will provide for attainment of the ozone and/or CO NAAQS by the applicable attainment date(s).

The Act further requires that each state in which all or part of a serious, severe, or extreme ozone nonattainment area is located shall submit SIP revisions that will reduce VOC emissions by November 15, 1996 by at least 15% of the 1990 baseline emissions. If the reductions identified in the SIP revisions are less than 15% of the baseline emissions, the State may obtain a waiver under section 182(b)(1)(A)(ii); this requires the State to make several demonstrations, including one that the plan reflecting the lesser amount includes all measures that can feasibly be implemented in the area in light of technological achievability. Many areas in California will have difficulty meeting the RFP requirements because credit for certain pre-1990 CAA programs, such as the federal motor vehicle control program and basic I/M, is not allowed. The additional benefits of enhanced I/M, however, are fully creditable towards meeting the RFP requirement. Enhanced I/M is one of the most powerful tools available to areas in terms of providing expeditious reductions in both VOC and NOx, both of which are treated in most California plans as precursors of ozone.

Finally, a federally approvable enhanced I/M program represents one of the most cost-effective air quality control strategies available. Without an effective I/M program, attainment of the ozone and CO air quality standard is virtually impossible. Without appropriate enabling legislation, an enhanced I/M program cannot be implemented.

II. Sanctions Under the Clean Air Act

This sanction action is being proposed under EPA's discretionary authority contained in section 110(m) of the Act. The predicate findings and types of sanctions are described in section 179 of the Act. The two sanctions available to EPA for application under section 110(m), as provided in section 179(b), are: (1) A prohibition on the funding of certain highway projects; and (2) an increase in the emission offset requirement for new and modified major stationary sources. The highway funding sanction prohibits approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under Title 23 of the U.S. Code, other

than projects or grants for safety and certain other categories of projects listed in section 179(b)(1). The offset sanction requires that, when States apply the emission offset requirement of section 173 to new or modified sources, the ratio of emission reductions to increased emissions must be at least 2 to 1.

Section 179(a) of the Act sets forth the findings¹ which provide EPA with discretion under section 110(m) to impose one or both of the sanctions specified under section 179(b). The four findings are: (1) A state has failed, for a nonattainment area, to submit a SIP or an element of a SIP, or that the SIP or SIP element submitted fails to meet the completeness criteria of section 110(k); (2) EPA disapproves a SIP submission for a nonattainment area based on the submission's failure to meet one or more plan elements required by the Act; (3) a State has not made any other submission required by the Act or has made a submission that does not meet the completeness criteria or has made a required submission that is disapproved by EPA for not meeting the Act's requirements; or (4) a requirement of an approved plan is not being implemented.

Under section 179(a), unless the State corrects the deficiency, one of the two sanctions listed in section 179(b) must be imposed 18 months after a finding is made, and the second must be imposed 6 months after the first sanction is imposed if the deficiency remains uncorrected.² In addition, both sanctions shall apply after 18 months if the Administrator finds a lack of good faith on the part of the State.

Although section 179(a) establishes mandatory deadlines for the application of sanctions at certain points after a finding of deficiency, section 110(m) provides EPA with the discretion to impose section 179(b) sanctions at any time (or at any time after) a section 179(a) finding. Likewise, although mandatory sanctions under section 179 are limited to the area with the deficiency, section 110(m) authorizes EPA to apply discretionary sanctions to any portion of the state that EPA deems reasonable and appropriate to ensure

¹ Section 179(a) refers to Agency findings, disapprovals, and determinations. These will all be referred to by the one term "findings."

² On October 1, 1993, EPA proposed a rule governing the order in which the sanctions shall apply under section 179 of the Act. 58 FR 51270. The rule proposes that the offset sanctions apply first and the highway sanctions apply second. According to the proposed rule, EPA may change this sequence of sanctions through individual notice and comment rulemaking. This proposed sequencing applies only to mandatory sanctions that apply under section 179(a) and does not govern sanctions imposed under section 110(m).

that the requirements of the Act are met. See 57 FR 44534, 44536-44537.

However, the Act requires EPA to establish by rule criteria to ensure that such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for the deficiency.

On September 28, 1992, EPA proposed criteria under section 110(m) that it would use when proposing statewide sanctions to determine if one or more political subdivisions is principally responsible for a SIP deficiency. 57 FR 44534. These proposed criteria are discussed later in this notice.

With regard to California, EPA is using its discretionary authority under section 110(m) to propose early sanctions³ based on California's failure to adopt legislation to improve its I/M program. EPA is taking this action for two reasons: (1) Congress required timely submittal of enhanced I/M programs as a measure central to allowing the State's metropolitan areas to meet CAA deadlines, and any legislative delay threatens the States's ability to meet those deadlines, and (2) enhanced I/M is the single most effective air pollution control measure available. Delayed legislative approval of an acceptable I/M program places a disproportionate burden for cleaning the air on the State's major industrial sources—additional burdens which are especially problematic given California's current economic difficulties.

III. Proposed Sanctions

A. Finding Under Section 179(a)

As stated previously, on December 30, 1993, EPA Region 9 issued a letter notifying the state of its failure to submit a complete SIP revision on November 15, 1993, as required by the Act. EPA's letter constitutes a finding under section 179(a) that triggers EPA's discretionary authority to impose the sanctions proposed in this notice under section 110(m). Further, on June 28, 1993, EPA proposed to conditionally approve California's I/M committal SIP for both basic and enhanced I/M programs. EPA also proposed, in the alternative, to disapprove this commitment if the state failed to adopt authorizing legislation and to submit the

required I/M programs by the November 15, 1993 date. California has also now failed to adopt and submit such programs.

If sufficient progress has not been made by California toward the implementation of an approvable I/M program to be operational on or before January 1, 1995, EPA hereby announces its intention to impose sanctions on May 15, 1994.

B. Rationale and Approach for Section 110(m) Sanctions

Section 110(m) of the Act allows EPA to apply the highway and offset sanctions at any time (or at any time after) it makes a finding under section 179(a). Based on its finding dated December 30, 1993, EPA is proposing to impose both the highway and offset sanctions. EPA believes that the imposition of highway sanctions is appropriate because of California's failure to adopt legislation to enhance its existing smog check program. In the absence of improved smog check, the ability of the State's metropolitan areas to meet the Clean Air Act deadlines for attaining healthy air quality is severely compromised. As previously noted, enhanced smog check is the single most effective air pollution control measures available and delayed legislative approval of an acceptable program further burdens major industrial sources of air pollution with responsibility for cleaning the air.

Under section 110(m), EPA may apply sanctions to any portion of the state it determines is reasonable and appropriate. During the 24 months following the finding, EPA may not impose the sanctions statewide if one or more political subdivisions within the state is principally responsible for the deficiency that is the basis for sanctions. EPA has proposed criteria for determining when a political subdivision is principally responsible (57 FR 44534, September 28, 1992). The criteria provide that a political subdivision is principally responsible if: (1) It has the legal authority to perform the required activity; (2) it has traditionally performed, or has been delegated the responsibility to perform, the required activity; (3) it has received, where appropriate, adequate funding, or authority to obtain funding, from the state to perform the required activity; (4) it has agreed to perform (and has not revoked that agreement), or is required by state law to accept responsibility for performing, the required activity; and (5) it has failed to perform the required activity. A "political subdivision" is defined as the representative body that is responsible for adopting and/or

implementing air pollution controls for any combination of political subdivisions created by, or pursuant to, Federal or State law. If no political subdivision meets all 5 criteria, EPA may use its discretion to determine whether it is reasonable and appropriate to apply sanctions on a statewide basis.

In this notice, EPA is proposing to use the above proposed criteria to determine if it may impose the highway sanction statewide for California because of the State's failure to submit a complete SIP revision complying with the I/M committal SIP revision.

EPA believes that the first criterion has not been met by any political subdivision. Only the California legislature has the authority to revise the state statute to provide for an enhanced I/M program meeting the CAA and EPA requirements. Once the legislature has acted, only state government agencies can adopt any implementing regulations. While individual air pollution control district or air quality management districts may request implementation of the state I/M program once adopted, this authority is meaningless unless the State has first established an appropriate program through legislation and regulations. Since the state legislature has not enacted the legislation required to provide the legal authority for an enhanced I/M program meeting the CAA and EPA requirements, an enhanced I/M program is not available to areas within the state that require the program.

Since no political subdivision within the state has met the first criterion, EPA believes that no political subdivision is principally responsible for the failure to have an enhanced I/M program. Therefore, EPA is not prohibited from imposing highway sanctions statewide. As noted above, the state legislature bears the ultimate responsibility to adopt the requisite legislative authority and CARB, not the individual air quality districts, must subsequently adopt adequate regulations. Since the state bears ultimate responsibility, EPA believes that it is reasonable and appropriate to impose sanctions on the entire State.

The offset requirements apply only to new or modified major stationary sources located in or to be located in areas that are required to have a permit program pursuant to section 173. Thus, the offset sanctions are limited to those areas which are required to have a permit program, i.e., the ozone and CO nonattainment areas. For ozone, those areas are: Monterey, Santa Barbara, San Diego, San Francisco Bay Area, South Coast, Ventura, Sacramento, San

³ EPA issued its letter on December 30, 1993, finding that the state's proposed SIP revision was a failure to submit a SIP revision as required by the Act and, in addition, was an incomplete SIP submittal. Mandatory sanctions were triggered under Section 179(a) by issuance of the letter notifying the state of the finding of deficiency.

Joaquin Valley, and the South East Desert. The offset sanction would apply to all new or modified major stationary sources for VOCs and NO_x that are locating to or located in each of these areas and for such sources of CO that are located in or locating to the following CO nonattainment areas: Chico, Sacramento, San Diego, San Francisco, San Joaquin, and South Coast. EPA proposes to impose the offset sanctions in the manner described in the proposed action on the sequencing of sanctions (58 FR 51270, 51275-51277 (October 1, 1993)).

C. Removal of Discretionary Sanctions

EPA is proposing to temporarily lift (i.e., toll)⁴ the highway and offset sanctions imposed under section 110(m) upon passage by the California legislature and signature by the Governor of legislation which EPA preliminarily determines provides legal authority for an enhanced I/M program meeting the requirements of the CAA and the I/M regulation. EPA proposes to notify the state of this tolling by a letter to the Governor and the public by a notice published in the notice section of the *Federal Register*. The section 110(m) sanctions would not be completely lifted until the State makes a complete submittal of its enhanced I/M program for the State of California. EPA will take action to completely lift section 110(m) sanctions at the time it determines the State's submittal to be complete or it is deemed complete. A complete submittal is one that contains all the critical elements listed in the I/M regulation as determined through the completeness criteria in section 110(k)(1).

As an alternative, if EPA takes final action disapproving California's committal SIP prior to taking final action imposing sanctions, EPA proposes that such disapproval be the basis for imposing the discretionary sanctions. In such case, the sanctions would be tolled in the same manner;

⁴ As a general rule, an Agency must go through rulemaking to remove or alter a requirement imposed through rulemaking. While U.S. EPA intends to issue a notice tolling the 110(m) sanction upon the occurrence of the events described, U.S. EPA will use the good cause exception to the otherwise applicable requirement for proposed rulemaking. EPA believes there is good cause to toll the sanctions once the state takes the action which cures the deficiency that resulted in the imposition of sanctions. See 5 U.S.C. § 553(b)(3). Therefore, no proposed action for removal will be issued. Consistent with U.S. EPA's intent to impose discretionary sanctions only on those areas that lack legislative authority, EPA believes that it is in the public interest to remove, at least temporarily, these discretionary sanctions as expeditiously as possible once the State of California has enacted legislative authority.

however, if the disapproval is the final basis for imposing the sanctions, such sanctions would not be completely lifted until EPA formally approves an enhanced I/M program for the State of California. In such a case, EPA would take action to lift the sanctions at the same time as EPA took final action approving the State's I/M program.

EPA's action imposing or tolling the section 110(m) sanctions will in no manner affect EPA's obligation to impose mandatory sanctions under section 179(a) where one mandatory sanction shall apply 18 months after EPA's finding of incompleteness and the second mandatory sanction shall apply 6 months later. Sanctions under section 179(a) apply to the area for which the deficiency exists. If the State does not adopt and submit to EPA a complete submittal providing for an I/M program within the 18-month and additional 6-month periods, the sanctions will automatically apply to those areas of the state that were required to have but do not have such a complete I/M program under the amended Act. See 58 FR 51270 (October 1, 1993). Moreover, if EPA takes final action disapproving California's I/M committal SIP, a second sanctions clock will be triggered and California must not only submit an I/M program, but EPA must also approve that program within the relevant time frames to stop the mandatory sanctions clock and avoid sanctions on the final disapproval.

IV. Regulatory Requirements

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the right and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action". Nevertheless after reviewing information regarding this action, OMB has waived review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities.

Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

EPA cannot reliably predict the impact of these restrictions because of the exemptions authorized for certain highway projects related to mass transit, public safety, and those that have beneficial air quality impacts. Careful review and evaluation of each project is necessary to determine whether or not a project is exempt.

If EPA takes final action on this proposal, the 2 to 1 emissions offset requirement will apply to major new sources and major modifications to the existing sources of volatile organic compounds (VOC), oxides of nitrogen (NO_x), and carbon monoxide (CO) in the California ozone and carbon monoxide areas subject to section 173(c) offset requirement.

Major stationary sources of VOC, NO_x, and CO are generally not small entities. Also, the 2 to 1 emission offset requirement does not prevent growth and modification but sets a higher offset standard than the current offset required. It is not expected that a large number of small entities will be affected by the emission offset requirement. In the past, when EPA has made efforts to quantify the impact of the Act's rules on the construction and modification of sources, EPA has been unable to do so due, in part, to the need to obtain information on future plans for business growth. This information is difficult to obtain, as business are understandably reluctant to make their plans public.

EPA is proposing to impose Federal highway funding assistance limitations statewide. This limitation could affect a number of government entities with populations of less than 50,000 since government entities often apply for and receive federal funding under Title 23, United States Code, for road improvement projects. Although a great

many projects are exempted under section 179(b)(1)(B), a number of projects are expected to be affected if EPA takes final action.

For the reasons stated above, EPA cannot further analyze the economic impacts of this action on small entities. The statements in this package constitute EPA's full regulatory flexibility analysis.

C. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Should the highway sanctions become effective, the Secretary of the U.S. Department of Transportation (USDOT) is required to determine which projects or grants should not be affected by the sanction and which, therefore, are exempt. This determination will be based on information readily available in existing documentation gathered for the purpose of evaluating the environmental, social, and economic impacts of different alternatives for transportation projects. These analyses are already required for the preparation of environmental assessments and impact statements under the National Environmental Policy Act (NEPA). Historically, exemption determinations by USDOT for sanctions have been based on such NEPA documentation and have not necessitated additional information gathering and analysis by the States. In addition, since under NEPA final environmental documents must be approved by USDOT, in most cases the NEPA documentation will already be in USDOT's possession. Therefore, EPA does not believe that the highway sanction, when applied, will impose an additional information collection burden on the states.

When the offset sanction applies, sources subject to it will not incur an additional information collection burden because sources are already required under the section 173 offset requirements to obtain an emission offset from between 1 to 1 and 1.5 to 1 (depending on the classification of the nonattainment area in which they are located). Should the offset sanction apply, it would not impose an additional information collection burden because sources will not have to provide additional information in the application beyond that which they would already have to provide in the absence of the sanction. (For the information collection burden of new requirements of the amended Act for nonattainment new source review (NSR)

and prevention of significant deterioration, an information collection request is being prepared to support rulemaking changes to parts 51 and 52.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen oxide, Ozone, Volatile organic compounds.

Dated: January 7, 1994.

Carol M. Browner,
Administrator.

40 CFR part 52 is proposed to be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401–7671q.

Subpart A —[Amended]

2. Subpart A is proposed to be amended by adding a new § 52.32 to read as follows:

§ 52.32 Discretionary sanction under section 110(m) of the Clean Air Act.

(a) *Purpose.* The purpose of this section is to implement 42 U.S.C. 7410 (m), with respect to the application of discretionary sanctions following a finding that has been made pursuant to 42 U.S.C. 7509 (a) (1), (2), (3), and (4).

(b) *Definitions.* All terms used in this section, but not specifically defined in this section shall have the meaning given them in § 52.01.

(1) *1990 Amendments* means the 1990 Amendments to the Clean Air Act (Pub. Law 101–549, 104 Stat. 2399).

(2) *Act* means Clean Air Act, as amended in 1990 (42 U.S.C. 7401 *et seq.*).

(3) *Criteria pollutant* means pollutant for which the Administrator has promulgated a national ambient air quality standard pursuant to 42 U.S.C. 7409 (e.g., ozone, lead, sulfur dioxide, particulate matter, carbon monoxide, nitrogen dioxide).

(4) *Findings or Finding* refer(s) to one or more of the findings, disapprovals, and determinations described in 42 U.S.C. 7509 (a) (1), (2), (3), and (4).

(5) *Part D* means part D of title I of the Act.

(6) *Part D SIP or SIP revision or Plan* means a state implementation plan or plan revision that states are required to submit or revise pursuant to part D.

(c) *Available sanctions and method for implementation.* (1) *Offset sanction.*

(i) As further set forth in paragraphs

(c)(1)(ii) through (iii) of this section, for the following areas, on the following dates, the State shall apply the emissions offset requirements, in accordance with 42 U.S.C. 7503 and 7509(b)(2), at a ratio of at least 2-to-1 for emission reductions to increased emissions of the following pollutants and their precursors for which the findings under 42 U.S.C. 7409 are made:

Affected area	Date sanction applies	Pollutant(s) affected
State of California:		
Chico		CO
Monterey		VOC, NO _x
Sacramento		VOC, NO _x , CO
San Diego		VOC, NO _x , CO
San Francisco		VOC, NO _x , CO
Bay Area		
San Joaquin Valley		VOC, NO _x , CO
Santa Barbara		VOC, NO _x , CO
South Coast		VOC, NO _x , CO
South East		VOC, NO _x
Desert		
Ventura		VOC, NO _x

(ii) For purposes of applying the emissions offset requirement set forth in 42 U.S.C. 7503, at the 2-to-1 ratio required under paragraph (c)(1) of this section, the State shall comply with the provisions of a State-adopted new source review program that the EPA has approved under 42 U.S.C. 7410(k)(3) as meeting the nonattainment area new source review requirements of 42 U.S.C. 7501–7515, as amended by the 1990 Amendments, or, if no such plan has been approved, the State shall comply directly with the nonattainment area new source review requirements specified in 42 U.S.C. 7501–7515, as amended by the 1990 Amendments, or cease issuing permits to construct and operate major new or modified sources. For purposes of applying the offset requirement under 42 U.S.C. 7503 where the EPA has not fully approved a State's new source review program as meeting the requirements of part D, the specifications of those provisions shall supersede any State requirement that is less stringent or inconsistent.

(iii) For purposes of applying the emission offset requirement set forth in 42 U.S.C. 7503, any permit required pursuant to 42 U.S.C. 7503 issued on or after the date the offset sanction applies shall be subject to the enhanced 2 to 1 ratio under paragraph (c)(1) of this section.

(2) *Highway funding sanction.* For the following areas, on the following dates, the highway sanction shall apply as provided in 42 U.S.C. 7509(b)(1):

Affected area	Date sanction applies
State of California	

[FR Doc. 94-1128 Filed 1-21-94; 10:00 am]
BILLING CODE 6560-50-P

40 CFR Part 52

[IL83-1-6155; FRL-4826-3]

Federal Highway Funding Assistance Limitations and Emissions Offset Requirements; Illinois

AGENCY: United States Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Environmental Protection Agency (USEPA) is proposing this action to impose sanctions on Illinois under the discretionary authority provided to the Agency under the Clean Air Act, as amended in 1990, (CAA or Act) for failure by the State to meet its commitment to adopt a basic and enhanced motor vehicle inspection and maintenance (I/M) program as required by the Act for certain ozone nonattainment areas. On November 11, 1992, the Illinois Environmental Protection Agency (IEPA), acting as the governor's designee, submitted a commitment to adopt (Committal SIP) an I/M program to meet the requirements of the Act and the I/M rule by November 15, 1993. The committal SIP provides for the adoption and implementation of a basic and enhanced I/M program meeting all requirements of US EPA's I/M regulations and includes an implementation schedule. On December 2, 1993, US EPA proposed to disapprove this SIP revision based on the failure by the State to meet milestones contained in the committal SIP's implementation schedule pertaining to the enactment of necessary legislative authority. A full SIP revision including State legislative authority to implement the program was required by November 15, 1993. The Illinois General Assembly adjourned on November 4, 1993, for the second time this year without taking necessary action to provide for implementation of the basic and enhanced I/M programs.

On December 30, 1993, EPA Region 5 issued a letter finding that the State had failed to submit the SIP revision required under sections 110 and 182 of the Act. Due to the failure of the State to submit a complete SIP revision fulfilling either the requirements of the Act and its commitment to adopt and

implement the required I/M programs as promised in its committal SIP, USEPA proposes to exercise its discretionary authority under the Act to apply a statewide highway funding limitation sanction and a 2 for 1 growth offset sanction in all areas required to have a permit program under the new source review provision of the Act.

DATES: Comments on this proposed action are to be submitted by March 15, 1994. The USEPA will hold two public hearings on March 2 and 4, 1994.

ADDRESSES: Comments on this proposed rule should be addressed to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (5AR-18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

The hearings will be held in Illinois as follows: March 2, 1994 in Chicago, at the Harold Washington Library on 400 S. State Street in the multipurpose room at 10 a.m. to 4 p.m.; and March 4, 1994 in Collinsville, at the Holiday Inn on 1000 Eastport Plaza Drive at 10 a.m. to 4 p.m.

Copies of Illinois' I/M Committal SIP submittal, USEPA's proposals and rulemakings, and other documents pertinent to this proposed rule are available at the following address: U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, Regulation Development Branch, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Francisco J. Acevedo, Environmental Engineer, Regulation Development Section, Regulation Development Branch (5AR-18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6061. Anyone wishing to come to Region 5 offices should first contact Francisco J. Acevedo.

SUPPLEMENTARY INFORMATION:

I. I/M Program requirements

Pursuant to the 1977 amendments to the Act, vehicle I/M programs were mandated for certain areas with long standing air quality problems. The 1990 amendments to the Act expanded the role of I/M programs as an attainment strategy and required USEPA to develop different performance standards for "basic" and "enhanced" I/M programs. The performance standard is the minimum amount of emission reductions a program must achieve, based on a model or benchmark program design. In addition, the amended Act directed USEPA to

address requirements for specific design elements and program implementation issues for both basic and enhanced I/M programs. The amended Act requires states containing nonattainment areas to make changes to improve existing I/M programs or implement new ones. Section 182(a)(2)(B) of the Act directed USEPA to publish updated guidance for state I/M programs, taking into consideration findings of the Administrator's audits and investigations of these programs. The Act further requires each area required by the Act to have an I/M program to incorporate this guidance into the SIP. Based on these requirements, USEPA promulgated an I/M regulation on November 5, 1992. (57 FR 52950)

Under section 182(c)(3) of the Act, areas designated as serious or worse ozone nonattainment areas with 1980 populations of 200,000 or more, in addition to metropolitan statistical areas with populations of 100,000 or more in the northeast ozone transport region, are required to meet USEPA requirements for "enhanced" I/M programs. These areas were required to submit a SIP revision to incorporate an I/M program by November 15, 1992. In Illinois, the State must implement I/M programs in the urbanized areas of the Chicago and East St. Louis ozone nonattainment areas.

The I/M regulation establishes minimum performance standards for basic and enhanced I/M programs as well as requirements for the following: Network type and program evaluation; adequate tools and resources; test frequency and convenience; vehicle coverage; test procedures and standards; test equipment; quality control; waivers and compliance via diagnostic inspection; motorist compliance enforcement; motorist compliance enforcement program oversight; quality assurance; enforcement against contractors, stations and inspectors; data collection; data analysis and reporting; inspector training and licensing or certification; public information and consumer protection; improving repair effectiveness; compliance with recall notices; on-road testing; SIP revisions; and implementation deadlines.

For enhanced I/M programs, all requirements must be implemented by January 1, 1995 except that areas switching from an existing test-and-repair network to a test-only network may phase in that change between January 1995 and January 1996.

Each state required to implement an I/M program was required to submit by November 15, 1992, a SIP revision (here and after referred to as the "I/M

committal SIP") including two elements: (1) A commitment from the Governor or his/her designee to the timely adoption and implementation of an I/M program meeting all the requirements of the I/M regulation; and (2) a schedule for adoption of the program, with interim milestones including passage of enabling statutory or other legal authority and adoption of final regulations. Acceptance of I/M committal SIPs in lieu of full SIPs was justified by the fact that states could not have been expected to begin development of an I/M program meeting the requirements of the Act and the I/M regulation until the I/M regulation was adopted as a final rule, which did not occur until November 5, 1992. A complete SIP revision which contained all of the elements identified in the adoption schedule, including the authorizing legislation and implementing regulations, was to be submitted no later than November 15, 1993.

On November 11, 1992, the State of Illinois submitted a committal SIP to USEPA. A public hearing on this submittal was held by the State on October 27, 1992, in Springfield, Illinois. The submittal included a schedule of implementation and a commitment to the timely adoption and implementation of an I/M program in the Chicago and East St. Louis ozone nonattainment areas meeting all the requirements of the I/M regulation and the amended Act by November 15, 1993.

On July 13, 1993, the Illinois General Assembly adjourned without taking the necessary action to enable Illinois to adopt and implement the I/M provisions mandated by the amended Act and the final I/M rule in Chicago and East St. Louis ozone nonattainment areas. Failure to provide such authority prevented the State from submitting a complete SIP revision containing all the required elements of the program by November 15, 1993. On September 28, 1993, USEPA sent a letter to Illinois Governor Edgar advising him that USEPA had decided to exercise its discretionary authority under section 110(m) of the Act to impose sanctions at any time once a finding of SIP deficiency is made if necessary legislation was not adopted during the October 1993 veto session of the Illinois General Assembly. The Illinois General Assembly reconvened on October 12, 1993, for the fall veto session. During this session which adjourned November 4, 1993, the legislature failed for the second time to enact the legislation needed to implement the required I/M program meeting the requirements of the Act in the State of Illinois. After

review of the committal SIP, USEPA proposed to disapprove the commitment on December 2, 1993 (58 FR 63547), based on the failure by the State to meet interim and final milestones in the schedule contained in the SIP submittal pertaining to the enactment of necessary authority to implement I/M requirements during the 1993 Illinois General Legislative session. On November 15, 1993, the State of Illinois failed to meet its commitment to USEPA by failing to submit a full SIP revision for I/M program implementation.

Beyond being a specific mandate of the Act, I/M programs play an important role in the ability of the Chicago and East St. Louis ozone nonattainment areas to comply with the requirements of the Act for achieving the National Ambient Air Quality Standards (NAAQS) for ozone, as well as the Act's requirements for reasonable further progress (RFP) reductions for ozone. The Act provides that each state in which all or part of certain classifications for ozone nonattainment areas are located is required to provide an attainment demonstration showing that its SIP, as revised, will provide for attainment of the ozone NAAQS by the applicable attainment date(s). The Act further requires that each state in which all or part of a serious, severe, or extreme ozone nonattainment area is located shall submit SIP revisions that will reduce VOC emissions by November 15, 1996 by at least 15% of the 1990 baseline emissions. If the reductions identified in the SIP revisions are less than 15% of baseline emissions, the State may obtain a waiver under section 182(b)(1)(A)(ii); this requires the State to make several demonstrations, including one that the plan reflecting the lesser amount includes all measures that can feasibly be implemented in the area in light of technological achievability. The Chicago and East St. Louis ozone nonattainment areas in Illinois will have difficulty meeting the applicable RFP requirements because credit for certain pre-1990 CAA programs, such as the federal motor vehicle control program and basic I/M is not allowed. The additional benefits resulting from implementing an I/M program that meets the requirements of the final November 5, 1992, I/M regulation, however, are fully creditable towards meeting the RFP requirement. An I/M program is one of the most powerful tools available to areas in terms of providing expeditious reductions in both VOC and NO_x, both of which are precursors of ozone.

Finally, a federally approvable basic and enhanced I/M program represents

one of the most cost-effective air quality control strategies available. Without an effective I/M program, attainment of the ozone air quality standard is virtually impossible, and without appropriate enabling legislation, an I/M program meeting final USEPA I/M regulations cannot be implemented.

II. Sanctions Under the Clean Air Act

This sanction action is being proposed under USEPA's discretionary authority contained in section 110(m) of the Act. The predicate findings and types of sanctions are in section 179. The two sanctions available to USEPA for application under section 110(m), as provided in section 179(b), are: (1) A prohibition on the funding of certain highway projects; and (2) an increase in the emission offset requirement for new and modified major stationary sources. The highway funding sanction prohibits the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under Title 23 of the U.S. Code, other than projects or grants for safety and certain other categories of projects listed in section 179(b)(1). The offset sanction requires that, when states apply the emission offset requirement of section 173 to new or modified sources, the ratio of emission reductions to increased emissions must be at least 2 to 1.

Section 179(a) of the Act sets forth the findings¹ which provide USEPA with discretion under section 110(m) to impose one or both of the sanctions specified under section 179(b). The four findings are: (1) A state has failed, for a nonattainment area, to submit a SIP or an element of the SIP, or that the SIP or SIP element submitted fails to meet the completeness criteria of section 110(k); (2) USEPA disapproves a SIP submission for a nonattainment area based on the submission's failure to meet one or more plan elements required by the Act; (3) a state has not made any other submission required by the Act or has made a submission that does not meet the completeness criteria or has made a required submission that is disapproved by USEPA for not meeting the Act's requirements; or (4) a requirement of an approved plan is not being implemented.

Under section 179(a), unless the state corrects the deficiency, one of the two sanctions listed in section 179(b) must be imposed 18 months after a finding is made, and the second must be imposed 6 months after the first sanction is imposed, if the deficiency remains

¹ Section 179(a) refers to Agency findings, disapprovals, and determinations. These will all be referred to by the one term "findings."

uncorrected.² In addition, USEPA may apply both sanctions after 18 months if the Administrator finds a lack of good faith on the part of the state.

Although section 179(a) establishes mandatory deadlines for the application of sanctions at certain points after a finding of deficiency, section 110(m) provides USEPA with the discretion to impose section 179(b) sanctions at any time (or at any time after) a section 179(a) finding. Likewise, although mandatory sanctions under section 179 are limited to the area with the deficiency, section 110(m) authorizes USEPA to apply discretionary sanctions to any portion of the state that USEPA deems reasonable and appropriate to ensure that the requirements of the Act are met. See 57 FR 44534, 44536-44537. However, the Act requires USEPA to establish by rule criteria to ensure that such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for the deficiency.

On September 28, 1992, USEPA proposed criteria under section 110(m) that it would use when proposing statewide sanctions to determine if one or more political subdivisions is principally responsible for a SIP deficiency. 57 FR 44534. These proposed criteria are discussed later in this notice. With regard to Illinois, USEPA is using its discretionary authority under section 110(m) to propose early sanctions³ based on Illinois' failure to submit a complete I/M program. USEPA is taking this action for two reasons: (1) Congress required timely submittal of I/M programs as a measure central to allowing the State's metropolitan areas to meet CAA deadlines and any legislative delay threatens the State's ability to meet those deadlines, and (2) enhanced I/M is the single most effective air pollution control measure available. Delayed legislative approval of an acceptable I/M program places a disproportionate

burden for cleaning the air on the State's major industrial sources.

III. Proposed Sanctions

A. Finding Under Section 179(a)

As stated previously, on December 30, 1993, USEPA Region 5 issued a letter notifying the State of its failure to submit a complete SIP revision on November 15, 1993, as required by the Act. USEPA's letter constitutes a finding under section 179(a) that triggers EPA's discretionary authority to impose the sanctions proposed in this notice under section 110(m). Further, on December 2, 1993, USEPA proposed to disapprove the I/M committal SIP containing Illinois' commitment to adopt and submit both basic and enhanced I/M programs meeting the requirements of the Act and USEPA's I/M regulation by November 15, 1993. Illinois has now failed to adopt and submit such programs.

If sufficient progress has not been made by Illinois toward the implementation of an approvable I/M program to be operational on or before January 1, 1995, EPA hereby announces its intention to impose sanctions on May 15, 1994.

B. Rationale and Approach for Section 110(m) Sanctions

Section 110(m) of the Act allows USEPA to apply the Federal highway funding assistance limitations and the 2:1 emission offset sanction at any time (or at any time after) it makes a finding under section 179(a). Based on its finding dated December 30, 1993, USEPA is proposing to impose both the Federal highway funding assistance limitations and 2:1 emission offset sanctions. USEPA believes that the imposition of both sanctions is appropriate because of Illinois' failure to submit a complete SIP revision to enhance its existing vehicle I/M program. In the absence of improved vehicle I/M, the ability of the State's metropolitan areas to meet the CAA deadlines for attaining healthy air quality is severely compromised. As previously noted, I/M programs are the single most effective air pollution control measures available and delayed legislative approval of an acceptable program further burdens major industrial sources of air pollution with responsibility for cleaning the air.

Under section 110(m), USEPA may apply sanctions to any portion of the state it determines is reasonable and appropriate. During the 24 months following the finding, USEPA may not impose the sanctions statewide if one or more political subdivisions within the

state is principally responsible for the deficiency that is the basis for sanctions. USEPA has proposed criteria for determining when a political subdivision is principally responsible (57 FR 44534, September 28, 1992). The criteria provide that a political subdivision is principally responsible if: (1) It has the legal authority to perform the required activity; (2) it has traditionally performed, or has been delegated the responsibility to perform, the required activity; (3) it has received, where appropriate, adequate funding, or authority to obtain funding, from the state to perform the required activity; (4) it has agreed to perform (and has not revoked the agreement), or is required by state law to accept responsibility for performing, the required activity; and (5) it has failed to perform the required activity. A "political subdivision" is defined as the representative body that is responsible for adopting and/or implementing air pollution controls for any combination of political subdivisions created by, or pursuant to, Federal or State law. If no political subdivision meets all 5 criteria, USEPA may use its discretion to determine whether it is reasonable and appropriate to apply sanctions on a statewide basis.

In this notice, USEPA is proposing to use the above proposed criteria to determine if it may impose sanctions statewide for Illinois because of the failure to comply with the I/M committal SIP revision adopting an I/M program. USEPA believes that the first criterion has not been met by any political subdivision. Only the Illinois General Assembly, composed of representatives from all portions of the State of Illinois, has the authority to revise the state statute to provide for a basic and enhanced I/M program meeting the CAA and USEPA requirements. Once the legislature has acted, only state government agencies can adopt any implementing regulations. While individual air pollution control districts or air quality management districts may request implementation of the state I/M program within their districts once that program is adopted, this authority is meaningless unless the State has first established an appropriate program through legislation and regulations. Since the State legislature has not enacted the legislation required to provide the legal authority for an I/M program meeting the CAA and USEPA requirements an I/M program meeting such requirements is not available to areas within the State that require the program.

Since no political subdivision within the State has met the first criterion, USEPA believes that no political

² On October 1, 1993, U.S. EPA proposed a rule governing the order in which the sanctions shall apply under section 179 of the Act. 58 FR 51270. The rule proposes that the offset sanction apply first and the highway funding sanction apply second. According to the proposed rule, U.S. EPA may change this sequence of sanctions through individual notice-and-comment rulemaking. This proposed sequencing applies only to mandatory sanctions that apply under section 179(a) and does not govern sanctions imposed under section 110(m).

³ U.S. EPA issued a letter on December 30, 1993, finding that the state's failed to submit a SIP revision as required by the Act. Mandatory sanctions under section 179(a) were triggered by issuance of the letter notifying the state of the finding of the deficiency.

subdivision is principally responsible for the failure to have an I/M program that meets final USEPA regulations. Therefore, USEPA is not prohibited from imposing sanctions statewide. As noted above, the State legislature bears the ultimate responsibility to adopt the requisite legislative authority and IEPA, not the individual air quality districts, must subsequently adopt adequate regulations. Since the State does bear the ultimate responsibility, USEPA believes that it is reasonable and appropriate for USEPA to impose the highway sanction on the entire State.

The 2:1 offset sanction requirements apply only to new or modified major stationary sources located in or to be located in areas that are required to have a permit program pursuant to section 173. Thus, USEPA is proposing to impose the 2:1 emission offset sanction only in those areas in which it will have an effect, i.e., the following ozone nonattainment counties: Cook, Lake, Kane, DuPage, Will, McHenry, Madison, Monroe, St. Clair, Grundy (Aux Sable and Gooselake Townships only), and Kendall (Oswego Township only). The 2:1 emission offset would apply to all new or modified major stationary sources of VOC and NO_x that are locating to or located in each of these areas. USEPA proposes to impose the offset sanctions in the manner described in the proposed action on the sequencing of sanctions (58 FR 51270, 51275-51277 (October 1, 1993)).

C. Removal of Discretionary Sanctions

USEPA is proposing to temporarily lift (i.e., toll)⁴ the highway and offset sanctions imposed under section 110(m) upon the passage by the Illinois General Assembly and signature by the Governor of legislation which USEPA preliminary determines provides legal authority for a basic and enhanced I/M program meeting the requirements of the CAA and the I/M regulations. USEPA proposes to notify the State of this tolling by a letter to the Governor and

the public by a notice published in the notice section of the **Federal Register**. The section 110(m) sanctions would not be completely lifted until the State submits a complete enhanced I/M program. USEPA will take action to completely lift section 110(m) sanctions upon a determination that the State has submitted a complete enhanced I/M program.

As an alternative, if EPA takes final action disapproving Illinois's committal SIP prior to taking final action imposing sanctions, EPA proposes that such disapproval be the basis for imposing the discretionary sanctions. In such case, the sanctions would be tolled in the same manner; however, if the disapproval is the final basis for imposing the sanctions such sanctions would not be completely lifted until EPA formally approves an enhanced I/M program for the State of Illinois. In such a case, EPA would take action to lift the sanctions at the same time as EPA took final action approving the State's I/M program.

USEPA's action imposing or tolling the section 110(m) sanctions will in no manner affect USEPA's obligation to impose mandatory sanctions under section 179(a) where one mandatory sanction shall apply 18 months after USEPA's finding of failure to submit a complete SIP and the second mandatory sanction shall apply 6 months later. Sanctions under section 179(a) apply to the areas for which the deficiency exists. If the State does not adopt and submit to USEPA a complete submittal providing for an I/M program within the 18-month and additional 6-month periods, the sanctions will automatically apply on those areas of the State that were required to have but do not have such a complete I/M program under the amended Act. See 58 FR 51270 (October 1, 1993). Moreover, if EPA takes final action disapproving Illinois's I/M committal SIP, a second sanctions clock will be triggered and Illinois must not only submit an I/M program, but EPA must also approve that program within the relevant time frames to stop the mandatory sanctions clock and avoid sanctions based on the final disapproval.

IV. Regulatory Requirements

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant

regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely effect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." Nevertheless, after reviewing information regarding this action, OMB has waived review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities.

Alternatively, USEPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

The USEPA cannot reliably predict the impact of these restrictions because of the exemptions authorized for certain highway projects related to mass transit, public safety, and those that have beneficial air quality impacts. Careful review and evaluation of each project is necessary to determine whether or not a project is exempt.

If USEPA takes final action on this proposal, the 2:1 emission offset requirement will apply to major new sources and major modifications to existing sources of VOC and NO_x, in the Illinois ozone areas subject to the section 173 offset requirement.

Major stationary sources of VOC and NO_x with emissions are generally not small entities. Also, the 2:1 emission offset requirement does not prevent growth and modification but sets a higher offset standard than the current offset required. It is not expected that a large number of small entities will be affected by the emission offset requirement. In the past, when USEPA has made efforts to quantify the impact

⁴ As a general rule, an Agency must go through rulemaking to remove or alter a requirement imposed through rulemaking. While USEPA intends to issue a notice tolling the 110(m) sanctions upon the occurrence of the events described, USEPA will use the good cause exception to the otherwise applicable requirement for proposed rulemaking. EPA believes there is good cause to toll the sanctions once the state takes the action which cures the deficiency that resulted in imposition of sanctions. See 5 U.S.C. § 553(b)(B). Therefore, no proposed action for removal will be issued. Consistent with USEPA's intent to impose discretionary sanctions only on those areas that lack legislative authority, USEPA believes that it is in the public interest to remove, at least temporarily, these discretionary sanctions as expeditiously as possible once the State of Illinois has enacted legislative authority.

of the Act's rules on the construction and modification of sources, USEPA has been unable to do so due, in part, to the need to obtain information on future plans for business growth. This information is difficult to obtain, as businesses are understandably reluctant to make their plans public.

The USEPA is also proposing to impose Federal highway funding assistance limitations statewide. This limitation could affect a number of government entities with jurisdiction over populations of less than 50,000 since government entities often apply for and receive federal funding under Title 23, United States Code, for road improvement projects. Although a great many projects are exempted under section 179(b)(1)(B), a number of projects are expected to be affected if the USEPA takes final action. For the reasons stated above, USEPA cannot further analyze the economic impacts of this action on small entities. The statements in this package constitute USEPA's full regulatory Flexibility analysis.

C. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Should the highway sanctions become effective, the Secretary of the U.S. Department of Transportation (USDOT) is required to determine which projects or grants should not be affected by the sanction and which, therefore, are exempt. This determination will be based on information readily available in existing documentation gathered for the purpose of evaluating the environmental, social, and economic impacts of different alternatives for transportation projects. These analyses are already required for the preparation of environmental assessments and impact statements under the National Environmental Policy Act (NEPA). Historically, exemption determinations by USDOT for sanctions have been based on such NEPA documentation and have not necessitated additional information gathering and analysis by the states. In addition, since under NEPA, final environmental documents must be approved by USDOT, in most cases the NEPA documentation will already be in USDOT's possession. Therefore, USEPA does not believe that the highway sanctions, when applied, will impose an additional information collection burden on the states.

When the offset sanction applies, sources subject to it will not incur an

additional information collection burden because sources are already required under section 173 offset requirements to obtain an emission offset from between 1 to 1 and 1.5 to 1 (depending on the classification of the nonattainment area in which they are located). Should the offset sanction apply, it would not impose an additional information collection burden because sources will not have to provide additional information in the application beyond that which they would already have to provide in the absence of the sanction. (For the information collection burden of new requirements of the amended Act for nonattainment new source review and prevention of significant deterioration, an information collection request is being prepared to support rulemaking changes to parts 51 and 52.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Motor vehicle pollution, Nitrogen oxide, Volatile organic compounds.

Dated: January 7, 1994.

Carol M. Browner,
Administrator.

40 CFR part 52 is proposed to be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401-7671q.

Subpart A—[Amended]

2. Section 52.32, as proposed to be added in a document published elsewhere in this *Federal Register*, is amended by adding entries for the State of Illinois in the tables in paragraphs (c)(1)(i) and (c)(2) to read as follows:

§ 52.32 Discretionary sanction under section 110(m) of the Clean Air Act.

* * * * *

(c) * * *

(1) * * *

(i) * * *

Affected area	Date sanction applies	Pollutant(s) affected
State of Illinois:		
Cook		VOC, NO _x
DuPage		VOC, NO _x
Grundy		
—Aux Sable Township		VOC, NO _x

Affected area	Date sanction applies	Pollutant(s) affected
—Gooselake Township		VOC, NO _x
Kane		VOC, NO _x
Kendal		
—Oswego Township		VOC, NO _x
Lake		VOC, NO _x
Madison		VOC, NO _x
McHenry		VOC, NO _x
Monroe		VOC, NO _x
St. Clair		VOC, NO _x
Will		VOC, NO _x

* * *	
(2) * * *	
Affected area	Date sanction applies
* * *	
State of Illinois	

[FR Doc. 94-1129 Filed 1-21-94; 10:00 am]
BILLING CODE 8560-50-P

40 CFR Part 52

[IN33-1-6049; FRL-4826-5]

Federal Highway Funding Assistance Limitations and Emissions Offset Requirements; Indiana

AGENCY: United States Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Environmental Protection Agency (USEPA) is proposing this action to impose sanctions on Indiana under the discretionary sanction authority provided under the Clean Air Act, as amended in 1990, (CAA or Act) for failure by the State to submit a complete SIP revision for an enhanced motor vehicle inspection and maintenance (I/M) program as required by the Act for certain ozone nonattainment areas. On December 2, 1992, the Indiana Department of Environmental Management (IDEM), acting as the governor's designee, submitted a commitment (Committal SIP) to adopt an I/M program to meet the requirement of the Act and the I/M rule by November 15, 1993. The committal SIP provides for the adoption and implementation of an enhanced I/M program meeting all requirements of USEPA's I/M regulations and includes an implementation schedule. On September 9, 1993, USEPA proposed to disapprove this SIP revision and on

disapprove this SIP revision and on November 29, 1993, USEPA disapproved this SIP revision based on the failure by the State to meet milestones contained in the committal SIP's implementation schedule pertaining to the enactment of necessary legislative authority. A full SIP revision including State legislative authority to implement the program was required by November 15, 1993. The Indiana legislature adjourned on June 30, 1993, without taking necessary action to provide for implementation of an enhanced I/M program. On December 30, 1993, USEPA Region 5 issued a letter finding that the State had failed to submit the SIP revision required under sections 110 and 182 of the Act. Due to the failure of the State to submit a complete SIP revision fulfilling either the requirements of the Act or its commitment to adopt and implement an enhanced I/M program as promised in its committal SIP, USEPA proposes to exercise its discretionary authority under the Act to apply a statewide highway funding limitation sanction and a 2 for 1 growth offset sanction in all areas required to have a permit program under the new source review provisions of the Act.

DATES: Comments on this proposed action are to be submitted by March 15, 1994. The USEPA will hold three public hearings on February 16, 18, and 22.

ADDRESSES: Comments on this proposed rule should be addressed to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (5AR-18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

The public hearings will be held in Indiana as follows: February 16, 1994 in Valparaiso, (Porter County) at the Porter County Administration Center on 155 Indiana Avenue in Suite 205 at 11 a.m. to 4 p.m.; February 18, 1994 in New Albany (Floyd County) at the New Albany Courthouse on West First and Spring Streets in the third floor assembly room at 11 a.m. to 4 p.m.; and February 22, 1994 in Indianapolis (Marion County) at the Indiana Government Center South on 402 West Washington Street in the auditorium at 11 a.m. to 4 p.m.

Copies of Indiana's I/M Committal SIP submittal, USEPA's proposals and rulemakings, and other documents pertinent to this proposed rule are available at the following address: U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, Regulation Development Branch, 77

West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Francisco J. Acevedo, Environmental Engineer, Regulation Development Section, Regulation Development Branch (5AR-18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6061. Anyone wishing to come to Region 5 offices should first contact Francisco J. Acevedo.

SUPPLEMENTARY INFORMATION:

I. I/M Program Requirements

Pursuant to the 1977 amendments to the Act, vehicle I/M programs were mandated for certain areas with long standing air quality problems. The 1990 amendments to the Act expanded the role of I/M programs as an attainment strategy and required USEPA to develop different performance standards for "basic" and "enhanced" I/M programs. The performance standard is the minimum amount of emission reductions a program must achieve, based on a model or benchmark program design. In addition, the amended Act directed USEPA to address requirements for specific design elements and program implementation issues for both basic and enhanced I/M programs. The amended Act requires states containing nonattainment areas to make changes to improve existing I/M programs or implement new ones. Section 182(a)(2)(B) of the Act directed USEPA to publish updated guidance for state I/M programs, taking into consideration findings of the Administrator's audits and investigations of these programs. The Act further requires each area required by the Act to have an I/M program to incorporate this guidance into the SIP. Based on these requirements, USEPA promulgated an I/M regulation on November 5, 1992. (57 FR 52950)

Under section 182(c)(3) of the Act, areas designated as serious or worse ozone nonattainment areas with populations of 200,000 or more, in addition to metropolitan statistical areas with populations of 100,000 or more in the northeast ozone transport region, are required to meet USEPA requirements for "enhanced" I/M programs. These areas were required to submit a SIP revision to incorporate an enhanced I/M program by November 15, 1992. In Indiana, the State must implement a basic I/M program in the urbanized areas of Clark and Floyd counties; it must implement an enhanced I/M program in the urbanized areas of Lake and Porter counties.

The I/M regulation establishes minimum performance standards for basic and enhanced I/M programs as well as requirements for the following: Network type and program evaluation; adequate tools and resources; test frequency and convenience; vehicle coverage; test procedures and standards; test equipment; quality control; waivers and compliance via diagnostic inspection; motorist compliance enforcement; motorist compliance enforcement program oversight; quality assurance; enforcement against contractors, stations and inspectors; data collection; data analysis and reporting; inspector training and licensing or certification; public information and consumer protection; improving repair effectiveness; compliance with recall notices; on-road testing; SIP revisions; and implementation deadlines.

For enhanced I/M programs, all requirements must be implemented by January 1, 1995 except that areas switching from an existing test-and-repair network to a test-only network may phase in that change between January 1995 and January 1996.

Each state required to implement an I/M program was required to submit by November 15, 1992, a SIP revision (here and after referred to as "I/M committal SIP") including two elements: (1) A commitment from the Governor or his/her designee to the timely adoption and implementation of an I/M program meeting all the requirements of the I/M regulation; and, (2) a schedule for adoption of the program, with interim milestones including passage of enabling statutory or other legal authority and adoption of final regulations. Acceptance of I/M committal SIPs in lieu of full SIPs was justified by the fact that states could not have been expected to begin development of an I/M program meeting the requirements of the Act and the I/M regulation until the I/M regulation was adopted as a final rule, which did not occur until November 5, 1992. A complete SIP revision which contained all of the elements identified in the adoption schedule, including the authorizing legislation and implementing regulations, was to be submitted no later than November 15, 1993.

On December 2, 1992, the State of Indiana submitted a committal SIP to USEPA. A public hearing on this submittal was held by the State on October 22, 1992, in Gary, Indiana. The submittal included a schedule of implementation and a commitment to the timely adoption and implementation of an I/M program in the Lake, Porter,

Clark, and Floyd County ozone nonattainment areas meeting all the requirements of the I/M regulation and the amended Act by November 15, 1993.

On June 30, 1993, the Indiana legislature adjourned without taking the necessary action to enable Indiana to adopt and implement the I/M provisions mandated by the amended Act and the final I/M rule in Lake and Porter Counties. Failure to provide such authority prevented the State from submitting a complete SIP revision containing all the required elements of the program by November 15, 1993. On August 17, 1993, USEPA sent a letter to Governor Bayh of Indiana and to the Regional Administrator of the Federal Highway Administration advising them that USEPA had decided to exercise its discretionary authority under section 110(m) of the Act to impose sanctions at any time once a finding of SIP deficiency is made. After review of the committal SIP, USEPA proposed to disapprove the commitment on September 9, 1993 (58 FR 47415), and on November 29, 1993 USEPA disapproved this SIP revision based on the failure by the State to meet interim and final milestones in the schedule contained in the SIP submittal pertaining to the enactment of necessary authority to implement I/M requirements during the 1993 Indiana General Legislative session. On November 15, 1993, the State of Indiana failed to meet its commitment to USEPA by failing to submit a full SIP revision for I/M program implementation.

Beyond being a specific mandate of the Act, enhanced I/M programs play an important role in the ability of Lake and Porter Counties to comply with the CAA requirements for achieving the National Ambient Air Quality Standards (NAAQS) for ozone, as well as the Act's requirements for reasonable further progress (RFP) reductions for ozone. The Act provides that each state in which all or part of certain classifications for ozone and/or CO nonattainment areas are located is required to provide an attainment demonstration showing that its SIP, as revised, will provide for attainment of the NAAQS by the applicable attainment date(s). The Act further requires that each state in which all or part of a serious, severe, or extreme ozone nonattainment area is located shall submit SIP revisions that will reduce VOC emissions by November 15, 1996 by at least 15% of 1990 baseline emissions. If the reductions identified in the SIP revisions are less than 15% of baseline emissions, the state may obtain a waiver under section 182(b)(1)(A)(ii); this requires the State to make several

demonstrations, including one that the plan reflecting the lesser amount includes all measures that can feasibly be implemented in the area in light of technological achievability. The Lake and Porter areas in Indiana will have difficulty meeting the RFP requirements because credit for certain pre-1990 CAA programs, such as the federal motor vehicle control program and basic I/M is not allowed. The additional benefits of enhanced I/M, however, are fully creditable towards meeting the RFP requirement. Enhanced I/M is one of the most powerful tools available to areas in terms of providing expeditious reductions in both VOC and NOx, both of which are precursors of ozone.

Finally, a federally approvable enhanced I/M program represents one of the most cost-effective air quality control strategies available. Without an effective I/M program, attainment of the ozone air quality standard is virtually impossible, and without appropriate enabling legislation, an enhanced I/M program cannot be implemented.

II. Sanctions Under the Clean Air Act

This sanction action is being proposed under USEPA's discretionary authority contained in section 110(m) of the Act. The predicate findings and types of sanctions are in section 179. The two sanctions available to USEPA for application under section 110(m), as provided in section 179(b), are: (1) A prohibition on the funding of certain highway projects; and (2) an increase in the emission offset requirement for new and modified major stationary sources. The highway funding sanction prohibits the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under Title 23 of the U.S. Code, other than projects or grants for safety and certain other categories of projects listed in section 179(b)(1). The offset sanction requires that, when states apply the emission offset requirement of section 173 to new or modified sources, the ratio of emission reductions to increased emissions must be at least 2 to 1.

Section 179(a) of the Act sets forth the findings¹ which provide USEPA with discretion under section 110(m) to impose one or both of the sanctions specified under section 179(b). The four findings are: (1) A state has failed, for a nonattainment area, to submit a SIP or an element of the SIP, or that the SIP or SIP element submitted fails to meet the completeness criteria of section 110(k); (2) USEPA disapproves a SIP

submission for a nonattainment area based on the submission's failure to meet one or more plan elements required by the Act; (3) a state has not made any other submission required by the Act or has made a submission that does not meet the completeness criteria or has made a required submission that is disapproved by USEPA for not meeting the Act's requirements; or (4) a requirement of an approved plan is not being implemented.

Under section 179(a), unless the state corrects the deficiency, one of the two sanctions listed in section 179(b) must be imposed 18 months after a finding is made, and the second must be imposed 6 months after the first sanction is imposed, if the deficiency remains uncorrected.² In addition, USEPA may apply both sanctions after 18 months if the Administrator finds a lack of good faith on the part of the state.

Although section 179(a) establishes mandatory deadlines for the application of sanctions at certain points after a finding of deficiency, section 110(m) provides USEPA with the discretion to impose section 179(b) sanctions at any time (or at any time after) a section 179(a) finding. Likewise, although mandatory sanctions under section 179 are limited to the area with the deficiency, section 110(m) authorizes USEPA to apply discretionary sanctions to any portion of the state that USEPA deems reasonable and appropriate to ensure that the requirements of the Act are met. See 57 FR 44534, 44536-44537. However, the Act requires USEPA to establish by rule criteria to ensure that such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for the deficiency.

On September 28, 1992, USEPA proposed criteria under section 110(m) that it would use when proposing statewide sanctions to determine if one or more political subdivisions is principally responsible for a SIP deficiency. 57 FR 44534. These proposed criteria are discussed later in this notice.

With regard to Indiana, EPA is using its discretionary authority under section

¹ Section 179(a) refers to Agency findings, disapprovals, and determinations. These will all be referred to by the one term "findings."

² On October 1, 1993, U.S. EPA proposed a rule governing the order in which the sanctions shall apply under section 179 of the Act. 58 FR 51270. The rule proposes that the offset sanction apply first and the highway funding sanction apply second. According to the proposed rule, U.S. EPA may change this sequence of sanctions through individual notice-and-comment rulemaking. This proposed sequencing applies only to mandatory sanctions that apply under section 179(a) and does not govern sanctions imposed under section 110(m).

110(m) to propose early sanctions³ based on Indiana's failure to submit a complete SIP to improve its I/M program. EPA is taking this action for two reasons: (1) Congress required timely submittal of enhanced I/M programs as a measure the State's metropolitan areas to meet CAA deadlines, and any legislative delay threatens the State's ability to meet those deadlines, and (2) enhanced I/M is the single most effective air pollution control measure available. Delayed legislative approval of an acceptable I/M program places a disproportionate burden for cleaning the air on the State's major industrial sources.

III. Proposed Sanctions

A. Finding Under Section 179(a)

As stated previously on December 30, 1993, USEPA Region 5 issued a letter notifying the State of its failure to submit a complete SIP revision on November 15, 1993, as required by the Act. USEPA's letter constitutes a finding under section 179(a) that triggers USEPA's discretionary authority to impose the sanctions proposed in this notice under section 110(m). Further, on November 29, 1993, USEPA disapproved Indiana's committal SIP revision because the State had failed to meet its commitment.

If sufficient progress has not been made by Indiana toward the implementation of an approvable I/M program to be operational on or before January 1, 1995, EPA hereby announces its intention to impose sanctions on May 15, 1994.

B. Rationale and Approach for Section 110(m) Sanctions

Section 110(m) of the Act allows USEPA to apply the Federal highway funding assistance limitations and 2:1 emission offset sanction at any time (or at any time after) it makes a finding under section 179(a). Based on its finding dated December 30, 1993, USEPA is proposing to impose both the Federal highway funding assistance limitations and 2:1 emission offset sanctions. USEPA believes that the imposition of both sanctions is appropriate because of Indiana's failure to adopt legislation to enhance its existing vehicle inspection and maintenance program. In the absence of an improved vehicle inspection and maintenance program, the ability of the

State's metropolitan areas to meet the Clean Air Act deadlines for attaining healthy air quality is severely compromised. As previously noted, enhanced vehicle inspection and maintenance is the single most effective air pollution control measure available and delayed legislative approval of an acceptable program further burdens major industrial sources of air pollution with responsibility for cleaning the air.

Under section 110(m), USEPA may apply sanctions to any portion of the state it determines is reasonable and appropriate. During the 24 months following the finding, USEPA may not impose the sanctions statewide if one or more political subdivisions within the state is principally responsible for the deficiency that is the basis for sanctions. USEPA has proposed criteria for determining when a political subdivision is principally responsible (57 FR 44534, September 28, 1992). The criteria provide that a political subdivision is principally responsible if: (1) It has the legal authority to perform the required activity; (2) it has traditionally performed, or has been delegated the responsibility to perform, the required activity; (3) it has received, where appropriate, adequate funding, or authority to obtain funding, from the state to perform the required activity; (4) it has agreed to perform (and has not revoked the agreement), or is required by state law to accept responsibility for performing, the required activity; and (5) it has failed to perform the required activity. A "political subdivision" is defined as the representative body that is responsible for adopting and/or implementing air pollution controls for any combination of political subdivisions created by, or pursuant to, Federal or State law. If no political subdivision meets all 5 criteria, USEPA may use its discretion to determine whether it is reasonable and appropriate to apply sanctions on a statewide basis.

In this notice, USEPA is proposing to use the above proposed criteria to determine if it may impose highway sanction statewide for Indiana because of the failure to submit a complete enhanced I/M program.

USEPA believes that the first criterion has not been met by any political subdivision. Only the Indiana legislature, composed of representatives from all portions of the State of Indiana, has the authority to revise the state statute to provide for an enhanced I/M program meeting the CAA and EPA requirements. Once the legislature has acted, only state government agencies can adopt any implementing regulations. While individual air pollution control districts or air quality

management districts may request implementation of the state I/M program within their districts once that program is adopted, this authority is meaningless unless the State has first established an appropriate program through legislation and regulations. Since the State legislature has not enacted the legislation required to provide the legal authority for an enhanced I/M program meeting the CAA and USEPA requirements, the program is not available to areas within the State that require the program.

Since no political subdivision within the State has met the first criterion, EPA believes that no political subdivision is principally responsible for the failure to have an enhanced I/M program. Therefore, EPA is not prohibited from imposing sanctions statewide. As noted above, the State legislature bears the ultimate responsibility to adopt the requisite legislative authority and IDEM, not the individual air quality districts, must subsequently adopt adequate regulations. Since the State does bear the ultimate responsibility, USEPA believes that it is reasonable and appropriate for USEPA to impose the highway sanction on the entire State.

The 2:1 offset sanction requirements apply only to new or modified major stationary sources located or to be located in areas that are required to have a permit program pursuant to section 173. Thus, USEPA is proposing to impose the 2:1 emission offset sanction in the following ozone nonattainment counties: Lake, Porter, Clark, Floyd, Marion, St. Joseph, Elkhart, and Vanderburgh. The 2:1 emission offset would apply to all new or modified major stationary sources for volatile organic compounds and oxides of nitrogen that are locating to or located in each of these areas. USEPA proposes to impose the offset sanction in the manner described in the proposed action on the sequencing of sanctions (58 FR 51270, 51275-51277 (Oct. 1, 1993)).

C. Removal of Discretionary Sanctions

USEPA is proposing to temporarily lift (i.e., toll)⁴ the highway and offset

³ U.S. EPA issued a letter on December 30, 1993, finding that the State's proposed SIP revision was a failure to submit a SIP revision as required by the Act. Mandatory sanctions under section 179(a) were triggered by issuance of the letter notifying the State of the finding of the deficiency.

⁴ As a general rule, an Agency must go through rulemaking to remove or alter a requirement imposed through rulemaking. While U.S. EPA intends to issue a notice tolling the 110(m) sanctions upon the occurrence of the events described, U.S. EPA will use the good cause exception to the otherwise applicable requirement for proposed rulemaking. EPA believes there is good cause to toll the sanctions once the state takes the action which cures the deficiency that resulted in the imposition of sanctions. See 5 U.S.C. § 553(b)(3). Therefore, no proposed action for removal will be issued. Consistent with U.S. EPA's

sanctions imposed under section 110(m) upon the passage by the Indiana legislature and signature by the Governor of legislation which USEPA preliminary determines provides legal authority for an enhanced I/M program meeting the requirements of the CAA and the I/M regulations. USEPA proposes to notify the State of this tolling by a letter to the Governor and the public by a notice published in the notice section of the **Federal Register**. The section 110(m) sanctions would not be completely lifted until the State of Indiana submits a complete enhanced I/M program to USEPA. USEPA will take action to completely lift section 110(m) sanctions upon its determination that the State has submitted a complete enhanced I/M program.

As an alternative, EPA proposes that the basis for the discretionary sanctions is EPA's disapproval of Indiana's committal SIP. If the EPA's disapproval of the committal SIP is the basis for the discretionary sanctions, such sanctions would be tolled in the same manner as if the finding of failure to submit were the basis; however, if the disapproval is the basis for imposing the sanctions such sanctions would not be completely lifted until EPA formally approves an enhanced I/M program for the State of Indiana. In such a case, EPA would take action to lift the sanctions at the same time as EPA took final action approving the State's I/M program.

USEPA's action imposing or tolling the section 110(m) sanctions will in no manner affect EPA's obligation to impose mandatory sanctions under section 179(a). The mandatory sanctions clock for Indiana was triggered on November 29, 1993 by EPA's disapproval of Indiana's committal SIP. Therefore, one mandatory sanction shall apply 18 months after USEPA's final disapproval of the committal SIP and the second mandatory sanction shall apply 6 months later. Sanctions under section 179(a) apply to the areas for which the deficiency exists and until such deficiency has been corrected. Moreover, if the State does not adopt and USEPA does not approve regulations providing for an I/M program within the 18-month and additional 6-month periods following the effective date of EPA's disapproval, the sanctions will automatically apply on those areas of the State that were required to have but do not have such a USEPA-approved I/M program under

intent to impose discretionary sanctions only on those areas that lack legislative authority U.S. EPA believes that it is in the public interest to remove, at least temporarily, these discretionary sanctions as expeditiously as possible once the State of Indiana has enacted legislative authority.

the amended Act. See 58 FR 51270 (October 1, 1993).

IV. Regulatory Requirements

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely effect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
 - (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
 - (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
 - (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.
- Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." Nevertheless, this action has been informally submitted to OMB for review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, USEPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000. For reasons cited below, USEPA has not completed a regulatory flexibility analysis for this rule.

The USEPA cannot reliably predict the impact of these restrictions because of the exemptions authorized for certain highway projects related to mass transit, public safety, and those that have beneficial air quality impacts. Careful review and evaluation of each project is necessary to determine whether or not a project is exempt.

Major stationary sources of VOC and NO_x with emissions are generally not

small entities. Also, the 2:1 emission offset requirement does not prevent growth and modification but sets a higher offset standard than the current offset required. It is not expected that a large number of small entities will be affected by the emission offset requirement. In the past, when USEPA has made efforts to quantify the impact of the Act's rules on the construction and modification of sources, USEPA has been unable to do so due, in part, to the need to obtain information on future plans for business growth. This information is difficult to obtain, as businesses are understandably reluctant to make their plans public.

The USEPA is also proposing to impose Federal highway funding assistance limitations statewide. This limitation could affect a number of government entities with jurisdiction over populations of less than 50,000 since government entities often apply for and receive federal funding under Title 23, United States Code, for road improvement projects. Although a great many projects are exempted under section 179(b)(1)(B), a number of projects are expected to be affected if the USEPA takes final action.

For the reasons stated above, EPA cannot further analyze the economic impacts of this action on small entities. The statements in this package constitute EPA's full regulatory flexibility analysis.

C. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Should the highway sanctions become effective, the Secretary of the U.S. Department of Transportation (USDOT) is required to determine which projects or grants should not be affected by the sanction and which, therefore, are exempt. This determination will be based on information readily available in existing documentation gathered for the purpose of evaluating the environmental, social, and economic impacts of different alternatives for transportation projects. These analyses are already required for the preparation of environmental assessments and impact statements under the National Environmental Policy Act (NEPA). Historically, exemption determinations by USDOT for sanctions have been based on such NEPA documentation and have not necessitated additional information gathering and analysis by the states. In addition, since under NEPA, final environmental documents must be

approved by USDOT, in most cases the NEPA documentation will already be in USDOT's possession. Therefore, USEPA does not believe that the highway sanctions, when applied, will impose an additional information collection burden on the states.

When the offset sanction applies, sources subject to it will not incur an additional information collection burden because sources are already required under section 173 offset requirements to obtain an emission offset from between 1 to 1 and 1.5 to 1 (depending on the classification of the nonattainment area in which they are located). Should the offset sanction apply, it would not impose an additional information collection burden because sources will not have to provide additional information in the application beyond that which they would already have to provide in the absence of the sanction. (For the information collection burden of new requirements of the amended Act for nonattainment new source review (NSR) and prevention of significant deterioration, an information collection request is being prepared to support rulemaking changes to parts 51 and 52.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Motor vehicle pollution, Nitrogen oxide, Volatile organic compounds.

Dated: January 7, 1994.

Carol M. Browner,
Administrator.

40 CFR part 52 is proposed to be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401-7671q.

Subpart A—[Amended]

2. Section 52.32, as proposed to be added in a document published elsewhere in this Federal Register, is amended by adding entries for the State of Indiana in the tables in paragraphs (c)(1)(i) and (c)(2) to read as follows:

§ 52.32 Discretionary sanction under section 110(m) of the Clean Air Act.

(c) * * *

(1) * * *

(i) * * *

Affected area	Date sanction applies	Pollutant(s) affected
State of Indiana:		
Clark		VOC, NO _x
Elkhart		VOC, NO _x
Floyd		VOC, NO _x
Lake		VOC, NO _x
Marion		VOC, NO _x
Porter		VOC, NO _x
St. Joseph		VOC, NO _x
Vanderburgh		VOC, NO _x

* * * * *

(2) * * *

Affected area	Date sanction applies
State of Indiana:	

[FR Doc. 94-1131 Filed 1-21-94; 10:00 am]
BILLING CODE 6560-50-P

Notices

Federal Register

Vol. 59, No. 15

Monday, January 24, 1994

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

January 14, 1994.

The Department of Agriculture has submitted to OMB for review the following proposal 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, extension, 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) 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) 690-2118.

Revision

- Farmers Home Administration, 7 CFR 1980-B, Guaranteed Farmer Program Loans, FmHA 449-11, 1980-15, 24, 25, 38, 58, 64, 83, On occasion, Individuals or households; State or local governments; farms; businesses or other for-profit; 144,340 responses; 191,027 hours, Jack Holston (202) 720-9736.
- Agricultural Marketing Service, National Research, Promotion, and Consumer Information Programs, Recordkeeping; on occasion; monthly; semi-annually, Individuals or

households; farms, businesses or other for-profit; small businesses or organizations; 4,472,143 responses; 389,544 hours, Margie B. Trainor (202) 720-1123.

Extension

- Agricultural Marketing Service, Limes Grown in Florida, Marketing Order No. 911, Recordkeeping; on occasion, weekly; annually, farms; businesses or other for-profit; small businesses or organizations; 2,372 responses; 278 hours, Gary Rasussen (202) 720-5331.

Reinstatement

- Farmers Home Administration, 7 CFR 1924-F, Complaints and Compensation for Construction Defects, FmHA 1924-4
On occasion, Individuals or households; 5,300 responses; 1,500 hours, Jack Holston (202) 720-9736.
- Agricultural Stabilization and Conservation Service, 7 CFR Part 1475, Emergency Feed Program, CCC-652, 640, 640-A, 651, 651B, 651 Appendix, 653A, 657, 658, 659, On occasion, farms; 381,000 responses; 81,832 hours, Clarence Domire (202) 720-7673.
- Agricultural Stabilization and Conservation Service, 7 CFR 1423.1 Processed Commodities Standards, CCC-560, 55, 33, 33A, 34, 34-1, 29, 29-1, 29-2, 29-3, 56, 56-1, 56-2, KC-140, 269A, On occasion; annually, businesses or other for-profit; 13,955 responses, 16,784 hours, Barry Klein (202) 720-4647.
- Soil Conservation Service, Rural Abandoned Mine Program (RAMP), CS-LTP-11, 11A, 11B, 12, 13, 150-156, FNM 140-141, On occasion, Individuals or households; State or local governments; farms; 990 responses; 845 hours, Bobby Rakestraw (202) 720-1866.

New Collection

- Rural Electrification Administration, Demand Side Management and Integrated Resource Plan, On occasion, Small businesses or organizations; 63 responses; 2,920 hours, F. Lamont Heppe, Jr. (202) 720-0736.
- Animal and Plant Health Inspection Service, Permit for Movement of Restricted Animals—Addendum 1, VS 1-27, On occasion, Farms; 33

responses; 5 hours, Dr. Daniel E. Harpster (301) 436-6954.

Larry K. Roberson,

Deputy Department Clearance Officer.

[FR Doc. 94-1529 Filed 1-21-94; 10:00 am]

BILLING CODE 3410-01-M

Forest Service

West Fork Squaw Timber Sale; Clearwater National Forest, Idaho County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will analyze and disclose the environmental impacts of a proposal to harvest timber, regenerate harvested timber stands, rehabilitate existing sediment sources, reconstruct existing roads, and construct new roads in a portion of the West Fork Squaw Creek and Spring Creek drainages on the Powell Ranger District. An environmental impact statement (EIS) will be prepared which will document the analysis. This EIS will tier to the Clearwater National Forest Land and Resource Management Plan Final EIS of September 1987, which provides overall guidance in achieving the desired condition for the area. The primary purpose and need of the proposed action is to implement land management direction for the West Fork Squaw Creek and Spring Creek drainages. The goal is to develop a viable timber sale proposal that is compatible with current resource management objectives.

DATES: Comments concerning the scope of the analysis should be received by January 31, 1994, to receive timely consideration in the preparation of the Draft EIS. The Draft EIS will be filed with the Environmental Protection Agency by May 1, 1994. The Final EIS and Record of Decision are expected in November of 1994.

ADDRESSES: Send written comments to the Responsible Official, Margaret J. Gorski District Ranger, Powell Ranger District, Powell Ranger Station, Lolo, Montana 59847.

FOR FURTHER INFORMATION CONTACT: Ralph Johnson, West Fork Squaw Analysis Interdisciplinary Team Leader, or Margaret J. Gorski, District Ranger,

Powell Ranger District, Lolo, Montana 59847. (208) 942-3113.

SUPPLEMENTARY INFORMATION: The analysis area in which the proposed management activities would occur consists of approximately 3,650 acres of National Forest land in the West Fork of Squaw Creek and Spring Creek drainage on the Powell Ranger District. The study area includes all or portions of Sections 1, 2, 11, 12, 13, 14, and 24 of T37N, R12E and Sections 6, 7, 18, and 19, of T37N, R13E, Boise Meridian, Idaho County, Idaho.

The Land and Resource Management Plan for the Clearwater National Forest provides the overall guidance for management activities in the potentially affected area through its goals, objectives, standards, guidelines and management area direction. In the West Fork Squaw Creek analysis area, four Forest Plan Management Areas are found: E1 which emphasized optimum timber management, M2 which emphasizes protection of riparian values, A6 which emphasizes the cultural and visual resources from the historic trail corridor, and US which is lands unsuitable for timber production. The areas of proposed timber harvest, regeneration and associated road construction and reconstruction activities are located in Management Area E1, which emphasizes optimum sustained timber production.

To date, considerable scoping and analysis has been done in regard to the proposed action. In April 1991 the staff of the Powell Ranger District began an Integrated Resource Analysis (IRA) of the West Fork of Squaw Creek (Silvicultural compartment 621) to identify the existing and desired conditions. During December of 1991, a Position Statement was sent to the staff of the Clearwater National Forest, State agencies, the Nez Perce Tribal Executive Committee, and other known local interest groups and individuals informing the public of the analysis and seeking comment. In January 1992, an Interdisciplinary Team (IDT) was assigned to continue the analysis after receiving a number of comments during the initial scoping phase. This team identified the primary issues in February 1992 after reviewing the input received.

The key issues identified by the Interdisciplinary Team are:

1. **Scenery**—Proposed logging and road construction may influence, either positively or negatively, the view from the Lolo Trail Corridor, which consists of the Lolo motorway, Nez Perce National Historic Trail, and the Lewis & Clark National Historic Landmark.

2. **Fisheries and Water Quality**—Proposed logging and road construction will be analyzed for sediment production and potential mitigation measures to determine effects on the west fork and mainstem of Squaw Creek (recently recovered to minimum Forest Plan standards) affecting the Spring/Summer Chinook salmon and the bull trout.

3. **Old Growth, Wildlife, and Threatened, Endangered, and Sensitive Species**—

Old Growth—Proposed logging and road construction may reduce the level of old-growth habitat in the analysis area and further fragment corridors linking areas of old-growth habitat. Potential Old Growth stands within or adjacent to proposed activities will be field verified.

Wildlife—Timber harvesting and road construction may create new openings, decreasing suitable habitat needed for wildlife. **Threatened, Endangered and Sensitive Species**—Timber harvesting and road construction may affect Threatened, Endangered and Sensitive species or their habitat.

4. **Timber Management**—Proposed logging may increase overall stand productivity by removing timber which has reached biological maturity and by removing timber which is infected with bark beetles and disease pathogens. Proposed logging would also contribute timber to the local and National timber supply.

5. **Economics**—Proposed logging and environmental protection measures may affect the economic viability of a timber sale offering.

In response to the identified issues and concerns, the IDT has described four management alternatives. One of these is the "no-action" alternative in which timber harvest, timber stand regeneration, and road construction/reconstruction activities would not be implemented. Three other alternatives will examine various levels and locations of timber harvest, rehabilitation of active sediment sources, and road construction/reconstruction activity. Various mixes of timber and non-timber resource values of each alternative will also be examined.

Under the action alternatives that the Interdisciplinary Team has described to this point, timber harvest ranges from 1.9 to 3.9 million board feet (MMBF), with harvest directly affecting from 323 to 472 acres. To access proposed harvest units, up to 0.9 mile of new road construction and no road reconstruction would be required.

The preliminary analysis indicates that tentative alternatives may have

significant effects to the environment. The Responsible Official, Margaret J. Gorski, Powell District Ranger, has decided to continue the analysis and document it with an Environmental Impact Statement. Due to changed environmental conditions, the proposed action is changed from the original position statement.

The Forest Service is now seeking further information and comments from Federal, State, local agencies, and other individuals or organizations who are interested in or affected by the proposed action. This additional input will be used in preparing the Draft EIS (DEIS).

The process will include:

1. Identification of additional potential issues.
2. Identification of issues to be analyzed in depth.
3. Elimination of insignificant issues.
4. Identification of additional reasonable alternatives.
5. Identification of potential environmental effects of the alternatives.
6. Determination of potential cooperating agencies.

The EIS will disclose the environmental effects of alternative ways of implementing the Forest Plan. The Forest Service will analyze and document the direct, indirect, and cumulative effects of the alternatives. In addition, the EIS will disclose site specific mitigation measures and their expected effectiveness.

Public participation will be especially important at several points in the analysis. People are encouraged to visit with Forest Service officials at any time during the analysis and prior to the decision. A Final EIS is expected to be filed in November 1994. Two key time periods have been identified for receipt of formal comments on the analysis:

1. Scoping period (now through January 1994).
2. Review of the Draft EIS in June 1994.

The U.S. Fish and Wildlife Service, Department of Interior, will be informally consulted throughout the analysis. To meet the requirements of the Endangered Species Act, the U.S. Fish and Wildlife Service will review the EIS and Biological Assessment of the effects on Threatened and Endangered species, including the grizzly bear, gray wolf, and fall chinook salmon.

The DEIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review by May 1994. At that time, the EPA will publish a Notice of Availability of the DEIS in the **Federal Register**. After a 45-day public comment period, the

comments received will be analyzed and considered by the Forest Service in the final Environmental Impact Statement (FEIS). The FEIS is scheduled to be completed by November 1994. The Forest Service will respond in the FEIS to the comments received on the DEIS. The responsible official is the District Ranger of the Powell Ranger District, Clearwater National Forest, Lolo, Montana 59847. The decision and reasons for the decision will be documented in a Record of Decision.

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 Forest Service believes, at this early stage, it is important to give reviewers notice 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 Agoon 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 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: January 11, 1994.

Margaret J. Gorski,

District Ranger, Powell Ranger District,
Clearwater National Forest.

[FR Doc. 94-1526 Filed 1-21-94; 10:00 am]

BILLING CODE 3410-11-M

G. Antolini and Son, Colson Quarry Operations

AGENCY: Forest Service, USDA and Pacific Unified School District.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an Environmental Impact Statement (EIS), as required by the National Environmental Quality Act (NEPA). The proposed project is to evaluate a 10-Year Plan of Operations submitted by G. Antolini and Son for continuing quarrying operations at the Colson Quarry. The quarry is located on the Santa Lucia Ranger District, Los Padres National Forest, Santa Barbara County, California. The proposal could result in the approval of the proposed Operating Plan and the issuance of a Contract for the Sale of Mineral Materials to G. Antolini and Son. Operating period could be for as little as five years or as long as ten years. Proposed operating volume is an annual maximum of two thousand tons.

DATES: Any new information or issues regarding this analysis will be accepted on or before February 23, 1994.

ADDRESSES: Submit written comments concerning new information or issues related to this analysis to Dennis Cooper, Lands and Minerals Assistant, 1616 Carlotti Drive, Santa Maria, California, 93454.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action should be directed to Dennis Cooper, Lands and Minerals Assistant, 1616 Carlotti Drive, Santa Maria, California, 93454, telephone (805) 925-9538.

SUPPLEMENTARY INFORMATION: The project has been proposed by G. Antolini and Son, in order to continue quarrying operations inside approximately fifty acres of National Forest System lands on the Los Padres National Forest. The proposed operation would involve additional open-pit mining of decorative building stone from approximately eighteen acres of National Forest System lands. The remaining thirty-two acres is divided into sixteen acres for support facilities and sixteen acres for old waste dumps. Disposal of mine wastes would be inside of the existing quarry area. Annual volume of stone removed from

the quarry would not exceed 2000 tons per year. Proposed project is for a total of ten years.

The original proposal by G. Antolini and Son resulted in the preparation of an environmental assessment for the proposed action and four alternatives. The four alternatives included "No Action" and three alternatives that would allow quarrying operations. The three operating alternatives vary in the amounts of Forest land that would be disturbed, the different operating requirements and/or the lengths imposed on the total operating time. Based on agency scoping and issues related to reclamation and the Surface Mining and Reclamation Act [SMARA] (California Public Resources Code 2710 *et seq.*), it was determined that an environmental impact statement would be required.

The project will require G. Antolini and Son to submit to the Resource Management Department, Santa Barbara County, California, a Reclamation Plan as per SMARA. Any decision to approve the proposed Operating Plan would be in accordance with Forest Service rules and regulations for the disposal of mineral materials as found at 36 CFR 228.40 through 228.67 and the regulations contained in SMARA. The County of Santa Barbara, California, as per the October 1992 Memorandum of Understanding between the State of California, Department of Conservation and the State Mining and Geology Board, the U.S. Department of Agriculture, Forest Service, Pacific Southwest Region, and the U.S. Department of the Interior, Bureau of Land Management, California, will be accepting the final EIS as a functionally equivalent document to meet their requirements under SMARA.

In an effort to inform and to seek new information, comments and assistance during the original scoping period, the Santa Lucia Ranger District, Los Padres National Forest, formally contacted ninety-two Federal, State, and local agencies and other individuals and organizations who potentially were interested in or were affected by the proposed action in December 1992. An additional twenty-four potentially interested individuals were formally contacted in January 1993. A total of seven written responses were received by the Forest Service. This input was used to determine the scope of the document and to validate the range of alternatives. The final phase of the public involvement process will be the request for public comments on the draft EIS.

Preliminary issues which have been identified are: visual viewshed, cultural

and paleontological resource impacts, slope stability, rehabilitation and reclamation of the mine and all of the associated area, impacts to water quality, impacts to air quality, noise pollution, additional traffic and the need for road maintenance, impacts to the biological resources, and socioeconomic effects.

The responsible official for the Forest Service and the NEPA process is Kathryn J. Silverman, District Ranger, Santa Lucia Ranger District, 1616 Carlotti Drive, Santa Maria, California, 93454.

The decision to be made by the District Ranger is whether or not to approve the proposed 10-Year Plan of Operations for the Colson Quarry, as submitted by G. Antolini and Son, or to select another alternative for management of the current quarry and the associated National Forest System lands.

The estimated date for completion of the DEIS is February 22, 1994. The estimated date for completion of the final EIS is April 14, 1994.

The comment period of 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 Forest Service believes, at this early stage, it is important to give reviewers notice 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 the agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement 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 *Western 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 available to the Forest Service at a time when it can meaningfully consider them and respond to them in the 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: January 12, 1994.

Kathryn J. Silverman,
District Ranger.

[FR Doc. 94-1525 Filed 1-21-94; 10:00 am]

BILLING CODE 3410-11-M

Proposed Millwood Timber Sale Within the Council Mountain Roadless Area, Payette National Forest, Adams County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement for the proposed Millwood Timber Sale, Council Ranger District, Payette National Forest, Idaho. The proposed sale would construct road and harvest timber within a portion of the Council Mountain Roadless Area that the Payette National Forest Land and Resource Management Plan (1988) allocated to multiple use management.

The agency gives notice of the environmental analysis and decision-making process that is beginning on the proposal so that interested and affected people know how they may participate and contribute to the final decision. The agency invites comments and suggestions on the scope of the analysis, including issues to be addressed during the analysis.

A scoping meeting will be held to gather comments from the public on the proposed action. The meeting will be Thursday, February 3, at 7 p.m. at the Council Ranger District office conference room in Council, Idaho. Forest Service officials will explain the proposed action and planning process, and accept public input.

A scoping document explaining the proposed action and analysis process is also available from the contacts identified below.

DATES: Comments on the scope of the analysis must be received by March 1, 1994.

ADDRESSES: Send written comments to Pete L. Johnston, District Ranger, Council Ranger District, Payette National Forest, P.O. Box 567, Council, ID 83629.

FOR FURTHER INFORMATION CONTACT: Pete Johnston, District Ranger, or Tracy Beck, EIS Team Leader, phone 208-253-4215.

SUPPLEMENTARY INFORMATION: The USDA Forest Service is proposing to construct 18.8 miles of road and harvest about 17.5 million board feet of timber from 1,847 acres of suitable timber lands within the Millwood timber sale area. A mix of silvicultural treatments is proposed, including 209 acres of commercial thinning, 467 acres of shelterwood (about 35 percent crown canopy closure), 351 acres of irregular shelterwood (50-60 percent crown canopy closure), 452 acres of reserve tree (about 5 trees per acre), 306 acres of sanitation/salvage, and 62 acres of strata 21 rehabilitation. This mix of silvicultural prescriptions seeks to retain suitable habitat for sensitive species within all treatment units where it currently exists, improve forest health (resilience and resistance to insect and disease), and increase dominance of seral ponderosa pine and Douglas-fir.

Helicopter logging is proposed for 150 acres (8 percent of the treatment acreage). Skyline logging is proposed for 894 acres (48 percent of the treatment acreage). Tractor logging is proposed for 803 acres (44 percent of the treatment acreage). The proposed mix of logging systems seeks to protect leave stands and regenerate stands in a cost efficient and cost effective manner.

This sale lies within the Council Mountain Roadless Area, Adams County, Idaho. Mill Creek and Cottonwood Creek are the two drainages within the proposed timber sale area; both are tributaries of the Weiser River.

The proposal follows direction in the Payette National Forest Land and Resource Management Plan, 1988 (Forest Plan). The decision to be made is whether the sale area should be entered at this time for timber harvest and associated activities, and, if so, the specific conditions of entry.

Preliminary issues include the proposal's effect on roadless characteristics, vegetation, water quality, biological diversity, fisheries, soils, wildlife habitat, and economics.

Preliminary alternatives being considered include no action, one that seeks to achieve Forest Plan objectives to maximize timber growth and yield, and the proposed action alternative that modifies timber management intensity in response to the preliminary issues.

A draft environmental impact statement (DEIS) considering the proposed action and a reasonable range of alternatives will be prepared. The DEIS is expected to be filed with the Environmental Protection Agency and to be available for public review by March 1995. The comment period on the DEIS will be 45 days from the date the Environmental Protection Agency's notice of availability appears in the *Federal Register*.

The Forest Service believes, at this early stage, it is important to give reviewers early notice 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 that proposal so that it is meaningful and alerts an agency to the reviewers position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could have been 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 Circuit, 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.

The final environmental impact statement is scheduled to be completed by July 1995.

The Responsible Official is David F. Alexander, Forest Supervisor, Payette National Forest, McCall, ID 83638.

Dated: January 10, 1994.

David F. Alexander,

Forest Supervisor.

[FR Doc. 94-1501 Filed 1-21-94; 10:00 am]

BILLING CODE 3410-11-M

Proposed Crystal Creek Timber Sale within the Council Mountain Roadless Area, Payette National Forest, Adams County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement for the proposed Crystal Creek Timber Sale, Council Ranger District, Payette National Forest, Idaho. The proposed sale would construct road and harvest timber within a portion of the Council Mountain Roadless area that the Payette National Forest Land and Resource Management Plan (1988) allocated to multiple use management.

The agency gives notice of the environmental analysis and decision-making process that is beginning on the proposal so that interested and affected people know how they may participate and contribute to the final decision. The agency invites comments and suggestions on the scope of the analysis, including issues to be addressed during the analysis.

A scoping meeting will be held to gather comments from the public on the proposed action. The meeting will be Thursday, February 3, 7 p.m. at the Council Ranger District office conference room in Council, Idaho. Forest Service officials will explain the proposed action and planning process, and accept public input.

A scoping document explaining the proposed action and analysis process is also available from the contacts identified below.

DATES: Comments on the scope of the analysis should be received by February 14, 1994, to assure timely consideration.

ADDRESSES: Send written comments to Pete L. Johnston, District Ranger, Council Ranger District, Payette National Forest, P.O. Box 567, Council, ID 83629.

FOR FURTHER INFORMATION CONTACT: Pete Johnston, District Ranger, or Tracy Beck, EIS Team Leader, phone 208-253-4215.

SUPPLEMENTARY INFORMATION: The USDA Forest Service is proposing to construct 10.0 miles of road and harvest about 14.9 million board feet of timber from 1,145 acres of suitable timber lands within the Crystal Creek timber sale area. A mix of silvicultural treatments is

proposed, including 8 acres of commercial thinning, 101 acres of shelterwood (about 35 percent crown canopy closure), 643 acres of reserve tree (about 5 trees per acre), and 393 acres of sanitation/salvage. This mix of silvicultural prescriptions seeks to retain suitable habitat for sensitive species within all treatment units where it currently exists, improve forest health (resilience and resistance to insect and disease), and increase dominance of seral ponderosa pine and douglas-fir.

Helicopter logging is proposed for 354 acres (31 percent of the treatment acreage). Skyline logging is proposed for 322 acres (28 percent of the treatment acreage). Tractor logging is proposed for 469 acres (41 percent of the treatment acreage). The proposed mix of logging systems seeks to protect leave stands and regenerate stands in a cost efficient and cost effective manner.

This sale lies within the council Mountain Roadless Area, Adams County, Idaho. Crystal Creek and Lake Creek are the two drainages within the proposed timber sale area; both are tributaries of the Middle Fork Weiser River.

The proposal follows direction in the Payette National Forest Land and Resource Management Plan, 1988 (Forest Plan). The decision to be made is whether the sale area should be entered at this time for timber harvest and associated activities, and, if so, the specific conditions of entry.

Preliminary issues include the proposal's effect on roadless characteristics, vegetation, water quality, biological diversity, fisheries, soils, wildlife habitat, and economics.

Preliminary alternatives being considered include no action, an alternative that seeks to achieve forest Plan objectives to maximize timber growth and yield, and the proposed action alternative that modifies timber management intensity in response to the preliminary issues.

A draft environmental impact statement (DEIS) considering the proposed action and a reasonable range of alternatives will be prepared. The DEIS is expected to be filed with the Environmental Protection Agency and to be available for public review by March 1995. The comment period on the DEIS will be 45 days from the date the Environmental Protection Agency's notice of availability appears in the *Federal Register*.

The Forest Service believes, at this early stage, it is important to give reviewers early notice 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 that proposal so that it is meaningful and alerts an agency to the reviewers position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could have been 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 Circuit, 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.

The final environmental impact statement is scheduled to be completed by July 1995.

The Responsible Official is David F. Alexander, Forest Supervisor, Payette National Forest, McCall, ID 83638.

Dated: January 10, 1994.

David F. Alexander,
Forest Supervisor.

[FR Doc. 94-1502 Filed 1-21-94; 10:00 am]

BILLING CODE 3410-11-M

COMMISSION ON CIVIL RIGHTS

Hearing on Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination; New York City, NY

Notice is hereby given pursuant to the provisions of the United States Commission on Civil Rights Act of 1983,

Pub. L. 98-183, 97 Stat. 1301, as amended, that a public hearing of the U.S. Commission on Civil Rights will commence on Monday, February 28, 1994, beginning at 11:30 a.m., in the Ceremonial Court of the U.S. Court of International Trade, located at One Federal Plaza, New York, New York 10007.

The purpose of the hearing will be to collect information within the jurisdiction of the Commission, in order to examine the underlying causes of racial and ethnic tensions in the United States.

The Commission is an independent, bipartisan, factfinding agency, authorized to study, collect, and disseminate information, and to appraise the laws and policies of the Federal Government, and to study and collect information concerning legal developments, with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice.

Hearing impaired persons who will attend the hearing and require the services of a sign language interpreter, should contact Betty Edmiston, Administrative Services and Clearinghouse Division, at (202) 376-8105 (TDD (202) 376-8116)), at least five (5) working days before the scheduled date of the hearing.

Dated at Washington, D.C., January 18, 1994.

Mary Frances Berry,
Chairperson.

[FR Doc. 94-1546 Filed 1-21-94; 10:00 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Minority Business Development Agency

Business Development Center Applications: Dayton, OH MSA (Service Area)

AGENCY: Minority Business Development Agency, Commerce.
ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program. The total cost of performance for the first budget period (12 months) from July 1, 1994 to June 30, 1995 is estimated at \$198,971. The application

must include a minimum cost-share of 15% of the total project cost through non-Federal contributions. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the Dayton, Ohio geographic service area. The award number of this MBDC will be 05-10-94006-01.

The funding instrument for this project will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program provides business development services to the minority business community to help establish and maintain viable minority businesses. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of management and technical assistance to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points).

An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an applicant not being considered for award. The applicant with the highest point score will not necessarily receive the award.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. To

assist in this effort, the MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of \$50 per hour, the MBDC will charge client fees at 20% of the total cost for firms with gross sales of \$500,000 or less, and 35% of the total cost for firms with gross sales of over \$500,000.

Quarterly reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

DATES: The closing date for applications is March 1, 1994. Applications must be postmarked on or before March 1, 1994.

ADDRESSES: Chicago Regional Office, 55 E. Monroe Street, suite 1440, Chicago, Illinois 60603, (312) 353-0182.

FOR FURTHER INFORMATION CONTACT:

David Vega, Regional Director, Chicago Regional Office, telephone (312) 353-0182.

SUPPLEMENTARY INFORMATION:

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006. A pre-bid conference will be held on February 4, 1994, at 10 a.m. at the Chicago Regional Office. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address.

Pre-Award Costs—Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award cost. Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

Outstanding Account Receivable—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or

other arrangements satisfactory to the Department of Commerce are made.

Name Check Policy—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

Award Termination—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which may cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

False Statements—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18-U.S.C. 1001.

Primary Applicant Certifications—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

Nonprocurement Debarment and Suspension—Prospective participants (as defined at 15 CFR part 26, Section 105) are subject to 15 CFR part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

Drug Free Workplace—Grantees (as defined at 15 CFR part 26, Section 605) are subject to 15 CFR part 26, Subpart F, "Government-wide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

Anti-Lobbying—Persons (as defined at 15 CFR part 28, Section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for

grants, cooperative agreements, and contracts for more than \$100,000.

Anti-Lobbying Disclosures—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, Appendix B.

Lower Tier Certifications—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

11.800 Minority Business Development
(Catalog of Federal Domestic Assistance)

Dated: January 14, 1994.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 94-1503 Filed 1-21-94; 10:00 am]

BILLING CODE 3510-21-M

Patent and Trademark Office

Grant of Certificate of Interim Extension of the Term of U.S. Patent No. 4,005,196; Olestra

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of patent term extension.

SUMMARY: The Patent and Trademark Office has issued a certificate under 35 U.S.C. 156(d)(5) for a one-year interim extension of the term of U.S. Patent No. 4,005,196 that claims the food additive known as olestra.

FOR FURTHER INFORMATION CONTACT: Gerald A. Dost by telephone at (703) 305-8813; or by mail marked to his attention and addressed to the Commissioner of Patents and Trademarks, Washington, D.C. 20231.

SUPPLEMENTARY INFORMATION: Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to 5 years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review. Under section 156, a patent is eligible for term extension only if regulatory review of the claimed product was

completed before the original patent term expired.

On December 3, 1993, section 156 was amended by Pub. L. No. 103-179 to provide that if the owner of record of the patent or its agent reasonably expects the applicable regulatory review period to extend beyond the expiration of the patent, the owner or its agent may submit an application to the Commissioner of Patents and Trademarks for an interim extension of the patent term. If the Commissioner determines that, except for permission to market or use the product commercially, the patent would be eligible for a statutory extension of the patent term, the Commissioner shall issue to the applicant a certificate of interim extension for a period of not more than one year.

On January 7, 1994, Procter & Gamble Company, owner of record in the Patent and Trademark Office of U.S. Patent No. 4,005,196, filed an application for interim extension of the term of this patent under 35 U.S.C. 156(d)(5). The application states that the patent claims a composition of matter comprising the food additive product olestra. The application indicates that the product is currently undergoing a regulatory review before the Food and Drug Administration for permission to market or use the product commercially. The original term of the patent is set to expire on January 25, 1994. Applicant requests an interim extension of the term of the patent for a period of one year.

Review of the application indicates that, except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156. Since it is apparent that the regulatory review period may extend beyond the expiration of the original patent term, an interim extension of the patent term under 35 U.S.C. 156(d)(5) is appropriate. Accordingly, an interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 4,005,196 has been granted for a period of one year from the original expiration date of the patent.

Dated: January 14, 1994.

Michael K. Kirk,

*Acting Assistant Secretary of Commerce and
Acting Commissioner of Patents and
Trademarks.*

[FR Doc. 94-1560 Filed 1-21-94; 10:00 am]

BILLING CODE 3510-16-M

DEPARTMENT OF DEFENSE

Department of the Navy

Government-Owned Inventions; Availability for Licensing

AGENCY: Department of the Navy, Defense.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

Copies of the patents are available from the Commissioner of Patents and Trademarks, Washington, DC 20231 for \$3.00 each. Requests for copies of patents must include the patent numbers.

Request for copies of patent applications cited should be directed to the Office of Naval Research (Code 00CC3), Ballston Tower One, 800 North Quincy Street, Arlington, Virginia 22217-5660 and must include the application serial number.

FOR FURTHER INFORMATION CONTACT:

Mr. R.J. Erickson, Staff Patent Attorney, Office of Naval Research (Code 00CC3), 800 North Quincy Street, Arlington, Virginia 22217-5660, telephone (703) 696-4001.

Patent 4,932,783: APPARATUS AND METHOD FOR MINIMIZING POLARIZATION-INDUCED SIGNAL FADING IN AN INTERFEROMETRIC FIBER-OPTIC SENSOR USING INPUT-POLARIZATION MODULATION; filed 21 July 1989; patented 12 June 1990.

Patent 4,897,543: APPARATUS AND METHOD FOR MINIMIZING POLARIZATION-INDUCED SIGNAL FADING IN AN INTERFEROMETRIC FIBER-OPTIC SENSOR USING INPUT-POLARIZATION CONTROL; filed 1 January 1989; patented 30 January 1990.

Patent 4,889,986: SERIAL INTERFEROMETRIC FIBER-OPTIC SENSOR ARRAY; filed 18 August 1988; patented 26 December 1989.

Patent 4,238,856: FIBER-OPTIC ACOUSTIC SENSOR; filed 24 January 1979; patented 9 December 1980.

Patent 4,162,397: FIBER-OPTIC ACOUSTIC SENSOR; filed 28 June 1978; patented 24 July 1979.

Patent Application 130,480: MAGNETOSTRICTIVE LINEAR DISPLACEMENT SENSOR, ANGULAR DISPLACEMENT SENSOR, AND VARIABLE RESISTOR; filed 1 October 1993.

Dated: January 13, 1994.

Michael P. Rummel,

*LCDR, JAGC, USN, Federal Register Liaison
Officer.*

[FR Doc. 94-1510 Filed 1-21-94; 10:00 am]

BILLING CODE 3810-AE-M

DEPARTMENT OF THE INTERIOR

[AZ-020-4410-04-2600]

Notice of Availability

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of Proposed Kingman Resource Management Plan/Final Environmental Impact Statement.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, and section 202(f) of the Federal Land Policy and Management Act of 1978, a Proposed Resource Management Plan/Final Environmental Impact Statement (RMP/EIS) has been prepared for the Kingman Planning Area.

The Proposed RMP/FEIS addresses future management options for approximately 2,500,000 acres of public land administered by the Phoenix District, Kingman Resource Area in Mohave, Yavapai and Coconino counties in northwestern Arizona.

The Proposed Plan is a modified version of the preferred alternative in the Draft Kingman Resource Management Plan published in November, 1990.

SUPPLEMENTARY INFORMATION: The Proposed Resource Management Plan addresses several issues; recreation, special management areas, wildlife habitat, riparian-wetland management, land tenure and mineral development as well as several management concerns. These issues and concerns are considered in three alternatives.

Following the publication of the Notice of Filing by the Environmental Protection Agency in the **Federal Register**, a 30-day period will be provided for the filing of protests. Protests are to be sent to: Bureau of Land Management, Division of Planning and Environmental Coordination, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Kenneth Drew, Kingman Resource Area Manager, 2475 Beverly Avenue, Kingman, Arizona, 86401, (602) 757-3161. Copies of the document are available for review at the following locations:

Bureau of Land Management, Arizona State Office, 3707 North 7th Street, Phoenix, Arizona 85014.

Bureau of Land Management, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027.
Bureau of Land Management, Kingman Resource Area, 2475 Beverly Avenue, Kingman, Arizona 86401.

Lester K. Rosenkrance,
State Director.

[FR Doc. 94-1507 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-84-M

Bureau of Land Management

[NM-920-4191-04]

Closure of Public Land in Socorro County, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: In notice document 92-24990 on page 52786 in the issue of Tuesday, October 12, 1993, make the following correction: Under the heading "SUMMARY", the first sentence should be changed to read "Notice is hereby given that effective immediately the following public land is temporarily closed to all public uses".

Dated: January 11, 1994.

Stephanie Hargrove,
Associate District Manager.

[FR Doc. 94-1500 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-FB-M

[MT-903-4210-06; SDM 80731]

Opening of Land in a Proposed Withdrawal; South Dakota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates the temporary segregative effect of a proposed withdrawal of 2 acres of National Forest System land for the old Spokane Mine and millsite.

EFFECTIVE DATE: March 5, 1994.

FOR FURTHER INFORMATION CONTACT:

Sandra Ward, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406-255-2949.

SUPPLEMENTARY INFORMATION: Pursuant to the regulations contained in 43 CFR 2310.2-1(e), at 9 a.m. on March 5, 1994, the following described land will be relieved of the segregative effect of withdrawal application SDM 80731. The withdrawal application will continue to be processed, unless it is canceled or denied.

Black Hills Meridian

(A 2-acre parcel within the following described land):

T. 2 S., R. 6 E.,

Sec. 26, S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$.

The area described contains 2 acres in Custer County.

Dated: January 14, 1994.

John Thompson,

Acting Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 94-1512 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-DN-M

[CA-050-3110-10-B501, CACA-30108]

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction to Notice of Realty Action CACA-30108 in Colusa, Glenn, Lake, Solano, and Yolo Counties in California.

SUMMARY: The notice of Realty Action published on Thursday, December 16, 1993, in Volume 58, No. 240 of the *Federal Register*, Page 65728, is hereby corrected as follows:

1. On line 20 in column 2 on page 65728 which reads:

T. 16 N., T. 6 W.

should read:

T. 16 N., R. 6 W.

2. On line 31 in column 2 on page 65728 which reads:

Sec. 28: N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$.

should read:

Sec. 28: N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$.

3. On line 50 in column 3 on page 65728 which reads:

Sec. 13: Lot 13.

should read:

Sec. 31: Lot 13.

These were in error and are being corrected.

FOR FURTHER INFORMATION CONTACT: Renee Snyder, Clear Lake Resource Area Manager, Bureau of Land Management, 555 Leslie Street, Ukiah, California 95482; Phone (707) 462-3873.

Dated: January 10, 1994.

Renee Snyder,

Clear Lake Resource Area Manager.

[FR Doc. 94-1506 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-40-M

[NV-010-5700-10; N-56882; 4-00154]

Realty Action; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action, N-56882.

SUMMARY: The following described land in Eureka County, Nevada, has been examined and found suitable for airport lease under the Act of May 24, 1928, as amended (49 U.S.C., Appendix 211-213). The lands will not be offered for lease until at least 60 days after the date of publication of this notice in the *Federal Register*.

Mount Diablo Meridian, Nevada

T. 29 N., R. 48 E.

Section 4, Lots 3-6, S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$.

Containing 365.25 acres, more or less.

FOR FURTHER INFORMATION CONTACT:

Detailed information concerning this action is available for review at the Bureau of Land Management, Elko Resource Area, 3900 E. Idaho Street, Elko, Nevada.

SUPPLEMENTARY INFORMATION: The Eureka County Board of Commissioners has applied to lease an existing airstrip which serves the unincorporated Town of Crescent Valley, Nevada, and surrounding vicinity. The lands were previously leased for airport purposes by a succession of private individuals; however, the lease was allowed to expire the Eureka County has now applied to lease the airstrip. The land is not required for any Federal purpose. Issuance of the lease would be consistent with the Bureau's planning for the area.

The described lands were previously segregated from mineral entry by virtue of the previous lease, but were never opened to entry upon expiration of the lease. Accordingly, this notice continues to segregate the lands from all forms of appropriation under the public land laws, including the mining laws. Upon termination of the lease, the segregative effect would terminate as specified in an opening order published in the *Federal Register*. The lease when issued, will be subject to the provisions of the Act of May 24, 1928, and applicable regulations (43 CFR 2911) of the Secretary of the Interior.

On or before March 10, 1994 interested parties may submit comments to the District Manager, Elko District Office, P.O. Box 831, Elko, NV 89803. Any objections will be evaluated by the State Director, who may sustain, vacate or modify this realty action. In the absence of timely filed objections, this realty action will become a final determination of the Department of the Interior.

Dated: January 13, 1994.

Rodney Harris,
District Manager.

[FR Doc. 94-1527 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-HC-M

[OR-130-04-4210-04: GP4-059; WAOR 48464; 4-00151]

Realty Action; Exchange of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action; Exchange of Public Lands in Ferry, Lincoln, Spokane and Stevens Counties, Washington.

SUMMARY: This notice will serve to supplement the notice of Realty Action published in Vol. 57, No. 191 of the *Federal Register*, on October 1, 1992. The following described lands have been identified for acquisition through land exchange WAOR 48464.

Willamette Meridian

T. 21 N., R. 40 E.,

Sec. 6, Lots 1, 2, 3, 4, 5 & 6, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$;

T. 22 N., R. 40 E.,

Sec. 31, Lots 3 & 4, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$;

Aggregating 756.51 acres in Spokane County, Washington.

Date of issue: January 11, 1994.

Joseph K. Buesing,

Spokane District Manager.

[FR Doc. 94-1523 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-33-M

and upon request, the authorized officer may give written permission for extension of these limits.

In accordance with 43 CFR 8365.1-6, the following supplementary rules are hereby established for the entire Susanville District.

1. Firearms discharge is prohibited within $\frac{1}{4}$ mile of all trailheads on the Susanville District.

2. No person may leave personal property unattended in campgrounds, developed recreation areas, or elsewhere on public lands within the Susanville District for a period of more than seventy-two (72) hours without written permission from the authorized officer.

3. No person shall discharge or ignite a firecracker, rocket or other firework, or explosive without authorization from the BLM.

4. No person shall cut or remove live standing trees or any portion thereof except when authorized by BLM permits or timber sale contracts.

5. Campfires are allowed in designated fire-safe areas of on existing natural bare mineral soil where ten (10) feet or more of clearance exists between the campfire area and adjacent vegetation. Persons using campfires are required to have a campfire permit issued by the Bureau of Land Management, the U.S. Forest Service, or the California Department of Forestry. All campfires are subject to seasonal fire restrictions.

DATES: All comments and information shall be submitted in writing by March 1, 1994.

ADDRESSES: All comments concerning this proposed rulemaking should be addressed to Herrick Hanks, District Manager, Bureau of Land Management, Susanville District Office, 705 Hall Street, Susanville, California 96130.

FOR FURTHER INFORMATION CONTACT: Stan Bales, Outdoor Recreation Planner, Eagle Lake Resource Area, 705 Hall Street, Susanville, CA 96130, (916) 257-0456; hours 7:45 a.m. to 4:30 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: This occupancy and camping stay limit is being established to provide consistency and uniformity for the camping public on Bureau of Land Management administered lands throughout the Susanville District, California, and to prevent user conflicts by providing equal opportunities to camp in given areas. Establishment of this length of stay limit is also to assist the Bureau in reducing the incidence of unauthorized occupancy of public lands in the name of recreational camping. These supplementary rules do not supersede camping and occupancy rules

developed for special areas or emergency situations. The supplementary rules are to protect resources and to improve the safety of recreational users of the public lands.

Authority for this stay and the supplementary rules are contained in CFR title 43, chapter II, part 8360, subparts 8365.1-2 (a) and 8365.1-6.

PENALTIES: Violations of any regulations in this part by a member of the public, except for the provisions of 8365.1-7, are punishable by fine not to exceed \$1,000 and/or imprisonment not to exceed 12 months. Violations of supplementary rules authorized by 8365.1-6 are punishable in the same manner.

Dated: January 14, 1994.

Robert J. Sherve,

Acting District Manager.

[FR Doc. 94-1511 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-40-M

[ID-942-04-4060-02]

Idaho: Filing of Plats of Survey; Idaho

The plat of survey of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9 a.m., January 14, 1994.

The plat represented the dependent resurvey of portions of the new boundary of the Fort Hall Indian Reservation, south and east boundaries, subdivisional lines, the subdivision of certain sections and a metes-and-bounds survey of the take line for the American Falls Reservoir in section 25, in Township 5 South, Range 33 East, Boise Meridian, Idaho, Group No. 779, was accepted January 12, 1994.

This survey was executed to meet certain administrative needs of the Bureau of Indian Affairs, Fort Hall Indian Reservation.

All inquiries concerning the survey of the above-described land must be sent to the Chief, Branch of Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Dated: January 14, 1994.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 94-1509 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-GG-M

[ID-942-04-4051-02]

Filing of Plats of Survey; Idaho

The plat of survey of the following described land was officially filed in the Idaho State Office, Bureau of Land

[CA-020-06-4333-01]

Occupancy, Camping Stay Limits and Supplementary Rules

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Supplementary Rules under 43 CFR subpart 8365.

SUMMARY: This occupancy and camping stay limit applies to designated campgrounds and to undeveloped Bureau of Land Management administered public lands (that are not closed to camping) within the Susanville District, California. Persons camping on the public lands in the Susanville District are limited to a total of twenty-eight (28) days per year in each of the three (3) resource areas. A fourteen (14) day consecutive limit is established for any one location. Campers must move a minimum of 2 miles when changing from one location to another. Camping along the Bizz Johnson Trail on BLM land is limited to seven (7) days between each trailhead. No camping is allowed at or within one (1) mile of Hobo Camp or Devil's Corral trailheads and is prohibited along the south side road that extends west of Hobo Camp within the Susan River Canyon. Under special circumstances

Management, Boise, Idaho, effective 9 a.m., January 12, 1994.

The plat representing the dependent resurvey of portions of certain mineral surveys in Township 12 North, Range 18 East, Boise Meridian, Idaho, Group No. 847, was accepted January 10, 1994.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

All inquiries concerning the survey of the above-described land must be sent to the Chief, Branch of Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Dated: January 12, 1994.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 94-1524 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-GG-M

Fish and Wildlife Service

Finding of No Significant Impact for an Incidental Take Permit for the Proposed Lake Pointe Development, Austin, Travis County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) has prepared an Environmental Assessment for issuance of a section 10(a)(1)(B) permit for the incidental take of the Federally endangered golden-cheeked warbler (*Dendroica chrysoparia*) during construction and operation of a 496 acre mixed residential and commercial development known as Lake Pointe in Austin, Travis County, Texas.

Proposed Action

The proposed action is the issuance of a permit under section 10(a)(1)(B) of the Endangered Species Act to authorize the incidental take of the golden-cheeked warbler.

The Applicant plans to build 850 single-family residences, a 10-acre commercial site, an elementary school, and associated streets and utility corridors in southwest Travis County, Texas. The development will occupy approximately 354 acres with the remaining 142 acres for open space, conducting golden-cheeked warbler monitoring studies, providing \$90,000 to fund the acquisition of golden-cheeked warbler habitat preserves, and constructing and maintaining a fence between the proposed development and the areas of open space set aside for the golden-cheeked warbler. Details of the mitigation are provided in the Lake

Pointe Habitat Conservation Plan. Guarantees for implementation are provided in the Agreement and the Management Agreement.

These conservation plan actions ensure that the criteria established for issuance of an incidental take permit will be fully satisfied.

Alternatives Considered

1. No action,
2. Proposed action,
3. Alternate project location,
4. Reduce the proposed project, and
5. Wait for the completion of the

Balcones Canyonlands Conservation Plan Section 10(a) permit.

Determination

Based upon information contained in the Environmental Assessment and the Habitat Conservation Plan, the Service has determined that this action is not a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969. Accordingly, the preparation of an Environmental Impact Statement on the proposed action is not required.

It is my decision to approve the issuance of the section 10(a)(1)(B) permit for the construction of the 496 acre mixed residential/commercial development known as Lake Pointe Development in Austin, Travis County, Texas.

Dated: January 12, 1994.

John G. Rogers,

Regional Director, Southwest Region (2), U.S. Fish and Wildlife Service, Albuquerque, New Mexico.

[FR Doc. 94-1540 Filed 1-21-94; 10:00 am]

BILLING CODE 4410-55-M

Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for the Proposed Overlook at Cat Mountain Development, Austin, Travis County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Overlook, Incorporated (Applicant) has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to Section 10(a) of the Endangered Species Act (Act). The Applicant has been assigned Permit Number PRT-782824. The requested permit, which is for a period not to exceed 30 years, would authorize the incidental take of the endangered golden-cheeked warbler

(*Dendroica chrysoparia*). The proposed take would occur as a result of the construction and operation of a residential development on a 213 acre tract in Austin, Travis County, Texas.

The Service has prepared an environment assessment (EA) for the incidental take application. A determination of jeopardy to the species or a Finding of No Significant Impact (FONSI) will not be made before 30 days from the date of publication of this notice. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the application and EA should be received on February 23, 1994.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing to the Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103. Persons wishing to review the EA may obtain a copy by contacting Robert B. Simpson, Ecological Services Field Office, U.S. Fish and Wildlife Service, 611 East Sixth Street, suite 407, Austin, Texas 78701 (512) 482-5436.

Documents will be available by written request for public inspection, by appointment, during normal business hours (8 to 4) at the Southwest Regional Office, Division of Endangered Species/Permits, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103, or the Ecological Services Field Office (8 to 4:30), U.S. Fish and Wildlife Service, 611 East Sixth Street, suite 407, Austin, Texas 78701. Written data or comments concerning the application and EA should be submitted to the State Administrator, Ecological Services Field Office, Austin, Texas (see ADDRESSES above). Please refer to Permit Number PRT-782824 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Robert B. Simpson at the above Austin Ecological Service Field Office address.

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the "Taking" of any endangered species, including the golden-cheeked warbler. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species if such taking is incidental to, and not the purpose of otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

The Applicant plans to build a residential development on a 213 acre tract on RR2222 at Far West Blvd., west of Austin, Travis County, Texas. The

development will occupy approximately 86.84 acres including 10.58 acres of impervious cover (i.e., streets, rooftops and driveways) with the remaining 126.16 acres proposed as conservation areas. These activities will permanently eliminate about 86.84 acres of occupied and/or potential endangered species habitat. The applicant proposed to mitigate the incidental take via dedicating 126.16 acres for open space, and providing sufficient money to purchase land containing six golden-cheeked warbler territories adjacent to, or within, a preserve that is managed for the warbler, and money, or other compensation, to operate and manage those lands for the life of the permit.

The Applicant considered five alternatives but rejected four of them because they were not economically viable.

James A. Young,

Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, Southwest Region (2), Albuquerque, New Mexico.

[FR Doc. 94-1541 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-55-M

Availability of Draft Environmental Assessments Regarding Habitat Management and Livestock Grazing for Wildlife Habitat on the Monte Vista National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability of draft environmental assessments regarding habitat management and livestock grazing for wildlife habitat on the Monte Vista National Wildlife Refuge.

SUMMARY: The U.S. Fish and Wildlife Service (Service), has prepared, for public review, a Draft Environmental Assessment regarding habitat management and livestock grazing for wildlife habitat on Monte Vista National Wildlife Refuge. The draft assessment, which may be obtained at the address listed under the heading **ADDRESSES**, includes alternatives in habitat management at the refuge and environmental consequences of each alternative.

DATES: Comments on the Draft Environmental Assessment should be submitted no later than February 23, 1994.

ADDRESSES: Written comments and requests for copies of the draft assessment may be addressed to: Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Box 25486, Denver Federal

Center, Denver, CO 80225; Telephone (303) 236-8145.

FOR FURTHER INFORMATION CONTACT: Skip N. Ladd, Jr., Refuges and Wildlife, U.S. Fish and Wildlife Service, Box 25486, Denver Federal Center, Denver, CO 80225; Telephone (303) 236-8145.

Dated: December 22, 1993.

William Hartwig,

Acting Assistant Director.

[FR Doc. 94-1535 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-55-M

U.S. Geological Survey

Federal Geographic Data Committee (FGDC); Public Review of the United States National Cartographic Standards for Spatial Accuracy (NCSSA)

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice; Request for comments.

SUMMARY: The FGDC is sponsoring a public review of the United States National Cartographic Standards for Spatial Accuracy. The standard specifies the means of calculating horizontal and vertical accuracy for map graphics, the method by which accuracy will be tested, the label to be applied to products that have been tested, and the application of the standard to map series.

The FGDC anticipates that the final standard will be submitted to the U.S. Office of Management and Budget for the replacement of the National Map Accuracy Standards, the last revision of which was issued by the former Bureau of the Budget in 1947.

DATES: Comments must be received on or before February 11, 1994.

ADDRESSES: Written comments about the proposed standard should be sent by mail to NCSSA Review, FGDC Secretariat, U.S. Geological Survey, 590 National Center, 12201 Sunrise Valley Drive, Reston, Virginia 22092; by Internet to "gdc@usgs.gov", or by facsimile to (703) 648-5755. The draft standard may be requested from the same mailing or Internet addresses or facsimile number. Internet users should include their name, affiliation, mailing address, and telephone number at the bottom of their message.

FOR FURTHER INFORMATION CONTACT: Jennifer Snyder, FGDC Secretariat, U.S. Geological Survey, 590 National Center, 12201 Sunrise Valley Drive, Reston, Virginia 22092; telephone (703) 648-5514; facsimile (703) 648-5755; Internet "gdc@usgs.gov".

SUPPLEMENTARY INFORMATION: The proposed standard is based on work published by the American Society for Photogrammetry and Remote Sensing. The society recommended that the draft replace the existing National Map Accuracy Standards. The standard has been reviewed by components of the FGDC, and is now in final review in the committee.

Dated: January 10, 1994.

Allen H. Watkins,

Chief, National Mapping Division.

[FR Doc. 94-1522 Filed 1-21-94; 10:00 am]

BILLING CODE 4310-31-M

INTERSTATE COMMERCE COMMISSION

Availability of Environmental Assessments

Pursuant to 42 U.S.C. 4332, the Commission has prepared and made available environmental assessments for the proceedings listed below. Dates environmental assessments are available are listed below for each individual proceeding.

To obtain copies of these environmental assessments contact Ms. Tawanna Glover-Sanders or Ms. Johnnie Davis, Interstate Commerce Commission, Section of Energy and Environment, room 3219, Washington, DC 20423, (202) 927-6212 or (202) 927-6245.

Comments on the following assessment are due 15 days after the date of availability:

AB-167 (SUB-NO. 1134X),
CONSOLIDATED RAIL
CORPORATION ABANDONMENT
EXEMPTION—IN CRAWFORD
COUNTY, PA. EA available 1/11/94.

AB-167 (SUB-NO. 1133X),
CONSOLIDATED RAIL
CORPORATION—ABANDONMENT
EXEMPTION—IN SOMERSET
COUNTY, PENNSYLVANIA. EA
available 1/14/94.

Comments on the following assessment are due 30 days after the date of availability:

AB-6 (SUB-NO. 359X),
ABANDONMENT OF CAR BARGE
SERVICE BETWEEN MOBILE AND
BLAKELY ISLAND, ALABAMA AND
BLAKELY ISLAND TRACKAGE
BETWEEN ENGINEERING STATIONS
(ES) 0.00N TO ES 58+98N AND ES
0+00S TO ES 103+53S. EA available
1/14/94.

AB-410 (SUB-NO. 1X), AUSTIN
RAILROAD CO., INC.—
DISCONTINUANCE OF SERVICE
EXEMPTION—IN BURNET AND

LLANO COUNTIES, TEXAS. EA
available 1/10/94.

AB-6 (SUB-NO. 360X), BURLINGTON
NORTHERN RAILROAD
COMPANY—ABANDONMENT OF
TRACKAGE NEAR KEARNEY—IN
BUFFALO COUNTY, NEBRASKA. EA
available 1/10/94.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94-1554 Filed 1-21-94; 8:45 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32437]

**The A&G Railroad, L.L.C.; Acquisition
and Operation Exemption; Rail Lines
of Abbeville & Grimes Railway
Company**

The A&G Railroad, L.L.C. (A&G) has
filed a notice of exemption to acquire
from Abbeville & Grimes Railway
Company (Abbeville) and to operate
approximately 27 rail miles in Alabama,
between Abbeville and Grimes, together
with incidental trackage rights over 7
miles of CSX Transportation, Inc.
(CSXT) lines between Grimes and
Dothan, AL, and substantially all of the
other railroad operating assets of
Abbeville. The proposed transaction is
expected to be consummated promptly
upon the effectiveness of the exemption.

A&G is 100% owned and controlled
by Rail Partners, L.P. (Partners), a
Delaware limited partnership, and
Panama City Beach Office Park, Ltd.
(Office Park), a Florida limited
partnership (collectively, Owners).
Neither Partners nor Office Park is a
carrier, and Office Park does not
currently control a carrier. However,
Partners is jointly owned and controlled
by Mr. K. Earl Durden (Durden), Green
Bay Packaging, Inc. (GBP), and Rail
Management and Consulting
Corporation (RMCC), and with them
jointly owns and controls several class
III rail carriers. Office Park is jointly
owned and controlled by Partners and
RMCC, and is thus under common
control with those class III carriers.

None of the class III carriers currently
affiliated with Owners connects with
A&G. However, Durden, GBP, Partners,
and RMCC are, by a contemporaneously
filed notice of exemption in Finance
Docket No. 32436, *Rail Management
and Consulting Corporation, Green Bay
Packaging, Inc., K. Earl Durden, and
Rail Partners, L.P.—Continuance in
Control Exemption—the Bay Line
Railroad, L.L.C.*, seeking to continue in
control of another company they own,
the Bay Line Railroad, L.L.C. (Bay Line),
upon Bay Line's becoming a carrier by
purchase and operation of the lines of

the Atlanta & St. Andrews Bay Railroad,
Inc. (ASAB), a transaction subject to an
exemption notice filed in Finance
Docket No. 32435, *The Bay Line
Railroad, L.L.C.—Acquisition and
Operation Exemption—Rail Lines of
Atlanta and St. Andrews Bay Railroad
Company*. Because A&G and Bay Line
connect by means of incidental trackage
rights over CSXT, between Grimes and
Dothan, the ownership of A&G will be
placed in an independent voting trust
prior to closing to prevent Durden,
RMCC, GBP, Partners, and Office Park
from retaining direct control over A&G
once it becomes a carrier. After the
closing, a separate petition for
exemption, or other pleading, will be
filed with the Commission, seeking
authority for them to dissolve the voting
trust and acquire direct control over
A&G.

Any comments must be filed with the
Commission and served on Donald G.
Avery, Slover & Loftus, 1224 17th
Street, NW, Washington, DC 20036.

This notice is filed under 49 CFR
1150.31. If the notice contains false or
misleading information, the exemption
is void *ab initio*. 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
automatically stay the transaction.

Decided: January 18, 1994.

By the Commission, David M. Konschnik,
Director, Office of Proceedings.

Sidney L. Strickland Jr.,

Secretary.

[FR Doc. 94-1555 Filed 1-21-94; 10:00 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32435]

**The Bay Line Railroad, L.L.C.—
Acquisition and Operation
Exemption—Rail Lines of Atlanta & St.
Andrews Bay Railroad Company**

The Bay Line Railroad, L.L.C. (Bay
Line),¹ a noncarrier, has filed a notice of
exemption to acquire from the Atlanta &
St. Andrews Bay Railroad Company
(ASAB), approximately 88 miles of main
line trackage running from Panama City,
FL, to Dothan, AL, together with

¹ Bay Line is 100% owned and controlled by Rail
Partners, L.P. (Partners), a Delaware limited
partnership, and Panama City Beach Office Park,
Ltd. (Office Park), a Florida limited partnership.
Neither Partners nor Office Park is a carrier, and
Office Park does not currently control a carrier.
However, Partners is jointly owned and controlled
by Green Bay Packaging, Inc. (GBP), Rail
Management and Consulting Corporation (RMCC),
and K. Earl Durden (Durden) (collectively, Owners),
and with them jointly owns and controls several
class III rail carriers, none of which would connect
with Bay Line. Office Park is jointly owned and
controlled by Partners and RMCC.

substantially all of the other railroad
operating assets of ASAB.² The
proposed transaction is expected to be
consummated promptly upon the
effectiveness of this exemption which
will result in Bay Line's becoming a
carrier.

This transaction is related to a notice
of exemption filed concurrently in
Finance Docket No. 32436, *Rail
Management and Consulting
Corporation, Green Bay Packaging, Inc.,
K. Earl Durden, and Rail Partners, L.P.—
Continuance in Control Exemption—the
Bay Line Railroad, L.L.C.*, in which
Owners, all noncarriers, seek to
continue in control of Bay Line, upon
Bay Line's becoming a carrier.³

Any comments must be filed with the
Commission and served on Donald G.
Avery, Slover & Loftus, 1224 17th Street
NW., Washington, DC 20036.⁴

This notice is filed under 49 CFR
1150.31. If the notice contains false or
misleading information, the exemption
is void *ab initio*. 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
automatically stay the transaction.

² Bay Line indicates that the acquisition also
includes the Graceville Branch, a light-density
branch line of ASAB running from a junction with
the main line at Campbellton, FL, to Graceville, FL.

³ Also contemporaneous with this filing, the A&G
Railroad, L.L.C. (A&G), another newly formed
Alabama limited liability company, also owned by
Partners and Office Park, is filing a notice of
exemption in Finance Docket No. 32437, *The A&G
Railroad, L.L.C.—Acquisition and Operation
Exemption—Rail Lines of Abbeville & Grimes
Railway Company*, to acquire from Abbeville &
Grimes Railway Company (Abbeville) and to
operate approximately 27 rail miles in Alabama,
between Abbeville and Grimes, together with
incidental trackage rights over 7 miles of CSX
Transportation, Inc. (CSXT) lines between Grimes
and Dothan, AL, and substantially all of the other
railroad operating assets of Abbeville. Bay Line
states that because, as a carrier, it will connect with
A&G by means of incidental trackage rights over
CSXT, between Grimes and Dothan, the ownership
of A&G will be placed in an independent voting
trust prior to closing to prevent Durden, RMCC,
GBP, Partners, and Office Park from retaining direct
control over A&G once A&G becomes a carrier. Bay
Line indicates that after the closing, a separate
petition for exemption, or other pleading, will be
filed with the Commission, seeking appropriate
authority or exemption for Owners to dissolve the
voting trust and acquire direct control over A&G.

⁴ By identical letters filed January 6 through
January 12, 1994, various individuals and the Dixie
Federation (Brotherhood of Maintenance of Way
Employees), concerned with labor protection for
ASAB employees, expressed opposition to the
acquisition. None of the letter-protests includes a
certificate showing simultaneous service upon all
parties to the proceeding (see 49 CFR 1104.12). Any
interested person will have the opportunity to file
a petition to revoke under 49 U.S.C. 10505(d)
requesting either complete revocation of the
exemption of the transaction or partial revocation
to impose conditions (such as those to protect
labor). Revocation petitions must comply with the
rules with respect to revocation of exemptions at 49
CFR 1121.4(f).

Decided: January 18, 1994.

By the Commission, David M. Konschnik,
Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94-1552 Filed 1-21-94; 10:00 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32430]

Central Kansas Railway, Limited Liability Co.; Acquisition and Operation Exemption; Central Kansas Railway, Inc., and Certain Incidental Line Segments of the Atchinson, Topeka & Santa Fe Railway Co. and Burlington Northern Railroad Co.

Central Kansas Railway, Limited Liability Company (CKRLLC), a noncarrier, has filed a notice of exemption to acquire and operate: (1) Approximately 890 miles of rail line owned by Central Kansas Railway, Inc. (CKR); (2) 3.05 miles of rail line owned by The Atchinson, Topeka and Santa Fe Railway Company (Santa Fe); and (3) 17.03 miles of rail line owned by Burlington Northern Railroad Company (BN). CKRLLC also seeks to acquire incidental trackage rights over about 70 miles of track owned by Santa Fe, Union Pacific Railroad Company (UP), Missouri Pacific Railroad Company (MP), and St. Louis Southwestern Railway Company (SLSW). The proposed transaction was expected to be consummated on or after December 28, 1993.

The rail lines involved in this transaction consist of: (A) CKR's lines (i) between milepost 20+4751.4 in Osborne, KS, including all industry, team, passing, house, and side track, and including all of CKR's yard tracks and side tracks at Salina; (ii) between milepost 11+1984 west Marion, KS, and milepost 98+1209.5 in Ellinwood, KS, including all industry, team, passing, house, and side track, and including all of CKR's yard tracks in Ellinwood and McPherson, KS; (iii) between milepost 20+2769.6 in Lorraine, KS, and milepost 57+2730 in Galatia, KS, including all industry, team, passing, house, and side tracks; (iv) between milepost 0+0 in Great Bend, KS, and milepost 120+1338.7 in Scott City, KS, including all industry, team, passing, house, and side tracks; (v) between milepost 120+169 in Scott City, KS, and milepost 125+4687 at Shallow Water, KS, including all industry, team, passing, house, and side tracks; (vi) between milepost 218.3 east of Monroe Street in Hutchinson, KS, and milepost 315+4230.1 in Kinsley, KS, including all industry, team, passing, house, and side

tracks, and including all of CKR's yard tracks in Great Bend, KS; (vii) between milepost 0+0 at Larned, KS, and milepost 46+2483.5 in Jetmore, KS, including all industry, team, passing, house, and side tracks; (viii) between milepost 3+2640 near Darlow, KS, and milepost 59+4005.2 in Harper, KS; (ix) between milepost 59+4013.2 in Harper, KS, and milepost 128+0 in Blackwell, OK, including all industry, team, passing, house, and side tracks; (x) between milepost X-0+466.3 in Wellington, KS, including all industry, team, passing, house, and side tracks; (xi) between milepost 1.5 west of Seneca Street in Wichita, KS (including the remaining trackage on the Englewood Subdivision in Wichita) and milepost 79+3855 in Pratt, KS; (xii) between milepost 46+0 east of Rago, KS, and milepost 166+2917.7 in Englewood, KS, including all industry, team, passing, house, and side tracks; and (xiii) between milepost 49+1784 at O.B. Junction, near Belvidere, KS, and milepost 0+1016 in Attica, KS, including all industry, team, passing, house, and side tracks and including the entire spur line located near Sun City, KS; (B) Santa Fe's lines (i) between milepost 9+3586 and milepost 11+1984 (a 1.7-mile portion of the McPherson Subdivision in Marion, KS); and (ii) between milepost 0+1512 and milepost 1+3345 (a 1.35-mile portion of the Englewood Subdivision); (C) BN's line between milepost 594.03 in Lorraine, KS, and milepost 577.0 in Lyons, KS; and (D) incidental trackage rights over the following lines: (i) Santa Fe's Hutchinson Subdivision rail line between milepost 218.3 at or near Monroe Street and milepost 213+4333 in Hutchinson, KS, including Santa Fe's Hutchinson, KS "Way" Yard Track Nos. 144, 259, 304, 260, 261, 221, 174, 172, 171, 241, 220, 169, and 168; (ii) Santa Fe's H & S Subdivision rail line between milepost 2+2640 and milepost 3+2640 north of Darlow, KS; (iii) Santa Fe's Wichita Subdivision rail line between milepost 1.5 west of Seneca Street in Wichita, KS, and Santa Fe's Wichita Subdivision milepost 0+1365, being also Wichita Terminal milepost 213+1378, and further beyond, to North Junction Wichita Terminal milepost 211+3610, being also Santa Fe's Arkansas City Subdivision milepost 211+3610, and further beyond to Santa Fe's Arkansas City Subdivision milepost 208+2320, including Santa Fe's Wichita, KS Yard Track Nos. 32, 204, 243, 1, 143, 244, 122, 242, 113, 237, 236, 307, 308, 195, 344, and 124; (iv) Santa Fe's H & S Subdivision and Waynoka Subdivision rail lines between Santa Fe's H & S

Subdivision, milepost 59+4005.2 on the north, and Santa Fe's H & S Subdivision milepost 59+4013.2 on the south, and between Waynoka Subdivision milepost 273+0 on the east, and Waynoka Subdivision milepost 275+0 on the west, including Santa Fe's Harper, KS Yard Track Nos. 1, 11, 12, 14, 31, 32, 33, 37, 43, 45, and 47; (v) Santa Fe's Medicine Lodge Subdivision rail line, between milepost 0+1016 and milepost 0+0 in Attica, KS, and also Santa Fe's Waynoka Subdivision rail line between milepost 285+1600 in Attica, KS, including Santa Fe's Attica, KS Yard Track Nos. 21, 20, 19, 18, 15, and 9; (vi) Santa Fe's H & S and Waynoka Subdivision rail lines in Wellington, KS, between H & S Subdivision X-0+466.3 on the south, H & S Subdivision X-0+0 on the North, Waynoka Subdivision milepost 238+2331.8 on the west, and Waynoka Subdivision milepost 237+1068 on the east, including Santa Fe's Wellington, KS Yard Track Nos. 19, 104, 186, 187, 218, 219, and 222; (vii) MP's rail line between milepost 487.10 at Newton, KS, and milepost 516.52 at McPherson, KS, including the segment of track extending about 116 feet in a southerly direction from milepost 487.10, and including MP's Siding Track No. 6 at Hesston, KS, and Siding Track No. 1 at Moundridge, KS; (viii) UP's rail line between milepost 164.7 in Abilene, KS, and milepost 184.6 at Salina, KS; and (ix) SLSW's rail line between milepost 246.46 and milepost 243.56 in Hutchinson, KS.

This proceeding is related to Finance Docket No. 32431, Patrick D. Broe—Continuance in Control Exemption—Central Kansas Railway, Limited Liability Company, wherein Patrick D. Broe has concurrently filed a notice of exemption to continue in control of CKRLLC when CKRLLC becomes a rail carrier upon consummation of the transaction described in this notice.

Any comments must be filed with the Commission and served on: Louis E. Gitomer, Suite 210, 919 18th Street, NW, Washington, DC 20006.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void ab initio. 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 automatically stay the transaction.

Decided: January 13, 1994.

By the Commission, David M. Konschnik,
Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94-1553 Filed 1-21-94; 10:00 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32436]

Rail Management and Consulting Corporation, Green Bay Packaging, Inc., K. Earl Durden, and Rail Partners, L.P.—Continuance in Control Exemption—The Bay Line Railroad, L.L.C.

Green Bay Packaging, Inc. (GBP), Rail management and Consulting Corporation (RMCC), Rail Partners, L.P. (Partners), and K. Earl Durden (Durden) (collectively, Owners), all noncarriers, have filed a notice of exemption to continue to control The Bay Line Railroad, L.L.C. (Bay Line)¹, a noncarrier, upon Bay Line's becoming a carrier. Bay Line has concurrently filed a notice of exemption in Finance Docket No. 32435, The Bay Line Railroad, L.L.C.—Acquisition and Operation Exemption—Rail Lines of Atlanta & St. Andrews Bay Railroad Company, to acquire from the Atlanta & St. Andrews Bay Railroad Company (ASAB), approximately 88 miles of main line trackage running from Panama City, FL, to Dothan, AL, together with substantially all of the other railroad operating assets of ASAB.

Owners jointly control 10 class III rail carriers. Additionally, Durden individually controls another short line, the Lakeside Transportation Co. Owners indicate that: (1) Bay Line does not connect with any other railroad controlled by Owners; (2) the continuance in control is not a part of a series of anticipated transactions that would connect Bay Line with any other railroad controlled by Owners;² and (3)

¹ Bay Line is 100% owned and controlled by Rail Partners, L.P. (Partners), a Delaware limited partnership, and Panama City Beach Office Park, Ltd. (Office Park), a Florida limited partnership. Neither Partners nor Office Park is a carrier, and Office Park does not currently control a carrier. However, Partners is jointly owned and controlled by Durden, GBP, and RMCC, and with them jointly owns and controls several class III rail carriers, none of which would connect with Bay Line. Office Park is jointly owned and controlled by Partners and RMCC.

² Also contemporaneous with this filing, the A&G Railroad, L.L.C. (A&G), another newly formed Alabama limited liability company, also owned by Partners and Office Park, is filing a notice of exemption in Finance Docket No. 32437, The A&G Railroad, L.L.C.—Acquisition and Operation Exemption—Rail Lines of Abbeville & Grimes Railway Company, to acquire from Abbeville & Grimes Railway Company (Abbeville) and to operate approximately 27 rail miles in Alabama, between Abbeville and Grimes, together with incidental trackage rights over 7 miles of CSX Transportation, Inc. (CSXT) lines between Grimes and Dothan, AL, and substantially all of the other railroad operating assets of Abbeville. Bay Line states that because, as a carrier, it will connect with A&G by means of incidental trackage rights over CSXT, between Grimes and Dothan, the ownership of A&G will be placed in an independent voting trust prior to closing to prevent Durden, RMCC, GBP, Partners, and Office Park from retaining direct

the transaction does not involve a class I carrier. The transaction therefore is exempt from the prior approval requirements of 49 U.S.C. 11343. See 49 CFR 1180.2(d)(2).

As a condition to use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

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 automatically stay the transaction. Pleadings must be filed with the Commission and served on: Donald G. Avery, Slover & Loftus, 1224 17th Street, NW, Washington, DC 20036.

Decided: January 18, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland Jr.,

Secretary.

[FR Doc. 94-1551 Filed 1-21-94; 10:00 am]

BILLING CODE 7035-01-P

DEPARTMENT OF JUSTICE

Lodging of Consent Decree and Lodging of First Amendment to Consent Decree Pursuant to Superfund (CERCLA)

In accordance with Section 122(d) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9622(d), and the policy of the United States Department of Justice, as provided in 28 CFR 50.7, notice is hereby given that on December 16, 1993, a proposed Consent Decree in *United States v. Ciba-Geigy Corporation*, Civ. No. 93-1015-AH5, was lodged with the United States District Court for the Southern District of Alabama. This Consent Decree concerns Operable Unit Four of the Ciba-Geigy Corporation manufacturing plant site ("the Site") adjacent to the Tombigbee River near McIntosh, Alabama. Pursuant to Sections 106 and 107(a) of CERCLA, the Complaint in this action seeks recovery of past response costs incurred by the United States at the entire Site, future response costs in connection with the proposed Decree, and injunctive relief for Operable Unit No. 4 ("OU4"). OU4 consists of 128,000 cubic yards of contaminated soils at a former waster management unit (the "Bluffline Area") at the Site. Ciba-Geigy

control over A&G once A&G becomes a carrier. Bay Line indicates that after the closing, a separate petition for exemption, or other pleading, will be filed with the Commission, seeking appropriate authority or exemption for Owners to dissolve the voting trust and acquire direct control over A&G.

has agreed in the proposed Consent Decree to: (1) perform the selected remedy for OU4, which includes excavation and remediation of the contaminated soils, at a total estimated cost of \$25 million, and (2) reimburse the United States for all of its outstanding past response costs incurred at the Site not covered under a previous Consent Decree for OU2, and for all of its future response and oversight costs incurred in connection with OU4 and this Decree.

In addition, notice is also hereby given that on December 16, 1993, a proposed First Amendment to Consent Decree in *United States v. Ciba-Geigy Corporation*, Civil No. 92-0742-AH-C, was lodged with the United States District Court for the Southern District of Alabama. This First Amendment concerns a modification to the Financial Assurances provisions of the Consent Decree for Operable Unit Two of the Ciba-Geigy Corporation Site, entered on November 18, 1992.

The Department of Justice will receive on or before February 23, 1994 comments concerning the proposed Consent Decree and proposed First Amendment to Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044. For the Consent Decree, comments should refer to *United States v. Ciba-Geigy Corporation* (Operable Unit 4 of Ciba-Geigy McIntosh, Alabama Site), D.J. Ref. 90-11-2-781A. For the First Amendment to Consent Decree, comments should refer to *United States v. Ciba-Geigy Corporation* (Operable Unit 2 of Ciba-Geigy McIntosh, Alabama Site), D.J. Ref. 90-11-2-781.

The proposed Consent Decree and First Amendment to Consent Decree may be examined at any of the following offices: (1) The Office of the United States Attorney for the Southern District of Alabama, U.S. Courthouse, 113 St. Joseph Street, Mobile, Alabama; (2) the U.S. Environmental Protection Agency, Region 4, 345 Courtland Street, NE., Atlanta, Georgia; and (3) the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005 (telephone (202) 624-0892). Copies of the proposed Consent Decree and First Amendment to Consent Decree may be obtained by mail from the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005. For a copy of the Consent Decree with attachments (Record of Decision, Statement of Work and Site map) please enclose a check for \$57.00 (\$.25 per page reproduction charge)

payable to "Consent Decree Library." For a copy of the Consent Decree without those attachments please enclose a check for \$20.50 (\$.25 per page reproduction charge) payable to "Consent Decree Library." For a copy of the First Amendment to Consent Decree, please enclose a check for \$2.25 (\$.25 per page reproduction charge) payable to "Consent Decree Library."

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment & Natural Resources Division.
[FR Doc. 94-1515 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on January 4, 1994, a proposed Consent Decree in *United States v. GTE North, Inc. and Manley Motor Sales Company*, Civil Action No. 90-C-20302, was lodged in the United States District Court for the Northern District of Illinois. The Complaint filed by the United States alleged violations under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607(a), for costs incurred by the United States in responding to the release or threat of release of hazardous substances at the Belvidere No. 1 Municipal Landfill site in Belvidere, Boone County, Illinois ("the Belvidere Site"). The Consent Decree requires defendant Manley Motor Sales Company to pay \$60,000 to reimburse the United States Environmental Protection Agency for unrecovered past response costs at the Belvidere Site.

The Department of Justice will receive on or before February 23, 1994, comments concerning the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States v. GTE North, Inc. and Manley Motor Sales Company*, D.J. Ref. No. 90-11-3-248A.

The proposed Consent Decree may be examined at any of the following offices: (1) The United States Attorney for the Northern District of Illinois, 211 South Court Street, Rockford, Illinois 61101 (contact Assistant United States Attorney James Zuba); (2) the U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590 (contact

Assistant Regional Counsel John Tielsch); and at the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005, (202) 624-0892. Copies of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 601 Pennsylvania Avenue, NW., Washington, DC 20044, telephone (202) 347-7829. For a copy of the Consent Decree please enclose a check in the amount of \$3.75 (25 cents per page reproduction charge) payable to Consent Decree Library.

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment & Natural Resources Division.
[FR Doc. 94-1517 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on December 21, 1993, proposed Consent Decrees in *United States v. Jadco, Inc. et al.*, Civil Action No. 3:92CV-293-MU, and *United States v. Hoescht Celanese Corporation et al.*, Civil Action No. 3:93CV-412-MC, were lodged with the United States District Court for the Western District of North Carolina. The Complaints, brought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. 9607, seek the recovery of past response costs incurred by the United States in connection with the Jadco-Hughes Superfund Site, North Belmont, North Carolina (the "Site"). The Site is situated in Gaston County, North Carolina, approximately 12 miles west of Charlotte, North Carolina and occupies approximately 6 acres. The Site was used from 1971 until at least 1975 for recovery, storage and disposal of waste solvents and other hazardous substances. These hazardous wastes were stored on the Site in 55 gallon drums. In some areas of the Site, drums were stacked as many as three to a stack in deteriorating condition.

The Consent Decree in *United States v. Jadco, Inc. et al.* provides that the Settling Defendants in that action will pay \$227,453.24 in settlement of the United States' claims. The Consent Decree in *United States v. Hoescht Celanese Corporation et al.* provides that the Settling Defendants in that action will pay \$555,000.00 in settlement of the United States' claims.

The Department of Justice will receive, on or before February 23, 1994, comments relating to the proposed Consent Decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530. Comments should refer to *United States v. Jadco, Inc. et al.*, D.O.J. Ref. 90-5-1-1-3679A or *United States v. Hoescht Celanese Corporation et al.*, D.O.J. Ref. 90-5-1-1-3679A.

The proposed Consent Decrees may be examined at the Office of the United States Attorney, Western District of North Carolina, 401 West Trade Street, Charlotte, North Carolina 28202; Office of the U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365; and at the Consent Decree Library, 1120 G Street, NW., Washington, DC 20005, (202) 624-0892. A copy of the proposed consent decrees may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of \$4.50 for the *United States v. Jadco, Inc. et al.* Consent Decree and/or a check in the amount of \$10.75 for the *United States v. Hoescht Celanese Corporation et al.* Consent Decree (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.
[FR Doc. 94-1516 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Consent Decree in Action Brought Under the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a Consent Decree in *United States v. Roger E. Martin, et al.*, Civil Action No. 92-469 JE, was lodged with the United States District Court for the District of Oregon on December 14, 1993. As to the defendants, Roger E. Martin, Pacificorp, Inc., and Portland General Electric Company, this Consent Decree settles an action filed by the United States pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9607. The Consent Decree also settles all counterclaims brought by those defendants against seven federal agencies.

The United States Department of Justice brought this action on behalf of the U.S. Environmental Protection Agency, to recover costs incurred by the U.S. Environmental Protection Agency ("EPA") in connection with removal actions at the Martin Electric Lake Oswego Site (the "Site"), a defunct used electrical equipment storage yard in Lake Oswego, Oregon. In this settlement, Roger E. Martin will pay the United States \$100,000, Pacificorp, Inc. will pay the United States \$70,000, and Portland General Electric Company will pay the United States \$69,000. The federal agencies will pay a combined sum of \$43,200. Also, in consideration of these payments, the settling generators will receive a covenant not to sue for recovery of the past costs at the Site.

The Department of Justice will accept written comments relating to this proposed Consent Decree on or before February 23, 1994. Please address comments to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044 and refer to *United States v. Roger E. Martin, et al.*, DOJ number 90-11-3-934.

Copies of the proposed Consent Decree may be examined at the Office of the United States Attorney, District of Oregon, 888 SW 5th Avenue suite 1000, Portland, Oregon, 97204-2024, and at the Environmental Protection Agency, Office of the Regional Counsel, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. Copies of the proposed Consent Decree may also be obtained from the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed Consent Decree can be obtained by mail or in person from the Consent Decree Library. When requesting a copy of the Consent Decree, please enclose a check in the amount of \$3.75 (25 cents per page reproduction costs) payable to the Consent Decree Library.

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.
[FR Doc. 94-1521 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Lodging of a Consent Decree Pursuant to the Toxic Substances Control Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on January 7, 1994, a proposed consent decree in *United States v. New York State Department of Transportation*, No. 89-CV-319, was lodged with the United States District

Court for the Northern District of New York. The decree resolves claims of the United States for injunctive relief against the Defendant in the above-referenced action under the Toxic Substances Control Act ("TSCA") relating to PCB-contaminated dredged materials at two areas known as the Buoy 212 Site and the Special Area 13 Site (the "Sites"). The Buoy 212 Site is located in the Town of Fort Edward, New York. The Special Area 13 Site is located in the Town of Moreau, New York. In the proposed consent decree the Defendant agrees to perform site characterization, temporary remedial work, monitoring, maintenance, and continuing assessment of the future permanent remediation of the Sites. New York State Department of Transportation has already initiated and/or completed actions required by the Decree.

The proposed decree may be examined at the Environmental Enforcement Section Consent Decree Library, 1120 G Street, NW., Washington, DC 20005, (202) 624-0892. A copy of the proposed decree may be obtained in person or by mail from the Consent Decree Library.

The Department of Justice will receive written comments relating to the proposed consent decree on or before February 23, 1994. Comments should be addressed to Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. New York State Department of Transportation*, (DOJ Reference No. 90-5-1-1-3297).

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.
[FR Doc. 94-1518 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental Policy 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States v. Vertac Chemical Corp., et al.*, Civil Action No. LR-C-80-109, was lodged on December 30, 1993 with the United States District Court for the Eastern District of Arkansas. The proposed consent decree resolves the liability of Velsicol Chemical Corporation under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act, 42

U.S.C. 6973, with respect to the Vertac Site located in Jacksonville, Arkansas.

The Department of Justice will receive, for a period on or before February 23, 1994, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Vertac Chemical Corp., et al.*, DOJ Ref #90-7-1-18B.

The proposed consent decree may be examined at the office of the United States Attorney, 425 W. Capital, 5th floor, Little Rock, Arkansas 72201; the Region VI Office of the Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202; and at the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of \$7.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden,
Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.
[FR Doc. 94-1519 Filed 1-21-94; 10:00 am]
BILLING CODE 4410-01-M

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993 Gas-Fueled Railway Research Program Demonstration Project

Notice is hereby given that, on December 30, 1993, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute ("SwRI") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) The identities of the parties and (2) The nature and objectives of the project. 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. Pursuant to Section 6(b) of the Act, the identities of the parties are Gas Research Institute, Chicago, IL; General Motors Corporation, Electro-Motive Division, La Grange, IL; South Coast Air Quality Management District,

Diamond Bar, CA; Southern California Gas Company, Los Angeles, CA; and Southern California Regional Rail Authority, Los Angeles, CA. The project's general areas of planned activities are to develop and demonstrate natural gas locomotive engines as low cost, low pollution alternatives to diesel powered locomotive engines through the quantification of emissions benefits and performance trade-offs associated with existing natural gas engines conversion technologies utilizing a single-cylinder engine; applying technology derived from use of the single-cylinder engine to a multi-cylinder EMD locomotive engine; integrating the locomotive engine with on-board control and support systems in a fully operational locomotive; testing the durability of a developed prototype natural gas locomotive engine to minimize fuel system failures which may occur in planned field demonstrations both on urban passenger and cross country freight locomotives; and evaluating advanced exhaust aftertreatment technologies such as catalytic aftertreatment and electronic NO_x suppression system originally developed for diesel fuel systems. Membership in the project remains open, and the parties intend to file additional written notification disclosing all changes in membership to the project.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 94-1513 Filed 1-21-94; 10:00 am]

BILLING CODE 4410-01-M

Notice Pursuant to the National Cooperative Research and Production Act of 1993—UNIX International, Inc.

Notice is hereby given that, on August 4, 1993, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq ("the Act"), UNIX International, Inc. ("UNIX"), filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the following have become members of UNIX effective on July 23, 1993: Unix Systems Technology—China, Beijing, CHINA; International Management Corp. (IMC), Edison, NJ; Information Communication Institute of Singapore (ICIS), Singapore Telecommunications Academy,

SINGAPORE; and Wipro Systems Ltd., Bangalore, INDIA. The following are no longer members of UNIX: Acer/Altos Corporation, Addamax, Alenia (Aeritalia & Selenia), Alliant Computer Systems Corporation, Aris Corporation, AT&T, Boeing, Cadence Design Systems, Inc., CBIS, CETIA (a Thomson CSF Subsidiary), Com Food Software GmbH, Commodore International Limited, Dell Computer Corporation, FPS Computing, G.C. McKeown Co., Ltd., Highland Software, KYOCERA Corp., OA Systems Group, Lionel Singer Corporation, Inc., Mannesmann Informationstechnik, Mentec International Limited, Mizar/Integrated Solutions, MODCOMP, MULTIUSER Systems Corporation, NBI, Inc., Open Technology Ltd., Prime Computer, Ricoh, Scientific Software, Inc., and Sector 7 Software.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UNIX intends to file additional written notifications disclosing all changes in membership.

On January 30, 1989, UNIX filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the *Federal Register* pursuant to Section 6(b) of the Act on March 1, 1989 (54 FR 8608).

The last notification was filed with the Department on May 5, 1993. A notice was published in the *Federal Register* pursuant to Section 6(b) of the Act on June 2, 1993 (58 FR 31417).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 94-1514 Filed 1-21-94; 10:00 am]

BILLING CODE 4410-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 94-002]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC); Meeting on Flight Controls and Guidance

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a NAC, Aeronautics Advisory Committee meeting on flight controls and guidance.

DATES: February 16, 1994, 8 a.m. to 4:15 p.m.; February 17, 1994, 8 a.m. to 4:30 p.m.; and February 18, 1994, 8 a.m. to Noon.

ADDRESSES: National Aeronautics and Space Administration, Ames Research Center, Room 213, Building 200, Moffett Field, CA 94035.

FOR FURTHER INFORMATION CONTACT:

Mr. C. Thomas Snyder, National Aeronautics and Space Administration, Ames Research Center, Moffett Field, CA 94035, 415/604-5066.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

- Aeronautics Program Overview
- Industry Panel on Technology Transfer
- Subsonic Transportation Controls and Guidance Activities
- Critical Disciplines Controls and Guidance Research
- Rotorcraft Controls and Guidance Activities
- High Performance Aircraft Controls and Guidance Activities

Dated: January 14, 1994.

Timothy M. Sullivan,

Advisory Committee Management Officer.

[FR Doc. 94-1543 Filed 1-21-94; 10:00 am]

BILLING CODE 7510-01-M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the Railroad Retirement Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

SUMMARY OF PROPOSAL(S):

- (1) *Collection title:* Nonresident Questionnaire
- (2) *Form(s) submitted:* RRB-1001
- (3) *OMB Number:* 3220-0145
- (4) *Expiration date of current OMB clearance:* Three years from date of OMB approval
- (5) *Type of request:* Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection
- (6) *Frequency of response:* On occasion, quarterly
- (7) *Respondents:* Individuals or households
- (8) *Estimated annual number of respondents:* 1,700
- (9) *Total annual responses:* 1,700
- (10) *Average time per response:* .06350 hours
- (11) *Total annual reporting hours:* 108

(12) *Collection description:* Under the Railroad Retirement Act, the benefits payable to an annuitant living outside the United States may be subject to withholding under Public Law 98-21 and 98-76. The form obtains the information needed to determine the amount to be withheld.

ADDITIONAL INFORMATION OR COMMENTS: Copies of the form and supporting documents can be obtained from Dennis Eagan, the agency clearance officer (312-751-4693). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092 and the OMB reviewer, Laura Oliven 9202-395-7316), Office of Management and Budget, room 3002, New Executive Office Building, Washington, DC 20503. Dennis Eagan, Clearance Officer.

[FR Doc. 94-1504 Filed 1-21-94; 10:00 am]

BILLING CODE 7905-01-M

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the Railroad Retirement Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

SUMMARY OF PROPOSAL(S):

- (1) *Collection title:* RRB Customer Satisfaction Survey
- (2) *Form(s) submitted:* G-200, G-201
- (3) *OMB Number:* New Information Collection
- (4) *Expiration date of current OMB clearance:* Three years from date of OMB approval
- (5) *Type of request:* New Collection
- (6) *Frequency of response:* On occasion, annually
- (7) *Respondents:* Individuals or households
- (8) *Estimated annual number of respondents:* 11,250
- (9) *Total annual responses:* 11,250
- (10) *Average time per response:* .09182 hours
- (11) *Total annual reporting hours:* 1,033
- (12) *Collection description:* Annually, at least 150,000 members of the public have contact with the Railroad Retirement Board (RRB) by mail, telephone or in person, concerning benefits they have applied for, were denied, or are receiving under provisions of the Railroad Retirement and Railroad Unemployment Insurance Acts. The collection will obtain information for determining

the level of satisfaction with the service provided by the RRB to these individuals and to identify any areas where improvements in providing service could be made.

ADDITIONAL INFORMATION OR COMMENTS: Copies of the form and supporting documents can be obtained from Dennis Eagan, the agency clearance officer (312-751-4693). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092 and the OMB reviewer, Laura Oliven (202-395-7316), Office of Management and Budget, room 3002, New Executive Office Building, Washington, DC 20503. Dennis Eagan, Clearance Officer.

[FR Doc. 94-1505 Filed 1-21-94; 10:00 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-33468; File No. SR-NASD-94-3]

January 18, 1994.

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Credit Against the Annual Assessments and Fees on Members

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 January 14, 1994, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The NASD has designated this proposal as one establishing or changing a fee under Section 19(b)(3)(A)(ii) of the Act, which renders the rule effective upon the Commission's receipt of this filing. 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 NASD is proposing a rule change to amend Schedule A to the By-Laws to adjust the amount of credit as set forth in Section 1(d) of Schedule A, which is currently 67%, to 59%, and to amend the calendar year dates from 1993 to 1994.

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 Article VI of the By-Laws of the Corporation, the NASD requires its members to pay an annual assessment fee based on gross income as defined by Schedule A, Section 1 to the By-Laws.¹ The NASD also allows a credit against such assessment pursuant to Section 1(d). The NASD calculates the gross income assessment from the gross income reported for the calendar or fiscal year preceding the NASD's calendar budget year. Based on the operating budget for 1994, and subject to revision based on final actual gross income reports for 1993, the NASD is proposing to amend the credit to adjust member assessments to reflect the estimated revenue needed to fund 1994 operations. This proposed rule change, therefore, amends the amount of credit set forth in Section 1(d) of Schedule A to the By-Laws, which is currently 67%, to 59%, and applies the credit to the entire 1994 calendar budget year, and amends the calendar year dates from 1993 to 1994.²

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,³ which require that the rules of the Association provide for the equitable allocation of reasonable dues, fees, and other charges among members in that the proposed rule change equitably adjusts the 1994 assessment credit rate based on the projected 1994 budget.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any

¹ NASD Manual, Schedule A to the By-Laws, Sec. 1(d), (CCH) ¶1752.

² See Securities Exchange Act Release No. 33363 (December 21, 1993), 58 FR 68974 (December 29, 1993) (noticing file SR-NASD-93-71).

³ 15 U.S.C. 78o-3 (1988).

burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act and Section (e) of Rule 19b-4 promulgated there under in that it constitutes a due, fee or other charge imposed by a self-regulatory organization.

At any time within 60 days of the filing of a rule change pursuant to section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such 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 on February 14, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94-1545 Filed 1-21-94; 10:00 am]

BILLING CODE 8010-01-M

[Release No. IC-20021; File No. 812-8714]

Security Life of Denver Insurance Co., et al.

January 18, 1994.

AGENCY: Securities and Exchange Commission (the "SEC" or "Commission").

ACTION: Notice of Application for Exemptions under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Security Life of Denver Insurance Company ("Security Life"), Security Life Separate Account A1 (the "Account"), certain separate accounts that may be created in the future, and SLD Equities, Inc. ("SLD Equities").

RELEVANT ACT SECTIONS: Order requested under Section 6(c) for exemptions from Sections 26(a)(2)(C) and 27(c)(2) of the Act.

SUMMARY OF APPLICATION: Applicants seek an order to permit them to deduct a mortality and expense risk charge from the assets of the Account, which funds certain deferred variable annuity contracts (the "Contracts") featuring an enhanced death benefit.

FILING DATE: The application was filed on December 3, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the Application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on February 14, 1994, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, Security Life Center, 1290 Broadway, Denver, Colorado 80203-5699.

FOR FURTHER INFORMATION CONTACT: C. Christopher Sprague, Senior Staff Attorney, at (202) 504-2802, or Michael V. Wible, Special Counsel, at (202) 272-2060, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the Application. The complete Application is available for a fee from the Commission's Public Reference Branch.

Applicant's Representations

1. Security Life is a stock life insurance company organized under the laws of Colorado and is the depositor of the Account. The Account was organized under Colorado law, and is registered under the Act as a unit investment trust. That portion of the assets of the Account that is equal to the reserves and other Contract liabilities with respect to the Account is not chargeable with liabilities arising out of any other business of Security Life. Any income, gains, or losses, realized or unrealized, from assets allocated to the Account are credited to or charged against the Account without regard to other income, gains, or losses of Security Life. The Account is divided into six divisions, each of which invests exclusively in shares of The Palladian Trust (the "Trust"). The Trust is registered under the Act as an open-end management investment company.

2. SLD Equities, a registered broker-dealer and a wholly-owned subsidiary of Security Life, will be the principal underwriter of the Contracts.

3. The Contracts provide for retirement payments or other long-term benefits for persons covered under plans that receive favorable federal income tax treatment under the Internal Revenue Code of 1986 and for persons desiring such benefits who do not qualify for such tax advantages. The minimum initial purchase payment is \$25,000 for a non-qualified Contract and \$1,500 for a qualified Contract. The minimum additional purchase payment is \$500 for a non-qualified Contract and \$250 for a qualified Contract. Annuity payments under a Contract may be received on a variable basis.

4. The administrative charges to be assessed under the Contracts will be (a) an administrative charge of \$30 per Contract year, during the accumulation period only, if total purchase payments in the first Contract year are less than \$100,000 and (b) a daily asset-based charge, at an annual effective rate of 0.15%, during both the accumulation and annuity periods. Security Life guarantees that it will not raise these administrative charges for the duration of the Contracts. Security Life also represents that it does not expect that the total revenues from the administrative charges will be greater than the total expected cost of administering the Contracts, on average, excluding costs that properly are categorized as distribution expenses, over the period that the Contracts are in force.

5. If more than one demand partial withdrawal occurs during a Contract

year, there will be a charge of the lesser of \$25 or 2% of the amount withdrawn for each additional demand partial withdrawal. Security Life represents that it does not expect that the total revenues from the partial withdrawal transaction charge will be greater than the total expected cost of administering demand partial withdrawals, on average, over the period that the Contracts are in force.

6. The Contracts will permit transfers among the divisions of the Account, subject to certain conditions. Prior to the annuity date, an Owner will be able to make up to 12 transfers each Contract year at no charge. Each additional transfer will be subject to a charge of \$25. After the annuity date, an Owner will be able to make no more than four transfers each Contract year. No charge will be assessed for a transfer after the annuity date. Security Life represents that it does not expect that the total revenues from the excess transfer charges will be greater than the total expected cost of administering excess transfers, on average, over the period that the Contracts are in force. Security Life represents that the amount that it will recover for premium taxes will not be greater than the amount of premium taxes required to be paid.

7. No front-end sales charge will be imposed when purchase payments are applied under the Contracts. However, a surrender charge will be assessed if the Contract is surrendered or partial withdrawals exceeding certain amounts are taken during the six year period from the date Security Life receives and accepts each purchase payment. The surrender charge in the first Contract year is 7%, and reduces by 1% each Contract year thereafter; there is no surrender charge applicable to the withdrawal of payments that are six or more years old. In no event is the surrender charge greater than the amount withdrawn.

8. Applicants seek to impose a daily asset-based charge equal to 1.55% annually to compensate Security Life for certain mortality and expense risks it bears under the Contracts. Security Life will assume several mortality risks under the Contracts. First, Security Life assumes a mortality risk arising from the fact that the Contract does not impose any surrender charge on the death benefit. Second, Security Life assumes an additional mortality risk by its contractual obligation to continue to make annuity payments for the entire life of the Annuitant under annuity options involving life contingencies. Third, Security Life will assume a mortality risk because of its promise to pay a death benefit to the beneficiary if

the Owner dies prior to the annuity date. This assures each Annuitant that neither the Annuitant's own longevity nor an improvement in life expectancy generally will have an adverse effect on the annuity payments received under a Contract. At the same time, Security Life assumes the risk that Annuitants as a group will live longer than Security Life's annuity tables had predicted, which would require Security Life to pay out more in annuity income than planned. The contracts contain annuity tables that are based on the 1983a Individual Annuity Mortality Table and, for variable annuity options, alternative net investment factors of 3% or 5%. Security Life guarantees these annuity tables for the duration of the Contracts.

9. In general, the Contracts provide for a death benefit that is the greatest of: (a) The purchase payments made (less partial withdrawals and any surrender and partial withdrawal transaction charges taken), accumulated at 7% per year (the interest rate for any Owner of attained age 75 or greater is 0%) up to a maximum of two times the sum of all purchase payments (less partial withdrawals and any surrender and partial withdrawal transaction charges taken); (b) the accumulation value at the time of death; and (c) the step-up benefit plus purchase payments made, less partial withdrawals and any surrender and partial withdrawal transaction charges taken since the last step-up anniversary. The step-up benefit at issue is the initial purchase payment. At each step-up anniversary, the current accumulation value is compared to the prior determination of the step-up benefit, increased by purchase payments made and reduced by partial withdrawals and any surrender and partial withdrawal transaction charges taken since that anniversary. The greater of these becomes the new step-up benefit. The step-up anniversaries are the Contract date and every sixth Contract anniversary thereafter (*i.e.*, sixth, twelfth, eighteenth, etc. Contract anniversaries). The death benefit equal to the accumulation value, or to the sum of the purchase payments made less partial withdrawals and any surrender and partial withdrawal transaction charges taken, constitutes the basic death benefit. The death benefit in excess of the foregoing basic death benefit, including purchase payments accumulated at 7% interest as described above, and the step-up benefits as described above, constitutes the enhanced death benefit.

10. In addition to mortality risks, Security Life will assume an expense risk under the Contracts. This risk arises because the administrative charges

under outstanding Contracts, which cannot be raised, may be insufficient to cover actual administrative expenses.

11. As compensation for assuming these mortality and expense risks, Security Life proposes to assess against the Account a daily charge at an annual aggregate rate of 1.55%. Approximately 1.20% of this annual charge is allocated to the mortality risks that Security Life will assume, and 0.35% is allocated to the expense risks that Security Life will assume. Of the 1.20% charge allocated to the mortality risk, 0.90% is for the cost of the basic death benefit and the other mortality risks assumed by Security Life under the Contracts, and 0.30% is for the cost of the enhanced death benefit. Security Life will assess the charge for mortality and expense risks during the accumulation period and annuity period, except that Security Life will not assess the 0.30% charge for the enhanced death benefit during the annuity period. Security Life guarantees that it will not raise the charge for the duration of the Contracts.

12. If the administrative charges and the mortality and expense risk charge are insufficient to cover the expenses and costs assumed, the loss will be borne by Security Life. Conversely, if the amount deducted proves more than sufficient, the excess will be profit to Security Life. Security Life represents that it likely will earn a profit from the mortality and expense risk charge. To the extent that the surrender charge is insufficient to cover the actual costs of distribution, the expenses will be paid from Security Life's general account assets, which will include profit, if any, derived from the mortality and expenses risk charge.

13. Applicants request that the order also permit the deduction of the mortality and expense risk charge from the assets of any other separate account established by Security Life in the future to support deferred variable annuity contracts, which contracts are offered on a basis that is similar in all material respects to the basis on which the Contracts are offered.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting exemptions from sections 26(a)(2)(C) and 27(c)(2) of the Act to the extent necessary to permit the deduction of the mortality and expense risk charge. Applicants submit that their request for an order that applies to the Account and to future separate accounts issuing contracts that are substantially similar to the Contracts is appropriate in the public interest. Such an order would promote competitiveness in the variable

annuity contract market by eliminating the need for Security Life to file redundant exemptive applications, thereby reducing its administrative expenses and maximizing the efficient use of its resources. The delay and expense involved in having to repeatedly seek exemptive relief would impair Security Life's ability to effectively take advantage of business opportunities as they arise. Applicants further submit that the requested relief is consistent with the purposes of the Act and the protection of investors for the same reasons. If Security Life were required to repeatedly seek exemptive relief with respect to the same issues addressed in this Application, investors would not receive any benefit or additional protection thereby. Thus, Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Sections 26(a)(2)(C) and 27(c)(2) prohibit a registered unit investment trust and any depositor or underwriter thereof from selling periodic payment plan certificates unless the proceeds of all payments are deposited with a trustee or custodian having the qualifications prescribed by section 26(a)(1) of the Act and are held under an agreement that provides that no payment to the depositor or principal underwriter shall be allowed except as a fee, not exceeding such reasonable amount as the Commission may prescribe, for bookkeeping and other administrative services. Applicants' proposed mortality and expense risk charge would not be considered a bookkeeping and administrative expense.

3. Applicants have concluded that the mortality and expense risk charge of 1.25% (which includes the basic mortality risk charge of 0.90% and the expense risk charge of 0.35%), or 1.55% (which includes the foregoing charge of 1.25% and the enhanced mortality risk charge of 0.30%), is reasonable in relation to the risks assumed by Security Life under the Contracts and reasonable in amount as determined by industry practice with respect to comparable annuity products. Applicants state that these determinations are based on their analysis of publicly available information about similar industry practices, taking into consideration such factors as current charge levels and benefits provided, the existence of expense charge guarantees, and guaranteed annuity rates. Security Life undertakes to maintain at its home office, and make available to the

Commission or its staff upon request, a memorandum setting forth in detail the methodology used in making the foregoing determinations.

4. Applicants assert that the mortality risk charge of 0.30% for the enhanced death benefit is reasonable in relation to the risks assumed by Security Life under the Contracts. In arriving at this determination, Security Life conducted a large number of trials at different issue ages to determine the expected cost of the enhanced death benefit. First, hypothetical asset returns were projected using generally accepted actuarial simulation methods. For each asset return pattern generated, hypothetical accumulated values were calculated by applying the projected asset returns to the initial value in a hypothetical account. Each accumulated value so calculated was then compared to the amount of the enhanced death benefit payable in the event of the hypothetical Owner's death during the year in question. By analyzing the results of a statistically valid number of such simulations, Security Life was able to determine actuarially the level cost of providing the enhanced death benefit. Based on this analysis, Security Life determined that the mortality risk charge of 0.30% was a reasonable charge for providing the enhanced death benefit. Security Life undertakes to maintain at its home office a memorandum, available to the Commission and its staff upon request, setting forth in detail the methodology used in determining that the risk charge of 0.30% for the enhanced death benefit is reasonable in relation to the risks assumed by Security Life under the Contracts.

5. The surrender charge may be insufficient to cover all costs relating to the distribution of the Contracts. In that event, if a profit is realized from the mortality and expense risk charge, all or a portion of such profit may be offset by distribution expenses not reimbursed by the surrender charge. Notwithstanding the foregoing, Security Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements will benefit the Account and its Owners. Security Life undertakes to maintain at its home office, and make available upon request to the Commission and its staff, a memorandum setting out the basis for such conclusion.

6. Security Life also represents that the Account will invest only in an underlying mutual fund which undertakes, in the event it should adopt any plan under Rule 12b-1 to finance distribution expenses, to have such plan formulated and approved by a board of

directors, a majority of the members of which are not "interested persons" of such fund within the meaning of Section 2(a)(19) of the Act.

Applicants' Conclusion

Applicants submit that, for all of the reasons stated herein, the requested exemptions from Sections 26(a)(2)(C) and 27(c)(2) of the Act meet the standards set out in Section 6(c) of the Act. Applicants assert that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94-1544 Filed 1-21-94; 10:00 am]
BILLING CODE 8010-01-M

[Investment Company Act Release No. 20018; 812-8580]

NWNL Northstar Series Trust, et al.; Notice of Application

January 14, 1994.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: NWNL Northstar Series Trust (the "Trust"), NWNL Northstar Distributors, Inc. (the "Distributor"), and Northstar Investment Management Corporation (the "Adviser").

RELEVANT ACT SECTIONS: Conditional order requested under section 6(c) for exemption from the provisions of sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c) and 22(d), and rule 22c-1.

SUMMARY OF APPLICATION: The Trust, on behalf of NWNL Northstar High Yield Bond Fund, NWNL Northstar Income and Growth Fund, NWNL Northstar Multi-Sector Bond Fund, and any other series of the Trust or any other open-end management investment companies that in the future may be in the same "group of investment companies" as defined in rule 11a-3 of the Act (the "Funds"), the Distributor, the Adviser, and any entity controlling, under common control with or controlled by the Distributor or the Adviser that may in the future serve as, respectively, the Funds' distributor or investment adviser, seek a conditional order that would permit the Funds (a) to issue an unlimited number of classes of securities representing interests in the

same portfolio, and (b) to assess a contingent deferred sales charge ("CDSC") on redemptions of shares of some of the classes, and to waive the CDSC in certain cases.¹

FILING DATE: The application was filed on September 14, 1993, and amended on November 19, 1993 and January 7, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 8, 1994, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, Northstar Investment Management Corporation, Two Pickwick Plaza, Greenwich, Connecticut 06830, Attn: Lisa M. Hurley, Esq.

FOR FURTHER INFORMATION CONTACT: Felicia H. Kung, Senior Attorney, at (202) 504-2803, or Elizabeth G. Osterman, Branch Chief, at (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Each of the Funds is a series, and separate diversified portfolio of, the Trust, a registered open-end management investment company. The Trust is organized as a Massachusetts business trust. The Adviser, a majority-owned subsidiary of NWNL Companies, Inc., is a registered investment adviser that will provide investment advisory services to each of the Funds. The Distributor is a registered broker-dealer that will act as principal underwriter of the Funds' shares, and is an affiliated person of the Adviser.

¹All conditions and representations herein will apply equally to any entity controlling, under common control with, or controlled by the Adviser or the Distributor that may in the future serve as investment adviser or distributor of the Funds.

2. Applicants propose to establish a multiple class distribution system (the "Multi-Class Distribution System") to enable each of the Funds to offer an unlimited number of classes of shares that would be subject to a front-end sales load, a CDSC, a rule 12b-1 plan providing for a distribution fee and service fee, a combination of the above, or none of the above. Classes of shares that do not have a front-end sales load, and are subject to a rule 12b-1 plan and a CDSC are referred to herein as "Deferred Option" classes. Applicants will comply with Article III, Section 26 of the NASD's Rules of Fair Practice, which limits the amount of asset-based distribution charges a Fund may assess. All Fund expenditures for distribution will be made in accordance with rule 12b-1.

3. Each Fund currently intends to offer only two classes of shares ("Class A" and "Class B"). Some or all of the Funds may not in fact create or issue additional classes of shares.

4. The Funds will offer Class A shares at net asset value plus a front-end sales load. The front-end sales loads generally would be subject to reductions for larger purchases and under a right of accumulation. Class A shares also will be subject to a rule 12b-1 plan providing for distribution and service fees at a combined annual rate of up to .30 percent of the average daily net asset value of that class. In addition, Class A shareholders who purchase shares at net asset value without the imposition of a front-end sales load may be subject to a low level CDSC (not to exceed 2 percent of net asset value) for a specified period, not to exceed two years, from the date of purchase when they redeem their Class A shares. The purpose of such a sales charge is to reimburse the Distributor for commissions paid to dealers at the time of sale from the Distributor's own resources.

5. The Funds will offer Class B shares at net asset value subject to a CDSC, as described below. Class B shares also will be subject to a rule 12b-1 plan providing for combined distribution and service fees at an annual rate of up to 1 percent of the average daily net asset value of that class.

6. Investment income and unrealized and realized gains or losses will be allocated daily to each class of shares based on the percentage of net assets of the outstanding or dividend eligible shares, as appropriate, in each class of a Fund at the beginning of each day. Operating expenses, which are attributable to all classes, will be allocated daily to each class of shares based on the percentage of the Fund's net assets in each class at the beginning

of the day. Expenses that have a greater cost for one class than another (i.e., rule 12b-1 fees and possibly transfer agent fees) will be charged separately to each class. Because of higher ongoing distribution fees and potentially higher transfer agency fees paid by holders of the Deferred Option shares, the net income attributable to and the dividends payable on Deferred Option shares would be lower than the net income attributable to and the dividends payable on Class A shares.

7. Class B shares may convert automatically to Class A shares after a specified period of years. In addition, for the purposes of conversion, shares purchased through the reinvestment of dividends and other distributions paid in respect of Class B shares are also Class B shares, except that they will be considered held in a separate sub-account. Each time a shareholder's Class B shares, other than those in the sub-account, convert to Class A, a *pro rata* portion of the Class B shares in the sub-account also will convert to Class A.

8. Applicants reserve the ability to convert shares of any class to shares of another, consistent with the standards, policies, conditions, and representations set forth in the application regarding the conversion of Class B shares to Class A shares. Such ability to convert shares will be subject to the terms fully disclosed in a Fund's registration statement current at the time of sale, and will be at the relative net asset values of each of the classes.

9. The conversion feature is subject to the availability of an opinion of counsel or Internal Revenue Service private letter ruling to the effect that such conversion of shares does not constitute a taxable event under federal income tax law, and may be suspended if such a ruling or opinion is not available.

10. Applicants anticipate that each class of shares may be exchanged for shares of the same class in another Fund to the extent that the shareholder would have been eligible to purchase the shares acquired in the exchange. The exchange privileges will comply with rule 11a-3 under the Act.

11. Applicants expect that the CDSC applicable to Class B shares will vary from 2 percent to 5 percent for redemptions made during the first year after purchase to 1 percent for redemptions made during the fourth year after purchase. The CDSC applicable to Class B shares will not be imposed on redemptions of shares purchased more than six years prior to their redemption.

12. The amount of the CDSC will be calculated as the lesser of the amount that represents a specified percentage of

the net asset value of the shares at the time of purchase or at the time of redemption. The CDSC of any particular Fund or class thereof may be higher or lower than that described in the application. The CDSC will not be imposed on shares derived from the reinvestment of dividends or capital gains distributions. Furthermore, no CDSC will be imposed on an amount which represents an increase in the value of the shareholder's account resulting from capital appreciation above the amount paid for shares purchased during the CDSC period.

13. In determining the applicability and rate of any CDSC, it will be assumed that a redemption is made first of shares representing capital appreciation, next of shares derived from reinvestment of dividends and capital gains distributions, and finally of other shares held by the shareholder for the longest period of time. This will result in the charge, if any, being imposed at the lowest possible rate.

14. Applicants propose to waive the CDSC, in whole or in part, in connection with (a) redemptions made within one year following the death or disability, as defined in Section 72(m)(7) of the Internal Revenue Code of 1986, as amended (the "Code"), of a shareholder; (b)(i) a lump sum or other distribution following retirement, or, in the case of an individual retirement account ("IRA"), Keogh Plan, or custodial account pursuant to section 403(b)(7) of the Code, after the shareholder has attained age 59½, or any redemption resulting from a tax-free return of an excess contribution pursuant to section 408(d) (4) or (5) of the Code, or from the death or disability of the employee, or (ii) in the alternative, in connection with a distribution following retirement under a tax-deferred retirement plan, or attaining age 70½ in the case of an IRA, Keogh Plan, or custodial account pursuant to section 403(b) of the Code, or resulting from the tax-free return of an excess contribution to an IRA; (c) redemptions of shares purchased by active or retired officers, directors or trustees, partners and employees of the Funds, the Distributor or affiliated companies, by members of the immediate families of such persons, by dealers having a sales agreement with the Distributor, by any state, county, or city, or any instrumentality, department, authority, or agency thereof and by trust companies and bank trust departments which hold shares in a fiduciary capacity; (d) redemptions of shares made pursuant to a shareholder's participation in any systematic withdrawal plan adopted by a Fund; (e)

redemptions by shareholders holding shares of a Fund worth over \$1 million immediately prior to redemption; (f) redemptions effected by advisory accounts managed by the Adviser; (g) redemptions by tax-exempt employee benefit plans resulting from the adoption or promulgation of any law or regulation; and (h) redemptions effected by registered investment companies in connection with the combination of an investment company with a Fund by merger, acquisition of assets, or by any other transaction.

15. If the Funds waive or reduce the CDSC, such waiver or reduction will be applied uniformly to all offerees in the specified class. If the Trustees of a Fund determine to discontinue the waiver or reduction of the CDSC, the disclosure in the Fund's prospectus will be appropriately revised. Any shares purchased prior to the termination or reduction of such waiver will be able to have the CDSC waived or reduced as provided in the Fund's prospectus at the time of the purchase of such shares.

16. The Funds may provide a *pro rata* credit, to be paid for by the Distributor, for any CDSC paid in connection with a redemption of shares followed by a reinvestment effected within 365 days, or a shorter period, of the redemption.

Applicants' Legal Analysis

1. Applicants request an exemptive order to the extent that the proposed Multi-Class Distribution System might be deemed: (a) to result in the issuance of a "senior security" within the meaning of section 18(g), and thus prohibited by section 18(f)(1), and (b) to violate the equal voting provisions of section 18(i). Applicants also seek an exemption from sections 2(a)(32), 2(a)(35), 22(c) and 22(d), and rule 22c-1 to the extent necessary to permit the imposition and waiver of a CDSC on redemptions of Fund shares.

2. Applicants believe that the proposal will permit the Funds to facilitate both the distribution of their securities and provide investors with a broader choice as to the method of purchasing shares without assuming excessive accounting and bookkeeping costs or unnecessary investment risks. Applicants assert that, under the proposed Multi-Class Distribution System, the Funds will save the organizational and other continuing costs that would be incurred if the Funds were required to establish new separate investment portfolios.

3. Applicants believe that the Multi-Class Distribution System does not raise any of the concerns that prompted the SEC to recommend the adoption of section 18, *i.e.*, excessive borrowing,

inadequate assets or reserves, and increased speculative character of junior securities. Applicants state that the proposal does not involve borrowings and does not affect the Funds' existing assets or reserves. In addition, applicants state that the proposed arrangement will not increase the speculative character of the shares of the Funds, since all such shares will participate *pro rata* in all of a Fund's appreciation, income and expenses, with the exception of the different distribution fees and any different transfer agency costs payable by each class. Applicants contend that mutuality of risk will be preserved with respect to each class of shares in a Fund.

4. Applicants assert that the proposed capital structures of the Funds will not induce any group of shareholders to invest in risky securities to the detriment of any other group of shareholders because the investment risks of each Fund will be borne equally by all of its shareholders. Moreover, applicants further assert that the proposed capital structures will not enable insiders to manipulate the expenses and profits among the various classes of shares because the Funds are not organized in a pyramid fashion, all expenses and profits of a Fund, other than the different class expenses, will be borne *pro rata* by all shares of the Fund, and all shareholders will have equal voting rights, except concerning matters relating to each class' rule 12b-1 plan.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following:

1. Each class of shares will represent interests in the same portfolio of investments of a Fund and be identical in all respects, except as set forth below. The only differences among the classes of shares of the same Fund will relate solely to: (a) The impact of the respective rule 12b-1 plan payments made by each of the classes of shares of a Fund, any higher incremental transfer agency costs attributable solely to the Deferred Option shares of a Fund, and any other incremental expenses subsequently identified that should be properly allocated to one class which shall be approved by the SEC pursuant to an amended order; (b) the fact that the classes will vote separately with respect to a Fund's rule 12b-1 distribution plan, except as provided in condition 4 below; (c) the different exchange privileges of each class of shares; (d) the fact that only certain classes will have a conversion feature; and (e) the designation of each class of shares of a Fund.

2. The Trustees of each of the Funds, including a majority of the Independent Trustees, shall have approved the Multi-Class Distribution System, prior to the implementation of the Multi-Class Distribution System by a particular Fund. The minutes of the meetings of the Trustees of each of the Funds regarding the deliberations of the Trustees with respect to the approvals necessary to implement the Multi-Class Distribution System will reflect in detail the reasons for determining that the proposed Multi-Class Distribution System is in the best interests of both the Funds and their respective shareholders and such minutes will be available for inspection by the SEC staff.

3. On an ongoing basis, the Trustees of the Funds, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund for the existence of any material conflicts between or among the interests of the classes of shares offered. The Trustees, including a majority of the Independent Trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Adviser and the Distributor will be responsible for reporting any potential or existing conflicts to the Trustees. If a conflict arises, the Adviser and the Distributor at their own costs will remedy such conflict up to and including establishing a new registered management investment company.

4. If a Fund implements any amendment to its rule 12b-1 plan (or, if presented to shareholders, adopts or implements any amendment of a non-rule 12b-1 shareholder services plan) that would increase materially the amount that may be borne by a class of shares (the "Target Class") under the plan, existing shares of a class of shares that converts into the Target Class shares after a period of time (the "Purchase Class") will stop converting into the Target Class unless the Purchase Class shareholders, voting separately as a class, approve the proposal. The Trustees shall take such action as is necessary to ensure that existing Purchase Class shares are exchanged or converted into a new class of shares (the "New Target Class"), identical in all material respects to the Target Class as it existed prior to implementation of the proposal, no later than such shares previously were scheduled to convert into the Target Class. If deemed advisable by the Trustees to implement the foregoing, such action may include the exchange of all existing Purchase Class shares for a new class (the "New Purchase Class"), identical to existing Purchase Class shares in all material respects except

that the New Purchase Class will convert into the New Target Class. The New Target Class or the New Purchase Class may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the Trustees reasonably believe will not be subject to federal taxation. In accordance with condition 3, any additional cost associated with the creation, exchange, or conversion of the New Target Class or the New Purchase Class shall be borne solely by the Adviser and the Distributor. The Purchase Class shares sold after the implementation of the proposal may convert into the Target Class shares subject to the higher maximum payment, provided that the material features of the Target Class plan and the relationship of such plan to the Purchase Class shares are disclosed in an effective registration statement.

5. The Trustees of the Funds will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b-1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the Trustees to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the Independent Trustees in the exercise of their fiduciary duties.

6. Dividends paid by a Fund with respect to each class of shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day and will be in the same amount, except that fee payments made under rule 12b-1 plans relating to each respective class of shares will be borne exclusively by that class and any incremental transfer agency costs relating a particular class of shares will be borne exclusively by such class.

7. The methodology and procedures for calculating the net asset value and dividends and distributions of the classes and the proper allocation of income and expenses between the classes has been reviewed by an expert (the "Independent Examiner") who has rendered a report to applicants, which has been provided to the staff of the SEC, stating that such methodology and procedures are adequate to ensure that such calculations and allocations will

be made in an appropriate manner. On an ongoing basis, the Independent Examiner, or an appropriate substitute Independent Examiner, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Funds that the calculations and allocations are being made properly. The reports of the Independent Examiner shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Independent Examiner with respect to such reports, following request by the Funds which the Funds agree to make, will be available for inspection by the SEC staff upon the written request for such work papers by a senior member of the Division of Investment Management or of a Regional Office of the Commission, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Independent Examiner is a "report on policies and procedures placed in operation" and the ongoing reports will be "reports on policies and procedures placed in operation and tests of operating effectiveness" as defined and described in SAS No. 70 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

8. The applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the classes of shares and the proper allocation of expenses between such classes of shares, and this representation has been concurred with by the Independent Examiner in the initial report referred to in condition 7 above and will be concurred with by the Independent Examiner, or an appropriate substitute Independent Examiner, on an ongoing basis at least annually in the ongoing reports referred to in condition 7 above. Applicants will take immediate corrective action if this representation is not concurred in by the Independent Examiner, or appropriate substitute Independent Examiner.

9. The prospectuses of the Funds will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling Fund shares may receive different levels of compensation for

selling or servicing one particular class of shares over another in a Fund.

10. The Distributor will adopt compliance standards as to when each class of shares may appropriately be sold to particular investors. Applicants will require all persons selling shares of the Funds to agree to conform to such standards.

11. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the Trustees of the Funds with respect to the Multi-Class Distribution System will be set forth in guidelines which will be furnished to the Trustees.

12. Each Fund will disclose the respective expenses, performance data, distribution arrangements, service, fees, sales loads, deferred sales loads, and exchange privileges applicable to each class of shares in every prospectus, regardless of whether all classes of shares are offered through each prospectus. Each Fund will disclose the expenses and performance data applicable to all classes of shares in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Fund as a whole generally and not on a per class basis. Each Fund's per share data, however, will be prepared on a per class basis with respect to the classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will disclose the expenses and/or performance data applicable to all classes of shares. The information provided by applicants for publication in any newspaper or similar listing of the Funds' net asset values and public offering prices will present each class of shares separately.

13. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval, authorization or acquiescence in any particular level of payments that the Funds may make pursuant to rule 12b-1 plans in reliance on the exemptive order.

14. The conversion of one class of shares to another class of shares will be done on the basis of the relative net asset value of the two classes, without the imposition of any sales load, fee, or other charge. After conversion, the converted shares will be subject to an asset-based sales charge and/or service fee (as those terms are defined in Article III, Section 26 of the NASD's Rules of Fair Practice), if any, that in the aggregate are lower than the asset-based sales charge and service fee to which

they were subject prior to the conversion.

15. Applicants will comply with the provisions of proposed rule 6c-10 under the Act, Investment Company Act Release No. 16619 (Nov. 2, 1988), as such rule is currently proposed and as it may be repropounded, adopted, or amended.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-1530 Filed 1-21-94; 10:00 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 1935]

Delegation of Authority No. 209; Under Secretary for Political Affairs

January 7, 1994.

1. *Delegation.* By virtue of the authority vested in the Secretary of State, including the authority of section 4, of the Act of May 26, 1949 (22 U.S.C. 2658), as amended, I hereby delegate to the Under Secretary for Political Affairs the following:

(a) Those functions conferred upon the Secretary of State by 18 U.S.C. 3186 relating to ordering delivery of persons committed under 18 U.S.C. 3184 and 3185 to authorized agents of foreign countries; and,

(b) Those functions conferred upon the Secretary of State by 18 U.S.C. 981(i)(1), 19 U.S.C. 1616a(c)(2), and 21 U.S.C. 881(e)(1)(E), and similar statutes that may be enacted, to approve the transfer of forfeited assets to foreign governments.

2. *Technical provisions.* (a) Notwithstanding this delegation of authority, the Secretary of State may at any time exercise any function delegated by this delegation.

(b) Any act affected by this delegation shall be deemed to be such act as amended from time to time.

(c) Nothing herein shall derogate from Department of State Delegation of Authority No. 134, dated March 4, 1976, or Delegation of Authority No. 202, dated March 23, 1993, which delegated the above-enumerated functions to the Deputy Secretary of State.

(d) This delegation of authority to the Under Secretary for Political Affairs shall remain in effect only until such time as a confirmed nominee assumes the position of Deputy Secretary of State or the President appoints an Acting Deputy Secretary of State under 5 U.S.C. 3347, at which time this delegation of authority shall expire.

Dated: January 7, 1994.

Warren Christopher,
Secretary of State.

[FR Doc. 94-1508 Filed 1-21-94; 10:00 am]

BILLING CODE 4710-24-M

UNITED STATES INFORMATION AGENCY

Reporting and Information Collection Requirements Under OMB Review

AGENCY: United States Information Agency.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed or established reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the *Federal Register* notifying the public that the Agency has made such a submission. The information collection activity involved with this program is conducted pursuant to the mandate given to the United States Information Agency in accordance with Public Law 98-111 as amended by Public Law 101-246. USIA is requesting reinstatement of this collection for a three-year period. The information collection is entitled "Surveys, Interviews and Other Audience Research for Radio and TV Marti", under OMB Control Number 3116-0197. Estimated burden hours per response is thirty-five (35) minutes. Respondents will be required to respond only one time.

DATES: Comments are due on or before February 23, 1994.

COPIES: Copies of the Request for Clearance (SF-83), supporting statement, transmittal letter and other documents submitted to OMB for approval may be obtained from the USIA Clearance Officer. Comments on the items listed should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for USIA, and also to the USIA Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Agency Clearance Officer, Ms. Debbie Knox, United States Information Agency, M/ADD, 301 Fourth Street, SW., Washington, DC 20547, telephone (202) 619-5503; and OMB review: Mr. Jeffery Hill, Office of Information And Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone (202) 395-7340.

SUPPLEMENTARY INFORMATION: Public reporting burden for this collection of

information (Paper Work Reduction Project: OMB No. 3116-0197) is estimated to average 35 minutes 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 this burden to the United States Information Agency, M/ADD, 301 Fourth Street, SW., Washington, DC

20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

TITLE: Surveys, Interviews and Other Audience Research for Radio and TV Marti.

FORM NUMBER: None.

ABSTRACT: Data from this information collection are used by USIA's Office of Cuba Broadcasting (OCB) to evaluate effectiveness of Radio and TV Marti operations by estimating the audience

size and composition for broadcasts. OCB also assesses signal reception, credibility and relevance of programming through this research.

PROPOSED FREQUENCY OF RESPONSES:

No. of Respondents—5,500.

Recordkeeping Hours—.6. Total Annual Burden—3,345.

Dated: January 18, 1994.

Rose Royal,

Federal Register Liaison.

[FR Doc. 94-1534 Filed 1-21-94; 10:00 am]

BILLING CODE 8230-01-M

Federal Register

Monday
January 24, 1994

Part II

**Department of
Education**

34 CFR Part 602

**Secretary's Procedures and Criteria for
Recognition of Accrediting Agencies;
Proposed Rule**

DEPARTMENT OF EDUCATION

34 CFR Part 602

RIN 1840-AB82

Secretary's Procedures and Criteria for Recognition of Accrediting Agencies

AGENCY: Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Secretary's recognition of accrediting agencies. The proposed regulations are needed to implement provisions added to the Higher Education Act of 1965 (HEA) by the Higher Education Amendments of 1992. The purpose of the Secretary's recognition of accrediting agencies is to assure that those agencies are, for HEA and other Federal purposes, reliable authorities as to the quality of education or training offered by the institutions of higher education or higher education programs they accredit.

DATES: Comments must be received on or before March 21, 1994.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Karen W. Kershenstein, U.S. Department of Education, 400 Maryland Avenue, SW., room 3036, ROB-3, Washington, DC 20202-5244.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT:

Karen W. Kershenstein. Telephone: (202) 708-7417. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: In order to approve a postsecondary education institution to participate in the student financial assistance (SFA) programs authorized under Title IV of the HEA and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an "institution of higher education." Under the HEA and other Federal statutes, one element of that definition requires an eligible institution of higher education to be accredited or preaccredited by an accrediting agency recognized by the Secretary as a reliable authority as to the quality of the education or training provided by the institution. Another element requires an eligible institution

to be legally authorized to provide an educational program beyond the secondary level in the State in which it is located. Thus, the statutory definition of an institution of higher education provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to SFA programs is opened to only those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as "the triad." While the concept of a triad of entities responsible for gatekeeping has had a long history, the triad has not always worked as effectively as it should to ensure educational quality, nor has it served as an effective deterrent to abuse by institutions participating in SFA programs.

For several years, certain institutions participating in SFA programs have failed to provide students with education or training of an acceptable level of quality; they have also failed to treat students fairly. In addition, they have failed to meet acceptable standards of financial responsibility and administrative capability and to adequately protect the SFA program funds entrusted to them. The institutions that have engaged in these abusive practices are not restricted to a particular sector of higher education. Rather, the abuses have been found in all types of institutions participating in SFA programs, including those in the private non-profit and public sectors of higher education as well as those in the proprietary sector.

At the same time, gatekeeping functions have not been carried out effectively. For example, some accrediting agencies have not taken sufficient care to ensure the quality of the education or training provided by the institutions or programs they accredit or to protect student interests when they accredit particular institutions or programs. Moreover, some States have also not taken sufficient care to ensure the quality of the education or training provided by the institutions they authorize or license to operate in the State or to protect student interests. Finally, the Federal government's management of its responsibilities to determine eligibility and to certify institutions to participate in SFA programs has not always been adequate to prevent abusive practices at institutions that participate in SFA programs.

Consequently, in the Higher Education Amendments of 1992, Public

Law 102-325, Congress amended the HEA to provide for a new part H of Title IV entitled "Program Integrity Triad." Under that part, States and accrediting agencies are required to assume major new oversight responsibilities, and States, accrediting associations, and the Secretary are linked to create a stronger and more coordinated evaluation of institutions that participate or wish to participate in the SFA programs. The Secretary believes that the most appropriate approach to this coordinated evaluation of institutions by the three components of the triad is a complementary one with each component focusing its evaluation on its obligations within the context of the HEA. Thus, the focus for accrediting agencies is the quality of education or training provided by the institutions or programs they accredit. For States, which already had responsibility for determining that institutions have the legal authority to operate within the State, the HEA added a new focus: reviewing institutions that meet certain statutory review criteria. The focus of the Secretary's evaluation of institutions is the administrative and financial capacity of those institutions to participate in the SFA programs.

The statute allocates legal responsibility among the entities that compose the program integrity triad. While specific statutory responsibilities for the three triad entities may overlap, when viewed as a whole the triad brings together in a coordinated fashion three different but very important aspects of institutional review. Within this statutory scheme, the Secretary has sought to assure that the gatekeeping system operates as efficiently as possible, with maximum integration among the three triad entities and without unnecessary burden on postsecondary institutions. In order to assist the Secretary in designing a final regulation that achieves these goals, the Secretary specifically requests comment on the following questions:

(1) In several areas, the statute specifically requires each triad entity to evaluate an institution under the same or similar standards. For example, a SPRE and an accrediting agency may establish different standards for evaluating the financial responsibility of an institution or for evaluating the success of an institution's educational program. Thus, a reviewed institution would need to satisfy the SPRE's and the accrediting agency's standards even though those standards address the same areas. How should final regulations be structured to both reduce the burden on institutions and enable

the triad entities to carry out effectively their statutory functions?

(2) Should the final regulations be more explicit in identifying levels, characteristics, or definitions for any of the assessment or review criteria that a triad entity is expected to consider in its evaluation of an institution?

Subpart 1 of part H establishes a State Postsecondary Review Program under which each State designates a single State postsecondary review entity that is responsible for reviewing institutions of higher education that the Secretary identifies as meeting certain review criteria and for determining whether those institutions should continue to participate in the SFA programs. Subpart 3 specifies the procedures the Secretary uses to determine whether an institution meets the eligibility requirements and has the administrative capacity and financial responsibility to administer the SFA programs.

In subpart 2 of part H, the Secretary is charged with making a comprehensive and careful evaluation of an accrediting agency before recognizing that agency as a reliable authority as to the quality of the education or training offered by institutions or programs that the agency accredits. Moreover, as part of this evaluation, the Secretary is charged with establishing recognition standards that must include "an appropriate measure or measures of student achievement." Accordingly, the standards that the Secretary proposes in this notice of proposed rulemaking require an accrediting agency to make a detailed and careful evaluation of the institutions or programs it accredits and to include in that evaluation "appropriate measure or measures of student achievement."

These proposed regulations were subject to the negotiated rulemaking process set forth in section 492 of the HEA. Under that process, the Secretary convened four regional meetings in September, 1992 to obtain public involvement in the development of these proposed regulations. The meetings were held in San Francisco, Atlanta, New York, and Kansas City. Before convening the meetings, the Secretary held a meeting in Washington, DC in August 1992 to invite comments from interested parties as to the key issues that should be addressed at the regional meetings.

At the four regional meetings, the Secretary provided attendees with a list of issues that needed to be addressed in these proposed regulations. A summary of the responses of the attendees is contained in Appendix A to these proposed regulations.

Individuals and groups who attended the regional meetings nominated individuals to participate in the negotiated rulemaking process. The Secretary selected negotiators from the list of nominees to reflect all the groups that are involved in the SFA programs. With regard to these proposed regulations, the Secretary chose negotiators who reflected the diversity of the accrediting community as well as the interests of States, higher education institutions, and students.

In accordance with section 492(b) of the HEA, the Secretary prepared a draft proposed regulation and negotiated the provisions of that draft with the negotiators. Two negotiating sessions were held: one in January 1993 and one in February 1993. During those sessions, consensus was reached on several of the provisions that are included in this notice of proposed rulemaking. On the remaining provisions, however, the negotiators agreed to disagree. Where agreement was not reached on a particular provision, that fact is noted in the discussion that follows.

On several issues that were negotiated, there was general discussion on various approaches to take with regard to those issues. The Secretary believes those issues are important enough to include in this preamble possible alternative approaches in order to give the public a fuller understanding of the issues and the available potential solutions. Finally, on most issues where consensus was reached, the negotiators also reached general agreement on the language of a proposed regulatory provision. However, the Secretary wishes to reiterate the remarks of the Federal negotiators that the agreed-to language with regard to a specific provision would be subject to change in the proposed regulations for technical reasons but the substance of the provision would remain unchanged, wherever possible. Where a substantive change was made in a particular provision, that fact is noted in the discussion that follows, and an explanation of the reasons for the change is provided.

Significant Changes Proposed by the Regulations

The following discussion reflects proposed significant changes to the existing regulations governing the Secretary's Procedures and Criteria for Recognition of Accrediting Agencies. The changes are discussed in the order in which they appear in the proposed regulations. If a provision applies to more than one section or is included in more than one section, it is discussed the first time it appears with an

appropriate cross-reference to its other appearances. The general format for the discussion of each section is to state the appropriate statutory provision for that section and to explain any provisions that interpret or clarify the statute that the Secretary believes are necessary to implement the statutory provision through regulation.

In developing these proposed regulations, the Secretary has regulated as little as possible. He has regulated narrowly to the law, except where the Secretary deems further interpretation is necessary. In these cases, either the proposed regulations include the specific language agreed to by negotiators during negotiated rulemaking, if an agreement was reached, or the Secretary proposes language where agreement was not reached. In both cases, the Secretary solicits comments on the clarifications and interpretations included in the proposed regulations.

Subpart A—General Provisions

Section 602.1 Purpose

Current regulations permit the Secretary to recognize any accrediting agency the Secretary determines to be a reliable authority as to the quality of postsecondary education or training provided by the institutions or programs it accredits. However, section 496(m) of the HEA now authorizes the Secretary to recognize only those agencies that accredit institutions of higher education or higher education programs for the purpose of enabling those institutions or programs to establish eligibility to participate in programs administered either by the Secretary or by other Federal agencies. In § 602.1 of the proposed regulations, the Secretary reiterates the statutory provision.

Section 602.2 Definitions

Most of the definitions included in the proposed regulations are self-explanatory. Three, however, warrant additional comment based on the discussions that took place during the negotiated rulemaking sessions.

Institution of higher education. In the proposed regulations, the Secretary defines an institution of higher education to be an educational institution that qualifies or may qualify as an eligible institution under 34 CFR part 600, Institutional Eligibility under the Higher Education Act of 1965, as amended. Some of the non-Federal negotiators, however, pointed out that it is not clear that this definition includes certain types of hospitals and health care facilities. For this reason, the Secretary wishes to make clear that a

hospital or health care facility may qualify as an eligible institution of higher education if the hospital or facility satisfies any definition of that term, i.e., a "public or nonprofit private institution of higher education," a "proprietary institution of higher education," or a "postsecondary vocational institution."

Prebaccalaureate vocational education programs and vocational education programs.

In § 602.2, the Secretary proposes to define the term "vocational education program" based upon the statutory provision included in the definition of various types of eligible institutions of higher education. Thus, the Secretary defines a vocational education program as a program that "prepares students for gainful employment in a recognized occupation." (See, for example, section 481(b)(1) of the HEA for a "proprietary institution of higher education;" section 481(c)(1) for a "postsecondary vocational institution;" and the second sentence of section 1201(a) of the HEA for a "public and private nonprofit institution of higher education.")

This definition, if read literally, could be viewed as including all postsecondary programs. To avoid this overreaching conclusion, the Secretary proposes that the vocational education programs that trigger actions under these regulations are prebaccalaureate vocational education programs. See, for example, § 602.24(c). This latter term is defined as a vocational education program that leads to a certificate, degree, or other education credential that is less than a bachelor's degree. The Secretary invites comment on these definitions, as well as alternative definitions, in light of the fact that the non-Federal negotiators could not agree among themselves as to the acceptability of these definitions.

One alternative definition for prebaccalaureate vocational education that the Secretary is considering is "undergraduate vocational education that leads to a certificate or other educational credential but not to a degree." The Secretary is considering this definition in order to ease the burden on institutions whose vocational education programs leading to an associate degree would also trigger special action under the proposed regulations.

If this alternative definition were to be adopted, however, the Secretary is concerned that some institutions might try to stretch their non-degree programs into associate-degree programs simply to avoid the additional requirements that, as a result of these proposed regulations, accrediting agencies will

have to impose on institutions that provide prebaccalaureate vocational education. The Secretary invites comments on the alternative definition of prebaccalaureate vocational education and suggestions for preventing unwarranted course or program stretching, should the alternative definition be adopted. The Secretary also wishes to know if commenters believe there are other risks associated with adopting the alternative definition that might outweigh any benefits derived by the degree-granting sector of the higher education community through its adoption.

The Secretary acknowledges that the definition of "vocational education" in these proposed regulations differs from the definition of "vocational program" as that term is defined in the proposed regulations for the State Postsecondary Review Program ("an educational program below the baccalaureate degree level, that is not classified as a professional program, that prepares students for gainful employment in a recognized profession"). The Secretary requests specific comment on whether the same definition should be used in both regulations and, if so, what that definition should be.

Section 602.3 Organization and Membership

Section 496(a) of the HEA requires accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA to be administratively and financially separate from and independent of any related, associated, or affiliated trade association or membership organization. The term "separate and independent" is defined in section 496(b) of the HEA. In § 602.3 (a), (b), and (c) of the proposed regulations, the Secretary reiterates the statutory requirement and definition.

During the negotiated rulemaking sessions, non-Federal negotiators expressed concern that the "separate and independent" requirement would prevent any joint use of personnel, services, equipment, or facilities by an accrediting agency and a related, associated, or affiliated trade association or membership organization, a practice that is fairly common among accrediting agencies and helps reduce the cost of accreditation. To address this concern, in § 602.3(d) the Secretary proposes conditions that accrediting agencies must meet regarding the joint use of personnel, services, equipment, or facilities if that use is not to be considered a violation of the "separate and independent" requirement. The Secretary believes this approach

respects the intent of Congress yet eases the financial burden on agencies to implement the new requirement.

Section 496(a) of the HEA permits the Secretary to waive the "separate and independent" requirement if the agency is one that, for purposes of determining eligibility for SFA programs, either conducts accreditation through a voluntary membership organization of individuals participating in a profession or has as its principal purpose the accreditation of programs within institutions that are accredited by another agency recognized by the Secretary. In § 602.3(e) of the proposed regulations, the Secretary proposes conditions under which the Secretary may waive the "separate and independent" requirement. Specifically, the Secretary proposes to grant an agency's request for a waiver if the agency demonstrates to the Secretary's satisfaction that the existing relationship between the agency and the trade association or membership organization has not compromised the independence of its accreditation process.

In providing comments with regard to this section, the Secretary advises commenters that only the type of accrediting agency described in § 602.3(b)(4) may seek a waiver of the separate and independent requirement under the law. Thus, the Secretary is precluded by statute from waiving this requirement for any other type of accrediting agency.

Finally, the Secretary wishes to note that the language in § 602.3(c)(2) specifying that no less than one-seventh of an agency's decision-making body must consist of representatives of the public is derived from language in the Conference Report stating that the House agrees to the requirement in the Senate bill that "at least one out of every seven members of an accreditation association's board be members of the general public."

Section 602.4 Submission of Information to the Secretary by Recognized Accrediting Agencies

Section 496 does not specifically address the type of information that a recognized accrediting agency must submit to the Secretary to enable the Secretary to evaluate whether the agency continues to comply with the requirements for recognition throughout its recognition period. In § 602.4 (a), (b), (c), (d), and (f) of the proposed regulations, the Secretary proposes various types of information that recognized agencies must routinely submit to the Secretary during their recognition period. All of the items on

the list were agreed to by the negotiators, who did not perceive them to be particularly burdensome to agencies to provide.

Of particular note is the requirement in § 602.4(e) that accrediting agencies must submit to the Secretary, upon request, information to assist the Secretary in resolving problems with any institution or program accredited by the agency, provided the Secretary's request does not conflict with the agency's policies on confidentiality with respect to its records on its institutions or programs. This provision reflects the agreement of negotiators. However, the Secretary has reconsidered the "confidentiality" aspect of this provision because of a concern that certain information that the Secretary may need to resolve a problem with a particular institution or program may not be obtainable from an agency because of its confidentiality policies. The Secretary believes this situation is untenable because it allows agencies to withhold information that the Secretary may need to carry out the Secretary's responsibilities under the Act, such as determining whether an institution or program accredited by the agency should remain eligible to participate in SFA programs. The Secretary seeks suggestions for resolving this dilemma in a manner that respects both the agency's need for confidentiality and the Secretary's need for information.

The Secretary also is considering adding to this section a requirement that an accrediting agency must refer to the Department's Office of Inspector General any fraudulent activities it discovers on the part of an institution or program that it accredits, if the institution or program participates in Department programs. The Secretary invites comments on this possible additional requirement and alternative approaches to sharing information among members of the triad concerning suspected fraudulent activity by an institution or program.

Subpart B—Recognition and Termination Procedures

Section 496(o) of the HEA requires the Secretary to provide, by regulation, the procedures the Secretary uses for recognizing accrediting agencies. In the proposed regulations, the Secretary proposes to specify procedures for recognizing accrediting agencies in far greater detail than in current or previous regulations. The Secretary believes this greater detail is necessary to ensure that all agencies applying for recognition, as well as other interested parties, have a clear understanding of the entire process.

The Secretary acknowledges that the application for recognition constitutes a significant burden on agencies seeking recognition by the Secretary. For this reason, the Secretary is considering ways to minimize the burden. One approach under consideration is to allow an agency to provide a simple statement of assurance, along with supporting documentation, that it meets certain requirements for recognition. The Secretary estimates that at least two-thirds of the requirements in the proposed regulations are amenable to this type of approach, and the resultant savings in time, effort, and cost to prepare an application for recognition would be significant. The Secretary invites comments on this approach and alternative methods for minimizing the burden on agencies of the application process without adversely affecting the Secretary's ability to conduct a thorough evaluation of the agency.

The recognition process, as described in subpart B of the proposed regulations, consists of an application to the Secretary by the agency, an analysis of the application by a designated Department official, an opportunity for a written response to that analysis by the applicant agency, a review of the agency's application by the National Advisory Committee on Institutional Quality and Integrity (Advisory Committee), a recommendation to the Secretary by the Advisory Committee with regard to that application, an opportunity to contest the Advisory Committee's recommendation by either the agency or the designated Department official, and, finally, a decision on that application by the Secretary. The analysis of an agency's application by the designated Department official includes publication of a notice of the agency's application in the *Federal Register* inviting comment on the agency's compliance with the requirements for recognition and a review by the designated Department official of any public comment received. The Secretary believes the new procedures for recognition allow an agency a full and fair review of its application.

Additional appeal procedures. The proposed regulations add two key new steps to the recognition process. First, in § 602.11(b) the Secretary gives an accrediting agency seeking recognition by the Secretary an opportunity to respond in writing to the designated Department official's analysis of its application for recognition before the application is reviewed by the Advisory Committee. Second, in § 602.13(b), after the Advisory Committee completes its review of the agency's application and

makes a recommendation to the Secretary on the agency's application, the Secretary gives both the agency and the designated Department official an opportunity to contest the Advisory Committee's recommendation. The contesting party, however, may not submit any evidence to the Secretary that it did not submit to the Advisory Committee. This restriction is to ensure that the Advisory Committee's authority is not circumvented. The Secretary believes that in general the only reasonable grounds for contesting an Advisory Committee recommendation would be if the contesting party could demonstrate that the Advisory Committee either misunderstood or did not take into proper account certain information presented by the contesting party.

The negotiators reached consensus during the negotiated rulemaking sessions on the first step. The Secretary added the second step after the negotiated rulemaking sessions ended to address the non-Federal negotiators' concerns about the lack of sufficient appeal mechanisms for agencies prior to the Secretary's final decision. The Secretary believes that these two new steps in the proposed recognition process provide agencies with sufficient opportunity to present any concerns they might have regarding the recommendation of either the designated Department official or the Advisory Committee before the Secretary reaches a decision on the agency's application.

Announced and unannounced site visits by the Secretary. Section 496(n) of the HEA requires the Secretary to conduct an independent analysis of an agency's application for recognition, which must include a site visit to the accrediting agency and may, at the Secretary's discretion, include site visits to representative institutions or programs accredited by the agency. Section 496(n) of the HEA also provides that the site visits may be unannounced, as appropriate. Accordingly, both § 602.10(b) and § 602.11(b) of the proposed regulations provide for unannounced site visits. Specifically, the Secretary proposes to conduct unannounced site visits only, where necessary in the judgment of the Secretary, to obtain information to verify the agency's compliance with the requirements for recognition and the information would not be forthcoming in an announced site visit. The Secretary wishes to make it clear that this Secretarial judgment is not subject to challenge by an accrediting agency.

In § 602.11(b), the Secretary also proposes that the Secretary's evaluation

of an agency may include a review of information directly related to the institutions or programs accredited by the agency, as this information relates to the institution's or program's compliance with the agency's standards, the effectiveness of those standards, or the agency's application of those standards. The Secretary believes that the inclusion of this language in the proposed regulations, which was agreed to by negotiators, provides the agency, the institutions and programs it accredits, and the general public with a clear understanding of the scope of the Secretary's evaluation of an agency.

In sum, to implement section 496(n) of the HEA, the proposed regulations make it clear that in evaluating an agency's application for recognition, the Secretary may not and does not depend solely on written submissions from the accrediting agency or on announced visits to the agency or its member institutions or programs. The Secretary makes a more thorough and independent evaluation of an agency's application for recognition, including, where appropriate, unannounced visits to ensure that information available to the designated Department official is comprehensive, accurate, and unbiased, and to ensure that the agency is actually carrying out its stated policies and procedures.

Scope of recognition requirements. Under § 602.10(b) of the current regulations, in order for an accrediting agency to be recognized by the Secretary, the agency has to meet each recognition criterion taken as a whole unless it can demonstrate to the Secretary's satisfaction that one or more criteria should not be applied. In § 602.13(c) of the proposed regulations, the Secretary requires an agency to meet each of the requirements contained in this part. However, in § 602.13(e) the Secretary proposes that the Secretary may exercise discretion and grant recognition to an agency that does not comply with each requirement if the Secretary determines that the agency's effectiveness is not impaired by its noncompliance. Such discretion might, for example, be exercised if an accrediting agency is unable to conduct an unannounced site visit, as required by § 602.24, because the program being evaluated is offered on a military installation that requires prior approval before any visitors are permitted on the installation. The Secretary believes that Secretarial discretion provides the desired flexibility that non-Federal negotiators sought during the negotiated rulemaking sessions.

Consensus was reached by negotiators regarding the elements to be included in

the scope of recognition the Secretary grants to an agency, *i.e.*, geographic area, the degrees or certificates awarded, the types of courses or programs offered, and the length of the recognition period. In the proposed regulations, the Secretary has clarified that an agency's scope of recognition does not automatically extend to any preaccreditation status it offers. Rather, when an agency formally applies for recognition, it must include the types of preaccreditation status for which it seeks recognition, and the Secretary grants recognition to an agency for each preaccreditation status if the agency complies with all the requirements for recognition with regard to that preaccreditation status.

Section 602.14 Limitation, Suspension, or Termination of Recognition.

Section 496(l) of the HEA permits the Secretary to limit, suspend, or terminate the Secretary's recognition of an accrediting agency before the completion of the agency's recognition period if the Secretary determines that the agency has failed to meet any of the requirements of part 602. In § 602.14 of the proposed regulations, the Secretary establishes the procedures to be followed before the Secretary may limit, suspend, or terminate an agency's recognition. The proposed procedures allow the agency to request a hearing to contest that action.

The Secretary proposes that, if an agency requests a hearing, the hearing will be conducted by the Advisory Committee. However, the Secretary further proposes that the hearing may be conducted by a subcommittee of the Advisory Committee, consisting of three members of the Advisory Committee, if the schedule of the full Advisory Committee would not permit a hearing to be held in a timely manner. After evaluating the evidence presented before it, the Advisory Committee or subcommittee makes a recommendation to the Secretary as to whether the sanction proposed by the designated Department official, no sanction, or another sanction is warranted. Any hearing held under this section is open to the public.

After the negotiated rulemaking sessions, in response to non-Federal negotiators' concerns about the lack of sufficient appeal mechanisms, the Secretary added to this section a provision that either party in a hearing may appeal the Advisory Committee's or subcommittee's recommendation to the Secretary.

Section 602.15 Requests for Reconsideration of the Secretary's Decision

Section 496(o) of the HEA requires the Secretary to provide in regulation the procedures to be followed by an accrediting agency for the appeal of the Secretary's decision regarding its application for recognition. Accordingly, in § 602.15 of the proposed regulations, the Secretary permits an agency to request reconsideration of a final decision of the Secretary regarding either the agency's application for recognition or the limitation, suspension, or termination of the agency's recognition. However, § 602.15(a)(2) proposes that a request for reconsideration may be made only under limited conditions. Under these limited conditions, the agency may request reconsideration only if it demonstrates that it has new information that could not have been presented previously and that the information is likely to result in reversal of the Secretary's decision.

While, as noted by the non-Federal negotiators at the negotiated rulemaking sessions, the grounds for reconsideration are narrow, the Secretary believes the narrow grounds are appropriate. Adverse decisions regarding an agency's application for recognition are made by the Advisory Committee and forwarded to the Secretary. Under § 602.13, the agency may appeal the Advisory Committee's recommendation to the Secretary. Similarly, under § 602.14, the agency may appeal an adverse Advisory Committee or subcommittee recommendation to the Secretary under a limitation, suspension or termination proceeding. Therefore, the Secretary believes that reconsideration requests should be narrowly circumscribed. The Secretary notes that non-Federal negotiators requested opportunities for agencies to request reconsideration in cases where the Secretary had not established appeal procedures. Given the provisions for appeal that are now in the proposed regulations, the Secretary requests public comment on whether reconsideration procedures are necessary.

The Secretary wishes to make clear that any agency that fails to notify the Secretary of its intent to file a written request for reconsideration within the 10-day time frame specified in the regulations forfeits its right to reconsideration. Additionally, the Secretary wishes to reiterate that, in general, any failure to meet a required deadline date in any appeal to the

Secretary results in a forfeiture of that appeal right.

While consensus was reached during the negotiated rulemaking sessions that an agency should have 45 days to submit its written request for reconsideration, the Secretary questions whether a shorter period—30 days—is sufficient for the agency to prepare an adequate request, given the fact that 30 days is the usual time frame specified by the Department for other types of appeals to the Secretary. The Secretary requests comments on the shorter period.

Because requests for reconsideration are restricted to instances where the Secretary's decision involves denial, limitation, suspension, or termination of an agency's recognition, it is anticipated that, due to the extensive material that must be reviewed, the Secretary will require more than 30 days to reach a final decision on an agency's request for reconsideration. Non-Federal negotiators were concerned that there be some time limit imposed to bring the issue to closure. Accordingly, the Secretary is proposing a 60-day time frame for reaching a final decision on an agency's request for reconsideration.

Section 602.16. Appeals Procedures.

As mentioned in § 602.15, section 496(o) of the HEA requires the Secretary to provide for the appeal of the Secretary's decision regarding an accrediting agency's application for recognition. In § 602.16 of the proposed regulations, the Secretary provides for an appeal to the Federal courts of all final decisions of the Secretary regarding an agency's application for recognition. During the negotiated rulemaking sessions, non-Federal negotiators urged an appeals procedure other than through the courts, as, for example, through an administrative law judge. However, the Secretary believes that there can be no administrative appeal within the Department of a Secretarial decision since the Secretary, as head of the Department of Education, makes all final decisions on behalf of the Department. It should be noted, however, that in response to the non-Federal negotiators' concerns, the Secretary has modified the proposed recognition procedures to include an opportunity for an agency to appeal an Advisory Committee's recommendation to the Secretary before the Secretary reaches a final decision on the agency's application. The proposed limitation, suspension, and termination procedures also have been modified to provide for an appeal to the Secretary of an Advisory Committee or subcommittee recommendation.

Subpart C—Criteria for Secretarial Recognition

Section 602.22 Demonstration of Accreditation Experience

Section 496(a)(1) of the HEA requires accrediting agencies to demonstrate experience in operating as an accrediting agency as a condition for recognition. In § 602.22 of the proposed regulations, the Secretary defines what a demonstration of accrediting experience must include, basically reiterating the requirements for experience set forth in § 602.14 of the current regulations. However, § 602.22 does not contain the requirement set forth in § 602.14(c) of the current regulations that agencies must demonstrate that their policies, evaluation methods, and decisions are accepted throughout the United States by recognized accrediting agencies. The Secretary is aware, as argued by the non-Federal negotiators, that this requirement is an important indicator of an agency's acceptance. On the other hand, this requirement has been subject to criticism by persons and institutions interested in forming new accrediting agencies. These individuals and agencies have often expressed concern to the Secretary that this requirement imposes unfair hurdles for them and unduly stifles competition among accrediting agencies. The Secretary proposes to eliminate this requirement because the Secretary believes that it is inappropriate to require acceptance by recognized agencies as a condition for recognition even though evidence of acceptance by recognized accrediting agencies provides some measure of an agency's reliability.

Section 602.23 Application of Standards

Current regulations require accrediting agencies to maintain a systematic program of review designed to assess the validity and reliability of their criteria, procedures, and standards and their relevance to the educational and training needs of affected students. As this requirement is fundamental to sound accrediting practice, there was consensus among negotiators that it should continue to be part of any regulations governing the accrediting agency recognition process. However, the language of the requirement has been changed in the proposed regulations from the language of the current regulations in response to the non-Federal negotiators' concerns about various technical interpretations of the words "validity and reliability." The substance of the requirement, as expressed in § 602.23(b)(5), is

unchanged. The Secretary wishes to emphasize the importance of this requirement, which is fundamental to the establishment of sound standards for the accreditation process and the determination of educational quality.

Section 602.24 Accreditation Processes

Section 496(c)(1) of the HEA requires that, in addition to the announced on-site review that is part of the regular accreditation process, an accrediting agency whose accreditation enables the institutions it accredits to participate in programs authorized under the HEA must conduct, some time during any accreditation or preaccreditation period, at least one unannounced on-site review at each institution that provides vocational education or training. Accordingly, in § 602.24(c) of the proposed regulations, the Secretary requires unannounced site visits by these accrediting agencies. However, as noted in the discussion of § 602.2, if the term "vocational education" is interpreted literally, it could be viewed as including all postsecondary education, and, under this interpretation, accrediting agencies would have to conduct unannounced site visits to all institutions. To avoid this outcome, in § 602.24(c) of the proposed regulations, the Secretary limits the type of vocational education programs that trigger unannounced visits to the prebaccalaureate level. As non-Federal negotiators were divided among themselves as to the definition of vocational education, they did not reach consensus on this point.

As mentioned in the discussion under § 602.2, the Secretary is considering an alternative definition of prebaccalaureate vocational education that would not require unannounced site visits to degree-granting institutions whose prebaccalaureate vocational programs lead to the associate degree. This would minimize the burden of the new requirement for unannounced visits, hopefully without any adverse consequences. The Secretary invites comments on this approach and suggestions for alternative ways of reducing the burden without eliminating from review those institutions offering vocational education that have abused the Title IV program.

Section 602.25 Additions to or Substantive Changes in Educational Programs

Section 496(a) of the HEA authorizes the Secretary to recognize accrediting agencies that are reliable authorities as to the quality of the education or

training provided by the institutions or programs they accredit. Section 496 does not specifically address the manner in which accrediting agencies evaluate either new programs begun by institutions after their last grant of accreditation or preaccreditation or programs that are substantially changed after the institution is accredited or preaccredited. However, the Secretary believes that an agency cannot be a reliable authority as to the quality of education or training offered by an institution if the agency does not assess those new or substantively changed programs. Accordingly, in § 602.25 of the proposed regulations, the Secretary establishes the framework for a policy that accrediting agencies must have to address additions to and substantive changes in educational programs. Specifically, in § 602.25(a) the Secretary proposes that an accrediting agency may include within its previous grant of accreditation or preaccreditation an educational program that an institution initially offers or substantively changes after that grant of accreditation or preaccreditation only if the agency specifically evaluates and approves the program. The Secretary proposes this requirement based upon the past actions of some accrediting agencies.

Certain accrediting agencies that accredit institutions offering specific prebaccalaureate vocational education programs have, on occasion, extended their accreditation to additional programs that these institutions offered after being accredited, without evaluating the quality of those additional programs, even though the additional programs were totally unrelated to the programs initially accredited. For example, an accrediting agency that accredited an institution that offered cosmetology courses extended its accreditation to additional programs that the institution subsequently offered in jet airplane mechanics and air conditioning and refrigeration without ever evaluating the quality of those additional programs. The Secretary believes that this practice violates the purpose of accreditation.

On the other hand, the Secretary believes that prior approval of programs is not necessary in all circumstances, a belief shared by negotiators, although no consensus was reached as to the circumstances. In § 602.25(b) the Secretary proposes an exception to this requirement if the institution notifies the accrediting agency of the new or substantially changed program before it is offered, and the new or substantially changed program does not provide prebaccalaureate vocational education. The Secretary proposes this exception

because the Secretary believes that new bachelor and higher degree programs are thoroughly reviewed by a variety of entities before they may be offered. Most institutional accrediting agencies, for example, require institutions to have thorough internal reviews of all new degree programs by curriculum committees, governing boards, and other appropriate units within the institution and to obtain appropriate state authorization for those new degree programs before they are offered. However, even though an accrediting agency may not be required by these proposed regulations to evaluate a new or substantively changed program before it is offered under § 602.25(b), accrediting agencies are certainly free, and encouraged, to do so under their own policies.

The Secretary acknowledges that the task of deciding which programs should require preapproval by accrediting agencies is a difficult one and seeks suggestions from commenters. For commenters who suggest that preapproval be allowed for prebaccalaureate vocational education programs that are "related" to a previously accredited program, the Secretary requests specific suggestions on how to determine whether the new or substantially changed program is "related" to the other program.

The Secretary notes that most accrediting agencies already have a definition of "substantive change" but observes that there is considerable variation among agencies as to what this term means. Most agencies' definitions generally include the following kinds of changes: a substantial change in the length of a program, its content, or both, as, for example, when a secretarial program increases from 1200 clock hours to 1600 clock hours to provide a 400-hour component in office automation; a change from a traditional 15-week semester format to an alternate weekend format; and a change from a certificate program to an associate degree program. The Secretary seeks to require preapproval for these and similar types of changes and proposes that an agency's definition of a substantive change in an educational program include, at a minimum, a substantial change in the number of clock or credit hours, the number of weeks, or the content of a program, a change in the type of program offered, a change in the credential awarded for completion of the program, and a change in the manner in which the institution measures the educational quantity of the program from clock hours to credit hours. The Secretary invites comments on this approach as

well as suggestions for alternative approaches to defining which types of programs require preapproval.

Finally, the Secretary acknowledges that the proposed requirement for a substantive change policy may result in increased costs to agencies and, in turn, institutions. However, for the reasons noted above, the Secretary believes the benefits far outweigh the costs. The Secretary also wishes to note that there was general consensus among non-Federal negotiators about the appropriateness of including a substantive change requirement in the proposed regulations. However, not all of the negotiators agreed that the approach proposed by the Secretary was appropriate.

Section 602.26 Required Accreditation Standards

Section 496 of the HEA authorizes the Secretary to recognize accrediting agencies that are reliable authorities as to the quality of the education or training provided by the institutions or programs only if the agencies satisfy standards established by the Secretary. Section 496(a) specifically requires the Secretary to establish standards and requires the standards to include "an appropriate measure or measures of student achievement."

Section 496(a)(5) of the HEA provides that the Secretary's standards for recognition of accrediting agencies must require that an accrediting agency establish accreditation standards that assess 12 areas pertaining to the institutions or programs it accredits. These areas are: (1) Curricula; (2) faculty; (3) facilities, equipment and supplies; (4) fiscal and administrative capacity as appropriate to the specified scale of operation; (5) student support services; (6) recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising; (7) program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered; (8) measures of program length in clock hours or credit hours; (9) success with respect to student achievement in relation to the institution's mission; (10) default rates in student loan programs under Title IV of the HEA; (11) record of student complaints received by, or available to, the accrediting agency; and (12) the institution's compliance with its program responsibilities under title IV of the HEA. However, under section 496(a)(5), accrediting agencies that have as their principal purpose the accrediting of institutions of higher education or higher education programs to enable them to participate in Federal

programs not authorized under the HEA are exempt from the requirement to have standards for the areas listed in (7), (8), (9), (10), and (12).

The Secretary notes that most accrediting agencies already have standards addressing many of these areas. However, to the extent that an agency does not have standards for all of them, there is an increased cost to that agency to develop and implement the new standards. The Secretary believes that the proposed regulations minimize the increased cost by allowing agencies maximum flexibility to set their standards to best suit their needs and the needs of the institutions or programs they accredit.

If the ultimate purpose of section 496 is to authorize the Secretary to recognize accrediting agencies that are reliable authorities as to the quality of the education or training provided by the institutions or programs they accredit, so that recognized agencies only accredit institutions or programs of demonstrated quality, then the Secretary believes that each agency's standard for a particular area listed in section 496(a)(5) must evaluate the quality of the effort the institution or program is making in that area.

Accordingly, in § 602.26 of the proposed regulations, the Secretary requires accrediting agencies to have standards assessing the 12 areas cited in section 496(a)(5) of the HEA. In § 602.26(a)(3), the Secretary exempts accrediting agencies whose accreditation enables their institutions or programs to participate only in Federal programs not authorized under the HEA from having to establish standards for the areas listed under (7), (8), (10), and (12). However, the Secretary does not exempt these agencies from the requirement to establish standards that assess success with respect to student achievement. The Secretary believes that the standards specified in § 602.26(b)(9) fulfill the requirement in section 496(a) of the HEA that the Secretary recognize accrediting agencies that meet the Secretary's standards, which must include "an appropriate measure or measures of student achievement." Furthermore, the Secretary believes that any determination by an accrediting agency that the program or institution it accredits provides quality education or training must be based, in part, on an assessment of the achievement of students enrolled in the institution or program. The Secretary notes that the exemption provided in section 496(a)(5) of the HEA for certain standards was not discussed during negotiated rulemaking because it was added as a technical

legislative amendment after the negotiations took place.

Each of the 12 required standards is discussed below. The title for each standard is based on the statutory language used in section 496(a)(5) for that standard. Unless otherwise noted, consensus was reached among negotiators as to language for each of the standards.

The proposed regulatory language in § 602.26(b) for standards addressing areas (1), (2), (3), and (5) follows the recommendations of negotiators and simply restates the law. These four provisions require that, to be recognized by the Secretary, an accrediting agency must adopt standards under which it evaluates the quality of an institution's or program's curricula; faculty; facilities, equipment, and supplies; and student support services. The Secretary has reexamined the manner in which these four standards are described in the proposed regulations and believes that it may be more useful to provide guidance as to the manner in which quality may or should be discussed under these standards than to simply restate the law. The Secretary requests comment on this matter. To assist commenters in this regard, for each of the four areas, the Secretary examined the standards of several accrediting agencies to determine how these agencies addressed quality standards for those areas and presents the results of that examination under the appropriate topic. The Secretary invites comments on those approaches and additional suggestions for focusing on quality assessment.

Section 602.26(b)(1) Curricula. The Secretary found that the standards most accrediting agencies have adopted to evaluate an institution's or program's curricula relate to the overall quality of the curricula, its appropriateness in light of an institution's or program's educational objectives and the specific degrees or certificates awarded, and the mechanisms the institution or program uses to evaluate the curricula and make modifications. The Secretary considers all of these to be elements of good practice in the assessment of an institution's or program's curricula. Accordingly, the Secretary requests specific comment as to whether the manner in which these agencies handle standards for curricula would be a useful addition to these regulations. The Secretary also invites additional comments regarding other elements that the Secretary should include in the evaluation of accrediting agencies for compliance with this requirement.

Section 602.26(b)(2) Faculty. The Secretary found that the standards most accrediting agencies have adopted to

evaluate an institution's or program's faculty relate to the overall quality of the faculty, the extent to which the institution or program relies on part-time faculty to teach students, and the effectiveness of the teaching provided by all faculty. Some agencies also include in their standards an assessment of the procedures an institution or program uses for the hiring, promotion, evaluation, and professional development of faculty, while other agencies merely examine these issues in light of whether the institution's or program's policies provide for the fair and equitable treatment of faculty. The Secretary considers all of these to be elements of good practice in the assessment of an institution's or program's faculty. Accordingly, the Secretary requests specific comment as to whether the manner in which these agencies handle standards for faculty would be a useful addition to these regulations. The Secretary also invites additional comments regarding other elements that the Secretary should include in the evaluation of accrediting agencies for compliance with this requirement.

Section 602.26(b)(3) Facilities, equipment, and supplies. The Secretary found that the standards most accrediting agencies have adopted to evaluate an institution's or program's facilities, equipment, and supplies relate to the overall quality of these support areas. Specifically, the Secretary found that most accrediting agencies assess, in light of an institution's or program's educational objectives, the adequacy and appropriateness of: libraries, learning resource centers, and other academic and instructional support facilities; the equipment and supplies that support the instructional program; and any other physical resources the institution or program uses to achieve its educational objectives. The Secretary considers all of these elements to be good practices for the assessment of facilities, equipment, and supplies. Accordingly, the Secretary requests specific comment as to whether the manner in which these agencies handle standards for this area would be a useful addition to these regulations. The Secretary also invites additional comments regarding other elements that the Secretary should include in the evaluation of accrediting agencies for compliance with this requirement.

Section 602.26(b)(4) Fiscal and administrative capacity as appropriate to the specified scale of operations. Section 496(a)(5)(D) requires an accrediting agency to have standards that address the fiscal and

administrative capacity of an institution or program in relation to its scale of operation. It is the Secretary's view that the purpose of this requirement is to enable the agency to determine whether the institution or program is fiscally and administratively sound and will likely remain so for a future period. Because the financial condition of an institution is subject to change, the Secretary proposes that an agency must make this determination each time it grants accreditation, preaccreditation, or reaccreditation. The Secretary also proposes that an agency must examine each institution's financial capacity in sufficient depth on an annual basis to determine if the financial capacity of the institution threatens the ability of the institution or program to continue to meet the agency's standards and, if so, to take appropriate follow-up action. The Secretary invites comments as to whether this follow-up action should include notifying the Secretary of the institution's financial condition.

The Secretary believes that the enhanced financial monitoring by accrediting agencies that is required by these proposed regulations will provide increased protection to students with regard to problems arising from an institution's financial instability.

Section 602.26(b)(5) *Student support services.* The Secretary found that the standards most accrediting agencies have adopted to evaluate an institution's or program's student support services relate to the overall quality and extent of the services provided and their appropriateness in light of the institution's or program's mission and the types of students it admits. The Secretary considers all of these elements to be good practices for the assessment of student support services. Accordingly, the Secretary requests specific comment as to whether the manner in which these agencies handle standards for this area would be a useful addition to these regulations. The Secretary also invites additional comments regarding other elements that the Secretary should include in the evaluation of accrediting agencies for compliance with this requirement.

Section 602.26(b)(6) *Recruiting and admission practices; and academic calendars, catalogs, publications, grading, and advertising.* Section 496(a)(5)(F) requires an accrediting agency to have standards that address an institution's or program's recruiting and admissions practices, as well as its academic calendars, catalogs, publications, grading, and advertising. The Secretary believes this statutory provision contains two different standards. One standard relates to the

appropriateness of the institution's or program's recruiting and admission practices. Under this standard, the agency must determine whether an institution's practices are reasonable in light of the institution's or program's educational mission.

The other standard relates to the institution's academic calendars, catalogs, publications, grading, and advertising. Under that standard, which is in the nature of consumer protection, the agency must evaluate whether those items are accurate, complete, and consistent with the institution's actual practice.

Section 602.26(b)(7) *Program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered.* Section 496(a)(5)(G) requires an accrediting agency to have standards that address program length and tuition and fees in relation to the subject matters taught and the objectives of the degree or credential offered. It is the Secretary's view that one of the purposes of this requirement is to eliminate certain abuses that have been discovered at institutions participating in Title IV, HEA programs.

These abusive practices fall into three main categories. One category involves accredited institutions that offer prebaccalaureate vocational programs and charge an excessive amount of tuition and fees for programs that lead to dead end or very low-paying jobs. In some cases, the tuition and fees for a short-term program to prepare students for a particular job exceeded the annual income that a person employed in that job could expect to earn.

Another category involves accredited institutions that offer prebaccalaureate vocational education programs and inflate either the clock or credit hours for the program or the length of the program without educational justification, simply to increase the amount of SFA funds these institutions may receive. The third category involves accredited institutions that offer prebaccalaureate vocational education that are simply too short to be able to provide training that has any value in the workplace.

The Secretary proposes to address the statutory requirement for standards related to program length and tuition and fees by requiring an accrediting agency to establish minimum and maximum program lengths for prebaccalaureate vocational programs. In this context, program length means both the number of clock hours or credit hours in a program and the number of weeks that a program is offered. The Secretary invites specific comments

with regard to this requirement. The topic of standards for establishing minimum and maximum program lengths was not discussed during the negotiated rulemaking sessions, and the Secretary invites comments on this topic as well.

During the negotiated rulemaking sessions, consensus was reached on various factors that should be considered when an agency establishes its standard for program length in relation to tuition and fees. These factors are listed under § 602.26(b)(7) (i), (ii), (iii), and (iv). The Secretary has reconsidered this matter and now proposes two additional factors. The first concerns any applicable Federal statutes and regulations. The Secretary does not believe the addition of a requirement for agencies to take into account applicable statutes and regulations when developing their standards goes beyond the intent of the HEA because it does not require agencies to adopt the Federal policies but simply to take them into account. The second factor concerns the relationship between tuition and fees for a prebaccalaureate vocational program and the remuneration that a graduate of that program can reasonably be expected to receive. The Secretary is concerned about this issue for this type of program because the very purpose of a prebaccalaureate vocational program is to prepare a student for gainful employment in a recognized occupation. Moreover, the Secretary is concerned that tuition and fees being charged for prebaccalaureate vocational programs may be excessive given the type of job for which a graduate of the program qualifies. Accordingly, the Secretary requests specific comment regarding standards that address tuition and fee charges for a prebaccalaureate vocational program *vis-a-vis* the remuneration that graduates of a program may receive.

The Secretary requests comments on the various factors proposed for standards that assess program length and tuition and fees. In calling for comments with regard to this standard, the Secretary wishes to remind commenters that a violation of a standard does not necessarily preclude an agency from accrediting an institution or program. The violation would, however, at least require the institution to justify its tuition and fee charges to the agency.

The Secretary acknowledges that the development of standards for this area involves very complex issues. For the purpose of stimulating discussion in this area, the Secretary offers the following possible approaches to the

development of standards. Under one approach, the standard might require that annualized tuition and fees for a program not exceed a percentage of the annualized minimum wage. Under another approach, the standard might require that annualized tuition and fees for a program not exceed a percentage of the program's graduates' average earnings for their first year of employment. Under still another approach, annualized tuition and fees for a program could not exceed a percentage of the average annualized wages, as reported by the U.S. Bureau of Labor Statistics, in occupations for which the program prepares students. In suggesting possible approaches to the establishment of standards for this area, the Secretary reminds commenters of the difficulty in obtaining employment information, including salaries and wages, from graduates of an institution for periods beyond the first year after graduation.

The Secretary is considering establishing in other regulations requirements governing program length and tuition and fees for programs that are eligible to participate in the SFA programs. Accordingly, if those regulatory requirements are established, the Secretary would consider requiring an accrediting agency to notify the Secretary if it knows that an institution's program is too long or too short under that requirement, or if it knows that an institution's tuition and fee charges violate that other requirement. The Secretary invites comments about the feasibility of adding this notification requirement or any alternative method of obtaining this information.

Finally, the Secretary notes that the requirement to establish a standard for program length and tuition and fees applies only to those accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA.

Section 602.26(b)(8) *Measures of program length in clock hours or credit hours.* Section 496(a)(5)(H) requires an accrediting agency to have standards that address measures of program length in clock or credit hours. It is the Secretary's view that the purpose of this requirement is to enable the agency to determine if an institution take into proper account, as appropriate, factors such as program objectives and content, the types and locations of instructional delivery, and the knowledge and skills necessary for students to reach competence in the field being taught when determining the length of its programs in clock or credit hours.

General agreement was reached by negotiators with regard to the substance of this standard. However, the Secretary has reconsidered this matter and now proposes an additional factor: any applicable Federal statutes and regulations. The Secretary does not believe the addition of a requirement for agencies to take into account applicable statutes and regulations when developing their standards goes beyond the HEA because it does not require agencies to adopt the Federal policies but simply to take them into account. The Secretary invites comments on this proposed addition.

To the extent that the Secretary regulates this area in other regulations governing the SFA programs, these regulations may need to be modified. Moreover, as indicated with regard to § 602.26(b)(7), if those other regulations are established, the Secretary may consider requiring an accrediting agency to notify the Secretary if it knows that an institution's measure of the number of credits hours in its programs does not satisfy that other regulatory requirement. The Secretary invites comments about the feasibility of adding this notification requirement or on alternative methods of obtaining this information.

The Secretary notes that the requirement to establish a standard for measures of program length in clock or credit hours applies only to those accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA.

Section 602.26(b)(9) *Success with respect to student achievement in relation to mission.* Section 496(a)(5)(I) of the HEA requires an accrediting agency to have standards that address success with respect to student achievement in relation to mission, including, as appropriate, consideration of course completion rates, pass rates on State licensing examinations, and job placement rates. It is the Secretary's view that standards for student achievement are the most important of all accreditation standards because the true success of an institution or program is measured by the success of its students. For institutions that offer prebaccalaureate vocational programs, the Secretary proposes to require agencies to establish minimum quantitative standards for completion rates, job placement rates, and pass rates on State licensing examinations for those programs, since gainful employment is the purpose of those programs. The Secretary proposes this additional requirement for institutions offering prebaccalaureate vocational

education programs because, as noted in the discussion under § 602.26(b)(7), these institutions have often engaged in abusive practices. The Secretary notes that the concept of minimum quantitative standards, even when restricted to prebaccalaureate vocational education, was not supported by non-Federal negotiators.

The Secretary acknowledges that there are many possible approaches to the establishment of the standards for measuring success in prebaccalaureate vocational programs, both in terms of the information collected and the minimum standard selected. For example, if an institution's students are mainly first-time, full-time students in short-term programs, agencies could use data collected by institutions under the Student Right-to-Know and Campus Security Act of 1990 for calculating completion rates. Minimum job placement rate standards might be developed using three-year moving averages, adjusted for regional unemployment rates as computed by the Bureau of Labor Statistics of the U.S. Department of Labor. Further, a job placement rate could be calculated only for those jobs in the areas for which training was offered, all jobs obtained by graduates, or a combination of the two.

The Secretary specifically invites suggestions for standards in this area. Further, the Secretary understands that developing appropriate standards in these areas is not easy and requests suggestions with regard to specific rates for the standards in these areas. The Secretary suggests as a reference point for completion and placement rates the statutory requirement, contained in section 481(e)(2) of the HEA, that, to be an eligible short-term vocational program under the SFA programs, a program must have a 70 percent completion and a 70 percent placement rate.

Section 602.26(b)(10) *Default rates in the student loan programs established under Title IV of the HEA.* Section 496(a)(5)(J) of the HEA requires an accrediting agency to have standards that address an institution's default rates in the student loan programs established under Title IV of the HEA. It is the Secretary's view that the purpose of this requirement is to enable the agency to determine if an institution is out of compliance with its accrediting standards when the institution's latest cohort default rate under the Federal Family Education Loan (FFEL) programs exceeds a certain threshold or has increased significantly over its previous rate. The Secretary proposes to require an agency to conduct a review if an institution's latest cohort default rate

equals or exceeds 25 percent. The Secretary establishes this rate as the trigger for review because that is the rate, beginning in fiscal year 1994, *i.e.* October 1, 1993, at which an institution will be disqualified from participating in the FFEL programs. An accrediting agency is free, of course, to set its trigger for review at a default rate below 25 percent.

The Secretary also is concerned that a significant change in an institution's default rate could be an indication of other serious problems that may affect the institution's compliance with an agency's standards. For this reason, the Secretary proposes to require an agency to conduct a review when the institution's latest cohort default rate increases significantly over its rate the previous year. The Secretary does not propose to define the term "significant increase" in the proposed regulations but invites comments on an appropriate definition. One possibility that the Secretary is considering is to require an agency to conduct a review when the institution's default rate increases by more than 50 percent from its previous rate, provided that previous rate exceeds 10 percent. The Secretary believes that a cohort default rate below 10 percent is not necessarily an indication that the institution may be in violation of its accrediting agency's standards. Therefore, this provision would apply only if the institution's latest cohort default rate exceeds 15 percent and has increased by more than 50 percent from its previous rate. The Secretary invites comments on this approach and other approaches that will provide guidance to agencies on what constitutes a significant increase in default rate.

The Secretary notes that the requirement to establish a standard for this area applies only to those accrediting agencies whose accreditation permits the institutions they accredit to participate in programs authorized under the HEA.

Section 602.26(b)(11) *Record of student complaints received by, or available to, an agency.* Section 496(a)(5)(K) of the HEA requires an accrediting agency to have standards that address the record of student complaints received by, or available to, an agency concerning an institution or program it accredits. It is the Secretary's view that the purpose of this requirement is to enable an agency to focus its evaluation of the institution or program on the matters that gave rise to the student complaints when the agency undertakes its next evaluation of the institution or program.

Section 602.26(b)(12) *Compliance with an institution's program*

responsibilities under Title IV of the Act. Section 496(a)(5)(L) of the HEA requires an accrediting agency to have standards that address an institution's compliance with its program responsibilities under Title IV of the Act. It is the Secretary's view that an institution's failure to comply with its Title IV responsibilities should be a factor in an accrediting agency's determination as to whether that institution should continue to be accredited by the agency. The Secretary recognizes that accrediting agencies do not have the responsibility, expertise, personnel, or time to evaluate, on a routine basis, whether the institutions they accredit are in compliance with their Title IV responsibilities. On the other hand, agencies may not ignore information provided to them regarding the lack of compliance of those institutions. Accordingly, the Secretary proposes that, in assessing an institution's compliance under this standard, the agency relies on documentation forwarded to it by the Secretary. The Secretary wishes to make it clear that this section of the proposed regulations does not require accrediting agencies to review an institution to determine whether the institution is fulfilling its responsibilities under the SFA programs, as, for example, by verifying that an institution is calculating Pell distributions properly. Rather, the Secretary expects agencies to use the information provided by the Secretary on the institution to trigger a review of the institution for compliance with agency standards if the documentation provided by the Secretary indicates a problem that is related to one or more of the agency's standards.

The Secretary notes that the requirement to establish standards for this area applies only to those accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA.

Section 602.26(b)(13) *The institution's practice of making refunds to students.* Under section 484B of the HEA, an institution participating in the SFA programs must have a fair and equitable refund policy. An institution's refund policy is judged to be fair and equitable if it provides a refund in an amount of at least the largest of the amounts provided under "(1) the requirements of applicable State law; (2) the specific refund requirements established by the institution's nationally recognized accrediting agency and approved by the Secretary; or (3) the pro rata refund calculation" described elsewhere in section 484B. To

permit an institution to satisfy the fair and equitable refund requirement using this criterion, the Secretary proposes not to recognize an accrediting agency unless the agency has a refund policy that provides for a fair and equitable refund to a student of tuition, fees, and other institutional charges. Thus, the Secretary's recognition of an agency means that the Secretary has approved that agency's refund policy. Non-Federal negotiators objected to the inclusion of this requirement in the proposed regulations on the grounds that section 496(g) of the HEA explicitly states that the Secretary may not establish standards for accrediting agencies that are not required by section 496. The Secretary believes, however, that the inclusion of a requirement for a standard addressing an institution's refund policy in the proposed regulations is necessary to comply with section 484B of the HEA.

Section 602.26(c) *Time limit on correcting deficiencies.* In § 602.26(c), the Secretary proposes that, when an institution or program fails to meet an agency standard, the agency may permit the institution or program a period, which may not exceed 18 months, during which time it must take corrective action to bring itself back into compliance with the standard. The agency is free to set the time frame for coming into compliance at less than 18 months. If the institution or program fails to bring itself into compliance during the specified period, the agency must take adverse action, unless it finds that the time frame for achieving compliance should be extended for cause. Of course, the agency may take adverse action against an institution or program, either immediately or in less than 18 months, without offering the institution or program the opportunity to take corrective action if the agency believes that the adverse action is necessary.

The Secretary believes that the 18-month time frame is necessary to ensure that institutions and programs make serious efforts to improve the quality of their offerings and to ensure that accrediting agencies take adverse actions when institutions fail to make those efforts. Accordingly, the Secretary anticipates that extensions beyond 18 months for cause will not be routinely granted. Additionally, the Secretary anticipates that for violations that are easily correctable, the appropriate period will be significantly less than 18 months.

The Secretary is considering adding to this section a requirement that an accrediting agency must take action not only if it determines that an institution

or program is not in compliance with a standard but also if it determines that an institution or program may currently meet the standard but is unlikely to be able to continue to meet the standard. The Secretary invites comments on this possible addition to the section.

Section 602.27 Required Operating Procedures

Section 496(c) of the HEA requires accrediting agencies whose accreditation enables institutions to participate in Title IV, HEA programs to take special action whenever institutions establish new branch campuses or undergo changes in ownership that result in changes in control. Accordingly, in § 602.27 of the proposed regulations, the Secretary reiterates the requirement for special action set forth in that section. For purposes of this section, the Secretary notes that the term "branch campus" includes any "additional location," which the Secretary defines to be a location that is geographically apart from the main campus, that has its own separate administrative structure, services, and facilities, and at which the institution plans to offer a complete educational program. The Secretary believes the inclusion of additional locations in this requirement is consistent with the intent of Congress. The close scrutiny of branch campuses and additional locations includes the requirement contained in sections 496(c)(2) and (3) to approve a business plan for a branch prior to its opening; to extend accreditation to the branch only after determining that it has sufficient educational, financial, operations, management, and physical resources to provide education or training consistent with the accreditation standards; and to conduct on-site reviews within six months for all new branches and all institutions that change ownership that results in a change in control.

Another requirement of section 496(c) of the HEA is that any institution participating in Title IV, HEA programs that enters into a teach-out agreement with another institution must agree to submit to its accrediting agency for approval a teach-out agreement that is consistent with applicable standards and regulations. In § 602.27(b) of the proposed regulations, the Secretary reiterates this requirement.

Section 602.28 Due Process for Institutions and Programs

Section 496(a)(6) of the HEA requires an accrediting agency seeking recognition by the Secretary to use procedures throughout its accreditation

process that satisfy due process requirements. Accordingly, in § 602.28 of the proposed regulations, the Secretary sets out this due process requirement. Specifically, in § 602.28 the Secretary requires an agency to set forth in writing all of its procedures governing its accreditation and preaccreditation processes, including its processes for the appeal of an adverse action it takes against an institution or program, to notify an institution or program in writing of any adverse action the agency takes against it, and to afford the institution or program the opportunity to appeal the adverse action. In accordance with section 496(a)(6)(D) of the HEA, in § 602.28(b)(5) the Secretary specifically requires that an agency permit an institution or program the right to representation by counsel during an appeal of an adverse action.

The Secretary acknowledges that the cost to an agency when an institution or program appeals an adverse action can be substantial. To minimize this cost, the Secretary has included in § 602.28(b)(5) a provision, suggested by non-Federal negotiators, that agencies be given the discretion to determine when an appeal may be made only in writing.

Section 602.29 Notification of Accrediting Decisions

Section 496(a)(7) of the HEA requires accrediting agencies to notify the Secretary, the appropriate State postsecondary review entities, and the public of any final adverse accrediting action regarding an institution or program. Accordingly, in § 602.29(a) of the proposed regulations, the Secretary establishes this notification requirement. The Secretary proposes an additional requirement in § 602.29(a) that is not specified in the law: that accrediting agencies notify other appropriate accrediting agencies of all final adverse actions. The Secretary believes this additional notification requirement, which was suggested after the negotiated rulemaking sessions by one of the non-Federal negotiators, is necessary because of the requirement, implied in section 496(l)(2) of the HEA, that an accrediting agency must take into account the adverse accrediting actions of other accrediting agencies in making its own accrediting decisions.

Section 496(a)(8) of the HEA requires accrediting agencies to make available to the Secretary, the appropriate State postsecondary review entity and, upon request, the public a brief statement supporting any decision to deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an

institution or program, together with the comments of the affected institution or program concerning that decision. Accordingly, in § 602.29 of the proposed regulations, the Secretary establishes this requirement. To ensure that the statement is made available in a timely fashion, the Secretary proposes to require that the statement be made available within 60 days of an agency's final decision.

The Secretary is considering adding to this section a requirement that agencies notify the Secretary prior to taking final adverse action against an institution when the information that caused the agency to take the adverse action may relate to the institution's continued participation in Title IV, HEA programs, as, for example, in the case of fraud or gross mismanagement of Federal funds. The Secretary is considering this additional notification requirement because of the length of time it often takes agencies to reach a final adverse decision, due to an institution's rights under due process, even when circumstances indicate a gross violation of agency standards. The Secretary invites comments on this additional requirement and alternative approaches to notifying the Secretary when an agency has such serious concerns about an institution that it initiates an adverse action.

Finally, the Secretary is considering adding to this section a requirement that an accrediting agency must notify the Secretary and the appropriate State postsecondary review entity of any final adverse accrediting action at the same time the agency notifies the institution of this action. The Secretary believes this addition would prevent excessive draw-down of SFA funds by an institution after it loses accreditation. The Secretary notes that, while this topic was not discussed during negotiated rulemaking, many negotiators have told Department staff that this additional requirement would not present an undue hardship to their agencies. The Secretary invites comments on this proposed additional requirement and suggestions for alternative approaches to prevent unwarranted expenditure of SFA funds by institutions that have lost accreditation.

Section 602.30 Regard for Decisions of States and Other Accrediting Agencies

Section 496(l)(2) of the HEA implies that accrediting agencies are responsible for knowing what actions other recognized accrediting agencies have taken against an institution. The Secretary addresses this issue in § 602.30 by proposing that all agencies,

including those that accredit only programs, take into account the decisions of States and other accrediting agencies when making any accreditation or preaccreditation decision involving an institution or program. The Secretary believes the inclusion of programmatic accrediting agencies in this requirement is essential to ensure that the problems that caused a programmatic accrediting agency to take adverse action against a program within an institution are promptly reviewed by the institutional accrediting agency that accredits the institution to determine if the institution is still in compliance with the latter agency's standards.

In § 602.30(a)(3) of the proposed regulations, the Secretary requires that agencies routinely share with other appropriate recognized accrediting agencies and State agencies information about any actions they have taken regarding an institution's or programs's accreditation or preaccreditation. The Secretary is considering adding to this section a requirement that agencies share information about actions they are taking or are about to take regarding an institution's or program's accreditation or preaccreditation. The Secretary invites comments on this additional requirement and alternative approaches to sharing information with the other members of the triad regarding actions either under way or planned by the agency with respect to an institution or program.

Finally, in § 602.30(b) the Secretary proposes that agencies are subject to the requirements in § 602.30(a) if they "knew, or should have known," of the actions being taken by another recognized accrediting agency or State agency. The Secretary believes that it is reasonable to expect an agency to have known of these actions if there is evidence that the other agencies have sent information concerning these actions to the agency.

Other Issues

The following discussion addresses other issues either discussed by negotiators or raised by the Secretary after the negotiations. None of the issues, however, involves a significant change from the current policies and procedures governing the accrediting agency recognition process, and thus none warrants inclusion in the previous section.

Section 602.2 Definitions

Accrediting agency. While the definition in the proposed regulations eliminates the language in the current regulations describing the type of entity that may comprise an agency, the

Secretary wishes to make clear that the legal entity that is an accrediting agency may be an association, council, commission, or corporation.

Designated Department official. While this term is not used in the current regulations, the Secretary proposes to use it in subpart B on recognition and termination procedures to describe much of what has, in fact, been the Department's practice with respect to the accrediting agency recognition process. For example, the Assistant Secretary for Postsecondary Education has, on occasion, presented the summary of the preliminary analysis of an accrediting agency to the Advisory Committee; on other occasions, the Assistant Secretary has delegated that responsibility to a member of the Assistant Secretary's staff. After the Advisory Committee meeting, the Assistant Secretary has routinely forwarded to the Secretary the Advisory Committee's recommendation on an agency's application for recognition, along with the Assistant Secretary's recommendation. Finally, the Assistant Secretary has routinely advised the Secretary on issues related to the recognition of agencies. The Secretary believes that the inclusion of the term "designated Department official" and its use throughout subpart B clarifies the longstanding involvement of individuals other than the Secretary in the accrediting agency recognition process.

Representative of the public. The Secretary wishes to make clear that under an agency's policy on conflicts of interest, a representative of the public may not participate in any accrediting decisions pertaining to an institution or program with which he or she may have any direct or indirect affiliation.

Section 602.21 Administrative and Fiscal Responsibility

Consensus was reached by negotiators regarding the provisions specified in this section for demonstrating that an accrediting agency has the necessary administrative and fiscal resources to carry out its accrediting responsibilities. However, the Secretary is concerned that the provisions contained in this section do not adequately address whether an agency's personnel and fiscal resources will continue to be adequate during any recognition period granted. The Secretary invites suggestions on how to address this concern.

Executive Order 12866

These proposed regulations have been reviewed in accordance with Executive Order 12866. An assessment of the

potential costs and benefits of the various requirements contained in the proposed regulations has been incorporated into the relevant sections of this preamble. The Secretary notes that, as these proposed regulations were subject to negotiated rulemaking, the costs and benefits of the various requirements were discussed thoroughly by negotiators. The resultant consensus reached on a particular requirement reflected agreement on the best possible approach to that requirement in terms of cost and benefit.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small number of entities that would be affected by these proposed regulations are accrediting agencies that apply for recognition by the Secretary. The regulations would not have a significant economic impact on the institutions affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose the minimum requirements needed to ensure the proper implementation of the Secretary's statutory mandate to recognize accrediting agencies.

Paperwork Reduction Act of 1980

Sections 602.4, 602.10, 602.26, and 602.27 contain information collection requirements. In addition, section 602.21(b)(7) contains specific record retention requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

These proposed regulations contain substantial information collection requirements for accrediting agencies applying for recognition by the Secretary, as well as additional requirements for recognized agencies during their recognition period. The Department needs and uses the information collected to determine whether an agency seeking recognition by the Secretary meets the requirements for recognition and whether, if the agency is recognized, it continues to operate in compliance with the requirements for recognition throughout its recognition period.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office

Building, Washington, DC 20503;
Attention: Daniel J. Chenok.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 3069, ROB-3, 7th & D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comments on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the accrediting agency recognition process.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 602

Colleges and universities, Education, Reporting and recordkeeping requirements.

[Catalog of Federal Domestic Assistance Number does not apply.]

Dated: January 14, 1994.

Richard W. Riley,
Secretary of Education.

The Secretary proposes to amend title 34 of the Code of Federal Regulations by revising part 602 to read as follows:

PART 602—SECRETARY'S PROCEDURES AND CRITERIA FOR THE RECOGNITION OF ACCREDITING AGENCIES

Subpart A—General Provisions

Sec.

- 602.1 Purpose.
- 602.2 Definitions.
- 602.3 Organization and membership.
- 602.4 Submission of information to the Secretary by recognized accrediting agencies.

Subpart B—Recognition and Termination Procedures

- 602.10 Application for recognition.
- 602.11 Preliminary review by the Secretary.

- 602.12 Review by the National Advisory Committee on Institutional Quality and Integrity.
- 602.13 Review and decision by the Secretary.
- 602.14 Limitation, suspension, or termination of recognition.
- 602.15 Requests for reconsideration of the Secretary's decisions.
- 602.16 Appeals procedures.
- 602.17 Publication of list of recognized agencies.

Subpart C—Criteria for Secretarial Recognition

- 602.20 Geographic scope of accrediting activities.
- 602.21 Administrative and fiscal responsibility.
- 602.22 Accreditation experience.
- 602.23 Application of standards.
- 602.24 Accreditation processes.
- 602.25 Additions to or substantive changes in educational programs.
- 602.26 Required accreditation standards.
- 602.27 Additional required operating procedures.
- 602.28 Due process for institutions and programs.
- 602.29 Notification of accrediting agency decisions.
- 602.30 Regard for decisions of States and other accrediting agencies.

Authority: 20 U.S.C. 1058, 1061, 1085, 1088, 1099b, 1141, 1401, 2471, and 3381, unless otherwise noted.

Subpart A—General Provisions

§ 602.1 Purpose.

(a)(1) This part establishes procedures and criteria for the Secretary's recognition of accrediting agencies. The purpose of the Secretary's recognition of agencies is to assure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities as to the quality of education or training offered by the institutions of higher education or the higher education programs they accredit.

(2) The Secretary's recognition of an accrediting agency is based on the Secretary's determination that the agency satisfies the requirements of this part.

(b) The Secretary grants recognition only to those agencies that—
(1) Accredit institutions of higher education for the purpose of enabling them to establish eligibility to participate in HEA programs; or

(2) Accredit institutions of higher education or higher education programs for the purpose of enabling them to establish eligibility to participate in other programs administered by the Department or by other Federal agencies.

(Authority: 20 U.S.C. 1099b)

§ 602.2 Definitions.

The following definitions apply to terms used in this part:

Accreditation means the status of public recognition that an accrediting agency grants to an educational institution or program that meets the agency's established qualifications and standards.

Accrediting agency or agency means a legal entity, or that part of a legal entity, that conducts accrediting activities through voluntary, non-Federal peer evaluations and makes decisions concerning the accreditation or preaccreditation status of institutions, programs, or both.

Act means the Higher Education Act of 1965, as amended.

Adverse accrediting action means the denial, withdrawal, suspension, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program, except that placing an institution or program on probation or issuing a show cause order against an institution or program is not an adverse accrediting action unless it is so defined by the accrediting agency.

Advisory Committee means the National Advisory Committee on Institutional Quality and Integrity.

Branch campus means a location of an institution of higher education that is geographically apart from and independent of the main campus of the institution. The Secretary considers a location of an institution to be independent of the main campus if the location (1) is permanent in nature; (2) offers courses in educational programs leading to a degree, certificate, or other recognized educational credential; (3) has its own faculty and administrative or supervisory organization; and (4) has its own budgetary and hiring authority.

Designated Department official means the official in the Department of Education to whom the Secretary has delegated the responsibilities indicated in this part.

Institution of higher education or institution means an educational institution that qualifies or may qualify as an eligible institution under 34 CFR part 600.

Institutional accrediting agency means an agency that accredits institutions of higher education.

Nationally recognized accrediting agency, nationally recognized agency, or recognized agency means an accrediting agency that is recognized by the Secretary under this part.

Part means part 602 of title 34 of the Code of Federal Regulations governing the Secretary's procedures and criteria

for the recognition of accrediting agencies.

Preaccreditation means the status of public recognition that an accrediting agency grants to an institution or program for a limited period of time that signifies that the agency has determined that the institution or program is progressing towards accreditation and is likely to attain accreditation within a reasonable period of time.

Prebaccalaureate vocational education means vocational education that leads to a certificate, degree, or other credential that is less than a bachelor's degree.

Program means a postsecondary educational program offered by an institution that leads to an academic or professional degree, vocational certificate, or other recognized educational credential.

Programmatic accrediting agency means an agency that accredits specific educational programs that prepare students for entry into a profession, occupation, or vocation.

Representative of the public means a person who is not (1) an employee, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that either is accredited by the agency or has applied for accreditation; or (2) a member of any trade association or membership organization related to, affiliated with, or associated with the accrediting agency.

Secretary means the Secretary of the U.S. Department of Education or any official or employee of the Department acting for the Secretary under a delegation of authority.

State means a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Teach-out agreement means a written agreement between accredited institutions that provides for the equitable treatment of students if one of those institutions stops offering an educational program before all students enrolled in that program complete the program.

Title IV, HEA program means any of the programs set forth in 34 CFR 668.1(c).

Vocational education means education or training that prepares students for gainful employment in a recognized occupation.

(Authority: 20 U.S.C. 1099b)

§ 602.3 Organization and membership.

(a) The Secretary recognizes only the accrediting agencies described in paragraph (b) of this section that—

(1) Accredite institutions of higher education or higher education programs for the purpose described in § 601.1(b); and

(2) Satisfy the criteria for Secretarial recognition contained in subpart C of this part.

(b) The accrediting agencies referred to in paragraph (a) of this section are—

(1) A State agency that—

(i) Has as a principal purpose the accrediting of institutions of higher education, higher education programs, or both; and

(ii) Has been listed by the Secretary as a nationally recognized accrediting agency on or before October 1, 1991;

(2) An accrediting agency that—

(i) Has a voluntary membership of institutions of higher education;

(ii) Has as a principal purpose the accrediting of institutions of higher education to enable them to participate in programs authorized under this Act; and

(iii) Satisfies the "separate and independent" requirements contained in paragraph (c) of this section;

(3) An accrediting agency that—

(i) Has a voluntary membership; and

(ii) Has as its principal purpose the accrediting of higher education programs, or higher education programs and institutions of higher education to enable them to participate in Federal programs not authorized under this Act; and

(4) An accrediting agency that, for purposes of determining eligibility for Title IV, HEA programs—

(i)(A) Has a voluntary membership of individuals participating in a profession; or

(B) Has as its principal purpose the accrediting of programs within institutions that are accredited by another nationally recognized accrediting agency; and

(ii)(A) Satisfies the "separate and independent" requirements contained in paragraph (c) of this section; or

(B) Obtains a waiver from the Secretary under paragraph (e) of this section of the "separate and independent" requirements contained in paragraph (c) of this section.

(c) For purposes of this section, "separate and independent" means that—

(1) The members of the agency's decision-making body—who make its accrediting decisions, establish its accreditation policies, or both—are not elected or selected by the board or chief executive officer of any related,

associated, or affiliated trade association or membership organization;

(2) At least one member of the agency's decision-making body is a representative of the public, with no less than one-seventh of the body consisting of representatives of the public;

(3) The agency has established and implemented guidelines for each member of the decision-making body to avoid conflicts of interest in making decisions;

(4) The agency's dues are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(5) The agency's budget is developed and determined by the agency without review by or consultation with any other entity or organization.

(d) The Secretary considers that any joint use of personnel, services, equipment, or facilities by an accrediting agency and a related, associated, or affiliated trade association or membership organization does not violate the provisions of paragraph (c) of this section if—

(1) The agency pays the fair market value for its proportionate share of the joint use; and

(2) The joint use does not compromise the independence and confidentiality of the accreditation process.

(e)(1) Upon request of an accrediting agency described in paragraph (b)(4) of this section, the Secretary waives the "separate and independent" requirements of this section if the agency demonstrates that—

(i) The agency has been listed by the Secretary as a nationally recognized agency on or before October 1, 1991; and

(ii) The existing relationship between the agency and the related, associated, or affiliated trade association or membership organization does not compromise the independence of the accreditation process.

(2) To demonstrate that the existing relationship between the agency and the related, associated, or affiliated trade association or membership organization does not compromise the independence of the accreditation process, the agency must show that—

(i) The related, associated, or affiliated trade association or membership organization plays no role in making or ratifying the accreditation decisions of the agency;

(ii) The agency has sufficient budget and administrative autonomy to carry out its accrediting functions; and

(iii) The agency provides to the related, associated, or affiliated trade

association or membership organization only information it makes available to the public.

(Authority: 20 U.S.C. 1099b)

§ 602.4 Submission of information to the Secretary by recognized accrediting agencies.

Each accrediting agency recognized by the Secretary shall submit to the Secretary—

(a) Reports of final accrediting actions taken by the agency with respect to the institutions and programs it accredits;

(b) A copy of any annual report prepared by the agency;

(c) A copy, updated annually, of the agency's directory of accredited institutions and programs;

(d) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if so requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(e) Upon request, information to assist the Secretary in resolving problems with any institution or program accredited by the agency, provided that the request does not conflict with the agency's policies on confidentiality with respect to its records on those institutions or programs; and

(f) Any proposed change that might alter the agency's—

(1) Scope of recognition; or

(2) Compliance with the requirements of this part.

(Authority: 20 U.S.C. 1099b)

Subpart B—Recognition and Termination Procedures

§ 602.10 Application for recognition.

(a) An accrediting agency seeking initial or renewed recognition by the Secretary as a nationally recognized accrediting agency submits a written application to the Secretary. The application for recognition consists of—

(1) A statement of the agency's requested scope of recognition;

(2) An analysis of the agency's compliance with the criteria for recognition set forth in this part; and

(3) Supporting documentation.

(b)(1) An accrediting agency's application for recognition constitutes a grant of authority to the Secretary to conduct site visits and to gain access to agency records, personnel, and facilities on an announced or unannounced basis.

(2) The Secretary conducts an unannounced site visit only, where necessary in the judgment of the Secretary, to obtain information to verify that the agency is in compliance with the requirements of this part and the information cannot be obtained or substantiated in an announced site visit.

(c) The Secretary does not make available to the public any confidential agency materials examined by Department personnel or the Secretary as part of the evaluation of an accrediting agency's application for recognition.

(Authority: 20 U.S.C. 1099b)

§ 602.11 Preliminary review by the Secretary.

(a) Upon receipt of an accrediting agency's application for recognition, the Secretary—

(1) Establishes a schedule for the review of the agency by the designated Department official, the National Advisory Committee on Institutional Quality and Integrity, and the Secretary; and

(2) Publishes a notice of the agency's application in the *Federal Register* inviting public comment on the agency's compliance with the requirements for recognition.

(b)(1) The designated Department official analyzes the accrediting agency's application to determine whether the agency satisfies the requirements of this part, taking into account all available relevant information concerning the compliance of the agency with the requirements for recognition. The analysis includes—

(i) Site visits, on an announced or unannounced basis, to the agency and, at the Secretary's discretion, representative institutions or programs it accredits;

(ii) Review of public comment and other third-party information solicited by the Secretary, as well as any other information provided to the Secretary, concerning the performance of the agency in relation to the requirements of this part; and

(iii) Review of complaints or legal actions involving the agency.

(2) The designated Department official's evaluation may also include a review of information directly related to institutions or programs accredited or preaccredited by the agency, relative to their compliance with the accrediting agency's standards, the effectiveness of the agency's standards, or the agency's application of those standards.

(c) The designated Department official—

(1) Prepares a written analysis of the accrediting agency;

(2) Sends the analysis and all supporting documentation, including all third-party comments received by the Secretary, to the agency in advance of the Advisory Committee meeting; and

(3) Specifies a time period before the Advisory Committee meeting during which the agency may provide the

designated Department official with any written comments on the analysis.

(d) The accrediting agency provides any written comments it chooses to make to the designated Department official before the expiration of the time period specified in paragraph (c)(3) of this section.

(e) The designated Department official provides the Advisory Committee with the accrediting agency's application and supporting documentation, the designated Department official's analysis of the application, all information relied upon in developing the analysis, any response by the agency to the analysis, any Department rebuttal to the agency's response, and any third-party information the Secretary receives regarding the agency.

(f) The designated Department official provides the agency with a copy of any Department rebuttal provided to the Advisory Committee under paragraph (e) of this section.

(Authority: 20 U.S.C. 1099b)

§ 602.12 Review by the National Advisory Committee on Institutional Quality and Integrity.

(a)(1) The Advisory Committee considers an accrediting agency's application at a public meeting and invites the designated Department official, the agency, and other interested parties to make oral presentations at the meeting.

(2) The designated Department official arranges for a transcript to be made of the Advisory Committee meeting.

(b) At the conclusion of the meeting, the Advisory Committee recommends that the Secretary approve or deny recognition of the accrediting agency or defer a decision on the agency's application.

(c)(1) If the Advisory Committee recommends recognition, the Advisory Committee also recommends the scope of recognition for the agency and a recognition period.

(2) If the Advisory Committee recommends recognition despite finding that the agency failed to comply with each of the requirements of this part, the Advisory Committee provides the Secretary with a detailed explanation as to why it believes the agency's failure to comply with the particular requirement(s) does not require denial or deferral.

(3) If the Advisory Committee recommends denial of recognition, the Advisory Committee specifies the reasons for the recommendation and the requirements of this part that the agency failed to meet.

(4) If the Advisory Committee recommends deferral of a decision on

the agency's application, the Advisory Committee specifies the reasons for the recommendation, the requirements of this part that it believes the agency has not met, and a recommended deferral period.

(d) After the meeting, the Advisory Committee forwards its written recommendations concerning recognition to the Secretary.

(Authority: 20 U.S.C. 1099b, 1145)

§ 602.13 Review and decision by the Secretary.

(a) The Secretary determines whether to grant national recognition to an applicant accrediting agency based on the Advisory Committee's recommendation and the full record of the agency's application, including all oral and written presentations to the Advisory Committee by the agency, the designated Department official, and interested third parties.

(b)(1) Before making a final decision, the Secretary affords both the designated Department official and the accrediting agency an opportunity to contest, in writing, the Advisory Committee's recommendation. If either the agency or the designated Department official wishes to contest the recommendation, that party shall notify the Secretary and the other party no later than 10 days after the Advisory Committee meeting.

(2) If the party contesting the Advisory Committee's recommendation wishes to make a written submission to the Secretary, the Secretary must receive that submission no later than 30 days after the Advisory Committee meeting. However, the contesting party may not submit any evidence to the Secretary that it did not submit to the Advisory Committee. The contesting party shall simultaneously provide a copy of its submission to the other party.

(3) If the noncontesting party wishes to respond in writing to the Secretary, the Secretary must receive that submission no later than 30 days after the noncontesting party receives the contesting party's submission. However, the noncontesting party may not submit any evidence to the Secretary that it did not submit to the Advisory Committee. The noncontesting party shall simultaneously provide a copy of its response to the contesting party.

(4) If the Advisory Committee's recommendation is contested, the Secretary renders a final decision after taking into account the two parties' written submissions, if any.

(c) The Secretary approves the accrediting agency for national recognition if the Secretary determines

that the agency satisfies each of the requirements contained in this part.

(d) The Secretary approves the accrediting agency for national recognition even if the agency does not satisfy each of the requirements contained in this part if the Secretary determines that the agency's effectiveness is not impaired by the noncompliance.

(e) If the Secretary approves the accrediting agency for national recognition, the Secretary defines—

(1) The scope of recognition, which may include the—

- (i) Geographic area;
- (ii) Degrees and certificates awarded;
- (iii) Types of institutions the agency may accredit;
- (iv) Types of programs the agency may accredit; and
- (v) Preaccreditation status(es), if any, that the Secretary approves for recognition; and

(2) The recognition period, which does not exceed five years.

(f)(1) If the Secretary denies recognition to the accrediting agency or grants recognition for a scope narrower than that requested by the agency, the Secretary indicates in writing the reasons for that decision.

(2) The agency described in paragraph (f)(1) of this section may request that the Secretary reconsider the decision under the provisions of § 602.15.

(g) If the Secretary defers a decision on the accrediting agency's application, the Secretary—

(1) Indicates in writing the reasons for the deferral and the deferral period; and

(2) Automatically extends any previously granted recognition period until the Secretary reaches a decision on the renewal application.

(h) If the Secretary does not reach a final decision on an accrediting agency's application for renewal of recognition before the expiration of the agency's recognition period, the Secretary automatically extends the previously granted recognition period until the Secretary reaches a decision on the renewal application.

(Authority: 20 U.S.C. 1099b)

§ 602.14 Limitation, suspension, or termination of recognition.

(a)(1) The Secretary may limit, suspend, or terminate the recognition of an accrediting agency before completion of its previously granted recognition period if the Secretary determines, after notice and opportunity for a hearing, that the agency fails or has failed to satisfy any of the requirements of this part.

(2) If the agency requests a hearing—

(i) The hearing is conducted by the Advisory Committee or by a

subcommittee of three members of the Advisory Committee, appointed by the Secretary, if the Secretary determines that a more timely hearing is necessary than can be accommodated by the schedule of the full Advisory Committee; and

(ii) The designated Department official arranges for a transcript to be made of the hearing.

(b) The designated Department official begins a limitation, suspension, or termination proceeding against an accrediting agency by sending the agency a notice that—

(1) Informs the agency of the Secretary's intent to limit, suspend, or terminate its recognition;

(2) Identifies the alleged violations of the governing regulations that constitute the basis for the action;

(3) Describes the limits to be imposed if the Secretary seeks to limit the accrediting agency;

(4) Specifies the effective date of the limitation, suspension, or termination; and

(5) Informs the agency that it may—

(i) Submit to the designated Department official a written response to the notice no later than 30 days after it receives the notice; and

(ii) Request a hearing, which shall take place in Washington, DC, before the Advisory Committee or subcommittee if the agency submits a hearing request to the designated Department official no later than 30 days after it receives the notice.

(c)(1) As part of its response to the limitation, suspension, or termination notice or its hearing request, if any, the accrediting agency shall identify the issues and facts in dispute and its position with regard to those issues and facts.

(2) After receipt of the agency's response and hearing request, if any, the designated Department official—

(i) Transmits the limitation, suspension, or termination notice and the agency's response, if any, to that notice to the Advisory Committee or subcommittee; and

(ii) Establishes the date and time of any hearing before the Advisory Committee or subcommittee.

(d)(1) Except as provided in paragraph (d)(2) of this section, if a hearing is held, the Advisory Committee or subcommittee shall allow the designated Department official, the accrediting agency, and any interested party to make an oral or written presentation. That presentation may include the introduction of written and oral evidence.

(2) If the designated Department official and the accrediting agency each

agree, the Advisory Committee or subcommittee review shall be based solely on the written materials submitted to it under paragraph (c)(2)(i) of this section.

(e)(1) After the Advisory Committee or subcommittee reviews the presentations, it shall issue an opinion in which it—

(i) Makes findings of fact based upon the evidence presented;

(ii) Recommends whether a limitation, suspension, or termination of the agency's recognition is warranted; and

(iii) Provides the reasons for that recommendation.

(2) The Advisory Committee or subcommittee shall—

(i) Transmit its written opinion to the Secretary; and

(ii) Provide a copy of its opinion to the designated Department official and the accrediting agency.

(f)(1) After receiving the Advisory Committee's recommendation, the Secretary issues a decision on whether to limit, suspend, or terminate the agency's recognition, based upon the recommendation of the Advisory Committee and the full record before the Advisory Committee.

(2) Either the accrediting agency or the designated Department official may appeal the Advisory Committee's recommendation by filing a notice of appeal with the Secretary within 10 days of receipt of the Advisory Committee's or subcommittee's recommendation. If either party files an appeal with the Secretary, that party shall simultaneously provide a copy of the notice of appeal to the other party.

(3) The party appealing the Advisory Committee's or subcommittee's recommendation has 30 days after its receipt of the recommendation to make a written submission to the Secretary challenging the recommendation. However, the appealing party may not submit any evidence that was not submitted to the Advisory Committee or subcommittee. The appealing party shall simultaneously provide a copy of the submission to the other party.

(4) The nonappealing party has 30 days from the date it receives the appealing party's submission to file a written response to the Secretary regarding the submissions of the appealing party and shall simultaneously provide the appealing party with a copy of its response. The nonappealing party may not submit any evidence that was not submitted to the Advisory Committee or subcommittee.

(5) If the Advisory Committee's or subcommittee's recommendation is appealed, the Secretary renders a final

decision after taking into account that recommendation and the parties' written submissions on appeal.

(g) If the Secretary limits, suspends, or terminates an accrediting agency's recognition during its recognition period, the agency may request that the Secretary reconsider this decision under § 602.15.

(Authority: 20 U.S.C. 1099b)

§ 602.15 Requests for reconsideration of the Secretary's decisions.

(a)(1) An accrediting agency may request a reconsideration of a Secretarial decision if the Secretary—

(i) Denies its application for recognition;

(ii) Does not grant its requested scope of recognition; or

(iii) Limits, suspends, or terminates the agency's recognition during its recognition period.

(2) The agency may request reconsideration only if the agency demonstrates that—

(i) It has new information that could not have been presented previously; and

(ii) The new information is likely to result in reversal of the Secretary's decision.

(b) To request a reconsideration, the accrediting agency shall—

(1) Notify the Secretary of its intent no later than 10 days after its receipt of the Secretary's decision; and

(2) Submit its written request for reconsideration and the reasons for that request no later than 45 days after receipt of the Secretary's decision.

(c)(1) Within 60 days after receipt of the accrediting agency's written request for reconsideration, the Secretary renders a final decision based on the information contained in the agency's request and the entire record before both the Advisory Committee or subcommittee and the Secretary.

(2) The Secretary may request the opinion of the designated Department official, the Advisory Committee, or the subcommittee before rendering a final decision.

(Authority: 20 U.S.C. 1099b)

§ 602.16 Appeals procedures.

An accrediting agency may appeal the Secretary's final decision under this part regarding the agency's recognition to the Federal courts as a final decision in accordance with applicable Federal law.

(Authority: 20 U.S.C. 1099b)

§ 602.17 Publication of list of recognized agencies.

(a) The Secretary periodically publishes in the *Federal Register* a list of recognized accrediting agencies and each agency's scope of recognition.

(b) If the Secretary denies recognition to a previously recognized accrediting agency, or limits, suspends, or terminates its recognition during a previously granted recognition period, the Secretary publishes a notice of that action in the *Federal Register* and makes available to the public, upon request, the Secretary's determination.

(Authority: 20 U.S.C. 1099b)

Subpart C—Criteria for Secretarial Recognition

§ 602.20 Geographic scope of accrediting activities.

To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that the geographical scope of its accrediting activities covers—

(a) A State, if the agency is a component of a State government;

(b) A region of the United States that includes at least three States that are contiguous or in close geographical proximity to one another; or

(c) The United States.

(Authority: 20 U.S.C. 1099b)

§ 602.21 Administrative and fiscal responsibility.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if it has, and will likely continue to have—

(1) Adequate administrative staff to—

(i) Carry out its accrediting responsibilities effectively; and

(ii) Manage its finances effectively;

(2) Competent and knowledgeable individuals, qualified by experience and training, responsible for on-site evaluation, policy-making, and decision-making regarding accreditation and preaccreditation status;

(3) Representation on its evaluation, policy, and decision-making bodies of—

(i) For an institutional accrediting agency, both academic and administrative personnel; and

(ii) For a programmatic accrediting agency, both educators and practitioners;

(4) Representation of the public on all decision-making bodies;

(5) Clear and effective controls against conflicts of interest or the appearance of conflicts of interest by the agency's

board members, commissioners, evaluation team members, consultants, administrative staff, and other agency representatives;

(6) Adequate financial resources to carry out its accrediting responsibilities, taking into account the funds required to conduct the range of accrediting activities specified in the requested scope of recognition and the income necessary to meet the anticipated costs of its activities in the future; and

(7) Complete and accurate records of—

(i) Its last two full accreditation or preaccreditation reviews of each institution or program, including self-study reports, on-site evaluation team reports, institution or program responses to on-site reports, periodic review reports, and any reports of special review conducted by the agency between regular reviews; and

(ii) Its decisions with respect to all preaccreditation and accreditation actions, including all adverse actions.

(Authority: 20 U.S.C. 1099b)

§ 602.22 Accreditation experience.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has adequate experience in accrediting institutions, programs, or both.

(b) The Secretary considers that an accrediting agency satisfies the requirements of paragraph (a) of this section if it has—

(1) Granted accreditation or preaccreditation status to institutions or programs in the geographical area for which it seeks recognition;

(2) Conducted accreditation activities covering the range of the specific degrees, certificates, and programs for which it seeks recognition, including—

(i) Granting accreditation or preaccreditation status; and

(ii) Providing technical assistance related to accreditation to institutions, programs, or both; and

(3) Policies, evaluative criteria, and procedures, and has made evaluative decisions, that are accepted throughout the United States by—

(i) Educators and educational institutions; and

(ii) Licensing bodies, practitioners, and employers in the professional or vocational fields for which the educational institutions or programs within the agency's jurisdiction prepare their students.

(Authority: 20 U.S.C. 1099b)

§ 602.23 Application of standards.

(a) To be listed by the Secretary as a nationally recognized accrediting

agency, an accrediting agency must demonstrate to the Secretary that it consistently applies and enforces written standards that ensure that the education or training offered by an institution or program is of sufficient quality to achieve, for the duration of any accreditation period granted by the agency, the stated objective for which it is offered.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if—

(1) The agency's written standards and procedures for accreditation and preaccreditation, if that latter status is offered, comply with the requirements of this part;

(2) The agency's preaccreditation standards, if offered, are appropriately related to the agency's accreditation standards, with a limit on preaccreditation status of no more than five years for any institution or program;

(3) The agency's organizations, functions, and procedures include effective controls against the inconsistent application of its criteria and standards;

(4) The agency bases its decisions regarding accreditation or preaccreditation on its published criteria; and

(5) The agency maintains a systematic program of review designed to ensure that its criteria and standards are appropriate and sufficiently comprehensive to evaluate the quality of the education or training provided by the institutions or programs it accredits and are relevant to the education or training needs of affected students.

(Authority: 20 U.S.C. 1099b)

§ 602.24 Accreditation processes.

(a)(1) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has effective mechanisms for evaluating compliance with its standards and those mechanisms cover the full range of an institution's or program's offerings, including those offerings conducted at branch campuses and additional locations.

(2) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if it meets the requirements contained in paragraphs (b) through (f) of this section.

(b)(1) In determining whether to grant initial or renewed accreditation, the accrediting agency evaluates whether an institution or program—

(i) Maintains clearly specified educational objectives consistent with

its mission and appropriate in light of the degrees or certificates it awards;

(ii) Is successful in achieving its stated objectives;

(iii) Maintains degree and certificate requirements that at least conform to commonly accepted standards; and

(iv) Complies with the agency's criteria.

(2) In reaching its determination to grant initial or renewed accreditation, the accrediting agency—

(i) Requires an in-depth self-study by each institution or program in accordance with guidance provided by the agency, with particular focus on the assessment of educational quality and the continuing improvement of educational quality;

(ii) Conducts at least one on-site review of the institution or program at which the agency obtains sufficient information to enable it to determine if the institution or program complies with the agency's criteria;

(iii) Conducts its own analyses and evaluations of the self-study and supporting documentation furnished by the institution or program, and any other appropriate information from other sources, to determine whether the institution or program complies with the agency's standards; and

(iv) Provides to the institution or program a detailed written report on its review assessing—

(A) The institution's or program's compliance with the agency's standards, including areas needing improvement; and

(B) The institution's or program's performance with respect to student achievement.

(c) In addition to the on-site visit described in paragraph (b)(2)(ii) of this section, an institutional accrediting agency whose accreditation enables the institutions it accredits to seek eligibility to participate in Title IV, HEA programs conducts—during the interval between the agency's award of accreditation or preaccreditation to the institution or program and the expiration of the accreditation or preaccreditation period—at least one unannounced on-site review at each institution that provides prebaccalaureate vocational education or training for the purpose of determining the institution's or program's continued compliance with the agency's standards.

(d) The accrediting agency—

(1) Monitors institutions or programs throughout the accreditation or preaccreditation period to ensure continuing compliance with the agency's standards or criteria; and

(2) Conducts special evaluations, site visits, or both, as necessary.

(e) The accrediting agency regularly reevaluates institutions or programs that have been granted accreditation or preaccreditation.

(Authority: 20 U.S.C. 1099b)

§ 602.25 Additions to or substantive changes in educational programs.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that, except as provided in paragraph (b) of this section, it includes within its previous grant of accreditation or preaccreditation to an institution an educational program that an institution initially offers, or substantively changes after that grant of accreditation or preaccreditation, only after—

(1) The institution notifies the accrediting agency of the addition of the new program or the substantive change in the existing program; and

(2) The accrediting agency evaluates the new or substantively changed program and determines that it does not adversely affect the institution's capacity to meet the agency's standards.

(b) An accrediting agency may extend accreditation to an educational program that an institution initially offers or substantively changes after it received the agency's last grant of accreditation or preaccreditation without specifically evaluating and approving that program if—

(1) The institution notifies the agency of that program; and

(2) The program does not provide prebaccalaureate vocational education.

(c) For purposes of this section, an accrediting agency defines a substantive change in an educational program, but the definition must include—

(1) A substantial change in the number of clock or credit hours, the number of weeks, and the content of that program;

(2) A change in the type of program offered;

(3) A change in the credential awarded for the successful completion of the program; and

(4) A change from clock hours to credit hours or *vice versa*.

(Authority: 20 U.S.C. 1099b)

§ 602.26 Required accreditation standards.

(a)(1) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that its accreditation or preaccreditation standards, or both, are sufficiently rigorous to ensure that the agency is a reliable authority as to the quality of the

education or training provided by the institutions or programs it accredits.

(2) For a programmatic accrediting agency that does not serve as an institutional accrediting agency for any of the programs it accredits, the standards must address the areas contained in paragraph (b) of this section in terms of the type and level of the program rather than in terms of the institution.

(3) If none of the institutions an agency accredits participates in any Title IV, HEA program, or if the agency only accredits programs within institutions accredited by an accrediting agency recognized by the Secretary, the accrediting agency is not required to have the standards described in paragraphs (b)(7), (b)(8), (b)(10), (b)(12), and (b)(13) of this section.

(b) In order to assure that an accrediting agency is a reliable authority as to the quality of the education or training provided by an institution or program it accredits, the agency must have standards that effectively address the quality of an institution or program in the following areas:

(1) *Curricula.*

(2) *Faculty.*

(3) *Facilities, equipment, and supplies.*

(4) *Fiscal and administrative capacity as appropriate to the specified scale of operations.* The agency shall—

(i) Have standards addressing the institution's or program's finances and management that enable it to assess an institution's or program's fiscal and administrative capacity, as appropriate to its scale of operations, for the purpose of determining whether—

(A) The institution or program appears able to continue to be an ongoing, economically viable entity; and

(B) The finances of the institution or program appear to be sufficient for it to continue to meet the agency's standards;

(ii) Make a determination under this standard—

(A) When it initially evaluates an institution or program for accreditation or preaccreditation; and

(B) When it periodically reevaluates the institution or program for accreditation or preaccreditation;

(iii) Require an institution or program to submit on an annual basis sufficient financial information, which may include the annual audited financial statement the institution or program submits to the Secretary under the Title IV, HEA programs, to enable the agency to determine if the financial capacity of the institution threatens the ability of the institution or program to continue to meet the agency's standards; and

(iv) Review, as appropriate on an annual basis, the information obtained under paragraph (b)(4)(iii) of this section to determine if there is reason to take any follow-up action based on a reduced financial capacity.

(5) *Student support services.*

(6) *Recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising.* The agency shall have standards that enable it to assess an institution's or program's recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising in terms of—

(i) Whether the institution's or program's academic calendar, catalogs, publications, and advertising are accurate, complete, and consistent with actual practice and agency standards, particularly with respect to costs, financial obligations, refunds, graduation rates, employment prospects, and other statements regarding educational effectiveness; and

(ii) Whether the institution's or program's admissions policies and standards are reasonable in light of the institution's or program's educational mission.

(7) *Program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered.* The agency shall have standards that establish minimum and maximum program lengths for prebaccalaureate vocational education programs and have other standards to enable the agency to assess an institution's or program's length of program and tuition and fee charges. In developing these standards, the agency shall take into account such factors as—

(i) Program objectives and content;

(ii) The types and locations of instructional delivery;

(iii) The knowledge and skills necessary for students to reach competence in the field being taught;

(iv) Generally accepted practices in higher education;

(v) Any applicable Federal statutes or regulations; and

(vi) For any prebaccalaureate vocational education program, consideration of the remuneration that can reasonably be expected by students who complete the program.

(8) *Measures of program length in clock hours or credit hours.* The agency shall have standards that enable it to assess an institution's or program's measurement of program length. In developing these standards, the agency shall take into account such factors as—

(i) Program goals, objectives, and content;

(ii) The types and combinations of instructional methodologies and delivery systems, including outside preparation as appropriate;

(iii) The knowledge and skills necessary for students to reach competence in the field being taught;

(iv) Generally accepted practices in higher education; and

(v) Any applicable Federal statutes or regulations.

(9) *Success with respect to student achievement in relation to mission.* The agency shall have standards that enable it to assess an institution's or program's success with respect to student achievement. Under these standards, the agency shall—

(i) Require the institution or program to document and assess the educational achievement of students in verifiable and consistent ways, such as—

(A) Student grades, grade point averages, theses, or portfolios;

(B) Results of admissions tests for graduate or professional school or other standardized tests;

(C) Transfer rates to institutions offering higher level programs; and

(D) Job placement rates, completion rates, results of licensing examinations, evaluations by employers, follow-up studies of alumni, and other recognized measures of educational outcomes;

(ii) Require the institution or program to use effectively the information obtained under paragraph (b)(9)(i) of this section to improve student achievement with respect to the degrees or certificates offered;

(iii) Systematically monitor institutional or program performance with respect to student achievement to determine if performance is consistent with both the institution's or program's mission and objectives and the agency's objective measures of performance of student achievement; and

(iv) For any prebaccalaureate vocational education program accredited by the agency or provided by an institution the agency accredits, establish minimum quantitative standards for—

(A) Completion rates;

(B) Job placement rates; and

(C) Pass rates on State licensing examinations or other appropriate measures of occupational competency.

(10) *Default rates in the student loan programs established under Title IV of the Act, based on the most recent data provided by the Secretary.* The agency shall have standards that require it to evaluate an institution to determine whether the institution is out of compliance with its accrediting standards if the institution's latest cohort default rate under the Federal

Stafford Loan or Federal Supplemental Loans for Students program—

(i) Equals or exceeds 25 percent; or
(ii) Has increased significantly in relation to its rate in the previous year.

(11) *Record of student complaints received by, or available to, the agency.* The agency shall have standards that enable it to assess an institution's or program's record of student complaints received by or made available to the agency. Under these standards, the agency shall—

(i) Review student complaints that relate to the agency's standards;

(ii) Take appropriate follow-up action with regard to those complaints;

(iii) If considered necessary by the agency, refer complainants to appropriate Federal, State, and other agencies if the complaints do not relate to the agency's standards; and

(iv) Require institutions or programs to make available to students the agency's mailing address or telephone number for complaints.

(12) *Compliance with the institution's program responsibilities under Title IV of the Act.* The agency shall have standards that require institutions to be in compliance with their responsibilities under the Title IV, HEA programs. The agency's assessment under these standards shall be based on program reviews, financial and compliance audits, audited financial statements, and any other information that the Secretary provides.

(13) *The institution's practice of making refunds to students.* The agency shall have—

(i) A refund policy, that must be approved by the Secretary, that provides for a fair and equitable refund to a student of tuition, fees, and other institutional charges; and

(ii) Standards that enable it to assess whether an institution complies with its refund policy.

(c)(1) An accrediting agency shall take appropriate action if its review of an institution or program under any standard indicates that the institution or program is not in compliance with that standard.

(2) If the agency believes that the institution or program is not in compliance with the standards, the agency shall—

(i) Take prompt adverse action against the institution or program; or

(ii) Require the institution or program to take appropriate action to bring itself into compliance, or to ensure its continued compliance, with the agency's standards within a time frame specified by the agency.

(3) The accrediting agency has sole discretion to determine the time frame

specified in paragraph (c)(2)(ii) of this section for the institution or program to bring itself into compliance with agency standards. However, except as indicated in paragraph (c)(4) of this section, the specified period may not exceed 18 months.

(4) If the institution or program does not bring itself into compliance within the specified period, the agency must take adverse action unless the agency extends the period for achieving compliance for good cause.

(d) An accrediting agency shall have a reasonable basis for determining that the information it relies on for making the assessments described in paragraphs (b) and (c) of this section is accurate.

(e) An accrediting agency that has established and applies the standards in paragraph (b) of this section may establish any additional accreditation standards as it deems appropriate.

(Authority: 20 U.S.C. 1091, 1099b)

§ 602.27 Additional required operating procedures.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it satisfies the procedural requirements contained in other provisions of this part and the additional requirements contained in paragraphs (b) through (h) of this section.

(b) If the accrediting agency accredits institutions and that accreditation enables those institutions to seek eligibility to participate in Title IV, HEA programs—

(1) The agency requires the institution to—

(i) Notify the agency if the institution plans to establish a branch campus or an additional location; and

(ii) Submit a business plan described in paragraph (b)(2) of this section if the institution plans to operate a branch campus or additional location—

(A) That is geographically apart from the main campus;

(B) That has its own separate administrative structure, services, and facilities; and

(C) At which the institution plans to offer a complete educational program;

(2) The business plan that an institution submits under paragraph (b)(1)(ii) of this section must contain a description of—

(i) The educational program to be offered at the branch campus or location;

(ii) The projected revenues and expenditures and cash flow at the branch campus or location; and

(iii) The operation, management, and physical resources at the branch campus or location;

(3) The agency extends accreditation to the branch campus or additional location only after evaluating the business plan and taking other necessary actions to permit the agency to determine that the branch campus or additional location has sufficient educational, financial, operational, management, and physical resources to satisfy the accrediting agency's standards for accreditation;

(4) The agency undertakes a site visit of the branch campus or additional location as soon as practicable, but no later than six months after the establishment of that branch campus or additional location;

(5) The agency undertakes a site visit of an institution that has undergone a change of ownership that resulted in a change of control as soon as practicable, but no later than six months after the change of ownership; and

(6) The agency requires any institution it accredits that enters into a teach-out agreement with another institution to submit to the accrediting agency for approval a teach-out agreement that is consistent with applicable standards and regulations.

(c) The accrediting agency maintains and makes publicly available written materials describing—

(1) Each type of accreditation and preaccreditation granted by the agency;

(2) Its procedures for applying for accreditation or preaccreditation;

(3) The criteria and procedures used by the agency for determining whether to grant, reaffirm, reinstate, deny, restrict, revoke, or take any other action related to each type of accreditation and preaccreditation that the agency grants;

(4) The names, academic and professional qualifications, and relevant employment and organizational affiliations of the members of the agency's policy and decisionmaking bodies as well as the agency's principal administrative staff; and

(5) The institutions or programs that the agency currently accredits or preaccredits and the date when the agency will review or reconsider the accreditation or preaccreditation of each institution or program.

(d) In accordance with agency policy, the accrediting agency publishes the year when an institution or program subject to its jurisdiction is being considered for accreditation or preaccreditation and provides an opportunity for public comment concerning the institution's or program's qualifications for accreditation or preaccreditation.

(e) The accrediting agency provides advance public notice of proposed new or revised criteria, giving interested parties adequate opportunity to comment on these proposals prior to their adoption.

(f) The accrediting agency—

(1) Reviews any complaint against an accredited institution or program, or the agency itself, that is related to the agency's standards, criteria, or procedures; and

(2) Resolves the complaint in a timely, fair, and equitable manner.

(g) The accrediting agency ensures that if an institution or program elects to make a public disclosure of its accreditation or preaccreditation status granted by the agency, the institution or program discloses that status accurately, including the specific academic or instructional programs covered by that status.

(h) The accrediting agency provides for the public correction of incorrect or misleading information about—

(1) The accreditation status of an accredited or preaccredited institution or program;

(2) The contents of reports of site team visitors; and

(3) The agency's accrediting actions.

(Authority: 20 U.S.C. 1099b)

§ 602.28 Due process for institutions and programs.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that the procedures it uses throughout the accrediting process satisfy due process requirements.

(b) The Secretary considers that an accrediting agency's procedures satisfy due process requirements if—

(1) The agency sets forth in writing its procedures governing its accreditation or preaccreditation processes;

(2) The agency's procedures afford an institution or program a reasonable period of time to comply with agency requests for information and documents;

(3) The agency notifies the institution or program in writing of any adverse accrediting action;

(4) The agency's notice describes with particularity the basis for any adverse accrediting action;

(5) The agency permits the institution or program the opportunity to appeal an adverse accrediting action, and the right to representation by counsel during an appeal, except that the agency, at its sole discretion, may limit the appeal to a written appeal; and

(6) The agency notifies the applicant in writing of the result of the appeal and the basis for that result.

(Authority: 20 U.S.C. 1099b)

§ 602.29 Notification of accrediting agency decisions.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that its written policies, procedures, and practices require it to notify the Secretary, the appropriate State postsecondary review entity, the appropriate accrediting agencies, and the public of the following types of decisions, no later than 30 days after a decision is made:

(1) A decision by the agency to award initial accreditation or preaccreditation to an institution or program.

(2) A final decision by the agency to—

(i) Deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an institution or program; or

(ii) Take other adverse action against an institution or program.

(3) A decision by the agency to place an institution or program on probation.

(4) A decision by an accredited institution or program to withdraw voluntarily from accreditation or formal preaccreditation status.

(5) A decision by an accredited institution or program to let its accreditation or preaccreditation lapse.

(b) No later than 60 days after a final decision, the accrediting agency makes available to the Secretary, the appropriate State postsecondary review entity, and the public upon request, a brief statement supporting the agency's determination to deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an institution or program and the comments of the affected institution or program with regard to that decision.

(Authority: 20 U.S.C. 1099b)

§ 602.30 Regard for decisions of States and other accrediting agencies.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that—

(1) If the accrediting agency accredits institutions—

(i) The agency accredits only those institutions that are legally authorized under applicable State law to provide a program of education beyond the secondary level;

(ii) The agency does not renew, under the conditions described in paragraph (b) of this section, the accreditation or preaccreditation of an institution during a period in which the institution—

(A) Is the subject of an interim action by a recognized institutional accrediting

agency potentially leading to the suspension, revocation, or termination of accreditation or preaccreditation or by a State agency potentially leading to the suspension, revocation, or termination of the institution's legal authority to provide postsecondary education; or

(B) Has been notified of the loss of accreditation, or the suspension, revocation, or termination by the State of the institution's legal authority to provide postsecondary education, and the due process procedures required by the action have not been completed;

(iii) In considering whether to grant initial accreditation or preaccreditation to an institution, the agency takes into account actions by—

(A) Recognized institutional accrediting agencies that have denied accreditation or preaccreditation to the institution, placed the institution on public probationary status, or revoked the accreditation or preaccreditation of the institution; and

(B) A State agency that has suspended, revoked, or terminated the institution's legal authority to provide postsecondary education; and

(iv) If the agency grants accreditation or preaccreditation to an institution notwithstanding the actions described in paragraph (a)(1)(ii) or (a)(1)(iii) of this section, the agency shall provide to the Secretary a thorough explanation, consistent with its accreditation standards, why the previous action by a recognized institutional accrediting agency or the State does not preclude the agency's grant of accreditation or preaccreditation; and

(v) If a recognized institutional accrediting agency takes an adverse action with respect to a dually-accredited institution or places the institution on public probationary status, or if a programmatic accrediting agency takes an adverse action with respect to a program offered by the institution or places the program on public probation for reasons associated with the overall institution rather than the specific program, the agency shall promptly review its accreditation or preaccreditation of the institution to determine if it should also take adverse action against the institution.

(2) If the accrediting agency accredits programs—

(i) The agency does not renew, under the conditions described in paragraph (b) of this section, the accreditation or preaccreditation status of a program during any period in which the institution offering the program—

(A) Is the subject of an interim action by a recognized institutional accrediting agency potentially leading to the

suspension, revocation, or termination of accreditation or preaccreditation or by a State agency potentially leading to the suspension, revocation, or termination of the institution's legal authority to provide postsecondary education; or

(B) Has been notified of the loss of accreditation, or the suspension, revocation, or termination by the State of the institution's legal authority to provide postsecondary education, and the due process procedures required by the action have not been completed;

(ii) In considering whether to grant initial accreditation or preaccreditation to a program, the agency takes into account actions by—

(A) Recognized institutional accrediting agencies that have denied accreditation or preaccreditation to the institution offering the program, placed the institution on public probationary status, or revoked the accreditation or preaccreditation of the institution; and

(B) A State agency that has suspended, revoked, or terminated the institution's legal authority to provide postsecondary education;

(iii) If the agency grants accreditation or preaccreditation to a program notwithstanding the actions described in paragraph (a)(2)(ii) of this section, the agency provides to the Secretary a thorough explanation, consistent with its accreditation standards, why the previous action by a recognized institutional accrediting agency or the State does not preclude the agency's grant of accreditation or preaccreditation; and

(iv) If a recognized institutional accrediting agency takes adverse action with respect to the institution offering the program or places the institution on public probationary status, the agency promptly reviews its accreditation or preaccreditation of the program to determine if it should take adverse action against the program.

(3) The agency routinely shares information with other appropriate recognized accrediting agencies and State agencies information about the accreditation or preaccreditation status of an institution or program and any actions it has taken regarding the institution's or program's accreditation or preaccreditation.

(b) An accrediting agency is subject to the requirements contained in paragraph (a) of this section if the accrediting agency knew, or should have known, of the actions being taken by another recognized accrediting agency or State agency.

(Authority: 20 U.S.C. 1099b)

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix A to Preamble—Major Issues Discussed at the Regional Meetings

The Department convened four regional meetings in September 1992 to obtain public involvement in the development of regulations to implement Title IV, part H, subpart 2 of the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1992, Public Law 102-325. This subpart describes the procedures and criteria to be used for the Secretary's recognition of accrediting agencies.

The Department invited individuals and representatives of groups involved in student financial assistance programs to the four regional meetings. At each meeting, the Department provided for a comprehensive discussion and exchange of information regarding the implementation of subpart 2 by providing participants with an issue paper that raised issues and questions with regard to the statutory provisions included in subpart 2. The following is a summary of the information provided to the Department by participants at the regional meetings. The section of the proposed regulations that is the subject of the information is provided as a reference.

Separate and independent requirement—§ 602.3. Participants in the regional meetings suggested that, in order for an accrediting agency to obtain a waiver of the requirement that it be separate from and independent of, both administratively and financially, any related, associated, affiliated, trade association or membership organization, an agency should have to demonstrate that (a) its parent body has no role in making or ratifying its accrediting decisions, (b) it has sufficient budget and administrative autonomy to carry out its required accrediting responsibilities, and (c) information obtained in the course of its accrediting process is not made available to the parent body unless it is public information.

Unannounced visits by the Secretary—§ 602.10. Participants discussed the conditions under which an unannounced visit to either an accrediting agency or an institution or program that it accredits, as part of the Secretary's comprehensive review and evaluation of the agency, was appropriate and suggested that such a visit would be appropriate only if (a) the Secretary had evidence of the agency's non-compliance with the statute or Departmental regulations and (b) an unannounced site visit would assist in investigating the non-compliance.

Review by the National Advisory Committee on Institutional Quality and Integrity—§ 602.12. Participants discussed the role of the National Advisory Committee on Institutional Quality and Integrity in reviewing the applications of accrediting agencies seeking recognition by the Secretary and suggested that an agency should have an opportunity to appeal the Advisory Committee's recommendation before the Secretary reaches a final decision.

Limitation, suspension, or termination of recognition—§ 602.14. Participants discussed the process the Secretary should use in determining whether to limit, suspend, or terminate an accrediting agency's recognition if the Secretary determines, after notice and opportunity for a hearing, that the agency has failed to satisfy one or more of the requirements for recognition. They suggested that the proposed regulations should afford the agency due process by providing (a) written notice to the agency, (b) opportunity for the agency to respond in writing, (c) public review by the Advisory Committee, (d) a written decision by the Advisory Committee, and (e) an appeal to the Secretary.

Ability and experience—§ 602.21–§ 602.22. Participants discussed what standards the Secretary should use to determine whether an accrediting agency demonstrates sufficient ability and experience in operating as an accrediting agency. Most favored retention of the language contained in the current regulations on these issues, but a minority expressed concern that these requirements placed undue burden on new agencies seeking initial recognition.

Unannounced site visits by accrediting agencies—§ 602.24. Participants discussed whether the proposed regulations should contain

specific guidance on how and when accrediting agencies were to conduct unannounced site visits to institutions that offer vocational education and training and also what institutions were to be visited. They were in agreement that the agency should have discretion to decide how and when the visits took place; they were divided on the definition of institutions that offer vocational education, so they were divided on what institutions should be visited.

Required accreditation standards—§ 602.26. Participants discussed the standards that accrediting agencies must have for 13 specific areas. They felt that programmatic accrediting agencies and those agencies that do not accredit for purposes of Title IV should be exempt from the standards that address default rates, institutional compliance with its program responsibilities under Title IV, and refund policies. Their comments on specific standards were as follows:

Program length and tuition and fees—§ 602.26(b)(7). Participants felt that accrediting agencies should assess these in relation to the subject matter taught and the objectives of the degrees or credentials offered. They also felt that the proposed regulations should protect agencies against lawsuits alleging violation of anti-trust laws.

Measures of program length in clock hours or credit hours—§ 602.26(b)(8). Participants felt that accrediting agencies should be expected to evaluate program length at non-degree granting institutions for consistency with the time required to develop the knowledge base and skills necessary for entry level to the vocation for which the students are being prepared. In the case of degree-granting institutions, participants felt that agencies should evaluate program length for consistency with usual practice in higher education.

Success with respect to student achievement—§ 602.26(b)(9). Participants felt that accrediting agencies should be required to consider completion rates, job placement rates, and State licensing examination pass rates for institutions or programs that purport to train individuals for occupations, vocations, or professions. Most participants felt that agencies should be given the flexibility to establish standards for these areas, but a minority felt that the proposed regulations should contain specific requirements.

Default rates—§ 602.26(b)(10). Most participants felt that accrediting agencies should review schools for compliance with agency standards if their default rate exceeded a certain rate, but some felt that agencies should have to remove accreditation if the default rate exceeded a certain value.

Due process for institutions and programs—§ 602.28. Participants felt that accrediting agencies should be expected to adhere to principles of fundamental procedural fairness in dealing with institutions or programs. They also felt that any opportunity for a hearing that an agency might provide did not necessarily imply a personal appearance by representatives of the institution or program.

Implementation of the regulations. Participants felt that accrediting agencies should have 8–12 months from the effective date of the regulations to come into compliance.

Preamble. Participants felt that a preamble should be included to establish the context for the interpretation of the regulations.

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**Monday
January 24, 1994**

Part III

**Department of
Education**

34 CFR Part 667

**State Postsecondary Review Program;
Proposed Rule**

Federal Register

DEPARTMENT OF EDUCATION**34 CFR Part 667**

RIN: 1840-AB89

State Postsecondary Review Program

AGENCY: Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes regulations to implement the State Postsecondary Review Program (SPRP) authorized under title IV, part H, subpart 1 of the Higher Education Act of 1965, as amended (HEA). Under the SPRP, the Secretary enters into an agreement with a State in which the State designates a postsecondary review entity (SPRE) that is responsible for conducting or coordinating reviews of institutions of higher education referred to the State by the Secretary under specific statutory provisions. The purpose of the reviews is to determine whether those institutions should continue to participate in the Title IV, HEA programs. The SPRE reviews institutions on the basis of standards developed in consultation with institutions located in the State. The Secretary reimburses SPREs for costs they incur under the SPRP.

DATES: Comments must be received on or before March 21, 1994.

ADDRESSES: All comments concerning these proposed regulations should be addressed to John Kolotos, U.S. Department of Education, 400 Maryland Avenue, SW., room 4318, ROB-3, Washington, DC 20202-5244.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: John Kolotos. Telephone: (202) 708-7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: In order to approve a postsecondary education institution to participate in the student financial assistance programs authorized under Title IV of the HEA (Title IV, HEA programs) and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an "institution of higher education." Under the HEA and other Federal statutes, one element of that definition requires an eligible

institution of higher education to be accredited or preaccredited by an accrediting agency recognized by the Secretary as a reliable authority as to the quality of the education or training provided by the institution. Another element requires an eligible institution to be legally authorized to provide an educational program beyond the secondary level in the State in which it is located. Thus, the statutory definition of an institution of higher education provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to the Title IV, HEA programs is opened to only those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as "the triad." While the concept of a triad of entities responsible for gatekeeping has had a long history, the triad has not always worked as effectively as it should to ensure educational quality, nor has it served as an effective deterrent to abuse by institutions participating in the Title IV, HEA programs. For several years, certain institutions participating in the Title IV, HEA programs have failed to provide students with education or training of an acceptable level of quality; they have also failed to treat students fairly. In addition, they have failed to meet acceptable standards of financial responsibility and administrative capability and to adequately protect Title IV, HEA program funds entrusted to them. The institutions that have engaged in these abusive practices are not restricted to a particular sector of higher education. Rather, the abuses have been found in all types of institutions participating in the Title IV, HEA programs, including those in the private non-profit and public sectors of higher education as well as those in the proprietary sector.

At the same time, gatekeeping functions have not been carried out effectively. For example, some accrediting agencies have not taken sufficient care to ensure the quality of the education or training provided by the institutions or programs they accredit or to protect student interests when they accredit particular institutions or programs. Moreover, some States have also not taken sufficient care to ensure the quality of the education or training provided by the institutions they authorize or license to operate in the State or to protect student interests. Finally, the Federal

government's management of its responsibilities to determine eligibility and to certify institutions to participate in the Title IV, HEA programs has not always been adequate to prevent abusive practices at institutions that participate in those programs.

Consequently, in the Higher Education Amendments of 1992, Public Law 102-325, Congress amended the HEA to provide for a new part H of Title IV entitled "Program Integrity Triad." Under that part, States and accrediting agencies are required to assume major new oversight responsibilities, and States, accrediting associations, and the Secretary are linked to create a stronger and more coordinated evaluation of institutions that participate or wish to participate in the Title IV, HEA programs. The Secretary believes that the most appropriate approach to this coordinated evaluation of institutions by the three components of the triad is a complementary one with each component focusing its evaluation on its obligations within the context of the HEA. Thus, the focus for accrediting agencies is the quality of education or training provided by the institutions or programs they accredit. For States, which already had responsibility for determining that institutions have the legal authority to operate within the State, the HEA added a new focus: reviewing institutions that trigger certain statutory review criteria. The focus of the Secretary's evaluation of institutions is the administrative and financial capacity of those institutions to participate in the Title IV, HEA programs.

The statute allocates legal responsibility among the entities that compose the program integrity triad. While specific statutory responsibilities for the three triad entities may overlap, when viewed as a whole the triad brings together in a coordinated fashion three different but very important aspects of institutional review. Within this statutory scheme, the Secretary has sought to assure that the gatekeeping system operates as efficiently as possible, with maximum integration among the three triad entities and without unnecessary burden on postsecondary institutions. In order to assist the Secretary in designing a final regulation that achieve these goals, the Secretary specifically requests comment on the following questions:

(1) In several areas, the statute specifically requires each triad entity to evaluate an institution under the same or similar standards. For example, a SPRE and an accrediting agency may establish different standards for evaluating the financial responsibility of

an institution or for evaluating the success of an institution's educational program. Thus, a reviewed institution would need to satisfy the SPRE's and the accrediting agency's standards even though those standards address the same areas. How should final regulations be structured to both reduce the burden on institutions and enable the triad entities to carry out effectively their statutory functions?

(2) Should the final regulations be more explicit in identifying levels, characteristics, or definitions for any of the assessment or review criteria that a triad entity is expected to consider in its evaluation of an institution?

Subpart 1 of part H creates a new program, the State Postsecondary Review Program, or SPRP, under which State oversight of institutions participating in the Title IV, HEA programs is strengthened. Subpart 2 of part H establishes procedures and criteria under which the Secretary recognizes an accrediting agency as a reliable authority as to the quality of the education or training offered by institutions that the agency accredits. Lastly, Subpart 3 specifies the procedures the Secretary uses to determine whether an institution meets the eligibility requirements and has the administrative capacity and financial responsibility to administer the Title IV, HEA programs.

Along with this Notice of Proposed Rulemaking, the Secretary publishes in the *Federal Register* the NPRM to implement the accrediting agency provisions in Subpart 2 of part H of the HEA. This provides interested parties the opportunity to comment on the SPRP and accreditation NPRMs in a coordinated way. The Secretary also intends to publish in the *Federal Register* a NPRM implementing subpart 3 of part H of the HEA before the date the proposed regulations for Subparts 1 and 2 of part H of the HEA become final regulations.

Under the SPRP, each State designates a single SPRE that reviews institutions participating in the Title IV, HEA programs that are referred to the State for review by the Secretary under specific statutory provisions.

The SPRE reviews referred institutions using standards that it must develop in consultation with institutions located in the State. Areas that those standards must cover are also set forth in specific statutory provisions. Before a SPRE may review an institution under those standards, the standards must be evaluated by the Secretary and not disapproved by the Secretary.

If a SPRE finds that an institution it reviews does not satisfy the State's

review standards, the SPRE may require the institution to take prompt actions to bring itself into compliance with the State's standards, or the SPRE may determine that the institution should no longer participate in the Title IV, HEA programs. The Secretary recognizes that, in the former case, an institution may have cause for not meeting the State's review standards. Therefore, the Secretary proposes that SPREs provide the institution the opportunity to present compelling evidence that demonstrates that its failure to meet the State's review standards does not warrant any further action by the SPRE.

Where the SPRE determines that an institution should no longer participate in the Title IV, HEA programs, the SPRE notifies the Secretary of that determination; and, as required under section 494C(h) of the HEA, the Secretary immediately terminates the institution's participation in the Title IV, HEA programs.

In implementing their role under the State Postsecondary Review Program, the Secretary expects States to develop rigorous educational, administrative, and financial review standards and to conduct thorough, impartial reviews of referred institutions under those standards. Therefore, the Secretary anticipates that SPRE reviews will lead to increases in the quality of education and training provided by institutions that comply with or ascribe to the State's review standards. The Secretary also anticipates that, through reviews of referred institutions, SPREs will help to reduce fraud, waste, and abuse in the Title IV, HEA programs by taking actions to effect the termination of institutions that (1) fail substantially to meet the State's review standards, and are recalcitrant in taking actions to come into compliance with those standards, or (2) are involved in fraudulent practices.

These proposed regulations were subject to the negotiated rulemaking process in accordance with section 492 of the HEA. Under the negotiated rulemaking process, the Secretary convened four regional meetings in September 1992 to obtain public involvement in the development of these proposed regulations. The meetings were held in San Francisco, Atlanta, New York, and Kansas City. Before convening the meetings, the Secretary held a meeting in Washington, DC in August 1992 to invite comments from interested parties as to the key issues that should be addressed at the regional meetings. At the four regional meetings, the Secretary provided attendees with a list of issues that needed to be addressed in these

proposed regulations. A summary of the responses of the attendees is contained in Appendix A to these proposed regulations.

Individuals and groups who attended the regional meetings nominated individuals to participate in the negotiated rulemaking process. The Secretary selected negotiators from the list of nominees to reflect all the groups that are involved in the Title IV, HEA programs. With regard to these proposed regulations, the Secretary chose negotiators who reflected the diversity of State higher education authorities, the interests of accrediting bodies, national organizations of student financial aid administrators, institutions of higher education, and students.

In accordance with section 492(b) of the HEA, the Secretary prepared draft proposed regulations and negotiated provisions of the draft with the negotiators. Two negotiating sessions were held: one in April 1993 and one in June 1993. During the second session, the negotiators elected not to reach consensus on any of the provisions included in this notice of proposed rulemaking until they had an opportunity to review all the proposed regulations implementing the Program Integrity Triad. On September 20, 1993, the Secretary convened a meeting and distributed to the negotiators the proposed regulations for each part of the Program Integrity Triad. The negotiators who attended this meeting could not reach consensus on the provisions included in this proposed regulation. However, several negotiators submitted written comments on the draft regulations, and many of those comments were incorporated in this notice of proposed rulemaking.

Provisions Proposed by the Regulations

The following discussion reflects the proposed provisions governing the State Postsecondary Review Program. The provisions are discussed in the order in which they appear in the proposed regulations. If a provision applies to more than one section or is included in more than one section, it is discussed the first time it appears with an appropriate cross-reference to its other appearances. In addition, each section of the proposed provisions references or contains a description of the applicable statutory requirements.

In developing these provisions, the Secretary has regulated narrowly to the statute, except where the Secretary was required by the statute to promulgate specific regulations or where the Secretary determined that regulations were required to implement the statute. In this regard, the Secretary requests

respondents to comment only on provisions where the Secretary has made a regulatory proposal that interprets or implements the statute, rather than on provisions that are statutorily required and cannot be changed by the Secretary.

Section 667.1 Scope and Purpose.

The purpose of the State Postsecondary Review Program is to strengthen State oversight of institutions participating in the title IV, HEA programs through the development of State standards for those institutions, and State review of referred institutions using those standards. States will be reimbursed by the Secretary for developing these standards and conducting these reviews. However, a State will not be required to incur any cost or carry out any activity if the State will not be reimbursed for that cost or activity.

Several negotiators were concerned that SPREs had the authority under the SPRP to select any institution for review. Reviews by a SPRE are limited to those institutions that currently participate in the title IV, HEA programs that the Secretary or a State identify as meeting one or more of the review criteria in section 494C(b) of the HEA, and those institutions a State has reason to believe are engaged in fraudulent practices. As provided in section 494C(a) of the HEA, a State must request approval from the Secretary before it may conduct a review of an institution the State determines either meets a statutory referral criterion or is engaged in fraudulent practices. If the Secretary approves the State's request or does not disapprove that request within 21 days, the SPRE may conduct a review of that institution under this part.

Although the standards that a State develops will be used for the purpose of reviewing referred institutions under this program, nothing in this part or in the statute authorizing the SPRP, title IV, part H, subpart 1 of the HEA, precludes a State from using these developed standards for determining whether to grant a license to or otherwise authorize an institution to provide postsecondary education in the State. However, if a State reviews nonreferred institutions under the standards developed for the SPRP, reviews of those institutions will not be reimbursed. Moreover, the State may not take an action against nonreferred institutions under the SPRP.

Section 667.2 Definitions.

Education and general expenditures. The proposed definition of this term was copied from the statutory definition

set forth in section 312(a) of part A of title III of the HEA. Part A of title III authorizes the Strengthening Institutions Program.

Professional program. The definition of a professional program applies directly to the review standards described in sections 494C(d)(8)(A) and (14)(C) of the HEA and §§ 667.21(11)(1) and (18)(iii), respectively. The Secretary proposed to define a "professional program" as an undergraduate or graduate educational program that prepares individuals for an occupation, if that occupation—

(1) Is listed in a Federal educational program classification manual;

(2) Requires at least an associate degree to qualify for entry;

(3) Involves the independent practice or application of a defined or organized body of competencies that is unique to the occupation; and

(4) Is formally recognized and regulated under a national or State licensure, accreditation, or permit system.

Several negotiators argued that many educational programs that would satisfy this proposed definition of a "professional program" would also satisfy the proposed definition of a "vocational program". Those negotiators believed that, for purposes of developing standards under the SPRP, there should be a clear distinction between the classification of these programs.

Vocational program. The definition of "vocational program" applies directly to two review standards a State must develop under section 494C(d) of the HEA and § 667.21 of these regulations. Under the first standard, described in section 494C(d)(7) of the HEA and repeated in § 667.21(a)(10), if an institution offers a program that is designed to prepare students for gainful employment, the State must develop a standard to determine whether the tuition and fees charged for that program by the institution are reasonable given the amount of money that a student who successfully completes that program may reasonably be expected to earn. Under the second review standard, described in section 494C(d)(14)(C) of the HEA and repeated in § 667.21(a)(18)(iii), if an institution offers vocational or professional programs, the State must develop standards to determine if those programs are successful as measured, in part, by the placement rate of the graduates of those programs.

During negotiated rulemaking, the Secretary proposed to define the term "vocational program" based on the statutory provision included in the

definition of various types of eligible institutions of higher education. Thus, the Secretary proposed to define a vocational program as an "undergraduate educational program that prepares students for gainful employment in a recognized occupation." (See, for example, section 481(b)(1) of the HEA for a "proprietary institution of higher education"; section 481(c)(1) for a "postsecondary vocational institution"; and the second sentence of section 1201(a) of the HEA for a "public and private nonprofit institution of higher education.")

Several negotiators believed this proposed definition was too vague and were concerned that it could be interpreted to include all postsecondary undergraduate programs. Those negotiators contended that such a broad interpretation, if applied to the review standards discussed above, would cause unnecessary burden on all institutions, and argued for a more narrow definition of a vocational program.

Some negotiators proposed that the term "vocational program" encompass only those educational programs below the baccalaureate degree level that are not classified as "professional programs". Other negotiators suggested that the term "vocational program" be limited further to apply only to nondegree vocational educational programs offered by institutions whose primary purpose is to prepare students for employment.

The Secretary agrees that the proposed definition is too broad and thus, in § 667.2, proposes to define the term "vocational program" as "an educational program below the baccalaureate degree level, that is not classified as a professional program, that prepares students for gainful employment in a recognized occupation."

The Secretary acknowledges that the definition of "vocational program" in these proposed regulations differs from the definition of "vocational education" as that term is defined in the proposed regulations for the Secretary's Procedures and Criteria for the Recognition or Accrediting Agencies ("education or training that prepares students for gainful employment in a recognized occupation"). The Secretary requests specific comment on whether the same definition should be used in both regulations and, if so, which definition should be used.

The Secretary particularly invites public comments on the definitions of professional and vocational programs.

Section 667.3 State agreement

Section 494 of the HEA authorizes the Secretary to enter into an agreement with each State to carry out the purposes of this part. As provided in sections 494A(b) and 494C of the HEA, the agreement between each State and the Secretary must contain the following elements—

(1) A designation of a single SPRE which represents all entities in the State that are responsible for—

(A) granting State authorization to each institution of higher education in the State for the purposes of this title; and

(B) ensuring that each institution of higher education in the State remains in compliance with the standards developed pursuant to section 494C of the HEA (these provisions are discussed below in greater detail);

(2) Assurances that the SPRE has the authority under State law to make agreements between the State and the Federal Government;

(3) Assurances that the SPRE will review institutions reported to the State by the Secretary under section 494C(a) of the HEA (referred institutions) for the purpose of determining whether those institutions should participate in the Title IV, HEA programs on a schedule to coincide with the dates set by the Secretary to certify or recertify those institutions as provided in sections 481 and 498 of the HEA;

(4) Assurances that the SPRE will perform the functions authorized under this part and keep such records and provide such information as may be requested for financial and compliance audits and program evaluation, consistent with the responsibilities of the Secretary;

(5) A description of the relationship between the SPRE and the State approving agency for Veterans Affairs, the State guaranty agency under the FFEL programs, and the State agency responsible for administering the SSIG program;

(6) Provisions for SPRE contracts. The agreement must provide for the contracts the SPRE enters into with nationally recognized accrediting agencies or peer review systems as required under section 494C(d)(15) of the HEA, and the contracts the SPRE enters into with private agencies, accrediting agencies, or peer review systems for assistance in performing SPRE review activities as provided in section 494C(f) of the HEA; and

(7) A plan for performing the functions described in section 494C of the HEA.

With regard to element (1) paragraph (A), the SPRE must represent any State

entity that provides a license to postsecondary institutions to operate in the State or otherwise legally authorizes institutions to provide postsecondary education in the State. The Secretary wishes to make clear that the statute does not provide the SPRE the authority under the SPRP to provide licenses to or legally authorize institutions to operate in a State; the SPRE merely represents State entities that perform those functions. Similarly, under element (1), paragraph (B), the SPRE must represent any State entity that is responsible for ensuring that all institutions in the State remain in compliance with the State's review standards. Again, the Secretary wishes to make clear that the statute does not provide the SPRE the authority under the SPRP to ensure that all institutions in the State remain in compliance with the State's review standards; rather the SPRE must merely represent any State entity that has that responsibility. Moreover, a State is not required, for the purposes of this part, to create an entity responsible for ensuring that all institutions in the State remain in compliance with the State's review standards if such an entity does not currently exist. These statutory provisions are repeated in § 667.4.

In addition to the entities listed in the statute under element (5), in § 667.3(b)(4), the Secretary proposes to require the SPRE to describe its relationship with any State licensing body, any State-level entity that approves service providers under the Job Training Partnership Act, and any State-level entity that certifies vocational education. The Secretary proposes this requirement to ensure that all entities in the State involved with postsecondary institutions or postsecondary educational programs coordinate with the SPRE actions taken regarding those institutions or programs. The agreements the Secretary signed with States to implement the SPRP in fiscal year 1993 did not provide for a description of the SPRE's relationship with these additional entities. Thus, if any changes are required to be made to the agreement as a result of this proposal or other proposals in these regulations or as a result of public comment, States will be provided sufficient opportunity to execute new agreements. Any new terms will have a prospective effect.

Except for the proposed requirement under element (5), that the agreement describe additional relationships between the SPRE and other State authorities, the requirements contained in section 494A(b) of the HEA described above are repeated in § 667.3(a) and (b)

and therefore cannot be changed by the Secretary.

Section 494(c) of the HEA requires the Secretary to impose the following sanctions on a State if the State does not enter into an agreement with the Secretary or fails to comply with the terms of the agreement—

(1) The Secretary may not designate as eligible for participation in a Title IV, HEA program any institution seeking initial participation in that program, any branch campus for which an institution seeks an initial designation of eligibility, or any institution that has undergone a change in ownership that results in a change in control, pursuant to section 481 of the HEA and subpart 3 of part H of the HEA;

(2) The Secretary may grant only provisional certification to any institution in that State pursuant to subpart 3 of part H of the HEA; and,

(3) The State is ineligible to receive any funds appropriated to carry out the SPRP, its allotment under the SSIG Program, and any funds appropriated to carry out the National Early Intervention Scholarship and Partnership Program (NEISP).

The statutory sanctions described above are repeated in § 667.3(e). The Secretary, also, proposes to impose the statutory sanctions on a State if the State ends its participation in the SPRP or fails to establish review standards within two years.

First, in § 667.3(d)(3), the Secretary proposes to impose the sanctions on a State that ends its participation in the SPRP by terminating its agreement with the Secretary. The only exception for not participating in the SPRP is provided in section 494A(c) of the HEA. That section specifies that "no State shall be required to enter into an agreement with the Secretary under this subpart for performing review functions required by the agreement unless the Congress appropriates funds for this subpart". (The Congress made \$5.3 million of fiscal year 1993 funds available to initiate the SPRP and has appropriated \$21.25 million for fiscal year 1994.)

Secondly, in § 667.3(d)(4), the Secretary proposes to impose the sanctions on a State that does not establish review standards under § 667.21 that are not disapproved by the Secretary within two years from the time the State received Federal funds under this part. The Secretary believes that two years is a reasonable time for a State to establish review standards. Moreover, because a State must establish review standards before reviews of institutions can take place, the Secretary believes strongly that a

State should not unreasonably delay the conduct of reviews and continue to receive Federal funds under this part.

Finally, section 494(b) of the HEA provides that if a State declines to enter into an agreement with the Secretary to carry out the purposes of this part, the provisions of this part that refer to the State refer instead to the Secretary who may make appropriate arrangements with agencies or organizations of demonstrated competence in reviewing institutions to carry out the provisions of this part. The Secretary proposes to implement this section of the statute in § 667.3(e)(2)(iii)(A) and (B). Thus, in paragraph (A) the Secretary may establish review standards for any State that declines to enter into an agreement with the Secretary, and in paragraph (B) the Secretary may carry out, or arrange to carry out, the State's other responsibilities under this part.

Section 667.4 State Postsecondary Review Entity

Section 667.4 repeats the statutory provisions contained in section 494A(b)(1) of the HEA. These provisions have previously been discussed.

Section 667.5 Criteria the Secretary Uses To Refer Institutions to a SPRE for Review

Section 494C(a) of the HEA requires the Secretary to review all institutions in a State that participate in a Title IV, HEA program to determine if those institutions meet one or more of the review criteria contained in section 494C(b) of the HEA. If an institution meets one or more of the review criteria, the Secretary must refer the institution to a SPRE for review. The review criteria set forth in section 494C(b) are as follows—

(1) A cohort default rate (as defined in section 435(m) of the HEA) equal to or greater than 25 percent;

(2) A cohort default rate equal to or greater than 20 percent and either—

(A) More than two-thirds of the institution's total undergraduates who are enrolled on at least a half-time basis receive assistance under the Title IV, HEA programs, excluding assistance received under the SSIG, NEISP, and Federal PLUS programs; or

(B) Two-thirds or more of the institution's education and general expenditures are derived from funds provided to students enrolled at the institution from the Title IV, HEA programs, except funds provided from the SSIG, NEISP, and Federal PLUS programs;

(3) Two-thirds or more of the institution's education and general expenditures are derived from funds

provided to students enrolled at the institution from the Federal Pell Grant Program;

(4) A limitation, suspension, or termination action by the Secretary against the institution pursuant to section 487 of the HEA during the preceding 5 years;

(5) An audit finding during the 2 most recent audits of an institution's conduct of the Title IV, HEA programs that resulted in the repayment by the institution of amounts greater than 5 percent of the funds the institution received from the Title IV, HEA programs for any one year;

(6) A citation of an institution by the Secretary for failure to submit audits required under Title IV of the HEA in a timely fashion;

(7) A year-to-year fluctuation of more than 25 percent in the amounts received by students enrolled at the institution from either the Federal Pell Grant, Federal Stafford Loan, or Federal Supplemental Loans to Students programs, that are not accounted for by changes in those programs;

(8) Failure to meet financial responsibility standards pursuant to Title IV, Part H, Subpart 3 of the HEA;

(9) A change of ownership of the institution that results in a change of control which includes (but is not limited to)—

(A) The sale of the institution or the majority of its assets;

(B) The division of 1 or more institutions into 2 or more institutions;

(C) The transfer of the controlling interest in stock of the institution or its parent corporation;

(D) The transfer of the controlling interest of stock of the institution to its parent corporation; or

(E) The transfer of the liabilities of the institution to its parent corporation;

(10) Except with regard to any public institution that is affiliated with a State system of higher education, participation in the Federal Pell Grant, FFEL, FSEOG, FWS, or Federal Perkins Loan programs for less than 5 years;

(11) A pattern of student complaints pursuant to section 494C(j) of the HEA related to the management or conduct of the Title IV, HEA programs or relating to misleading or inappropriate advertising and promotion of the institution's programs, that in the judgement of the Secretary are sufficient to justify review of the institution.

The statutory review criteria described above are repeated in § 667.5(b).

The Secretary anticipates making referrals at least annually.

Section 494C(a) as amended by the Higher Education Technical

Amendments of 1993 (Pub. L. 103-208) further provides that the Secretary may determine not to refer to a SPRE for review an institution that meets only criterion (10) described above, if the SPRE previously reviewed that institution under this part and found no violations of the State's review standards. This provision is repeated in § 667.5(d).

Under a literal reading of review criteria (6) and (9), the Secretary would have to refer an institution to a SPRE in perpetuity for an event that happened once. However, the Secretary believes that it is wasteful to require a SPRE to continually review an institution for the same reason if the SPRE had previously reviewed that institution and found no violations of its standards. Therefore, in § 667.5(c), the Secretary proposes to reserve whether to refer an institution to a SPRE for review under these two criteria if on the basis of an earlier referral, the SPRE conducted a review of the institution and found no significant violations of its standards as a result of that review.

Section 494C(c) of the HEA provides that an institution may request confirmation of the data used by the Secretary to determine that the institution met one or more of the statutory review criteria. In § 667.5(e), the Secretary proposes to rescind a referral if the Secretary confirms that the data used to make the referral were inaccurate and that a referral would not be made under accurate data.

When confirming the accuracy of data, the Secretary will presume that records maintained in the ordinary course of business by the U.S. Department of Education, a guaranty agency under the FFEL programs, the SPRE, the State licensing agency, or another State agency are accurate unless the institution proves to the Secretary's satisfaction that the records are not properly maintained or are inaccurate.

Section 667.6 SPRE Selection of Institutions for Review

In addition to those institutions referred to a State by the Secretary for review as a result of meeting one or more of the criteria set forth in section 494C(b), section 494C(a) of the HEA provides that a State may, subject to approval by the Secretary, review additional institutions that—

(1) Meet one or more of the statutory review criteria based on more recent data available to the State; or

(2) The State has reason to believe are engaged in fraudulent practices.

The statute further provides that if the Secretary fails to approve or disapprove a State's request to review additional

institutions within 21 days, the State may proceed to review those additional institutions as if approved by the Secretary.

These statutory provisions are repeated in § 667.6.

Section 667.7 Notice to SPRE of Federal Actions

Section 494C(h)(2) of the HEA requires the Secretary to prescribe in regulations a time period within which the Secretary notifies a SPRE of any actions taken by the Secretary or another Federal agency against an institution located in the SPRE's State. Accordingly, in § 667.7, the Secretary proposes to notify a SPRE within 10 days of taking or learning of an action against an institution.

Section 667.8 Institutions With Locations in More Than One State

Section 667.8 deals with the situation when a referred institution has locations in more than one State. In proposing procedures for dealing with that situation, the Secretary had to decide which State standards would apply, which State would conduct the review, and, if more than one State had to conduct a review, how those reviews should be coordinated.

In § 667.8, the Secretary proposes the following. If an institution is referred for review, the Secretary will refer the institution to the SPRE in each State in which the institution is located. With the referral, the Secretary informs each SPRE of the other States in which the institution is located. The main campus of the institution or any branch campus or additional location of that institution is subject to the review standards of the State in which it is located.

The proposed procedures place the principal responsibility for reviewing the institution on the SPRE of the State in which the main campus of the institution is located. The SPRE of a State in which a branch campus or additional location of the institution is located may choose among three options to determine when to review that branch campus or additional location or to determine if review of that branch or additional location is warranted. Under the first option, the SPRE may review that branch campus or additional location before a review is conducted of the main campus of that institution. The second option provides that the SPRE may delay its review of that branch campus or additional location until a review is conducted of the main campus of that institution. Under the last option, if the State's allotment will not allow the SPRE to review all referred institutions, the SPRE may choose not to

review that branch campus or additional location if the SPRE of the State in which the main campus of that institution is located reviews that institution and makes no significant findings.

Finally, the Secretary proposes that SPREs may agree among themselves to alter these review requirements. Thus, if the institution was located in a metropolitan area such as Washington, DC and had its main campus in Washington, DC and branch campuses in Virginia and Maryland, the Washington, DC, Virginia, and Maryland SPREs could agree among themselves that the Virginia SPRE would review all the institution's locations. However, the applicable review standards would not change. Therefore, to the extent that the three jurisdictions had different standards, the Washington, DC locations would be subject to the Washington, DC standards, the Maryland locations would be subject to the Maryland standards and the Virginia locations would be subject to the Virginia standards.

Subpart B—Allotment Formula and Funding Procedures

Section 667.11 Allotment Formula

Section 494(a)(2) of the HEA authorizes the Secretary to provide Federal funds to a SPRE for performing the functions contained in the State's agreement with the Secretary. Accordingly, in § 667.11, the Secretary proposes a funding formula under which the Secretary allots annually to each SPRE its share of the Federal funds appropriated for the SPRP. The following discusses the proposed funding formula.

For each fiscal year that Federal funds are appropriated for the SPRP, the Secretary proposes to allot \$20,000 to Guam, \$20,000 to the Northern Mariana Islands, \$20,000 to the Virgin Islands, \$20,000 to the Trust Territory of the Pacific Islands (Palau), and \$20,000 to American Samoa. The Secretary believes this amount is sufficient for these States to carry out SPRE activities because only three institutions are located in Guam, and only one institution is located in each of the other jurisdictions.

The Secretary proposes to allot the remaining fiscal year appropriation so that each remaining State receives the greater of \$50,000, or the amount determined under a formula that uses the following two variables—

(1) The number of institutions located in a State that are certified to participate in the Title IV, HEA programs; and

(2) The amount of Title IV, HEA program funds made available to students enrolled in those institutions during the latest year for which complete data is available.

For purposes of the formula, the Title IV, HEA programs only include the Federal Pell Grant, Federal Family Education Loan (FFEL), Federal Direct Loan, Federal Supplemental Educational Opportunity Grant (FSEOG), Federal Work-Study (FWS), and Federal Perkins Loan programs.

The Secretary proposes the formula described in greater detail in § 667.11(a) because the Secretary believes that each State needs at least \$50,000 to carry out SPRE activities. In addition, at least in the initial years of the program, the Secretary believes it equitable to allot Federal funds to States based on the relative exposure of Title IV, HEA program funds in each State as represented by the two variables in the proposed funding formula. However, after several years, when there is a history of referrals to States and SPRE reviews of institutions as a result of those referrals, the Secretary plans to reexamine the funding formula to determine whether to base the formula on the percentage of referrals each State receives, the number of reviews each State performs, or a combination of those two variables.

In § 667.11(b), the Secretary proposes to reallocate Federal funds not expended by a State to other States in a manner that best carries out the purposes of the program. The Secretary proposes to reallocate those funds the Secretary determines a State will not spend during the period for which those funds are available, and those funds a State does not spend by the end of the period for which those funds are made available.

Section 667.12 Application for Funds

In § 667.12, the Secretary proposes procedures under which a State applies to receive its allotment for each fiscal year in which Congress appropriates funds for the State Postsecondary Review Program. Under these procedures, a State's application for funds consists of a plan to carry out specific activities and a budget that accounts for those activities. The Secretary views these application procedures as satisfying the requirement in section 494A(b)(5) of the HEA that a State include in its agreement with the Secretary its plan to carry out SPRE activities.

The Secretary proposes a two-phased State application process. In the first phase, a State applies for funds to develop review standards and to carry

out other activities that are necessary before the SPRE conducts reviews of referred institutions. In the second phase, a State applies for funds to conduct reviews of referred institutions and to perform other allowable activities. A State may apply for funds in the second phase only after it has established review standards. The Secretary considers a State to have established review standards if those standards were developed in accordance with the requirements contained in § 667.21 and those standards were not disapproved by the Secretary under § 667.22.

Application before standards are established. For this phase of the application process, in § 667.12(b), the Secretary proposes that the State submit a plan to—

(1) Develop the State review standards described in section 494C(d) of the HEA and discussed further in §§ 667.21 and 667.22 of this preamble; and

(2) Develop procedures for receiving and responding to complaints from students, faculty, and others regarding an institution, as required by section 494C(j) of the HEA.

Both the standards and the complaint procedures must be developed in consultation with institutions in the State, as required under sections 494C(d) and 494C(j) of the HEA, respectively. In addition, the State may submit a plan to identify information systems maintained by institutions and State agencies that are relevant to developing State review standards. Finally, the plan may contain estimates of the costs of coordinating those information systems with an information system for the SPRE.

The Secretary proposes these allowable activities because the SPRE cannot carry out a review of an institution to determine whether the institution is in compliance with State standards until the State has developed those standards in required consultation with institutions in that State. Similarly, a State cannot process complaints until it has developed procedures, in required consultation with institutions in the State, to respond to complaints. Finally, a State cannot determine whether it will be cost-effective to coordinate existing data systems without first determining the costs of coordinating those systems.

Several negotiators suggested that the Secretary specify the manner in which States were to consult with institutions in their State while developing State standards and complaint procedures. The Secretary believes that each State is in a better position than the Secretary to determine the most appropriate consultation method for that State.

Moreover, the Secretary believes that States should be able to select from a variety of consultation formats when developing its standards and complaint procedures with the institutions in its State. Therefore, the Secretary has not specified the type of required consultation under this section.

However, the Secretary expects a State's consultation process to be thorough and inclusive of the range and types of institutions in the State.

With its plan, the State must submit a budget for carrying out the allowable activities. In § 667.12(b)(2), the Secretary proposes that a State carry out the allowable activities in a priority order if the State anticipates that the cost of carrying out all those activities will exceed its allotment. Specifically, the Secretary proposes that a State first use its allotment to develop review standards. If a portion of the allotment remains after the State has developed its review standards, the State may develop procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State. Finally, the State may use any remaining portion of its allotment to provide costs estimates for the SPRE's information system after it has completed its review standards and complaint procedures.

The Congress made \$5.3 million of fiscal year 1993 funds available to initiate the State Postsecondary Review Program. Under a notice published in the *Federal Register* on July 14, 1993, 58 FR 38022–38025, the Secretary has allotted those funds to States for the purposes set forth in § 667.12(b). Therefore, except for the following provision, the Secretary acknowledges that most States will have complied with the provisions contained in § 667.12(b) when these provisions are published as final regulations.

If a State does not establish review standards with its fiscal year 1993 allotment, the Secretary proposes that the funds it may receive in any future fiscal year for those activities may not exceed the amount it received or was scheduled to receive in fiscal year 1993. The Secretary proposes this provision because the Secretary believes that the primary purpose of the State Postsecondary Review Program is SPRE reviews of institutions and that the funds allotted to States in fiscal year 1993 were adequate to develop review standards.

Application after standards are established. For the second phase of the application process, the Secretary proposes in § 667.12(c) that a State submit—

(1) A plan to review referred institutions;

(2) A plan to carry out the activities described in § 667.14; and

(3) A budget for those reviews and activities that does not exceed the State's allotment.

The Secretary acknowledges that a State's allotment of funds may be inadequate to review all the institutions that must be reviewed under §§ 667.5 and 667.6. Therefore, in § 667.12(c)(2), the Secretary proposes that a SPRE submit, as part of its plan, a priority system for selecting institutions for review from among the referred institutions if the SPRE anticipates that the cost of reviewing all the referred institutions will exceed the State's allotment. The Secretary proposes to provide maximum flexibility to States in selecting institutions to review, except as limited by section 494A(b)(2) of the HEA. That section requires States to review referred institutions on a schedule that coincides with the dates set by the Secretary to recertify those institutions to participate in the Title IV, HEA programs. However, the Secretary expects States to establish review priorities that reflect the objectives of protecting students, saving tax dollars, and promoting educational quality.

The Secretary requests public comment on the potential benefits of developing specific criteria for States to consider in determining their review priorities and the nature of those criteria.

Section 667.13 Approval of Funding Application

Approval of funding application before a State establishes review standards. In § 667.13(a), the Secretary proposes to approve a State's plan and budget for the first phase of the SPRP, the development of standards and complaint procedures in consultation with institutions in the State, if—

(1) The State's plan provides a reasonable basis, and adequate budget justification, for conducting those activities;

(2) The State's plan provides for conducting those activities in the priority order proposed in § 667.12(b)(2); and

(3) The State's budget includes only reasonable allowable costs within the State's fiscal year 1993 allotment. The Secretary proposes allowable costs in § 667.14.

Approval of funding application after a State establishes review standards. In § 667.13(b), the Secretary proposes to approve a State's plan and budget for the second phase of the SPRP, primarily the review of referred institutions, if—

(1) The State's plan provides adequate budget justification for carrying out the activities proposed and described in § 667.14 within its allotment;

(2) The State's plan provides a reasonable scheme for reviewing referred institutions;

(3) The State's plan includes a priority system for reviewing referred institutions; and

(4) Any contract the State proposes to enter into with another agency to carry out SPRE functions, as provided in section 494C(f) of the HEA, is reasonable and appropriate.

If a State that does not submit an application for funds under § 667.12 or does not submit an approvable application, the Secretary proposes in § 667.13(c) to impose on that State the sanctions described in section 494(c) of the HEA.

Section 667.14 Allowable Costs and Activities

As required by sections 494A(c) and 494B of the HEA, a State is not required to expend any funds under the SPRP to carry out allowable activities unless the Secretary reimburses the State for the costs it incurs in carrying out those activities. To the extent appropriations are available the Secretary proposes to reimburse a State for the direct and indirect costs of carrying out allowable SPRE activities if those activities are included in a plan that is approved by the Secretary.

The terms "direct costs" and "indirect costs" are defined in the Office of Management and Budget (OMB) Circular A-87. In addition, the Secretary proposes to rely on the cost principles described in OMB Circular A-87 for determining allowable costs under the State Postsecondary Review Program.

The Secretary proposes to consider as allowable activities those activities that are directly related to—

(1) Establishing State review standards in consultation with institutions in the State;

(2) Publicizing and providing initial and continuing training to State and other personnel in the State, including personnel at the institution subject to review;

(3) Establishing and implementing procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State;

(4) Reviewing referred institutions; and

(5) Developing and maintaining an information system for SPRE review activities.

In § 667.14(d), the Secretary identifies a nonexhaustive list of direct costs

associated with carrying out the proposed allowable activities.

Section 667.15 Fiscal Procedures and Records

In § 667.15, the Secretary proposes requirements regarding a State's use and accounting of the Federal funds it receives under this part. To minimize burden on States, the Secretary proposes that a State account for funds it receives under this part in accordance with the procedures it uses to account for its own funds.

In addition, the Secretary proposes that a State keep fiscal and accounting records that support, on audit, its expenditure of funds under this part and maintain those records for five years. Finally, the Secretary proposes that a State must have an audit performed of the SPRE's activities under this part at least once every two years. An audit conducted under the Single Agency Audit Act satisfies this audit requirement.

Section 667.16 Supplement, Not Supplant, Requirement

Section 494(B) of the HEA provides that the Secretary may reimburse a State for the costs of necessary SPRE activities "which supplement, but do not supplant, existing licensing or review functions conducted by the State." This statutory provision is repeated in § 667.16.

The Secretary requests comments on what standards and measures would most accurately determine whether a State has satisfied the supplement but not supplant requirement.

Subpart C—State Review Standards, SPRE Reviews, and Termination of Institutional Participation

Section 667.21 State Review Standards

Section 494C(d) of the HEA requires a State to develop review standards, in consultation with the institutions in the State, that are consistent with the laws and constitution of the State. A State's authority to develop review standards is further clarified in section 494C(g) of the HEA. That section prohibits the Secretary from requiring a State to establish review standards that are unrelated to ensuring institutional or program integrity or that violate the provisions of the State's constitution or laws.

The SPRE reviews referred institutions under the State-developed standards set forth in section 494C(d) of the HEA. In conducting its review, the SPRE must determine whether a referred institution has complied with standards that address the following areas—

(1) The availability to students and prospective students of catalogs, admissions requirements, course outlines, schedules of tuition and fees, policies regarding course cancellations, and the rules and regulations of the institution relating to students and the accuracy of such catalogs and course outlines in reflecting the courses and programs offered by the institution;

(2) Assurance that the institution has a method to assess a student's ability to successfully complete the course of study for which he or she has applied;

(3) Assurance that the institution maintains and enforces standards relating to academic progress and maintains adequate student and other records;

(4) Compliance by the institution with relevant safety and health standards, such as fire, building, and sanitation codes;

(5) The financial and administrative capacity of the institution as appropriate to a specified scale of operations and the maintenance of adequate financial and other information necessary to determine the financial and administrative capacity of the institution;

(6) For institutions financially at risk, the adequacy of provisions to provide for the instruction of students and to provide for the retention and accessibility of academic and financial aid records of students in the event the institution closes;

(7) If the stated objectives of the courses or programs of the institution are to prepare students for employment, the relationship of the tuition and fees to the remuneration that can be reasonably expected by students who complete the course or program and the relationship of the courses or programs (including the appropriateness of the length of such courses) to providing the student with quality training and useful employment in recognized occupations in the State;

(8) Availability to students of relevant information by institutions of higher education, including—

(A) Information relating to market and job availability for students in occupational, professional, and vocational programs; and

(B) Information regarding the relationship of courses to specific standards necessary for State licensure in specific occupations;

(9) The appropriateness of the number of credit or clock hours required for the completion of programs or of the length of 600-hour courses;

(10) Assessing the actions of any owner, shareholder, or person exercising control over the educational

institution which may adversely affect eligibility for programs under Title IV of the HEA;

(11) The adequacy of procedures for investigation and resolution of student complaints;

(12) The appropriateness of advertising and promotion and student recruitment practices;

(13) That the institution has a fair and equitable refund policy to protect students; and

(14) The success of the program at the institution, including—

(A) The rates of the institution's students' program completion and graduation, taking into account the length of the program at the institution and the selectivity of the institution's admissions policies;

(B) The withdrawal rates of the institution's students;

(C) with respect to vocational and professional programs, the rates of placement of the institution's graduates in occupations related to their course of study;

(D) where appropriate, the rate at which the institution's graduates pass licensure examinations; and

(E) the variety of student completion goals, including transfer to another institution of higher education, full-time employment in the field of study, and military service.

Except for the following standard, the statutory provisions contained in section 494C(d) of the HEA are essentially repeated in § 667.21(a).

In § 667.21(a)(4), the Secretary proposed to interpret the standard described in 494C(d)(2) of the HEA to require that a judgement be made regarding the effectiveness of an institution's method to assess a student's ability to complete successfully an educational program. The proposed standard would require a SPRE to measure the effectiveness of its assessment method by the completion rate of the assessed students enrolled in the institution's program.

Several negotiators indicated that the proposed standard implies a highly predictive association between the institution's assessment method and the students' completion of the program. According to those negotiators, such a predictive association does not exist. Therefore, the negotiators suggested that the success of the institution's assessment method be judged by using measures other than completion rates. The Secretary invites comments on this suggestion and alternative approaches for evaluating the effectiveness of an institution's method to assess a student's ability to complete successfully an educational program.

With regard to the standard described in section 494C(d)(4) of the HEA and § 667.21(a)(7), the Secretary invites public comments on whether the SPRE's review of an institution should include a review of the institution's compliance with statutes and regulations governing access to disabled individuals.

In § 667.21(b), the Secretary has proposed a framework under which a State develops review standards. Under that framework the Secretary proposes—

(1) To permit States to develop different standards for different types or categories of institutions and educational programs;

(2) That States specify the records that referred institutions would need to maintain to satisfy State standards;

(3) That States must quantify certain review standards; and

(4) That States determine whether a Title IV, HEA program standard would be an adequate State standard.

Negotiators disagreed among themselves with regard to the proposal in § 667.22(b)(1), to provide latitude to States to develop different standards for different types or categories of institutions or educational programs. While many negotiators agreed strongly with this approach, others disagreed vociferously, arguing that States would use this latitude to establish unreasonably stringent standards for vocational and proprietary institutions.

The Secretary believes the statute does not prohibit the establishment of different standards for different institutions and therefore does not wish to preclude a State from establishing such standards, provided the State can adequately justify that different standards are more appropriate than uniform standards for the institutions in its State.

In § 667.21(b)(2), the Secretary proposes that a State establish standards that specify the records and information a referred institution would need to maintain to demonstrate to a SPRE the institution's compliance with those standards. The Secretary wishes to make clear that technically, only a referred institution is subject to the recordkeeping requirements specified in the State's standards unless, as discussed previously in § 667.3 of this preamble, the State has or creates an entity that is responsible for ensuring that all institutions in the State remain in compliance with those standards. Otherwise, a nonreferred institution may choose not to maintain the specified records. However, that institution would risk losing its participation in the Title IV, HEA programs if as a result of some future event it triggered a statutory review

criterion, and was unable to produce the records required to demonstrate to the SPRE its compliance with the State's standards.

In addition, concern has been raised regarding a State's authority to collect information from all institutions in the State for the purpose of establishing review standards. For example, a State may establish on an annual basis a student graduation rate standard that is equal to the average graduation rate of students at all institutions in the State. While the Secretary believes that this method of establishing review standards is reasonable and appropriate, a State does not have the authority under the SPRE to require all institutions in the State to report standards-related information to the SPRE.

Notwithstanding this limitation, the Secretary encourages all institutions to comply with a request from a SPRE for this information, particularly if the only alternative available to the SPRE is to establish arbitrary standards. The Secretary wishes to make clear, however, that a SPRE has the authority under section 494C(d) of the HEA to require standards-related information from all referred institutions in the State. The Secretary notes that if a State standard is based upon an average, such as an average graduation rate, there must be a sufficient number of institutions providing data to support that rate, and the reporting institutions should be representative of the institutions located in the State.

In § 667.21(b)(4), the Secretary proposes that a State must quantify certain review standards. Thus, for the standard described in section 494C(d)(7) of the HEA and repeated in § 667.21(a)(10), the Secretary proposes that a State establish an acceptable percentage for the relationship between the tuition and fees charged by an institution for an educational program and the amount of money that a student who successfully completes that program actually earns.

Similarly, for the standard described in section 494C(d)(14) of the HEA and repeated in § 667.21(a)(18), the Secretary proposes that a State establish acceptable percentages for—

(1) The completion and graduation rates of students enrolled in educational programs offered by an institution;

(2) The withdrawal rate of students at an institution;

(3) With respect to an institution's vocational and professional programs, the placement rate of the institution's graduates in occupations related to their educational program; and

(4) The rate or rates at which the institution's graduates pass licensure examinations.

For each of these areas, the acceptable percentage sets the level above which a SPRE must consider an institution to be in compliance with the review standard, and below which a SPRE makes either a finding of noncompliance or conducts a further review of the institution to account for the reasons the institution failed to meet that percentage.

The Secretary understands that developing such standards will be difficult and will therefore allow States great flexibility in developing these quantifiable standards, both in terms of the methods used to determine an acceptable percentage and the actual acceptable percentage. Moreover, the Secretary wishes to reiterate that the acceptable percentage that a State establishes should reflect whether an institution is successfully providing its educational programs to its students rather than whether the institution should automatically be terminated from participation in the Title IV, HEA programs solely because it failed to satisfy that standard. The Secretary also reiterates that a State need not recommend the termination of an institution's participation in the Title IV, HEA programs solely because the institution failed to meet any particular State standard.

In § 667.21(b)(5) the Secretary proposes to require a State to determine the extent to which it is appropriate to base a State review standard on a related Title IV, HEA program standard or requirement or to establish as the State's review standard the comparable Title IV, HEA standard or requirement.

The Secretary believes it is imperative that States take into consideration the standards and requirements institutions must satisfy to participate in the Title IV, HEA programs before increasing the burden on those institutions by adopting entirely new standards for this part. In this regard, the Secretary expects States to avoid establishing standards that are weaker than similar Title IV, HEA program standards that an institution must otherwise satisfy to participate in those programs. In addition, when the Secretary publishes regulations implementing the Student-Right-to-Know provisions in section 485(a) of the HEA, the Secretary expects States to adopt the methodology contained in those regulations for calculating student completion and graduation rates.

For the convenience of the reader, the following Title IV, HEA program standards and requirements are related

or comparable to the State review standards described in § 667.21—

(1) With respect to the State review standards in paragraphs (a)(1) and (a)(2), the consumer information requirements in 34 CFR part 668, subpart D, 34 CFR 668.14, and 34 CFR 668.15; and the standards and rules in 34 CFR part 668, subpart F, under which the Secretary initiates an adverse action against an institution for any substantial misrepresentation made by that institution regarding its educational program, financial charges, or employability of its graduates;

(2) With respect to the State review standards in paragraphs (a)(3) and (a)(4), the State process and testing requirements regarding students who do not have a high school diploma or its recognized equivalent in section 484(d) of the HEA;

(3) With respect to the State review standards in paragraphs (a)(5) and (a)(6), the standards of satisfactory progress in 34 CFR 668.14; and the record retention and audit requirements in 34 CFR 668.23;

(4) With respect to the State review standard in paragraph (a)(8), the standards and requirements in 34 CFR 668.13, 34 CFR 668.14, and subpart 3 of part H of the HEA regarding an institution's financial and administrative capability;

(5) With respect to the State review standard in paragraph (a)(10), the standards and requirements in 34 CFR 668.14 regarding an institution's administrative capability, and 34 CFR part 600, subpart A, regarding an educational program offered by an institution that prepares students for gainful employment in recognized occupations; or an educational program that is designed to provide occupational skills to students for useful employment in recognized occupations;

(6) With respect to the State review standards in paragraphs (a)(11) and (a)(16), the provisions in section 487(a)(8) of the HEA that require an institution that advertises job placement rates as a means of attracting students to provide to those students information concerning employment statistics, graduation statistics, other information necessary to substantiate the truthfulness of the advertisement, and any State licensing requirements for a job for which the institution's educational program prepares such students; and the provisions in section 487(a)(20) of the HEA prohibiting an institution from paying a commission, bonus, or other incentive based on securing enrollments to any person engaged in student recruiting or admission activities;

(7) With respect to the State review standard in paragraphs (a)(12) and (a)(13), the formula in 34 CFR 668.8 and 34 CFR 668.9 that an institution that offers an educational program in credit hours must use to determine if that program satisfies the requirements of an eligible program;

(8) With respect to the State review standard in paragraph (a)(14), the standards in 34 CFR 668.13, regarding an institution's financial responsibility; the provisions in 34 CFR 668.14 regarding an institution's administrative capability; and the standards in 34 CFR 600.30 regarding a person's ability to affect substantially the actions of an institution;

(9) With respect to the State review standard in paragraph (a)(17), the requirements in section 484B of the HEA regarding an institution's refund policy; and,

(10) With respect to the State review standards in paragraph (a)(18), the provisions in section 485(a) of the HEA regarding the calculation of the completion or graduation rate of certificate- or degree-seeking, full-time undergraduate students; the standard in 34 CFR 668.15 regarding the withdrawal rate of students at an institution; and, the provisions in section 481(e)(2) of the HEA regarding the placement rate and graduation rate of students enrolled in educational programs of less than 600 clock-hours.

The Secretary recognizes that many of the referenced Title IV, HEA program standards will be revised or recodified in the near future as additional regulations are published implementing changes made in the HEA by the Higher Education Amendments of 1992.

The Secretary invites public comment regarding the development of standards under the proposed framework and on alternative approaches that would assure the development of meaningful and rigorous standards. Specifically, the Secretary seeks comment on ways to establish common methodologies for computing quantitative standards, and common recordkeeping requirements associated with those standards, among institutions in all States, and among the three members of the Integrity triad in a manner that reduces the administrative burden on institutions and the triad. In addition, the Secretary invites comments on approaches that would minimize extreme disparities in standards between States.

Section 667.22. Disapproval of State Review Standards

Under section 494C(d) of the HEA, State-developed standards are "subject to disapproval by the Secretary." In

accordance with that section of the HEA, in § 667.22, the Secretary proposes procedures under which the Secretary evaluates a State's review standards to determine whether to disapprove those standards.

Specifically, in § 667.22(a), a State must submit to the Secretary its review standards along with an explanation of how each standard was established, including—

(1) A description of the manner in which institutions in the State were consulted in the development of the standards;

(2) An explanation of the relationship between each of the State's review standards and the related or comparable Title IV, HEA program standards or requirements; and

(3) If applicable, an explanation of the reasons for establishing different review standards for different types of institutions or educational programs.

In § 667.22(b), the Secretary proposes criteria to determine whether to disapprove a State's review standards. Specifically, the Secretary proposes to disapprove a State's review standards if—

(1) The State does not assure the Secretary that the State's review standards are consistent with the laws and constitution of that State, as required by section 494C(d) of the HEA;

(2) The State does not submit evidence that the State's review standards were developed in consultation with institutions in that State, as required in section 494C(d) of the HEA;

(3) The State's review standards do not meet or exceed all of the requirements and cover all the areas described in section 494C(d) of the HEA and § 667.21; or

(4) The standards the State quantified under § 667.21(b)(4) do not meet certain procedural and statistical requirements.

Finally, in § 667.22(c), if the Secretary disapproves a State's review standards, the Secretary proposes to give the State the reasons for that disapproval and proposes to provide the State an opportunity to either demonstrate why the Secretary's disapproval was incorrect or submit revised standards that address the reasons for the Secretary's disapproval.

The Secretary invites public comment regarding the proposed evaluation criteria and on additional criteria the Secretary should use to evaluate a State's review standards.

Section 667.23 SPRE Reviews of Institutions

In § 667.23, the Secretary proposes procedures regarding SPRE reviews of

referred institutions. In general, if the Secretary refers an institution to a SPRE for review under § 667.5, or the SPRE selects an institution for review under § 667.6 and the Secretary approves that selection, the SPRE reviews, or arranges for the review of, that institution to determine whether the institution is in compliance with the State review standards described in § 667.21.

To implement the part of section 494C(d) of the HEA that requires a SPRE to review referred institutions in accordance with published State standards, in § 667.23(b), the Secretary proposes that the SPRE provide written notice of the State's established review standards to each institution in the State before the SPRE conducts reviews of referred institutions.

In § 667.23(c), the Secretary proposes that the SPRE issue a report of its findings and provide it to the institution no later than 45 days after the SPRE completes its review. For each finding contained in the report, the SPRE must cite the standard violated and cite the nature of the violation. The SPRE may prescribe, if necessary, a course of action the institution must follow to correct the violation, or the SPRE may determine that the institution should no longer participate in the Title IV, HEA programs. If the SPRE chooses to prescribe a corrective action, the Secretary proposes to give the SPRE sole discretion to determine an appropriate period for the institution to correct the violation and bring itself into compliance with the State's review standards. Alternatively, if the SPRE determines that the institution should no longer participate in the Title IV, HEA programs, as provided in section 494C(h) of the HEA, the SPRE may initiate the process described in § 667.25, under which the Secretary ultimately terminates the institution's participation in those programs.

In § 667.23(d), the Secretary proposes that the SPRE give the institution an opportunity to respond to its findings and required actions. If the institution chooses to respond within the time permitted by the SPRE, in § 667.23(e), the Secretary proposes that the SPRE evaluate the institution's response and issue a final report to the institution that includes its findings and required action.

Section 494C(h)(1) provides that a SPRE must notify the Secretary of its findings and the actions the SPRE is taking, or has taken, in response to those findings within a time period prescribed by the Secretary in regulations. Therefore, in § 667.23(f), the Secretary proposes that the SPRE provide to the Secretary a copy of its final report to an

institution within 30 days of its issuance to the institution. A final report includes the report that the SPRE produces after the institution responds to its initial findings. However, if the institution does not respond to the SPRE's initial report in the time permitted by the SPRE, the SPRE's initial report becomes its final report on the day after the deadline date provided to the institution for responding to that report.

In § 667.23(g), the Secretary proposes that a SPRE may determine that an institution should no longer participate in the Title IV, HEA programs for reasons other than the institution's failure to meet the State's review standards. Specifically, a SPRE may initiate a proceeding to effect the termination of the institution's participation in the Title IV, HEA programs under § 667.25, if that institution—

(1) Does not respond to the SPRE's findings or required actions within the time permitted by the SPRE and the SPRE's findings show serious violations of the State's standards; (2) Does not allow SPRE personnel at the institution; or (3) Fails to provide SPRE officials with prompt access to its documents and records.

The Secretary wishes to make clear that these proposed regulations do not require a SPRE to take specific actions against an institution that fails to meet a State's review standards. The Secretary believes strongly that SPREs be afforded the latitude to prescribe appropriate corrective actions, or, if the SPRE finds that an institution has continuously or egregiously violated the State's standards, make the determination that the institution should no longer participate in the Title IV, HEA programs. On the other hand, the Secretary would be concerned if a SPRE failed consistently to prescribe appropriate and adequate corrective actions for institutions that did not satisfy the State's standards.

Finally, the Secretary intends to add to this section a requirement that a SPRE establish performance standards that would enable the Secretary to evaluate the conduct and quality of the SPRE's reviews. Public comment is invited regarding the specific areas where SPRE performance standards should be established and how that performance should be evaluated.

Section 667.24 Peer Reviews of Institutions

For each referred institution, section 494C(d)(15) of the HEA requires a SPRE to contract with a nationally recognized accrediting agency or other peer review

system with demonstrated competence in assessing educational programs to carry out a review or provide information to the SPRE regarding that agency's or system's assessment of the quality and content of the institution educational programs.

Under a literal reading of this provision, a SPRE could contract with the accrediting agency that had previously accredited the referred institution for the latter to conduct another, limited accreditation review. Under normal circumstances, the Secretary believes that use of SPRP funds for that activity would not be a prudent use of those funds. Therefore, under normal circumstances, the Secretary recommends that a SPRE satisfy the requirements of section 494C(d)(15) of the HEA by contracting with the referred institution's accrediting agency for the latter to provide a copy of the relevant information that was included in connection with its previous grant of accreditation.

Except for the proposal that allows a SPRE to contract with a peer review system that it determines has competence in assessing educational programs, the provisions in section 494C(d)(15) are repeated in § 667.24.

Several negotiators argued that the Secretary should define the term "peer review system" or specify criteria to determine the competence of a peer review system. Those negotiators believed strongly that a peer review system selected by a SPRE would not be a credible authority in assessing postsecondary educational programs because that peer review system would not be subject to the requirements and standards imposed on accrediting agencies in subpart 2 of Part H of the HEA.

One negotiator suggested specific criteria to determine the competence of a peer review system. In particular, that negotiator suggested that the Secretary approve a peer review system if that system demonstrates that—

- (1) The geographical scope of the system's activities covers a State, region, or the United States;
- (2) The system has the administrative and fiscal capability to carry out its activities in light of the system's objectives and scope;
- (3) The system has established standards and adequate experience to assess the quality and content of institutions' programs of instruction, training, or study in relation to achieving the stated objectives for which the courses or programs are offered;

(4) The system has effective mechanisms for evaluating compliance with its standards and applying its standards consistently; and

(5) The system's activities will meet the needs of the State and the Secretary in accomplishing the purposes of the SPRP and not unnecessarily duplicate the capabilities of a nationally recognized accrediting agency available to perform the assessment described in § 667.24(b) of these regulations.

The Secretary believes that a peer review system for purposes of this program does not, in effect, have to qualify as a recognized accrediting agency to be used under the SPRP. Nevertheless, the Secretary invites comment on these suggested criteria and alternative approaches for determining the competence of a peer review system.

Section 667.25 Termination of an Institution's Participation in the Title IV, HEA Programs

In § 667.25, the Secretary proposes the procedures a SPRE must follow to effect the termination of an institution's participation in the Title IV, HEA programs. Under those procedures, if a SPRE determines, based upon its review, that an institution is in violation of the State's review standards and should no longer continue to participate in the Title IV, HEA programs or violates one of the provisions proposed in § 667.23(g), the SPRE provides the institution with the opportunity to contest that determination in accordance with procedures the Secretary has approved for that purpose under § 667.26.

If the SPRE concludes after affording the institution the opportunity to challenge the SPRE's findings and determination, that the institution should be terminated from participating in the Title IV, HEA Programs, the SPRE notifies the Secretary of those findings and that determination. Upon notice by the SPRE that the institution should no longer participate in the Title IV, HEA programs, the Secretary immediately terminates that institution's participation in those programs and notifies the institution and the SPRE of the effective date of that termination.

Further, the Secretary proposes that an institution terminated under this part may not reapply to the Secretary to participate in a Title IV, HEA program until 18 months have expired from the effective date of its termination. This proposal is consistent with the provisions in 34 CFR 668.96. Under that section of the Title IV, HEA program regulations, an institution whose participation in the Title IV, HEA programs has been terminated may not

seek reinstatement in those programs before the expiration of 18 months from the effective date of its termination. Moreover, section 494C(h)(1) of the HEA does not authorize any appeal to the Secretary of a termination determination.

Section 667.26 Due Process Requirements

Section 494C(h)(3) of the HEA requires the Secretary to prescribe in regulations minimum procedural standards for the disapproval of institutions by a SPRE. Thus, in § 667.26, the Secretary proposes due process criteria that a State must satisfy when permitting an institution to challenge a SPRE's finding that the institution is in violation of the State's review standards and should no longer continue to participate in the Title IV, HEA programs.

Specifically, the Secretary proposes to approve the State's procedures if those procedures satisfy basic due process requirements. Therefore, the Secretary proposes procedures that require the SPRE to—

- (1) Notify an institution of any required action and the basis for that action;
- (2) Permit the institution the opportunity to challenge that adverse action in a hearing or in writing;
- (3) Notify the institution in writing of the result of its challenge, and the basis for that result; and
- (4) Follow other applicable procedural requirements of State law.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Because these proposed regulations would affect only States and State agencies, the regulations would not have an impact on small entities. State and State agencies are not defined as "small entities" in the Regulatory Flexibility Act.

Paperwork Reduction Act of 1980

Sections 667.3, 667.4, 667.12, 667.15, 667.21, and 667.22 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

These proposed regulations contain information collection requirements for States that apply to the Secretary to receive funds under this part and for States that develop review standards and submit those standards to the

Secretary for approval. The Department needs and uses the information collected to determine whether to approve a State's application for funds.

Annual public reporting burden for this collection of information is estimated to average 1480 hours for each of the 57 States that prepare plans to perform SPRE activities, prepare budgets that account for those activities, develop review standards, and submit those plans, budgets, and standards to the Secretary for approval.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 4318, ROB-3, 7th & D Streets, SW, Washington, D.C., between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 667

Administrative practice and procedure, Colleges and universities, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, States, Student aid.

(Catalog of Federal Domestic Assistance Number: 84.267, State Postsecondary Review Program)

Dated: January 14, 1994.

Richard W. Riley,
Secretary of Education.

The Secretary proposes to amend title 34 of the Code of Federal Regulations by adding a new part 667 to read as follows:

PART 667—STATE POSTSECONDARY REVIEW PROGRAM

Subpart A—General

Sec.
667.1 Scope and purpose.

Sec.
667.2 Definitions.
667.3 State agreement.
667.4 State postsecondary review entity.
667.5 Criteria the Secretary uses to refer institutions to a SPRE for review.
667.6 SPRE selection of institutions for review.
667.7 Notice to SPRE of Federal actions.
667.8 Institutions with locations in more than one State.

Subpart B—Allotment Formula and Funding Procedures

667.11 Allotment formula.
667.12 Application for funds.
667.13 Approval of funding application.
667.14 Allowable costs and activities.
667.15 Fiscal procedures and records.
667.16 Supplement, not supplant, requirement.

Subpart C—State Review Standards, SPRE Reviews, and Termination of Institutional Participation

667.21 State review standards.
667.22 Disapproval of State review standards.
667.23 SPRE reviews of institutions.
667.24 Peer reviews of institutions.
667.25 Termination of an institution's participation in the Title IV, HEA programs.
667.26 Due process requirements.
Authority: 20 U.S.C. 1099a through 1099a-3, unless otherwise noted.

Subpart A—General

§ 667.1 Scope and purpose.

(a)(1) This part establishes the rules and procedures that govern the State Postsecondary Review Program, which is authorized under Title IV, Part H, Subpart 1 of the Higher Education Act of 1965, as amended (HEA). The purpose of the program is to strengthen State oversight of institutions participating in the Title IV, HEA programs through the development of State standards for those institutions, and State review under those standards of institutions referred by the Secretary under § 667.5 or selected by the State under § 667.6.

(2) Under this part, if a State finds that an institution it reviews does not satisfy the State standards, the State may—

(i) Require the institution to take prompt actions to bring itself into compliance with the State's standards; or

(ii) Determine that the institution should no longer participate in a Title IV, HEA program.

(b) A State must carry out activities under this part only to the extent that the costs of those activities will be reimbursed by Federal funds.

(c) As used in this part, "an institution" includes—

(1) An institution of higher education as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education as defined in 34 CFR 600.5; and

(3) A postsecondary vocational institution as defined in 34 CFR 600.6.

(d) The provisions in the Education Department General Administrative Regulations, State Administered Programs, 34 CFR Part 76, do not apply to this part except for the provisions in—

(1) 34 CFR 76.1, 76.2, and 76.50 of subpart A;

(2) 34 CFR 76.500 through 76.534, 76.561, 76.563, and 76.580 through 76.592 of Subpart F; and

(3) 34 CFR 76.700 through 76.702, 76.707, 76.720, 76.730, 76.731, 76.734, 76.760, and 76.761 of subpart G.

(Authority: 20 U.S.C. 1099a–1099a-3)

§ 667.2 Definitions.

(a) The following terms used in this part are defined in the regulations governing Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR Part 600:

Branch campus
Educational program
Federal Family Education Loan (FFEL) programs
Nationally recognized accrediting agency
Recognized occupation
Regular student
Secretary

(b) The following terms used in this part are defined in the Student Assistance General Provisions regulations, 34 CFR part 668:

Award year
Clock hour
Eligible program
Enrolled
Federal Pell Grant Program
Federal Perkins Loan Program
Federal PLUS Program
Federal Stafford Loan Program
Federal Supplemental Educational Opportunity Grant (FSEOG) Program
Federal Supplemental Loans for Students (SLS) Program
Federal Work-Study (FWS) Program
National Early Intervention Scholarship and Partnership (NEISP) Program
State
State Student Incentive Grant (SSIG) Program

(c) The following definitions apply to terms used in this part:

Classification of Instructional Programs (CIP): A manual published by the U.S. Department of Education, National Center for Education Statistics, that lists the codes, titles, and descriptions of instructional programs used by institutions and States for reporting and analyzing education data at the national level.

Education and general expenditures:

The total amount expended by an institution for instruction, research, public service, academic support (including library expenditures), student services, institutional support, scholarships and fellowships, operation and maintenance expenditures for the physical plant, and any mandatory transfers which the institution is required to pay by law.

National Occupational Information Coordinating Committee (NOICC): An agency jointly sponsored by the Departments of Education and Labor to facilitate comparisons between educational programs and related occupations and to provide information to State employment counseling services.

Professional program: An undergraduate or graduate educational program that prepares individuals for an occupation, if that occupation—

- (i) Is listed in SOC or CIP;
- (ii) Requires at least an associate degree to qualify for entry;
- (iii) Involves the independent practice or application of a defined or organized body of competencies that is unique to the occupation; and
- (iv) Is formally recognized and regulated under a national or State licensure, accreditation, or permit system.

Referred institution: An institution that a SPRE reviews as a result of—

- (i) A referral by the Secretary under § 667.5; or
- (ii) State selection under § 667.6.

Standard Occupational Classification (SOC) Manual: A manual published by the U.S. Department of Commerce, used for reporting national statistics on occupations and employment projections, compiled from data collected through the census and other Federal surveys.

State Postsecondary Review Entity (SPRE): The entity described in § 667.4.

Title IV, HEA program: One of the programs identified in 34 CFR 668.1.

Vocational program: An educational program below the baccalaureate degree level, that is not classified as a professional program, that prepares students for gainful employment in a recognized occupation.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.3 State agreement.

(a) To participate in the State Postsecondary Review Program, a State must enter into an agreement with the Secretary.

- (b) In the agreement, the State—
 - (1) Designates a SPRE;
 - (2) Describes the organizational structure of the SPRE;

(3) Assures that—

- (i) The SPRE has the legal authority under State law to carry out the functions required of it under this part;
- (ii) The SPRE will perform the functions required of it under this part;
- (iii) The SPRE will keep records or have access to records and provide information to the Secretary as may be requested for financial and compliance audits, and program evaluations;
- (iv) The SPRE will review referred institutions on a schedule that coincides with the Secretary's schedule for recertifying those institutions to participate in the Title IV, HEA programs;

(4) Describes the relationship between the SPRE, the State approving agency for Veterans Affairs, the State guaranty agency under the FFEL programs, the State agency responsible for administering the SSIG Program, any State entity that provides a license to institutions to operate in the State or otherwise legally authorizes institutions to provide postsecondary education in the State, any State-level entity that approves service providers under the Job Training Partnership Act, and any State-level entity that certifies vocational education;

(5) Indicates that the SPRE—

- (i) Shall contract with a nationally recognized accrediting agency or a peer review system for purposes of § 667.23; and

(ii) May contract with a private agency, nationally recognized accrediting agency, or peer review system for assistance in performing the SPRE's functions; and

(6) Includes the SPRE's plan for performing the functions described in § 667.12.

(c) The agreement between the State and the Secretary goes into effect when it is signed by the Secretary and remains in effect until it is terminated by the Secretary or the State. The Secretary or the State terminates an agreement under the provisions of that agreement.

(d) The sanctions set forth in paragraph (e) of this section follow if the State—

- (1) Does not enter into an agreement with the Secretary;
 - (2) Fails to comply with the terms of the agreement and the Secretary terminates that agreement;
 - (3) Terminates the agreement with the Secretary; or
 - (4) Does not establish review standards under § 667.21 that are approved by the Secretary by the end of the second year for which the State received an allotment under § 667.11.
- (e) If any of the events listed in paragraph (d) of this section occur—

(1) The State is ineligible to receive—

- (i) Any funds appropriated to carry out this program;

- (ii) Its allotment of any funds appropriated under the SSIG Program; and

- (iii) Any funds appropriated to carry out the NEISP Program; and

(2) The Secretary—

- (i) Does not designate as eligible for participation in a Title IV, HEA program any institution seeking initial participation in that program, any branch campus for which an institution seeks an initial designation of eligibility under 34 CFR part 600, or any institution that has undergone a change in ownership that results in a change in control as determined in 34 CFR part 600, that is located in that State;

- (ii) Grants only provisional certification, as determined in 34 CFR part 668, to an institution in that State not described in paragraph (e)(2)(i) of this section; and

- (iii) May—

- (A) Establish the review standards for that State described in § 667.21; and

- (B) Carry out, or arrange to carry out, the State's other responsibilities and requirements under this part.

(Authority: 20 U.S.C. 1099a-1)

§ 667.4 State postsecondary review entity.

The SPRE is the entity designated by the State in the agreement between the State and the Secretary under § 667.3, to—

(a) Represent all existing State entities that are, and all future State entities that will be, responsible for—

- (1) Granting State authorization to provide postsecondary education in that State; and

- (2) Ensuring that all institutions in the State that participate in a Title IV, HEA program remain in compliance with the State review standards established under § 667.21;

- (b) Perform the functions required of it under this part; and

- (c) Keep records or have access to records and provide information to the Secretary as may be requested for financial and compliance audits, and program evaluations.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.5 Criteria the Secretary uses to refer institutions to a SPRE for review.

(a)(1) The Secretary refers an institution that participates in a Title IV, HEA program to a SPRE for review if the institution meets one or more of the criteria contained in paragraph (b) of this section.

(2) In determining whether an institution meets one or more of the criteria contained in paragraph (b) of

this section, the Secretary uses the most recently available data.

(b) Except as provided in paragraphs (c), (d), and (e) of this section, the Secretary refers an institution to a SPRE if—

(1) The institution has a cohort default rate (defined in 34 CFR 668.15) equal to or greater than 25 percent;

(2)(i) The institution has a cohort default rate equal to or greater than 20 percent; and

(ii) During the latest completed award year for which data are available—

(A) More than two-thirds of the institution's regular undergraduate students who were enrolled as at least half-time students received assistance under any Title IV, HEA program, excluding assistance received from the SSIG, NEISP, and Federal PLUS Programs; or

(B) The amount that the institution's students received under the Title IV, HEA programs, excluding funds from the SSIG, NEISP, and Federal PLUS Programs, is equal to or greater than two-thirds of the institution's education and general expenditures;

(3) The amount that the institution's students received under the Federal Pell Grant Program is equal to or greater than two-thirds of the institution's education and general expenditures;

(4) The Secretary initiated a limitation, suspension, or termination action against the institution under 34 CFR part 668, subpart G, within the preceding 5 years;

(5) An audit finding in the institution's two most recent audits under 34 CFR 668.23 resulted in a required repayment by the institution of an amount greater than 5 percent of the funds the institution received under the Title IV, HEA programs for any one award year covered by those audits;

(6) The Secretary cited the institution for its failure to submit an audit report by the deadlines established under 34 CFR 668.23;

(7)(i) The amount that the institution's students received under the Federal Pell Grant Program during any award year differed by more than 25 percent from the amount those students received under that program in the award year that preceded that award year, unless the differences can be accounted for by changes in that program;

(ii) The amount that the institution's students received under the Federal Stafford Loan Program during any award year differs by more than 25 percent from the amount those students received under that program in the award year that preceded that award year, unless the differences can be

accounted for by changes in that program; or

(iii) The amount that the institution's students received under the Federal SLS Program during any award year differs by more than 25 percent from the amount those students received under that program in the award year that preceded that award year, unless the differences can be accounted for by changes in that program;

(8) The institution failed to meet the financial responsibility standards in 34 CFR part 668, subpart B;

(9) The institution underwent a change in ownership that resulted in a change of control as defined in 34 CFR 600.31;

(10) Except with regard to any public institution affiliated with a State system of higher education, the institution has participated for less than 5 years in—

- (i) The Federal Pell Grant Program;
- (ii) The FFEL programs;
- (iii) The FSEOG Program;
- (iv) The FWS Program; or
- (v) The Federal Perkins Loan Program;

or

(11) The institution has been subject to a pattern of complaints from students, faculty, or others, including information provided to the Secretary by the SPRE, related to its management or conduct of the Title IV, HEA programs or to misleading or inappropriate advertising and promotion of the institution's educational programs, that in the Secretary's judgment are sufficient to warrant review.

(c) If the Secretary refers an institution to the SPRE under paragraph (b)(9) with regard to the same change of ownership or (b)(6) of this section, and the SPRE conducts a review of the institution as a result of that referral and finds no significant violations of the State's standards, the Secretary reserves whether to refer that institution again to the SPRE for the same reason that resulted in the initial referral.

(d) The Secretary reserves whether to refer again to the SPRE an institution that meets only the conditions of paragraph (b)(10) of this section, if the SPRE previously conducted a review of that institution and found no violations of the State's standards.

(e)(1) An institution may request the Secretary to confirm the data used by the Secretary in referring that institution to a SPRE.

(2) The Secretary rescinds a referral if confirmation reveals that the data used to make a referral was inaccurate and a referral would not be required under accurate data.

(3) The Secretary does not rescind a referral if the Secretary—

- (i) Confirms that the data are accurate; or

(ii) Is unable to confirm the data.

(4) In confirming data, the Secretary presumes that records maintained in the normal course of business by the U.S. Department of Education, a guaranty agency under the FFEL programs, a SPRE, a State licensing agency, or another State agency are accurate unless the institution proves to the Secretary's satisfaction that the records are not properly maintained or are inaccurate.

(Authority: 20 U.S.C. 1099a-3)

§ 667.6 SPRE selection of institutions for review.

A SPRE may review an institution under this part that was not referred by the Secretary if—

(a) The SPRE—

(1)(i) Determines that the institution meets a referral criterion in § 667.5 based on more recent data available to the SPRE; or

(ii) Has reason to believe the institution is engaged in fraudulent practices; and

(2) Requests the Secretary to approve its review of that institution; and

(b) The Secretary—

(1) Approves that request; or

(2) Does not respond to the SPRE's request within 21 days after the date the Secretary receives that request.

(Authority: 20 U.S.C. 1099a-3)

§ 667.7 Notice to SPRE of Federal actions.

(a) If the Secretary takes an action against an institution, the Secretary notifies the SPRE of the State in which the institution is located within 10 days of taking that action.

(b) If the Secretary is informed that another Federal agency is taking an action against an institution, the Secretary notifies the SPRE of the State in which the institution is located as soon as possible but not later than 10 days after learning of that action.

(Authority: 20 U.S.C. 1099a-3)

§ 667.8 Institutions with locations in more than one State.

(a) If an institution that is subject to a referral has locations in more than one State, the Secretary refers the institution to the SPRE in each State in which the institution is located and informs each SPRE of the other States in which the institution is located.

(b) The SPRE of the State in which the main campus of the institution is located has the principal responsibility for reviewing that institution.

(c) If a branch campus or additional location of an institution is in a State other than the State in which the institution's main campus is located, the SPRE of the State in which that branch

campus or additional location is located—

(1) May review that branch campus or additional location before a SPRE review is conducted of the main campus of that institution;

(2) May delay its review of that branch campus or additional location until a SPRE review is conducted of the main campus of that institution; or

(3) May choose not to review that branch campus or additional location if—

(i) The SPRE of the State in which the main campus of that institution is located reviews that institution and makes no significant findings; and

(ii) The State's allotment is insufficient to allow the SPRE to review all referred institutions.

(d) An institution, its branch campuses, and additional locations are subject to the review standards of the State in which they are located.

(e) Notwithstanding paragraphs (b) and (c) of this section, to review a referred institution that has locations in more than one State, the SPREs of those States may enter into an agreement under which the SPREs may alter the review responsibilities set forth in paragraphs (b) and (c) of this section.

(Authority: 20 U.S.C. 1099a-3)

Subpart B—Allotment Formula and Funding Procedures

§ 667.11 Allotment formula.

(a) For each fiscal year for which funds are appropriated to carry out this part:

(1) The Secretary—

(i) Allots \$20,000 to Guam, \$20,000 to American Samoa, \$20,000 to the Northern Mariana Islands, \$20,000 to the Virgin Islands, and \$20,000 to the Trust Territory of the Pacific Islands;

(ii) Calculates each remaining State's allotment of the remaining funds under paragraph (a)(2) of this section; and

(iii) Notifies each State of its allotment.

(2) Except for Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands, the Secretary allots those funds to a State by—

(i) Determining the percentage of institutions participating in a Title IV, HEA program in the State by dividing the number of institutions located in that State that are certified to participate in a Title IV, HEA program by the total number of institutions that are certified to participate in all States;

(ii) For the latest award year for which information is available, determining the percentage of Title IV, HEA program

funds by dividing the total amount of Title IV, HEA program funds that were made available to students who enrolled in the institutions in that State that participate in a Title IV, HEA program, or to those students' parents, by the total amount of Title IV, HEA program funds that were made available to students, or to those student's parents, who enrolled in institutions that participate in a Title IV, HEA program in all States;

(iii) Averaging the two percentages determined in paragraph (a)(2)(i) and (ii) of this section;

(iv) Calculating an "initial distribution" by multiplying the average percentage determined in paragraph (a)(2)(iii) of this section by the amount appropriated to carry out this part less the total amount allotted to Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(v)(A) Determining which States receive less than \$50,000 under the initial distribution;

(B) Providing each of those States with \$50,000; and

(C) Calculating the difference between the \$50,000 provided to each of those States and those States' initial distribution;

(vi)(A) Determining which States receive more than \$50,000 under the initial distribution; and

(B) Calculating the difference between each of those States' initial distribution and \$50,000;

(vii) Calculating a "reduction percentage" by dividing the total amount obtained in paragraph (a)(2)(v)(C) of this section by the total amount obtained in paragraph (a)(2)(vi)(B) of this section; and

(viii) Reducing the initial distribution of each State in paragraph (a)(2)(vi)(A) of this section by the product of the amount obtained in paragraph (a)(2)(vi)(B) of this section and the reduction percentage in paragraph (a)(2)(vii) of this section.

(b) If the Secretary determines that a SPRE will not spend its entire allotment during the period for which those funds are made available, or if a SPRE does not spend its allotment by the end of the period for which those funds are made available, the Secretary reallocots those funds to other SPREs in a manner that the Secretary determines best carries out the purposes of the State Postsecondary Review Program.

(c) SSIG and NEISP Program Federal and State matching funds are excluded from the calculations in this section.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.12 Application for funds.

(a)(1) *General.* For each fiscal year for which funds are appropriated to carry out this part, a State that has entered into an agreement with the Secretary under § 667.3 shall apply to the Secretary to receive its allotment. The State's application must contain the information required in paragraph (b), (c), or (d) of this section, as appropriate. The Secretary publishes in the *Federal Register* the date by which a State must submit its application.

(2) *Established review standards.* A State has established review standards if those standards met the requirements in § 667.21 and the Secretary did not disapprove those standards under § 667.22.

(b) *Application before standards are established.*

(1) If a State has not established review standards, to receive its allotment the State—

(i) Must submit a plan to develop—

(A) The review standards described in § 667.21, in consultation with the institutions in that State, which shall describe the manner in which consultation will take place; and

(B) The procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State, in consultation with institutions in that State, which shall describe the manner in which consultation will take place;

(ii) May submit a plan to identify information maintained by institutions and State agencies, other than the information institutions are required to maintain under the Student Right-to-Know and Campus Security Act, that is relevant to developing the State review standards; to identify systems in which this information is maintained, and to provide estimates of the costs of coordinating the institutions' and State's information systems with an information system developed by the SPRE; and

(iii) Must submit a budget for developing the standards and the complaint procedures and for providing cost estimates for the SPRE's information system, if relevant, that does not exceed the State's fiscal year 1993 allotment.

(2) If the State's fiscal year 1993 allotment is less than the State's anticipated cost of carrying out the activities described in paragraphs (b)(1)(i) and (ii) of this section, the State shall first use its allotment to develop the review standards. If a portion of the allotment remains after the State develops its review standards, the State may develop procedures for receiving and responding to complaints from

students, faculty, and others regarding institutions in the State. The State may use any remaining portion of its allotment to provide cost estimates for the SPRE's information system only after it has completed developing its review standards and complaint procedures.

(c) *Application after standards are established.* (1) If the Secretary has not disapproved the State's review standards under § 667.22, to receive its allotment, the State must submit to the Secretary—

(i) Its plan to review referred institutions; and

(ii) A budget for those reviews that does not exceed the State's allotment calculated under § 667.11 less any amount expended by the SPRE in carrying out the activities under paragraph (b) of this section.

(2) If a SPRE anticipates that the cost of reviewing all the referred institutions will exceed the State's allotment, the SPRE shall, as part of its plan, submit a priority system for selecting institutions to review from among the referred institutions.

(3) The SPRE shall have discretion in developing its priority system, except that the SPRE must make its top priority for review, referred institutions that the Secretary has scheduled for recertification under 34 CFR part 668, subpart B.

(d) If a State first applies to the Secretary to receive an allotment after fiscal year 1993, the State must submit the information and documentation required under paragraph (b) of this section, and may submit the information required in paragraph (c) of this section.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.13 Approval of funding application.

(a) *Before standards are established.* The Secretary approves a State's plan and budget submitted before the State establishes review standards if—

(1) The plan provides a reasonable basis, and adequate budget justification, for carrying out the activities described in § 667.12(b)(1);

(2) If applicable, the plan includes a priority system for using the State's allotment as described in § 667.12(b)(2); and

(3) The budget includes only reasonable allowable costs within the State's fiscal year 1993 allotment.

(b) *After standards are established.* After the State establishes review standards, the Secretary approves a State's plan and budget for the allowable activities described in § 667.14 if—

(1) The plan provides adequate budget justification for those activities;

(2) The plan provides for a reasonable scheme for reviewing referred institutions;

(3) The plan includes a priority system for review as described in § 667.12(c)(3);

(4) The proposed contracts with private agencies, accrediting agencies, or peer review systems to carry out SPRE functions included in the plan are reasonable and appropriate; and

(5) The budget includes only reasonable allowable costs within the State's allotment.

(c) *Failure to submit an acceptable application.* If a State does not submit an application for funds under § 667.12 or its application is not approved under this section—

(1) The State is ineligible to receive—

(i) Any funds appropriated to carry out this program;

(ii) Its allotment of any funds appropriated under the SSIG Program; and

(iii) Any funds appropriated to carry out the NEISP Program; and

(2) The Secretary—

(i) Does not designate as eligible for participation in a Title IV, HEA program any institution seeking initial participation in that program, any branch campus for which an institution seeks an initial designation of eligibility under 34 CFR part 600, or any institution that has undergone a change in ownership that results in a change in control as determined in 34 CFR part 600, that is located in that State; and

(ii) Grants only provisional certification, as determined in 34 CFR part 668, to an institution in that State not described in paragraph (c)(2)(i) of this section.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.14 Allowable costs and activities.

(a) If included in a State's approved plan, the Secretary pays, by reimbursement, direct costs, in paragraph (c) and described in Office of Management and Budget (OMB) Circular A-87, and indirect costs as determined in paragraph (b) of this section, of—

(1) Establishing State review standards in consultation with institutions in the State, publicizing the State review standards, and providing initial and continuing training to State and other personnel in the State, including personnel at the institution subject to review;

(2) Establishing and implementing the procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State, in consultation with institutions in that State;

(3) Reviewing referred institutions; and

(4) Developing and maintaining an information system for SPRE review activities.

(b) If a State seeks reimbursement for indirect costs, the State shall—

(1) Use the restricted indirect cost rate, computed under 34 CFR 75.564, and approved by the Secretary under 34 CFR 75.561; and

(2) Not charge as a direct cost any cost that qualifies as an indirect cost.

(c) The direct costs of carrying out the activities described in paragraph (a) of this section include, but are not limited to—

(1) The salary of State employees engaged in allowable activities;

(2) Travel costs incurred—

(i) Consulting with institutions in developing standards and complaint procedures; and

(ii) Reviewing referred institutions;

(3) Training for—

(i) State employees to perform reviews of referred institutions; and

(ii) Institutional and other personnel regarding the State review standards;

(4) Contracting with private organizations, accrediting agencies, and peer review systems to carry out required activities; and

(5) Costs incurred by the State for administrative actions and legal proceedings.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.15 Fiscal procedures and records.

(a) A State must account for the funds it received under this part in accordance with the procedures it uses to account for the expenditure of its own funds and must keep fiscal and accounting records that support, on audit, its expenditure of funds under this part.

(b) (1) Except as provided in paragraph (b)(2) of this section, the State must keep intact and accessible records relating to its activities under this part for five years after the end of the period for which funds were provided.

(2) The State shall keep records on any claim or expenditure questioned on audit until any audit question is resolved.

(c) A State must have an audit performed of the SPRE's activities under this part at least once every two years and must submit that audit to the Secretary. An audit conducted under the Single Audit Act satisfies this requirement.

(Authority: 20 U.S.C. 1099a-1099a-3)

§ 667.16 Supplement, not supplant, requirement.

The Secretary reimburses a State for the costs of necessary SPRE activities

which supplement, but do not supplant, existing licensing or review functions conducted by the State.

(Authority: 20 U.S.C. 1099a-2)

Subpart C—State Review Standards, SPRE Reviews, and Termination of Institutional Participation.

§ 667.21 State review standards.

(a) Each State participating under this part must develop standards, in consultation with institutions in the State, under which the SPRE reviews referred institutions. The State-developed review standards must evaluate, with regard to a referred institution—

(1) The extent to which the institution makes available to its students and prospective students its catalogs, admission requirements, course outlines, tuition and fee schedules, refund policy, course cancellation policy, its rules and regulations, and its enrollment agreement if appropriate;

(2) Whether the institution's descriptions of its courses and programs are accurate;

(3) Whether the institution has a method to assess that a student has the ability to complete successfully the educational program for which he or she applies;

(4) The extent to which the institution's method to assess that a student has the ability to complete successfully the educational program for which he or she applies accurately assesses that ability as measured by the completion rate of that program;

(5) Whether the institution maintains and enforces standards relating to satisfactory progress;

(6) Whether the institution maintains adequate student and other records;

(7) Whether the institution complies with relevant safety, and health standards, such as fire, building, and sanitation codes;

(8) The extent to which the institution's financial and administrative capacity is appropriate to its scale of operations, and whether the institution maintains adequate financial and other information to determine the adequacy of its financial and administrative capacity;

(9) For an institution that the SPRE determines is at financial risk, the adequacy of the institution's plans to provide for, if the institution closes—

(i) Instruction to enrolled students; and

(ii) Retention of and access to academic and financial aid records;

(10) If an institution provides an educational program that is designed to

prepare students for gainful employment—

(i) Whether the tuition and fees charged for that educational program are reasonable given the amount of money that a student who successfully completes the program may reasonably be expected to earn; and

(ii) Whether the educational program provides students with quality training that leads to useful employment in an occupation recognized in that State. In making this evaluation, one of the factors the SPRE shall consider is the appropriateness of the length of the educational program in terms of both the number of days of instruction and the number of credit or clock hours the program offers;

(11) The extent to which the institution provides to its students relevant information regarding—

(i) Market and job availability for students in its occupational, professional, and vocational programs; and

(ii) The relationship between the institution's educational programs and State licensing standards for specific occupations;

(12) The appropriateness of the number of semester, trimester, or quarter credit or clock hours required for the completion of an educational program;

(13) The appropriateness of the length of 600-hour educational programs;

(14) Whether, and the extent to which, the actions of any owner or shareholder of the institution, or any person exercising control over the institution may adversely affect its participation in a Title IV, HEA program;

(15) The extent to which the institution's procedures for investigating and resolving student complaints are adequate;

(16) The extent to which the institution's advertising promotion, and student recruiting practices are appropriate;

(17) Whether the institution has a fair and equitable refund policy; and

(18) The extent to which the institution's educational programs are successful as measured by—

(i) The completion and graduation rates of the students enrolled in those programs, taking into account the length of the program and the selectivity of the institution's admissions policy (for the purpose of this provision, a completion rate is the same as a graduation rate);

(ii) The institution's withdrawal rate;

(iii) With respect to the institution's vocational and professional programs, the placement rate of the institution's graduates in occupations related to their

educational programs, with related programs and occupations determined by reference to the *NOICC CIP/DOT Master Crosswalk*;

(iv) Where appropriate, the rate at which the institution's graduates pass licensure examinations; and

(v) The success of the institution's students who express other completion goals, such as transferring to another institution, full-time employment in their field of study, or military service, in meeting those goals.

(b) In developing the review standards in paragraph (a) of this section, a State—

(1) May establish different standards for different types or categories of institutions or educational programs;

(2) Shall specify the records and information an institution would need to maintain to demonstrate to a SPRE the institution's compliance with those standards;

(3) Except for standards regarding prospective students in paragraph (a)(1) of this section, shall establish standards that apply at least to all regular students;

(4) Shall quantify the standards described in paragraphs (a)(10)(i) and (a)(18) (i), (ii), (iii), and (iv) of this section by establishing—

(i) An acceptable percentage for the relationship between the tuition and fees charged by an institution for an educational program and the amount of money that a student who successfully completes that program actually earns;

(ii) Acceptable completion and graduation rates of students enrolled in educational programs offered by an institution;

(iii) An acceptable withdrawal rate of students at an institution;

(iv) With respect to an institution's vocational and professional programs, an acceptable placement rate of the institution's graduates in occupations related to their educational program; and

(v) An acceptable rate or rates at which the institution's graduates pass licensure examinations; and

(5) Shall determine the extent to which it is appropriate to base a State review standard on a related Title IV, HEA program standard or requirement or establish as the State's review standard the comparable Title IV, HEA program standard or requirement.

(Authority: 20 U.S.C. 1099a-3)

§ 667.22 Disapproval of State review standards.

(a) (1) Each State shall submit to the Secretary for his evaluation the review standards it developed under § 667.21.

(2) The State shall also submit to the Secretary an explanation of how each standard was established, including—

(i) An explanation of the relationship between each of the State's review standards and the related or comparable Title IV, HEA standards and requirements;

(ii) If applicable, an explanation of the reasons for establishing different review standards for different types of institutions or educational programs; and

(iii) A description of the manner in which institutions were consulted in developing the review standards.

(b) The Secretary disapproves a State's review standards if—

(1) The State does not assure the Secretary that the State's review standards are consistent with the laws and constitution of that State;

(2) The State does not submit evidence that the State's review standards were developed in consultation with the institutions in that State;

(3) The State's review standards do not meet or exceed all of the requirements and cover all the areas described in § 667.21; or

(4) The standards developed under § 667.21(b)(4)—

(i) Do not specify the methods and procedures that an institution must use to calculate—

(A) The relationship between the tuition and fees charged by an institution for an educational program and the amount of money that a student who successfully completes that program actually earns; and

(B) The graduation or completion rates, withdrawal rates, placement rates, and licensure examination pass rates of the institution's students or graduates; and

(ii) Do not specify statistically valid methods and procedures that an institution must use if that institution conducts surveys of its graduates to obtain data regarding the type of employment, placement, earnings, or licensure examination pass rates of the institution's graduates;

(c) If the Secretary disapproves a State's review standards, the Secretary gives the State the reasons for that disapproval and gives the State an opportunity to—

(1) Demonstrate why the Secretary's disapproval was incorrect; or

(2) Submit revised review standards that address the reasons for the Secretary's disapproval.

(Authority: 20 U.S.C. 1099a-3)

§ 667.23 SPRE reviews of institutions.

(a) If the Secretary refers an institution to a SPRE for review under § 667.5 or the SPRE selects an institution for review under § 667.6 and the Secretary approves that selection, the SPRE reviews, or arranges for the review of that institution, to determine whether the institution is in compliance with the State review standards described in § 667.21.

(b) The SPRE shall provide written notice to all institutions in the State of the review standards approved by the Secretary under § 667.22 before it may conduct reviews of referred institutions.

(c) The SPRE must issue an initial report of its findings and provide it to the institution no later than 45 days after the SPRE completes its review. If the SPRE finds that the institution is in violation of a standard, for each finding, the SPRE—

(1) Must cite the standard violated and the nature of the violation; and

(2) May—

(i) Prescribe, if necessary, a course of action the institution must follow to correct the violation. The SPRE has sole discretion to determine an appropriate period for the institution to correct the violation and bring itself into compliance with the State's review standards; or

(ii) Initiate a proceeding under § 667.25 to effect the termination of the institution's participation in the Title IV, HEA programs.

(d) The SPRE must give the institution an opportunity to respond to its findings and required actions.

(e) If the institution chooses to respond within the time permitted by the SPRE, the SPRE must evaluate the institution's response and issue a final report to the institution that includes its findings and required action.

(f) (1) The SPRE must provide to the Secretary a copy of its final report to an institution within 30 days of its issuance to the institution; or

(2) If the institution did not respond to the SPRE's initial report by the date permitted by the SPRE, the SPRE must provide to the Secretary a copy of its initial report. The SPRE's initial report becomes its final report on the day after the date provided to the institution for responding to that report; and

(3) If the SPRE did not prescribe a course of action the institution must follow to correct a violation of the State's standards under paragraph (c) of this section, the SPRE must include in its report to the Secretary an explanation of why no action was prescribed.

(g) In addition to the reasons for initiating a proceeding to effect the

termination an institution's participation in the Title IV, HEA programs under paragraph (c) of this section, the SPRE may determine that the institution should no longer participate in the Title IV, HEA programs if that institution—

(1) Does not respond to the SPRE's findings or required actions within the time permitted by the SPRE and the SPRE's findings show serious violations of the State's standards;

(2) Does not allow SPRE personnel at the institution; or

(3) Fails to provide SPRE officials with prompt access to its documents and records.

(Authority: 20 U.S.C. 1099a-3)

§ 667.24 Peer reviews of institutions.

(a) To carry out a review of a referred institution, the SPRE must contract with a nationally recognized accrediting agency or other peer review system the SPRE determines demonstrates competence in assessing educational programs.

(b) (1) Under the contract described in paragraph (a) of this section, the accrediting agency or peer review system shall carry out a review or provide information from its previous grant of accreditation or previous review to the SPRE regarding the agency's or system's assessment of the quality and content of the institution's educational programs in relation to achieving the stated objectives for which the programs were offered.

(2) In making its assessment under paragraph (b)(1) of this section, for each educational program, the agency or system shall take into account the adequacy of the space, equipment, instructional materials, staff, and student support services, including student orientation and counseling provided for each program, and any other areas specified in the agency's contract with the SPRE.

(Authority: 20 U.S.C. 1099a-3)

§ 667.25 Termination of an institution's participation in the Title IV, HEA programs.

(a) (1) If a SPRE determines that an institution should no longer participate in a Title IV, HEA program, based upon its review, because the institution is in violation of State standards or has not complied with the SPRE requirements such as those listed in § 667.23(g), the SPRE must provide the institution with the opportunity to contest that determination in accordance with procedures the Secretary has approved for that purpose under § 667.26.

(2) If the SPRE still concludes after affording the institution the opportunity to challenge the SPRE's initial

determination that the institution is in violation of the State's review standards and should no longer continue to participate in a Title IV, HEA program, the SPRE notifies the Secretary of those findings and that determination.

(b) (1) Upon notice by the SPRE that the institution should no longer participate in a Title IV, HEA program, the Secretary immediately terminates that institution's participation in that program and notifies the institution and the SPRE of the effective date of that termination.

(2) If an institution's participation in a Title IV, HEA program is terminated under this section—

(i) The institution may not appeal that termination to the Secretary; and

(ii) The institution may not reapply to the Secretary to participate in that program until 18 months have expired from the effective date of its termination.

(Authority: 20 U.S.C. 1099a-3)

§ 667.26 Due process requirements.

(a) Each State shall submit to the Secretary for approval the procedures it uses to allow an institution to challenge a SPRE's finding that the institution is in violation of the State's review standards and should no longer continue to participate in a Title IV, HEA program.

(b) The Secretary approves a State's procedures described in paragraph (a) of this section if—

(1) The State review standards are in writing; and

(2) The procedures require the SPRE to—

(i) Notify an institution of any required action and the basis for that action;

(ii) Permit the institution the opportunity to challenge that adverse action in a hearing or in writing;

(iii) Notify the institution in writing of the result of its challenge, and the basis for that result; and

(iv) Follow other applicable procedural requirements of State law.

(Authority: 20 U.S.C. 1099a-3)

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix A to Preamble.—Major Issues Discussed at the Regional Meetings

The Department convened four regional meetings in September 1992 to obtain public involvement in the development of regulations to implement Title IV, part H, subpart 1 of the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1992, Public Law 102-325. This subpart describes the rules

and procedures that govern the State Postsecondary Review Program.

The Department invited individuals and representatives of groups involved in student financial assistance programs to the four regional meetings. At each meeting, the Department provided for a comprehensive discussion and exchange of information regarding the implementation of subpart 1 by providing participants with an issue paper that raised issues and questions with regard to the statutory provisions included in subpart 1. The following is a summary of the information provided to the Department by participants at the regional meetings. The section of the proposed regulations that is the subject of the information is provided as a reference.

Time requirement for development of State review standards—§ 667.3.

Participants in the regional meetings discussed whether the Secretary should require States to develop review standards within a specified time. The participants agreed that the Secretary should specify a time period but disagreed on what that time period should be.

Allotment formula—§ 667.11.

Participants discussed how Federal funds should be divided among the States that have entered into an agreement with the Secretary and suggested a funding scheme under which each participating State would receive (1) an allotment sufficient to carry out minimum SPRE activities, and (2) a supplemental allotment based on the number of institutions in the State, the total Title IV, HEA program funds made available to students attending institutions in the State, or the number institutions referred to the State by the Secretary.

Allowable costs and activities—§ 667.14.

Participants discussed the extent to which a State should be reimbursed for the costs of performing reviews and other activities and suggested that the Secretary reimburse the State for the direct and indirect costs of SPRE review activities, including salaries and fringe benefits, travel and other review costs, costs for developing State review standards and complaint procedures, and litigation costs.

Consultation with institutions—§ 667.12.

Participants discussed whether the Secretary should establish procedures that a State must use to consult with institutions in its State in the development of State review standards. They recommended that the Secretary suggest, but not establish, consultation procedures.

Federal minimum review standards—§ 667.21.

Participants discussed whether the Secretary should establish Federal minimum standards and whether a State could establish standards that are weaker than comparable standards that govern an institution's eligibility and participation in the Title IV, HEA programs. The participants were divided on the first issue; the majority argued that Federal minimums would not be appropriate because they could not be developed in a manner that would adequately account for the mission and diversity of all postsecondary institutions. With respect to the second issue, some participants felt that a State should have the flexibility to develop weaker standards, while others felt that no distinction should be made between a "weaker" standard or a "different" standard. Those participants felt that a State should be able to develop different standards for different types of institutions.

Quantifiable standards—§ 667.21.

Participants discussed whether a State should quantify review standards and suggested that, to the extent that standards could be quantified, they should be quantified. However, most participants felt that the State should have the flexibility to establish the level at which an institution would be considered to be in violation of the quantified standard.

SPRE review findings—§ 667.23.

Participants discussed whether a SPRE should be required to determine that an institution should no longer participate in the Title IV, HEA programs based on the institution's failure to satisfy a particular State standard. Most participants felt that a SPRE could, but should not be required to, make that determination. The participants suggested that, based on the nature and severity of an institution's violations, the SPRE should have the latitude to take an adverse action against the institution or to require the institution to take actions to bring itself into compliance with the State's standards.

Disapproval of State review standards—§ 667.22.

Participants discussed the basis under which the Secretary should disapprove a State's review standards. Most participants felt that the Secretary should disapprove a State's standards only if those standards did not adequately address the statutory requirements.

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Department of Housing and Urban Development

24 CFR Part 907

Homeownership Demonstration Program in Omaha, Nebraska; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**Office of the Secretary****24 CFR Part 907**

[Docket No. R-94-1704; FR-3573-I-01]

RIN 2577-AB38

Homeownership Demonstration Program in Omaha, Nebraska

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule implements section 132 of the Housing and Community Development Act of 1992. Section 132 establishes a demonstration program to facilitate self-sufficiency and permits the homeownership sale of single family homes administered by the Housing Authority of the City of Omaha in the State of Nebraska. The purpose of the demonstration is to exhibit the effectiveness of promoting homeownership and providing support services.

DATES: Effective date: January 24, 1994. Expiration date: 24 CFR part 907 will expire on January 24, 1995. Comments due date: March 25, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Rules Docket Clerk, Office of the General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection during regular business hours (weekdays 7:30 am to 5:30 pm) at the above address.

FOR FURTHER INFORMATION CONTACT: Gary Van Buskirk, Homeownership Division, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., room 4112, Washington, DC 20410. Telephone number, voice (202) 708-4233, TDD (202) 708-0850. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: This interim rule implements section 132 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992). Section 132 establishes a demonstration program to facilitate self-sufficiency and to permit the homeownership sale of single family homes administered by the Housing Authority of the City of Omaha in the State of Nebraska. The purpose of the demonstration is to exhibit the effectiveness of promoting

homeownership and providing support services.

This interim rule is closely modeled on the interim rule for the Section 5(h) Homeownership Program codified in 24 CFR part 906. Section 132 specifies that the Housing Authority of the City of Omaha (hereafter the Housing Authority) is the organization to carry out the demonstration program. The Housing Authority is already administering a homeownership program approved pursuant to Section 5(h) of the United States Housing Act of 1937. In its correspondence with the Department concerning the demonstration program, the Housing Authority has indicated that it wishes to operate the demonstration program in a fashion similar to that of its existing Section 5(h) program.

There are many areas of similarity between the Section 5(h) homeownership program and the demonstration program. The Department believes that, in light of the Housing Authority's desire to pattern the demonstration program upon its existing Section 5(h) homeownership program and the Department's substantial experience with the Section 5(h) homeownership program, it should use language from the existing 5(h) regulation whenever appropriate in this interim regulation.

There are a number of clear differences between the demonstration and the Section 5(h) regulation. Because the demonstration program is established pursuant to legislation that is not part of the 1937 Act, it is not subject to the replacement requirements of the 1937 Act. The demonstration program also gives the Housing Authority greater freedom in selecting participant homebuyers under the program than the Section 5(h) program permits. There is, however, a specific mandate that, "[i]n conducting the demonstration, the Housing Authority shall affirmatively further fair housing objectives." There is also a statutory obligation that "[t]he Housing Authority shall ensure the availability of supportive services to each family participating in the demonstration program."

Justification for Interim Rule

In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking at 24 CFR part 10. However, section 132(g) requires that the Secretary implement this demonstration by issuing interim regulations, allowing for a 60-day public comment period. The Department has adopted a policy of setting an expiration

date for an interim rule unless a final rule is published before that date. This "sunset" provision appears in § 907.1(b) of the interim rule, and provides that the interim rule will expire on a date 12 months from publication.

Section 132(g) also requires that the interim regulation be effective upon issuance. The Department interprets this provision as superseding the requirement for a 30-day delay between publication and effective date of a rule required by section 7(o) of the Department of Housing and Urban Development Act.

Other Matters*National Environmental Policy Act*

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 implementing 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 between 7:30 a.m. and 5:30 p.m. weekdays at the Office of Rules Docket Clerk, 451 Seventh Street SW., room 10276, Washington, DC 20410-0500.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this interim rule before publication and by approving it certifies that the interim rule will not have a significant economic impact on a substantial number of small entities. The interim rule is limited in scope to Omaha, Nebraska.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that the provisions of this interim rule will not have a significant impact on family formation, maintenance or well being, except to the extent that the program authorized by the interim rule will increase homeownership opportunities for low-income families in Omaha, Nebraska. Any such impact is beneficial and merits no further review under the Order.

Executive Order 12611, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12611, Federalism, has determined that the policies contained in this interim rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the

distribution of power and responsibilities among the various levels of government.

Semi-Annual Agenda of Regulations

This interim rule was listed as sequence number 1648 in the Department's Semiannual Agenda of Regulations published on October 25, 1993 (58 FR 56402, 56409) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 907

Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

In accordance with the reasons set forth in the preamble, title 24 of the Code of Federal Regulations is amended by adding to chapter IX, a new part 907, consisting of §§ 907.1 through 907.21, to read as follows:

PART 907—HOMEOWNERSHIP DEMONSTRATION PROGRAM IN OMAHA, NEBRASKA

- Sec.
- 907.1 Purpose.
- 907.2 Applicability.
- 907.3 General authority for sale.
- 907.4 Fundamental criteria for HUD approval.
- 907.5 Resident consultation and involvement.
- 907.6 Property that may be sold.
- 907.7 Methods of sale and ownership.
- 907.8 Purchaser eligibility and selection.
- 907.9 Counseling, training, and technical assistance.
- 907.10 Nonpurchasing residents.
- 907.11 Maintenance reserve.
- 907.12 Purchase prices and financing.
- 907.13 Protection against fraud and abuse.
- 907.14 Limitation on resale profit.
- 907.15 Use of sale proceeds.
- 907.17 Records, reports, and audits.
- 907.18 Submission and review of homeownership plan.
- 907.19 HUD approval and Housing Authority—HUD implementing agreement.
- 907.20 Content of homeownership plan.
- 907.21 Supporting documentation.

Authority: 42 U.S.C. 3535(d); sec. 132, Pub. L. 102-550, 106 Stat. 3712-3713.

§ 907.1 Purpose.

(a) *Purpose.* This part implements section 132 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) (hereafter section 132). Section 132 establishes a demonstration program to facilitate self-sufficiency and permits the homeownership sale of single family homes administered by the Housing Authority of the City of Omaha in the State of Nebraska (hereafter "the Housing Authority"). The purpose of the demonstration is to exhibit the

effectiveness of promoting homeownership and providing support services.

(b) *Expiration date.* This part 907 expires on January 24, 1995.

§ 907.2 Applicability.

This part applies to single-family public housing units administered by the Housing Authority that have been designated by the Housing Authority for eventual homeownership. Before entering into a contract or other obligation to sell a home to a homebuyer under this part, the Housing Authority will give the Department of Housing and Urban Development (hereafter HUD) a written proposed designation that a home is to be sold under this part. The proposed designation shall specify the address of the unit(s) to be sold. HUD shall review the proposed designation to ensure that the designated home is single family public housing, that the Housing Authority has not designated more than twenty percent of the total number of public housing units that it administers and that the location of the homes complies with fair housing requirements. (The twenty percent ceiling on the number of homes that can be designated is 602 homes plus twenty percent of any additional public housing units developed by the Housing Authority through the award of public housing development funds pursuant to section 5 of the 1937 Act subsequent to October 28, 1992 that do not constitute replacement units for units demolished or disposed of pursuant to Section 18 of the 1937 Act or the Section 5(H) or Title III homeownership programs under the 1937 Act.) Consistent with the Housing Authority's affirmative obligation to further fair housing objectives, the Housing Authority shall offer homeownership opportunities in a variety of locations and promote an expanded housing choice for minorities. Homeownership opportunities for minorities shall include locations not located in an area of minority concentration.

§ 907.3 General authority for sale.

The Housing Authority may sell single family homes designated pursuant to § 907.2, for purposes of homeownership, according to a homeownership plan approved by HUD under this part. If the home is subject to indebtedness under the ACC, HUD will continue to make any debt service contributions for which it is obligated under the ACC, and the property sold will not be subject to the encumbrance of that indebtedness. (In the case of a home that is part of a development with financing restrictions (such as a bond-

financed development), however, sale is subject to the terms and conditions of the applicable restrictions.) In reference to housing properties, "development" means the same as "project," as defined in the United States Housing Act of 1937 (hereafter the 1937 Act), rather than the statutory definition of "development." Upon sale in accordance with the HUD-approved homeownership plan, HUD will execute a release of the title restrictions prescribed by the ACC. Because the property will no longer be subject to the ACC after sale, it will cease to be eligible for further HUD funding for operating subsidies or modernization under the 1937 Act upon conveyance of title by the PHA. (That does not preclude any other types of post-sale subsidies that may be available, under other Federal, State, or local programs, such as the possibility of available assistance under Section 8 of the 1937 Act, in connection with a plan for cooperative homeownership.)

§ 907.4 Fundamental criteria for HUD approval.

HUD will approve the Housing Authority's homeownership plan if it meets all three of the following criteria:

(a) The plan must be practically workable, with sound potential for long-term success. Financial viability, including the capability of purchasers to meet the financial obligations of homeownership, is a critical requirement.

(b) The plan must be consistent with law, including the requirements of this part, any other applicable Federal, State, and local statutes and regulations, and existing contracts. Subject to the other two criteria stated in this section, any provision that is not contrary to those legal requirements may be included in the plan, at the discretion of the Housing Authority, whether or not expressly authorized in this part.

(c) The plan must be clear and complete enough to serve as a working document for implementation, as well as a basis for HUD review.

§ 907.5 Resident consultation and involvement.

(a) *Consultation.* In developing a proposed homeownership plan, and in carrying out the plan after HUD approval, the Housing Authority shall consult with residents of the homes to be designated pursuant to § 907.2, and with any resident organization that represents them, as necessary and appropriate to provide them with information and a reasonable opportunity to make their views and recommendations known to the Housing

Authority. Except where otherwise indicated by the context, "resident" means the same as "tenant," as the latter term is used in the 1937 Act. In a case where vacant units are expected to be available for purchase, the Housing Authority shall consult with any resident organization or organizations that represent the prospective purchasers, as indicated by the eligibility standards stated in the plan, and with any Resident Management Corporation (RMC) formed by residents of the Housing Authority's public housing developments. While this Part gives the Housing Authority sole legal authority for final decisions as to whether or not to participate in the homeownership program under this part, as to whether or not to submit a proposed homeownership plan and the content of such a proposal, the Housing Authority shall give residents and their resident organizations full opportunity for input in the homeownership planning process, and full consideration of their concerns and opinions.

(b) *Negotiations.* Where individual residents, a RMC, or another form of resident organization may wish to initiate discussion of a possible homeownership plan, the Housing Authority shall negotiate with them in good faith. Joint development and submission of the plan by the Housing Authority and RMC, or other resident organization, is encouraged. In addition, participation of a RMC or other resident organization in the implementation of the plan is encouraged.

§ 907.6 Property that may be sold.

(a) *Types of Property.* A homeownership plan may provide for sale of one or more single family homes designated pursuant to § 907.2. A plan may provide for conversion of existing housing to homeownership or for homeownership sale of newly developed public housing.

(b) *Housing standards.* The unit must be free from any defects that pose a danger to life, health, or safety and shall meet minimum housing standards (except as permitted below) before transfer of an ownership interest to a purchaser (or execution of a lease with an option to purchase). The minimum housing standards requirement shall be met either by complying with local housing codes or, if no local code exists, the housing quality standards established by HUD for the Section 8 Certificate program. The Housing Authority prior to sale shall inspect, or ensure inspection of, each unit to determine it does not pose an imminent threat to the life, health, or safety of current or future residents and that the

property has passed recent fire and other applicable safety inspections conducted by appropriate local officials and that the unit does comply with minimum housing standards. Higher standards may be proposed by the Housing Authority or required by lenders. The property also must meet the requirements for elimination of lead-based paint hazards in HUD-associated housing, under subpart C of 24 CFR part 35. Further, the property must be in good repair, with the major components having a remaining useful life that is sufficient to justify a reasonable expectation that homeownership will be affordable by the purchasers. These standards must be met as a condition for sale of a dwelling to an individual purchaser (or execution of a lease with an option to purchase), unless the terms of sale (or lease) include measures to assure that the work will be completed within a reasonable time after the purchase (or lease), not to exceed two years (e.g., as a part of a mortgage financing package that provides the purchaser with a home improvement loan or pursuant to a sound sweat equity arrangement).

§ 907.7 Methods of sale and ownership.

(a) *General.* Any appropriate method of sale and ownership may be used, such as fee-simple conveyance or sales to resident-owned cooperatives or condominiums.

(b) *Fair housing objectives.* In conducting the demonstration, the Housing Authority shall affirmatively further fair housing objectives. Prior to marketing the homes, placing an occupant in a vacant public housing unit designated pursuant to § 907.2, or entering into a contract or other obligation to sell the homes, the Housing Authority shall submit to HUD for its approval an affirmative fair housing marketing strategy for informing and soliciting applications from people who are least likely to apply, because of race, color, religion, sex, handicap, familial status, or national origin, for the homeownership program without special outreach. (See § 92.351 of this title for an example of an affirmative fair housing marketing strategy.) HUD shall review the affirmative fair housing marketing strategy to ensure that it complies with all fair housing requirements. Once HUD approves the affirmative fair housing marketing strategy, the Housing Authority must comply with the strategy's provisions in marketing the homes to purchasers. If the initial sale will be to a resident-owned cooperative or condominium, the cooperative or condominium shall also be required to

comply with the provisions of the affirmative fair housing marketing strategy.

§ 907.8 Purchaser eligibility and selection.

Standards and procedures for eligibility and selection of the initial purchasers of individual dwellings shall be consistent with the following provisions:

(a) *Participation of families.* The Housing Authority shall establish criteria for the participation of families in the demonstration program. Such criteria shall be based on factors that may reasonably be expected to predict a family's ability to succeed in the homeownership program governed by this part.

(b) *Evidence of interest.* The criteria referred to in paragraph (a) of this section shall include evidence of interest by the family in homeownership, the employment status and history of employment of family members, and maintenance by the family of the family's previous dwelling.

(c) *Homebuyer eligibility.* Eligibility shall be limited to residents who are capable of assuming the financial obligations of homeownership, under minimum income standards for affordability, taking into account the unavailability of public housing operating subsidies and modernization funds after conveyance of the property by the Housing Authority. A homeownership plan may, however, take account of any available subsidy from other sources (e.g., if available, assistance under Section 8 of the 1937 Act, in connection with a plan for cooperative ownership). Under this affordability standard, an applicant must meet the following requirements:

(1) The monthly expenditure for principal, interest, taxes, and insurance by an eligible purchaser plus estimated utility costs and other monthly housing costs (such as maintenance and condominium or cooperative monthly fees) shall be not more than 35 percent of the adjusted family income of the purchaser, determined in accordance with parts 913 or 905 of this title, as appropriate. The Housing Authority may request that HUD approve a higher percentage cap, where the application demonstrates that a higher cap than 35 percent is necessary to make the homeownership program feasible and that the purchaser will be able to afford the higher monthly cost.

(2) In the case of cooperative or condominium ownership, if the monthly charge to the homeowner includes amounts for principal, interest, taxes, insurance, or utilities, the portion of the charge covering these amounts

shall be considered for purposes of making the affordability determinations under this paragraph.

(3) The Housing Authority can pay any amounts required for closing, such as a down payment (if any) and closing costs chargeable to the purchaser, as may be specified in the homeownership plan.

(d) *Procedures/Affirmative Fair Housing Marketing Strategy.* The Housing Authority must establish written equitable procedures for identifying and selecting eligible families to participate in the homeownership program. The Housing Authority must have an affirmative fair housing marketing strategy that applies whenever homeownership opportunities are made available to other than current residents of the property. Selections made from the Housing Authority's waiting list for the homeownership program must be in a nondiscriminatory manner in accordance with HUD approved preferences.

(e) *Other eligibility standards or preferences.* If consistent with paragraphs (a) through (d) of this section, a homeownership plan may include any other standards for eligibility or preference, or both, that are not contrary to law, at the discretion of the Housing Authority.

(f) *Homeownership plan eligibility standards.* Once a homeownership plan has been approved by HUD and prior to the sale of a unit identified for sale under the homeownership plan, the Housing Authority must use the eligibility standards and procedures outlined in its homeownership plan pursuant to this section in placing residents in occupancy of vacant public housing units using the order of the homeownership program waiting list.

§ 907.9 Counseling, training, and technical assistance.

(a) *Supportive services.* The Housing Authority shall ensure the availability of supportive services to each family participating in the demonstration program through its own resources and through coordination with Federal, State, and local agencies and private entities. Supportive services available under the demonstration program may include counseling, remedial education, education for completion of high school, job training and preparation, financial counseling emphasizing planning for homeownership, and any other appropriate services. The Housing Authority must identify the needs of prospective homebuyers for supportive services and must adequately provide for all identified needs.

(b) *Counseling.* Appropriate counseling shall be provided to prospective and actual purchasers, as necessary for each stage of implementation of the homeownership plan. Particular attention must be given to the terms of purchase and financing, along with the other financial and maintenance responsibilities of homeownership. In addition, where applicable, appropriate training and technical assistance shall be provided to any entity (such as a RMC, other resident organization, or a cooperative or condominium entity) that has responsibilities for carrying out the plan.

§ 907.10 Nonpurchasing residents.

(a) *General.* If an existing resident of a dwelling authorized for sale under a homeownership plan is ineligible to purchase, or declines to purchase that unit or another unit under the homeownership plan, the resident may choose to relocate. However, no person who is a tenant of public housing may be involuntarily relocated or displaced (forced to relocate permanently) from his or her dwelling as a result of the demonstration program. A violation of this relocation/displacement prohibition may, in addition to applicable program sanctions, trigger a requirement to provide relocation assistance in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and implementing rules.

(b) *Notice.* As soon as feasible after they can be identified, all nonpurchasing residents shall be given written notice of their options under this section. The notice must contain a clear statement that the resident will not be displaced if he or she does not wish to participate in the program.

(c) *Relocation assistance to residents who elect to relocate permanently.* A tenant/resident who chooses to relocate permanently shall be offered at least the following relocation assistance:

(1) Advisory services, including timely information about the assistance to be provided under this section, counseling, referrals to suitable, affordable, decent, safe and sanitary alternative housing, inside and outside areas of minority concentration, and an explanation of the resident's rights under the Fair Housing Act.

(2) Payment for actual, reasonable moving expenses.

(3) Replacement housing assistance sufficient to permit relocation to suitable, decent, safe and sanitary replacement housing (at a rent no higher than permitted by the 1937 Act) in accordance with the relocation

assistance component of the HUD-approved homeownership assistance program. This requirement will be met if the resident is offered the opportunity to relocate to another suitable dwelling under the Public Housing Program, any of the housing assistance programs under Section 8 of the 1937 Act, or any other Federal, State, or local program that is comparable, as to standards for housing quality, admission and rent, to the programs under the 1937 Act, and provides a term of assistance of at least five years.

§ 907.11 Maintenance reserve.

(a) *General.* Maintenance and capital replacement reserves are required, unless the availability of the funds needed for maintenance and capital replacement is adequately addressed under the affordability standard adopted in accordance with § 907.8(c).

(b) *Purpose of reserves.* The purpose of these reserves shall be to provide a source of reserve funds for maintenance, repair and replacement, as necessary to ensure the long-term success of the plan, including protection of the interests of purchasers and the Housing Authority. The amounts to be set aside, and other terms of this reserve, shall be as necessary and appropriate for the particular homeownership plan, taking into account such factors as prospective needs for nonroutine maintenance and replacement, the homeowners' financial resources, and any special factors that may aggravate or mitigate the need for reserves.

§ 907.12 Purchase prices and financing.

(a) *Purchase price.* To ensure affordability by eligible purchasers, by the standard adopted under § 907.8(c), a homeownership plan may provide for below-market purchase prices or below-market financing, or a combination of the two. Discounted purchase prices may be determined on a unit-by-unit basis, based on the particular purchaser's ability to pay, or may be determined by any other fair and reasonable method (e.g., uniform prices for a group of comparable dwellings, within a range of affordability by a group of potential purchasers).

(b) *Financing.* Any type of private or public financing may be used (e.g., conventional, Federal Housing Administration (FHA), Department of Veterans Affairs (VA), or a State or local program). The Housing Authority may finance or assist in financing purchase by any methods it may choose, such as purchase money mortgages, guarantees of mortgage loans from other lenders, shared equity, or lease-purchase arrangements. The homeownership plan

shall avoid using financing, such as a mortgage that is not fully amortizing (such as a "balloon" mortgage) or that involves negative amortization, that would impair the continued affordability of the property for eligible families.

§ 907.13 Protection against fraud and abuse.

A homeownership plan shall include appropriate protections against any risks of fraud or abuse that are presented by the particular plan, such as extended use of the dwelling by the purchaser as rental property, or collusive sale that would circumvent the resale profit limitation of § 907.14.

§ 907.14 Limitation on resale profit.

(a) *General.* If a dwelling is sold to the initial purchaser for less than fair market value, the homeownership plan shall provide for appropriate measures to preclude realization by purchasers of windfall profit on resale. "Windfall profit" means all or a portion of the resale proceeds attributable to the purchase price discount (the fair market value at date of purchase from the Housing Authority less the below-market purchase price), as determined by one of the methods described in paragraphs (b) through (d) of this section. Subject to that requirement, however, purchasers should be permitted to retain any resale profit attributable to appreciation in value after purchase, or a reasonable portion of such profit, under a limited or shared equity arrangement, along with any portion of the resale profit that is fairly attributable to improvements made by them after purchase.

(b) *Promissory note method.* Where there is potential for a windfall profit because the dwelling unit is sold to the initial purchaser for less than fair market value, the initial purchaser shall execute a promissory note, payable to the Housing Authority, along with a mortgage securing the obligation of the note, on the following terms and conditions:

(1) The principal amount of indebtedness shall be the lesser of:

(i) The purchase price discount, as determined by the definition in paragraph (a) of this section and stated in the note as a dollar amount; or

(ii) The net resale profit, in an amount to be determined upon resale by a formula stated in the note. That formula shall define net resale profit as the amount by which the gross resale price exceeds the sum of:

(A) The discounted purchase price;

(B) Reasonable sale costs charged to the initial purchaser upon resale; and

(C) Any increase in the value of the property that is attributable to improvements paid for or performed by the initial purchaser during tenure as a homeowner.

(2) At the option of the Housing Authority, the note may provide for automatic reduction of the principal amount over a specified period of ownership while the property is used as the purchaser's family residence, resulting in total forgiveness of the indebtedness over a period of not less than five years from the date of conveyance, in annual increments of not more than 20 percent. This does not require the Housing Authority's plan to provide for any such reduction at all, or preclude it from specifying terms that are less generous to the purchaser than those stated in the foregoing sentence.

(3) To preclude collusive resale that would circumvent the intent of this section, the Housing Authority shall (by an appropriate form of title restriction) condition the initial purchaser's right to resell upon approval by the Housing Authority, to be based solely on the Housing Authority's determination that the resale price represents fair market value or a lesser amount that will result in payment to the Housing Authority, under the note, of the full amount of the purchase price discount (subject to any accrued reduction, if provided for under paragraph (b)(2) of this section). If so determined, the Housing Authority shall be obligated to approve the resale.

(4) The Housing Authority may, in its sole discretion, agree to subordination of the mortgage that secures the promissory note, in favor of an additional mortgage given by the purchaser as security for a home improvement loan.

(c) *Limited equity method.* As a second option, the requirement of this section may be satisfied by an appropriate form of limited equity arrangement, restricting the amount of net resale profit that may be realized by the seller (the initial purchaser and successive purchasers over a period prescribed by the homeownership plan) to the sum of:

(1) The seller's paid-in equity;

(2) The portion of the resale proceeds attributable to any improvements paid for or performed by the seller during homeownership tenure; and

(3) An allowance for appreciation in value, calculated by a fair and reasonable method specified in the homeownership plan (e.g., according to a price index factor or other measure).

(d) *Third method.* The requirements of this section may be satisfied by any other fair and reasonable arrangement that will accomplish the essential

purposes stated in paragraph (a) of this section.

(e) *Appraisal.* Determinations of fair market value under this section shall be made on the basis of appraisal within a reasonable time prior to sale by an independent appraiser, to be selected by the Housing Authority.

§ 907.15 Use of sale proceeds.

(a) *General authority for use.* Sale proceeds may, after provision for sale and administrative costs that are necessary and reasonable for carrying out the homeownership plan, be retained by the Housing Authority and used for housing assistance to low-income families (as such families are defined under the 1937 Act). The term "sale proceeds" includes all payments made by purchasers for credit to the purchase price (e.g., earnest money, down payments, payments out of the proceeds of mortgage loans, and principal and interest payments under purchase-money mortgages), along with any amounts payable upon resale under § 907.14, and interest earned on all such receipts. (Residual receipts, as defined in the ACC, shall not be treated as sale proceeds.)

(b) *Permissible uses.* Sale proceeds may be used for any one or more of the following forms of housing assistance for low-income families, at the discretion of the Housing Authority and as stated in the HUD-approved homeownership plan:

(1) In connection with the homeownership plan from which the funds are derived, for special purposes that are justified to ensure the success of the plan, and to protect the interests of the homeowners, the Housing Authority and any other entity with responsibility for carrying out the plan. Examples include a reserve for loans to homeowners to prevent or cure default, or for other emergency housing needs; a reserve for any contingent liabilities of the Housing Authority under the homeownership plan (such as Housing Authority guaranty of mortgage loans); and a reserve for Housing Authority repurchase, repair and resale of homes in the event of defaults.

(2) In connection with another HUD-approved homeownership plan under this part, for assistance to purchasers and for reasonable planning and administrative costs.

(3) In connection with a State or local homeownership program for low-income families, for assistance to purchasers and for reasonable planning and administrative costs. Under such programs, sales proceeds may be used to construct or acquire additional dwellings for sale to low-income

families, or to assist such families in purchasing other dwellings from public or private owners. Where this kind of use is proposed, the homeownership plan must include a description of the State or local homeownership program.

(4) In connection with the Housing Authority's other public housing that remains under ACC, for any purposes authorized for the use of operating funds under the ACC and applicable provisions of the 1937 Act and Federal regulations, as included in the HUD-approved operating budgets. Examples include maintenance and modernization, augmentation of operating reserves, protective services, and resident services. Such use shall not result in the reduction of the operating subsidy otherwise payable to the Housing Authority under 24 CFR part 990.

(5) In connection with any other type of Federal, State, or local housing program for low-income families.

§ 907.17 Records, reports, and audits.

The Housing Authority shall be responsible for the maintenance of records (including sales and financial records, which contain racial and ethnic characteristics of the purchasers) for all activities incident to implementation of the HUD-approved homeownership plan. These records include those pertaining to the affirmative fair housing marketing strategy and the nondiscriminatory selection of purchasers. Until all planned sales of individual dwellings have been completed, the Housing Authority shall submit to HUD annual sales reports, in a form prescribed by HUD. The receipt, retention, and use of the sale proceeds shall be covered in the regular independent audits of the Housing Authority's public housing operations, and any supplementary audits that HUD may find necessary for monitoring. Where another entity is responsible for sale of individual units, pursuant to § 907.7(b), the Housing Authority must ensure that the entity's responsibilities include proper record keeping and accountability to the Housing Authority, sufficient to enable the Housing Authority to monitor compliance with the approved homeownership plan, to prepare its reports to HUD, and to meet its audit responsibilities. All books and records shall be subject to inspection and audit by HUD and the General Accounting Office (GAO).

§ 907.18 Submission and review of homeownership plan.

Whether to develop and submit a proposed homeownership plan is a matter within the discretion of the

Housing Authority. The Housing Authority may initiate a proposal at any time, according to the following procedures:

(a) *Consultation with Field Office.* Before submission of a proposed plan, the Housing Authority shall consult informally with its local HUD Field Office to assess feasibility and the particulars to be addressed by the plan.

(b) *Plan.* The Housing Authority shall submit the proposed plan, together with supporting documentation, to the local HUD Field Office.

(c) *Conditional approval.* Conditional approval may be given, at HUD discretion, where HUD determines that to be justified. For example, conditional HUD approval might be a necessary precondition for the Housing Authority to obtain the funding commitments required to satisfy the requirements for final HUD approval of a complete homeownership plan. Where conditional approval is granted, HUD will specify the conditions in writing.

(d) *Environmental review.* Before approval of the plan, HUD will conduct an environmental review of the properties in accordance with 24 CFR part 50.

§ 907.19 HUD approval and Housing Authority-HUD implementing agreement.

Upon HUD notification to the Housing Authority that the homeownership plan is approvable (in final form that satisfies all applicable requirements of this part), the Housing Authority and HUD will execute a written implementing agreement, in a form prescribed by HUD, to evidence HUD approval and authorization for implementation. The plan itself, as approved by HUD, shall be incorporated in the implementing agreement. Any of the items of supporting documentation may also be incorporated, if agreeable to the parties. The Housing Authority shall be obligated to carry out the approved homeownership plan and other provisions of the implementing agreement without modification, except with written approval by HUD.

§ 907.20 Content of homeownership plan.

The homeownership plan must address the following matters, as applicable to the particular factual situation:

(a) *Property description.* A description of the property, including identification of the specific dwellings to be sold.

(b) *Plan for repair or rehabilitation.* If applicable, a plan for any repair or rehabilitation required under § 907.6, based on the assessment of the physical condition of the property that is

included in the supporting documentation.

(c) *Selection of purchasers.* Purchaser eligibility and selection (see § 907.8).

(d) *Terms of sale.* Terms and conditions of sale (see, particularly, §§ 907.11 through 907.14).

(e) *Consultation plan.* A plan for consultation with residents during the implementation stage (see § 907.5). If appropriate, this may be combined with the plan for counseling.

(f) *Budget estimate.* A budget estimate, showing the costs of implementing the plan, and the sources of the funds that will be used.

(g) *Counseling plan.* Counseling, training, and technical assistance to be provided in accordance with § 907.9.

(h) *Sale to entity other than residents.* If the plan contemplates sale to residents via an entity other than the Housing Authority, a description of that entity's responsibilities.

(i) *Plan for nonpurchasers.* If applicable, a plan for nonpurchasing residents, in accordance with § 907.10.

(j) *Administrative plan.* An administrative plan, including estimated staffing requirements.

(k) *Plan for use of sale proceeds.* An estimate of the sale proceeds and an explanation of how they will be used, in accordance with § 907.15.

(l) *Accounting and reporting procedures.* A description of the accounting and reporting procedures to be used, including those required to meet the requirements of § 907.17.

(m) *Timetable.* An estimated timetable for the major steps required to carry out the plan.

(n) *Affirmative Fair Housing Marketing Strategy.* A description of the Housing Authority's strategy for informing and soliciting applications from people who are least likely to apply, because of race, color, religion, sex, handicap, familial status, or national origin, for the homeownership program without special outreach pursuant to § 907.7.

(o) *Supportive Services Plan.* A description of the need for and availability of supportive services to be provided pursuant to § 907.9(a) as well as the source and funding level for the supportive services to be provided.

§ 907.21 Supporting documentation.

The following supporting documentation shall be submitted to HUD with the proposed homeownership plan, as appropriate for the particular plan:

(a) *Value of property.* An estimate of the fair market value of the property, including the range of fair market values of individual dwellings, with such

information as HUD finds sufficient to support the estimate.

(b) *Condition of property.* An assessment of the physical condition of the property, based on the standards specified in § 907.6.

(c) *Workability of plan.* A statement demonstrating the practical workability of the plan, based on analysis of data on such elements as purchase prices, costs of repair or rehabilitation, homeownership costs, need for maintenance or capital reserves, family incomes, availability of financing, and the extent to which there are eligible residents who are expected to be interested in purchase. (See § 907.4(a).)

(d) *Capability of Housing Authority.* Information to substantiate the commitment and capability of the Housing Authority and any other entity with substantial responsibilities for implementing the plan.

(e) *Consultation activities.* A description of resident consultation activities carried out pursuant to § 907.5 before submission of the plan, with a summary of the views and recommendations of residents and copies of any written comments that may have been submitted to the

Housing Authority by individual residents and resident organizations, and any other individuals and organizations.

(f) *Housing Authority certification.* The Housing Authority's certification that it will administer the plan on a nondiscriminatory basis, in accordance with the Fair Housing Act and implementing regulations and any other applicable statutes, regulations, or Executive Orders related to fair housing and equal opportunity, and that it will affirmatively further fair housing. The Housing Authority will also assure compliance with those requirements by any other entity that may assume substantial responsibilities for implementing the plan.

(g) *Legal opinion.* An opinion by legal counsel to the Housing Authority, stating that counsel has reviewed the plan and finds it consistent with all applicable requirements of Federal, State, and local law, including regulations as well as statutes. In addition, counsel must identify the major legal requirements that remain to be met in implementing the plan, if approved by HUD as submitted,

indicating an opinion about whether those requirements can be met without special problems that may disrupt the timetable or other features contained in the plan.

(h) *Resolution.* A resolution by the Housing Authority's Board of Commissioners, evidencing its approval of the plan.

(i) *Other information.* Any other information that may reasonably be required for HUD review of the plan. HUD approval is not required for documents to be prepared and used by the Housing Authority in implementing the plan (such as contracts, applications, deeds, mortgages, promissory notes, and cooperative or condominium documents), if their essential terms and conditions are described in the plan. Consequently, those documents need not be submitted as part of the plan or the supporting documentation.

Dated: January 12, 1994.

Henry G. Cisneros,
Secretary.

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¹Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

²The July 1, 1985 edition of 32 CFR Parts 1-189 contains a note only for Parts 1-39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1-39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

³The July 1, 1985 edition of 41 CFR Chapters 1-100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

⁴No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1993. The CFR volume issued April 1, 1990, should be retained.

⁵No amendments to this volume were promulgated during the period Apr. 1, 1991 to Mar. 31, 1993. The CFR volume issued April 1, 1991, should be retained.

⁶No amendments to this volume were promulgated during the period July 1, 1991 to June 30, 1993. The CFR volume issued July 1, 1991, should be retained.

⁷No amendments to this volume were promulgated during the period October 1, 1991 to September 30, 1992. The CFR volume issued October 1, 1991, should be retained.

Public Laws

103d Congress, 2d Session, 1994

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Guide to Record Retention Requirements in the Code of Federal Regulations (CFR)

GUIDE: Revised January 1, 1992

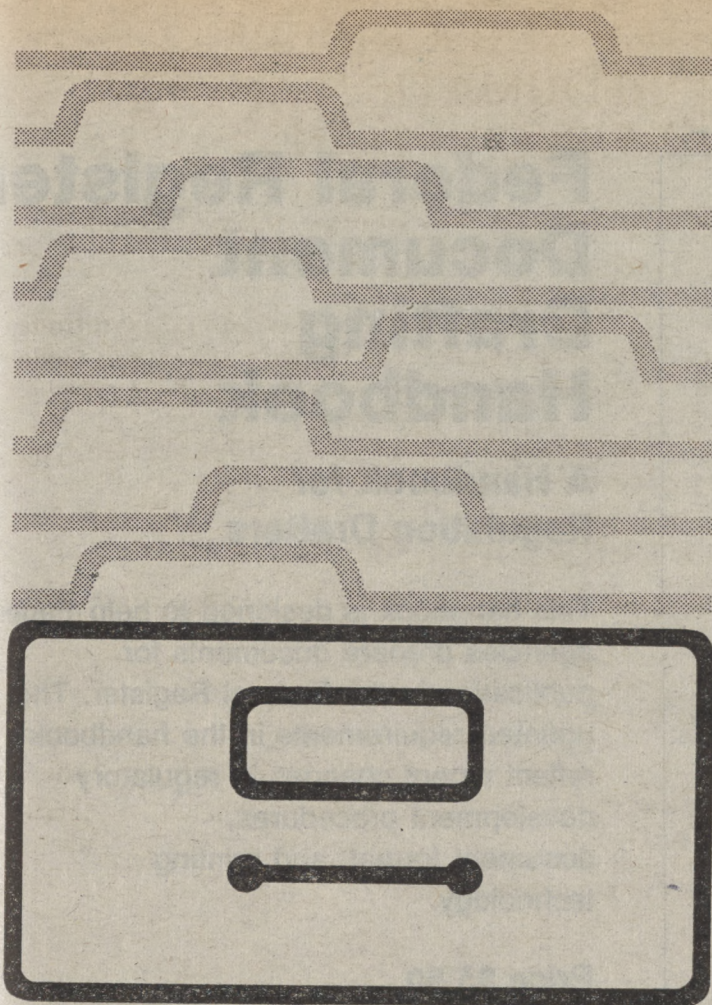
SUPPLEMENT: Revised January 1, 1993

The GUIDE and the SUPPLEMENT should be used together. This useful reference tool, compiled from agency regulations, is designed to assist anyone with Federal recordkeeping obligations.

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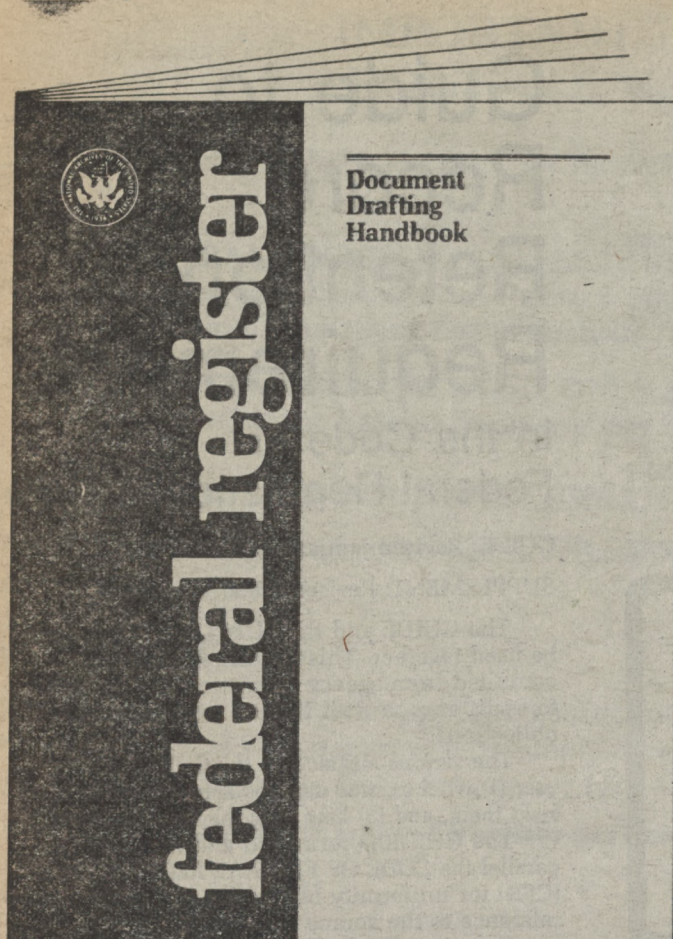
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