

On cases filed on or after March 1, 1979, petitions for intervention either with or without leave are appropriate.

Section 247(f) provides, in part, that an applicant which does not intend timely to prosecute its application shall promptly request that it be dismissed, and that failure to prosecute an application under the procedures of the Commission will result in its dismissal.

If applicant has introduced rates as an issue it is noted. Upon request an applicant must provide a copy of the tentative rate schedule to any protestant.

Further processing steps will be by Commission notice, decision, or letter which will be served on each party of record. *Broadening amendments will not be accepted after the date of this publication.*

Any authority granted may reflect administratively acceptable restrictive amendments to the service proposed below. Some of the applications may have been modified to conform to the Commission's policy of simplifying grants of operating authority.

We find: With the exceptions of those applications involving duly noted problems (e.g., unresolved common control, unresolved fitness questions, and jurisdictional problems) we find, preliminarily, that each common carrier applicant has demonstrated that its proposed service is required by the public convenience and necessity, and that each contract carrier applicant qualifies as a contract carrier and its proposed contract carrier service will be consistent with the public interest and the transportation policy of 49 U.S.C. § 10101. Each applicant is fit, willing, and able properly to perform the service proposed and to conform to the requirements of Title 49, Subtitle IV, United States Code, and the Commission's regulations. Except where specifically noted this decision is neither a major Federal action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

In those proceedings containing a statement or note that dual operations are or may be involved we find, preliminarily and in the absence of the issue being raised by a protestant, that the proposed dual operations are consistent with the public interest and the transportation policy of 49 U.S.C. § 10101 subject to the right of the Commission, which is expressly reserved, to impose such conditions as it finds necessary to insure that applicant's operations shall conform to the provisions of 49 U.S.C. § 10930(a)

[formerly section 210 of the Interstate Commerce Act].

In the absence of legally sufficient protests, filed within 30 days of publication of this decision-notice (or, if the application later becomes unopposed), appropriate authority will be issued to each applicant (except those with duly noted problems) upon compliance with certain requirements which will be set forth in a notification of effectiveness of this decision-notice. To the extent that the authority sought below may duplicate an applicant's existing authority, such duplication shall not be construed as conferring more than a single operating right.

Applicant must comply with all specific conditions set forth in the grant or grants of authority within 90 days after the service of the notification of the effectiveness of this decision-notice, or the application of a non-complying applicant shall stand denied.

By the Commission, Review Board Number 1, Members, Carleton, Jones, and Joyce.

Agatha L. Mergenovich,
Secretary.

MC 112123 (Sub-15F), filed December 7, 1978, and previously published in the *Federal Register* on February 8, 1979. Applicant: BEST-WAY TRANSPORTATION, a corporation, 5150 North 16th Street, Phoenix, AZ 85016. Representative: Donald E. Fernaays, 4040 East McDowell Road, Suite 320, Phoenix, AZ 85008. To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over regular routes, transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), between Green Valley, AZ, and Nogales, AZ, over U.S. Hwy 89 and Interstate Hwy 19, serving all intermediate points, and the off-route points of the Twin Buttes Mine Sites, Pima Mine Site, and Esperanza Mine Site, in Pima County, AZ. (Hearing site: Los Angeles, CA, or Phoenix, AZ.)

Note.—The purpose of this republication is to show that applicant intends to tack this authority with carrier's existing authorities.

MC 146002 (Sub-2F), filed February 26, 1979, and published in the FR issue of May 8, 1979, as MC 146003 Sub 2F, and republished as corrected this issue. Applicant: BROOKRIDGE LEASING, INC., 7211 Brookpart Road, Parma, OH 44129. Representative: E. H. Van Deusen, 220 West Bridge Street, Dublin, OH 43107. The scope of this application remains as previously published. The

purpose of this republication is to correctly identify the application as MC 146002 Sub 2F.

[FR Doc. 79-23519 Filed 7-30-79; 8:45 am]
BILLING CODE 7035-01-M

[No. MC-112989 (Sub-No. 60) F]

**West Coast Truck Lines, Inc.,
Extension—Turner, or (Eugene, OR);
Decision**

Decided: July 2, 1979.

By prior decision of February 7, 1979, served March 20, 1979, the application in this proceeding was granted substantially as set forth in the appendix. However, a request by applicant to include Texas as a destination State (Texas was included in the original application but omitted from the original *Federal Register* publication) was not considered.

We have now considered this unopposed application with that request in mind and have determined that a need for service to points in Texas have been demonstrated. We will, however, require republication inasmuch as it is possible that other parties who have relied on the notice of the application as published, may have an interest in and would be prejudiced by a lack of proper notice of the authority granted. Thus, a notice of the authority actually granted, as described in the appendix, will be published in the *Federal Register*, and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period, any proper party in interest may file an appropriate petition for leave to intervene in the proceeding, setting forth in detail the precise manner in which it has been prejudiced.

We find:

The present and future public convenience and necessity require operation by applicant, performing the service described in the appendix. Applicant is fit, willing, and able properly to perform the granted service and to conform to the requirements of Title 49, Subtitle IV, U.S. Code, and the Commission's regulations. An appropriate certificate should be granted, subject to republication in the *Federal Register*. This decision is not a major Federal action significantly affecting the quality of the human environment.

It is ordered:

The application is granted to the extent set forth in the appendix.

The prior decision of February 7, 1979, to the extent inconsistent with the

matters discussed in this decision, is vacated.

Operations will begin only following the service of a *certificate* which will be issued if applicant complies with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310), and compliance with the republication condition set forth in the appendix.

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

By the Commission, Review Board Number 2, Members Boyle, Eaton, and Liberman. (Board Member Eaton not participating).

Agatha L. Mergenovich,

Secretary.

Appendix

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate. To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *plastic pipe, fittings, and accessories* for plastic pipe, from Turner, OR, to points in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. Condition: Issuance of the certificate authorized in this proceeding shall be withheld for a period of 30 days from the date of publication in the *Federal Register* of a notice of the authority actually granted.

[FR Doc. 79-23517 Filed 7-30-79; 8:45 am]

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Sunshine Act Meetings

Federal Register

Vol. 44, No. 148

Tuesday, July 31, 1979

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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FEDERAL COMMUNICATIONS COMMISSION.

TIME AND DATE: 9:30 a.m., Wednesday, August 1, 1979.

PLACE: Room 856, 1919 M Street N.W., Washington, D.C.

STATUS: Closed Commission Meeting following the Open Meeting.

MATTERS TO BE CONSIDERED:

Agenda, Item No., and Subject

- General—1—Reprogramming of Budgeted Funds and Redistribution of Field Personnel to Enhance Service to the Public.
- Hearing—1—Petition for leave to dismiss with prejudice the application filed by Tidewater Sounds, Inc. in the Suffolk, Virginia, FM broadcast proceeding (Docket Nos. 20269-20270).
- Hearing—2—Petition for acceptance of an engineering amendment, contingent upon return of the application to processing, in the Edna, Texas, AM licensing proceeding, (Docket No. 20075).
- Hearing—3—Petition for special relief requesting a "distress sale" of stations WDAS and WDAS-FM in the Philadelphia, Pennsylvania, renewal proceeding (BC Docket Nos. 79-30 and 79-31).

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

If additional information is required concerning this meeting it may be obtained from FCC Office of Public Affairs, telephone no. (202) 632-7260.

Issued: July 26, 1979.

[S-1521-79 Filed 7-27-79; 3:24 pm]

BILLING CODE 6712-01-M

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FEDERAL COMMUNICATIONS COMMISSION.

TIME AND DATE: 9:30 a.m., Wednesday, August 1, 1979.

PLACE: Room 856, 1919 M Street NW., Washington, D.C.

STATUS: Open Commission Meeting.

MATTERS TO BE CONSIDERED:

Agenda, Item No., and Subject

Hearing—1—Appeal from Presiding Officer's Interlocutory Ruling in the Selma, Alabama, WSLA-TV broadcast proceeding (BC Docket No. 78-238).

General—1—Title: Application for review of a ruling by the Chief, Broadcast Bureau, denying an FOIA request by Studio Broadcasting System for inspection of annual financial reports of station KQTV, St. Joseph, Missouri. Summary: Studio Broadcasting System seeks release of Forms 324 for KQTV for 1970-78, contending that station's financial condition has been placed in issue in context of proceeding in which Amaturo Group, Inc. (owner of KQTV) seeks to operate station in Topeka, Kansas and to convert KQTV to satellite Station. Amaturo Group, Inc. contends that KQTV's financial condition has not been placed in issue and that it has merely addressed future demographic composition of St. Joseph.

General—2—Title: Application for Review of a ruling by the Chief, Common Carrier Bureau, which denied in part an FOIA request by the Puerto Rico Telephone Authority and Puerto Rico Telephone Company (PRTA). (FOIA No. 9-64). Summary: The Chief of the Common Carrier Bureau partially denied a request for agency records under the Freedom of Information Act. The Bureau concluded that some of the records requested should not be disclosed because they were exempt from the public disclosure requirements of the Act. The requestor of the information, the Puerto Rico Telephone Authority and Puerto Rico Telephone Company (PRTA), appeals the Bureau's ruling contending that the records withheld by the Bureau should be publicly disclosed.

General—3—Application for Review of a ruling by the Chief, Broadcast Bureau, which denied in part an FOIA request by the NAACP Legal Defense Fund (LDF). (FOIA Control No. 9-65). Summary: The Chief of the Broadcast Bureau partially denied a request for agency records under the Freedom of Information Act. The Bureau concluded that some of the records requested should not be disclosed because they were exempt from the public disclosure requirements of the Act. The requestor of the information, the NAACP Legal Defense Fund, appeals the Bureau's ruling contending that the records withheld by the Bureau are required to be publicly disclosed.

General—4—Title: Inquiry into High Seas Public Coast Station Operations, Services and Industry. Summary: This Notice of Inquiry solicits comments from licensees, users, other government agencies, the general public and all other interested parties on the problems of the maritime telecommunications industry with special emphasis on public coast stations' present and future services, operations and role in the industry.

General—5—Title: First Report and Order in Docket 20718 to adopt regulations for an induction cooking range. Summary: FCC considers staff recommendation to adopt regulations for induction cooking range as an initial step in finalizing the proceeding in Docket 20718. Recommendation includes a requirement for mandatory certification without recertification, for a radiated interference limit and a conducted interference limit.

General—6—Title: Petition for waiver of §§ 15.4(m) and 15.7 filed by Texas Instrument Inc. on February 28, 1979. Summary: FCC considers petition filed by TI to waive §§ 15.4 and 15.7 to permit immediate marketing of a personal computer and a stand alone modulator while a rule change to this effect is waiting final action by the Commission. Rule change is proposed in RM-3328.

General—7—Title: Notice of Proposed Rule Making to amend Part 15 of the Rules in response to petition filed by Bell & Howell (RM 3188). Summary: The Commission considers a staff recommendation for proposed new rules to be included in Part 15 which will provide for the sale and operation of a wireless inflight entertainment system. The wireless inflight entertainment system is a low power communications device operating in the 72-73 MHz radio frequency band used to provide audio entertainment throughout the passenger cabin of a commercial aircraft without the use of wires.

General—8—Title: Second Notice of Inquiry to Consider Phase II of the Fee Refund Program (Fees of \$20 and Less.) Docket No. 78-316. Summary: The Commission will consider proposing preliminary refund amounts and procedures for obtaining those refunds in Phase II of its Refund Program. Phase II deals with fees of \$20 and less which were paid to the Commission from 1970 through 1976. Approximately \$30 million. The Commission will only be seeking comments from the public at this time on proposed refunds and procedures. Further Commission action in late 1979 will be necessary before refunds in Phase II can begin to be made.

General—9—Fiscal Year 1981 Budget Estimates to OMB—Commission-Wide

Priorities.—As part of our Fiscal Year 1981 Estimates to OMB, we are required to rank, in priority order, all of the decision packages which comprise the Commission's budget request. This item describes the different priority levels (minimum, fixed, current, and improved) and provides a recommended list of Commission-wide priorities.

General—10—Title: Amendment of Parts 2, 21, 87, and 90 of the Commission's Rules to Allocate Spectrum for, and to Adopt Other Rules and Policies Pertaining to, the Use of Radio in Digital Termination Systems for a new Common Carrier Digital Communication Service. **Summary:** On November 16, 1978, Xerox filed a petition for the re-allocation of the 130 MHz between 10.55 and 10.68 GHz, and for the adoption of other rules and policies to permit establishment of new common carrier nationwide networks providing for the high-speed, end-to-end two-way transmission of digitally encoded information. The service that Xerox proposes would provide for such information transfer as document distribution, computer data transfer, and teleconferencing. The merits of the petition and the other issues raised by it are considered.

Private Radio—1—Title: Orders dismissing rulemaking petitions, RM-2015 and RM-2215, proposing to amend Amateur Radio Service Rule Section 97.101 on emergency communications procedures, and Radio Control (RC) Service Rules, Part 95, to assign an exclusive frequency for an in-vehicle warning system. **Summary:** Rule Section 97.101 already provides for the emergency procedures proposed by the petitioner. Therefore, the issue before the Commission in whether to dismiss these rulemaking petitions.

Private Radio—2—Title: Notice of Proposed Rule Making to provide 50 channels in the 800 MHz band for slow growth public safety and utilities radio systems. (RM-3380). **Summary:** the FCC is proposing to amend Part 90 of its Rules to provide 50 radio channels in the 800 MHz private land mobile radio spectrum specifically for certain qualified applicants in the Police, Fire, Local Government, Telephone Maintenance, and Power Radio Services. These applicants are those with large, long-term planning, multi-year implemented radio systems. The NPRM proposes eligibility requirements for such applicants, outlines the frequency assignment plan for the 50 channels, and proposes certain system implementation reporting requirements.

Private Radio—3—Title: Rule Making petitions 3315, 3325, and 3330 concerning medical paging operations in the Special Emergency Radio Service. **Summary:** This action proposes to reallocate four 450 MHz band radio box frequencies, which are very lightly utilized, from the Local Government Radio Service to the Special Emergency Radio Service where there is urgent need for additional frequencies for medical paging operations. The action would also extend the January 1, 1980, deadline for

conversion of paging operations in Special Emergency Radio systems to paging-only frequencies.

Common Carrier—1—Title: Request for Stay of rules and policies set forth in the Memorandum Opinion and Second Report and Order relating to the adoption of rules for the regulation of cable television pole attachments (CC Docket No. 78-144). **Summary:** The Commission recently amended procedural rules and established substantive guidelines relative to the determination of just and reasonable pole attachment rates, such as additional costs, operating expenses and actual capital costs of the utility, usable space, and guidelines for terms and conditions. GTE filed a request for stay of these rules and policies pending Commission action on petitions for reconsideration filed by it and other parties. The Commission considers whether GTE is likely to prevail on the merits and whether it will suffer irreparable injury if the stay is not granted.

Common Carrier—2—Title: Revision of the Uniform System of Accounts (USOA) for Telephone Carriers, CC Docket 78-196: First Supplemental Notice of Proposed Rulemaking. The Supplemental Notice of Proposed Rule Making gives the interested parties opportunity to comment on matters which they did not address in response to the Original Notice concerning the Revision of the Uniform System of Accounts for Telephone Carriers, CC Docket 78-196. It also provides opportunity for extension and clarification of prior comments and lists particular items for comment, including the Functional Accounting System (FAS) advocated by the Bell System.

Common Carrier—3—Title: Order concerning the construction and operation of a seventh transatlantic submarine cable system (TAT-7) between the United States and the United Kingdom. **Summary:** The FCC is considering the application to construct and operate the TAT-7 Cable, filed by the American Telephone & Telegraph Company, FIC Communications, Inc., ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications Corp. and Western Union International on May 17, 1979 and amended June 5, 1979. The application was filed pursuant to the Commission's determination in Docket No. 18875 that the introduction of a TAT-7 Cable in 1983 would be in the public interest if it facilitated the implementation of a comprehensive cable/satellite facility use plan for the North Atlantic region.

Common Carrier—4—Title: Application of Graphnet Systems, Inc., to Participate in the Hinterland Delivery of International Public Message Services (PMS). **Summary:** In *Domestic Public Message Services*, 71 FCC 2d 471 (Released March 28, 1979), the Commission authorized Graphnet to participate in the hinterland delivery of international communications messages. RCA Alascom seeks clarification of and TRT Telecommunications seeks reconsideration of the Commission order. The issues before the Commission are:

- (1) Whether the March 28, 1979 order encompasses the services provided by RCA Alascom.
- (2) Whether the International Formula, which presently applies to merged domestic telegraph carriers (Western Union), for dividing unrouted outbound PMS traffic between the International Record Carriers should be imposed on Graphnet.
- (3) Whether certain contract clauses between Graphnet and RCA Globcom, Western Union International, and ITT Worldcom each constitute a reciprocal trading arrangement contrary to the public interest.

Common Carrier—5—Title: Memorandum Opinion and Order concerning Policy to be Followed in Future Licensing of Facilities for Overseas Communications. (Docket No. 18875) **Subject:** The FCC is further considering the comprehensive facilities plan negotiated among the U.S. carriers and the European and Canadian telecommunication entities for the construction and use of North Atlantic facilities through year-end 1985.

Common Carrier—6—Title: United Video, Inc., revision to Tariff F.C.C. No. 6, service to cable television customers in Oklahoma, Transmittal No. 164. **Summary:** United Video, Inc., distributes via terrestrial microwave facilities television and FM signals to cable television systems in Oklahoma. It proposes a 3 percent surcharge to its existing rates. Petitions for suspension have been filed by two customers of United Video, Inc., Cablevision of Oklahoma, Inc. and Okmulgee Video, Inc. Among the issues to be considered are whether serious inconsistencies in cost support data exist between United Video's present transmittal and earlier filings, whether its rate increase has been adequately justified, and whether its surcharge should be suspended because its existing tariff contains population sensitive rates. The Commission proposes to allow United Video's surcharge to become effective.

Common Carrier—7—Title: Request for Declaratory Ruling and Investigation by GRAPHNET SYSTEMS, INCORPORATED concerning a Proposed Offering of Electronic Computer Originated Mail (ECOM). **Summary:** The Commission is asked to address the policy and legal issues relevant to the Commission's jurisdiction with respect to the United States Postal Service's Proposed Offering of ECOM.

Cable Television—1—Title: Docket 19128: Rulemaking proceeding in which the Commission proposed to require cable television systems to maintain logs of program originations. **Summary:** In 1969 the Commission adopted rules requiring cable television systems with 3,500 or more subscribers to originate programming. It was proposed that cable system operators be required to make a log of all cablecast programming distributed as a means of assisting the Commission to fulfill its regulatory responsibilities in this area. Due to changing regulatory requirements the proposal was not adopted and remains pending at this time. The issue now to be

- decided is what action the Commission should take in terms of requiring the retention of logs of cablecast programs.
- Cable Television—2—Title: RM-3115: Petition for rulemaking by Television Muscle Shoals, Inc. Summary:** Petition filed by the licensee of station WOWL-TV in Florence, Alabama asked that Florence be added to the Huntsville-Decatur television market for purposes of the cable television rules. This change would expand in one direction the area in which the station is permitted and even required to be carried on cable television systems which the station feels would equalize competition among broadcasters in the market, be of benefit to cable subscribers and of benefit to station WOWL-TV. In addition, the change is said to be consistent with the manner in which audience rating services define the market.
- Cable Television—3—Title: Docket 20553: A rulemaking proceeding relating to the carriage of "specialty" stations by cable television systems. Summary:** This proceeding relates to the carriage of "specialty" stations by cable television systems. In an earlier decision the Commission exempted from the cable television signal carriage limits, stations carrying significant amounts of foreign language, religious or automated programming. The proceeding was left open for the purpose of possible inclusion within the "specialty" definition of stations carrying ethnic programming or subscription television programming. The Commission has since, in Dockets 20988 and 21284, proposed to delete all of the signal carriage limits raising the question as to what, if any, further action needs to be taken in this "specialty" station proceeding.
- Cable Television—4—Title: RM-2822: Petition for rulemaking filed by the Citizens for Cable Awareness in Pennsylvania and the Legislative Committee of the Philadelphia Community Cable Coalition. Summary:** Petition requests that the Commission release information on the number of cable television systems in operation and the type and number of complaints received relating to cable television operations in a manner similar to that now done for the broadcasting industry.
- Cable Television—5—Title: Memorandum Opinion and Order in CT Docket 78-206, regarding three requests to reconsider a previous decision. Summary:** In 1978 the Commission decided that the system of prior review and certification of cable television systems should be eliminated and replaced by a process of registration. (Section 76.12 of Rules). The Commission has received three requests to reconsider that decision. They urge (a) that we reinstate the certificate of compliance process, (b) that copies of registration statements be sent to affected television stations, and/or (c) that registration statements list all the signals currently being carried.
- Cable Television—6—In Arlington Telecommunications Corp. (Arlington County, Va.), FCC 78-781, 69 FCC 2d 1923 (1978) [ARTEC II], the FCC changed the standard by which cable TV operators must prove they are entitled to waivers of the Commission's signal carriage limitations. The National Association of Broadcasters and four other parties have jointly requested that the FCC postpone the implementation of the new standard adopted in ARTEC II until the U.S. Court of Appeals decides several cases appealing the FCC's decision. The FCC must also determine whether to grant a waiver of the Rules of the Arlington County cable system to permit it to carry the signals of three Baltimore network-affiliated stations.**
- Cable Television—7—"Response to Commission Request for Information", filed by Station KIRO-TV (CBS, Channel 7), Seattle, Washington, concerning various cable systems in Seattle, Washington.—**The issue raised herein is: Should KIRO receive network program non-duplication on cable systems in its area against imported Canadian signals which pre-release some American network programming? In the two most recent opinions, the Commission, reacting to an earlier order issued by the United States Court of Appeals, held that the problem of Canadian pre-release presented as serious a threat to the local, American broadcaster as simultaneous duplication. However, additional information was sought from the parties concerning economic impact. This item deals with the new submissions.
- Assignment and Transfer—1—Title: Request of William H. Rudolph for tax certificate in connection with sale of the Macomb Daily Journal, Macomb, Illinois. Summary:** William H. Rudolph, the sole stockholder of the licensee of Stations WKAL-AM-FM, Macomb, Illinois, was prior to January 3, 1979, the President and majority stockholder of the Macomb Daily Journal, Incorporated, publisher of the only daily newspaper in Macomb. The Commission has been requested to issue a tax certificate, pursuant to Section 1071 of the Internal Revenue Code, for the sale of a daily newspaper.
- Assignment and Transfer—2—Title: (1) Applications for consent to the assignment of license and/or the transfer of control to Viacom Broadcasting, Inc. (VBI) of certain stations licensed to Sonderling Broadcasting Co. (SBC). (2) Applications for the assignment of license and the transfer of control of stations WOPA and WBMX (FM), Oak Park, Illinois, from SBC to Sonderling Radio Corporation. (3) Applications (BAL-790608G1) for the voluntary assignment of license of station WOL, Washington, D.C., from SBC to WOL, Inc. Summary:** SBC has proposed to merge into Viacom International, Inc. with Viacom acquiring all of SBC's broadcast facilities except WOPA and WBMX (FM), Oak Park, Illinois, and WOL, Washington, D.C.
- Assignment and Transfer—3—Title: Request for an exception to the Top Fifty Market Policy in connection with an application for the transfer of control of the licensee of WDCA-TV, Washington, D.C., to Taft Broadcasting Company; Petition to deny filed by Washington Association for Television and Children (WATCH). Summary:** Taft presently controls the licenses of one UHF and five VHF television stations in the nation's top fifty markets. It is requesting an exception to the Top Fifty Market Policy to enable it to acquire its seventh television station and its second independent UHF station.
- Assignment and Transfer—4—Title: (a) Request for issuance of a tax certificate in connection with the sale of Station KJLH (FM), Compton, California, from John Lamar Hill to Taxi Productions, Inc. (b) Request for issuance of a tax certificate in connection with the sale of Station KFOX (FM), Redondo Beach, California, from Jack Barry to KFOX Radio, Inc. Summary:** Station KJLH (FM), and KFOX (FM), have been sold to corporations which are owned and controlled by minorities. Each seller has requested that the Commission issue a tax certificate for the sale of its station in accordance with the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) which sets forth the Commission's policy of fostering minority ownership.
- Renewal—1—Title: Memorandum Opinion and Order Further Considering the Commission's Grant of the 1974 License Renewal Application of Station KCCW, San Antonio, Texas (File No. BR-1776). Summary:** On November 2, 1976, the United States Court of Appeals for the District of Columbia Circuit remanded the Commission's Memorandum Opinion and Order, 56 FCC 2d 333 (1975), granting the above-referenced broadcast renewal application and denying the petition to deny filed by the Bilingual Bicultural Coalition on Mass Media, Inc. The Court, without reaching the merits of the case, mandated further consideration of our Order in light of its decision in *Bilingual Bicultural Coalition on Mass Media, Inc. v. F.C.C.*, No. 75-1855, D.C. Cir., May 4, 1978 (*en banc*) ("*Bilingual III*"). The primary issue in this proceeding is whether further Commission action now is warranted.
- Renewal—2—Title: Newhouse Broadcasting Corp. and KSD/KSD-TV, Inc. for renewal of licenses for stations KTVI (TV), KSD (AM) and KSD-TV, all located in St. Louis, Missouri. Summary:** St. Louis Broadcasting Coalition's petitions for reconsideration of Commission Order in *Newhouse Broadcasting Corp.*, 61 FCC 2d 528 (1976); *KSD/KSD-TV, Inc.* 61 FCC 2d 504 (1976); and *Newhouse Broadcasting Corp., et al.* 62 FCC 2d 280 (1976). The proposed Order considers allegations regarding: cross-ownership of print and broadcast media; specific abuses of that cross-ownership; and various procedural matters.
- Renewal—3—Title: McClatchy Newspapers, for renewal of license for Station KOVR(TV), Stockton, California. Summary:** The proposed Order considers San Joaquin Communications Corporation petition to deny (i) licensee's employment practices are discriminatory, (ii) licensee has an undue concentration on media control in

Sacramento and Stockton, California, (iii) licensee failed to exercise good faith in giving all substantive reasons in filing an application to assign KOVR; and (iv) licensee has engaged in *ex parte* communication with four commissioners.

Renewal—4—Title: Service Broadcasting Corp. applications for renewal of licenses for Stations KKDA, Grand Prairie, Texas and KKDA-FM, Dallas, Texas. Summary: The proposed Order considers allegations that the licensee; failed to ascertain and program for the needs of the black community; distorted news; presented objectionable programming; aired unethical contests; improperly promoted local concerts and records; presented entertainment logged as news and public affairs; and discriminated in employment.

Renewal—5—Title: In re Applications of KCOP Television, Inc. for Renewal of License of Station KCOP-TV, Los Angeles, California (BRCT-102) and Metromedia, Inc. for Renewal of License of Station KTTV-TV, Los Angeles, California (File No. BRCT-64). Summary: The D.C. Court of Appeals remanded the records in these two cases to the Commission for further consideration in light of its *en banc* decision in *Bilingual Bicultural Coalition on Mass Media v. F.C.C.*, No. 75-1855, May 4, 1978. Petitioners allegations of employment discrimination against women are reconsidered with particular emphasis on statistical analysis and the "zone of reasonableness."

Renewal—6—Title: In re application of CHANNEL 20, INCORPORATED, For Renewal of License of Station WDCA-TV, Washington, D.C., File No. BRCT-624. Summary: The Washington Association for Children and Television (WATCH) filed a petition to deny the license renewal application of Channel 20, Inc., for station WDCA-TV, Washington, D.C., on the grounds that Channel 20 has failed to broadcast sufficient amounts of educational children's programming and age specific children's programming as required by the guidelines for children's television established in *Action for Children's Television, (Children's Report)*, 50 FCC 2d 1 (1974), *petition for reconsideration denied*, 55 FCC 2d 691 (1975), *aff'd sub nom. Action for Children's Television v. F.C.C.* WATCH also asserted that Channel 20 has failed to conduct an adequate ascertainment of the problems, needs and interests of the children in its service area. In Memorandum Opinion and Order FCC 79-83, released February 16, 1979, the Commission granted Channel 20's license renewal application and denied WATCH'S petition to deny. Now before the Commission is WATCH'S petition for reconsideration of that Order, Channel 20's opposition to that petition, and related pleadings. WATCH again raises the same issues involving the adequacy of Channel 20's educational and age-specific children's programming, as well as the station's ascertainment of the problems of children.

Aural—1—Title: Modification of License to Change Main Studio Location. Summary: Jackson County Broadcasting, Inc., licensee

of AM Station WKOV, Wellston, Ohio, is seeking authority to relocate its main studio to Jackson, Ohio. Because WKOV proposes to relocate its main studio outside its community of license, at a site other than its transmitter site, the WKOV application is grantable only upon the waiver of the Commission's Main Studio Rule. The issue to be considered is whether WKOV has shown special circumstances to justify waiver of the Main Studio Rule.

Aural—2—Title: Two competing applications for construction permits for new FM stations at Sparks, Nevada, filed by Edward H. "Pepper" Schultz and Beck Enterprises, Inc., and petitions to deny. Summary: Memorandum Opinion and Order considers whether applications should be designated for hearing in a consolidated proceeding.

Television—1—Title: Requests for waivers of Section 73.653(b) of Rules to allow separate operation of TV aural and visual transmitters, filed by The Outlet Company (WDBO-TV, Orlando, FL; WJAR-TV, Providence, RI; WCMH-TV, Columbus, OH). Summary: Licensee requests 3 waivers of rule to allow separate operation of the aural and visual transmitters for its 3 TV stations. The issue before the Commission is whether to grant the waivers.

Television—2—Title: Applications of KOTV, Inc. (KOTV-TV) and Scripps-Howard Broadcasting (KTEW-TV), both Tulsa, Oklahoma, to change transmitter sites and to make equipment changes. Summary: KOTV and KTEW, both Tulsa, Oklahoma, request GPs to move their transmitters to the same site. Applications are opposed by UHF stations in Joplin, MO; Fort Smith, AR; and Fayetteville, AR. Questions raised as to UHF impact, loss areas, unserved areas, and other questions.

Broadcast—1—Title: Response to GAO Report on FCC regulatory policies affecting commercial radio and television. Memorandum and letter of transmittal from the Commission to the Committees on Government Operations of the House and Senate, Appropriations Committees of the House and Senate, to GAO and to OMB, responding to GAO report on FCC regulatory policies affecting commercial radio and television.

This meeting may be continued the following workday to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from the FCC Public Affairs Office, telephone number (202) 632-7260.

Issued: July 26, 1979.

[S-1522-79 Filed 7-27-79; 3:24 p.m.]

BILLING CODE 6712-01-M

3

FEDERAL ENERGY REGULATORY COMMISSION.

TIME AND DATE: August 1, 1979, 10 a.m.

PLACE: 825 North Capitol Street NE., Washington, D.C. 20426, Room 9306.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

Note.—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION:

Kenneth F. Plumb, Secretary, Telephone (202) 275-4166.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Office of Public Information.

Power Agenda—332nd Meeting, August 1, 1979, Regular Meeting (10 a.m.)

- CAP-1. Project No. 2729, Power Authority of the State of New York.
- CAP-2. Project No. 2777, Idaho Power Co.
- CAP-3. Project No. 2778, Idaho Power Co.
- CAP-4. Docket No. ER79-438, Public Service Co. of Indiana
- CAP-5. Docket No. E-7734, Mid-Continent Area Power Pool Agreement
- CAP-6. Docket No. ER78-517, Connecticut Light and Power Co.
- CAP-7. Docket No. ER79-166, Kansas City Power and Light Co.

Miscellaneous Agenda—332nd Meeting, August 1, 1979, Regular Meeting

- CAM-1. 404 Referral—Proposed amendments to include additional petroleum substitutes in the entitlements program.
- CAM-2. Kansas Power and Light Co.
- CAM-3. Potomac Edison Co.
- CAM-4. Monongahela Power Co.
- CAM-5. Delmarva Power and Light Co. of Maryland.
- CAM-6. Docket No. RM79- , Final Part 284 regulations under the Natural Gas Policy Act of 1978.

Gas Agenda—332nd Meeting, August 1, 1979, Regular Meeting

- CAG-1. Docket No. RP-79-22, Consolidated Gas Supply Corp.
- CAG-2. Docket No. RP79-7, Southern Natural Gas Co.
- CAG-3. Docket No. RP79-11, Texas Gas Pipe Line Corp.
- CAG-4. Docket No. RI79-28, Kaiser-Francis Special Account C.
- CAG-5. Docket No. RI79-36, Triton Oil and Gas Corp.
- CAG-6. Docket No. CI72-145, Gulf Oil Corp.
- CAG-7. Docket No. CI79-414, Mesa Petroleum Co., Docket No. CI78-902, MRT Exploration Co., Docket No. CS78-111, Petroleum, Inc., Docket No. CI72-276, The Superior Oil Co., Docket No. CI72-352, Ashland Exploration, Inc., Docket No. CI72-462, Trans-Ocean Oil, Inc., Docket No. CI72-542, Hassie Hunt, Inc., Docket No. CI72-543, Hunt Petroleum Corp.
- CAG-8. Docket Nos. CI74-392, et al., Exxon Corp., et al.

- CAG-9. Docket Nos. CI72-440, et al., Amoco Production Co., et al.
 CAG-10. Docket Nos. CI70-727, et al., Ocean Production Co. (Operator), et al.
 CAG-11. Docket Nos. CS71-281 and CS76-44, Elf Aquitaine, Inc., et al.
 CAG-12. Docket Nos. G-5010, et al., Shell Oil Co., et al.
 CAG-13. Transcontinental Gas Pipe Line Corp.
 CAG-14. Docket No. CP79-114, Cities Service Gas Co. and El Paso Natural Gas Co., Docket No. CP79-115, Northwest Pipeline Corp. and Mountain Fuel Supply Co.
 CAG-15. Docket No. CP79-118, United Gas Pipe Line Co., Docket No. CP79-196, Trunkline Gas Co.
 CAG-16. Docket No. CP79-281, Transcontinental Gas Pipe Line Corp.
 CAG-17. Docket No. CP79-207, Equitable Gas Co.
 CAG-18. Docket No. CP79-303, Panhandle Eastern Pipe Line Co.
 CAG-19. Docket No. G-10395, Texas Gas Transmission Corp.
 CAG-20. Docket No. CP76-321, Texas Gas Transmission Corp. and Tennessee Gas Pipeline Co., a division of Tenneco Inc.

Power Agenda—332nd Meeting, August 1, 1979, Regular Meeting

I. Licensed Project Matters

- P-1. E-9530. *Pyramid Lake Paiute Tribe of Indians, complainant v. Sierra Pacific Power Company*, respondent, Truckee-Carson Irrigation District and Washoe County Water Conservation District, additional respondents.
 P-2. Project No. 516 and E-7791, South Carolina Electric and Gas Co.

II. Electric Rate Matters

- ER-1. Docket No. ER79-339, Arkansas Power & Light Co.
 ER-2. Docket No. ER79-435, Union Electric Co.
 ER-4. Docket No. ER79-429, Black Hills Power & Light Co.
 ER-5. Docket No. E-9578 (Phase I), Texas Power & Light Co.
 ER-6. Docket No. E-9565, town of Massena, New York v. Niagara Mohawk Power Corporation and Power Authority of the State of New York.
 ER-7. Docket Nos. ER79-216 and ER79-217, Boston Edison Co.
 ER-8. Docket No. ER77-89, Central Illinois Public Service Co.

Miscellaneous Agenda—332nd Meeting, August 1, 1979, Regular Meeting

- M-1. Docket No. RM79-6, Procedures governing the collection and reporting of information associated with the cost of providing electric service.
 M-2. Docket No. RM79-, Flood plain management and protection of wetlands.
 M-3. Docket No. RM79-, Regulations implementing National Environmental Policy Act.
 M-4. Reserved.
 M-5. Reserved.
 M-6. Docket No. RM79-, Final rule amending regulations on new natural gas and certain

natural gas produced from the outer continental shelf.

- M-7. Docket No. RM79-, Final regulations under sections 105 and 108(b) of the NGPA.
 M-8. Docket No. RM79-, Regulations relative to section 109 of the NGPA.
 M-9. Docket No. RM79-, Fees applicable to natural gas pipeline construction.
 M-10. Docket No. RM79-22, Amendment and clarification of the Commission's interim regulations implementing the Natural Gas Policy Act of 1978 and regulations under the Natural Gas Act.
 M-11. Docket No. RM79-, Regulation implementing section 502c of the Natural Gas Policy Act for interpretation.
 M-12. Docket No. RM79-34, Transportation certificates for natural gas for the displacement of fuel oil.
 M-13. Notices of determinations.
 M-14. Notices of determinations.
 M-15. Notice of determinations.
 M-16. Docket No. GP79-4, Kansas Power & Light Co., MESA Petroleum Corp.

Gas Agenda—332nd Meeting, August 1, 1979, Regular Meeting

I. Pipeline Rate Matters

- RP-1. Docket Nos. RP76-136 and RP77-26, Transcontinental Gas Pipe Line Corp.
 RP-2. Docket No. RP71-107 (Phase II), Northern Natural Gas Co.
 RP-3. Docket Nos. RP72-122 (PGA 78-3), RP78-51 and RP79-1, Colorado Interstate Gas Co.
 RP-4. Docket No. OR79-1, Williams Pipe Line Co.

II. Producer Matters

- CI-1. Docket No. CI77-298, Tenneco, Inc. and Amoco Production Co., et al.
 CI-2. Docket No. CI77-701, City of Perryton, Docket No. CI77-799, Falcon Petroleum.

III. Pipeline Certificate Matters

- CP-1. Docket No. CP76-399, Southwest Gas Corporation v. Northwest Pipeline Corporation.
 CP-2. Docket Nos. CP78-123, et al., Alaskan Northern Transportation Co.—pipeline design and capacity.
 CP-3. Docket No. TC79-79, Cities Service Gas Co.

Kenneth F. Plumb,

Secretary.

[S-1515-79 Filed 7-27-79; 9:51 am]

BILLING CODE 6450-01-M

4

FEDERAL RESERVE SYSTEM: Board of Governors

TIME AND DATE: 11 a.m., Friday, August 3, 1979.

PLACE: 20th Street and Constitution Avenue NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any agenda items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 462-3204.

Dated: July 26, 1979.

Griffith L. Garwood,
Deputy Secretary of the Board.

[S-1519-79 Filed 7-27-79; 3:24 pm]

BILLING CODE 6210-01-M

5

[USITC SE-79-30A]

INTERNATIONAL TRADE COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Filed with FR July 20, 1979. *

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10 a.m., Tuesday, July 31, 1979.

CHANGES IN THE MEETING: In deliberations held Thursday, July 26, 1979, the United States International Trade Commission, in conformity with 19 CFR 201.37, voted that Commission business requires that the meeting previously scheduled to be held on Tuesday, July 31, 1979, be cancelled.

Commissioners Parker, Moore, and Stern determined by unanimous consent that Commission business requires the cancellation of the meeting for Tuesday, July 31, 1979, and affirmed that no earlier announcement of the change was possible, and directed the issuance of this notice at the earliest practicable time. Commissioners Alberger and Bedell were not present for the vote.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

[S-1516-79 Filed 7-27-79; 9:51 am]

BILLING CODE 7020-02-M

6

[USITC SE-79-31]

INTERNATIONAL TRADE COMMISSION.

TIME AND DATE: 10 a.m., Thursday, August 9, 1979.

PLACE: Room 117, 701 E Street, N.W., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: 1. Investigation 332-87 (Conditions of Competition in the Western U.S. Steel Market)—Consideration of the report.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

[S-1517-79 Filed 7-27-79; 9:51 am]

BILLING CODE 7020-02-M

7

MERIT SYSTEMS PROTECTION BOARD.

TIME AND DATE OF MEETING: 9:30 a.m. Wednesday, Thursday, and Friday, August 8-10, 1979.

PLACE: Room 404, 717 Madison Place, N.W., Washington, D.C.

SUBJECT: Hearing in case of: *In re Frazier, et al.*

CONTACT PERSON FOR MORE

INFORMATION: Charles J. Stanislav, Jr., Acting Director, Office of the Secretary (202-653-7130)

Merit Systems Protection Board.

Ruth T. Prokop,

Chair.

[S-1518-79 Filed 7-27-79; 10:08 am]

BILLING CODE 6325-20-M

8

NATIONAL SCIENCE BOARD.

DATE AND TIME: August 16, 1979, 1:00 p.m., Open Session. August 17, 1979, 9:00 a.m., Closed Session.

PLACE: National Science Foundation, Rm 540, 1800 G. Street, N.W., Washington, D.C.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED AT THE OPEN SESSION:

1. Program Review—Chemical and Process Engineering.
2. Minutes—Open Session—207th Meeting.
3. Chairman's Report.
4. Director's Report:
 - a. Report on Grant and Contract Activity—6/20-8/15, 1979.
 - b. Organizational and Staff Changes.
 - c. Congressional and Legislative Matters.
 - d. NSF Budget for Fiscal Year 1980.
5. Board Committees—Reports on Meetings:
 - a. Executive Committee.
 - b. Planning and Policy Committee.
 - c. Programs Committee.
 - d. Committee on Budget.
 - e. Committee on Minorities and Women in Science.
 - f. Committee on Role of NSF in Basic Research.
 - g. Ad Hoc Committee on Big and Little Science.
 - h. Ad Hoc Committee on Deep Sea and Margin Drilling Programs.
 - i. Ad Hoc Committee on NSB Nominees.
 - j. Ad Hoc Committee on NSF Act review.
6. NSF Advisory Groups.
7. Board Representation at Future Site Visits of Materials Research Laboratories.
8. Grants, Contracts, and Programs.
9. Review of NSF Act of 1950, as Amended.
10. Discussion of Reports and Future Action on June Discussion Group Reports and Recommendations.
11. Other Business.

12. Next Meetings: National Science Board, 209th Meeting, September 20-21, 1979.

MATTERS TO BE CONSIDERED AT THE CLOSED SESSION:

- A. Minutes—Closed Session—207th Meeting.
- B. Nominations: NSB, NSF Assistant Directors, and Alan T. Waterman Award Committee.
- C. NSB Annual Reports.
- D. NSF Budgets for Fiscal Year 1981 and Subsequent Years.
- E. Grants, Contracts, and Programs.

CONTACT PERSON FOR MORE

INFORMATION: Miss Vernice Anderson, Executive Secretary, (202) 632-5840.

[S-1520-79 Filed 7-27-79; 3:24 pm]

BILLING CODE 7555-01-M

9

NUCLEAR REGULATORY COMMISSION.**"FEDERAL REGISTER" CITATION OF**

PREVIOUS ANNOUNCEMENT: 44 FR 43401.

TIME AND DATE: July 27 and 30, 1979

(Changes). ^{1/2}

PLACE: Commissioners' Conference Room, 1717 H Street, N.W., Washington, D.C.

STATUS: Open (Changes).

MATTERS TO BE CONSIDERED:

Friday, July 27; 9:30 a.m.

1. Affirmation Session (approximate 10 minutes, public meeting):
 - a. Order in S-3 (tentative).
 - b. ALAB-542 (Atlantic Research) (tentative).
 - c. Anderson FOIA Appeal (as scheduled).
 - d. Upgrade Rule (postponed).
 - e. Revision of 10 CFR 2.802, PRM (as scheduled).
 - f. Order in Restart of TMI-1 (postponed).
2. Discussion of Technical Issues in Restart of TMI-1 (approximately 2 hours, public meeting, continued from 7/25).

Monday, July 30; 2:00 p.m.

Budget Presentation (approximately 3 hours, public meeting)—NMSS (postponed from 7/27).

CONTACT PERSON FOR MORE

INFORMATION: Walter Magee (202) 634-1410.

Roger M. Tweed,

Office of the Secretary.

July 26, 1979.

[S-1523-79 Filed 7-27-79; 3:24 p.m.]

BILLING CODE 7590-01-M

10

NUCLEAR REGULATORY COMMISSION.

TIME AND DATE: July 31; August 1, 2, and 3, 1979.

PLACE: Commissioners' Conference Room, 1717 H Street, N.W., Washington, D.C.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Tuesday, July 31; 9:30 a.m.

1. Budget Presentation (approx 3 hours, public meeting)—NRR (postponed from 7/30).

Tuesday, July 31, 2:00 p.m.

1. Budget Presentations (approx 3 hours, public meeting)—Research.

Wednesday, August 1; 9:30 a.m.

1. Budget Presentations (approx 3 hours, public meeting)—ADM, EDO office, COM offices.

Wednesday, August 1; 2:00 p.m.

1. Budget Markup Session (approx 3 hours, closed—exemption 9).

Thursday, August 2; 9:30 a.m.

1. Briefing on Results of IE Investigation of TMI Incident (approx 1½ hours, public meeting).

2. Budget Markup Session (approx 1½ hours, closed—exemption 9).

Friday, August 3; 9:30 a.m.

1. Budget Markup Session (approx 3 hours, closed—exemption 9).

Friday, August 3; 2:00 p.m.

1. Budget Markup Session (approx 3 hours, closed—exemption 9).

CONTACT PERSON FOR MORE

INFORMATION: Walter Magee (202) 634-1410.

Walter Magee,

Office of the Secretary.

July 24, 1979.

[S-1524-79 Filed 7-27-79; 3:24 pm]

BILLING CODE 7590-01-M

Register

Register

Tuesday
July 31, 1979

Part II

**Department of
Health, Education,
and Welfare**

Office of Human Development Services

Grants for State and Community
Programs on Aging

**DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE**

**Office of Human Development
Services**

[45 CFR Parts 1320, 1321, 1324, 1326]

**Grants for State and Community
Programs on Aging**

AGENCY: Office of Human Development Services, (OHDS), HEW.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Administration on Aging (AoA) in the Office of Human Development Services, proposes new and revised regulations. The basis for these are the Comprehensive Older Americans Act Amendments of 1978 (Act). The amendments consolidate under one title, Title III, the older Americans programs for three activities: social services, nutrition services, and multipurpose senior centers. These were authorized before under three separate titles (III, V, and VII.) In these proposed rules, AoA is also revising and clarifying the current policies and regulations that will have continued applicability. Proposed rules are also included for new programs such as the long-term care ombudsman program authorized by the 1978 amendments.

DATES: Consideration will be given to comments received by October 1, 1979.

ADDRESSES: Address comments in writing to Commissioner on Aging, Administration on Aging, HEW North Building, 330 Independence Avenue, SW., Washington, D.C. 20201. Agencies and organizations are requested to submit comments in duplicate. Beginning two weeks from today, the public may review the comments submitted in response to this notice in room 4748, HEW North Building, 330 Independence Avenue, SW., Washington, D.C. 20201 between the hours of 9 a.m. and 4 p.m. Monday through Friday except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Fred Luhmann, (202) 245-6809.

SUPPLEMENTARY INFORMATION:

Background

1. *History of Program.* The Older Americans Act was first enacted in 1965. On October 18, 1978 the President signed the Comprehensive Older Americans Act Amendments of 1978, Pub. L. 95-478. The Amendments were effective on October 1, 1978. The Act was amended seven times, in the period between 1965 and 1978.

As first enacted, the Act authorized funding under Title III to support in each State a State agency on aging. Title III also provided funds for each State agency to initiate local community projects to provide social services to older persons. Activities under the Act began on a modest scale. In fiscal year 1966, the total appropriation under the Act was \$7.5 million.

In 1972, a new Title VII was enacted which authorized funds for local community projects to provide nutrition services to the elderly. The projects were designed to provide older persons aged 60 and older with at least one hot nutritious meal five or more days a week. Emphasis in the projects was placed on serving older persons with the greatest economic need, and on reducing the isolation of old age.

A second major change occurred in 1973. The amendments revised the Title III State grant program in order to provide for a better organization at State and local levels and to authorize the targeting of limited resources to priority services.

The State agency was directed to divide the entire State into planning and service areas, determine for which areas an area plan would be developed, and designate an area agency on aging to develop and administer the plan in each area. The 1973 amendments also added a new Title V to the Act which authorized the Commissioner to make grants directly to local community agencies to pay part of the cost of the acquisition, renovation, alteration or initial staffing of facilities for use as multipurpose senior centers.

The 1975 amendments specified four priority services to be provided under State plans: transportation, home services, legal services, and residential repair and renovations.

2. *1978 Amendments.* The 1978 amendments represent another evolutionary step in the process of establishing in each planning and service area a basic capacity to respond to the needs of older persons. They consolidated under an amended Title III the social services, nutrition, and multipurpose senior center programs authorized before under Titles III, VII, and V.

The House committee report on the subject of consolidation states that:

The committee believes that by combining the [Title III, V, and VII] service programs under one title rather than retaining them under separate titles and administrative structures as provided for in current law it will eliminate duplicative and overlapping functions such as outreach, advocacy, needs assessment tasks, planning, staff training,

and various administrative tasks. It is also the committee's hope that consolidation will increase the visibility, political strength, and significance of area agencies on aging in the community, as well as provide for more effective coordination of community resources for the elderly.¹

The Senate committee report on the 1978 amendments provides additional insight into the Congressional intent on consolidation. The report states that:

Throughout its work on this bill, the committee has taken the view that major revision of the Older Americans Act was necessary at this time. No major revisions have been made in the programs under the Act since 1973. At that time, an entire new network of area agencies was installed. New responsibilities and different roles were also established for the State agencies on aging and the Administration on Aging. The major goals of that legislation have now been achieved. We have accomplished the initial phase of agenda setting and administrative development necessary to move forward on the second phase of problem solving.²

In another comment on the subject of consolidation, the Senate report indicated that in many instances throughout the country nutrition sites and multipurpose senior centers have served effectively as focal points within the community for the delivery of a full range of social services. The report noted that the 1978 amendments contain renewed emphasis on this concept of a single focal point for service delivery within each community and expect that each area agency, in carrying out its plan, will assure that nutrition services and social services are fully integrated.³

3. *Transition period.* In addition to consolidating programs under a new Title III, the 1978 amendments changed in a number of other ways the direction of programs and activities under the Act. In recognition of the major changes which are required at each operational level, the amendments provide a transition period of up to two years if necessary for State and area agencies to be in full compliance with the new requirements of the Act. Under section 307(d)(2) of the Act, the Commissioner for Fiscal Years 1979 and 1980 may grant a State agency a waiver of any new requirement that he determines the State agency cannot meet because of consolidation or because meeting the requirement would reduce or jeopardize the quality of services under the Act. The Commissioner may grant a waiver only if the State agency shows that it is taking steps to meet the requirement.

¹ 95th Cong., 2d. Sess. House. Rept. No. 95-1100, p. 8.

² 95th Cong., 2d. Sess. Senate. Rept. No. 95-855, p. 4.

³ Senate. Rept., *supra*, p. 8.

The State agency has similar authority to grant waivers to area agencies.

The Commissioner has received and granted a number of waiver requests for FY 1979. States may submit additional waiver requests for FY 1980.

4. *Title VI.* The 1978 amendments also enacted a new Title VI: Grants for Indian Tribes, which authorizes a new program of direct grants from the Commissioner to Indian tribal organizations. Funds have not yet been appropriated for Title VI. The new Title VI replaces a previous provision of the Act. Section 303(b)(3) introduced in 1975, required States to assure that older Indians received equitable service under Title III, and authorized the Commissioner to reallocate funds directly to Indian tribes that he determined were not being equitably served. While proposed regulations for the Title III and Title VI programs are being issued separately, (the proposed Title VI regulations will be issued shortly as Part 1328) the two programs are closely related.

An eligible Indian tribal organization may apply for direct Federal funding under Title VI but it is not required to do so. It may continue to seek funding under Title III. Title III provides that Indian tribal organizations may be designated as area agencies and provides that Indian reservations may be designated as planning and service areas. Title III even includes a right of appeal to the Commissioner for an Indian tribal organization if its reservation is denied planning and service area status by the State agency. Any Indian tribal organization designated as an area agency on aging receives older Americans Act Title III funds from the Administration on Aging through the State agency on aging. In effect tribal organizations funded under Title VI would function as area agencies on aging with a direct grant relationship with the Federal government. If an Indian tribal organization receives a direct grant under Title VI, the allotment of the State in which the Older Indians served under the grant reside is reduced, based on the number of older Indians who are both counted for purposes of the State's allotment under Title III and served under Title VI.

Grants may not be made under Title VI until at least \$5 million is appropriated for the program. Since no funds have yet been appropriated for Title VI, State and area agencies continue to be fully responsible for serving older Indians, many of whom are in great social or economic need and therefore should be given priority consideration under Title III.

5. *Initial Public Involvement.* We began a process of broad public input and open discussion shortly after the enactment of the amendments. This process was designed to involve many groups and organizations in the implementation of the many significant changes made by the amendments. The process began with a Working Conference held in Arlington, Virginia, November 8-11, 1978. More than 200 participants representing Congressional Committees, national aging organizations, service providers, education and research societies, States, Area Agencies, and State and Area Agency Advisory Committee members spent three days examining the amendments. Small group workshops were asked to examine the opportunity the amendments provide to improve and expand benefits to older people, to identify issues to be clarified in implementing regulations; and to recommend specific language for definitions. Recommendations from the workshops were compiled and used in the development of these proposed regulations.

Our initial drafting uncovered questions and options which we thought needed further exchange and exploration with the field of aging. The Commissioner on Aging convened six small group meetings during January 1979, to review the preliminary thinking of AoA on the issues and to give various interested groups an opportunity to raise and further clarify their recommendations. The Commissioner met with staff members from the House and Senate special and authorizing committees, with representatives from the National Association of Counties, the National Governors Association, the Council of State Government, the National Conferences of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, and the International City Management Association. A similar session was held with the Executive Directors of the National Aging Organizations including, the National Council of Senior Citizens, the National Council on Aging, the American Association of Retired Persons/National Retired Teachers Association, the Association Nacional Pro Personas Mayores, the National Indian Council on Aging, the Gerontological Society, and the Gray Panthers. A meeting was also held with representatives from the major provider organizations such as the Title VII Directors, the National Association of Meal Programs, the Alliance of Information and Referral Services, the Ad Hoc Coalition of Legal Service

Providers, National Institute of Senior Centers, NVOILA, Council for Home Health Agencies and Community Health Services, National Council of Homemaker and Home Health Aides, FRAC, The Dietetic Association and the National Association of Social Workers. On February 15, 1979, the Commissioner met with 25 representatives from State and Area Agency Advisory Committee and grass roots advocacy organizations to discuss both the regulations and the role older people must play in implementing Older Americans Act programs. We held two major conference telephone calls involving all 50 State agencies to give each State an opportunity to ask questions and receive clarification on our implementation of the amendments. Through this process, the Administration on Aging has tried to insure on-going dialogue with those most interested and affected by the regulations.

These proposed regulations contain all program regulations for implementation of Title III of the Act. General Departmental regulations also applicable to activities under Title III are not repeated, but are referenced in Section 1321.5. Current regulations for the social services, nutrition services, and multipurpose senior center programs are found at 45 CFR Parts 1321, 1324, and 1326. These proposed regulations would revise and simplify the content of current regulations and eliminate those provisions that are inconsistent with the new amendments, or are unnecessary, or no longer reflect AoA policy.

1. *Organization.* These proposed regulations are organized into ten subparts. Subpart A describes the basis and purpose of the regulations and contains definitions applicable to the part.

Designation of a sole State agency on aging is the first step required to receive grants under Title III. Subpart B sets forth general requirements for State agency designation and administration. The next steps are the development and submission by the designated State agency to the Commissioner of a State plan that meets all statutory and regulatory requirements, and the approval of the plan by the Commission. Subpart C specifies State plan requirements and the procedure for plan approval.

In addition to development and submission of the State plan, the State agency must perform a variety of functions in administering the Title III program in the State. Subpart D specifies these State agency advocacy and service delivery requirements,

including requirements for the long-term care ombudsmen program, State advisory council on aging, State agency hearing procedures, intrastate funding formula, and designation of planning and service areas.

State agencies are required to designate area agencies and approve area plans in planning and service areas in which the State agency decides to spend Title III funds. Services under the Title III program are provided under these approved area plans. Subpart E specifies general requirements for area agency designation and administration. Subpart F specifies area plan requirements, including the development and implementation of a comprehensive and coordinated service delivery system under the plan and procedures for approval and disapproval of an area plan. Subpart G specifies area agency responsibilities, including designation of community focal points, establishment of the area agency advisory council, and coordination with other programs serving older persons.

Once an area plan is approved, services may be funded under it. Subpart H specifies service delivery requirements for all Title III services. The regulations would impose a series of general requirements for all services, including restrictions on profit-making contracts and direct service provision by State and area agencies, and requirements on all service providers for licensure, training, outreach, coordination, preference for those in greatest economic or social need, contributions, maintenance of non-Federal support for services, and advisory roles for older participants. We are proposing specific service delivery requirements for those five services for which the Act contains specific requirements: multipurpose senior centers, nutrition services, legal services, information and referral, and transportation.

The two final subparts of the regulations contain proposed fiscal requirements and State agency hearing procedures. Subpart I contains proposed fiscal requirements, including requirements for initial allotments, allowable uses of allotments, reallocating allotted funds, mandatory minimum expenditure requirements, and Federal program review and audits. The Federal program review and audit sections would put in regulations our present review practices. Subpart J contains proposed procedures for notice and hearing for State agencies on issues of State plan disapproval, finding that a State agency does not meet the requirements of this part, or substantial

noncompliance in the provisions or administration of an approved State plan.

The organization of the proposed regulations differs in some respects from that of the Act and existing regulations. We are proposing to group the requirements in what we think is a more logical order. We are proposing to group together all State agency requirements, including those agency requirements that appear in section 307(a) of the Act as State plan requirements. We would incorporate each of these State agency requirements by reference in the section of the regulations, § 1321.25, which specifies the content of State plans. We are proposing to group separately all area agency requirements, all service delivery requirements that apply to both State and area plans, and all fiscal requirements. For example, section 307 of the Act requires a State plan to provide that the State agency will evaluate the need for services (307(a)(3)(A)), spend in rural areas 105% of the amount spent in fiscal 1978 (307(a)(3)(B)), and afford an opportunity for a hearing to all area agencies and providers (307(a)(5)). We have placed the evaluation and hearing requirements under State agency responsibilities, §§ 1321.45(a)(8), and 1321.51, and the rural expenditure requirement under Subpart I, § 1321.193.

The area plan requirements under section 306 include area agency and fiscal requirements. For example, section 306(a)(6) imposes nine functions on an area agency. We have placed those requirements in Subpart G, area agency responsibilities, under §§ 1321.91 and 1321.93, and incorporated them by reference in the section specifying content of an area plan; section 1321.77. Section 306(a)(2) imposes a 50 percent priority services expenditure requirement on area plans—these regulations would place that requirement in Subpart I, § 1321.195.

We have also included as State or area agency responsibilities, with references in the plan sections, certain additional State and area plan requirements that we think must logically be performed by the agencies. Examples are the requirement of section 306(a)(3) that the area plan designate community focal points, and the requirement of section 307(a)(11) that the State plan provide that hiring preference in State and area agencies will be given to older persons.

These regulations would use a similar structure for the service delivery requirements. Many of the statutory requirements for nutrition, legal services, and senior centers are drafted

as State plan requirements, in the future tense. We would draft them as present requirements on each provider of the service, and incorporate the requirements by reference in the State and area plan content sections.

We particularly invite comment on whether our proposed organization and structure of the requirements makes the regulations easier to use, and clarifies the effect of the requirements.

Major Issues

1. *Organization of the sole State agency on aging.* A major issue raised in these proposed regulations is the organization of the sole State agency on aging. Section 305(a)(1) of the Act requires a State to designate a sole State agency on aging to develop and administer the State plan, to coordinate all State activities related to the purposes of the Act, and to serve as the effective and visible advocate for the elderly in the State. The legislative history, particularly the conference report on the 1975 amendments,⁴ makes clear that the purpose of the sole State agency requirement is to ensure that there be a strong and easily-identifiable State agency on aging, and that limited funds under this Act be used in a way that maximizes their effectiveness in meeting the needs of older persons. Our present regulations at 45 CFR 1321.13 and 1321.34 allow a State to designate either a multipurpose or an independent single purpose agency as the sole State agency, but require a multipurpose agency to designate a single organizational unit whose principal responsibilities are in the field of aging to administer Older Americans Act programs.

We are proposing to remove this requirement because some State agencies, many of which also administer other Federal programs providing services to older persons, have commented that a State agency could better carry out its responsibilities to coordinate all State activities related to aging, and to maximize the effectiveness of service delivery to older persons, if it was given more flexibility in organizing the administration of Older Americans Act programs within the agency. We agree that it is important to allow State agencies the flexibility to administer their programs in a way that will increase effective service delivery to older persons. (The legislative history of the 1978 amendments indicates that Congress was deeply concerned about the fragmentation of existing services to older persons, and mandated the

⁴ 94th Cong. 1st Sess. House. Rept. No. 94-870, p. 36.

consolidation of nutrition, social, and multipurpose senior center services under this Act as a first step in reducing this fragmentation.)⁵

Since our present single organizational unit requirement is not required by the Act, we are proposing to remove it, and to allow a multipurpose State agency the option of assigning responsibilities under the Title III program to a designated unit, including one whose only responsibilities are in the field of aging. State agencies on aging that chose not to administer the Title III program through a single aging unit would, of course, still be required to administer their programs in a way that met fully their statutory advocacy and service delivery responsibilities to older persons. We are also proposing to eliminate the present single organizational unit requirement in section 1321.64 for area agencies.

2. *State agency procedures.* These proposed regulations would require State agencies to develop and use written procedures in carrying out all of their functions under this part. The proposed regulations specify a notice and comment process for development of these procedures that is designed to ensure that interested persons have an adequate opportunity to participate in that development. Section 305(a)(2)(B) specifically requires that a State agency provide satisfactory assurances that it takes into account the views of older persons in developing and administering the plan, and section 307(a)(4) of the Act requires that a State plan provide for the use of methods of administration that are necessary for the proper and efficient administration of the plan. In our view, the lack of standard written procedures, openly developed, has frequently resulted in problems in the administration of Older Americans Act Programs. If a State has its own rulemaking process that satisfies our proposed requirements, it could of course, follow that process. We are also proposing to require area agencies to develop and use written procedures in carrying out their functions.

3. *Hearing requirements.* A significant issue in the development of those proposed regulations has been the implementation of the various hearing requirements specified in the Act. The former Titles III and VII each required notice and opportunity for a hearing before the Commissioner prior to withholding of grants from a State's allotment for failure to meet State agency or State plan requirements. Our present regulations do not specify any procedures for these hearings. Section

307 (c) and (d) of the amended Act retains this pre-termination requirement. Other sections of the Act impose several new hearing requirements. Section 305(b)(1) requires a State agency to give an opportunity for a hearing, on application, to any unit of general purpose local government with a population of 100,000 or more that applies for designation as a planning and service area, and section 305(b)(4) requires the Commissioner to give an opportunity for a hearing to any unit of general purpose local government, region, metropolitan area, or Indian reservation that is denied designation as a planning and service area by the State. Section 307(a)(5) of the Act requires the State plan to provide that the State agency will give an opportunity for a hearing to any area agency, service provider, or service provider applicant.

Section 501(b) of the amendments requires the State agency to provide a hearing prior to defunding nutrition projects that were receiving funds under the former Title VII on September 30, 1978, the day before the effective date of the amended Act.

These proposed regulations set forth four types of hearing procedures to implement these various statutory requirements: (1) general State agency hearing requirements for area agencies, providers, and planning and service area applicants (§ 1321.51); (2) hearing requirements for units of general purpose local governments of 100,000 or more that apply for designation as planning and service area; (§ 1321.51(d)); (3) hearing procedures before the Commissioner for denial of planning and service area designation (§ 1321.55); and (4) hearing procedures before the Commissioner for plan disapproval and compliance actions (§§ 1321.235 to 1321.269). We recognize that it may be confusing to require four types of procedures, but think that the statutory rights created are sufficiently different in nature that different processes are required.

Section 307 (c) and (e) provide for a formal hearing before the Commissioner on plan disapproval and compliance actions, with a right of judicial appeal based on the hearing record before the Commissioner. Since the statute requires a formal hearing record, for purposes of judicial appeal, and termination of all or a portion of a State's funding under its plan would obviously have a major impact, we think that detailed procedural requirements are necessary for these hearings. We are therefore proposing in Subpart J to adopt, with minor modifications, the State plan disapproval and compliance procedures

used by the Department in other State plan programs, including titles IV-A (AFDC), XIX (Medicaid) and XX (Social Services).

In our view, the hearing process before the Commissioner for denial of planning and service area designation should be much less detailed than that required for State plan disapproval. In these designation hearings, the Commissioner would simply be reviewing, on request, designations for which the State agency has statutory responsibility. In § 1321.55 we are proposing to limit the hearing procedures before the Commissioner to an opportunity for the appellant to be represented and to present evidence, and are not providing for an opportunity to cross-examine or present witnesses. We are proposing a limited standard of review under which the State's decision would be upheld if the State followed prescribed hearing procedures and its decision was not manifestly inconsistent with the purposes of the Act.

In § 1321.51 we are proposing a uniform set of hearing procedures for all hearings that the State agency is required to conduct except for those hearings for units of general purpose local government with a population of 100,000 or more, which by statute have a right to hearing on application to be a planning and service area.

We would vary the timing of the hearing (before or after final agency action) according to the type of action being taken and the nature of the rights involved. We are also proposing to limit the State agency hearings requirement to those cases in which the State or area agency proposes to take or has taken an adverse action. While the language of section 307(a)(5) is broad, and might be read to require a State agency hearing to an area agency or provider before any adverse action is contemplated, the Senate report on the Senate bill S. 2850 in which this requirement originated, characterizes this hearing requirement as an "appeal mechanism".⁶ We think, therefore, that the Congressional intent will be carried out if we limit this requirement to actions of an adverse nature.

Because of the significance of the action, we are requiring that the State agency conduct a hearing prior to any final decision regarding area agency designation, area plan disapproval or noncompliance. (See section 1321.131 to 1321.269.)

We are also requiring in § 1321.141(b)(3) a prior hearing, as does section 501 (b) of the amendments, for nutrition projects protected by that

⁵ Senate, Rept. *supra*, p. 4.

⁶ Senate Rept. *supra*, p. 11.

section. The issues raised in the implementation of that section are discussed below under nutrition services.

We particularly solicit comments on whether State agency hearing procedures for service providers which are denied funding by an area agency should be less extensive than hearing procedures for an area agency which is de-designated or whose area plan is disapproved, or a unit of general purpose local government or region whose application for planning and service area designation is denied. (See § 1321.51(a).)

4. *Intrastate funding formula.* Section 305(a)(2)(C) of the Act imposes a new requirement on State agencies to develop an intrastate formula, in accordance with guidelines issued by the Commissioner, for distribution under area plans within the State of funds received under Title III. The Senate Report on S. 2850, in which this requirement originated,⁷ indicates clearly that Congress intended the Commissioner to prescribe broad criteria for the formula, and review and comment on each State's proposed formula against those criteria, but to allow each State flexibility in developing its formula to meet the particular needs of older persons within the State.

The Act requires that the State take into account the distribution of population age 60 and older in the State in developing its formula. In § 1321.49, we are proposing a series of additional general criteria to be used in developing the formula, including requirements that the formula contain a minimum funding base for each area plan, meet the 105 percent requirement for rural areas, and reflect the distribution of older persons with greatest economic need and the distribution of other resources available to meet the service needs of older persons.

We are proposing a minimum funding requirement for each area agency because we think that a formula based solely on population and the other factors we have specified might not allow an area agency sufficient funds to carry out statutory area agency and area plan requirements. We are not proposing to require that the State agency use the distribution of older persons with greatest social need in developing its formula, because we do not think that States have sufficiently precise data on persons with greatest social need. Since Title III funds are to be used to coordinate, concentrate, and increase services to older people, we

think that any formula for distribution of Title III funds should reflect the distribution of other available resources.

Because the intrastate funding formula is closely tied to the State's resource allocation plan, we are proposing that the State agency submit its formula to the Commissioner for review and comment as an attachment to the State plan. We are not, however, proposing to require the Commissioner's approval for either the resource allocation plan or the intrastate funding formula, provided that the State's formula meets the specified criteria.

We also want States that allocate other Federal and State funds to area agencies to use in funding services that could be funded under Title III, to allocate these funds in a way that will maximize their effectiveness in serving older people. We therefore encourage States to distribute these funds under their intrastate formulas.

5. *State plan based on area plans.* Section 307(a)(1) of the Act requires that the State plan contain assurances that the State plan "will be based on area plans developed by area agencies on aging within the State." There is no guidance in the legislative history on the meaning of this requirement, or on how Congress intended it to be implemented. In our view, the purpose of this requirement is to assure a close relationship between the provisions in State and area plans for advocacy and services system development. We do not believe that it is the intent of the requirement that State plans be a simple compilation of area plans or that the development of State plans follow in time the development of area plans.

To assume that "based on" means that a State plan should be merely a compilation of area plans would restrict the authority of the State agency in a manner which is inconsistent with the responsibilities assigned to the State agency in the Act for statewide management of the Title III program. Since the State agency designates area agencies, approves and funds area plans; the authority of the State agency for the State plan could not be controlled by the content of the area plans.

In our view, it would also not be feasible to interpret "based on" to require the State agency to develop the State plan after area plans are developed unless we specified uniform planning cycles in these regulations for State and area plans. We would prefer to allow State and area agencies the flexibility of continuing to set their own planning cycles.

The proposed regulations provide at § 1321.29(a) that the State agency must carry out the "based on" requirement of section 307(a)(1) by giving all area agencies in the State adequate opportunity to participate in the development of the State plan in order to ensure that the objectives established in State and area plans are consistent. We think this provision satisfies the intent of the Act and avoids the problems of interpretation mentioned above.

6. *Comprehensive and coordinated services delivery systems.* Section 306(a)(1) of the Act requires that each area plan must provide, through a comprehensive and coordinated system, for social services, nutrition services, and, where appropriate, for the establishment, maintenance, or construction of multipurpose senior centers within the planning and service area covered by the plan. Section 302(1) of the Act states that the purpose of a comprehensive and coordinated system is to provide all necessary social and nutrition services to older persons in a planning and service area. The system, according to the Act: (1) must be designed to facilitate access to and use of all services; and (2) must develop and use services effectively and efficiently, with a minimum of duplication.

We believe that the Act places on each area agency the responsibility to develop a comprehensive and coordinated system over time, that is, there is an evolutionary meaning to the word "develop." We also believe that the Act intends the "system" to include all social and nutritional services in the planning and service area, not just Title III funded services. We have based § 1321.75(a) of the proposed regulations which sets forth the components of an ideal system on these two assumptions.

Section 321(a) of the Act specifies a large number of social services that may be funded under Title III. We believe that the services and those services funded under other programs which are included in the comprehensive and coordinated system can be grouped into four major categories. The first category includes those services which facilitate access to other services. The remaining three categories are based on the point at which the service is delivered: in the community, in the home, in care providing facilities.

Section 1321.75(b) of the proposed regulations uses these four categories as unifying concepts and lists the individual services mentioned in each service under one of the categories. We recognize that in some instances a service listed in one of the latter three

⁷ Senate Rept. *supra*, p. 8.

categories may also be provided under other categories. For example, "legal services" appears as a service provided in the community; but, depending on circumstances, "legal services" may be provided in the home or in a care providing facility. To avoid repetition, we usually chose to list each service only once, in the category in which it would most often be provided.

7. *Community Focal Point.* Section 306(a)(3) of the Act requires each area plan to designate, where feasible, a focal point for comprehensive service delivery in each community to encourage the maximum collocation and coordination of services for older persons. The Act requires area agencies to give special consideration to designating multipurpose senior centers as focal points.

Section 1321.3 of the proposed regulations contains a definition of community focal point which is based on section 306(a)(3) of the Act. The proposed definition provides that a community focal point may be a mobile facility. Section 321(b)(1) of the Act allows mobile units to serve as multipurpose senior centers. Since the Act also directs area agencies to give special consideration to designating multipurpose senior centers as focal points, we believe it is logical to include mobile facilities in the definition of community focal point.

The Senate report indicates that Congress intended that there be a renewed emphasis on the concept of a single focal point for service delivery within each community.⁸ The legislative history does not provide further guidance on how this requirement should be implemented. The proposed regulations set up a process for the implementation of the focal point requirement. As a first step, all area agencies would be required to divide the entire planning and service area into "community service areas" in order to decide in which communities to designate focal points.

We have intentionally chosen not to define the term community. We decided to leave to each area agency the responsibility of defining "community" for its own planning and service area. We reached this decision for two reasons. First, we reviewed a significant number of commonly used definitions of "community" but did not find a definition which we thought had general validity for Title III programs. Second, we believe that each area agency is in the best position to know the best composition and appropriate subdivisions of its own planning and

service area. The proposed regulations at § 1321.95(b)(1) specify a set of criteria which the area agency must consider in designating community service areas. These criteria are similar to those specified in § 1321.53 for the designation of planning and service areas. The proposed regulations however, leave to the discretion of the area agency the manner in which it applies these criteria.

We believe the Act intends that a community focal point be a unique type of place within the community, a place which has broader and more responsible functions than other service agencies or multipurpose senior centers. For this reason, we are proposing that the area agency designate one community focal point in each community and are prescribing a series of minimum functions for a community focal point in § 1321.95.

8. *Continuity of services in a planning and service area.* Section (307)(d) of the Act prescribes the methods by which the Commissioner may provide for the continuity of services in a State that has had grants from its allotment withheld for failure to meet State agency or State plan requirements. The Act does not contain a comparable provision for continuity of services in a planning and service area when the State agency must terminate an area agency. Section 307(a)(5) of the Act gives an area agency the right to a hearing before the State agency, and § 1321.51 of the proposed regulations prescribes the procedures for such a hearing. However, our present regulations do not provide a method for States to assure that services to older persons in a planning and service area are not disrupted when a State terminates funding to an area agency.

We believe there are sound programmatic reasons to specify in these proposed regulations procedures for States to follow when they terminate area agency funding. Section 1321.85 (b) and (c) of the proposed regulations specifies a three-step process: a State must notify the Commissioner in writing of its actions; provide a plan for the continuity of services in the affected planning and service area; and act in a timely manner to designate a new area agency.

We believe that the termination of funding of an area agency by the State agency is a drastic action which should take place only after extended efforts by the State to assist the area agency, including providing the area agency the hearing required in § 1321.51. When a State agency foresees the possibility of termination, it should identify a potential successor agency that could be

designated to immediately assume the responsibilities of the terminated area agency. We recognize that there are circumstances in which there may be a delay in designating a successor area agency. For this reason § 1321.85(c) of the proposed regulations allows the State agency, for a period of 180 days after it withdraws designation of an area agency, to perform the responsibilities of the area agency directly or assign them to another agency in the planning and service area.

9. *Direct services.* A major issue in the development of these regulations has been determining the circumstances under which State and area agencies may directly provide services. Section 305(a)(8) of the former Title III contained a prohibition on direct provision of social services by a State or area agency unless the State agency determined that direct provision was necessary to assure an adequate supply of the service. Our implementing regulations at 45 CFR 1321.67 divided social services into two groups: (1) information and referral and coordination; and (2) all other services. Under these regulations, State agency approval is required for the first category of services, but no test for an adequate supply is imposed. For the second category of services, direct provision is prohibited unless it is necessary to assure an adequate supply and no other agency can or will effectively provide the service. Area agencies which were providing services directly prior to their designation are exempted from the requirements of this section. The former Title VII did not contain this direct services prohibition, and it is our understanding that some area agencies were providing nutrition services directly. Section 307(a)(10) of the Act, as amended, extends the prohibition to nutrition services as well.

We have reviewed this prohibition carefully together with our proposal to remove the single organizational unit requirement for both State and area agencies. After thorough review, we have concluded that the statute requires that all direct service provision by all State and area agencies, including provision of coordination and information and referral, be subject to some test for adequate supply. We recognize that there is a clear difference in the kinds of services provided under State and area plans. Some of these services, such as information and referral, advocacy, and outreach, are directly related to an area agency's statutory advocacy and service delivery responsibilities—responsibilities that must be carried out consistently throughout the planning and service

⁸ Senate Rept., *supra*, p. 7.

area, and for which a less stringent test for adequate supply seems appropriate. We are therefore proposing that an area agency be allowed to provide these services directly if the State agency determines that the area agency can provide them more effectively and efficiently.

Other social and nutrition services should, in our view, not be provided directly except in unusual circumstances. The conference report on the 1978 amendments characterizes section 307(a)(10) as a requirement that direct services not be provided "except as a last resort."⁹ For these services, our proposed regulations retain the test in the present regulations, and would require the area agency to subcontract or contract for the services unless the State agency determined that no other agency could or would effectively provide the service. We would also allow an area agency that was providing a direct service prior to its designation to continue to provide the service if requiring it to stop would result in disruption of the service.

Since section 304(d)(1)(B) provides that all of a State's allotment, with the exception of administrative funds, be used for social and nutrition services under parts B and C of the Act, provided under approved area plans,¹⁰ we think that a single planning and service area State, in which the State agency also functions like the area agency, is the only type of State in which the State agency would now have the authority to provide services directly. These proposed regulations would apply the same tests for direct service provision to single planning and service area States as are applied to area agencies.

A final issue arises whether the direct service restriction applies to all funds administered by the area agency or only services funded under Title III. This is particularly important issue for multipurpose agencies that might choose not to designate a single organizational unit. We are proposing to limit this restriction to services funded under Title III only. We recognize that this distinction may well result in a multipurpose agency being required to make an award for home health services, for example, under Title III, but use its own staff nurse to provide the services directly under Title XX. We particularly solicit comment on problems that may be raised by this requirement, and possible solutions for those problems.

10. *Greatest economic or social need.*
a. *Economic or social need and minority status.*—Sections 305(a)(2)(E) and 306(a)(5) of the Act require respectively that State and area agencies assure that preference will be given to providing services under their plans to older persons with the greatest economic or social needs. This is a new provision in the Act, and the legislative history does not indicate Congressional intent concerning the definitions of "greatest economic or social need."

Section 705(a)(4) of the former Title VII required that preference be given to serving primarily low-income older persons. The former Title III required only that the State and area agency include the number of older persons with low incomes in determining the incidence of need for social services. (Sec. 304(a)(1)(E) and (c)(1)) Existing Title III regulations at § 1321.48(c) define "low income" as below the current Department of Commerce, Bureau of Census poverty threshold.

In section 1321.3 of the proposed regulations, we have proposed three options for the definition of "greatest economic need". Based on our review of the comments received, we will select one definition for the final regulations. Option 1 defines greatest economic need as the income level below the poverty threshold established by the Department of Commerce, Bureau of Census. This is the same definition that is in § 1321.48(a) of our present regulations.

This is the lowest income level of the level of three proposed. Bureau of Census data indicate that in 1975, 31% of unrelated individuals age 65 and older, had incomes below \$2,572 and 8.9% of families with the head of household age 65 and older, had incomes below this level.

Option 2 defines greatest economic need as the income level below the "near poverty" threshold established by the Bureau of Census. These income levels are somewhat higher than the "poverty" threshold. In 1975, 48.2% of unrelated individuals age 65 and older and 15.8% of families with the head of household age 65 and older had incomes below this level.

Under option 3 greatest economic need is defined as the income level that falls below the maximum income level for eligibility under Title XX of the Social Security Act in each State. Under Title XX, all recipients of Supplemental Security Income benefits are eligible for services. Otherwise, the family's gross monthly income must be less than 115% (or less at State option) of the median income for a family of four in the State. This income level is adjusted for family

size. The median income for a family of four in each State is set annually by the Secretary of Health, Education, and Welfare.

The Title XX definition of greatest economic need represents the highest income levels of the three proposed definitions. When the Title XX definition is applied in eight sample States (Cal., Fla., Ga., Mass., Neb., Pa., Tx., and W. Va.), over two thirds of all elderly families and unrelated individuals would be in greatest economic need. Also, the Title XX definition of greatest economic need varies significantly by State. These variations are due not only to variations in median income levels but to service eligibility standards established by States.

We considered at great length how to define greatest social need. The legislative history does not indicate the specific meaning with which the Congress used the term. Section 1321.3 of the proposed regulations defines "greatest social need" as meaning isolation, physical or mental limitations, racial or cultural obstacles, or other non-economic factors which restrict individual ability to carry out normal activities of daily living and which threaten an individual's capacity to live an independent life.

This definition is one which we developed based on our own program experience. We have included in the definition of those in greatest social need those older minority population groups who experience cultural and social barriers to opportunities for participation in and access to assistance and services. We particularly invite comments on this definition.

Prior to the 1978 amendments, section 705(a)(4) of the Act required that, to the extent feasible, grants be awarded to projects operated by and serving the needs of minority, Indian and limited English-speaking eligible individuals in proportion to their numbers in the State. This provision was included in program regulations issued prior to the 1978 amendments for nutrition and, with some modification, for social services. The 1978 amendments do not contain any explicit requirements relative to serving minorities in proportion to their relative numbers in the population, although all programs under the Act must, of course, comply with the requirements of Title VI of the Civil Rights Act. Rather, the specific emphasis in the Older Americans Act is now on those older persons with the greatest economic or social need. We believe, however, that there is considerable evidence that a high proportion of minority older persons are among those

⁹House, Rept. No. 95-1618, *supra*, p. 71.

¹⁰The ombudsman program is the only exception to this requirement.

in greatest need, and that State and area agencies on aging should therefore continue to emphasize services to minorities and to assure full participation of minorities in programs supported under the Act.

b. *Means test.*—The legislative history of the Act has consistently stressed that means testing was prohibited under the Act. The Senate Report on the 1973 amendments, for example, stated: "the Older Americans Act was never intended to operate as a welfare program in the sense that it does not contain a means test and its services are not restricted to those with incomes below the poverty line."¹¹

The 1978 Conference Report in several places emphasizes that inclusion of a preference for those with the greatest economic or social needs is not to be interpreted as a first step toward requiring a means test for programs under the Act.¹²

We have consistently advised States and area agencies that they could not use income screening to determine the eligibility of an older person to receive services under the Act. However, because we did not specifically prohibit means testing in our program regulations and because the Act does not contain a specific prohibition, we have received reports that some providers may be using types of means testing. Therefore, § 1321.25(g)(4)(ii) and 1321.77(e)(6)(ii) of the proposed regulations provide that in determining how to give preference to older persons with the greatest economic need, State and area agencies may not use a means test. The proposed regulations define a means test as the use of an older person's income or resources to deny or limit that person's receipt of services under Title III. We recognize that this is a strict definition of means testing and particularly encourage comments on it.

c. *Potential conflict.*—Some may feel that the proposed regulations present a conflict by requiring, on the one hand, emphasis on serving those with the greatest economic need and prohibiting, on the other hand, the use of a means test. We recognize that there is a tension between these two requirements but believe that State and area agencies and service providers can implement both requirements by using methods similar to those suggested by the conferees with respect to legal services. The conferees stated:

Concentration on the elderly with the greatest need should be effectuated through such means as location of offices, referral of

ineligible applicants from Legal Services Corporation projects, development of expertise in certain areas of the law, or general guidelines which the project post or give to an applicant providing information on the nature of the clientele usually served there and those eligible for services at the Legal Services Corporation project.¹³

11. *Contributions.* Section 307(a)(13)(C)(i) of the Act provides that each nutrition project will permit recipients of grants or contracts to charge participating individuals for meals furnished in accordance with guidelines established by the Commissioner, taking into consideration the income ranges of eligible individuals in local communities and other sources of income of the recipients of a grant or contract. This provision is carried over from section 705(a)(2)(A)(ii) of the former Title VII.

Program regulations at § 1321.44 interpreted the former section 705(a)(2)(A)(ii) as permitting only voluntary contributions by older persons receiving nutrition services. The regulations prohibited mandatory charges for meals and provided that no individual could be denied participation in the nutrition program because of an inability to pay all or part of the cost of the meals served. The legislative history indicates that Congress was aware of our interpretation of charges. The House Report on the 1978 amendments states:

Participants may pay for meals based on what they can afford. A suggested fee schedule usually is developed locally, but each participant decides whether and how much to pay.¹⁴

The Act has never specifically provided for contributions for services other than nutrition services. Regulations for the former Title III at § 1321.142 provided that older persons who received social services must be given an opportunity to contribute to all or part of the cost of the service.

We are proposing to continue our present policy of permitting only voluntary contributions, but not mandatory charges for all services under Title III. The proposed regulation also prescribes procedures which are intended to protect the privacy of each older person and to assure proper handling of contributions.

Section 1321.111(a)(7) of the proposed regulations requires as a general rule that all contributions received be used to expand the services of the provider for older persons. We believe this proposed rule is consistent with the requirement in section 302(1)(B) of the Act that the comprehensive and

coordinated system use available resources efficiently. This section of the proposed regulations also requires, as does section 307(a)(13)(C)(ii) of the Act, that nutrition service providers use all contributions solely to increase the number of meals served.

12. *Definition of Rural.* Section 307(a)(3)(B) of the Act provides that each State agency must spend in each fiscal year, for services to older persons in rural areas, at least 105 percent of the amount spent for services in rural areas in fiscal year 1978 under the former Titles III, V, and VII.

The Act does not define "rural area" and the legislative history does not indicate what is meant by the term. Section 1321.193 of the proposed regulations sets forth three possible options for the definition of "rural area".

Option 1 is based on a planning and service area definition of rural area.

Option 2 is based on a county definition of rural area.

Option 3 is based on geographic areas defined by State criteria which are approved in the State plan.

We sought to develop a definition of rural area which was widely accepted and which met the particular requirements of section 307(a)(3)(B) of the Act. In order to compute the required 105 percent we believe it is necessary to define rural area in a manner that fits with the service funding patterns under Title III, which are usually on either a planning and service area or a county basis.

We also believe that to define rural area using the single criterion of population might work to the disadvantage of an area which is close to a densely populated area. For this reason, in both the planning and service area and county based definitions of a rural area, we would require that only two out of three proposed criteria be met. We included option 3 because we think there may be factors we have not considered. We would prefer, if possible, to have a standard national definition. We, therefore, particularly solicit comments on options 1 and 2.

13. *Priority Services.* Section 306(a)(2) of the Act provides that each area plan shall provide assurances that at least 50 percent of the amount allotted for Part B to the planning and service area will be expended for the delivery of—

(a) services associated with access to services (transportation, outreach and information referral);

(b) in-home services (homemaker and home health aide, visiting and telephone reassurance, and chore maintenance); and

¹¹ 93rd Cong. 1st. Sess. Senate. Rept. No. 93-19, p. 5.

¹² House Rept. 95-1618, *supra.*, pp. 65, 68, 69.

¹³ House. Rept. 95-1618, *supra.*, p. 65.

¹⁴ House Rept. No. 95-1150, *supra.*, p. 8.

(c) legal services; and that some funds will be expended for each category of services.

Section 306(b)(2) provides that the State agency may waive this requirement if it determines that the need for any category of services is being met.

This provision of the 1978 amendments replaced the priority services provisions introduced into the Act with the 1975 amendments. In commenting on the reasons for including a revised priority services provision in the 1978 amendments, the Senate committee report indicated concern that despite the 1975 priority programs, very few services are provided in-depth in local communities.¹⁵

The proposed regulations address access, in-home and legal services in two sections. Section 1321.75 of the proposed regulations prescribes the components of a comprehensive and coordinated services delivery system. Section 1321.195 of the proposed regulations prescribes the rules for the fifty percent requirement. Only those services specified in the Act and listed in § 1321.195(a) may satisfy the 50 percent requirement. Additional services listed as access services (e.g., service management), or in-home services (e.g., casework) under § 1321.75 of the proposed regulations may not count toward meeting the 50 percent requirement. We believe that in listing specific services under section 306(a)(2) of the Act, Congress intended to prescribe a limited number of services to which it wished to target title III social service funds. We also believe, however, that there are a number of other services which from a program perspective, are access or in-home services. We have included these as components of the comprehensive and coordinated service delivery system described in section 1321.75 of the proposed regulations.

14. *Legal Services.* Several issues arise with respect to the delivery of legal services.

a. *Which legal services should be funded under Title III, and how should the State agency determine whether the need for those services is being met.*—Section 302(4) of the Act specifically defines legal services as services provided "to older individuals with economic or social needs." Section 307(a)(15)(A)(iii) requires area agencies to attempt to involve the private bar in legal services funded under Title III, and section 307(a)(15)(B) requires coordination with Legal Services Corporation (LSC) grantees in order to

concentrate provision of Title III legal services to those older persons with greatest needs who are not eligible under the Legal Services Corporation Act (LSCA). The issue arises how Title III legal services providers can coordinate their services with the services available from the private bar to those older persons who can pay for them, and with those services available to persons who are eligible under the LSCA. We want States, area agencies and providers to select methods of carrying out this concentration requirement that will respect the sensitivity and dignity of older people.

The Conference Report on the legal services provision indicates clearly that Congress did not intend to allow a legal services provider to carry out the requirement of concentration either through means testing or through requiring an older person to first apply for LSC assistance.¹⁶ Our proposed regulations at § 1321.25 would explicitly prohibit the use of means testing for any Title III service. The Conference Report suggested that the targeting requirement be implemented by such means as location of offices or selection of the types of legal services provided. In our view, concentration on those types of services that poorer or vulnerable older people are most likely to require is probably the best way of targeting the use of Title III funds on those individuals who are not having their legal services needs met through either the private bar or LSC assistance.¹⁷

Section 306(a)(2) requires each area agency to spend "some funds" in each of three categories: Legal services, in-home services, and access services, unless the State agency determines that the need for any category of services is being met. The issue arises with respect to legal services, particularly, whether we should prescribe some minimum funding level. The legislative history of this requirement makes clear that the percentage of funds to be spent on each category should be left to each area agency, and does not indicate what factors State agencies should consider in determining whether the need for a service is being met.¹⁸ We are therefore not proposing to require any minimum funding percentages for these priority services.

We have also decided not to propose any standards for determining whether the need for legal services is being met,

because we have been unable to identify standards of need that would effectively measure the special legal needs of older persons. We also considered requiring State agencies to evaluate only publicly or charitably funded legal services provided on the same income basis as Title III services when determining whether the need for legal services was being met. We decided, however, to leave the determination of need to the discretion of the State agency. We particularly solicit comment on whether we should attempt to specify standards for determining the need for legal services, or for other categories of priority services.

b. *What criteria should we prescribe for the provision of legal services?*—Section 307(a)(15)(B) provides that no legal services may be furnished unless the area agency makes a finding after assessment, "pursuant to standards for service promulgated by the Commissioner, that any grantee selected is the entity best able to provide the particular services." We considered trying to prescribe special criteria to measure the quality of legal services under Title III, but decided that it was not feasible to prescribe these specialized criteria, and that it would be sufficient to set a series of general requirements for all service providers, which area agencies could apply to potential legal services providers. Those proposed requirements, which include requirements for out-reach, training, use of elderly volunteers, and coordination with other service providers, are contained in §§ 321.105 through 321.113. We invite comment on whether we should prescribe more detailed Federal regulatory requirements for legal services, and if so, what additional Federal requirements should be prescribed.

c. *Should there be a special means testing requirement for legal services?*—These proposed regulations at § 1321.25(g)(4)(ii) set a strict prohibition on the use of a means test to "deny or limit" services under the part. We think that the legislative history cited above fully supports such a strict requirement, but are concerned that this prohibition might be too restrictive for legal services. Legal representation can at times be very expensive, and a single client, who may well need extensive legal services may also be able to pay, at least in part, for those services. We invite comment on whether it would be feasible or appropriate to allow legal services providers to consider an older person's income and resources in

¹⁵ House Rept. No. 95-1618, *supra*, p. 65.

¹⁷ House Rept. No. 95-1150 *supra*, p. 16, lists public benefits programs, consumer fraud, special tax issues, guardianship, institutionalization, and probate matters as examples of issues particularly affecting the elderly in greatest need.

¹⁸ Senate Rept., *supra*, p. 10.

¹⁵ Senate Rept., *Supra.*, p. 10.

deciding the extent of legal representation to provide that person.

d. *Legal Services Corporation restrictions and regulations.*—Section 307(a)(15)(A)(ii) provides that legal services providers must comply with whatever restrictions and regulations the Commissioner decides are appropriate. We have selected for inclusion in section 1321.161 of the proposed regulations four requirements that we think are clearly appropriate: those restricting outside employment and partisan political activity, and those requiring special language skills, and disclosure of operating policies and other general information. We solicit comments on these proposed requirements and, in general, on the appropriateness of including any additional LSC regulations in these regulations.

e. *Legal Services and Advocacy.*—A final issue is the extent to which these regulations should include advocacy in the definition of legal services, or require legal services providers to carry out advocacy functions. We think that the proposed definition of legal services as "legal representation to those with economic or social needs" is broad enough to include both ombudsman and advocacy responsibilities, and we encourage area agencies to use legal services providers to help carry out the agencies' ombudsman and advocacy responsibilities.

15. *Ombudsman Program.* A number of issues arise with respect to the implementation of this new program. Section 307(a)(12) of the Act sets forth minimum statutory requirements for a new mandatory nursing home ombudsman program that each State agency must operate in long term care facilities throughout the State. The program must include complaint investigation, legislative monitoring, and data collection. Section 307(a)(16) prescribes minimum funding requirements for the program. The legislative history of this new requirement indicates that Congress was impressed with the work of model projects ombudsman programs and felt that such programs should be required in each State under Title III.¹⁹

The statutory requirements for the new program are very extensive and raise a number of implementation issues on which the legislative history provides little guidance. The new requirements, particularly in the area of data collection and complaint resolution, generally go far beyond the scope of existing model project programs. Our experience in those programs has been

helpful in focusing the issues that are raised by the new statutory requirements. However, we do not think that we have sufficient experience to enable us to propose additional regulatory requirements now. Therefore, these proposed regulations at § 1321.43 restate and clarify, but do not generally go beyond, the minimum statutory requirements.

We are raising a number of issues now on which we invite public comment. We are presenting these issues to an Ombudsman Task Force, which is meeting from time to time throughout the comment period. We will consider all comments from the Task Force and others on the issues discussed below, and will incorporate in the final regulations any further requirements on these issues that appear necessary. We particularly invite comment on the extent to which resolution of the issues raised should be left to individual States.

a. *Definition of Long Term Care Facility.*—The first issue that arises concerns the kinds of facilities which the program should be required to cover. Section 302(3) of the Act defines long term care facility as any skilled nursing facility, as defined in Section 1861(j) of the Social Security Act, intermediate care facility, as defined in Section 1905(c) of the Social Security Act, any nursing home, as defined in Section 1906(e) of the Social Security Act, and "any other similar adult care home." We are proposing three options for the definition of "any other similar adult care home" those that are (1) defined by State law or regulations, (2) licensed by the State and providing health related or supportive services to at least four older persons, or (3) defined by the State agency in the State plan and approved by the Commissioner. We will select one of these options in the final regulation. We particularly solicit comment on these options, and on whether another definition would be more appropriate. We want to adopt a definition of "adult care home" that will ensure that those institutionalized older persons in need of assistance receive it, but do not want to impose on a State agency coverage requirements which are overly burdensome. For example, our experience with the model projects programs indicates that ombudsman programs will be called on to investigate complaints in many unlicensed boarding homes. However, we have not included these homes in either the first or second of the proposed definitions because we are concerned that State agencies, at least in the beginning phase of the program, might not be able to implement

it in these homes as well. In the third option, of course, a State might choose to include unlicensed boarding homes if it had the capacity to provide ombudsman services to residents of such facilities.

b. *Access to facilities and patients.*—Section 307(a)(12)(B) requires a State agency to "establish procedures for appropriate access by the ombudsman to long-term care facilities and patients' records."

The issue arises how a State agency on aging, which is not responsible for licensing or certifying long term care facilities, can require access to facilities. The Health Care Financing Administration is considering proposing regulations that would require skilled nursing facilities and intermediate care facilities participating in the Federal Medicare and Medicaid programs to allow access at all times to representatives of the ombudsman program. If these regulations are issued, access to facilities and patients in the Federal programs would be assured. However, there are many facilities that would be covered by the ombudsman program that do not participate in Medicaid and Medicare. We solicit comment on how States can ensure access to these facilities, and whether we should do anything further through Federal regulations to ensure implementation of this requirement.

The issue also arises of what is "appropriate access." For example, should State procedures differentiate between paid and volunteer ombudsman staff in specifying access requirements? We have added the requirement that access to patients be provided, as well as to facilities and records. Should Federal regulations specify limits on that access?

c. *Confidentiality.*—Section 307(a)(12)(B) also requires that the State agency establish procedures to protect the confidentiality of patient records and the identity of patients and complainants. The Federal Privacy Act, 5 USC 552a does not cover these State records. Should we attempt to specify other Federal procedures in this area?

d. *Complaint investigation and resolution.*—Section 307(a)(12)(A)(i) requires the ombudsman program to "investigate and resolve complaints . . . relating to administrative action which may adversely affect the health, safety, welfare, and rights" of residents of long term care facilities. Issues raised by this requirement include:

- (1) What is meant by investigation and resolution of complaints?
- (2) What types of possible complaints would not be related to administrative

¹⁹Senate Rept., *supra*, p. 11.

action and what procedures should be followed when such complaints are received?

e. Data collection and reports.—Section 307(a)(12)(C) requires the State agency to establish a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long term care facilities and to submit reports to the Commissioner. Issues raised by this requirement include:

- (1) What types of information should be collected?
- (2) What procedures should be specified for the handling of information?; and
- (3) What should be the frequency and content of reports submitted to the Commissioner?

We also solicit comment on any other issues and problems that commenters may identify in the implementation of this new program.

16. Nutrition services.—a. Special needs.—Section 307(a)(13)(G) of the Act provides that each nutrition services provider will provide special menus where feasible and appropriate to meet the particular dietary needs arising from the health requirements, religious requirements, or ethnic backgrounds of eligible individuals. This provision is substantively the same as section 706(a)(5) of the former Title VII.

We find that there are differences of opinion in the field as to what is meant by the words "where feasible and appropriate." Some area agencies or nutrition services providers have been reluctant to implement this requirement, and have argued that it is not feasible or appropriate to provide special diets if they are more expensive, unless the increased costs are absorbed by non-Title III funds. In our view, the clear intent of the Title III nutrition service program is that nutrition services be provided without distinction to all eligible individuals in a provider's target population. Therefore, we are proposing that a nutrition service provider provide special diets to all nutrition service participants even when special diets are more expensive than other meals. The only exception to this requirement would be when either the food or skills necessary to prepare the special diets is unavailable in the planning and service area.

b. Home delivered meals.—Under the former Title VII, a number of States had home-delivered meals programs, in which a limited number of meals were provided on an as-needed basis by congregate nutrition providers. The Act now explicitly authorizes provision of home-delivered meals, but retains

primary emphasis on congregate nutrition services. Section 307(a)(13)(B) of the Act provides that each nutrition project must provide meals in a congregate setting, "except that each such project may provide home-delivered meals based upon a determination of need made by the recipient of a grant or contract entered into under this title." The conference report makes clear that Title III funds for home-delivered meals may only be awarded to a provider that serves congregate meals, and emphasizes that every effort be made for nutrition service participants to participate in a congregate setting, unless home bound by reasons of illness, an incapacitating disability, or extreme transportation problems.²⁰

Our proposed regulations at § 1321.141(b) implement this requirement by providing that the area agency may only award funds for home delivered meals to a service provider that also provides congregate meals. The proposed regulations at § 1321.147 also prescribe criteria for eligibility to receive home delivered meals. These regulations also would require that the nutrition service provider conduct initial and subsequent assessments of an older person's need for home delivered meals using these criteria, in order to ensure that home delivered meals are provided only when necessary.

Section 307(a)(13)(H) of the Act provides that each area agency must give consideration, where feasible, in the furnishing of home delivered meals to using organizations which have demonstrated ability in this area, and which agree to continue to solicit voluntary support and not use Title III funds to supplant non-Federal funds. Section 1321.147(c) of the proposed regulations provides that the nutrition services provider must give first preference in purchasing home delivered meals to an existing provider of home-delivered meals which has the capacity and willingness to provide additional home-delivered meals funded under Title III. A nutrition services provider would be able to provide home-delivered meals directly only when there is no capable and willing home-delivered meals provider in the area.

Section 337 of the Act provides that the Commissioner, in consultation with a number of agencies and organizations named in the Act, develop minimum criteria for the furnishing of home delivered meals. We consulted with the agencies and organizations in question and developed the initial minimum criteria which appear in § 1321.143 of

the proposed regulations. While our original intent was to develop criteria only for home-delivered meals, we decided that the criteria were also applicable to congregate nutrition services and therefore propose to apply the criteria to all nutrition services.

We particularly solicit comment on whether these criteria are sufficient, or whether we should impose additional criteria, and if so, what those criteria should be.

c. Consolidation of nutrition projects under area agencies.—A major issue is the required consolidation under area agency administration of existing nutrition projects which had been funded under Title VII directly by the State agency. During the congressional debate preceding the enactment of the amendments, there was considerable concern expressed that existing projects performing effectively not be adversely affected by the change in administration. Section 106(b) of the House bill, H.R. 12255, would have required that all existing projects continue to be funded, provided they meet the requirements of the amended Title III. The Senate bill, S. 2850, did not contain this automatic protection, but the Senate Report accompanying the bill emphasized that consolidation should not adversely affect existing service providers, and that area agencies should give special attention to existing Title VII providers.²¹ The conference committee retained the special protection provided by the House bill, but modified that to allow area agencies some flexibility in making nutrition services awards. Section 501(b) of the Amendments provides that:

(b) Any project receiving funds under title VII of the Older Americans Act of 1965, as in effect on the day before the effective date of this Act, shall continue to receive funds under part C of title III of such Act, as amended by this Act, if such project meets the requirements and criteria established in such title III, as amended by this Act, except that a State, pursuant to regulations prescribed by the Commissioner on Aging, shall not discontinue the payment of such funds to a project unless such State, after a hearing (if requested by the person responsible for administering such project), determines that such project has not carried out activities supported by such funds with demonstrated effectiveness.

We notified States in Program Instruction 79-10, that States and area agencies could not terminate projects protected by this section, except under 45 CFR Part 74, Subpart M, for material failure to comply with the terms of their awards, until we issued regulations implementing this section.

²⁰House. Rept. No. 95-618, *supra*, p. 62.

²¹Senate. Rept., *supra*, p. 11.

Two major issues arise in the implementation of this section. The first is the definition of a project. We are proposing to define a nutrition project for purposes of section 501(b) as a recipient of a subgrant or contract, other than an area agency, to provide nutrition services that meet our regulatory requirements specified for nutrition projects in 45 CFR Part 1324. Under our proposed definition, all projects that had been directly funded by State agencies outside the area agency network would be protected but these programs that had been consolidated under area agency administration and no longer met all our regulatory requirements for nutrition projects would not be. We believe that our proposed definition would implement the congressional intent to protect any project that had been directly funded by the State agency and might therefore be threatened by consolidation under area agency administration.

The second major issue is the setting of the criteria the State agency uses to determine that a project has not performed with "demonstrated effectiveness." We considered trying to propose criteria for demonstrated effectiveness, but decided that State agencies responsible for nutrition programs within their States and knowledgeable about local standards of performance, would be better able to specify criteria that were more detailed than those required in the Act, implementing regulations, and guidelines. We are therefore proposing in § 1321.141(b)(3)(ii)(B) to require that State agencies develop criteria to measure the effectiveness of these protected projects. A State agency would not be able to apply any performance criteria that the project had not been required to meet during the term of its award.

d. Contracting in nutrition awards.— We are also concerned that, to the extent consistent with other requirements of the Act and these proposed regulations, nutrition funds be used as efficiently as possible. We solicit comments on whether we could improve efficiency and increase the number of meals served if we required area agencies to subcontract—thereby increasing competitive bidding—in making all nutrition awards.

17. Multi-purpose Senior Centers.— The 1978 amendments consolidated under area agency administration funding for multipurpose senior centers, which was formerly provided under Title V, through direct grants from the Commissioner. Area agencies are not

required to award any funds for senior centers, although the legislative history indicates that Congress intended that area agencies continue to place emphasis on the development and expansion of the multipurpose senior centers as an integral part of the comprehensive and coordinated service delivery system in each planning and service area.²² In addition, the amendments provided expanded authority for construction and staffing of centers, and require that they be given preference as designated focal points.

Since multipurpose senior centers now have an expanded role in service delivery within the planning and service area, and funds may be used for construction and staffing of the centers, we believe it is appropriate to propose minimum standards that a senior center funded under Title III must meet.

The requirements that we have proposed for senior centers in § 1321.121 are consistent with the senior center standards developed by the National Institute of Senior Centers and the Task Force on Senior Center Development. However, our proposed requirements are not as extensive as the standards proposed by the Institute or Task Force. Some of the criteria proposed by these groups are too general, or are not regulatory in nature. The criteria that we are proposing focus on the areas most critical to effective senior center operations: (1) the target group of individuals to be served; (2) the service program of the center; (3) essential coordination with other community services and programs, and (4) the physical facility from which the center program will operate.

The requirements proposed in § 1321.121(c)(2)(i) would establish, as a basic requirement, that the senior center program be a program open to all older persons of the community, with an emphasis on serving those in greatest economic or social need. Senior centers are too frequently designed for, and primarily serve, the active and mobile elderly. Senior center programs can and should significantly benefit isolated, frail and institutionalized older persons, but the programs must be designed and operated specifically to include such individuals.

Section 1321.121(c)(2) would require a senior center funded under Title III to operate a range of group activities, individual services and community services opportunities. These are generally accepted minimum services and activities for effective senior center programs. Centers would be required to provide some services in each of the

four categories specified in § 1321.75, in order to ensure that a comprehensive and coordinated service delivery program is developed in each senior center receiving funds under Title III.

The requirement proposed in § 1321.121(c)(2)(iii) for coordination with other community services and programs is basic to the effective operation of a senior center program, particularly for senior centers which are community focal points. We expect that senior centers will arrange to have a variety of service and staff resources financed by other programs operate from the facility.

The general requirements proposed for the physical structure of a multipurpose senior center are designed primarily to assure that senior center programs will be readily accessible to older individuals. Centers must also meet the minimum safety and construction requirements proposed in § 1321.123, as well as the requirements of 45 CFR Part 84: Nondiscrimination on the Basis of Handicap.

Our proposal in § 1321.121(C)(2)(iii) for a minimum number of 45 hours of operation is designed to ensure that each center will be open for services beyond the normal 40 hour week. Our intent is to require senior centers to have at least some evening and weekend hours. We have left discretion to each State to determine the minimum operation hours for centers in rural areas of the State.

18. Transportation agreements. Section 306(c) of the Act provides that, subject to regulations prescribed by the Commissioner, an area agency, or in areas of a State where no area agency has been designated, the State agency, may pool funds appropriated under Title III to enter into transportation agreements with agencies administering programs under the Rehabilitation Act of 1973, and titles XIX and XX of the Social Security Act. The language of this section is carried over from section 304(d) of the former Act.

Under the former Title III a State agency could make awards for social services directly in certain portions of the State without designating an area agency and funding these services through an area plan. Under section 304(d)(1)(B) of the amended Act, funds for social services may only be awarded through area agencies under approved area plans. Our proposed regulations at section 1321.181 would therefore provide that only State agencies in single planning and service area States could enter into transportation agreements using social service funds. In these States, the State agencies are performing the functions of an area agency. In all

²²House Rept. 95-1618, *supra*, p. 64.

other States, only area agencies could enter into these agreements.

Section 306(c)(2) of the Act provides that funds under Title III may be used for these agreements. Our proposed regulations would provide that only social service funds, and not nutrition funds could be used. We are proposing this limitation because, except for a transition through fiscal year 1980, section 307(a)(13)(I) of the Act as amended, prohibits the use of nutrition service funds for supporting services.

19. *Allotments and Reallotments.* A number of issues arise concerning the allotment and reallotment of funds under the Act.

a. *Area agency administration.*—Under section 303(e)(1) of the former Act, a State could use not more than 15 percent of its social services allotment for area plan administration. The present section 304(d)(1) provides that:

"From any State's allotment under this section for any fiscal year—

(A) Such amount as the State agency determines but not more than 8.5 percent thereof, shall be available for paying such percentage as the agency determines, but not more than 75 percent, of the cost of administration of area plans; and

Since our practice is to make separate allotments for social and nutrition services, an issue arises whether a State would be required to apply the 8.5 percent to each of these allotments, thus spreading administrative costs proportionately across social services and nutrition services. We think that administrative costs should be distributed proportionately, to ensure that the fair share of these costs is borne by each type of service. We recognize that States may want flexibility in distributing administrative costs. A State might choose to charge more administrative costs to its nutrition allotment in order to allow more funds for priority social services. Alternatively, a State might choose to charge more administrative costs to its social services allotment if, for example, it decided to place priority on increasing the number of meals served. On balance, however, we believe that the problems and potential abuse of allowing a State to distribute its administrative costs disproportionately are considerable, and have decided not to allow States this flexibility. (See § 321.207(b)).

We are also proposing to allow an area agency to deduct up to 8.5 percent of its administrative allotment before applying the 50 percent priority service requirement.

b. *Nutrition reallotment.*—Section 308(b)(5) provides that a State may elect in its plan under section 307(a)(13) to transfer funds between its home delivered and congregate allotments, "for use as the State considers appropriate to meet the needs of the area served." The Act provides that the Commissioner "shall approve any such transfers unless he determines that such transfer is not consistent with the purpose of this Act." The statute could be read to require the Commissioner's advance approval for any transfer, no matter how small. We believe, however, that States should be allowed the flexibility, if possible, to transfer small amounts of funds between home delivered and congregate without needing to obtain prior approval from the Commissioner. In our view, automatic transfer of small percentages of funds will not have significant impact on a State's nutrition plans, and would enable a State to respond to emergency situations. We do not foresee instances in which we would question these small transfers as inconsistent with the purpose of the Act. We therefore are proposing § 1321.199 to allow a State to transfer automatically 15 percent or less of each of its allotments. Transfers in excess of 15 percent may well involve a significant change in the manner in which nutrition services are provided, and we propose to require advance approval of each such transfer. We are particularly concerned to ensure that States carefully monitor the use of home delivered meals.

c. *Mandatory reallotment by the Commissioner.*—We have been deeply concerned over the last several years by the failure of many State and area agencies promptly to liquidate funds obligated under State and area plans. We believe that this funding backup interferes with delivery of needed services to older persons. We are considering a number of proposals for dealing with this problem. At least one of these proposals would require regulations.

Under section 304(b) of the Act, the Commissioner is authorized to reallot funds that he determines will not be used by one State to a State that he determines will use the funds. In the past, we have asked States to indicate voluntarily that portion of their allotment that they decide they will not need, and we have then reallotted that money to other States. We are considering using this reallotment authority to reallocate earlier in the fiscal year unobligated portions of the allotments of those States which have significant amounts of unliquidated

obligations from prior fiscal years. We would then reallocate those amounts to States that had liquidated their obligations more promptly and that had therefore shown that they could efficiently manage their resources. We are aware that this involuntary reallotment process has significant programmatic implications, and would require careful analysis to specify criteria for deciding the levels of unliquidated obligations that would justify reallotting some portion of the State's remaining unobligated allotment. We particularly invite comment on this problem and the solution we are considering, as well as on other solutions that may be preferable. A similar problem exists at the area level, and we solicit also comments on how to require all agencies to liquidate more quickly.

Explanatory Note

We propose that all the regulations now appearing in Subchapter C of 45 CFR Chapter XIII be replaced by the proposed Part 1321—Grants for State and Community Programs on Aging; Part 1320—General; Part 1324—Nutrition Programs for the elderly; and Part 1326—Multipurpose senior centers would be vacated and reserved, and Part 1321 would be completely revised. (Part 1322—Research and development projects; Part 1323—Training projects; and Part 1325—Model projects on aging of 45 CFR Chapter XIII were withdrawn on February 21, 1979—see 44 FR 10504.)

Authority: Title III of the Older Americans Act (42 U.S.C. 3021 3030g). (Catalog of Federal Domestic Assistance Program Numbers: 13.633 Special Programs for Aging Title III Parts A and B—Grants on Aging; 13.635 Special Programs for Aging Title III Part C—Nutrition Service.)

Dated: June 19, 1979.

Robert Benedict,
Commissioner on Aging.

Approved: July 3, 1979.

Arabella Martinez,
Assistant Secretary for Human Development.

Approved: July 23, 1979.

Joseph A. Califano, Jr.,
Secretary of Health, Education, and Welfare.

45 CFR Chapter XIII Subchapter C is amended as follows:

PARTS 1320, 1324, and 1326 [Reserved].

1. Parts 1320, 1324, and 1326 are vacated and reserved.

2. Part 1321 is revised to read as follows:

PART 1321—GRANTS FOR STATE AND COMMUNITY PROGRAMS ON AGING

Subpart A—Introduction

- Sec.
1321.1 Basis and purpose of part.
1321.3 Definitions.
1321.5 Applicability of other regulations.

Subpart B—State Agency Designation, Organization, and Functions

- 1321.11 Designation and Functions of the State Agency.
1321.13 Organization of State agency.
1321.15 State agency administration.
1321.17 Staffing.
1321.19 Confidentiality and disclosure of State agency information.

Subpart C—State Plan

- 1321.21 What a State plan is.
1321.23 Duration and format of the State plan.
1321.25 Content of the State plan.
1321.27 Amendments to the State plan.
1321.29 Development and review of the State plan and plan amendments.
1321.31 Submission of the State plan and plan amendments to the Commissioner for approval.
1321.33 Approval or disapproval of a State plan and plan amendments.
1321.35 How a State agency is notified.
1321.37 Effective date and expenditures under an approved State plan or amendment.

Subpart D—State Agency Responsibility

- 1321.41 Advocacy responsibilities: general.
1321.43 Long-term care ombudsman program.
1321.45 Service delivery systems responsibilities: general.
1321.47 State advisory council on aging.
1321.49 Intrastate funding formula.
1321.51 State agency hearing procedures.
1321.53 Designation of planning and service areas.
1321.55 Appeal to the Commissioner.
1321.57 Interstate planning and service area.
1321.59 Single State planning and service area.

Subpart E—Area Agency Designation, Organization, Functions

- 1321.61 Designation and functions of area agencies.
1321.63 Types of agencies that may be an area agency.
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Subpart A—Introduction

§ 1321.1 Basis and purpose of part.

(a) This part prescribes requirements State agencies must meet to receive grants to develop comprehensive and coordinated systems for the delivery of

social and nutrition services under title III of the Older Americans Act (Act). These requirements include:

- (1) Designation and responsibilities of State and area agencies;
- (2) State and area plans and amendments;
- (3) Services delivery;
- (4) Grant awards to State agencies; and
- (5) Hearing procedures for State and area agencies, applicants for planning and service area designation, and service providers.

(b) The requirements of this part are based on title III of the Act. Title III provides for formula grants to State agencies on aging under approved State plans for the development of comprehensive and coordinated systems for the delivery to older persons of social services, including multipurpose senior centers, and nutrition services. Each State agency designates planning and service areas in the State, and makes a subgrant under an approved area plan to one area agency in each planning and service area. Area agencies in turn make subgrants or contracts to service providers.

§ 1321.3 Definitions.

"Act" means the Older Americans Act of 1965, as amended (42 U.S.C. 3001 et. seq.)

"Area Agency" means the agency designated by the State agency in a planning and service area to develop and administer the area plan for a comprehensive and coordinated system of services for older persons.

"Administration on Aging" means the agency established in the Office of the Secretary, Department of Health, Education, and Welfare as part of the Office of Human Development Services; and which is charged with the responsibility of administering the provisions of the Act, except for title V.

"Commissioner" means the Commissioner on Aging of the Administration on Aging.

"Community focal point" means a place or mobile unit in a community or neighborhood designated by the area agency for the collocation and coordination of services to older persons.

"Comprehensive and coordinated system" means a program of interrelated social and nutrition services designed to meet the needs of older persons in a planning and service area.

"Department" means the Department of Health, Education, and Welfare.

"Fiscal year" means the Federal fiscal year.

"Greatest economic need" means

Option 1: the income level that falls at or below the poverty threshold established by the Bureau of the Census;

Option 2: the income level that falls at or below the near property level established by the Bureau of the Census;

Option 3: the income level that falls at or below the maximum income level for eligibility in the State under title XX of the Social Security Act.

"Greatest social need" means those non-economic factors such as isolation, physical or mental limitations, racial or cultural obstacles; or other non-economic factors which restrict individual ability to carry out normal activities of daily living and which threaten an individual's capacity to live an independent life.

"Human services" means social, health or welfare services.

"Indian tribal organization" means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned or chartered by the governing body.

"Indian tribe" means any tribe, band, nation, or other organized group or community of Indians (including any Alaska Native Village or regional village corporation as defined in or established under the Alaska Native Claims Settlement Act, P.L. 92-203, 85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or, is located on, or in proximity to a Federal or State reservation or rancheria.

"Multipurpose senior center" (senior center) means a community or neighborhood facility for the organization and provision of a broad spectrum of services including health, social, nutritional, educational services; and facilities for recreational and group activities for older persons.

"Nonprofit" as applied to any agency, institution or organization means an agency, institution or organization which is owned and operated by one or more corporations or associations with no part of the net earnings benefiting any private share holder or individual.

"Planning and service area" means a geographic area of a State that is designated for purposes of planning, development, delivery and overall administration of services under an area plan.

"Service provider" means an entity that is awarded a subgrant or contract from an area agency to provide services under the area plan.

"State" means each of the fifty States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto

Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands and the Northern Mariana Islands.

"State Agency" means the single State agency designated to develop and administer the State plan and to be the focal point on aging in the State.

"Unit of general purpose local government" means a political subdivision of the State whose authority is general and not limited to only one function or combination or related functions; or an Indian tribal organization.

§ 1321.5 Applicability of other regulations.

The provisions of the following regulations apply to all activities under this part:

(a) Title 45 of the Code of Federal Regulations:

Part 74—Administration of Grants, except Subpart N;

Part 80—Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health, Education, and Welfare; Effectuation of Title VI of the Civil Rights Act of 1964;

Part 81—Practice and Procedure for Hearings under Part 80 of this Title;

Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Participation; and

(b) Title 5 of the Code of Federal Regulations, Part 900, subpart F, Standards for a Merit System of Personnel Administration.

Subpart B—State Agency Designation, Organization, and Functions

§ 1321.11 Designation and functions of the State agency.

In order to be eligible to receive grants under this part, a State must designate a single State agency to:

(a) Develop and administer the State plan;

(b) Be primarily responsible for coordinating all activities in the State relating to the purposes of the Act;

(c) Serve as the effective and visible advocate for all older persons in the State; and

(d) Direct area agencies in the development of comprehensive and coordinated service delivery systems throughout the State.

§ 1321.13 Organization of the State agency.

The State agency may be either:

(a) An agency whose single purpose is to administer programs in the field of aging; or

(b) A multipurpose agency that administers human services programs in the State. A multipurpose agency may

delegate all authority and responsibility under this part to a designated organizational unit in the agency.

§ 1321.15 State agency administration.

(a) *General rule.* The State plan must provide for the use of methods of administration which are necessary for the proper and efficient administration of the plan. The State agency must administer the plan in accordance with all applicable Federal laws and regulations, including all requirements of this part.

(b) *State agency procedures.* (1) The State agency must have and follow written procedures in carrying out all of its functions under this part that are adopted in accordance with paragraph (2) of this section.

(2) The State agency must:

- (i) Develop proposed procedures;
- (ii) Publish the proposed procedures in a manner that allows area agencies, providers, and older persons within the State adequate opportunity to comment on the procedures;
- (iii) Consider all comments in establishing final procedures;
- (iv) Have final procedures in effect no later than September 30, 1980; and
- (v) Keep its procedures current, and revise them as necessary.

(c) *Functional statement.* The State agency must have on file for review a functional statement of the manner in which the State agency performs all of its responsibilities under this part.

(d) *Reports.* The State agency must submit to the Commissioner any reports that the Commissioner requires.

§ 1321.17 Staffing.

(a) *Preference.* Subject to merit system requirements, the State and area agencies must give preference in hiring for full or part time positions to persons age 60 or older.

(b) *Staffing plan.* The State agency must have on file for review a staffing plan that identifies the numbers and types of staff assigned to carry out State agency responsibilities and functions under this part.

§ 1321.19 Confidentiality and disclosure of State agency information.

(a) *Confidentiality.* (1) The State agency must have procedures to ensure that no information about, or obtained from an older person by an agency providing service under the plan, is disclosed in a form that identifies the person without his or her informed consent.

(2) The State agency must ensure that lists of older persons compiled under § 1321.171 are used solely for the

purpose of providing services authorized under this part, and only with the informed consent of each individual on the list.

(b) *Disclosure.* Subject to the confidentiality requirements in paragraph (a) of this section, the State agency must make available at reasonable times and places to all interested parties the written procedures required under § 1321.15, and all other information and documents developed or received by the agency in carrying out its responsibilities under this part.

Subpart C—State Plan

§ 1321.21 What a State plan is.

A State plan is the document submitted by a State in order to receive grants from its allotments under this part. It contains provisions required by section 307 of the Act and implementing regulations and commitments that the State agency will administer or supervise the administration of activities funded under this part in accordance with all Federal requirements. A State may receive grants under this part only under an approved State plan. A State may use its grants under this part only for activities under its approved plan.

§ 1321.23 Duration and format of the State plan.

The State plan must be in effect for the three year period specified by the Commissioner. A State agency must submit a State plan or plan amendment to the Commissioner in accordance with the Commissioner's instructions concerning the format, content, time limits, transmittal forms, and procedures.

§ 1321.25 Content of the State plan.

(a) *Based on area plans.* A State plan must be based on area plans.

(b) *State agency function requirements.* A State plan must provide that the State agency function requirements are met for:

- (1) Proper and efficient methods of administration, as provided in § 1321.15;
- (2) Confidentiality and disclosure of State agency information, as provided in § 1321.19;
- (3) State agency advocacy responsibilities, as provided in § 1321.41;
- (4) State agency evaluation of service needs, as provided in § 1321.45(a)(8);
- (5) Evaluation of activities and projects under the plan, as provided in § 1321.45(a)(9);
- (6) Development and distribution of a uniform area plan format, as provided in § 1321.45(a)(10);

(7) Coordination of legal services as provided in § 1321.45(a)(13);

(8) Commodity distribution agreements, as provided in § 1321.143;

(9) State advisory council on aging, as provided in § 1321.47;

(10) State agency hearings for area agencies, providers, and planning and service area applicants, as provided in § 1321.51;

(11) The requirements for area plan approval and disapproval, as provided in §§ 1321.81 and 1321.83.

(c) *Area agency and area plan requirements.* A State plan must provide that the area agency and area plan requirements are met for area agency designation, and development and submission to the State agency of an area plan which complies with the requirements of section 306 of the Act and this part, as provided in §§ 1321.61, 1321.69, 1321.71, 1321.73, 1321.75, 1321.77 and 1321.79.

(d) *Service delivery requirements.* A State plan must provide that the service delivery requirements are met for:

- (1) A long-term care ombudsman program, as provided in § 1321.43;
- (2) Restricting direct provision of services, as provided in § 1321.103;
- (3) All service providers concerning licensure, training, outreach, coordination, preference to those with greatest economic or social need, contributions, maintenance of non-Federal support for services, and advisory role for older persons, as provided in §§ 1321.105 through 1321.115.

(4) Multipurpose senior center activities, as provided in §§ 1321.121 through 1321.137;

(5) Nutrition services, as provided in §§ 1321.141 through 1321.147;

(6) Legal services, as provided in § 1321.161; and

(7) Information and referral, as provided in § 1321.171.

(e) *Fiscal requirements.* A State plan must provide that the following fiscal requirements are met for:

(1) Expenditures in each fiscal year in rural areas of 105 percent of FY 1978 expenditures, as provided in § 1321.193; and

(2) Minimum expenditures for the long term care ombudsman program, as provided in § 1321.197.

(f) *Directory of community focal points.* A State plan must assure that the State agency keeps a directory of focal points in the State.

(g) *Information requirements.* The State plan must specify:

- (1) Program objectives to implement the service delivery requirements of paragraphs (d)(1), and (d)(4) through

(d)(7) of this section, which are consistent with the requirements of this part, objectives established by the Commissioner, and objectives established in area plans in the State;

(2) Documentation of the designation of the State agency;

(3) A resource allocation plan indicating the proposed use of all funds directly administered by the State agency;

(4) Proposed methods for giving preference to those with greatest economic or social need in the provision of services under the plan. These methods—

(i) Must include, but are not limited to:
(A) Consideration of older persons with greatest economic need in the division of the State into planning and service areas, as provided in § 1321.53, and

(B) Consideration of older persons with greatest economic need in the development of the intrastate funding formula, as provided in § 1321.49.

(ii) May not include use of a means test. A means test is the use of an older person's income or resources to deny or limit that person's receipt of services under this part.

(5) A resource inventory of State and Federal funds spent by other agencies in the State for services to older persons; and

(6) An identification of all planning and service areas and all area agencies in the State.

§ 1321.27 Amendments to the State plan.

The State agency must amend its plan if:

(a) A new or amended Federal statute or regulation requires a new plan provision, or conflicts with any existing plan provision;

(b) A U.S. Supreme Court decision changes the interpretation of a statute or regulation;

(c) State law, organization, policy, or agency operation changes and is not accurately reflected in the plan;

(d) The State agency proposes to add, change or delete any plan provision;

(e) The State agency has changed the designation of any planning and service area or any area agency; or

(f) The Commissioner requires further annual amendments.

§ 1321.29 Development and review of the State plan and plan amendments.

(a) *State plan based on area plans.* The State agency must carry out the requirement of § 1321.25(a) that a State plan must be based on area plans by giving all area agencies in the State adequate opportunity to participate in

the development of the State plan in order to ensure that the objectives established in State and area plans are consistent.

(b) *Public Hearings.* The State agency must:

(1) Hold public hearings on the State plan and on all amendments to the State plan.

(2) Give adequate notice to older persons, public officials and other interested parties of the time, dates and locations of the public hearings.

(3) Hold public hearings throughout the State at times and locations which permit older persons, public officials, and other interested parties reasonable opportunity to participate.

(c) *Review by State Advisory Council and State A-95 Clearinghouse.* The State agency must submit the State plan or amendments for review and comment, first to the State advisory council, and then to the State A-95 clearinghouse.

(d) *Review by the Governor.* The State agency must submit the State plan or plan amendments to the Governor for review and signature.

§ 1321.31 Submission of the State plan and plan amendments to the Commissioner for approval.

The State agency must submit the State plan or plan amendments signed by the Governor to the Commissioner at least 90 calendar days before the proposed effective date of the plan, or plan amendments. The Commissioner does not consider a State plan or amendment for approval unless it is signed by the Governor.

§ 1321.33 Approval or disapproval of a State plan and plan amendments.

(a) The Commissioner approves any State plan or amendment that fully meets all Federal requirements including the requirements of this part.

(b) If the Commissioner finds that any required provision of the plan is unapprovable, he or she follows the procedures in Subpart J to disapprove the plan and withhold further payments to the State.

§ 1321.35 How a State agency is notified.

(a) *Approval.* When the Commissioner approves a State plan or amendment, the Commissioner notifies the State agency in writing.

(b) *Disapproval.* When the Commissioner proposes to disapprove a State plan or amendment, the Commissioner notifies the State agency in writing. The notice gives the reasons for proposed disapproval and informs the agency that it has 60 days to request a hearing on the proposed disapproval,

following the procedures specified in Subpart J.

§ 1321.37 Effective dates and expenditures under an approved State plan or amendment.

(a) *When a State plan or amendment becomes effective.* An approved State plan or amendment become effective on the date of approval by the Commissioner.

(b) *When an agency may make expenditures under a new plan or amendment.* An agency may not make expenditures under a new plan or amendment until it is approved.

Subpart D—State Agency Responsibilities

§ 1321.41 Advocacy responsibilities: general.

The State agency must:

(a) Review and comment on all State plans, budgets, and policies which affect older persons;

(b) Conduct public hearings on the needs of older persons;

(c) Coordinate statewide planning and development of activities related to the purposes of the Act and assure that each area agency has effective procedures to coordinate programs related to the purposes of the Act within the planning and service area;

(d) Represent the interests of older persons before legislative, executive and regulatory bodies in the State;

(e) Provide technical assistance to any public or private nonprofit agency, organization, or association, or individual representing older persons;

(f) Establish and operate the long-term care ombudsman program required by § 1321.43; and

(g) Review and comment, on request, on applications to State and Federal agencies for assistance relating to meeting the needs of older persons.

§ 1321.43 Long-term care ombudsman program.

(a) *General rule.* The State agency must establish and operate a statewide long-term care ombudsman program that meets the requirements of paragraphs (c) through (e) of this section. The State agency may operate the ombudsman program directly, or by contract or other arrangement, with any public agency or private nonprofit organization, except one that is—

(1) Responsible for licensing or certifying long-term care facilities or other residential facilities for older persons, or

(2) An association, or an affiliate of an association, of long-term care facilities for older persons.

(b) *Definition.* For purposes of this section, "long-term care facility" means any:

1) Skilled nursing facility as defined in Section 1861(j) of the Social Security Act.

2) Intermediate care facility as defined in Section 1905(c) of the Social Security Act.

3) Nursing home as defined in Section 1908(e) of the Social Security Act, or

4) Any other similar adult care home:

Option 1: as defined by State law or regulations; or

Option 2: licensed by the State which provides health related or supportive social services and domicile to at least four older persons; or

Option 3: as defined by the State agency in the State plan and approved by the Commissioner.

(c) *Functions of ombudsman program.* The ombudsman program must—

(1) Investigate and resolve complaints made by or for older persons in long-term care facilities about administrative actions that may adversely affect their health, safety, welfare or rights.

(2) Monitor the development and implementation of Federal, State and local laws, regulations and policies that relate to long-term care facilities in the State;

(3) Provide information to public agencies about the problems of older persons in long-term care facilities;

(4) Train volunteers and assist in the development of citizens organizations to participate in the ombudsman program; and

(5) Carry out other activities consistent with the requirements of this section which the Commissioner determines appropriate.

(d) *Access requirements.* The State agency must establish procedures to ensure that the ombudsman program:

(i) Is given appropriate access to long-term care facilities, patients, and patients' records; and

(ii) Does not obtain access to a patient's records without the written consent of the patient or a legal representative of the patient, or unless a court orders the disclosure.

(e) *Confidentiality and disclosure requirements.* The State agency must establish procedures for confidentiality, maintenance and disclosure of records and information by the ombudsman program that protect the confidentiality of patients' records and files and meet the following requirements:

(1) No information or records maintained by the ombudsman program are disclosed unless the director of the program authorizes the disclosure;

(2) The director of the program does not disclose the identity of any complainant or resident unless—

(i) The complainant or resident, or a legal representative or either, consents in writing to the disclosure; or

(ii) A court orders the disclosure.

(3) The State agency establishes a statewide uniform reporting system to collect and analyze information on complaints and conditions in long-term care facilities, including information provided under paragraph (1) of this section, for the purpose of identifying and resolving significant problems. The State agency must submit this information to the agency of the State responsible for licensing or certifying long-term care facilities in the State and to the Commissioner in the manner prescribed by the Commissioner.

§ 1321.45 Service delivery systems responsibilities: general.

(a) The State agency must:

(1) Develop and administer the State plan;

(2) Divide the State into planning and service areas, as provided in § 1321.53;

(3) Designate area agencies in those planning and service areas for which the State decides to have an area plan developed;

(4) Approve and supervise the administration of area plans;

(5) Provide adequate and effective opportunities for older persons to express their views to the State agency on policy development and program implementation under the plan;

(6) Give preference to older persons with the greatest economic or social need in the delivery of services under the State plan;

(7) Develop an intrastate funding formula, as provided in § 1321.49;

(8) Evaluate the need for social and nutritional services in the State, and determine the extent to which other public and private programs meet the needs;

(9) Conduct periodic evaluations of activities and projects carried out under the State plan;

(10) Develop and distribute a uniform plan format and guidance for area plans that meet the requirements specified in Subpart F;

(11) Provide technical assistance to and regularly assess the performance of area agencies and programs under area plans;

(12) Establish an advisory council on aging, as provided in § 1321.47;

(13) Coordinate legal services for older persons in the State, give technical assistance, advice, and training in the provision of legal services to older

persons; and make reasonable efforts to maintain existing levels of those services;

(14) Have an agreement with the U.S.D.A. State Distributing Agency, as provided in § 1321.143;

(15) Provide administrative and hearing procedures, as required under §§ 1321.15 and 1321.51;

(16) Ensure that all older persons in the State have reasonably convenient access to information and referral services; and

(17) Maintain a directory of community focal points in the State.

(b) The State agency may:

(1) Carry out training and development programs for personnel involved in implementing this part; and

(2) Enter into contracts to carry out demonstration projects of statewide significance relating to the initiation, expansion, or improvement of services provided under this part.

§ 1321.47 State advisory council on aging.

(a) *Functions of the council.* The State agency must establish a State advisory council in accordance with paragraphs (b) through (d) in this section to advise and help the agency to—

(1) Develop and implement the State plan;

(2) Conduct public hearings;

(3) Represent the interests of older persons; and

(4) Review and comment on State plans, budgets and policies which affect older persons.

(b) *Composition of the Council.* More than fifty percent of the persons appointed to the State advisory council must be at least 60 years of age.

(c) *Frequency of meetings.* The State advisory council must meet at least quarterly.

(d) *Support.* The State agency must provide staff and assistance to the State advisory council.

§ 1321.49 Intrastate funding formula.

(a) The State agency, after consultation with all area agencies in the State, must develop and use an intrastate funding formula in accordance with paragraphs (b) through (e) of this section, for the distribution of funds to area agencies under this part.

(b) The formula must:

(1) Include a minimum funding base for each area plan in the State;

(2) Assure that rural areas in the State receive at least 105 percent of the amount spent under the Act for services in rural areas in fiscal year 1978, as provided in § 1321.193;

(3) Reflect the distribution throughout the State of persons aged 60 and over with the greatest economic need; and

(4) Reflect the availability of other State and Federal funds for service authorized under this part.

(c) The State agency must publish the formula for review and comment.

(d) The State agency must submit its formula and any proposed revisions to the Commissioner for review and comment as an attachment to the State plan. The State agency must submit with the formula a summary of comments received on it.

(e) The State agency must review and update its formula at least every three years.

§ 1321.51 State agency hearing procedures.

(a) *General rule.* If requested by the person responsible for the organization, the State agency must provide a hearing in accordance with paragraphs (b) and

(c) to—

(1) A designated area agency when the State agency proposes to—

(i) Initially disapprove the plan or plan amendment submitted by the agency;

(ii) Disapprove an area plan for failure to comply substantially with the requirements of this part; or

(iii) Withdraw the agency's designation;

(2) Any unit of general purpose local government, or region, that is denied designation as a planning and service area;

(3) Any service provider whose application to provide services under an area plan is denied, or whose subgrant or contract is terminated or not renewed, except as provided in part 74, subpart M of this title.

(b) *Timing of the hearing.* The hearing must be completed within 120 days of request.

(c) *Hearing procedures.* The hearing at a minimum must include—

(1) Timely written notice to the appellant of the basis for the decision or proposed decision, and disclosure of the evidence on which the decision is taken;

(2) An opportunity for the appellant to appear before an impartial decision maker to refute the basis for the decision;

(3) An opportunity for the appellant to be represented by counsel or other representative;

(4) An opportunity for the appellant or its representatives to be heard in person, to call witnesses, and to present documentary evidence;

(5) An opportunity for the appellant to cross-examine witnesses; and

(6) A written decision by the impartial decision maker, setting forth the reasons for the decision and the evidence upon which the decision is based.

(d) *Special rule for units of general purpose local government applying for planning and service area designation.* If requested by the person responsible for the unit, the State agency must provide a hearing on application to any unit of general purpose local government that applies to be designated as a planning and service area. In conducting the hearing, the State agency may use any procedures developed in accordance with § 1321.15 that give adequate notice and opportunity to participate to the unit and to other interested persons.

§ 1321.53 Designation of planning and service areas.

(a) *General rule.* The State agency must divide the State into planning and service areas.

(b) *Areas that may be designated as a planning and service area.*

(1) The State agency may designate as a planning and service area—

(i) Any unit of general purpose local government;

(ii) Any regional planning area, if the State decides that designation of a regional planning and service area is necessary for the effective administration of programs under this part; or

(iii) Any Indian reservation.

(2) The State agency may include in the planning and service area any areas adjacent to those specified in paragraphs (b)(1)(i) and (ii) of this section, if it decides that including the additional areas is necessary for the effective administration of programs under this part.

(3) The State agency is encouraged to include all portions of an economic development district or an Indian reservation within a single planning and service area.

(c) *Factors to be used in designation.* In dividing the State into planning and service areas, the State agency must consider:

(1) The distribution in the State of persons 60 and older with the greatest economic need;

(2) The boundaries of units of general purpose local government, regions, Indian reservations, existing economic development districts, and areas within the State established for the planning and administration of human services;

(3) The views of public officials of the units of general purpose local government; and

(4) The incidence of need for services provided under this part, and the resources available to meet those needs.

(d) *Application for designation.* The State agency must provide an opportunity to apply to be designated as a planning and service area to any unit of general purpose local government or region, or to any Indian reservation. The application for an Indian reservation must be made by its tribal organization, which is its unit of general purpose local government.

(e) *Decision.* The State agency must document the basis for its designation of each planning and service area.

(f) *Hearing.* The State agency must provide a hearing following the procedures specified in § 1321.51 to any unit of general purpose local government with a population of 100,000 or more which applies for designation as a planning and service area, and to any other unit of general purpose local government, region, or Indian tribal reorganization whose application is denied.

(g) *Timetable for designation.* The State agency must designate planning and service areas in accordance with the criteria specified in paragraph (c) of this section within 90 days after the effective date of these regulations, or July 1, 1980 whichever is later.

1321.55 Appeal to the Commissioner.

(a) *General rule.* A unit of general purpose local government, region or Indian reservation whose application for designation as a planning and service area is denied by the State agency may appeal the denial to the Commissioner under the procedures specified in paragraphs (b) through (d) of this section. The appeal for an Indian reservation must be made by its tribal organization which is its unit of general purpose local government.

(b) *State agency appeal.* The appellant must first appeal to the State agency, following the procedures specified in § 1321.51.

(c) *Time for appeal to Commissioner.* If the hearing decision by the State agency is unfavorable to the appellant, the appellant may appeal to the Commissioner within 30 calendar days of the decision.

(d) *Review by the Commissioner.* When the Commissioner receives an appeal, the Commissioner requests the State agency to submit:

(1) A copy of the appellant's application for designation as a planning and service area;

(2) A copy of the written decision of the State; and

(3) Any other relevant information the Commissioner may require.

(e) *Procedures for appeal.* The procedures for the appeal consist of:

(1) Prior written notice to the appellant and the State agency of the time and location of the hearing;

(2) The required attendance of the head of the State agency or designated representatives;

(3) An opportunity for the appellant to be represented by counsel or other representative; and

(4) An opportunity for the appellant to be heard in person and to present documentary evidence.

(f) *Decision by the Commissioner.*

(1) The Commissioner issues a written decision.

(2) The Commission may—

(i) Deny the appeal and uphold the decision of the State agency;

(ii) Uphold the appeal and require the State agency to designate the appellant as a planning and service area; or

(iii) Take other appropriate action, including negotiating between the parties or remanding the appeal to the State agency after initial findings.

(3) The Commissioner upholds the decision of the State agency if the agency followed the procedures specified in §§ 1321.51 and 1321.53, and its decision was not manifestly inconsistent with the purposes of this part.

§ 1321.57 Interstate planning and service area.

(a) The Governor of each State in which a proposed planning and service area crosses State boundaries may request the permission of the Commissioner to designate an interstate planning and service area.

(b) Each Governor who requests this permission must submit the request as part of the State plan or as an amendment to the State plan.

(c) Each Governor must identify in the request the State agency proposed to have lead responsibility for administering programs within the interstate planning and service area and must list the conditions agreed to by each State governing formation, administration, and dissolution of the interstate planning and service area.

(d) If the Commissioner approves the request for designation of an interstate planning and service area, the Commissioner reduces the allotment(s) of the State(s) without lead responsibility for the administration of programs within the area in proportion to the number of individuals 60 and older in the State(s) portion of the area, and adds the amount(s) to the allotment of the State with lead responsibility.

§ 1321.59 Single State planning and service area.

(a) *Application for designation.* A State may apply to the Commissioner for approval to designate the entire State as a single planning and service area.

(b) *Criteria for approval.* The Commissioner may approve the designation of the State as a single planning and service area if:

(1) No jurisdiction successfully applied for designation as a planning and service area under the procedures specified in §§ 1321.51, 1321.53, and 1321.55, and

(2) The State agency demonstrates that:

(i) The State is not already divided for purposes of planning and administering human services; or

(ii) The State is so small or rural that the purposes of this part would be frustrated if the State was divided into planning and service areas; and

(iii) The State agency has the capacity to carry out the responsibilities of the area agency specified in Subparts E, F, and G for the entire State.

(c) *Approval by the Commissioner.* If the Commissioner approves the application—

(1) The Commissioner notifies the State agency to develop a Single State-Single Planning and Service Area Plan;

(2) The State agency must meet all the State and area agency function requirements specified in Subparts B, D, E, and G; and

(3) The approval does not extend beyond three years.

(d) *Denial by the Commissioner.* If the Commissioner denies the application, the Commissioner notifies the State to follow the procedures specified in § 1321.53 to divide the State into planning and service areas.

Subpart E—Area Agency Designation, Organization, Functions

§ 1321.61 Designation and functions of area agencies.

(a) *General rule.* The State agency must designate an area agency in each planning and service area in which the State agency decides to allocate funds under this part.

(b) *Purpose of designation.* The area agency must:

(1) Develop and administer the area plan for a comprehensive and coordinated system of services; and

(2) Serve as the advocate and focal point for older persons in the planning and service area.

(c) *Procedures before designation.* Before designating or redesignating an

area agency, the State agency must—

(1) Determine, through an on-site assessment, the capacity of the agency to carry out all the functions of an area agency specified in this part; and

(2) Consider the views of the unit or units of general purpose local government within the planning and service area.

(d) *Timetable for designation.* The State agency must make any initial designations or redesignation of area agencies within 150 days after the effective date of these regulations, or by September 30, 1980, whichever is later.

§ 1321.63 Types of agencies that may be an area agency.

(a) The State agency may designate as an area agency any one of the following types of agencies that has the authority and the capacity to carry out the functions of an area agency:

(1) An established office on aging which operates within the planning and service area;

(2) Any office or agency of a unit of general purpose local government that is proposed by the chief elected official of the unit;

(3) Any office or agency proposed by the chief elected officials of a combination of units of general purpose local government; or

(4) Any other public or private nonprofit agency, except any regional or local agency of the State.

(b) In designating or redesignating an area agency, the agency must give preference to:

(1) An established office on aging; or

(2) An Indian tribal organization in any planning and service area whose boundaries are essentially the same as those of an Indian reservation.

§ 1321.65 Organization of the area agency.

An area agency may be either—

(a) An agency whose single purpose is to administer programs in the field of aging; or

(b) A multipurpose agency established to administer human services in the area. A multipurpose agency may delegate all its authority under this part to a designated organizational unit in the agency.

§ 1321.67 Staffing.

Subject to merit system requirements, the area agency must give preference in hiring for full or part time positions to persons age 60 or older.

§ 1321.69 Area agency procedures.

The area agency must have written procedures for carrying out all its functions under this part that meet procedural requirements specified by the State agency.

Subpart F—Area Plan**§ 1321.71 What is an area plan.**

An area plan is the document submitted by an area agency to the State agency in order to receive subgrants from the State agency's grants under this part. The area plan contains provisions required by the Act and this part and commitments that the area agency will administer activities funded under this part in accordance with all Federal requirements. The area plan also contains a detailed statement of the manner in which the area agency is developing a comprehensive and coordinated system throughout the planning and service area for all services authorized under this part. An area agency may receive subgrants under this part only under an approved area plan. An area agency may use its subgrants under this part only for activities under its approved plan.

§ 1321.73 Duration and format of the area plan and plan amendments.

(a) The area plan must be for the three year period specified by the State agency.

(b) The area agency must submit an area plan or amendment to the State agency in accordance with the uniform area plan format and other instructions issued by the State agency.

§ 1321.75 Comprehensive and coordinated service delivery system.

(a) *General rule.* The area plan must provide for the development of a comprehensive and coordinated service delivery system for all social and nutrition services needed by older persons in the planning and service area through which the area agency enters into new cooperative arrangements with other service planners and providers to—

(1) Facilitate access to and utilization of all existing services; and

(2) Develop social and nutrition services effectively and efficiently to meet the needs of older persons.

(b) *Service components of a comprehensive and coordinated service delivery system that may be funded under this part are:*

(1) Services which facilitate access, such as transportation, outreach, information and referral, escort, individual needs assessment and service management;

(2) Services provided in the community, such as congregate meals, continuing education, health, legal services, program development and coordination activities, advocacy, information and referral, individual needs assessment and service management, casework, counseling (concerning financial problems, welfare, the use of facilities and services, pre-

retirement or second career), day care, protective services, health screening, services designed for the unique needs of the disabled, emergency services, including disaster relief services, residential repair and renovation, physical fitness, and recreation services, services in helping to obtain adequate housing. Alteration, renovation, acquisition and, where permitted according to the provisions of § 1321.131, construction of facilities for use as multipurpose senior centers, are community services for purposes of this part;

(3) Services provided in the home such as: home health, homemaker services, home health aide services, preinstitutional evaluation, casework, counseling, chore maintenance, visiting, shopping, readers, letter writing, and telephone reassurance; and may include home delivered meals and nutrition education; and

(4) Services provided to residents of care providing facilities, such as casework, counseling, placement and relocation assistance, group services, complaint and grievance resolution and visiting. Care providing facilities include long term care facilities, as defined in § 1321.43(b), emergency shelters, and other congregate living arrangements.

§ 1321.77 Content of the area plan.

(a) *Comprehensive and coordinated system.* An area plan must provide for the comprehensive and coordinated service delivery system specified in § 1321.75.

(b) *Area agency function requirements.* An area plan must provide that the area agency function requirements are met for:

(1) Monitoring, evaluation, and commenting on policies and programs affecting the elderly, as provided in § 1321.91(a);

(2) Arrangements with children's day care organizations as provided in § 1321.93(1);

(3) Arrangements with educational institutions, as provided in § 1321.93(m);

(4) Assessment of need for services in the planning and service area, and evaluation of effectiveness of services being provided, as provided in § 1321.93(b);

(5) Entering into subgrants or contracts for the provision of services under the plan, as provided in § 1321.93(c);

(6) Technical assistance and evaluation of all providers, as provided in § 1321.93(d);

(7) Taking into account the views of older participants, as provided in § 1321.93(i);

(8) Outreach efforts, as provided in § 1321.93(k);

(9) Designation of community focal points, as provided in § 1321.95; and

(10) Coordination with other Federal programs serving older persons, as provided in § 1321.99.

(c) *Service delivery requirements.* An area plan must provide that the service delivery requirements are met for:

(1) Preference to older persons with greatest economic or social need, as provided in § 1321.93(g);

(2) Restricting direct provision of services, as provided in § 1321.103;

(3) All service providers concerning licensure, training, outreach, coordination, preference to those with greatest economic or social need, contributions, maintenance of non-Federal support for services, and advisory role for older persons, as provided in §§ 1321.105 through 1321.115;

(4) Multipurpose senior centers activities, as provide in §§ 1321.121 through 1321.137;

(5) Nutrition services, as provided in §§ 1321.141 through 1321.147;

(6) Legal services, as provided in §§ 1321.161;

(7) Information and referral services, as provided in § 1321.171; and

(8) Transportation services, as provided in § 1321.181.

(d) *Fiscal requirements.* An area plan must provide that the requirement of § 1321.195 is met for expenditure of 50 percent of its social services allotment for priority services.

(e) *Informational requirements.* The area plan must specify:

(1) Program objectives to implement the service delivery requirements specified in paragraphs (c)(1), and (c)(4) through (c)(7) of this section, that are consistent with the requirements of this part and objectives established by the State agency;

(2) A resource allocation plan indicating the proposed use of all funds directly administered by the area agency;

(3) An inventory of programs operated by other agencies in the planning and service area for services to older persons;

(4) A description of community services areas and an identification of designated community focal points;

(5) Methods the area agency uses to set services priorities under the plan, particularly those services specified in § 1321.195; and

(6) Proposed methods for giving preference to those with greatest economic or social need in the provision of services under the plan. These methods—

(i) Must include, but are not limited to, consideration of older persons with

greatest economic need in the designation of community service areas and community focal points, as provided in § 1321.95; and

(ii) May not include use of a means test. A means test is the use of an older person's income or resources to deny or limit that person's receipt of services under this part.

§ 1321.79 Amendments to the area plan.

The area agency must amend the plan if:

(a) A new or amended State or Federal statute or regulation requires a new provision, or conflicts with any existing plan provision;

(b) A U.S. Supreme Court decision changes the interpretation of a statute or regulation;

(c) Local law, organization, policy, or agency operation changes and is no longer accurately reflected in the area plan;

(d) The area agency proposes to add, change, or delete any area plan provision; or

(e) The State agency requires further annual amendments.

§ 1321.81 Development and review of the area plan and plan amendments.

(a) *Public hearing.*

(1) The area agency must hold at least one public hearing on the area plan and on all amendments to the area plan.

(2) The area agency must give adequate notice to older persons, public officials, and other interested parties of the times, dates, and locations of the public hearing(s).

(3) The area agency must hold the public hearing(s) at a time and location which permit older persons, public officials, and other interested parties reasonable opportunity to participate.

(b) *Review and comments by advisory council and A-95 clearinghouse.* The area agency must submit the area plan and amendments for review and comment, first to the area advisory council and then to the State A-95 clearinghouse.

(c) *State agency approval.* The area agency must submit the area plan or amendments to the State agency for approval, following procedures specified by the State agency.

§ 1321.83 Approval or disapproval of an area plan and plan amendments.

(a) The State agency must approve an area plan or amendment which meets the requirements of this part.

(b) If the State finds that a plan is unapprovable, or if the State agency proposes to terminate the designation of an area agency, or to find that the provisions or administration of an approved area plan no longer substantially comply with the

requirements of this part, the State agency must follow the procedures specified in § 1321.51 to terminate the plan or the agency designation.

§ 1321.85 Termination of funds and continuity of services.

(a) The State agency must withhold further payments to an area agency whenever the State agency, after reasonable notice and opportunity for a hearing, as provided in § 1321.51, finds that—

(1) The area agency does not meet the requirements of this part.

(2) The plan or plan amendment is not approvable; or

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of this part.

(b) If the State agency terminates funds under paragraph (a) of this section, it must notify the Commissioner in writing of its action; provide a plan for the continuity of services in the affected planning and service area, and designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency—

(1) Perform the responsibilities of the area agency; or

(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

Subpart G—Area Agency Responsibilities

§ 1321.91 Advocacy responsibilities of the area agency.

The area agency must—

(a) Monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons;

(b) Conduct public hearings on the needs of older persons;

(c) Represent the interests of older persons to public officials, public and private agencies or organizations;

(d) Coordinate activities in support of the statewide long-term care ombudsman program; and

(e) Coordinate planning with other agencies and organizations to promote new or expanded benefits and opportunities for older persons.

§ 1321.93 Area agency general planning and management responsibilities.

The area agency must:

(a) Develop and administer an area plan for a comprehensive and coordinated service delivery system in

the planning and service area, in compliance with all applicable laws and regulations, including all requirements of this part;

(b) Assess the kinds and levels of services needed by older persons in the planning and service area, and the effectiveness of other public or private programs serving those needs;

(c) Except as provided in § 1321.103, enter into subgrants or contracts to provide all services under the plan;

(d) Provide technical assistance, monitor, and periodically evaluate the performance of all service providers under the plan;

(e) Coordinate the administration of its plan with the Federal programs specified in § 1321.99, and with other Federal, State and local resources in order to develop the comprehensive and coordinated service system required by § 1321.75;

(f) Establish an advisory council as required by § 1321.97;

(g) Give preference in the delivery of services under the area plan to older persons with the greatest economic or social need;

(h) Assure that older persons in the planning and service area have reasonably convenient access to information and referral services;

(i) Provide adequate and effective opportunities for older persons to express their views to the area agency on policy development and program implementation under the plan;

(j) Divide the entire planning and service area into community service areas and designate community focal points, as required by § 1321.95;

(k) Have outreach efforts, with special emphasis on the rural elderly, to identify older individuals with greatest economic or social needs and inform them of the availability of services under the plan;

(l) If possible, have arrangements with children's day care organizations under which older persons can volunteer to help provide the day care;

(m) If possible, have arrangements with local educational agencies, institutions of higher education, and nonprofit private organizations, to use the services provided older individuals under the community schools program of the Elementary and Secondary Education Act of 1965.

(n) Develop and publish the methods that the agency uses to establish priorities for services, particularly those specified in § 1321.195.

§ 1321.95 Designation of community focal points.

(a) *Purpose.* The area agency, where feasible, must designate one community

focal point in each community service area to provide a place for ready access to services furnished under the plan.

(b) *Procedures for designating community focal point.* The area agency must use the following procedures in designating community focal points.

(1) In order to decide in which communities to designate a focal point, the area agency must divide the entire planning and service area into community service areas, after considering:

- (i) The incidence of older persons with the greatest economic need;
- (ii) The delivery pattern of services funded under this part;
- (iii) The delivery pattern of services funded from other sources;
- (iv) The geographic boundaries of communities and natural neighborhoods; and
- (v) The location of agencies or organizations with the capacity and willingness to carry out the functions of a community focal point.

(2) The area agency may designate as a community focal point only an organization that is able and willing to make some provision for:

- (i) Individual needs assessment;
- (ii) Information and referral;
- (iii) Access to emergency services, twenty-four hours a day, seven days a week; and
- (iv) Collocation of services.

(3) The area agency must give special consideration in designating community focal points to multipurpose senior centers; and

(4) If the area agency decides it is not feasible to designate a focal point in any community service area, it must keep a written record of the basis for its decision.

§ 1321.97 Area agency advisory council.

(a) *Functions of council.* The area agency must establish an advisory council in accordance with paragraphs (b) through (d) of this section to advise the agency to:

- (1) Develop and administer the area plan;
- (2) Conduct public hearings;
- (3) Represent the interests of older persons; and
- (4) Review and comment on all community policies, programs and actions which affect older persons.

(b) *Composition of the council.* The advisory council must be made up of:

- (1) More than 50 percent older persons;
 - (2) Representatives of older persons;
 - (3) Local elected officials; and
 - (4) The general public.
- (c) The agency may use the advisory

council to assist it in carrying out any of its functions.

(d) The area agency must provide staff and assistance to the advisory council.

§ 1321.99 Coordination with other programs.

In carrying out its responsibilities for the development of a comprehensive and coordinated system, the area agency must establish effective and efficient procedures for coordinating programs funded under this part with the following programs:

- (1) Health systems agencies designated under Title XV of the Public Health Services Act;
- (2) The Comprehensive Employment and Training Act of 1973;
- (3) Title II of the Domestic Volunteer Act of 1973;
- (4) Titles II, XVI, XVIII, XIX, and XX of the Social Security Act;
- (5) Sections 231 and 232 of the National Housing Act;
- (6) The United States Housing Act of 1937;
- (7) Section 202 of the Housing Act of 1959;
- (8) Title I of the Housing and Community Development Act of 1974;
- (9) Section 222(a)(8) of the Economic Opportunity Act of 1964;
- (10) The community schools program under the Elementary and Secondary Education Act of 1964; and
- (11) Sections 3, 5, 9 and 16 of the Urban Mass Transportation Act of 1964.

Subpart H—Service Requirements General Requirements Applicable to All Services

§ 1321.101 State agency approval of area agency subgrants or contracts.

(a) The State agency may not require the area agency to submit for prior review or approval any proposed subgrants or contracts with public or private nonprofit agencies or organizations.

(b) The area agency must submit to the State agency for prior approval any proposed contracts with profit making organizations for services under the area plan. The State agency may approve the contracts only if the area agency demonstrates that the profit making organization would provide services in a manner clearly superior to other available public or private nonprofit providers.

§ 1321.103 Direct provision of services by State and area agencies.

(a) *General rule.* A State or area agency must use subgrants or contracts with service providers to provide all services under this part unless the State agency decides that direct provision of a service by the State or area agency is

necessary to assure an adequate supply of the service. A State agency may only provide direct services when the State has been designated as a single planning and service area, as provided in § 1321.59.

(b) *Test for adequate supply for services related to area agency statutory functions.*

(1) For any of the services directly related to an area agency's statutory functions, direct provision is necessary to assure an adequate supply if the State agency decides that the area agency (or the State agency in a single planning and service area State) can perform the services more effectively and efficiently than any other agency.

(2) Services directly related to the statutory advocacy and service delivery functions of the area agency are those which must be performed in a consistent manner throughout the agency's jurisdiction. These services are: information and referral, outreach, advocacy, program development, coordination, individual needs assessment and case management.

(c) *Test for adequate supply for other services.*

(1) For any other service funded under this part, direct provision is necessary to assure an adequate supply if:

(i) The area agency was providing the service before the agency's initial designation after the effective date of these regulations and requiring it to stop providing the service would result in a disruption of the service; or

(ii) No other agency can and will effectively provide the service.

(2) These services include all other services funded under the area plan, such as nutrition, homemaker, transportation, and legal services. They do not include any ombudsman services provided by the State agency under § 1321.43.

(d) *Services not under this part.* The area agency may plan, coordinate, and provide services funded under other programs, if it does not use funds under this part for those services; and if it continues to meet all its area agency responsibilities.

§ 1321.105 Licensure requirement.

All services provided under this part must meet any existing State and local licensure requirements for the provision of those services.

§ 1321.107 Training, outreach, and coordination.

All service providers under this part must have procedures for:

- (a) Outreach activities to ensure

participation of eligible older persons;

(b) Training and use of elderly volunteers and paid personnel; and

(c) Coordination with other service providers in the planning and service area.

§ 1321.109 Preference for those with greatest economic or social need.

All service providers under this part must give preference to those with greatest economic or social need. Service providers may use methods such as location of services and specialization in the types of services most needed by these groups to meet this requirement. No service provider may use a means test.

§ 1321.111 Contributions for services under the area plan.

(a) *Opportunity to contribute.* Each service provider under the area plan must—

(1) Give each older person who receives a service information about the cost of the service;

(2) Give each older person an opportunity to contribute to part or all of the cost of the service;

(3) Tell each older person that he or she may decide freely whether or not to contribute and how much;

(4) Avoid the appearance of pressure to contribute;

(5) Protect the privacy of each older person with respect to his or her contribution;

(6) Have appropriate procedures to safeguard and account for all contributions; and

(7) Use all contributions to expand the services of the provider under this part. Nutrition services providers must use all contributions to increase the number of meals served.

(b) *Contribution schedules.* The area agency must permit each service provider to develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule the provider must consider the income ranges of older persons in the community and the provider's other sources of income.

(c) *Failure to contribute.* The area agency may not allow any service provider to deny an older person a service because the older person would not contribute for the service.

§ 1321.113 Maintenance of non-Federal support for services.

Each service provider under the area plan must—

(a) Assure that funds under this part are not used to replace funds from non-Federal organizational sources; and

(b) Agree to continue or initiate efforts to obtain private and other public organizational support for services funded under this part.

§ 1321.115 Advisory role to service providers of older persons.

Each service provider under the area plan must have procedures for obtaining the views of participants on the services they receive.

Multipurpose Senior Centers

§ 1321.121 Multipurpose senior centers.

(a) *Purpose of making awards.* The area agency may award social service funds under this part for the following senior center activities:

(1) Alteration, leasing for at least 10 years, or renovation of a facility including a mobile facility, for use as a senior center;

(2) Subject to the provisions of § 1321.131, the acquisition or construction of a facility including a mobile facility for use as a senior center; or

(3) The costs of professional and technical personnel required for the operation of multipurpose senior centers.

(b) *Definitions.* For purposes of this subpart,

(1) "Acquiring" means purchasing or obtaining ownership of an existing facility for use as a senior center.

(2) "Altering" or "renovating" means making modifications to an existing facility which are necessary for its effective use as a senior center. This includes restoration, repair, expansion which is not more than twice the square footage of the original facility, and all related physical improvements.

(3) "Construction" means the building of a new facility, including the costs of land acquisition and architectural and engineering fees.

(4) "Structural change" means any change to the load bearing members of a building.

(c) *General requirements for senior center awards.*

(1) *Type of agency.* The area agency may award multipurpose senior center funds to either a public or private nonprofit agency or organization.

(2) *Minimum service requirements for funding.* Funds may be awarded for the purposes specified in paragraph (a) of this section only for a senior center which—

(i) Serves a cross section of all segments of the older population of its service area, with special emphasis on those in greatest economic or social need;

(ii) Operates a program of group activities, individual services and community service opportunities in each

of the following categories of service: (a) access service; (b) community services; (c) in-home services; and (d) services in care providing facilities;

(iii) Provides for necessary coordination with other services and programs in the service area, by collocating staff and services of other programs at the senior center or referring individuals needing services to other service providers; and

(iv) Operates its service program from a safe and physically accessible structure. Access to the service program must be available to older persons at least 45 hours per week, except that the State agency may set shorter access hours for centers in rural areas.

(3) *Preference for community focal points.* The area agency must give preference in making awards to agencies or organizations which have been or will be designated as community focal points in communities and neighborhoods with the greatest social or economic needs.

§ 1321.123 Compliance with health, safety, and construction requirements.

(a) *General.* A recipient of any award for senior center activities must comply with all applicable State and local health, fire, safety, building, zoning and sanitation laws, ordinances or codes.

(b) *Life Safety.* A recipient of any multipurpose senior center award must:

(1) Comply with the provisions of the National Fire Protection Association 101 Life Safety Code, applicable building occupancy classification, or State or local codes, whichever is most stringent;

(i) These regulations incorporate by reference the "Life Safety Code." (NFPA No. 101, 1976 edition). This code is available from the National Fire Protection Association, 470 Atlantic Avenue, Boston, Ma. 02210 at a cost of \$5.00 per copy.

(ii) A copy of the "Life Safety Code" is available for inspection at the Administration on Aging, Public Inquiries, Room 4146, 330 Independence Avenue, S.W., Washington, D.C. 20201, and at the Office of the Federal Register library, Room 8401, 1100 L Street N.W., Washington, D.C. 20408.

(2) Install an adequate number of smoke detectors in the senior center; and

(3) Have a plan for assuring the safety of older persons in a natural disaster or other safety threatening situation.

(b) *Architectural Barriers.* A recipient of an award for construction of a senior center must assure that plans and specifications for the facility comply with regulations relating to minimum standards of construction, particularly with the requirements of the Architectural Barriers Act of 1968.

(c) *HUD Consultation.* The State agency must assure that it will consult with the Secretary of Housing and Urban Development with respect to the technical adequacy of any proposed alteration or renovation of a senior center assisted under this part.

§ 1321.125 Compliance with Federal labor standards.

A recipient of an award for alteration, renovation, or construction of a facility for use as a multipurpose senior center must comply with the requirements of the Davis-Bacon Act and other mandatory Federal labor standards.

§ 1321.129 Length of use of an acquired or constructed facility.

(a) A recipient of an award for the acquisition of a facility to be used as a senior center must assure that the facility will be used for that purpose for at least ten years from the date of acquisition.

(b) A recipient of an award for the construction of a facility to be used as a senior center must assure the facility will be used for that purpose for at least twenty years after completion of construction.

(c) The Commissioner may waive the requirements specified in paragraphs (a) and (b) of this section in unusual circumstances.

§ 1321.131 Special conditions for approval of an award for acquisition or construction.

(a) The area agency must obtain the approval of the State agency before making an award for the construction of a facility.

(b) The State agency may approve the construction of the facility after considering the views of the area agency if it finds that there are no other suitable facilities available to serve as a focal point in the community.

(c) The area agency may make an award for the acquisition of a facility if there are no suitable facilities for leasing.

§ 1321.133 Compliance with prohibition on sectarian use of a facility.

A recipient of an award for acquisition or construction of a facility must assure that the facility will not be used for sectarian instruction or religious worship.

§ 1321.135 Funding and use requirements.

A recipient of an award for alteration, renovation, acquisition or construction of a facility must assure that:

(a) Sufficient funds will be available to meet the non-Federal share of the award;

(b) Sufficient funds will be available to effectively use the facility as a multipurpose senior center; and

(c) In a facility that is shared with other age groups, funds received under this part support only—

(1) That part of the facility used by older persons; or

(2) A proportionate share of the costs based on the extent of use of the facility by older persons.

§ 1321.137 Recapture of payments for acquired or constructed facilities

(a) The United States government is entitled to recapture a portion of Federal funds from the owner of a facility if within 10 years after acquisition or 20 years after completion of construction—

(1) The owner of the facility ceases to be a public or non-profit agency; or

(2) The facility is no longer used for senior center activities.

(b) The amount recovered under paragraph (a) of this section is that proportion of the current value of the facility equal to the proportion of Federal funds contributed to the original cost. The current value of the facility is determined by an agreement between the owner of the facility and the Federal government; or by an action in the Federal district court in which the facility is located.

Nutrition Services

§ 1321.141 Nutrition services.

(a) *Purpose of making awards.* Except as provided in § 1321.101(b), the area agency may award nutrition services funds received under this part to a public or private non-profit agency or organization to provide meals and other nutrition services, including nutrition education, to older persons.

(b) *Selection of nutrition services providers.*

(1) The area agency may award nutrition services funds only to a nutrition services provider that—(i) Provides congregate nutrition services and, depending on an assessment of need by the area agency or the provider, provides home delivered nutrition services either by contract or directly;

(ii) If it is not the designated community focal point, agrees to coordinate its activities with, and provide some meals at the focal point; and

(iii) Meets the requirements specified in §§ 1321.143 through 1321.147.

(2) The area agency must award funds to a nutrition services provider that:

(i) Was a nutrition project receiving funds under the former Title VII of the Act on September 30, 1978. For purposes of this requirement, "nutrition project"

means the recipient of a subgrant or contract to provide nutrition services, other than the area agency, which met the requirements for a project specified in the former Title VII regulations.

(ii) Meets the requirements of this subpart; and

(iii) Has carried out its nutrition services activities with demonstrated effectiveness.

(3) Except as provided in 45 CFR part 74, Subpart M, the area agency may not discontinue funding a nutrition project unless the State agency—(i) Has given the project an opportunity for a hearing, in accordance with § 1321.51, if a hearing is requested by the project director; and

(ii) Has determined that the project: (A) Does not meet the requirements of this subpart; or

(B) Has not carried out nutrition services activities with demonstrated effectiveness. The State agency may not set criteria for demonstrated effectiveness that are different from the requirements imposed on projects during the period for which their performance is being measured.

§ 1321.143 Food requirements for all nutrition services providers.

(a) In purchasing and preparing food, and delivering meals, the nutrition services provider must follow appropriate procedures to preserve nutritional value and food safety;

(b) The nutrition services provider must serve special meals to meet the particular health, religious, or ethnic dietary needs of individual participants even when special diets are more expensive than other meals. The area agency may exempt a nutrition service provider from this requirement only when the food or skills necessary to prepare the special diets are unavailable in the planning and service area.

(c) The nutrition services provider must use appropriate food containers and utensils for blind and handicapped participants.

(d) Each meal served by the nutrition services provider must contain at least one-third of the current Recommended Dietary Allowances as established by the Food and Nutrition Board of the National Academy of Sciences—National Research Council.

(e) U.S.D.A. food assistance programs.

(1) Direct assistance for nutrition services.

(i) The State agency must have an agreement with the U.S.D.A. State Distributing Agency to assure the availability to nutrition services providers under this part of food, cash, or a combination of food and cash.

(ii) The State agency must distribute all food, cash or the combination of food and cash received from U.S.D.A. through area agencies to nutrition services providers based on each provider's proportion of the total number of meals served in the State.

(iii) The State agency must comply with the requirements of 7 CFR Part 250 for participation in the U.S.D.A. program.

(iv) A nutrition services provider must accept and use any U.S.D.A. food made available by the State agency, and must assure appropriate and cost effective arrangements for the transportation, storage and use of the food.

(iv) If a nutrition service provider receives cash instead of food, the provider must spend the cash only for buying United States agricultural commodities and other food.

(2) Food stamp program. (i) The nutrition services provider must assist participants in taking advantage of benefits available to them under the food stamp program.

(ii) The nutrition services provider must coordinate its activities with agencies responsible for administering the food stamp program to facilitate participation of eligible older persons in the program.

§ 1321.145 Special requirements: congregate nutrition services.

(a) *Eligibility.* A person aged 60 or older, and the spouse of the person regardless of age, are eligible to participate in congregate nutrition services under this part.

(b) *Type and frequency of meals served.* The nutrition services provider must provide a hot or other appropriate meal in a congregate setting at least once a day, five or more days a week.

(c) *Location of congregate nutrition services.* The nutrition services provider must (i) locate congregate nutrition services as close as possible, preferably within walking distance, to the majority of eligible older persons, and (ii) give preference to community facilities.

§ 1321.147 Special requirements: home delivered nutrition services.

(a) *Eligibility.* A person aged 60 or over, and the spouse of the person regardless of age or condition, are eligible to receive home delivered meals if one or the other is homebound by reason of illness, incapacitating disability or is otherwise isolated.

(b) *Determination of need for home delivered nutrition services.*

(1) The nutrition services provider must conduct initial and subsequent periodic assessments of the eligible

individual's need for home delivered meals, unless the assessment is otherwise provided for by the area agency.

(2) If feasible the nutrition services provider must promptly meet an eligible individual's request for home delivered meals, and must continue to provide home delivered meals as long as the older person needs them.

(3) If the older person consents, the nutrition services provider must bring to the attention of the area agency any condition or circumstances which place the older person or the household in jeopardy.

(c) *Criteria for selecting providers of home delivered nutrition services.* (1) The area agency may only award funds for home delivered meals to a service provider that also provides congregate meals.

(2) The nutrition services provider must purchase home delivered meals from an organization, where one exists, that (i) Demonstrates proven ability to provide home delivered meals effectively and at reasonable costs;

(ii) Agrees to comply with regulations under this part when providing meals funded under this part; and

(iii) Has the capacity to deliver meals during a weather related emergency.

(2) Only when there is no existing organization which meets the criteria specified in paragraph (1) of this section may the nutrition services provider furnish home delivered meals directly.

(d) *Type and frequency of meals served.* The provider of home delivered meals must assure the availability to participants of at least one meal a day, seven days a week. Meals may be hot, cold, frozen, dried, canned, or supplemental foods with a satisfactory storage life.

Legal Services

§ 1361.161 Legal services.

(a) *Purpose of the award.* The area agency may award social service funds under this part for legal services. These legal services must be in addition to any legal services already being provided to older persons in the planning and service area.

(b) *Definition.* Legal services means legal advice and representation to those with economic or social needs, provided by a lawyer or non-lawyer where permitted by law. Legal services may also include counseling and other appropriate assistance by a paralegal or law student under the supervision of a lawyer.

(c) *Conditions legal service providers must meet.*

(1) A legal service provider must be either—(i) An organization that receives funds under the Legal Services Corporation Act; or

(ii) An organization that has a program or the capacity to develop a legal services program.

(2) Each legal service provider must—

(i) Make efforts to involve the private bar in legal services provided under this part, including groups within the private bar that furnish legal services to older persons on a pro bono and reduced fee basis;

(ii) Ensure that no attorney of the provider engages in any outside practice of law if the director of the provider has determined that such practice is inconsistent with the attorney's full time responsibilities;

(iii) Ensure that while employed under this part, no employee and no staff attorney of the provider shall, at any time,

(A) Use official authority or influence for the purpose of interfering with or affecting the results of an election or nomination for office, whether partisan or nonpartisan;

(B) Directly or indirectly coerce, attempt to coerce, command or advise an employee of any provider to pay, lend, or contribute anything of value to a political party, or committee, organization, agency or person for political purposes; or

(C) Be a candidate for partisan elective public office.

(iv) In areas where a significant number of clients speak a language other than English as their principal language, adopt employment policies that ensure that legal assistance will be provided in the language spoken by those clients; and

(v) Adopt a procedure for affording the public appropriate access to the Act, regulations and guidelines under this part, the provider's written policies, procedures, and guidelines, the names and addresses of the members of its governing body, and other materials that the provider determines should be disclosed. The procedure adopted must be subject to approval by the area agency.

(3) Each legal services provider that is not a Legal Services Corporation grantee must agree to coordinate its services with Legal Services Corporation grantees in order to concentrate legal services funded under this part on older persons with the greatest economic or social need who are not eligible for services under the Legal Services Corporation Act. In carrying out this requirement, legal services providers may not use means testing or require

older persons initially to apply for services through a Legal Services Corporation grantee.

(4) Each legal services provider to which the area agency awards funds must meet the requirements of § 1321.105 through § 1321.115 more fully than other applicants.

Information and referral services

§ 1321.171 Information and Referral Services.

(a) The area plan must provide for information and referral services sufficient to assure that older persons within the planning and service area have reasonably convenient access to the service. In areas in which a significant number of older persons speak a language other than English as their principal language, reasonably convenient access includes the provision of information and referral services in the language spoken by the older persons.

(b) "Information and referral service" means a location at which the service provider:

(1) Develops and maintains information about services and opportunities available to older persons;

(2) Has a trained paid and volunteer staff to inform older persons about those opportunities and services and help older persons take advantage of them; and

(3) Maintains current records of older persons needing or requesting services. These records may be maintained and disclosed by name with the consent of the older person or a family member.

(c) The State plan must provide for information and referral services for all older persons not furnished the service under paragraph (a) of this section.

Transportation Services

§ 1321.181 Transportation agreements.

(a) The area agency or the State agency in a single planning and service area State may enter into transportation agreements with agencies which administer programs under the Rehabilitation Act of 1973 and titles XIX and XX of the Social Security Act to meet the common need for transportation of service participants under the separate programs.

(b) The area agency may pool social service funds received under this part with funds available to other parties to the agreement to share expenses related to a common transportation service.

Subpart I—Fiscal Requirements

§ 1321.191 Allotments and grants to States.

(a) *General rule.* The Commissioner makes annual allotments to each State for paying part of the costs of administration and services under the State plan.

(b) *Types of allotments.* Each State receives separate allotments for—(1) State agency administration;

(2) Social services including senior center services;

(3) Congregate nutrition services; and

(4) Home delivered nutrition services.

(c) *Amounts allotted for social and nutrition services.* From the sums appropriated each fiscal year for social and nutrition services, each State is allotted an amount based on the ratio of its population aged 60 and older to the national population aged 60 and older except that—(1) Each State is allotted at least one-half of one percent;

(2) Guam, the Virgin Islands, and the Trust Territory of the Pacific Islands are each allotted one-fourth of one percent;

(3) American Samoa and the Northern Mariana Islands are each allotted one-sixteenth of one percent; and

(4) No State is allotted less than the State received for Fiscal Year 1978.

(d) *Amounts allotted for State administration.* From the sums appropriated each fiscal year for State agency administration, each State is allotted an amount based on the ratio of its population aged 60 or over to the national population age 60 and older, except that—

(1) Each State is allotted at least one-half of one percent of the sum appropriated, or \$300,000, whichever is greater.

(2) Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands and the Northern Mariana Islands are each allotted at least one-fourth of one percent or \$75,000, whichever is greater.

(e) *Grants.* The Commissioner makes grants to States from their allotments.

(f) *Limitation on use.* (1) Except as provided in §§ 1321.199, § 1321.203, § 1321.205, and paragraph (f)(2) of this section, a State must use each allotment for the purpose for which it was made.

(2) A State may use not more than 20 percent of its fiscal year 1979 and 1980 nutrition allotments for social services directly related to the delivery of nutrition services. The Commissioner may approve the use of up to 50 percent in a State with unusually high supportive costs.

(g) *Limitation on meaning of "State".* For purpose of paragraphs (c)(1) and

(d)(1) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands.

Service Funding Requirements

§ 1321.192 Area agency allotments.

(a) *General rule.* Except as provided in §§ 1321.59, 1321.197, and 1321.203, a State agency must reallocate its entire social and nutrition services allotments to area agencies under approved area plans. The area agency must use each allotment for the purpose for which it was made.

§ 1321.193 Expenditures in rural areas.

(a) *General rule.* The State agency must spend in each fiscal year for services to older persons in rural areas under this part at least 105 percent of the amount spent under the Act in rural areas during Fiscal Year 1978 for social and nutrition services and multipurpose senior centers.

(b) *Definition of rural area.* For purposes of this section, "rural area" means—

Option 1: A planning and service area that meets at least two of the following criteria:

(1) Less than 50 percent of the total population lives in an urban area as defined in the most recent census by the Bureau of the Census.

(2) The total population density of each county, according to the State's most recent population data, is less than 100 persons per square mile of land area. (In States where planning and service area boundaries are not the same as county boundaries, the portion of each county within a planning and service area is treated as a separate county.)

(3) In a multi-county planning and service area no more than two urban places or minor civil divisions, such as a township or district, have a total population that exceeds 20,000 persons. In a single county planning and service area, no more than one urban place or minor civil division has a total population that exceeds 20,000 persons; or

Option 2: A county that meets at least two of the following criteria:

(1) Less than 50 percent of the total population lives in an urban area as defined in the most recent census by the Bureau of the Census.

(2) The total population density of the county according to the State's most recent population data is less than 100 persons per square mile of land area.

(3) The county area includes no more than one urban place or minor civil

division with a total population that exceeds 20,000 persons; or

Option 3: Geographic areas of a State defined by the State agency as rural according to criteria established by the State agency and approved in the State plan.

(c) *Waiver.* The Commissioner, in approving a State plan, or plan amendment may waive the requirement of paragraph (a) of this section if the State agency demonstrates that—(1) The service needs of older persons in rural areas are being met; or

(2) The number of older individuals residing in rural areas is not sufficient to require the State agency to comply with the requirement of paragraph (a) of this section.

§ 1321.195 Fifty percent priority service requirement.

(a) *General rule.* An area agency must spend at least 50 percent of its social services allotment, excluding amounts used for administration under § 1321.201(c) for the following categories of services, with at least some funds spent in each category:

(1) Services associated with access to other services: transportation, outreach, and information and referral;

(2) In-home services: homemaker and home health aide, visiting and telephone reassurance, and chore maintenance; and

(3) Legal services.

(b) *Waiver.* The State agency, in approving the area plan or a plan amendment, may waive the requirement of paragraph (a) of this section for any category of service for which the area agency demonstrates to the State agency that the services provided from other sources meet the needs of older persons in the planning and service area for that category of service.

(c) *Revised priority expenditures.* If the area agency receives a waiver for any category of service, it must continue to spend for the remaining categories of services a percentage of the area agency's social service funds agreed on by the State and area agency.

§ 1321.197 Long-term care ombudsman program.

(a) The State agency must use annually at least 1 percent of the State's allotment for social services or \$20,000, whichever is greater, to operate the long-term care ombudsman program required under § 1321.43.

(b) The requirement of this section does not apply in any fiscal year in which the State spends from State or local funds an amount equal to the

amount required in paragraph (a) of this section.

(c) American Samoa, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands are not subject to the requirement of paragraph (a) of this section.

§ 1321.199 Transfer between congregate and home-delivered nutrition service funds under the State plan.

(a) A State agency may transfer 15 percent or less of the State's separate allotments for congregate and home delivered meals from one allotment to the other without the approval of the Commissioner.

(b) A State agency may apply to the Commissioner to transfer more than 15 percent of the State's separate allotments for a fiscal year for congregate and home-delivered nutrition services from one allotment to the other. The State agency must—(1) Specify the percent and the projected amount which the State agency proposed to transfer from one allotment to the other; and (2) Specify whether the proposed transfer is for the entire period of the State plan or a portion of the three year period.

(c) The Commissioner approves the State agency's request by approving the State plan or plan amendment. The Commissioner does not deny the transfer unless the Commissioner decides that the transfer is not consistent with the purposes of this part.

§ 1321.201 Allowable use of funds for State and area plan administration.

(a) *State plan administration.* (1) Except as provided in § 1321.205(b)(3), the State agency must use its allotment for State plan administration only to carry out the State agency responsibilities specified in subparts B and D.

(2) The State agency may use any part of its State plan administration allotment which it determines is not needed for that purpose to pay part of the cost of the administration of area plans.

(3) The State agency in a State which is a single planning and service area may use not more than 8.5 percent of its allotments for social and nutrition services for State plan administration instead of the State's allotment for State plan administration. The State agency may not use both allotments for this purpose.

(b) *Cost of Developing State Plan.* The Commissioner may pay to a State without an approved State plan any part of its allotment for State plan

administration for the purpose of developing an approvable State plan.

(c) *Area plan administration.* The State agency may use not more than 8.5 percent of each of its total allotments for social and nutrition services for area plan administration.

§ 1321.203 Additional funds for State plan administration.

(a) *General rule.* If the State agency needs additional funds for State plan administration, the State agency may apply to the Commissioner for permission to use not more than three-fourths of 1 percent of the total amount allotted to it for social and nutrition services.

(b) *Application procedures.* The State agency must submit an application for additional administrative funds in accordance with procedures specified by the Commissioner. The application must demonstrate that:

(1) The State agency needs the additional amount requested to fully and effectively administer its State plan;

(2) The State agency makes full and effective use of its State administration allotment and of the personnel of the State and area agencies; and

(3) The State and area agencies are carrying out, on a full time basis, programs and activities which support the purposes of this part.

(c) *Approval.* The Commissioner approves any application that meets the requirements specified in paragraph (b) of this section.

(d) *Restriction on employee salaries.* A State agency must assure that no funds approved under paragraph (c) of this section will be used to fund a vacancy created by terminating an employee funded from other sources.

§ 1321.205 Obligation and reallocation.

(a) *General rule.* Except as provided in paragraph (b) of this section, the State agency must obligate any funds received under this part during the fiscal year in which they were allotted.

(b) *Reallotment.* (1) If the Commissioner decides that a State will not use any amount allotted under this part for the purpose for which the allotment was made, the Commissioner reallots the unused funds to one or more other States according to their needs. The State agency receiving these reallotted funds must obligate them by the end of the fiscal year following the one in which they were reallotted.

(2) If an Indian tribal organization in a State receives a grant under Title VI of the Act, the Commissioner withholds a portion of the State's allotments for administration, social, and nutrition

services. The amount the Commissioner withholds is based on the number of older Indians who are counted both for purposes of the State's allotment under this part and the grant under Title VI. The Commissioner reallocates the withheld amount in accordance with paragraph (b)(1) of this section.

(3) If the Commissioner decides that a State does not need for State plan administration any portion of the State's allotment for State plan administration the State agency may use the amount for social or nutrition services.

§ 1321.207 Federal financial participation.

(a) *State plan administration.* A State agency may use its allotment for State plan administration to pay not more than 75 percent of the costs of administering the State plan.

(b) *Area plan administration.* A State agency may use up to 8.5 percent of each of its allotments for social and nutrition services to pay not more than 75 percent of the costs of administering area plans.

(c) *Social and nutrition services.* (1) In Fiscal Years 1979 and 1980, a State agency may use its allotments for social and nutritional services to pay not more than 90 percent of the costs of these activities.

(2) After Fiscal Year 1980, a State agency may use its allotments for social and nutrition services to pay not more than 85 percent of the costs of these activities.

§ 1321.209 Non-Federal share requirements.

The non-Federal share may be met either by allowable cost or third-party in-kind contributions, except that—(a) At least 25 percent of the non-Federal share in each fiscal year must be provided by State or local public sources; and

(b) The 5 percent increased non-Federal share required by

§ 1321.207(c)(2) may be provided only by the State.

§ 1321.211 State agency maintenance of effort.

Each fiscal year the State agency must spend under the State plan at least the same amount of State funds it spent under the plan in the previous fiscal year. If the State agency spends less than this amount, the Commissioner reduces the State's allotments under this part by a percentage equal to the percentage by which the State reduced its expenditures.

Federal Reviews and Audits in General

§ 1321.213 Federal reviews and audits.

A Federal review or audit is performed to determine if a State plan is still approvable, and if the State agency operations and expenditures are proper under Federal requirements, and the approved State plan. A review or audit may cover any aspect of the Title III program and may be performed by HEW, General Accounting Office, or by another authorized agency.

§ 1321.215 Types and effects of reviews and audits.

(a) *Types.* The types of Federal reviews and audits most often conducted are:

(1) Program and financial reviews described in § 1321.217; and

(2) HEW Audit Agency audits, described in §§ 1321.221 and 1321.223.

(b) *Effects.* Any review or audit may lead to a disallowance, formal compliance action, recommendations on how a State agency may improve the administration of its program, or offers of technical assistance.

Program and Financial Reviews

§ 1321.217 Program and financial reviews in general.

(a) *Responsibility for review.* The Regional Aging Program Director conducts program and financial reviews when he or she considers them appropriate. When conducting a review, the Regional Aging Program Director uses any procedures (including onsite review) or specialized assistance needed.

(b) *Review findings.* The Regional Aging Program Director makes all review findings available in writing to the State agency so that it can correct any unacceptable policy or practice. If a review results in disallowance of a cost, the Commissioner will reduce the State's allotment by the amount disallowed.

§ 1321.219 Issues of compliance or conformity after review.

(a) *Regional Aging Program Director tries to resolve.* A compliance issue may arise if the State fails to substantially carry out what is required by Federal requirements and pertinent court decisions and contained in the approved State plan. A compliance issue arises if a previously approved plan provision no longer meets Federal requirements or was approved in error. If the Regional Aging Program Director believes there is a compliance issue, he or she tries to obtain needed changes in the agency's operating practice or the State plan, through negotiation with the State.

(b) *Issues not resolved.* If the State agency does not make the changes necessary to bring about compliance, the Regional Aging Program Director, with concurrence of the Commissioner, will notify the agency in writing that there is an issue of compliance and advise it of its opportunity for a hearing under Subpart J.

HEW Audit Agency Reviews and Audits

§ 1321.221 Audit Agency reports.

After an audit or review, the Audit Agency releases its final report. The report contains the Audit Agency's findings and recommendations on the practices reviewed and the allowability of expenditures audited.

§ 1321.223 Action after Audit Agency reports.

If the Audit Agency questions an expenditure, the Commissioner may disallow the expenditure and reduce the State's allotment by the amount disallowed. If the Audit Agency finds a compliance issue, the Commissioner, after discussions with the State agency, decides whether to take compliance action and notifies the State agency accordingly.

Subpart J—Hearing Procedures for State Agencies

General Provisions

§ 1321.231 Scope.

(a) *General procedures.* Hearing procedures described in this subpart apply to notice and opportunity for a hearing on:

(1) Disapproval of a State plan or amendment;

(2) Determination that a State agency does not meet the requirements of this part;

(3) Determination that there is a failure in the provisions on the administration of an approved plan to substantially comply with Federal requirements.

(b) *Negotiations.* Nothing in this subpart limits negotiations between the Department and the State. Negotiations on hearing issues are not part of the hearing and are not subject to the rules in this subpart unless there is a specific indication to the contrary.

§ 1321.233 General rules.

(a) *How to get records.* Papers filed in connection with a hearing may be inspected and copied in the office of the HDS Hearing Clerk. Individuals may direct inquiries to the HDS Hearing Clerk, Department of Health, Education, and Welfare, 200 Independence Avenue, SW., Washington, D.C. 20201.

(b) How to file and serve papers.

(1) Anyone who wishes to submit papers for the docket shall file with the HDS Hearing Clerk an original and two copies except that only originals of exhibits and testimony transcripts need be submitted.

(2) Anyone who wishes papers to be part of the record shall also serve copies on the parties by personal delivery or by mail, and file proof of this service with the HDS Hearing Clerk. Service on a party's designated attorney is the same as service on the party.

(c) *When rules are suspended.* After notifying the parties the Commissioner or the presiding officer may modify or waive any rule in §§ 1321.233-1321.261, if the Commissioner or the presiding officer decides the action is equitable and does not unduly prejudice the rights of any party.

Arrangements for Hearing**§ 1321.235 How to request a hearing.**

(a) *General rule.* A State agency has 60 days from receipt of the Commissioner's written notice of proposed disapproval of a State plan, plan amendment, determination that a State agency does not meet the requirements of this part or intended compliance action to request a hearing. The agency shall make its request in writing to the Commissioner with a copy to the Regional Aging Program Director.

(b) *What happens if a State agency does not request a hearing.* If the State agency does not request a hearing within the time allowed by paragraph (a) of this section, the Commissioner makes a final determination and notifies the agency by letter whether AOA will withhold all further payments under the plan or only payments for those portions of the plan affected by the failure.

§ 1321.237 How request is acknowledged.

(a) *Notice of hearing.* Within 30 days of receiving a hearing request, the Commissioner notifies the State agency in writing of the date, time, and place of the hearing and of the issues to be considered. The Commissioner publishes the hearing notice in the Federal Register.

(b) *When hearing is held.* The date set for a hearing is 20 to 60 days from the date the agency receives the hearing notice. However, the State agency and the Commissioner may agree in writing to a different date.

§ 1321.239 What the hearing issues are.

(a) *General rule.* The issues at a hearing are those included in the notice to the State agency specified in § 1321.237.

(b) *How the Commissioner may add issues.* At least 20 days before a hearing, the Commissioner notifies the agency by letter of any additional issues to be considered. The Commissioner publishes this notice in the Federal Register. If the agency does not receive its notice of additional issues in the required time, any party may request that the Commissioner postpone the hearing. If a request is made, the Commissioner sets a new hearing date that is 20 to 60 days from the date the agency received the notice of additional issues.

(c) *How actions by the State may cause the Commissioner to add, modify, or remove issues.* The Commissioner may add, modify, or remove issues if the State agency:

(1) Changes its practices or organization to comply with Federal requirements and its State plan; or

(2) Conforms its plan to Federal requirements and pertinent court decisions.

(d) *What happens if State action causes the Commissioner to add, modify, or remove issues.*

(1) If the Commissioner specifies new or modified issues, the hearing proceeds on these issues.

(2)(i) If the Commissioner removes an issue, the hearing proceeds on the remaining issues. If the Commissioner removes all issues, the Commissioner terminates the hearing proceedings. The Commissioner may terminate hearing proceedings or remove issues before, during, or after the hearing.

(ii) Before removing an issue, the Commissioner notifies the parties other than the Department and the agency of the issue and the reasons for removing the issue. Within 20 days of the date of this notice, the parties may submit comments in writing on the merits of the proposed removal. The Commissioner considers these comments and they become part of the record.

§ 1321.241 What the purpose of a hearing is.

The purpose of the hearing is to receive factual evidence and testimony, including expert opinion testimony, related to the issues. The presiding officer may not allow argument as evidence.

§ 1321.243 Who presides.

The presiding officer at a hearing is the Commissioner or a person the Commissioner appoints. If the Commissioner appoints a presiding officer, the Commissioner sends copies of the appointment notice to the parties.

§ 1321.245 How to be a party or an amicus curiae to a hearing.

(a) *HEW and State agency.* HEW and the State agency are parties to a hearing without having to request participation.

(b) *Other parties or amicus curiae.* An individual or group wishing to be a party or amicus curiae to a hearing may file a petition with the HDS Hearing Clerk no more than 15 days following publication of the hearing notice in the Federal Register. A petitioner who wishes to be a party must also provide a copy of the petition to each party of record at that time.

(c) *What must be in a petition.* A petition must state concisely:

(1) Whether the petitioner wishes to be a party or an amicus curiae;

(2) The petitioner's interest in the proceedings;

(3) Who will appear for the petitioner;

(4) The issue on which the petitioner wishes to participate; and

(5) Whether the petitioner intends to present witnesses, if the petitioner wishes to be a party.

§ 1321.247 What happens to a petition.

(a) *Petitions to be a party.*

(1) The presiding officer determines if the issues to be considered at the hearing have caused the petitioner injury and if the petitioner's interest is within the zone of interest protected by the governing Federal statute. The presiding officer permits or denies the petition accordingly and promptly sends the petitioner a written notice of the decision. If the presiding officer denies the petition, the officer states the reasons in the notice.

(2) Before making this determination, the presiding officer will allow any party to file comments on the petition to be a party. Any party who wishes to file comments must do so within 5 days of receiving the petition.

(3) If the presiding officer decides that parties by petition have common interest, the officer may require that they designate a single representative, or may recognize two or more of these parties to represent all of them.

(b) *Petitions to be an amicus curiae.* The presiding officer determines if the petitioner has a legitimate interest in the proceedings and may contribute materially to the proper settlement of the issues. The officer also determines if the petitioner's participation would unduly delay the proceedings. The presiding officer permits or denies the petition accordingly and promptly sends the petitioner a written notice of the decision. If the presiding officer denies the petition, the officer states the reason in this notice.

§ 1321.249 Rights of parties and amicus curiae.

(a) *What rights parties have.* A party may:

- (1) Appear by counsel or other authorized representative in all hearing proceedings;
- (2) Participate in any prehearing conference held by the presiding officer;
- (3) Stipulate facts that, if uncontested, become part of the record;
- (4) Make opening statements;
- (5) Present relevant evidence;
- (6) Present witnesses who must be available for cross-examination;
- (7) Present oral arguments at the hearing; and
- (8) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

(b) *What rights amicus curiae have.* An amicus curiae may:

- (1) Present an oral statement at the hearing at the time specified by the presiding officer;
- (2) Submit a written statement of position to the presiding officer before the hearing begins; and
- (3) Submit a brief or written statement at the same time the parties submit briefs.

If an amicus curiae submits a written statement or brief, the amicus shall serve a copy on each party.

Conduct of Hearing

§ 1321.251 Authority of presiding officer.

(a) *General rule.* The presiding officer conducts a fair hearing, avoids delay, maintains order and makes a record of the proceedings. In so doing, he or she has authority that includes:

- (1) Regulating the course of the hearing;
- (2) Regulating the participation and conduct of parties, amici curiae, and other at the hearings;
- (3) Ruling on procedural matters and, if necessary, issuing protective orders or other relief to a party against whom discovery is sought;
- (4) Taking any action authorized by the rules in this subpart;
- (5) Making a final decision, if the Commissioner is the presiding officer;
- (6) Administering oaths and affirmations;
- (7) Examining witnesses;
- (8) Receiving or excluding evidence; and
- (9) Ruling on or limiting evidence or discovery.

(b) *What the presiding officer may not do.* The presiding officer may not compel by subpoena the production of witnesses, papers, or other evidence.

(c) *When the presiding officer's authority is limited.* If the presiding officer is not the Commissioner, the officer certifies the entire record to the Commissioner, including a recommended decision on each issue in the hearing, but may not:

- (1) Make a final decision; or
- (2) Recommend reduction or withholding of payments.

§ 1321.253 Discovery.

A party has the right to conduct discovery against other parties. These discovery proceedings are subject to Rules 26-37, Federal Rules of Civil Procedure. The presiding officer promptly rules on any written objection to discovery and may restrict or control discovery to prevent undue delay in the hearing. If a party fails to respond to discovery procedures, the presiding officer may issue any order and impose any sanction (other than contempt orders) authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1321.255 How evidence is handled.

(a) *Testimony.* Witnesses, under oath or affirmation, give oral testimony at a hearing. Witnesses must be available at the hearing for cross-examination by the parties.

(b) *Rules of evidence.* Technical rules of evidence do not apply to hearings described in this subpart. The presiding officer applies any rules or principles necessary to ensure disclosure of the most credible evidence available and to subject testimony to cross-examination. Cross-examination may be on any material matter, regardless of the scope of direct examination.

§ 1321.257 What happens to unsponsored written material.

Letters and other written material regarding matters at issue, if not submitted specifically on behalf of a party, become part of the correspondence section of the docket. This material is not part of the evidence or the record.

§ 1321.259 What the record is.

(a) *Official transcript.* HEW designates the official reporter for a hearing. The HDS Hearing Clerk has the official transcript of testimony, and any other material submitted with the official transcript. The parties and the public may obtain transcripts of testimony from the official reporter at rates that do not exceed the maximum fixed by contract between the reporter and HEW. Upon notice to the parties, the presiding officer may authorize transcript corrections that involve matters of substance.

(b) *Record.* The record for the hearing decision is the transcript of testimony, exhibits, and all other papers and requests filed in the proceedings except for the correspondence section of the docket. The record includes rulings and any recommended decision.

After the Hearing

§ 1321.261 Posthearing briefs.

The presiding officer fixes the time for filing posthearing briefs. They may contain proposed findings of fact and conclusions of law. The presiding officer may permit filing of reply briefs.

§ 1321.263 Decisions.

(a) *If the Commissioner is presiding officer.* If the Commissioner is the presiding officer, the Commissioner issues a final decision within 60 days after the time allowed for filing posthearing or reply brief ends.

(b) *If the Commissioner appoints a presiding officer.*

(1) After the time for filing posthearings or reply briefs ends, the presiding officer certifies the entire record, including his or her recommended decision, to the Commissioner.

(2) The Commissioner provides a copy of the recommended decision to the parties and any amici curiae. Within 20 days, a party may file with the Commissioner, exceptions to the recommended decision. The party must file a supporting brief or statement with the exceptions.

(3) The Commissioner reviews the record and, within 60 days of the date of receipt of the presiding officer's recommended decision, the Commissioner issues a final decision. The Commissioner provides copies of the decision to all parties and any amici curiae.

(c) If the Commissioner decides, after a hearing, that the plan or plan amendment is not approvable, that substantial noncompliance exists, or that the State agency does not meet the requirements of this part, the final decision states whether AoA will withhold all further payments or only payments under portions of the plan affected by the failure. This also applies if the hearing terminates prior to completion.

§ 1321.265 When a decision is effective.

(a) The Commissioner's decision specifies the effective date for AoA's reduction and withholding of the State's grant. This effective date may not be earlier than the date of the Commissioner's decision or later than

the first day of the next calendar quarter.

(b) The decision remains in effect unless reversed or stayed on judicial appeal, or until the agency or the plan is changed to meet all Federal requirements except that the Commissioner may modify or set aside his or her decision before the record of the proceedings under this subpart is filed in court.

§ 1321.267 How the State may appeal.

A State may appeal to the U.S. Court of Appeals which has jurisdiction in the State, the final decision of the Commissioner disapproving the State plan or plan amendment, finding noncompliance, or finding that a State agency does not meet the requirements of this part. The State must file the appeal within 30 days of the Commissioner's final decision.

§ 1321.269 How the Commissioner may disburse the State's withheld payments.

The Commissioner disburses funds withheld from the State directly to any public or nonprofit private organization or agency, or political subdivision of the State, that has the authority and capacity to carry out the functions of the State agency and submits a State plan which meets the requirements of this part.

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Part III

Environmental Protection Agency

Guidelines for Development and
Implementation of State Solid Waste
Management Plans

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 256

[FRL 1224-8]

Guidelines for Development and Implementation of State Solid Waste Management Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule contains guidelines for the development and implementation of State solid waste management plans (the guidelines). These guidelines are required by section 4002(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (the Act). States are eligible to receive financial assistance under subtitle D of the Act if the State plan has been approved by EPA. This rule establishes the requirements for State plans and recommends methods and procedures to meet those requirements. As set forth in the Act, the State plan must provide for the identification of State, local, and regional responsibilities for solid waste management, the encouragement of resource recovery and conservation and the application and enforcement of environmentally sound disposal practices.

EFFECTIVE DATE: August 30, 1979.

FOR FURTHER INFORMATION CONTACT:

Ms. Susan Absher, Office of Solid Waste (WH-564), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, 202/755-9145.

SUPPLEMENTARY INFORMATION: On August 28, 1978, EPA published a proposed rule (43 FR 38534) containing guidelines for State solid waste management plans. Ten public meetings and a public hearing were held during the public comment period. This rule responds to comments made at the public meetings and hearing, as well as to the written comments received. This preamble addresses the major comments raised in the public comment period. All other comments are addressed in a document entitled "Public Comment on Proposed Guidelines for the Development and Implementation of State Solid Waste Management Plans" which may be obtained at Docket 4002(b), Room 2107, EPA (WH-564), 401 M St., S.W., Washington, D.C. 20460. The docket is available for viewing from 9 a.m. to 4 p.m., Monday through Friday, excluding holidays.

Overview of Subtitle D

The objectives of the Act are to promote the protection of health and the environment and to conserve valuable material and energy resources. In order to accomplish this, the Act sets forth a national program to improve solid waste management including control of hazardous wastes, resource conservation, resource recovery, and establishment of environmentally sound disposal practices. This is to be carried out through a cooperative effort among Federal, State, and substate governments and private enterprise.

Subtitle D of the Act fosters this cooperative effort by providing for the development of State and regional solid waste management plans that involve all three levels of government. As the Federal partner in this process, EPA seeks, through guidelines and financial assistance, to aid State initiatives in the formulation and implementation of such plans.

Section 4002(b) of the Act requires the Administrator to promulgate guidelines for the development and implementation of State solid waste management plans (the guidelines). While these guidelines are to consider a broad range of topics, section 4003 identifies the minimum requirements which State plans must address. EPA provides financial assistance to help the States develop and implement their plans. Under section 4007, EPA reviews and approves State plans which satisfy the minimum requirements of section 4003.

It is clear from the statutory language and legislative history of subtitle D that the Congress intended States and localities to retain overall responsibility for the planning and actual operation of solid waste management programs. (This is in contrast to subtitle C which directs EPA to administer and enforce the hazardous waste program in lieu of authorized State programs.)

Several commentators raised the question of whether Federal guidelines and standards developed under subtitle D would pre-empt State requirements concerning solid wastes. The Act does not specifically address this issue. However, EPA believes that subtitle D is meant to encourage, not preclude, State initiatives. EPA establishes only "minimum" requirements under this portion of the Act which should not prevent States from developing broader programs or stricter standards under authority of State law. In discussing the subtitle D scheme the House Report (H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess. 33 (1976)) specifically stated:

It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient and damaging to local initiative.

Therefore EPA concludes that as long as Federal requirements are satisfied by State programs, subtitle D does not limit State power concerning solid waste management.

Role of State Plan

The State solid waste management plan is the centerpiece of the subtitle D system. Through the plan the State identifies a general strategy for protecting public health and the environment from adverse effects associated with solid waste disposal, for encouraging resource recovery and resource conservation, for providing adequate disposal capacity in the State, and for dealing with other issues relevant to solid waste management. The plan must also set forth the institutional arrangements that the State will use to implement this strategy. These arrangements include identifying State, regional and local responsibilities for solid waste management, as well as providing for the establishment of the regulatory powers needed under State law to enforce the plan's provisions. Thus, the State plan is the organizing mechanism in the subtitle D system which ties the goals and requirements of the Act to State priorities and institutional arrangements.

The other components of the subtitle D system (the open dump inventory, the annual work program and Federal financial assistance) are designed to support the State plan.

The Open Dump Inventory

Under section 4004(a) of the Act the Administrator is to promulgate "regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps . . .". The criteria establish the level of protection necessary to assure that "no reasonable probability of adverse effects on health or the environment" will result from operation of the site. In setting these criteria EPA is providing a general definition of "sanitary landfill" and "open dump". Under section 4005(b) EPA is to publish an inventory of open dumps; i.e., a listing of those facilities which violate the criteria. Because the Act does not give EPA authority to enter private property to conduct such a survey, and because the States have the prime role

in the implementation of subtitle D (including appropriate enforcement actions), EPA has concluded that the State should be responsible for conducting the inventory.

The inventory of "open dumps" performs two major functions. First it informs the Congress and the public about the extent of the problem presented by disposal facilities which do not adequately protect public health and the environment. Second, it provides an agenda for action by identifying a set of problem sites, routinely used for disposal, which should be addressed by State solid waste management plans.

Essentially the inventory is a planning tool which supports the State planning effort. The States must know where the problem facilities are in order to satisfy section 4003(3) which requires that the plan "provide for the closing or upgrading of all existing open dumps within the State . . .". In order to accommodate that purpose and to facilitate prompt compliance with section 4005(b), EPA has given the inventory high priority in the State planning effort.

Annual Work Program

The annual work program, submitted with a State's application for financial assistance under section 4008(a)(1) of the Act, will provide a basis for determining whether the State plan continues to be eligible for approval and is being implemented by the State. The annual work program (which is described in the grant regulations (40 CFR Part 35)) summarizes the current year's program and sets forth activities for the coming year. Each year, a State's priorities and activities should be examined to ensure that the program is directed at achieving the desired health, environmental, and resource conservation results.

The annual work program represents a joint agreement between EPA and the State and presents a mutually satisfactory statement of reasonable progress in meeting the requirements of the Act as expressed in these guidelines. It represents a State's obligation incurred by acceptance of financial assistance and must be developed in consultation with local elected officials and with public participation. As explained below, the work programs under the Resource Conservation and Recovery Act, as amended, the Clean Water Act, as amended (33 U.S.C. 466 et seq.), and the Safe Drinking Water Act (42 U.S.C. 300f et seq.) are being integrated through the State/EPA Agreement mechanism.

Financial Assistance

Sections 4008 and 4009 of the Act provide for financial assistance under subtitle D (funding of authorized State hazardous waste regulatory programs is provided under section 3011 of subtitle C of the Act). Section 4008 (a)(1) authorizes financial assistance for the development and implementation of State plans. The Act states that for this purpose, implementation does not include the acquisition, leasing, construction or modification of equipment or facilities, or the acquisition, leasing, or improvement of land. Funds appropriated under this section are to be allotted to the States in proportion to population and are to be distributed by States to State and substate agencies based upon the responsibilities of the respective parties for development and implementation of the State plan.

Section 4008 (a)(2) authorizes financial assistance to public solid waste management agencies and authorities for implementation of programs to provide solid waste management, resource recovery and resource conservation services, and planning for hazardous waste management activities. Financial assistance under section 4008(a)(2) may only be provided for programs certified by the State as consistent with the State or substate solid waste management plan. This assistance does not cover construction, equipment or land. Assistance is authorized for items such as facility planning and feasibility studies, consultation, surveys, and analyses, technology assessments, legal expenses, construction feasibility studies, and economic studies. These grants may be provided either directly to substate agencies or through the State.

Section 4008(e) authorizes financial assistance for improvement, conversion or construction of disposal facilities in which more than 75 percent of the solid waste disposal is from areas outside the jurisdiction of the community. The Act limits this assistance to not more than one community in every State. Section 4009 authorizes grants to certain rural communities which cannot feasibly be included in a regional solid waste management system. Such grants may be used for construction of solid waste management facilities which the State certifies as consistent with the State plan.

The Act provides no funding for acquisition of land or for operation or maintenance of facilities. Funding for construction of facilities is quite limited.

This means that such costs will have to be borne directly by State and substate governments and by solid waste generators and facility users. The State should explore funding sources at all levels of government and should consider means of increasing its financial base through such methods as user charges.

The Guidelines

Section 4003 of the Act identifies the minimum requirements for approval of State plans. Under section 4002(b) the Administrator is authorized to issue these Guidelines for the Development and Implementation of State Solid Waste Management Plans. Section 4002(c) identifies a broad set of considerations for the guidelines. While the requirements of section 4003 clearly fall within the scope of the section 4002(b) guidelines, such guidelines are to address a range of issues broader than those found in section 4003. However, only the requirements identified in section 4003 may be the basis for disapproval of a State plan. They include:

- (1) The identification of the responsibilities of State, local, and regional authorities in the development and implementation of the State plan;
- (2) The prohibition of new open dumps, and the requirement that all solid waste be utilized for resource recovery or disposed of in an environmentally sound manner;
- (3) The closing or upgrading of existing open dumps;
- (4) The establishment of State regulatory powers necessary to implement the State plan;
- (5) The elimination of State or local prohibitions of long-term contracts for the supply of solid waste to resource recovery facilities; and
- (6) The provision of resource conservation, resource recovery or environmentally sound disposal practices.

EPA believes that the best way to honor Congressional intent is to draw a distinction between requirements and recommendations. Each of the subparts in the guidelines lists the overall requirements for plan approval, which are based upon section 4003 of the Act. The requirements sections are followed by a discussion of recommended procedures, which expand on the requirements and involve a consideration of the factors listed in section 4002(c). The requirements use the term "shall". The recommendations, which are advisory, use the term "should".

While failure to comply with a requirement is grounds for denying a grant, failure to comply with a recommendation will not affect grant eligibility. The recommendations are provided to assist the States in developing and implementing the State plan. Any process which complies with requirements of these guidelines will be acceptable to EPA for purposes of approval of the State plan.

The guidelines contain seven subparts (A-G). Subpart A presents the purpose and scope of the guidelines and the State plan. It also contains the procedures for State adoption and revision and EPA approval of the State plan. In addition, important terms are defined.

Subparts B, C, D, and E discuss, respectively, (1) the identification of State, local, and regional responsibilities, (2) the development of the State disposal program, (3) the development of the State resource conservation and recovery program, and (4) facility planning and development.

Subpart F discusses coordination with other programs. The broad definitions of solid waste and disposal make this coordination especially important. Subpart F emphasizes coordination with planning for residuals management under section 208 of the Clean Water Act, as amended (33 U.S.C. 1288), with the National Pollutant Discharge Elimination System (NPDES) under section 402 of that Act (33 U.S.C. 1342), with the surface impoundments assessment and State underground injection control program under the Safe Drinking Water Act (42 U.S.C. 300(f) et seq.), and with State implementation plans under the Clean Air Act (42 U.S.C. 7401 et seq.).

Subpart G lists the requirements for public participation in the development and implementation of State and substate plans.

Subpart A—Purpose, General Requirement, Definitions

These guidelines assist in the development of State solid waste plans. They include the minimum requirements for approval of State plans identified in section 4003 of the Act. They also address the portion of section 4005(c) which requires a mechanism in the State plan to allow "any entity" to protect itself from citizen suit by obtaining a compliance schedule which phases out those acts which violate the prohibition of open dumping.

Scope of the State Plan

These guidelines require the State plan to address all solid wastes in the State that pose potential adverse effects on health or the environment or provide opportunity for resource conservation or recovery. The plan should address residential, commercial, and institutional solid waste, hazardous, industrial, mining, and agricultural waste, waste treatment sludges, septic tank pumpings, and other pollution control residues. It should explore the nature and severity of these categories of solid wastes and establish priorities for their management.

State plans developed under these guidelines apply to Federal agencies, Federal lands and facilities on leased Federal lands in accord with section 6001 of the Act. Therefore, States should consult with appropriate Federal agencies and facilities during the development and implementation of the plan.

The range of activities included in the plan should be as broad as the Act's definition of "solid waste management." Accordingly, the plan should contain provisions concerning collection, source separation, storage, transportation, transfer, processing, treatment and disposal of solid waste.

Subtitle C of the Act provides for the authorization of State programs to regulate hazardous waste management and for financial assistance for such programs. Under section 3006 of the Act EPA will promulgate guidelines to assist States in the development of hazardous waste programs. Therefore, the guidelines proposed in this rulemaking defer to the section 3006 guidelines for the requirements for authorized State hazardous waste regulatory programs. However, there are a number of hazardous waste management activities that are not regulatory in nature and, thus, not covered by the section 3006 guidelines. Such activities are to be carried out under the authorities of subtitle D and are subject to these guidelines for State plans. In general, the State plan is to describe how hazardous wastes will be managed in the State, including identification of responsibilities for that management and provision of necessary hazardous waste treatment, storage, and disposal facilities.

The proposed subtitle C standards for generators of hazardous waste (40 CFR Part 250.29) would exempt persons who produce and dispose of 100 kilograms or less a month of hazardous wastes; and, these wastes could be disposed of in a facility certified by the State as meeting

the section 4004 criteria. If the final subtitle C standards retain this or a similar exemption, the State should identify these exempted generators so that the State may gain control over the types and amounts of hazardous waste being disposed of at any one facility. These guidelines may be amended to require certain State actions after the final subtitle C regulations are promulgated.

State Plan Submission, Adoption and Revision

The plan must be developed in accord with public participation requirements discussed in subpart G of these guidelines. States are to adopt the plans in accord with State administrative procedures. In the proposed regulation EPA invited comment on whether it should require plan approval by the Governor or State legislature. The majority of the comments favored maintaining the flexibility inherent in allowing each State to follow its own State procedures. EPA is satisfied that as long as the public participation specified in subpart G is part of the approval process, the Act's objectives will be accomplished. Moreover, EPA believes that allowing such flexibility is consistent with subtitle D's reliance on State discretion in solid waste management planning.

These guidelines require that the State plan be developed within 18 months, that it cover a minimum of a five-year time period, and that it be adopted by the State. The State is to review the plan and, where necessary, revise and readopt it at least every three years. EPA is to approve or disapprove State plans and to provide financial assistance to States if the State plan has been approved, continues to be eligible for approval, and is being implemented by the State.

Several commentors stated that 18 months is inadequate time to develop a State plan of the broad scope required by these guidelines. While all required elements must be addressed in the State plan, EPA recognizes that certain lower priority areas will not be described in great detail in the State's initial plan submission. Therefore, EPA may approve a State plan which provides for time-phasing of activities, and which proposes less than full development of State planning and implementation activities over the five-year period, providing satisfactory justification is included in the State plan.

The plan may postpone planning and implementation activities for certain waste categories due to the need to focus resources on higher priority

categories. As indicated in § 256.02 of the guidelines, the State should determine which waste categories and activities have high priority based on the current level of management planning and implementation within the State, the extent of the solid waste management problem, the known health, environmental, and economic impacts, and the resources and management approaches available. While State priorities differ, EPA encourages States to emphasize planning and implementation activities for those waste categories with serious environmental impact and over which the State may have inadequate control, such as onsite industrial wastes.

State Plan Approval

Under section 4007 of the Act the Administrator shall approve plans which meet the requirements of paragraphs (1) (2) (3) and (5) of section 4003 and which contain provisions for revision. The State must revise its plan if the Administrator revises the minimum requirements of section 4003, if the Administrator determines that the plan is inadequate or if the Administrator determines that "such revision is otherwise necessary". Notice and public hearing must accompany such plan revision. In addition, the Administrator shall review approved plans from "time to time" and may withdraw approval of a plan if he determines that revision or correction is necessary "to bring such plan into compliance with the minimum requirements promulgated under section 4003 (including new or revised requirements) . . .".

EPA believes that sections 4007 and 4003 envision a scheme in which EPA grants initial plan approval on the basis of paragraphs (1) (2) (3) and (5) of section 4003 but reviews State plans on the basis of all the minimum requirements in section 4003, including paragraphs (4) and (6). This interpretation allows EPA to honor the Congressional intent expressed in section 4007 (that paragraphs 1, 2, 3 and 5 be the basis for initial approval) while maintaining section 4003's status as the list of "minimum requirements for approval of State plans".

This interpretation is a logical one because both paragraphs (4) and (6) involve assessments which are best made after the States have had some experience with plan implementation. For example, both EPA and a State will have a better sense of what regulations are necessary under State law to implement the plan, and thus of compliance with paragraph (4), once the

state has attempted to implement plan provisions. Also, judicial interpretation of those efforts may provide insight into the adequacy of the State's regulatory scheme. Likewise a determination of what combination of practices "may be necessary to use or dispose of such waste in a manner that is environmentally sound," as required by paragraph (6) of section 4003, is best made after the State plan is in operation and there has been some experience with its implementation.

The proposed guidelines requested comment on the State/EPA Agreement concept. Under such an agreement, State work program submissions for various environmental programs would be integrated in an attempt to determine environmental priorities and develop effective and efficient solutions to environmental problems. Half of the commentors to these proposed guidelines opposed the State/EPA Agreement concept. The rest were divided between qualified and unqualified support. Some States were concerned that their existing institutional arrangements would make it difficult to integrate work programs; others were concerned that solid waste programs would lose visibility and possibly funding if combined with larger and better established programs.

In response to these and other comments, EPA issued a guidance document on March 21, 1979 (44 FR 17294) for State/EPA Agreements. The guidance does not require integrated work programs, nor does it intend to force reorganization and consolidation of State agency structures or changes to existing grantor-grantee relationships. The State/EPA Agreement process, however, is designed to bring together Federal, State and local entities to determine environmental priorities, define intermedia problems and develop creative, efficient and effective solutions. Integrated work programs are encouraged where feasible.

Beginning in fiscal year 1980, the State/EPA Agreement will present a practical and comprehensive mechanism by which the States and EPA can integrate and manage the technical and financial assistance programs to States under the Resource Conservation and Recovery Act, as amended, the Clean Water Act, as amended (33 U.S.C. 1251 et seq.), and the Safe Drinking Water Act (42 U.S.C. § 300f et seq.). States are encouraged to integrate other environmental programs into the State/EPA Agreement if possible.

Definitions.

The guidelines define certain key terms including "criteria," "facility," "implementation," "inactive facility," "inventory of open dumps," "operator," "permit," "planning," "provide for" and "substate." Commentors raised questions concerning the following definitions:

1. *Planning.* Some commentors said that there was a need to clearly distinguish between planning and implementation. Planning is defined in these guidelines as the process of "identifying problems, defining objectives, collecting information, analyzing alternatives, and determining the necessary activities and courses of action." This includes analysis of solid waste generation rates and assessment of the adequacy of existing resource recovery and disposal facilities and the need for new or expanded facilities. It also includes setting priorities for the management of different wastes, identifying responsibilities, developing the necessary legislation and administrative powers to implement the plan, and planning for State resource conservation, recovery, and disposal programs.

2. *Implementation.* Implementation is defined in these guidelines as "putting the plan into practice by carrying out planned activities or ensuring such activities are carried out." One aspect of implementation is carrying out the necessary regulatory activities to ensure that solid wastes are managed and disposed of in a manner that protects the public health and the environment. This includes applying health or environmental standards to facilities, assessing and inspecting facilities, conducting a permit or registration program, and carrying out the necessary enforcement activities.

3. *Inactive Facility.* An "inactive facility" is one which no longer accepts waste. This definition was not contained in the proposed regulation. It is included in this final regulation because some commentors were confused about the terms "closed facility" and "abandoned facility" in the proposed regulation. Those terms are no longer included in the guidelines.

These guidelines no longer treat "closed facility" as a term of art that means a *properly* closed facility. An operator may close a facility properly or improperly, but this does not change the fact that such a facility is closed. The operator's liability, if any, is based on his failure to close a facility in accord with environmental standards developed pursuant to the State plan.

The term "abandoned facility" has been dropped because it connotes the non-existence of a human agent responsible for the site. The concern over the environmental impact of so-called "abandoned" facilities is the same whether or not a party is available who may be legally liable for the damage. The concern is that a site which no longer receives wastes is creating an environmental problem due to such ongoing effects as the leaching of contaminants into groundwater. Therefore EPA addresses itself here to the broader set of "inactive" sites which may or may not be abandoned. This preamble discusses the relationship of the guidelines to inactive facilities in more detail later.

Subpart B—Identification of Responsibilities; Distribution of Funding

The guidelines require that the State plans identify the responsibilities of States and substate agencies to satisfy the requirement in section 4003(1). EPA believes that this allocation of responsibilities must be a matter for the State to work out with the other general and special purpose governments in the State. EPA does not attempt to stipulate any particular institutional arrangement because there will necessarily be circumstances where differing schemes are more appropriate.

State agencies will be responsible for planning activities. However, substate agencies may need to conduct specific types of planning concerning the number and kinds of facilities needed in particular areas and the different institutions needed (e.g., solid waste authorities or districts) for managing solid wastes. Substate planning may also be necessary for establishing coordinating management of different waste streams (e.g., incineration of residential solid waste and municipal sewage sludge) or for establishing disposal or recovery facilities for new waste streams (e.g., industrial pretreatment residues).

Likewise there will be a need under the plan for developing health or environmental standards for facilities, assessing and inspecting facilities, conducting a permit or registration program, and carrying out the necessary enforcement activities. For the most part, such programs have been conducted by State agencies, although certain responsibilities (such as inspections) may be delegated to local public health agencies.

EPA's major concern in the process of allocating responsibility is that the

institutional arrangement devised by the State aid the achievement of the substantive goals of the Act.

Subpart C—Solid Waste Disposal Programs

This subpart addresses the requirements contained in sections 4003(2) and 4003(3) of the Act. Under section 4003(2) the plan is to prohibit the establishment of new open dumps in the State and contain requirements that all solid waste be utilized for resource recovery, disposed of in sanitary landfills or otherwise disposed of in an environmentally sound manner. Under section 4003(3) the plan is to provide for the closing or upgrading of all existing open dumps within the State. The subpart has four general sets of requirements: (1) those affecting overall legal authority; (2) those involving regulatory powers; (3) those concerning closure or upgrading of existing open dumps; and (4) those involving compliance schedules for complying with the prohibition of open dumping.

Legal Authority and Regulatory Powers

Under section 4003(4) the plan shall provide for the establishment of State regulatory powers as may be necessary to implement the plan. As discussed earlier this provision is not a basis, under section 4007, for initial approval of a State plan but rather is relevant to later review of progress under the plan. The States must make a reasonable effort to develop the powers necessary for plan implementation in order to remain eligible for Federal funding.

Although the proposed version of the guidelines did not distinguish between regulatory powers and legal authority, EPA has decided to make this distinction to give meaning to the distinction made in section 4007 between the requirements of sections 4003 (2) or (3) and those of section 4003(4). EPA believes that section 4007 contemplates a scheme that would allow a State with a general statutory or common law authority to take action against new or existing open dumps to have an approved State plan while it developed the companion regulatory mechanisms necessary to fully implement the plan. At the same time EPA does not believe that a State which does not have legal authority (according to statute or common law) to take action against disposal facilities for the general categories of environmental effects covered by the criteria can be in compliance with sections 4003 (2) and (3) of the Act. Therefore, EPA requires in these guidelines that the States have

adequate legal authority to prohibit new open dumps and close or upgrade all existing open dumps. States will be allowed to develop regulations and administrative systems to implement that general authority after initial approval of the State plan. However the failure to provide for the establishment of State regulatory powers, as outlined in § 256.21, could constitute noncompliance with section 4003(4) and thus be the basis for withdrawal of approval for a State plan.

In the proposed guidelines EPA suggested that the States could wait until after approval of the State plan to prohibit establishment of new open dumps. The language of the Act, particularly that found in section 4004(c), does not allow for such flexibility. Therefore, EPA has changed that requirement to be consistent with the Act's intent. The prohibition of the establishment of new open dumps shall take effect no later than six months after the date of promulgation of the criteria or on the date of approval of the State plan, whichever is later.

In establishing legal authority the States must include some type of permitting mechanism to ensure that the establishment of new open dumps is prohibited. Some commenters expressed concern that EPA's concept of a permit was too narrow and beyond the authority of subtitle D. EPA meant to give a broad interpretation of that term and the guidelines define permit to reflect that broader concept. EPA believes that effective regulations must include a mechanism for translating generally applicable standards into specific requirements for individual facilities. Some kind of a certificate of permission issued to particular parties is the best means of achieving that end. Such a certificate also performs an important informational role because it provides a clear statement of the terms to which parties will be held. This is certainly advantageous to the permittee, but it also gives EPA, the State and the public information on how this part of the solid waste management plan is being implemented.

As long as the States can devise a scheme that achieves these goals, EPA will be flexible on what constitutes a permit. With this flexibility, there can be little doubt that such a permit requirement is within the Act's purview. A State program that does not have the capacity to translate generally applicable standards into site specific requirements or to adequately inform interested parties of those requirements cannot provide adequate assurance that the Act's objective will be met.

Closure or Upgrading of Existing Open Dumps

The Guidelines require the State to classify existing solid waste disposal facilities according to the criteria. The State is to establish priorities for the classification effort after considering potential health and environmental impact of facilities, the availability of regulatory powers to address the problems presented by these facilities and the availability of financial resources in the State solid waste management program. The State submits a list of the facilities that fail to satisfy the criteria to EPA for publication in the **Federal Register**. The States are to take steps to close or upgrade open dumps.

1. *The Open Dump Inventory.* One of the principal issues concerning State solid waste management planning is the role of the inventory of open dumps in subtitle D. EPA has received many inquiries and comments concerning the inventory, particularly on the issue of whether notice and a hearing must precede inclusion of a facility in the inventory published in the **Federal Register**. The "notice and hearing" issue, however, is merely part of a broader question concerning the purpose of the inventory in the program contemplated by the Act. The issue is whether inclusion of a facility in the inventory constitutes a determination that an identifiable party is engaging in the prohibited act of open dumping.

After considering public comment on this issue and after further analysis of the issue, EPA has concluded that the Act intended the inventory to be a planning tool which provides information to the States and the public. The act of listing does *not* constitute a legal determination which subjects a particular party to legal sanctions for violation of the Act.

EPA reached this conclusion after substantial public discussion of the issue. Early in the development of these guidelines EPA indicated that the States would conduct the inventory as part of their solid waste management planning, and many of the comments on the guidelines addressed the role of the inventory. On April 24, 1979, the National Solid Wastes Management Association (NSWMA) petitioned EPA, seeking regulations providing a notice and hearing opportunity prior to a facility's inclusion in the inventory list. Since the inventory would be part of the State planning effort, NSWMA's petition directly affected the content of these guidelines. In fact, the relief NSWMA sought would logically be a part of these

guidelines. At the same time EPA was under court order from the U.S. District Court for the District of Columbia to promulgate these Guidelines by June 30, 1979. In order to air the notice and hearing issue and still make a reasonable effort to comply with that court order, EPA issued on May 15, 1979, a Supplemental Notice of Proposed Rulemaking (44 FR 28344) which invited public comment for 30 days on whether the guidelines should require notice and a hearing opportunity before a disposal facility is included in the inventory. The Notice explained EPA's tentative conclusion on the issue and included a copy of the NSWMA petition.

Several commentors argued that EPA's position on this issue, as stated in the Notice, differed from previous EPA statements about the inventory. EPA had a different view of the inventory when these guidelines were at an earlier stage of development. After further analysis of the Act, however, EPA changed its view. In issuing the Supplemental Notice, EPA sought to alleviate any confusion resulting from this reassessment of the issue and to provide the public with an opportunity to focus on the inventory's role.

The fact that EPA's interpretation of the Act, as set forth in this final regulation, differs from the viewpoints expressed in the proposal and in statements by Agency personnel does not undermine the legitimacy of that interpretation. EPA is not bound to legal interpretations advanced in earlier stages of a regulation's development. The role of the inventory in the subtitle D program is a complicated issue which necessarily involves an analysis of several parts of the Act. To hold the Agency to early viewpoints on such complex questions hinders responsible decision making and discourages the Agency from engaging in open public discussion on these matters. Ultimately, questions surrounding the role of the open dump inventory must be resolved after a substantive analysis of the Act, its legislative history and other applicable Federal law.

Under section 4005(b) EPA is required to *publish* an inventory of "open dumps" (those facilities which do not satisfy the criteria promulgated under section 4004). Section 4005(c) prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the *open dumping* of solid waste or hazardous waste." The essential problem presented by the Act is to determine the relationship between these two provisions. The task is complicated by the fact that sections 4005(b) and 4005(c) originated in

differing House and Senate bills and that there is no conference report to resolve the problem presented by these incongruous provisions.

In the effort to reconcile the differences between the Senate and House approaches to this issue, EPA sought an interpretation of the Act that retained as much of the original intent of the two bills as possible. In doing so EPA believes that it has devised a sound program that best achieves the overall objectives of the Act.

The inventory of open dumps was part of the House bill which relied totally on the States to regulate the problems associated with these facilities. The inventory was designed to be an informational tool that would give a comprehensive picture, based on a uniform definition of unacceptable environmental effects, of the problem presented by these "open dumps". This list was also to aid the States in directing their efforts for the closing and upgrading of existing open dumps.

The Act indicates that Congress meant to maintain the inventory's status as an informational tool and not as a regulatory mechanism. For example, there is no requirement for a "hearing on the record" or a public hearing in conjunction with the inventory. Likewise, the Congress required publication within one year of promulgation of the criteria. Knowing that the volume of problem sites could run into the thousands, it is doubtful that the Congress could have envisioned the inventory as a series of individual adjudications with all the attendant delays involved in preparing and documenting every part of the case. Also, the Congress could not have viewed the inventory as anything but informational in terms of EPA's involvement. The Act does not give EPA the authority to enter on private property to take samples or to require reporting on the facility's environmental effects. The absence of these necessities of a viable regulatory program indicates that the inventory can only be an informational tool. (The absence of EPA authority to conduct a proper inventory evaluation of facilities also suggests that the States must conduct the evaluations under authority of State law.)

The Senate bill prohibited the act of open dumping and allowed for Federal, State and citizen enforcement of that prohibition. There was no facility classification scheme. In the final version of the Act, the Federal enforcement provision was deleted, but States and the public were allowed to use the citizen suit provision (section 7003) to enforce the prohibition. In

prohibiting open dumping the Act does not specify who shall be deemed responsible. The legal liability of particular individuals is a matter for the courts to resolve on a case by case basis.

EPA does not believe that the inventory was designed to implement the prohibition of open dumping. Certain flaws in statutory interpretation and basic logic appear in any attempt to link the two provisions. For example, section 4005(c) requires each State plan to assure that all open dumps listed in the inventory "comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards". As section 1002(b)(4) indicates, the Act is concerned with environmental as well as health effects in prohibiting open dumping. Section 4005(c) also requires State plans to provide a mechanism for giving compliance schedules to parties engaged in open dumping. Such schedules are to lead to "compliance with the prohibition on open dumping" and are only available to entities which have no other "private or public alternative" to open dumping.

If inclusion on the inventory of open dumps also constitutes a determination of liability for open dumping, it is unclear which steps follow listing. Is the State to focus on the present or potential health hazards associated with the facility, or is it to address the full range of health and environmental concerns implicit in the open dumping concept? Also, is the State required to examine "public or private alternatives" for all listed facilities? Since the Act creates two differing approaches to handling listed open dumps and entities which could violate the open dumping prohibition, EPA believes that the dichotomy between the Senate and House approaches to the solid waste management program should be maintained.

EPA's interpretation avoids the conceptual problems involved in using the inventory to implement the open dumping ban. Fundamental to any determination of legal liability for an offense is a clear definition of *who* is responsible and of the *acts* which constitute the offense. The inventory is not well-suited to establishing either of those. In conducting the inventory, site inspectors will be evaluating the environmental impact of particular sites on particular days. They will not be investigating the relative responsibilities of the various parties involved in disposal activity (e.g. facility owner, facility operator, parent companies,

users of the facility). Likewise, inspectors will not be focusing on the particular acts which lead to the environmental damage (e.g. facility selection, design, and management; the bringing of particular wastes to the facility). Moreover, the inventory is not well-suited to defining the duration of a violation. The inventory is, after all, a picture of conditions at the facility at a particular time. The inventory does not in itself determine whether those conditions are due to ongoing practices at the facility or are the result of temporary problems at the time the evaluation occurred. Thus the inventory is not designed to establish several of the key elements necessary for placing legal liability on responsible parties and should not, therefore, be treated as an EPA determination that particular parties are open dumping.

An interpretation of the Act linking the inventory to the open dumping prohibition undermines the Act's objective of leaving principal responsibility for implementing solid waste management programs to the States. The language of subtitle D and its supporting legislative history clearly indicate that the Federal Government was to facilitate the development of State initiatives in this area. The removal of the Senate provisions for Federal enforcement of the open dumping prohibition in the final version of the Act underscores this point. Were EPA's publication of the inventory to constitute an Agency decision that each listed site is in violation of Federal law, EPA would be heavily involved in the administration of solid waste programs. EPA would have to carefully supervise the States in the conduct of the inventory. Were EPA to be ultimately responsible for the decision to list, it would have to carefully review State decision making, overruling decisions where appropriate. EPA does not believe that the Congress intended that EPA have such a central role in State solid waste management.

EPA concludes, therefore, that the inventory was not designed to be a decision on the open dumping issue. The inventory is an adjunct to the State planning process. It provides information to the public and helps the States in identifying their priorities. In publishing the inventory EPA is reporting on the first phase of the State planning effort and thus will include all facilities identified by the State. EPA will not add or remove facilities from the inventory. The open dumping prohibition is a provision of Federal law which stands on its own, separate from the State planning program. In

conjunction with the citizen suit provision, the open dumping prohibition creates a Federal cause of action allowing citizens and States to seek relief in Federal Court for damaging solid waste management practices.

Information generated during the inventory could be available to parties seeking to bring an open dumping action. That data would be made available in accord with applicable Federal and State law concerning the release of such information. Questions concerning the admissibility and weight of the information as evidence are for the courts to resolve. The ultimate issue of whether particular parties are guilty of open dumping would be for the court to decide after *de novo* review of the particular facts in each case. The point, however, is that while data generated in the inventory may be evidence relevant to an open dumping suit, the act of listing a site does not constitute an EPA decision on the open dumping issue which deserves judicial deference as a matter of law.

The public comments on the inventory suggested varying interpretations of the inventory. Some called it a rule; others called it a series of adjudications. A few commentators argued that the inventory was part of a *de facto* licensing program that implied permission to operate for those facilities not included on the list. None of these characterizations are appropriate because they imply that EPA has decided something concerning the facility. The inventory is only an informational tool. It does not adjudicate the rights of any persons or provide official approval for facilities not included. Likewise it is not a rule setting EPA policy, but rather is a tool to aid the States in defining their own priorities.

2. *Notice and Hearing Implications of the Inventory.* The Supplemental Notice of Proposed Rulemaking focused public attention on the question of whether notice and a hearing opportunity must accompany the inventory of open dumps. The NSWMA petition, which was incorporated into the Supplemental Notice, argued that a notice and hearing opportunity was required by the Act, the Administrative Procedures Act and the U.S. Constitution. The Act does not require hearing proceedings for the inventory. No hearing or notice requirement is found in section 4005(b). Some commentators argued that section 7004(b) requires public participation before publication of the inventory. These guidelines provide for public participation at several key stages in the State planning process, including review of the plan's priorities for conducting the

facility classifications. Those requirements provide an ample opportunity for public input on this aspect of the subtitle D program without direct public participation in the inventory list.

An added round of public participation on the inventory is particularly inappropriate because EPA will not be rendering a decision. In publishing the list EPA is merely reporting to the public on the progress of one important phase of the State planning program. Some commentators challenged this interpretation of EPA's role arguing that conduct of the inventory was EPA's responsibility and that the States are merely acting as EPA's agents in carrying out the inventory. EPA rejects this view. Section 4005(b) only requires EPA to *publish* the inventory. More importantly, the Act does not give EPA authority to enter private property to evaluate facilities for possible inclusion in the inventory. EPA's obvious lack of necessary authority, coupled with subtitle D's clear reliance on State initiatives for implementation functions, leads EPA to conclude that the inventory should be handled by the States.

In considering the applicability of the Administrative Procedures Act (APA) (5 U.S.C. 51 et seq.), several commentators argued that the inventory was an adjudication, licensing or rulemaking proceeding for purposes of the APA. After analyzing these comments EPA concluded that none of these characterizations properly describes the inventory. As discussed earlier the inventory is only an informational tool; and, therefore, its publication in the *Federal Register* is not the kind of agency action meant to be covered by the Administrative Procedures Act's notice and hearing provisions.

Several commentators argued that publication of the inventory without a formal notice and hearing opportunity constituted a denial of property without due process of law, violating the Fifth Amendment of the Constitution. EPA certainly does not seek to deny the due process rights of individuals in performing its part of the subtitle D program. It must be recognized, however, that not every government action which may affect an individual's property interests requires formal notice and hearing procedures. Generally some legal sanctions must be brought to bear on an individual before the due process right arises.

The issue in considering subtitle D's implications for due process rights is not a question of whether those rights exist at all, but rather when those rights are

properly invoked. Individuals involved in solid waste disposal will have an opportunity to be heard before government sanctions are permanently imposed. As indicated earlier, however, the inventory is not an EPA determination resulting in legal sanctions. By including a site on the inventory, EPA has not ordered any identifiable individuals to do anything.

Several of the key questions for legal liability—namely *who* is responsible for which *acts*—are not necessarily resolved by the inventory process. Under these circumstances it would be premature to hold a hearing because it is unclear who has the right to a hearing and what the accusations are. Once States have completed further investigations and are ready to direct their enforcement efforts at particular actions by particular individuals, the people in question will have an opportunity to be heard in either an administrative or judicial forum. States will be bound under their own laws and the U.S. Constitution to assure that there will be no denial of property without due process of law. Several comments from States showed an awareness of that obligation and indicated that existing State procedures would require various opportunities to be heard prior to the imposition of sanctions.

In arguing for a notice and hearing opportunity prior to publication of the inventory, commentators identified a variety of bases for that right. Some saw the right growing out of the link between the inventory and the open dumping prohibition. As indicated previously, there is no such link and therefore no such hearing right.

Others argued that the bad publicity associated with a facility's inclusion on the list would unfairly affect the operator's business. In particular, commentators noted that the inventory would encourage citizen actions (including suits brought under the Act) or responses by local governments which could interfere with the continued operation of listed sites.

It is not clear that the inventory will result in unfair criticism. In publishing the inventory, EPA will make every effort to clarify the status of the inventory as an informational exercise which does not imply legal liability on the part of any particular party. Such clarification may need to be given on a State by State basis in order to reflect the way the inventory is being used by each State solid waste program.

EPA cannot completely eliminate the possibility that some parties will improperly characterize the meaning of the inventory. EPA will, however, assure

that the inventory clearly states the purpose, basis and significance of the information provided. Parties affected by bad publicity will have an opportunity, in an administrative or judicial forum, to present their case prior to the imposition of legal sanctions against them.

Several commentators expressed particular concern that the inventory would lead to citizen suits against listed facilities. Under some circumstances inclusion of a facility on the inventory may increase the likelihood that some party may sue some other party concerning conditions at the facility. In marginally increasing the chances of suit, however, EPA is not denying property without due process of law. A civil suit in Federal court is hardly a summary proceeding in which the defendant has little opportunity to be heard. In fact the judicial forum probably affords the ultimate in due process of law.

Some commentators suggested that inclusion on the inventory was a prerequisite to the establishment of legal liability for open dumping. That conclusion reflects a misunderstanding of the Act. Citizen suits against acts of open dumping may be initiated regardless of the inventory process. Only a compliance schedule issued to specific parties, as contemplated by section 4005(c), insulates these parties from suit.

At least one commentator suggested that a citizen suit is just one of several "hindrances" to the solid waste industry, and that EPA should not be providing information that encourages such suits until the facility operator has had a formal notice and hearing opportunity. While some people may attempt to abuse the legal system, EPA does not believe that citizen suits are merely hindrances to the industry. Citizen suits may be legitimate expressions of genuine public concern that seek relief for actions that seriously threaten public health and the environment. Such suits will provide all parties, including those accused of open dumping, their day in court.

This leads to a general point about the notice and comment issue which should not be ignored. While EPA does not seek to deny legitimate due process rights, there is a countervailing interest that must be considered—the public's right to be informed of the dangers to their health and environment. The Act intended the open dump inventory to inform the public about the dangers associated with various disposal facilities. This would allow the public and the States to take protective action.

An enforcement action against responsible parties would be only one of several available options.

Since the inventory is not an accusation of wrongdoing against specific parties and since notice and hearing opportunities will precede the imposition of legal sanctions, EPA believes that it is inconsistent with the Act and contrary to the public interest to withhold this information from the public.

EPA's interpretation of the inventory means that it is up to the States to assure protection of the due process rights of parties affected by State regulatory activities. Several State agencies indicated that various formal or informal procedures for receiving comments (including hearing opportunities) would be conducted in conjunction with the inventory as a matter of State law. EPA approves of those efforts.

EPA does not believe, however, that it should be requiring the States to inform any particular parties according to any particular procedures. There are many different ways to assure that the system is not unfair to affected parties, and EPA believes that the States should be allowed to fashion a response appropriate to the circumstances. If EPA attempted to impose particular "notice" requirements, it might be unnecessarily intruding in matters of State law. For example, inclusion of a facility on the list does not establish the legal liability of any particular person as a matter of Federal law. Therefore, it is impossible to determine under the Act who is the appropriate recipient of notice. However, depending on the use of the inventory under State law, there may be clear legal requirements for who shall receive notice.

In order to avoid this potential problem EPA has removed any reference to notice and comment procedures in the requirements of subpart C. However, to indicate EPA's general preference for full disclosure of inventory information the guidelines recommend in subpart G that the States inform all affected parties of site classification results.

In response to the Supplemental Notice, EPA received comments supporting and opposing EPA's general position. Several commentors expressed concern that the interpretation suggested by NSWMA would increase administrative expenditures per facility and greatly reduce the number of facilities that could be evaluated with the limited funding available under subtitle D.

Such an outcome is possible and would be incompatible with Congressional intent that the inventory be completed promptly. This suggests that EPA's interpretation, which avoids the need for hearings while respecting individual rights, best accords with Congressional intent.

3. Closure or Upgrading Procedures. Section 4003(3) requires the plan to provide for the closing or upgrading of all existing open dumps. States may achieve this through a variety of mechanisms (e.g., permits, administrative orders, general regulations). Establishment of compliance schedules for each facility may be the best mechanism to achieve compliance with section 4003(3), but EPA does not wish to exclude the use of other approaches as long as the State can show that some effective action will be taken to close or upgrade open dumps.

The plan must, however, provide some means for assuring EPA and the public that steps are being taken to deal with the problem presented by existing open dumps. The guidelines, therefore, require that the plan reference some evidence that steps have or are being taken to close or upgrade each facility. By "evidence" EPA does not imply that the States must have a document, legally admissible in court, for each facility on the inventory. EPA is merely seeking documentation which indicates that some steps have been or are being taken to eliminate the problems associated with each site. Evidence of action could include an administrative order, a permit, or even a report on the site which indicates that problems identified during the inventory have been remedied.

4. Inactive Facilities. The proposed guidelines required that inactive disposal facilities (referred to as "abandoned facilities" in the proposed guidelines) which continue to produce adverse health or environmental effects be subject to classification according to the criteria and publication in the open dump inventory. Most commentors agreed that inactive disposal facilities can and do cause severe adverse health and environmental problems and that these facilities should not be ignored. A number of commentors, however, questioned EPA's authority to require State plans to include such facilities in the open dump inventory process. They were also concerned about what enforcement action the State might reasonably take, especially where a facility has been abandoned or ownership has been transferred or relinquished, and legal liability and

financial responsibility are difficult to establish.

It is important to note that since these guidelines were proposed, there has been an influx of reports of inactive sites posing substantial endangerment to public health and the environment. It is, therefore, incumbent upon the States to learn as much about problem sites in their jurisdictions as possible. The guidelines recommend that inactive facilities be evaluated for current or potential problems and that the State take steps to minimize or eliminate adverse health or environmental effects, particularly in emergency situations. If corrective actions by facility owners or operators cannot be brought about, public agencies should take the necessary measures to protect public health and safety. This should include, as a minimum, notification of adjacent residents and other affected parties of the potential health or environmental hazards.

EPA recognizes that there is some question about whether the environmental problems associated with inactive facilities fall within the scope of "disposal" as defined in the Act. Section 1004(3) defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or waters so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water". Taken literally this definition could encompass some aspects of pollution found at inactive facilities.

A second crucial question, however, is whether the particular regulatory programs created by the Act can be meaningfully applied to inactive sites. The hazardous waste program, under Subtitle C of the Act, calls for the issuance of permits (setting performance standards and operational controls) to owners and operators of facilities for the disposal of hazardous waste. Such a scheme is inappropriate for inactive facilities and, therefore, EPA has concluded that Subtitle C does not apply to inactive facilities.

In examining the open dump inventory under subtitle D, a slightly different problem arises. There is no reason to avoid collecting information on inactive facilities as it could be useful in the development of the State plan. At the same time EPA recognizes that inactive facilities present unique management problems that will require different kinds of responses by the States. Thus the plan may not be able to establish routine procedures for the closing and

upgrading of such facilities in the same way that such procedures will be possible for active facilities.

EPA has decided that there is no basis to exclude all inactive facilities from the scope of the open dump inventory. Yet EPA also believes that active facilities were intended to be the focus of the subtitle D program. The question of how the inventory addresses inactive facilities is one to be resolved in the establishment of State priorities for the inventory. In negotiating this question EPA and the State will be able to consider the magnitude of the environmental problem presented by inactive facilities and the State's ability to close or upgrade such facilities.

In writing the Guidelines EPA has included a specific set of recommendations on inactive facilities that should be part of the State plan. In applying the Guidelines' requirements for the inventory to inactive facilities, EPA recognizes that the meaning of "closing or upgrading open dumps" may have to be flexible to accommodate the unique problems involved in addressing inactive facilities.

The agency may use Section 7003 (Imminent Hazard) of the Act to bring suit against inactive facilities which pose human health and environment problems. This section is designed to prevent any imminent and substantial endangerment to human health or the environment from the improper disposal of solid waste. Under this procedure, the Agency can seek whatever remedy may be necessary to control the problem.

Compliance Schedules Affecting the Prohibition of Open Dumping

Section 4005(c) requires the plan to provide for compliance schedules for each entity that can show that it has no "public or private alternatives for solid waste management to comply with the prohibition on open dumping". The compliance schedule is to set forth "an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping within a reasonable time". The meaning of reasonable time is a matter for the State to decide, but no compliance schedule may allow open dumping to continue five years beyond publication of the inventory. By that time, the proper implementation of the plan should assure that adequate, environmentally acceptable disposal capacity is available in the State.

In determining whether other "public or private alternatives" exist the States should examine a range of factors concerning the State's overall solid waste management problem. EPA

recommends that the State consider the availability of processing and disposal at other facilities, cost constraints, existing contractual agreements, the likelihood of incremental environmental damage and other pertinent factors. A compliance schedule for owners and operators of facilities may involve steps to close or upgrade the facility. Upgrading is, however, the objective of the compliance schedule and not a "public or private alternative" for purposes of determining whether a compliance schedule is justified.

It should be made clear that the type of compliance schedule contemplated by section 4005(c), which includes an examination of public or private alternatives, is the only kind of compliance schedule that protects a party from the open dumping prohibition. The section 4005(c) compliance schedule is issued to particular parties, not sites. It can be issued to operators of disposal facilities but could also be issued to those parties that generate or transport wastes. The section 4005(c) compliance schedule may be coordinated with any schedule for closing or upgrading of a facility developed to comply with section 4003(3). Only those individuals bound by the compliance schedule, however, may be insulated from an open dumping action.

Subpart D—Resource Conservation and Recovery

One of the major objectives of the Act is to encourage resource recovery and resource conservation. As defined in the Act, resource recovery is the recovery of material and energy from solid waste, while resource conservation includes the reduction of the amounts of solid waste that are generated, the reduction of overall resource consumption and the utilization of recovered resources.

These guidelines establish several requirements for State plans to achieve this objective. The guidelines require the State plan to provide for the development of a policy and strategy to encourage resource recovery and resource conservation. This strategy should focus on removing existing technical, economic, and institutional constraints that impede increased resource recovery and conservation. State activities in this area could include technical assistance, training, information development and dissemination, financial support programs, and programs to develop markets for recovered materials and energy.

Several commentors suggested that the guidelines provide more detailed advice on the elements of a State strategy and on methods to implement this strategy. Such advice can be found in "Developing a State Resource Conservation and Recovery Program," a guidance document available from EPA.

The Act and these guidelines require State plans to ensure that local governments are not prohibited under State or local law from entering into long-term contracts for supplying solid waste to resource recovery facilities. This requirement reflects the concern that the development of resource recovery facilities has been hindered by not having a guaranteed long-term supply of solid waste. The guidelines recommend that the State plan provide for State agency review of pertinent State and local statutes, and for the development of a strategy for eliminating the long-term contracting restrictions on the supply of waste to resource recovery facilities.

Several States raised concerns about their ability to comply with this requirement. They cited State constitutional provisions for home rule as restricting their influence on local laws of this type. It is recognized that States and State agencies may have limited ability to modify local procurement laws. The guidelines contain a recommended procedure for the State to pursue, in conjunction with local governments, to change local laws violating this requirement. The Act envisions a cooperative State-local effort in meeting its goals, within the framework of the State constitution and laws.

One commentator pointed out that long-term contract restrictions have been enacted for sound reasons, such as to discourage corruption. It should be noted, however, that the Act only requires elimination of restrictions impacting resource recovery facilities; and, even where these restrictions are eliminated, there are other methods which may be employed to safeguard the contracting process (such as split bidding and acceptance of the lowest bid.)

Finally, several commentors asked what is meant by "long-term". This refers to a contract length sufficient to repay the capital costs of the resource recovery project. It is usually a 20 year period.

Under section 6002 of the Act each "procuring agency" is required to procure "items composed of the highest percentage of recovered materials practicable consistent with maintaining a satisfactory level of competition".

As defined by the Act a "procuring agency" includes "any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement * * *". The proposed guidelines contained a provision requiring compliance with section 6002 as a condition for approval of a State solid waste management plan. After analyzing the comments received on that provision and reassessing the relationship between sections 6002 and 4003, EPA has decided to discuss section 6002 in the "recommendations" and not the "requirements" portion of these guidelines.

Section 6002 applies to State agencies by its own terms and does not require final guidelines under section 4002 before it is applicable to State procurement. States should be addressing the requirement of section 6002 in handling all of their Federal funds regardless of whether they develop State solid waste management plans that satisfy the requirements of section 4003. EPA has deleted any reference to section 6002 in the requirements portion of subpart D to avoid any suggestion that the procurement requirements of the Act are only enforceable in the context of State solid waste management planning.

A number of States commented that the State solid waste agency can have only limited impact on the State procurement process. EPA recognizes that State solid waste management agencies are generally not involved in procurement practices and policies. However, these guidelines recommend that the State solid waste agency provide information and guidance on recovered materials to the State procurement agency and encourage that agency to develop procurement procedures in line with the section 6002 requirements. State solid waste management agencies should also seek to implement the section 6002 provisions wherever possible in their procurement activities and thereby set an example for other State agencies.

The guidelines recommend resource recovery and resource conservation as the preferred methods of solid waste management whenever technically and economically feasible. While resource recovery and conservation may reduce land disposal needs, however, these methods will not eliminate the need for land disposal. It is expected that in the near term, resource recovery and conservation will have only a limited impact on the solid waste generated nationwide. Therefore, there will continue to be a need for

environmentally sound land disposal facilities in order to meet the objectives of the Act.

Subpart E—Facility Planning and Implementation

These guidelines require that the State plan provide for adequate resource conservation, recovery, storage, treatment, and disposal facilities and practices necessary to use or dispose of solid and hazardous waste in an environmentally sound manner. These guidelines also recommend a number of actions that could be undertaken to help assure that the necessary facilities and services are in fact provided for.

Several commentors emphasized that in complying with this requirement, it is important to strike an appropriate balance between public and private sector activities. These guidelines do not favor one over the other. In some parts of the country, private sector initiatives may be sufficient to ensure that the needed facilities are available. However, in other instances, there may be a need for greater involvement of State or substate governments. This involvement should include an awareness of private sector activities in order to determine whether public sector involvement in facility planning and implementation is necessary.

EPA recognizes that there is an established solid waste management industry offering a wide range of services, including the design, construction, and operation of processing, storage, treatment, transport, disposal, and recovery facilities. It is not the intent of these guidelines that the public sector needlessly supplant or duplicate activities of the private sector. State and substate agencies are encouraged to establish policies for free and unrestricted movement of solid and hazardous waste across jurisdictional boundaries and procedures for sharing information useful to prospective and established entrepreneurs, as well as to provide relevant planning information to industry regarding population and waste generation trends, environmental conditions and other topics that would assist in the establishment of financially and environmentally sound facilities.

The guidelines recommend a statewide assessment of the adequacy of existing facilities and an evaluation of the need for new or expanded facilities. The guidelines purposely leave it up to State discretion whether this needs assessment is to be conducted by State or substate agencies or by a

combination of the two. One commentor pointed out that the needs assessment should consider the amount and extent of interstate transportation of solid wastes. A recommendation was added to include such considerations in assessing the need for facilities.

Where facilities and practices are found to be inadequate, actions should be taken to help ensure that needed facilities are developed by State or substate agencies or by the private sector. For areas found to have five or fewer years of capacity remaining, more detailed planning should be carried out, including evaluation of technologies and site locations. Implementation schedules also should be developed. It is widely accepted that facility siting is one of the most difficult solid waste management problems. Many commentors stressed that it is preferable for facility acquisition activities to remain the responsibility of local and regional governments. However, recent experience indicates that it is becoming more and more difficult for substate governments to obtain sites for solid waste disposal facilities. This is especially true for facilities that store, treat, or dispose of hazardous wastes.

These guidelines recommend that where there is less than two years projected capacity, the State should have the authority to acquire facilities or cause facilities to be acquired. The majority of the States responding to this recommendation agreed that it is important for the State plan to explore options for more direct State control over siting and facility development if local government and private sector initiatives fail.

Several commentors emphasized that due to the diversity in State constitutional provisions and legislative and regulatory authorities, EPA should not dictate specific methods for the State to obtain greater control over facility acquisition. EPA is not requiring any particular strategy for the States, but suggests that the States investigate the following methods recommended by commentors for acquiring more direct control over siting and facility development: obtaining the authority to override local zoning laws or to contract directly for facilities and services; using condemnation or eminent domain procedures; arbitrating siting disputes; establishing site locations at the invitation of local governments; requiring facility permits to conform to regional plans developed under the State plan; and, instituting a public utility agency to regulate the supply of services.

With regard to hazardous waste facility planning, there are certain special factors to be considered. Most hazardous waste recovery, treatment, storage, and disposal facilities are privately operated. Hazardous waste generators are often large industries with heavy capital investments in plants and equipment into which onsite hazardous waste management facilities have been integrated. In addition, there are over 100 private offsite hazardous waste management facilities which provide service to many industries.

The State plan should provide for adequate hazardous waste recovery, treatment, storage, and disposal facilities, including public facilities where necessary. States should develop implementation schedules which will insure siting of the necessary hazardous waste management facilities. State plans should also encourage waste exchanges and other waste utilization practices for hazardous wastes.

Subpart F—Coordination With Other Programs

Section 4003(1) requires the State solid waste management plan to identify means for coordinating regional planning and implementation under the State plan. Section 1006 requires the Administrator to integrate all provisions of this Act (including approval of State plans) with other Acts that grant regulatory authority to the Administrator in order to prevent duplication of administrative and enforcement efforts. To satisfy these general objectives the guidelines require that the State plan provide for coordination with Federal programs that affect State solid waste management.

Several commentors asked what the guidelines mean by coordination. Generally the goal of coordination is a balancing and sharing of responsibilities among programs with the aim of avoiding duplication of effort and gaps in program coverage. That goal may be achieved through the use of a wide range of administrative techniques, depending on the particular institutional arrangements in a State government. It is impossible to specify in these guidelines a general set of coordination steps which will be applicable to all States. Therefore, these guidelines identify several Federal programs that are relevant to solid waste management and require that the States examine the relationship between those programs and the State plan. The particular steps necessary to accommodate sound administration of solid waste programs to the objectives of other Federal

programs must be developed on a State-by-State basis through negotiations between EPA, the States and other Federal agencies.

Coordination With Guidelines and Regulations Under the Act

Certain guidelines and regulations developed under the Act which should be considered in conjunction with these guidelines for State plans include:

(1) Interim regulations to implement the Resource Conservation and Recovery Act of 1976 (40 CFR Part 35), as amended. These regulations establish procedures and policies for grants and financial assistance programs.

(2) Identification of regions and agencies for solid waste management, interim guidelines (40 CFR Part 255). Identifications should be made following the criteria and procedures in the Part 255 guidelines. Completed identifications should be reviewed to determine whether new or revised identifications must be made to comply with these planning guidelines.

(3) Solid waste disposal facilities, proposed criteria for classification (40 CFR Part 257). This regulation proposes minimum criteria for determining which solid waste land disposal facilities shall be classified as posing no reasonable probability of adverse effects on health or the environment.

(4) State hazardous waste program guidelines. These were proposed as 40 CFR Part 123, subparts A and B (44 FR 34298-34307, 6/14/79); Part 123 integrates the State hazardous waste program requirements with similar State regulations under the Clean Water Act, as amended (33 U.S.C. 1251 et seq.), and the Safe Drinking Water Act (42 U.S.C. 300f et seq.). Part 123 describes the various provisions and capabilities a State hazardous waste program must have in order to qualify for full or interim authorization under the Act. Other regulations for hazardous waste management developed under subtitle C of the Act which should be considered are:

Section 3001: Identification and Listing—40 CFR 250 Subpart A (43 FR 58954-58968, 12/18/78).

Section 3002: Generator Standards—40 CFR 250 Subpart B (43 FR 58969-58975, 12/18/78).

Section 3003: Transporter Standards—40 CFR 250 Subpart C (43 FR 18506-18512, 4/28/78; see also the DOT proposal, 43 FR 22626-22634, 5/25/78).

Section 3004: Facility Standards—40 CFR 250 Subpart D (43 FR 58994-59022, 12/18/78).

Section 3005: Permits—40 CFR 122 and 124 Subparts A and B (44 FR 34267-34282, 34321-34328, 6/14/79).

Section 3010: Notification—40 CFR 250 Subpart G (43 FR 29908-29918, 7/11/78).

Section 3011: Grants—40 CFR 35 (42 FR 56050, 10/20/77; amended by 43 FR 43424, 9/25/78).

(5) Resource recovery facility guidelines (40 CFR Part 245). These guidelines apply to Federal agencies' planning and establishment of resource recovery facilities.

Coordination With Other Environmental Programs

Plans developed under these guidelines should be coordinated with guidelines, regulations and programs developed under other Federal environmental acts:

(1) *Water Quality Management*. Subpart F of these guidelines addresses the requirements for coordinating the State plan with programs under section 208 of the Clean Water Act, as amended (33 U.S.C. 1288). Section 208 provides for the identification of complex water quality problem areas and for the designation of areawide agencies in those areas to conduct water quality management planning. The State is responsible for such planning in all areas of the State for which an areawide agency has not been identified and for coordination of all water quality management activities within the State. As part of this effort, State and areawide agencies are to identify a process to control the disposition of all residuals (solid) waste which affects water quality. After completion of such planning, the governor is to designate agencies to implement various elements of the plan.

Subpart F discusses the need to consider water quality management agencies when making agency identifications for solid waste planning and implementation. It also discusses the need to establish coordination procedures when separate agencies are identified. The following types of coordination should take place:

(a) Use of a common data base (e.g. demographic and population projections and geographic boundaries);

(b) Use of compatible report formats, maps, scales, legends, and so forth;

(c) Formulation of consistent policies for sludge and residuals management;

(d) Coordinated identification of State legislative changes needed for implementation; and

(e) Coordination of program development, implementation strategies, and public participation programs.

(2) *Surface Impoundment Studies.* Section 1442(a)(8)(C) of the Safe Drinking Water Act, as amended (SDWA) (42 U.S.C. 300j-1) requires a study of the nature and extent of the impact on underground water of ponds, pools, lagoons, pits, or other surface disposal of contaminants in underground water recharge areas. In partial fulfillment of these requirements, EPA is conducting through grants to State agencies, an assessment of surface impoundments and their effects on ground water. Those impoundments which are identified as having the greatest potential for serious impact on ground water quality should be considered high priority for development of the open-dump inventory to be conducted under the State solid waste plan. Such impoundments which are found to violate the disposal criteria issued under section 4004 should be listed in the inventory and be liable for closure or upgrading. Those surface impoundments that receive hazardous wastes are subject to the regulations for hazardous waste disposal facilities promulgated under subtitle C of the Act.

(3) *The National Pollutant Discharge Elimination System (NPDES).* Section 402 of the Clean Water Act, as amended (33 U.S.C. 1342) establishes the National Pollutant Discharge Elimination System (NPDES) governing discharge of pollutants into navigable waters. Permits issued under section 402 should be coordinated with hazardous waste and solid waste management permits, where applicable. Specifically, the plan should provide for necessary coordination with:

(a) State or Federal issuance of NPDES permits for facilities disposing or utilizing municipal waste water treatment sludge, including new facility permits and compliance schedules under existing permits.

(b) State or Federal issuance of NPDES permits for facilities disposing or utilizing industrial pollution control sludges, including new and existing facilities.

(c) State or Federal supervision of pretreatment programs requiring facilities to comply with requirements and compliance schedules before discharging into municipal sewer systems.

Several commentors incorrectly interpreted the proposed Guidelines to imply that all disposal facilities are to be covered by an NPDES permit. The NPDES program is only applicable to disposal facilities where operation of the facility involves the discharge of a pollutant to waters of the United States. The proposed guidelines required

coordination of the open dump inventory with the NPDES permit program. While such coordination is advisable where possible, coordination with a planning tool such as the inventory is not as important as coordination between parallel regulatory activities. Therefore, these guidelines only require coordination between the State solid waste permitting activity (including the establishment of compliance schedules) and the NPDES program.

(4) *State Implementation Plans.* Several commentors stated that coordination with State Implementation Plans under the Clean Air Act should receive greater emphasis in these guidelines. Coordination with State Implementation Plans has been changed to a "requirement" from "a requirement, where practicable." Commentors also stated that the guidelines should emphasize the need for full and timely coordination of plans for resource recovery systems with the requirements of State Implementation Plans. This change has been made.

(5) *Coordination With Mining Regulatory Agencies.* Title IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231) provides for the establishment of a fund for reclamation of abandoned mining lands. To be eligible to receive this funding, States must first develop an enforcement program for wastes from active mines, subject to the Department of the Interior and EPA approval (title V). All mine wastes must be disposed in accordance with performance standards to be promulgated by the Office of Surface Mining, Department of the Interior. Coordination between these EPA and Department of the Interior programs will facilitate the inventory of mining wastes and may increase the beneficial use of sludge as a soil conditioner in reclamation of abandoned lands.

(6) *Endangered and Threatened Species.* The proposed regulation required "coordination, where practicable" with programs administered by the Office of Endangered Species, Department of the Interior. In examining the Act and section 7 of the Endangered Species Act (16 U.S.C. 1530 et seq.), EPA concluded that these guidelines should address this issue more specifically. Sound solid waste management should include a sensitivity to the impact of solid waste collection, source separation, storage, transportation, transfer, processing, treatment and disposal on endangered and threatened species. Therefore, these guidelines require that the State plan

provide for coordination with the Office of Endangered Species in order to ensure that solid waste management activities not jeopardize the continued existence of an endangered or threatened species nor result in the destruction or adverse modification of a critical habitat. The Office of Endangered Species has identified the species and habitats of concern in its regulations (50 CFR Part 17) implementing the Endangered Species Act.

EPA does not believe that it is appropriate to require more than coordination with endangered species programs in these guidelines. The States may need to employ differing administrative tools, from general policy statements to site-specific permit conditions, to provide protection of endangered species within their borders. EPA believes that the States must have the flexibility to determine, after consultation with Federal agencies concerned with this issue, the appropriate role of the State solid waste management plan in dealing with these issues. Such an approach is consistent with subtitle D, which relies heavily on State initiative, and which ultimately provides the greatest assurance of devising a solid waste management program which will be effective in protecting endangered and threatened species.

(7) *Dredge and Fill Permit Program.* Under section 404 of the Clean Water Act, as amended (CWA), the United States Army Corps of Engineers is responsible for the issuance of permits for the discharge of dredged or fill material into the Waters of the United States. States may assume responsibility for the issuance of permits if they have a program which satisfies requirements specified in section 404 of the CWA. States should attempt to coordinate the State plan with the dredge and fill permit program, particularly in regard to the siting of disposal facilities. To emphasize the importance of this program these guidelines require coordination with the Corps of Engineers (or the appropriate State agency) concerning the dredge and fill permit program.

(8) *Programs Affecting Indian Reservations.* Suggestions were received for coordination with areas not listed in these guidelines. Several commentors were particularly concerned about coordination with programs affecting Indian tribes and lands. EPA recognizes that improper disposal of solid waste on Indian lands can cause pollution both on and off the reservation. States with Indian lands should therefore address

solid waste management on these lands in accord with treaties and State policy. A provision has been added to subpart F to encourage coordination with tribal solid waste management programs. General wording has also been added to subpart F to encourage the State to coordinate with any other Act or program area the State deems appropriate.

Subpart G—Public Participation

Under authority of section 7004(b) of the Act EPA is defining in these guidelines requirements for public participation in the development and implementation of State and substate plans. The requirements in these guidelines are supplemented by the requirements in 40 CFR Part 35 for solid waste program grants and by requirements in 40 CFR Part 25. Part 25 contains general public participation requirements for programs under the Solid Waste Disposal Act, as amended by RCRA, as well as for the programs under the Clean Water Act, as amended (33 U.S.C. 1251 et seq.) and the Safe Drinking Water Act, as amended (42 U.S.C. 300f et seq.).

The guidelines consider public participation for plan development, annual work program development, regulation development, and permitting of facilities. The guidelines require the greatest public participation in development of the State plan. The State must hold a public hearing on the plan in addition to other general efforts at publicizing the content of the plan. The State also is to prepare a responsiveness summary describing how it responded to public comment on the plan. The guidelines require that the draft annual State work program be made available to the public and that the work program include a public participation work plan. In the development of State regulations the guidelines allow the States to choose between a public hearing as described in 40 CFR Part 25 or the applicable portions of State law or administrative procedures. The guidelines require a public hearing on a facility permit if the State finds that there is a significant degree of public interest on the proposed permit.

Many comments were received on the requirement in these guidelines for an advisory group to assist with plan development and implementation. Several commentors stated that informal meetings or committees are a better means of obtaining public input on a solid waste management plan than formal advisory groups. Some States with formal advisory groups felt that the

way their advisory groups are currently structured is more suitable than the way proposed by Part 25.

EPA recognizes these concerns and has deleted both the requirement for an advisory group and the requirement that existing groups conform to the Part 25 provisions. EPA does believe, however, that advisory groups can be an important aspect of the public consultation process and that their use should be encouraged in those States where they are effective. Therefore, these guidelines *recommend* the use of advisory groups. States considering the establishment of an advisory group are encouraged to examine the guidance for advisory group membership and responsibilities contained in Part 25.

On a related issue, several commentors felt the guidelines should encourage public education programs that inform the public about and encourage their interest in planning for solid waste management. EPA agrees, and a recommendation for public education programs has been included.

The requirement to hold a public hearing before approving a permit for a resource recovery or disposal facility generated more comments than any other issue. Commentors cited the high cost of holding hearings and the lack of public interest in many permits. A majority of States responding suggested providing an opportunity for a hearing, while some felt hearings should not be required for permit renewals. Some commentors felt that a hearing at the local level should suffice, and a few commentors stated that there should be no requirements for hearings on permits in these guidelines.

After considering these comments, EPA has revised this section to require a hearing when the State finds a significant degree of public interest on the proposed permit. This change will avoid burdening the State with the cost of a hearing where there is no public interest in a permit, while providing an opportunity for public participation in this important facet of the solid waste management process. EPA decided that permit renewals should not be exempt from this requirement because a revised permit may result in a significantly different environmental impact. The hearing or the decision on the need for such a hearing may be a State or local function depending on how the plan identifies responsibilities within the State.

It should be made clear that the guidelines only address public hearing requirements in permit proceedings. Under State or Constitutional law there may be a right to an adjudicatory, or "on

the record", hearing prior to the imposition of legal sanctions. The guidelines do not address that issue.

Economic Impact

EPA has determined that this document does not require an economic impact analysis statement under Executive Order 12044 and OMB Circular A-107. The major economic impact of these guidelines is associated with the closure and upgrading of facilities in violation of the criteria for classification of solid waste disposal facilities (the Criteria, 40 CFR Part 257). The environmental impact statement prepared for the Criteria contains analysis of the cost of bringing facilities into compliance with the Criteria.

Dated: July 25, 1979.

Barbara Blum,
Acting Administrator.

Title 40 CFR is amended to add a new part 256 reading as follows:

PART 256—GUIDELINES FOR DEVELOPMENT AND IMPLEMENTATION OF STATE SOLID WASTE MANAGEMENT PLANS

Subpart A—Purposes, General Requirements, Definitions

- Sec.
- 256.01 Purpose and scope of the guidelines.
 - 256.02 Scope of the State solid waste management plan.
 - 256.03 State plan submission, adoption, and revision.
 - 256.04 State plan approval, financial assistance.
 - 256.05 Annual work program.
 - 256.06 Definitions.

Subpart B—Identification of Responsibilities; Distribution of Funding

- 256.10 Requirements.
- 256.11 Recommendations.

Subpart C—Solid Waste Disposal Programs

- 256.20 Requirements for State legal authority.
- 256.21 Requirements for State regulatory powers.
- 256.22 Recommendations for State regulatory powers.
- 256.23 Requirements for closing or upgrading open dumps.
- 256.24 Recommendations for closing or upgrading open dumps.
- 256.25 Recommendation for inactive facilities.
- 256.26 Requirement for schedules leading to compliance with the prohibition of open dumping.
- 256.27 Recommendation for schedules leading to compliance with the prohibition of open dumping.

Subpart D—Resource Conservation and Resource Recovery Programs

- 256.30 Requirements.

Sec.

256.31 Recommendations for developing and implementing resource conservation and recovery programs.

Subpart E—Facility Planning and Implementation

256.40 Requirements.

256.41 Recommendations for assessing the need for facilities.

256.42 Recommendations for assuring facility development.

Subpart F—Coordination With Other Programs

256.50 Requirements.

Subpart G—Public Participation

256.60 Requirements for public participation in State and substate plans.

256.61 Requirements for public participation in the annual State work program.

256.62 Requirements for public participation in State regulatory development.

256.63 Requirements for public participation in the permitting of facilities.

256.64 Recommendations for public participation.

Authority: Sections 4002(b) and 4003 of the Solid Waste Disposal Act, as amended, Pub. L. 94-580; 90 Stat. 2813, 2814; 42 U.S.C. 6942(b), 6943.

Subpart A—Purpose, General Requirements, Definitions

§ 256.01 Purpose and scope of the guidelines.

(a) The purpose of these guidelines is to assist in the development and implementation of State solid waste management plans, in accordance with section 4002(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6942(b)) (the "Act"). These guidelines contain methods for achieving the objectives of environmentally sound management and disposal of solid and hazardous waste, resource conservation, and maximum utilization of valuable resources.

(b) These guidelines address the minimum requirements for approval of State plans as set forth in section 4003 of the Act. These are:

(1) The plan shall identify, in accordance with section 4006(b), (i) the responsibilities of State, local, and regional authorities in the implementation of the State plan, (ii) the distribution of Federal funds to the authorities responsible for development and implementation of the State plan, and (iii) the means for coordinating regional planning and implementation under the State plan.

(2) The plan shall, in accordance with section 4005(c), prohibit the establishment of new open dumps within the State, and contain requirements that all solid waste

(including solid waste originating in other States, but not including hazardous waste) shall be (i) utilized for resource recovery or (ii) disposed of in sanitary landfills (within the meaning of section 4004(a)) or otherwise disposed of in an environmentally sound manner.

(3) The plan shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements of section 4005.

(4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.

(5) The plan shall provide that no local government within the State shall be prohibited under State or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities.

(6) The plan shall provide for resource conservation or recovery and for the disposal of solid waste in sanitary landfills or for any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound.

(c) These guidelines address the requirement of section 4005(c) that a State plan:

Shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule of compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed five years from the date of publication of the inventory).

§ 256.02 Scope of the State solid waste management plan.

(a)(1) The State plan shall address all solid waste in the State that poses potential adverse effects on health or the environment or provides opportunity for resource conservation or resource recovery. The plan shall consider:

- (i) Hazardous wastes;
- (ii) Residential, commercial and institutional solid waste;
- (iii) Wastewater treatment sludge;
- (iv) Pollution control residuals;
- (v) Industrial wastes;
- (vi) Mining wastes;
- (vii) Agricultural wastes;
- (viii) Water treatment sludge; and
- (ix) Septic tank pumpings.

(2) The State plan shall consider the following aspects of solid waste management:

- (i) Resource conservation;

- (ii) Source separation;
- (iii) Collection;
- (iv) Transportation;
- (v) Storage;
- (vi) Transfer;
- (vii) Processing (including resource recovery);

- (viii) Treatment; and
- (ix) Disposal.

(b) The State plan shall establish and justify priorities and timing for actions. These priorities shall be based on the current level of solid waste management planning and implementation within the State, the extent of the solid waste management problem, the health, environmental and economic impacts of the problem, and the resources and management approaches available.

(c) The State plan shall set forth an orderly and manageable process for achieving the objectives of the Act and meeting the requirements of these guidelines. This process shall describe as specifically as possible the activities to be undertaken, including detailed schedules and milestones.

(d) The State plan shall cover a minimum of a five year time period from the date submitted to EPA for approval.

(e) The State plan shall identify existing State legal authority for solid waste management and shall identify modifications to regulations necessary to meet the requirements of these guidelines.

§ 256.03 State plan submission, adoption, and revision.

(a) To be considered for approval, the State plan shall be submitted to EPA within eighteen months after final promulgation of these guidelines.

(b) Prior to submission to EPA, the plan shall be adopted by the State pursuant to State administrative procedures.

(c) The plan shall be developed in accord with public participation procedures required by subpart G of this part.

(d) The plan shall contain procedures for revision. The State plan shall be revised by the State, after notice and public hearings, when the Administrator, by regulation, or the State determines, that:

(1) The State plan is not in compliance with the requirements of these guidelines;

(2) Information has become available which demonstrates the inadequacy of the plan; or

(3) Such revision is otherwise necessary.

(e) The State plan shall be reviewed by the State and, where necessary,

revised and readopted not less frequently than every three years.

§ 256.04 State plan approval, financial assistance.

(a) The Administrator shall, within six months after a State plan has been submitted for approval, approve or disapprove the plan. The Administrator shall approve a plan if he determines that:

(1) It meets the requirements of these guidelines which address sections 4003(1), (2), (3), and (5), and

(2) It contains provisions for revision pursuant to § 256.03.

(b) The Administrator shall review approved plans from time to time, and if he determines that revisions or corrections are necessary to bring such plan into compliance with all of the requirements of these guidelines, including the requirements which address sections 4003(4) and (6) and any new or revised requirement established by amendment to this part, he shall notify the State and provide an opportunity for such revisions and corrections and for an appeal and public hearing. If the plan continues to remain out of compliance, he shall withdraw his approval of such plan.

(c) Such withdrawal of approval shall cease to be effective upon the Administrator's determination that the State plan complies with the requirements of these guidelines.

(d) The Administrator shall approve a State application for financial assistance under subtitle D of the Act, and make grants to such State, if the Administrator determines that the State plan continues to be eligible for approval and is being implemented by the State.

(e) Upon withdrawal of approval of a State plan, the Administrator shall withhold Federal financial and technical assistance under subtitle D (other than such technical assistance as may be necessary to assist in obtaining reinstatement of approval) until such time as approval is reinstated. (Procedures for termination of financial assistance and for settlement of disputes are contained in 40 CFR 30, appendix A, articles 7 and 8.)

§ 256.05 Annual work program.

(a) The annual work program submitted for financial assistance under section 4008(a)(1) and described in the grant regulations (40 CFR Part 35) shall be reviewed by the Administrator in order to determine whether the State plan is being implemented by the State.

(b) The Administrator and the State shall agree on the contents of the annual

work program. The Administrator will consider State initiatives and priorities, in light of the goals of the Act, in determining annual work programs for each State. The annual work program represents a State's obligation incurred by acceptance of financial assistance.

(c) Annual guidance for the development of State work programs will be issued by EPA. While this guidance will establish annual national priorities, flexibility will be provided in order to accommodate differing State priorities.

(d) The following documents developed under the State plan shall be included by reference in the annual work program:

(1) Substate solid waste management plans,

(2) Plans for the development of facilities and services, including hazardous waste management facilities and services,

(3) Evidence of actions or steps taken to close or upgrade open dumps.

(e) The annual work program shall allocate the distribution of Federal funds to agencies responsible for the development and implementation of the State plan.

§ 256.06 Definitions.

Terms not defined below have the meanings assigned them by section 1004 of the Act.

"The Act" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.).

"Criteria" means the "Criteria for Classification of Solid Waste Disposal Facilities", 40 CFR Part 257, promulgated under section 4004(a) of the Act.

"Facility" refers to any resource recovery system or component thereof, any system, program or facility for resource conservation, and any facility for collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid waste, including hazardous waste, whether such facility is associated with facilities generating such wastes or not.

"Implementation" means putting the plan into practice by carrying out planned activities, including compliance and enforcement activities, or ensuring such activities are carried out.

"Inactive facility" means a facility which no longer receives solid waste.

"Inventory of open dumps" means the inventory required under section 4005(b) and is defined as the list published by EPA of those disposal facilities which do not meet the criteria.

"Operator" includes facility owners and operators.

A "permit" is an entitlement to commence and continue operation of a facility as long as both procedural and performance standards are met. The term "permit" includes any functional equivalent such as a registration or license.

"Planning" includes identifying problems, defining objectives, collecting information, analyzing alternatives and determining necessary activities and courses of action.

"Provide for" in the phrase "the plan shall (should) provide for" means explain, establish or set forth steps or courses of action.

The term "shall" denotes requirements for the development and implementation of the State plan.

The term "should" denotes recommendations for the development and implementation of the State plan.

"Substate" refers to any public regional, local, county, municipal, or intermunicipal agency, or regional or local public (including interstate) solid or hazardous waste management authority, or other public agency below the State level.

Subpart B—Identification of Responsibilities; Distribution of Funding

§ 256.10 Requirements.

(a) In accordance with sections 4003(1) and 4006 and the interim guidelines for identification of regions and agencies for solid waste management (40 CFR Part 255), the State plan shall provide for:

(1) The identification of the responsibilities of State and substate (regional, local and interstate) authorities in the development and implementation of the State plan;

(2) The means of distribution of Federal funds to the authorities responsible for development and implementation of the State plan; and

(3) The means for coordinating substate planning and implementation.

(b) Responsibilities shall be identified for the classification of disposal facilities for the inventory of open dumps.

(c) Responsibilities shall be identified for development and implementation of the State regulatory program described in subpart C of this part.

(d) Responsibilities shall be identified for the development and implementation of the State resource conservation and resource recovery program described in subpart D of this part.

(e) State, substate and private sector responsibilities shall be identified for the planning and implementation of

solid and hazardous waste management facilities and services.

(f) Financial assistance under sections 4008(a) (1) and (2) shall be allocated by the State to State and substate authorities carrying out development and implementation of the State plan. Such allocation shall be based on the responsibilities of the respective parties as determined under section 4006(b).

§ 256.11 Recommendations.

(a) Responsibilities should be identified for each of the solid waste types listed in § 256.02(a)(1).

(b) Responsibilities should be identified for each of the aspects of solid waste management listed in § 256.02(a)(2).

(c) Responsibilities should be identified for planning and designating ground water use with respect to design and operation of solid waste disposal facilities.

(d) Responsibilities should be identified for the development and implementation of the authorized State hazardous waste management program under subtitle C of the Act.

(e) The State plan should include a schedule and procedure for the continuing review, reassessment and reassignment of responsibilities.

Subpart C—Solid Waste Disposal Programs

§ 256.20 Requirements for State legal authority.

In order to comply with sections 4003 (2) and (3), the State plan shall assure that the State has adequate legal authority to prohibit the establishment of new open dumps and to close or upgrade existing open dumps. The prohibition of the establishment of new open dumps shall take effect no later than six months after the date of promulgation of the criteria or on the date of approval of the State plan, whichever is later.

§ 256.21 Requirements for State regulatory powers.

In order to comply with section 4003(4), the State plan shall provide for the establishment of State regulatory powers. These powers:

(a) Shall be adequate to enforce solid waste disposal standards which are equivalent to or more stringent than the criteria for classification of solid waste disposal facilities (40 CFR Part 257). Such authority shall be as definitive as possible and clearly establish the means for compliance.

(b) Shall include surveillance capabilities necessary to detect adverse environmental effects from solid waste

disposal facilities. Such capabilities shall include access for inspection and monitoring by regulatory officials and the authority to establish operator monitoring and reporting requirements.

(c) Shall make use of a permit program which ensures that the establishment of new open dumps is prohibited.

(d) Shall have administrative and judicial enforcement capabilities, including enforceable orders, fines or other administrative procedures, as necessary to ensure compliance.

§ 256.22 Recommendations for State regulatory powers.

In order to assist compliance with section 4003(4), the following are recommendations for State regulatory powers as may be necessary to prohibit new open dumps and close or upgrade all existing open dumps.

(a) Solid waste disposal standards:

(1) Should be based on the health and environmental impacts of disposal facilities.

(2) Should specify design and operational standards.

(3) Should take into account the climatic, geologic, and other relevant characteristics of the State.

(b) Surveillance systems should establish monitoring requirements for facilities.

(1) Every facility should be evaluated for potential adverse health and environmental effects. Based on this evaluation, instrumentation, sampling, monitoring, and inspection requirements should be established.

(2) Every facility which produces leachate in quantities and concentrations that could contaminate ground water in an aquifer should be required to monitor to detect and predict contamination.

(3) Inspectors should be trained and provided detailed instructions for checking on the procedures and conditions that are specified in the engineering plan and site permit. Provisions should be made to ensure chain of custody for evidence.

(c) Facility assessment and prescription of remedial measures should be carried out by adequately trained or experienced professional staff, including engineers and geologists.

(d) The State permit system should provide the administrative control to prohibit the establishment of new open dumps and to assist in meeting the requirement that all wastes be used or disposed in an environmentally sound manner.

(1) Permitting procedures for new facilities should require applicants to

demonstrate that the facility will comply with the criteria.

(2) The permit system should specify, for the facility operator, the location, design, construction, operational, monitoring, reporting, completion and maintenance requirements.

(3) Permit procedures should include provisions to ensure that future use of the property on which the facility is located is compatible with that property's use as a solid waste disposal facility. These procedures should include identification of future land use or the inclusion of a stipulation in the property deed which notifies future purchasers of precautions necessitated by the use of the property as a solid waste disposal facility.

(4) Permits should only be issued to facilities that are consistent with the State plan, or with substate plans developed under the State plan.

(e) The enforcement system should be designed to include both administrative procedures and judicial remedies to enforce the compliance schedules and closure procedures for open dumps.

(1) Permits, surveillance, and enforcement system capabilities should be designed for supporting court action.

(2) Detection capabilities and penalties for false reporting should be provided for.

§ 256.23 Requirements for closing or upgrading open dumps.

In meeting the requirement of section 4003(3) for closing or upgrading open dumps:

(a) The State plan shall provide for the classification of existing solid waste disposal facilities according to the criteria. This classification shall be submitted to EPA, and facilities classified as open dumps shall be published in the inventory of open dumps.

(b) The State plan shall provide for an orderly time-phasing of the disposal facility classifications described in paragraph (a) of this section. The determination of priorities for the classification of disposal facilities shall be based upon:

(1) The potential health and environmental impact of the solid waste disposal facility;

(2) The availability of State regulatory and enforcement powers; and

(3) The availability of Federal and State resources for this purpose.

(c) For each facility classified as an open dump the State shall take steps to close or upgrade the facility. Evidence of that action shall be incorporated by reference into the annual work program and be made publicly available. When

the State's actions concerning open dumps are modified, the changes shall be referenced in subsequent annual work programs.

(d) In providing for the closure of open dumps the State shall take steps necessary to eliminate health hazards and minimize potential health hazards. These steps shall include requirements for long-term monitoring or contingency plans where necessary.

§ 256.24 Recommendations for closing or upgrading open dumps.

(a) All sources of information available to the State should be used to aid in the classification of facilities. Records of previous inspections and monitoring, as well as new inspections and new monitoring, should be considered.

(b) The steps to close or upgrade open dumps established under § 256.23(c) should be coordinated with the facility needs assessment described in § 256.41.

(c) A determination should be made of the feasibility of resource recovery or resource conservation to reduce the solid waste volume entering a facility classified as an open dump; and feasible measures to achieve that reduction should be implemented.

§ 256.25 Recommendation for inactive facilities.

Inactive facilities that continue to produce adverse health or environmental effects should be evaluated according to the criteria. The State plan should provide for measures to ensure that adverse health or environmental effects from inactive facilities are minimized or eliminated. Such measures may include actions by disposal facility owners and operators, notification of the general public, adjacent residents and other affected parties and notification of agencies responsible for public health and safety.

§ 256.26 Requirement for schedules leading to compliance with the prohibition of open dumping.

In implementing the section 4005(c) prohibition on open dumping, the State plan shall provide that any entity which demonstrates that it has considered other public or private alternatives to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, may obtain a timetable or schedule for compliance which specifies a schedule of remedial measures, and an enforceable sequence of actions, leading to compliance within a reasonable time (not to exceed 5 years from the date of publication of the inventory).

§ 256.27 Recommendation for schedules leading to compliance with the prohibition of open dumping.

In reviewing applications for compliance schedules under § 256.26, the State should consider the availability of processing and disposal facilities, the likelihood of environmental damage from disposal at available facilities, the existence of State or substate requirements (including other compliance schedules) applicable to available facilities, cost constraints, existing contractual agreements and other pertinent factors.

Subpart D—Resource Conservation and Resource Recovery Programs

§ 256.30 Requirements.

(a) In order to comply with sections 4003(2) and (6) as they pertain to resource conservation and recovery, the State plan shall provide for a policy and strategy for encouragement of resource recovery and conservation activities.

(b) In order to comply with section 4003(5), the State plan shall provide that no local government within the State is prohibited under State or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities.

§ 256.31 Recommendations for developing and implementing resource conservation and recovery programs.

(a) In order to encourage resource recovery and conservation, the State plan should provide for technical assistance, training, information development and dissemination, financial support programs, market studies and market development programs.

(b) In order to comply with the requirement of § 256.30(b) regarding long-term contract prohibitions, the State plan should provide for:

(1) Review of existing State and local laws and regulations pertinent to contracting for resource recovery services or facilities.

(2) Reporting of all laws and regulations found to be in violation of this requirement to the executive officer of the administrative agency responsible for the statute.

(3) Development of an administrative order or a revised law or regulation or any other preliminary step for the removal or amending of a law or regulation in violation of this requirement.

(4) Development of a strategy for the consideration of the legislature to prohibit and/or remove from State or local law provisions in violation of this requirement.

(c) The State plan should aid and encourage State procurement of products containing recovered materials in accord with section 6002 of the Act. To assist this effort, the State plan should provide for:

(1) The development of a policy statement encouraging the procurement of recovered materials, wherever feasible;

(2) The identification of the key purchasing agencies of the State, along with potential uses of recovered materials by these agencies; and,

(3) The development of a plan of action to promote the use of recovered materials through executive order, legislative initiative, or other action that the State deems necessary.

(d) In order to encourage resource recovery and conservation, the State plan should provide for the elimination, to the extent possible, of restrictions on the purchase of goods or services, especially negotiated procurements, for resource recovery facilities. This should include:

(1) Review of existing State and local laws pertinent to the procurement of equipment and services for the design, construction and operation of resource recovery facilities;

(2) Listing of all laws that limit the ability of localities to negotiate for the procurement of the design, construction, or operation of resource recovery facilities;

(3) Development of administrative orders or legislation or other action that would eliminate these restrictions; and

(4) Development of a strategy and plan of action for the consideration of the legislature for execution of administrative orders or other action that would eliminate these restrictions.

(e) The State plan should encourage the development of resource recovery and resource conservation facilities and practices as the preferred means of solid waste management whenever technically and economically feasible. The State plan should provide for the following activities:

(1) The composition of wastes should be analyzed with particular emphasis on recovery potential for material and energy, including fuel value, percentages of recoverable industrial wastes, grades of wastepaper, glass, and non-ferrous and ferrous metals.

(2) Available and potential markets for recovered materials and energy should be identified, including markets for recoverable industrial wastes; wastepapers; ferrous and non-ferrous metals; glass; solid, liquid, or gaseous fuels; sludges; and tires. The following should be evaluated: location and

transportation requirements, materials and energy specifications of user industries, minimum quantity requirements, pricing mechanisms and long-term contract availability.

(3) Resource recovery feasibility studies should be conducted in regions of the State in which uses or markets for recovered materials or energy are identified. These studies should review various technological approaches, environmental considerations, institutional and financial constraints, and economic feasibility.

(4) Source separation, recycling and resource conservation should be utilized whenever technically and economically feasible.

(5) Mixed waste processing facilities for the recovery of energy and materials should be utilized whenever technically and economically feasible.

(6) Source separation, resource conservation and mixed waste processing capacity should be combined to achieve the most effective resource conservation and economic balance.

Subpart E—Facility Planning and Implementation

§ 256.40 Requirements.

In order to comply with section 4003(6), the State plan shall provide for adequate resource conservation, recovery, storage, treatment and disposal facilities and practices necessary to use or dispose of solid and hazardous waste in an environmentally sound manner.

§ 256.41 Recommendations for assessing the need for facilities.

(a) In meeting the requirement for adequate resource conservation, recovery, storage, treatment and disposal facilities and practices, the State plan should provide for an assessment of the adequacy of existing facilities and practices and the need for new or expanded facilities and practices.

(1) The needs assessment should be based on current and projected waste generation rates and on the capacities of presently operating and planned facilities.

(2) Existing and planned resource conservation and recovery practices and their impact on facility needs should be assessed.

(3) Current and projected movement of solid and hazardous waste across State and local boundaries should be assessed.

(4) Special handling needs should be determined for all solid waste categories.

(5) Impact on facility capacities due to predictable changes in waste quantities and characteristics should be estimated.

(6) Environmental, economic, and other constraints on continued operation of facilities should be assessed.

(7) Diversion of wastes due to closure of open dumps should be anticipated.

(8) Facilities and practices planned or provided for by the private sector should be assessed.

(b) The State plan should provide for the identification of areas which require new capacity development, based on the needs assessment.

§ 256.42 Recommendations for assuring facility development.

(a) The State plan should address facility planning and acquisition for all areas which are determined to have insufficient recovery, storage, treatment and disposal capacity in the assessment of facility needs.

(b) Where facilities and practices are found to be inadequate, the State plan should provide for the necessary facilities and practices to be developed by responsible State and substate agencies or by the private sector.

(c) For all areas found to have five or fewer years of capacity remaining, the State plan should provide for:

(1) The development of estimates of waste generation by type and characteristic.

(2) The evaluation and selection of resource recovery, conservation or disposal methods.

(3) Selection of sites for facilities, and

(4) Development of schedules of implementation.

(d) The State plan should encourage private sector initiatives in order to meet the identified facility needs.

(e) In any area having fewer than 2 years of projected capacity, the State plan should provide for the State to take action such as acquiring facilities or causing facilities to be acquired.

(f) The State plan should provide for the initiation and development of environmentally sound facilities as soon as practicable to replace all open dumps.

(g) The State plan should provide for the State, in cooperation with substate agencies, to establish procedures for choosing which facilities will get priority for technical or financial assistance or other emphasis. Highest priority should be given to facilities developed to replace or upgrade open dumps.

(h) The State plan should provide for substate cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries.

Subpart F—Coordination With Other Programs

§ 256.50 Requirements.

Section 4003(1) requires the State solid waste management plan to identify means for coordinating regional planning and implementation under the State plan. Section 1006 requires the Administrator to integrate all provisions of this Act (including approval of State plans) with other Acts that grant regulatory authority to the Administrator in order to prevent duplication of administrative and enforcement efforts. In order to meet these requirements:

(a) The State solid waste management plan shall be developed in coordination with Federal, State, and substate programs for air quality, water quality, water supply, waste water treatment, pesticides, ocean protection, toxic substances control, noise control, and radiation control.

(b) The State plan shall provide for coordination with programs under section 208 of the Clean Water Act, as amended (33 U.S.C. 1288). In identifying agencies for solid waste management planning and implementation, the State shall review the solid waste management activities being conducted by water quality planning and management agencies designated under section 208 of the Clean Water Act. Where feasible, identification of such agencies should be considered during the identification of responsibilities under subpart B of this part. Where solid waste management and water quality agencies are separate entities, necessary coordination procedures shall be established.

(c) The State plan shall provide for coordination with the National Pollutant Discharge Elimination System (NPDES) established under section 402 of the Clean Water Act, as amended (33 U.S.C. 1342). The issuance of State facility permits and actions taken to close or upgrade open dumps shall be timed, where practicable, to coordinate closely with the issuance of a new or revised NPDES permit for such facility.

(d) The State plan shall provide for coordination with activities for municipal sewage sludge disposal and utilization conducted under the authority of section 405 of the Clean Water Act, as amended (33 U.S.C. 1345), and with the program for construction grants for publicly owned treatment works under section 201 of the Clean Water Act, as amended (33 U.S.C. 1281).

(e) The State plan shall provide for coordination with State pretreatment

activities under section 307 of the Clean Water Act, as amended (33 U.S.C. 1317).

(f) The State plan shall provide for coordination with agencies conducting assessments of the impact of surface impoundments on underground sources of drinking water under the authority of section 1442(a)(8)(C) of the Safe Drinking Water Act (42 U.S.C. 300j-1).

(g) The State plan shall provide for coordination with State underground injection control programs (40 CFR Parts 122, 123, 124, and 146) carried out under the authority of the Safe Drinking Water Act (42 U.S.C. 300f et seq.) and with the designation of sole source aquifers under section 1424 of that Act.

(h) The State plan shall provide for coordination with State implementation plans developed under the Clean Air Act (42 U.S.C. 7401 et seq.; incineration and open burning limitations; and, State implementation plan requirements impacting resource recovery systems).

(i) The State plan shall provide for coordination with the Army Corps of Engineers permit program (or authorized State program) under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344) for dredge and fill activities in waters of the United States.

(j) The State plan shall provide for coordination with the Office of Endangered Species, Department of the Interior, to ensure that solid waste management activities, especially the siting of disposal facilities, do not jeopardize the continued existence of an endangered or threatened species nor result in the destruction or adverse modification of a critical habitat.

(k) The State plan shall provide for coordination, where practicable, with programs under:

(1) The Toxic Substances Control Act (15 U.S.C. 2601 et seq.; disposal of chemical substances and mixtures).

(2) The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 1362 et seq.; disposal and storage of pesticides and pesticide containers).

(3) The Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1420 et seq.; disposal in ocean waters).

(l) The State plan shall provide for coordination, where practicable, with programs of other Federal agencies, including:

(1) Department of the Interior.

(i) Fish and Wildlife Service (wetlands).

(ii) Bureau of Mines and Office of Surface Mining (mining waste disposal and use of sludge in reclamation).

(iii) U.S. Geological Survey (wetlands, floodplains, ground water);

(2) Department of Commerce, National Oceanic and Atmospheric

Administration (coastal zone management plans);

(3) Water Resources Council (floodplains, surface and ground waters);

(4) Department of Agriculture, including Soil Conservation Service (land spreading solid waste on food chain croplands);

(5) Federal Aviation Administration (locating disposal facilities on or near airport property);

(6) Department of Housing and Urban Development (701 comprehensive planning program, flood plains mapping);

(7) Department of Defense (development and implementation of State and substate plans with regard to resource recovery and solid waste disposal programs at various installations);

(8) Department of Energy (State energy conservation plans under the Energy Policy and Conservation Act (42 U.S.C. 6321)); and

(9) Other programs.

(m) The State plan shall provide for coordination, where practicable, with solid waste management plans in neighboring States and with plans for Indian reservations in the State.

Subpart G—Public Participation

§ 256.60 Requirements for public participation in State and substate plans.

(a) State and substate planning agencies shall:

(1) Maintain a current list of agencies, organizations, and individuals affected by or interested in the plan;

(2) Provide depositories of relevant information in one or more convenient locations; and

(3) Prepare a responsiveness summary, in accord with 40 CFR Part 25.8, where required by this subpart or by an approved public participation work plan, which describes matters on which the public was consulted, summarizes the public's views, and sets forth the agency's response to the public input.

(b) State and substate planning agencies shall provide information and consult with the public on plan development and implementation. Provision of information and consultation shall occur both early in the planning process (including the preparation and distribution of a summary of the proposed plan) and on major policy decisions made during the course of plan development, revision and implementation. To meet this requirement, planning agencies shall:

(1) Publicize information in news media having broad audiences in the geographic area;

(2) Place information in depositories maintained under paragraph (a)(2) of this section;

(3) Send information directly to agencies, organizations and individuals on the list maintained under paragraph (a)(1) of this section; and

(4) Prepare and make available to the public a responsiveness summary in accord with 40 CFR Part 25.8.

(c) State and substate planning agencies shall conduct public hearings (and public meetings, where the agency determines there is sufficient interest) in accord with 40 CFR Parts 25.5 and 25.6. The purpose of the hearings and meetings is to solicit reactions and recommendations from interested or affected parties and to explain major issues within the proposed plan. Following the public hearings, a responsiveness summary shall be prepared and made available to the public in accord with 40 CFR Part 25.8.

§ 256.61 Requirements for public participation in the annual State work program.

(a) A public participation work plan in accord with 40 CFR Part 25.11 shall be included in the annual State work program.

(b) The State shall consult with the public in the development of the annual work program. One month prior to submission of the draft work program to the Regional Administrator, as required by 40 CFR Part 35, the draft work program shall be made available to the public at the State information depositories maintained under § 256.60(a)(2). The public shall be notified of the availability of the draft work program, and a public meeting shall be held if the planning agency determines there is sufficient interest.

(c) The State shall comply with the requirements of Office of Management and Budget Circular No. A-95.

(d) Copies of the final work program shall be placed in the State information depositories maintained under § 256.60(a)(2).

§ 256.62 Requirements for public participation in State regulatory development.

(a) The State shall conduct public hearings (and public meetings where the State determines there is sufficient interest) on State legislation and regulations, in accord with the State administrative procedures act, to solicit reactions and recommendations. Following the public hearings, a

responsiveness summary shall be prepared and made available to the public in accord with 40 CFR Part 25.8.

(b) In advance of the hearings and meetings required by paragraph (a) of this section, the State shall prepare a fact sheet on proposed regulations or legislation, mail the fact sheet to agencies, organizations and individuals on the list maintained under § 256.60(a)(1) and place the fact sheet in the State information depositories maintained under § 256.60(a)(2).

§ 256.63 Requirements for public participation in the permitting of facilities.

(a) Before approving a permit application (or renewal of a permit) for a resource recovery or solid waste disposal facility the State shall hold a public hearing to solicit public reaction and recommendations on the proposed permit application if the State determines there is a significant degree of public interest in the proposed permit.

(b) This hearing shall be held in accord with 40 CFR Part 25.5.

§ 256.64 Recommendations for public participation.

(a) State and substate planning agencies should establish an advisory group, or utilize an existing group, to provide recommendations on major policy and program decisions. The advisory group's membership should reflect a balanced viewpoint in accord with 40 CFR Part 25.7(c).

(b) State and substate planning agencies should develop public education programs designed to encourage informed public participation in the development and implementation of solid waste management plans.

(c) The State should inform all affected parties of the classification of a facility as an open dump, in accord with § 256.22(a), prior to publication of that facility by EPA on the open dump inventory.

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