

Copper Center
Gakona
Gulkana
McCarthy
Mentasta Lake
Nabesna
Slana
Yakutat

(2) *Aircraft Use.* In extraordinary cases where no reasonable alternative exists local rural residents who permanently reside in the following exempted communities(ies) may use aircraft for access to lands and waters within the park for subsistence purposes in accordance with a permit issued by the Superintendent:

Yakutat

§ 13.72 Yukon Charley National Preserve.

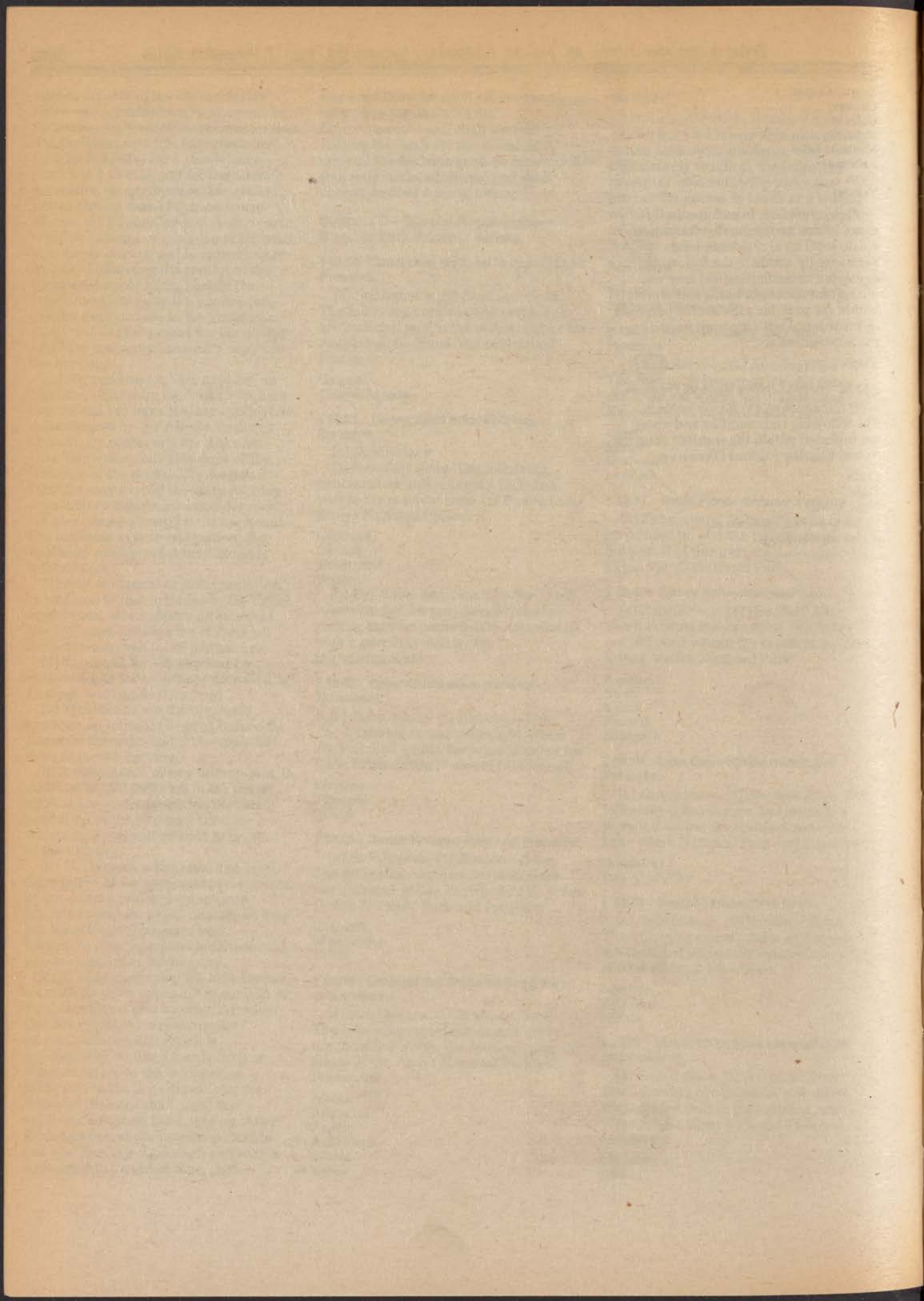
(a) *Subsistence.* (1) *Resident Zone.*

The following communities and areas are included within the resident zone for Yukon Charley National Preserve:

Circle
Eagle
Eagle Village

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Part XXVI

Department of the Interior

Fish and Wildlife Service

Alaska National Wildlife Refuges

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 36

Alaska National Wildlife Refuges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: On December 2, 1980, President Carter signed into law the Alaska National Interest Lands Conservation Act (hereafter referred to as the "Alaska Lands Act"). The Alaska Lands Act contains a significant number of new and complex standards for management of the National Wildlife Refuge System in Alaska. Enactment of the Alaska Lands Act also resulted in the automatic application of the general National Wildlife Refuge System regulations to the 57 million acres of refuges designated in the Act.

These proposed regulations, when finalized, will perform two functions. Most importantly, they will relieve those restrictions imposed by the general National Wildlife Refuge System regulations that are inappropriate in Alaska, such as those placing restrictions on the carrying of firearms. The regulations will also implement and clarify on an interim basis a number of provisions of the Act that are of immediate importance to Alaskans, such as those relating to subsistence and cabins. The Fish and Wildlife Service deems these proposed regulations as the minimal necessary to provide proper management for Alaska National Wildlife Refuges. These proposed regulations are not intended, however, to result in final comprehensive regulations for these areas. The Service will undertake additional rulemaking as appropriate for issues not addressed in this proposal. Public comments on these proposed rules are solicited for 45 days.

DATES: Written comments should be submitted on or before March 5, 1981.

ADDRESS: Comments should be directed to: Alaska Regional Director, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99507

FOR FURTHER INFORMATION CONTACT: Keith Schreiner, Alaska Regional Director, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99507 (907-276-3800) or William C. Reffalt, Chief, Division of Refuge Management, U.S. Fish and Wildlife Service, Room 2349, U.S. Department of the Interior, Washington, D.C. 20240 (202-343-4791).

SUPPLEMENTARY INFORMATION:

Background

The Alaska Lands Act established, redesignated, or expanded sixteen National Wildlife Refuges in Alaska: Alaska Maritime, Alaska Peninsula, Arctic, Becharof, Innoko, Izembek, Kanuti, Kenai, Kodiak, Koyukuk, Nowitna, Selawik, Tetlin, Togiak, Yukon Delta, and Yukon Flats (see the Addendum at the end of this publication). Each of these areas is to be managed pursuant to applicable National Wildlife Refuge law, most notably the Refuge Administration Act, 16 U.S.C. 668dd *et seq.*, and the provisions of the Alaska Lands Act. Until these rules are finalized, the existing general National Wildlife Refuge System rules found at 50 CFR Chapter I, Subchapter C apply except as modified by the provisions of the Alaska Lands Act.

The vast majority of the areas encompassed by the sixteen Alaska National Wildlife Refuges were previously administered by the Fish and Wildlife Service under various legal authorities. The Becharof and Yukon Flats National Wildlife Monuments, established by the President on December 1, 1978, were generally managed under authority of the Antiquities Act, 16 U.S.C. 431 *et seq.*, and emergency interim regulations, 43 FR 60255 (Dec. 26, 1978). Twelve other areas, Alaska Marine Resources, Arctic, Innoko, Kanuti, Kenai, Koyukuk, Nowitna, Selawik, Tetlin, Togiak, Yukon Delta, and Yukon Flats, were withdrawn and established as wildlife refuges by the Secretary of the Interior on February 11, 1980, and were generally managed under authority of the Refuge Administration Act and emergency interim regulations, 45 FR 14192 (March 4, 1980). The withdrawals and reservations establishing these areas as monuments and refuges were rescinded by operation of law as of December 2, 1980, pursuant to section 1322(b) of the Alaska Lands Act when the State of Alaska recently relinquished their land selections made on November 14, 1978, within the boundaries of conservation system units, national conservation areas, national recreation areas, and forest additions. Accordingly, the emergency interim regulations for both the National Wildlife Monuments and the National Wildlife Refuges established February 11, 1980, are revoked by operation of law.

The Need For Expeditions Rulemaking

These proposed rules would provide relief from existing general National Wildlife Refuge System regulations found in 50 CFR Chapter I, Subchapter

C. They would also establish administrative procedures necessary to implement and clarify several provisions of the Alaska Lands Act. For these reasons and as further developed below, the Fish and Wildlife Service has determined that there is a need for expeditious rulemaking. Accordingly, the Service has adopted a 45 day comment period (which is longer than that required under 5 U.S.C. 553) for these proposed rules and plans to issue final regulations in March 1981. The basis for this approach are summarized below:

First, many sections of the final regulations will relieve restrictions on public uses of refuge areas in Alaska that would otherwise be applicable under 50 CFR Chapter I, Subchapter C. Activities such as snowmobile use or the possession of firearms for hunting (which are generally considered recreational and nonessential in the lower 48 states) are vital to the maintenance of the present lifestyle of rural inhabitants of the communities in or near Alaska National Wildlife Refuges. Similarly, in most regions of Alaska the airplane is the only convenient or available means of transportation. To the extent that the current refuge system regulations generally prohibit the possession of firearms and the use of snowmobiles or airplanes within National Wildlife Refuges, literally thousands of otherwise law abiding citizens in rural Alaska have been placed in jeopardy of criminal prosecution as a result of the automatic application of the general refuge management regulations to the new conservation system units. These three examples are merely representative of the hardships created in Alaska by the automatic application of the general refuge system regulations. The Fish and Wildlife Service does not believe that Congress intended to create these hardships through the designation of the new Alaska National Wildlife Refuges and, therefore, feels that it is imperative that various public use restrictions be modified as quickly as possible. The Service believes it is contrary to the public interest to force inholders and users of the new refuges in Alaska to be in apparent contravention of certain provisions of the general refuge management regulations and therefore intends to promulgate in the near future final regulations to correct this conflict.

Second, there is a need to establish administrative procedures for implementing the new directives of the Alaska Lands Act. The Act's provisions on subsistence, access, and cabins

require administrative mechanisms for providing public guidance. Final regulations are needed to establish the administrative channels for implementing these provisions.

Third, with the new directives in the Alaska Lands Act, there is considerable confusion concerning public use of refuge areas in Alaska. For instance, the nonwasteful subsistence use of fish, wildlife and other renewable resources by local rural residents is formally recognized for the first time within Alaska National Wildlife Refuge areas. In order to harmonize the statutory directives with existing regulations and to alleviate public concern over potential criminal prosecution, the Fish and Wildlife Service believes that expeditious public guidance is necessary. The delay caused by a long rulemaking process would exacerbate confusion and uncertainty concerning which activities could be conducted in refuge areas without the threat of criminal prosecution.

Fourth, the Service believes expeditious rulemaking is warranted since the Service has already received extensive public comment concerning the management of fish and wildlife conservation areas in Alaska during earlier regulatory efforts and since these proposed regulations also provide a public comment period. To the greatest extent possible consistent with the Alaska Lands Act, these proposed regulations follow the public desires on open access, carrying of firearms, subsistence, and other issues that were articulated during earlier public involvement proceedings.

In February of 1979 the Fish and Wildlife Service published a "Notice of Intent to Publish Rules" for National Wildlife Monuments in Alaska. 44 FR 11247 (Feb. 28, 1979). The Notice of Intent solicited public comment on the same management issues addressed in these proposed regulations.

Furthermore, when it proposed permanent general management regulations for national wildlife monuments in June of 1979, 44 FR 37754 (June 28, 1979), the Fish and Wildlife Service received over 200 written public comments from private individuals, private or public interest groups, governmental agencies, and private business corporations or companies. In addition, formal public hearings on the proposed regulations were conducted in Anchorage and Fairbanks and written and oral testimony were received. Comments were received on such topics as general refuge purposes; inholdings; Native allotments; public access, including the use of aircraft, motorboats, snowmobiles and off-road vehicles;

subsistence; commercial activities; recreational use; cabins; explosives and firearms; unattended or abandoned property; animal management and control; sport hunting and fishing; and commercial fishing.

Beginning in early April 1979, an intense program of public consultation was again initiated regarding potential Secretarial refuge withdrawals under section 204(c) of the Federal Land Policy and Management Act. This consultation process included press conferences, information packets, distribution of maps, and press releases explaining the proposed withdrawals and probable management controls on public activities. Public hearings regarding the proposed 204(c) withdrawals were conducted in six rural Alaska communities of key geographical location and in the urban centers of Anchorage and Fairbanks. Public hearings were also held in San Francisco, CA, Denver, CO, and Washington, D.C.

In addition to the formal hearings on the matter, numerous meetings were held in Alaska communities to explain section 204(c) proposals to local residents as well as leaders of local government, Native groups, and others. Special efforts were also made to explain the proposed withdrawals to individual local residents.

The regulations proposed here constitute the bare minimum required for interim management of the Alaska National Wildlife Refuges and implementation of the Alaska Lands Act. As noted above, the proposed regulations would either relieve regulatory restrictions which are inappropriate in the Alaska setting (*e.g.*, carrying of firearms and unattended property), or implement crucial provisions of the Alaska Lands Act (*e.g.*, subsistence, access, cabins, taking of fish and wildlife). The limited agenda of these proposed regulations covers only those topics areas which had been subject to prior public notice and comment in previous Fish and Wildlife rulemakings relating to Alaska.

Additional topic areas not addressed in this proposed rulemaking will be the subject of future regulatory exercises. The Fish and Wildlife Service will strive for substantial public comment periods in any future rulemakings proposed by the Service or other parties.

Description of the Proposed Rules

The following is a brief summary of the various regulatory provisions contained in these proposed rules.

Subpart A—Introduction and General Provisions

Section 36.1 This proposed section sets out the applicability and scope of these rules. Alaska National Wildlife Refuges are subject to all of the general National Wildlife Refuge System regulations (*see*, 50 CFR, Chapter I, Subchapter C), as supplemented and modified by these rules when finalized. Existing special regulations now in force and effect will also apply to applicable refuge lands in Alaska National Wildlife Refuges, except as inconsistent with the rules as finally promulgated.

Sections 103(c) and 906(o) of the Alaska Lands Act generally restrict the applicability of Fish and Wildlife Service regulations to federally owned lands within the boundaries of Alaska National Wildlife Refuges. Consistent with the statute and the explanatory legislative history [126 Cong. Rec. H11115 (daily ed. Nov. 21, 1980) and 126 Cong. Rec. S15150-31 (daily ed. Dec. 1, 1980)], § 36.1(b) restricts the applicability of these regulations to "federally owned" lands, which is defined to include all interest held by the Federal government. With the legislative conveyance of 98 million acres of State selections in section 906 of the Act, no un conveyed State selections remain within Alaska refuges. Therefore, no State selected and conveyed lands within the boundaries of the Alaska National Wildlife Refuges will be subject to the provisions of these regulations. Similarly, land interests intermly conveyed or patented to Native corporations, where such interests are located within the boundaries of areas initially added to the National Wildlife Refuge System by the Alaska Lands Act, would not be affected by these regulations. Other private, patented inholdings within the Alaska National Wildlife Refuge would also not be subject to these regulations.

Section 36.2 This section sets out the definitions of key terms used in these emergency interim rules. The definitions generally follow the language of the Alaska Lands Act where available or adopt generally accepted definitions used in prior regulations promulgated by the Fish and Wildlife Service for fish and wildlife conservation areas. The term "fish and wildlife," for instance, tracks the language of the statute, although the Fish and Wildlife Service recognizes the clearly expressed Congressional intent that this term does not include those animals the Service determines to be exotic or domestic [126 Cong. Rec. H10543 (daily ed. Nov. 12, 1980)]. Other definitions, such as those for "adequate and feasible access" and

"subsistence uses," are discussed in connection with the substantive access and subsistence provisions and are not repeated here.

Subpart B—Subsistence Uses

Subpart B of these proposed regulations would implement the policies and procedures governing subsistence uses contained in Title VIII of the Alaska Lands Act.

The proposed regulations for subsistence are necessary for several reasons. First, they would relieve restrictions in the otherwise applicable general National Wildlife Refuge System regulations for uses and activities integral to the subsistence lifestyle. In certain cases, the Alaska Lands Act does not specifically relieve these restrictions; in other cases, the Act allows the uses, but the general refuge regulations appear to prohibit them under threat of criminal penalty. Second, proposed regulations would implement certain critical provisions of the Alaska Lands Act concerning subsistence (e.g., the subsistence priority, the closure standards and procedures for subsistence uses of fish and wildlife, and subsistence and land use decisions), and would extend the approach of certain of these provisions to subjects not specifically mentioned by the Act (e.g., closure standards and procedures for subsistence use of plants).

For the most part, the Subpart B regulations proposed today were proposed for comment as regulations for the Alaska National Monuments. 44 FR 37,754 (June 28, 1979). The Fish and Wildlife Service received extensive comment on those proposed regulations and has accordingly revised the proposed monument regulations in several places. Moreover, the Service welcomes additional comments on these proposed regulations in the next forty-five days. Today's proposed regulations differ from the proposed monument regulations in certain respects because of the now applicable mandates of the Alaska Lands Act.

The proposed regulations on subsistence are not comprehensive. They would not provide for implementing certain provisions of Title VIII of the Alaska Lands Act that, in the Service's judgment, do not limit themselves to expeditious promulgation since they have not previously been the subject of notice and comment. Notable among these statutory provisions are the State regulation opportunity of Section 805(d) and the Federal monitoring requirement of Section 806. It should be emphasized that all parties must comply with these statutory provisions as long

as they remain in effect; however, the Fish and Wildlife Service will consider specific regulations and policies as appropriate for implementing these provisions in the future.

Section 36.11 Section 36.11(a) would establish that, consistent with proper management of fish and wildlife and the purposes for which the Alaska National Wildlife Refuges were established, the purpose of Subpart B of the regulations is to provide the opportunity for local rural residents engaged in a subsistence way of life to do so pursuant to applicable State law and Federal law Alaska Lands Act, sections 101(c) and 802(1). The proposed Subpart B regulations are designed to accommodate and protect the unique subsistence relationship of certain local rural people in Alaska with their natural environment. Alaska Native people have been living a subsistence way of life for thousands of years, and certain non-Native rural residents have developed a subsistence way of life in more recent times. Many of these local rural residents have customarily and traditionally taken the renewable resources which are now within the boundaries of refuge areas. The resources satisfy both the physical needs of these local rural residents for food, shelter, fuel, clothing, tools, and transportation and their societal needs for cultural identity through skills, lore, and traditions. In light of the cultural and societal importance of the subsistence lifestyle in rural Alaska and its dependence on the renewable resources, therefore, Subpart B would implement the Congressional directive to continue the opportunity for subsistence uses within Alaska National Wildlife Refuges by local rural residents.

Least Adverse Impact Possible. In fulfilling the aforementioned goal of the subsistence regulations, proposed § 36.11(b)–(c) sets forth basic policies which the Alaska Lands Act adopted to guide the activities of the administering agencies. Alaska Lands Act, sections 802 (1), (2) and 804. First, consistent with sound resource management principles and the conservation of healthy populations of fish and wildlife, the utilization of refuge areas is to cause the least adverse impact possible on local rural residents who depend upon subsistence uses of the resources of the public lands in Alaska for their economic and physical well-being and cultural vitality. This statutory policy is implemented throughout the proposed regulations, particularly in the procedures mandated by § 36.37, the subsistence priority established by

§ 36.11(c), and the limitations on closure, §§ 36.12, 36.15, and 36.16.

Subsistence Priority. The second policy, articulated in § 36.11(c), would establish nonwasteful subsistence uses of fish, wildlife, and other renewable resources by local rural residents as the priority consumptive use over any other consumptive uses permitted within refuge areas. The Fish and Wildlife Service anticipates State regulations implementing the subsistence priority.

Limitations. In addition to establishing the purpose and policies of the Subpart B regulations, proposed § 36.11 also establishes the limitations of the purpose and policies. According to § 36.11(a), the subsistence opportunity may only be provided in a manner and degree consistent with the management of fish and wildlife in accordance with recognized scientific principles and with the purposes for which each refuge area was established, designated, or expanded by the Alaska Lands Act. According to proposed § 36.11(b), the utilization of the public lands is to cause the least adverse impact possible on local rural residents, but this policy is limited by the requirement that it be consistent with sound management principles and the conservation of healthy populations of fish and wildlife. Furthermore, proposed § 36.11(c) establishes the basic limitations of all the provisions of the proposed Subpart B regulations: subsistence uses of fish and wildlife populations must be appropriately regulated so as to assure conservation of healthy populations within Alaska National Wildlife Refuges. Congress provided the following guidelines on the implementation of this concept:

The Committee intends the phrase "the conservation of healthy populations of fish and wildlife" to mean the maintenance of fish and wildlife resources and their habitats in a condition which assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems, including recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem; minimizes the likelihood of irreversible or long-term adverse effects upon such populations and species; and ensures maximum practicable diversity of options for the future. The greater the ignorance of the resource parameters, particularly of the ability and capacity of a population or species to respond to changes in its ecosystem, the greater the safety factor must be. Thus, in order to insure that subsistence uses are compatible with the maintenance of

healthy populations of fish and wildlife, it must be recognized that the likelihood of irreversible or long-term adverse effects to a population or species must be proportional to the magnitude of the risks caused by a proposed use of such population or species.

The Committee recognizes that the management policies and legal authorities of the National Park System and the National Wildlife Refuge System may require different interpretations and application of the "healthy population" concept consistent with the management objectives of each system. Accordingly, the Committee recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and the manipulation of the components of the ecosystem. S. Rep. No. 96-413, *supra*, 233.

Local Rural Resident. Throughout the proposed regulations, the Fish and Wildlife Service categorizes those people who may engage in subsistence uses as "local rural residents." This term derives from the term "local residents" in Title III of the Alaska Lands Act and the term "rural Alaska residents" in the definition of "subsistence uses" in Title VIII. Title III authorizes the opportunity for continued subsistence uses by *local residents*. Alaska Lands Act, section 302 and 303. The definition of "subsistence uses" refers to "rural Alaska residents" Alaska Lands Act, Section 803. The relationship between this language in Title III and Title VIII was described as follows in the Congressional Record:

Since the definition of "subsistence uses" in § 803 limit such uses to "rural Alaska residents," a reading of Title VIII and Title III * * * together make it clear that the policy throughout is that only local rural residents are by statute provided the opportunity to engage in subsistence uses in areas of the * * * National Wildlife Refuge System. 126 Cong. Rec. S15129 (daily ed. Dec. 1, 1980).

Subsistence Uses. The proposed definition of "subsistence uses" tracks the language of section 803 of the Alaska Lands Act with one modification: as explained below, today's proposed definition offers some guidance on the meaning of the term "customary trade," which the statute leaves undefined.

The term "subsistence uses" means the customary and traditional uses by rural Alaska residents of fish, wildlife, and other wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles from the nonedible byproducts of fish and

wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. This proposed definition uses several terms which require further explanation.

To begin with, the definition uses the phrase "customary and traditional" to modify the term "uses" in order to emphasize that Native and non-Native subsistence uses "have played a long established and important role in the economy and culture of the community and * * * [that] such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation." S. Rep. No. 96-413, *supra*, 269; H. Rep. No. 96-97, 96th Congress, 1st Session 280 (1979).

Next, the definition limits subsistence uses to those "by rural Alaska residents." Clearly, this limitation excludes residents of Ketchikan, Juneau, Anchorage, and Fairbanks from engaging in authorized "subsistence uses." See, S. Rep. No. 96-413, *supra*, 233. Residents of "rural" Alaska—including communities such as Dillingham, Bethel, Nome, Kotzebue, Barrow, and other villages throughout the State (as long as such communities remain rural) may engage in "subsistence uses." It is important to emphasize, however, that in refuge areas, only *local* "rural residents" are accorded the subsistence priority. Thus, while the statutory definition of "subsistence uses" focuses more broadly on "rural Alaska residents" wherever they may live, the legislative history of Title III and VIII clearly shows that it is only for that category of rural resident who is also *local* to the vicinity of a particular wildlife refuge, that the subsistence priority is intended to apply. See 126 Cong. Rec. S15129 (daily ed., Dec. 1, 1980).

The term "family" is defined to include any person living within a local rural resident's household on a permanent basis as well as those persons living outside the household who are related by blood, marriage, or adoption (legal or equitable). The definition of "family" recognizes extended family patterns common in the subsistence culture of Alaska.

The definition of "subsistence uses" includes the making and selling of handicraft articles from the nonedible byproducts only of fish and wildlife resources taken for personal or family consumption. Accordingly, the definition covers such commercial activities only if the edible portions of the resource have been used for personal or family consumption. The "subsistence uses" definition also includes "barter" for

personal or family consumption in recognition that a genuine subsistence lifestyle includes certain foodstuffs and other items which may be available through a non-cash exchange. Thus, barter of subsistence resources of a limited and noncommercial nature falls within the meaning of "subsistence uses."

Finally, the definition of "customary trade" proposed today recognizes that a subsistence lifestyle may also include limited involvement in the cash economy through the exchange of furs. Trapping of furbearers is an integral and longstanding part of the subsistence lifestyle in many regions in Alaska. While some of the furs are utilized for personal or family use, it is recognized that a portion of the furs ultimately become items for sale on the commercial market. The cash remuneration, in turn, helps to provide the basic tools and supplies associated with trapping and the subsistence lifestyle of which trapping is a part. For example, local rural residents may engage in trapping to obtain the cash required for necessary store-bought supplies such as gasoline and ammunition. The allowance of cash interchange related to trapping is intended to provide continuity to the traditional and customary harvest of furbearers by those who engage in subsistence uses within refuge areas.

It should be recognized, however, that the definition of "customary trade" was intended by Congress to be narrow:

The Committee does not intend that "customary trade" be construed to permit the establishment of significant commercial enterprises under the guise of "subsistence uses." The Committee expects the Secretary and the State to closely monitor the "customary trade" component of the definition and promulgate regulations consistent with the intent of the subsistence title. S. Rep. No. 96-413, *supra*, 234.

Accordingly, this provision is not intended to allow trapping within refuge areas to be or become a solely or predominantly commercial enterprise beyond its traditional role as part of the subsistence regulations.

Today's proposed definition of "customary trade" is the same as the definition proposed by the Fish and Wildlife Service in the regulations for the Alaska National Wildlife Monuments [44 FR 37,786 (June 29, 1979)]. Most commenters on the definition supported it since, as one commenter wrote, "Nowhere in the Alaska bush today does anyone live without some items purchased from the 'outside,' and trapping is often the only way to earn the necessary cash." The Alaska Federation of Natives (FAN)

suggested in its comments on the proposed monument regulations that the definition be expanded to include, in addition to the exchange of furs for cash, the exchange of other fish, wildlife, and plant resources for cash as may be specifically permitted for particular park areas by Subpart C regulations. AFN did not, however, propose any specific additions to the customary trade definition for particular refuge areas. Today's proposed interim regulations do not adopt AFN's earlier suggested expansion. Information currently available to the Department reveals no basis or need for such expansion, and the Alaska Lands Act does not invite new commercial enterprises under the guise of "subsistence uses." In fact, it should be emphasized that customary trade may only derive from "customary and traditional" uses of resources under the definition of "subsistence uses." If new information is developed which shows the definition of "customary trade" should be expanded, the Service will address the need through special regulations for the refuge in question.

Section 36.12 In furtherance of Section 811 of the Alaska Lands Act, this section would provide local rural residents engaged in subsistence uses reasonable access to the subsistence resources on which they depend. This proposed section liberalizes the provisions of subpart C on snowmobiles, motorboats, and certain off-road vehicles in the case of local rural residents who are engaged in subsistence hunting, fishing, and gathering activities within the refuge areas. All routes and areas are open to subsistence use of these vehicles except as specifically restricted or closed. The Refuge Manager will implement such closures or restrictions on the basis of criteria which are more limited than the criteria for closure to general recreation use. Basically, in order to impose a restriction, the Refuge Manager must determine that the use in question is causing or may cause an adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species, and other management considerations necessary to ensure that the use of snowmobiles, motorboats, as other purposes or values for which the refuge area was established. The Refuge Manager will arrange notice and public participation concerning closure proposals in order to involve those affected to the fullest extent possible in the decisionmaking.

It should be noted that the types of access vehicles covered by proposed § 36.12 include "other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses." The limitations of this phrase, if any, will be addressed as appropriate in future rulemaking efforts.

Under the proposed regulations, any person operating motorboats, snowmobiles, and other means of surface transportation must comply with applicable State and Federal laws governing such operation and must avoid causing waste or damage to fish, wildlife, terrain, or other values of the refuge area. In addition, consistent with State law, the vehicle operator may not use a motorized vehicle so as to herd, harass, haze, or drive wildlife for hunting or any other purpose.

At all times when not engaged in subsistence uses, local rural residents would be able to use snowmobiles, motorboats, and other means of surface transportation in accordance with the appropriate subpart C regulations. For example, local rural residents engaged in recreational uses of snowmobiles, motorboats, and other means of surface transportation would comply with the provisions of §§ 36.21 and 36.22 and local rural residents seeking otherwise closed access to inholdings or temporary access would comply with the provisions of §§ 36.23 and 36.24 respectively.

Section 36.13 This section would authorize local rural residents to engage in fishing in Alaska National Wildlife Refuges in compliance with applicable State and Federal law. Section 36.16, explained below, would govern closures to fishing for subsistence purposes.

Section 36.14 This section would authorize local rural residents to hunt or trap wildlife for subsistence uses in compliance with applicable State and Federal law. Closure of areas to subsistence hunting and trapping is treated in § 36.16.

Section 36.15—This section addresses subsistence uses of timber and plant material. Section 36.15(a) authorizes the noncommercial cutting of live standing timber and the noncommercial gathering of fruits, berries, mushrooms, and other plant material by local rural residents for subsistence uses. Permits would not be required for such activities or for gathering dead or downed timber for firewood for personal, not commercial, use.

Section 36.15(b) sets forth the proposed standards and procedures for closing a refuge area to the subsistence uses of a particular plant population. Although not expressly required by the Alaska Lands Act, the Fish and Wildlife

Service proposes to apply similar closure provisions for subsistence uses of plants as the Act requires for subsistence uses of fish and wildlife. As discussed below in the latter context, the closure standards are narrow, and the closure procedures involve significant public participation, in order to protect the affected local rural residents who depend on the resources.

Section 36.16 Pursuant to Section 816 of the Alaska Lands Act and this proposed section, the Refuge Manager has the authority to close or restrict any part or all of an Alaska National Wildlife Refuge to subsistence uses of a particular fish or wildlife population only temporarily and only if necessary "for reasons of public safety, administration, or to assure the continued viability of such population." To implement Congress' intent, proposed § 36.16 provides protection standards, time limitations, and notice requirements for closures to subsistence taking of fish and wildlife.

With respect to the standards for closure, the Act lists only three: public safety, administration, and for assurance of the continued viability of a fish or wildlife population. No closure for purposes of administration, moreover, may be made prior to notice and hearing in the vicinity of the closure. The public safety standard clearly allows the Refuge Manager to act in situations which threaten public health and welfare. For example, the Refuge Manager may prohibit subsistence hunting and trapping for reasons of public safety in specified areas surrounding a public campground, roadway, or hiking trail. The "fish or wildlife viability" standard allows the Refuge Manager to act for purposes of maintaining resource populations upon which local rural residents rely at levels adequately above the threatened level. As Congress stated, "it is not the intent that actual depletion of a population or an emergency exist before a closure under this section may be justified." S. Rep. No. 96-413, *supra*, 278; H. Rep. No. 96-97, *supra*, 289.

Moreover, as stated in Section 815 of the Alaska Lands Act and § 36.11(d) of these proposed regulations, and explained previously, the subsistence provisions are not to be construed as permitting a level of subsistence use of fish and wildlife within Alaska National Wildlife Refuges determined to be inconsistent with the conservation of healthy populations of fish and wildlife. The "administration" standard is potentially the broadest of the three closure standards, though "recognition of the importance of subsistence

activities to most [local] rural residents requires that this authority be utilized narrowly and with consistent restraint." S. Rep. No. 96-413, *supra*, 278; H. Rep. No. 96-97, *supra*, 289. Guided by this intent, the Refuge Manager can invoke the administration standard to protect the purposes and values of the refuge areas and to otherwise manage the refuge prudently. The limitation of Section 815 of the Act and § 36.11(d) of the proposed regulations would also be relevant to this closure standard.

Closures shall last only so long as reasonably necessary to achieve the purposes of the closure. In the case of closing an area around a hiking trail for reasons of public safety, for example, the closure "should remain in effect only so long as reasonably necessary to provide for the public safety during normal periods of consistent public use, and only apply to the minimum portion of the public lands reasonably necessary to achieve this purpose." S. Rep. No. 96-413, *supra*, 277-78; H. Rep. No. 96-97, *supra*, 289. Thus, closures may be seasonal in nature, for example, if warranted by the situation.

In the normal case, a closure would be preceded by consultation with the State and adequate notice and informal public hearing in the vicinity of the closure. In an emergency situation, the Refuge Manager would immediately close the area for a period not to exceed sixty days. As proposed, the Refuge Manager may extend an emergency closure only if he establishes, after notice and formal public hearing in the vicinity, that the extension is justified under the applicable closure standards.

Finally, § 36.16(c) proposes thorough notice procedures designed to inform as many local rural residents as possible about any closures which may affect them.

Subpart C—Use of Motorized Vehicles and Access

Proposed § 36.21–36.24 of these regulations implement sections 1110 and 1111 of the Alaska Lands Act concerning access by the public across Alaska National Wildlife Refuges for nonsubsistence purposes. These proposed regulations generally relax restrictions on access that are applicable to National Wildlife Refuge units outside of Alaska, consistent with the requirements of the Alaska Lands Act. These sections are designed to and are presented in an order which will funnel the vast majority of access needs away from a system of individual access permits. Section 36.21 initially opens all refuges to access by snowmobile, aircraft, and motorboat for any purpose. (Additional access for subsistence uses

is set forth in § 36.12). Section 36.22 provides a mechanism for establishing common corridors and areas for off-road vehicle use. In the less common situation where §§ 36.11 and 36.22 do not accommodate a refuge "inholder's" need for access, § 36.23 provides for individual permits that insure adequate and feasible access while minimizing damage to refuge resources. Finally, where §§ 36.21–36.23 do not otherwise provide temporary access, § 36.24 creates another means for obtaining desired access.

Section 36.21 This section initially opens all Alaska National Wildlife Refuges to access by snowmobile (on areas with adequate snow cover or frozen areas), motorboat, and aircraft without the need for individual access permits. Access by these methods of transportation is authorized for any purpose (e.g., travel between villages, to a homesite, for mineral development on valid existing claims or patented lands, for recreation, or for traditional activities), except as is specifically provided for subsistence uses in § 36.12.

Section 36.21 implements section 1110(a) of the Alaska Lands Act, which permits access for "traditional activities and for travel to and from villages and homesites." This approach extends the statutory concept to access for all purposes, except for subsistence uses which is addressed in independent statutory and regulatory sections. Consistent with section 1110(a) of the Act, section 13.42 authorizes the closure of refuges to snowmobile, motorboat, and aircraft access only after notice and hearing. Even after closure, emergency landing of aircraft (e.g., because of severe weather or vehicle failure) will not be prosecuted. This general authorization of access by snowmobile, motorboat, and aircraft should greatly reduce the need to obtain specific access permits under §§ 36.23 and 36.24, since in most cases reasonable access will be granted under § 36.21.

This section also sets out procedures for removal of aircraft downed after December 2, 1980, on Alaska National Wildlife Refuges. The regulations would require that downed aircraft must be removed pursuant to the terms of a special use permit unless the Refuge Manager determines, on a case-by-case basis, that the removal of the aircraft would constitute an unacceptable risk to human life, would result in extensive resource damage, or would otherwise be impracticable or impossible. In evaluating this final criterion, the Service would not require removal of a downed aircraft in any situation when the removal of the aircraft would cause

such a severe and significant hardship to the owner as to be economically prohibitive.

Section 36.22 This section provides a procedure for supplementary access needs without requiring individual access permits. While all Alaska refuges are initially closed to off-road vehicle use because of the heightened potential for habitat degradation arising from this uncontrolled use, § 36.22 authorizes the Refuge Manager to designate off-road vehicle routes and areas. The Service anticipates that this procedure will be used most often to designate common corridors for off-road vehicle travel between villages, and similar situations when a single route can satisfy the access needs of a group of individuals. Section 36.22 implements the directive of section 1110(b) of the Alaska Lands Act to provide "adequate and feasible" access and does so through a methodology that will reduce the need for individual access permits. Furthermore, as in any situation involving rule-making, persons may petition the Refuge Manager under the procedures of 43 CFR 14.6 to have a route or area designated as open for off-road vehicle use, should the Service fail to identify or propose that area as open.

Section 36.23 If § 36.21 and 36.22 have not already provided "adequate and feasible" access for persons with valid property or occupancy interests which are surrounded or effectively surrounded by refuge lands, proposed § 36.23 creates a procedure for obtaining such access as required by section 1110(b) of the Alaska Lands Act. As proposed, "adequate and feasible access" is defined in § 36.2 in terms of an economically practicable method and route of access (but not necessarily the most economically feasible alternative), consistent with the legislative history appearing in S. Rep. No. 96-413, 69th Cong., 2nd., sess., 248-49 (Nov. 14, 1979). Section 36.23 would apply only when an area has been closed to snowmobile, aircraft, or motorboat use, or when no designated off-road vehicle route or areas exists. In such cases, the landowner would apply to the appropriate Refuge Manager for an access permit, stating the desired method and route of access, and whether this desired form of access has been traditionally used by the landowner in the past. (Additional information would be required for mineral exploration, assessment or development activities, as discussed below).

Under this section as proposed, the Refuge Manager is required to issue an access permit for the routes and

methods desired by the applicant unless he determines that such access would cause significant damage to refuge resources or would jeopardize public health and safety (including concerns for subsistence uses and adjacent landowners), and in either case, that adequate and feasible access otherwise exists (e.g., a different route exists which would minimize refuge damage, snowmobile or aircraft access already provides "adequate and feasible access", etc.).

If the Refuge Manager makes one of these determinations, this section requires that he specify in a permit such other alternate methods and routes of access as will provide adequate and feasible access to the applicant, while minimizing damage to refuge resources. Of course, the access routes and methods finally authorized may be used by guests and invitees of the permittee.

Thus, proposed § 36.23 implements section 1110(b) of the Alaska Lands Act by insuring adequate and feasible access to refuge "inholders" through an individual permit process, which would be utilized only when the non-permit provisions of §§ 36.21 and 36.22 do not provide reasonable access.

Subsection 36.23(c) would provide special information requirements for access inside refuge areas for mineral exploration or development. These special information requirements are not applicable when the inholder does not require access across refuge lands (e.g., aircraft landings on nonfederally owned lands) or when access is to be accomplished through the use of aircraft, motorboats or snowmobiles which has already been provided for pursuant to §§ 36.21 and 36.22 of these regulations. Thus, these proposed rules would establish no requirement to provide information when access across refuge areas for mineral exploration or development is available by snowmobile, aircraft, motorboat or designated off-road vehicle route under §§ 36.21 and 36.22.

This approach would limit the special mining information requirements to situations where the potential for damage to refuge resources is the greatest (e.g., bulldozer and production equipment access). In situations where proposed § 36.23(c) is applicable, prospective mineral developers would be required to apply for an access permit and include the information called for by this section. This information, which is the same as that previously required in other Fish and Wildlife Service, regulations applicable to Alaska areas, has not proven to be burdensome in the past.

Mining claimants are also reminded that maintenance of a claim requires compliance with the annual filing and other requirements of section 314 of the Federal Land Policy and Management Act, 43 U.S.C. 1744. Furthermore, mining claimants within Alaska National Wildlife Refuges are reminded that section 304 of the Alaska Lands Act closed all refuges to new mining locations and entries. The Fish and Wildlife Service reserves the rights to refuse access when it is found that a valid mining claim does not exist, pursuant to sections 304 and 1110(b) of the Alaska Lands Act.

Section 36.24 This proposed section implements section 1111 of the Alaska Lands Act by establishing a permit mechanism for obtaining temporary access across an Alaska National Wildlife Refuge for purposes of survey, geophysical, exploratory, or other temporary uses of non-federal lands located outside refuge boundaries. Section 36.24 requires an access permit only where §§ 36.21 and 36.22 do not provide the desired access, and where § 36.23 is not applicable (e.g., if a refuge "inholder" or a person effectively surrounded by Federal lands requires temporary access across a refuge, section 1110(b) of the Alaska Lands Act and § 36.23 of these regulations grant greater access privileges). Where temporary access is otherwise unavailable, the applicant would apply to the Refuge Manager for an access permit. The permit applicant must indicate the proposed route and method of access, the temporary use the applicant proposes to undertake, and, in the case of mineral survey or exploration, the same information on the planned mineral operations required in § 36.23. The Refuge Manager would be required to grant the desired temporary access if no permanent harm to refuge resources will result. The Refuge Manager is directed by this section to include such stipulations and conditions (e.g., alternate methods and routes of access) on temporary access as will ensure consistency with refuge purposes and no permanent harm to refuge resources.

Subpart D—Other Refuge Uses

Section 36.31 This section authorizes public recreational activities such as boating, camping, hiking, and picnicking, within an Alaska National Wildlife Refuge as long as these activities are conducted in a manner compatible with the purposes of the particular refuge. After reviewing the various types of such activities which are ongoing within the Alaska National Wildlife Refuges, the Service presently believes that all

such activities are practicable and compatible with the purposes for which the refuges were established, designated, or expanded. Recreational activities would be prohibited or restricted only in compliance with the public participation provisions of § 36.42.

Section 36.32 This section authorizes the taking of fish and wildlife on Alaska National Wildlife Refuges in accordance with applicable State and Federal law. (Additional provisions on subsistence hunting, trapping, and fishing are provided in §§ 36.13 and 36.14). As proposed, a permit for these activities need not be obtained from the Refuge Manager, except that the presently existing requirement to obtain a permit before trapping on the Kenai, Izaembek and Kodiak Refuges and the Aleutian Islands unit of Alaska Maritime Refuge is retained. The taking of fish and wildlife may be prohibited or restricted only in conjunction with notice and hearing pursuant to the requirements of § 36.42.

Section 36.33 This section implements section 1303 of the Alaska Lands Act by providing procedures and guidance for those occupying and using existing cabins and those desiring to construct new cabins within Alaska National Wildlife Refuges. It addresses construction of new cabins, use of existing cabins by occupants who may not have a legal interest in them, and use of existing cabins by those with valid existing rights in cabins as of December 2, 1980.

Under the Alaska Lands Act, new cabins are authorized in Alaska National Wildlife Refuges only pursuant to a non-transferable, five-year special use permit issued by the Refuge Manager. Section 36.33, tracking the language of the statute, authorizes issuance of such a permit only upon a determination that (1) the proposed use, construction, and maintenance of a cabin is compatible with the purposes for which the refuge was established and (2) that the use of the cabin is either directly related to the administration of the refuge or is necessary to provide for a continuation of an ongoing activity or use otherwise allowed within the refuge where the permit applicant has no reasonable alternative site for constructing a cabin outside the refuge. As prescribed by the Act, no special use permit may be issued to authorize the construction of a cabin for private recreational use.

Subsection (b)(1) addresses the use of existing cabins by occupants who may not have a legal right to the cabin. The traditional and customary use of these existing cabins within an Alaska

National Wildlife Refuge is authorized in accordance with a five-year, special use permit issued upon a determination by the Refuge Manager that the traditional and customary uses are compatible with the purposes of the refuge. As with new cabins, special use permits may not be issued to authorize the use of an existing cabin for private recreational uses.

Subsection (b)(2) addresses use of existing cabins by occupants who have a valid permit or lease in effect on December 2, 1980 for those structures. Such an occupant is entitled, as a matter of right, to continuation of such permit or lease unless the Refuge Manager determines, following notice and an opportunity for response, that such a continuation would directly threaten or significantly impair the purposes for which the refuge was established.

All permits authorized under this section must be renewed every five years until the death of the last immediate member of the claimant residing in the cabin. Permits need not be renewed, however, if the Refuge Manager determines, after a formal adjudicatory hearing, that the use of the cabin under the permit is causing or may cause significant detriment to the principal purposes for which the refuge was established.

Section 36.34 This section authorizes, in accordance with State and Federal law, the possession, use and transporting of firearms on Alaska National Wildlife Refuges for purposes of hunting or personal protection. Such uses may be prohibited or restricted only in accordance with the public participation provision of § 36.42.

Section 36.35 The general National Wildlife Refuge System regulations authorize the leaving of unattended personal property on a refuge for only short periods of time. Recognizing unique Alaska circumstances, such as the need to allow for trapping caches, this section generally extends the period to 12 months, except that no time limit applies to leaving personal property in a cache or cabin. The Service would retain the authority to impound unattended property that interfaces with the safe and orderly management of the refuge in case of damage to refuge resources.

Section 36.36 As proposed, this section relaxes the general trespass provisions of the general National Wildlife Refuge System regulations (50 CFR 26.11) for household pets and sled or pack dogs under the control of their owners or handlers.

Section 36.37 This proposed section applies to all discretionary determinations by the Fish and Wildlife

Service concerning whether to lease or otherwise permit the use or occupancy of refuge lands where authorized by law. Alaska Lands Act, Section 810. For example, the Refuge Manager must comply with the procedures of this section in determining whether to open routes or areas to offroad vehicle use under the provisions of § 36.22 of these regulations. In any such determination, § 36.37 requires the Refuge Manager to evaluate the effect on subsistence uses and needs, the availability of other lands to achieve the desired purposes, and other alternatives which would reduce or eliminate the use or occupancy of refuge lands needed for subsistence purposes. Prior to any lease, permit, use, or occupancy which would significantly restrict subsistence uses, under Section 810 of the Act, the Fish and Wildlife Service official must give notice to the appropriate State agency and local committees and regional councils; give notice to local residents of the affected area and hold an informal public hearing in the area; determine that such a significant restriction of subsistence uses is necessary and consistent with sound management principles for refuge areas; that the proposed actions will involve the minimal amount of refuge lands necessary to accomplish the desired purpose; and that reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources. If the Fish and Wildlife Service is required to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act for the proposed use or occupancy, § 36.37 states that the required notice, hearing and findings would be provided in the EIS process.

Section 810 of the Alaska Lands Act makes clear that the above provisions are not to be construed as prohibiting or impairing the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act. It should be noted that the requirements of section 810 of the Alaska Lands Act, and § 36.37, are procedural in nature. In other words, as explained in the section's legislative history, "until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S. Rep. No. 96-413, *Supra*, 234.

Subpart E—Permits and Public Participation

Section 36.41 This section would consolidate procedures regarding the issuance and denial of permits required by the general National Wildlife Refuge System regulations and these regulations. The procedures specify to whom an application for a permit must be submitted, and direct the Refuge Manager to promptly acknowledge in writing the receipt of all requests for permits, access routes, or other requirements of this section. This section also proposes an appeal procedure for applicants aggrieved by a decision of the Refuge Manager.

The appeals systems was established with a view toward minimizing the requirements imposed upon the applicant during the appeal process, yet establishing a procedure that would fairly meet the concerns of the applicant. Any person whose permit application has been denied by the Refuge Manager has a right to appeal that denial to the Regional Director. Whether the appeal will include an opportunity for an oral hearing must be determined by the Regional Director. The Regional Director *shall* provide an oral hearing if it is determined that the applicant would present new relevant information at such a hearing. In addition, the Regional Director *may* provide a hearing opportunity if he determines, as a matter of discretion, that such a hearing would be useful.

Section 36.42 As proposed, this section authorizes the Refuge Manager to close a refuge area or restrict an activity thereon either on an emergency or permanent basis. Emergency closures or restrictions may not exceed 60 days unless extended, after notice and hearing, for as long a period of time as necessary to respond to the circumstances or conditions originally justifying an emergency closure. Under this section, permanent closures or restrictions are effective for as long as necessary to achieve their intended purposes.

All closures or restrictions must be accompanied by extensive public notice. Under this section the Service would: publish such notices in at least one newspaper of general circulation in the State and in at least one local newspaper if appropriate, post the notice at community post offices within the vicinity affected, make the notice available for broadcast on local radio studios, and designate the affected area on a map at the office of the Refuge Manager or other places convenient to the public. Notice of the closures or

restrictions also could be carried out by the posting of appropriate signs.

In addition to these extensive notification procedures, section 36.42 requires public hearings in the affected vicinity in certain cases. For instance, as proposed, emergency or permanent closures or restrictions relating to the use of aircraft, snowmobile or motorboats requires *prior* notice and hearing. Furthermore, emergency closures or restrictions relating to the taking of fish and wildlife would be accompanied by simultaneous publication of a public notice with a subsequent public hearing, while a permanent closure involving the taking of fish and wildlife would require prior notice and public hearing.

Drafting Information

The primary authors of these proposed rules are William C. Reffalt and Ronald Fowler, Division of Refuge Management, U.S. Fish and Wildlife Service, Washington, D.C.

Impact Analysis

The Department of the Interior has made a determination that these proposed regulations are not significant, as that term is defined under Executive Order No. 12044 and 43 CFR Part 14, nor do they require the preparation of a regulatory analysis pursuant to the provisions of those authorities.

As required by the Regulatory Flexibility Act (Pub. L. 96-354), the Fish and Wildlife Service has made an initial determination that these interim regulations will not have a significant economic effect on a substantial number of small business, small organizations, or small governmental jurisdictions. However, public comment is invited on whether the consequences or the rule will require this analysis.

A 28-volume environmental impact statement was prepared in 1974 concerning the establishment, management, and public use of Alaska National Interest Lands conservation system units in Alaska, including the areas now designated as units of the National Wildlife Refuge System in the Alaska Lands Act. The 1974 EIS was supplemented in November, 1978 with an analysis of the impacts of alternative Executive Branch actions designed to conserve the Alaska National Interest Lands.

In addition to those environmental documents which received extensive public comment, and the numerous studies included within their bibliographies upon which they were based, a wealth of other materials and analyses have been generated on the management of the Alaska National

Interest Lands as a result of congressional action on the so called "d-2" legislation. As of the date of this emergency rulemaking, four separate committee reports, a background committee report, and extensive legislative history printed in the *Congressional Record* have been published by the House of Representatives. In the Senate, two extensive committee reports, a two-volume report concerning the results of a committee workshop in Alaska and an extensive legislative history printed in the *Congressional Record* have been published.

All of these reports and histories concern the establishment, management, and public use of the new conservation system units in Alaska. This is in addition to more than 45 days of formal congressional committee hearings held throughout the United States on this matter. The joint Federal-State Land Use Planning Commission for Alaska also conducted more than a dozen public hearings throughout the country in its investigations concerning the proposed public use and classifications of the proposed conservation system units.

Public Participation

These proposed regulations would give interim management guidance on subsistence, access, cabins, and public recreational use of the refuge areas in Alaska. Public comment on these proposed rules is actively solicited and desired during the 45-day public review period. Following the consideration of public comment and appropriate changes, it is anticipated that final regulations will be issued in March of 1981 to give the public interim management guidance on the permissible uses of Alaska National Wildlife Refuges. This expedited schedule is so that regulations will be in effect in times for the peak public use season.

With the substantial prior public comment and the emergency need for public guidance in advance of the peak public use seasons, the Fish and Wildlife Service believes that a 45-day public comment period is the maximum that can be afforded on this limited agenda rulemaking. Any longer public comment period would place the effective data of these regulations beyond the spring "break up" of deep winter conditions, and would create public confusion on allowable uses of refuge areas during peak public use (e.g., recreation, access, subsistence, mining) seasons. Thus, the Fish and Wildlife Service believes that a 45-day public comment period (which is longer than required under 5 U.S.C. 553) strikes an

appropriate balance between desires for advance public review of proposed regulations and the needs for interim management and public guidance.

In addition to comments on these proposed regulations the Fish and Wildlife Service is also inviting comment on any other issues that should be considered in any future rulemaking.

Bob Herbst,

Assistant Secretary for Fish and Wildlife and Parks.

January 14, 1981.

In consideration of the foregoing, Title 50 of the Code of Federal Regulations is proposed to be amended by establishment of a new Part 36 in Chapter I, Subchapter C, as follows:

PART 36—ALASKA NATIONAL WILDLIFE REFUGES

Subpart A—Introduction and General Provisions

Sec.

- 36.1 Applicability and scope.
- 36.2 Definitions.

Subpart B—Subsistence Uses

- 36.11 Purpose and policy.
- 36.12 Use of snowmobiles, motorboats, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses.
- 36.13 Subsistence fishing.
- 36.14 Subsistence hunting and trapping.
- 36.15 Subsistence uses of timber and plant material.
- 36.16 Closure to subsistence uses of fish and wildlife.

Subpart C—Use of Motorized Vehicles and Access

- 36.21 Use of snowmobiles, motorboats, and aircraft.
- 36.22 Use of off-road vehicles.
- 36.23 Access to inholdings.
- 36.24 Temporary access.

Subpart D—Other Refuge Uses

- 36.31 Recreational activities.
- 36.32 Taking of fish and wildlife.
- 36.33 Cabins and other structures.
- 36.34 Firearms.
- 36.35 Unattended property.
- 36.36 Sled dogs and household pets.
- 36.37 Subsistence and land use decisions.

Subpart E—Permits and Public Participation

- 36.41 Permits.
- 36.42 Public participation.

Table I—Summary Listing of the National Wildlife Refuges in Alaska as Established by the Alaska Lands Act

Authority: The Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487 (December 2, 1980); the National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. 668dd *et seq.*, Fish and Wildlife Act of 1956, 16 U.S.C. 742(a) *et seq.*; Refuge Recreation Act, 16 U.S.C. 460k *et seq.*

Subpart A—Introduction and General Provisions

§ 36.1 Applicability and scope.

(a) The regulations contained in this part are prescribed for the proper use and management of all Alaska National Wildlife Refuges and supplement the general National Wildlife Refuge System regulations found in Title 50, Code of Federal Regulations, Chapter I, Subchapter C. The general National Wildlife Refuge System regulations are automatically applicable in their entirety to the Alaska National Wildlife Refuges except as supplemented or modified by these regulations.

(b) The regulations contained in this part are applicable only on Federally owned lands within the boundaries of any Alaska National Wildlife Refuge. For purpose of this part "Federally owned lands" means land interests held or retained by the United States, but does not include those land interests: (1) tentatively approved, legislatively conveyed, or patented to the State of Alaska, or (2) interim conveyed or patented to a Native Corporation or person.

§ 36.2 Definitions.

The following definitions shall apply to the regulations contained in this part.

(a) "Adequate and feasible access" means a method and route of access which is economically practicable for achieving the reasonable use or development desired by the applicant of the applicant's nonfederal land or occupancy interest, but does not necessarily mean the most economically feasible alternative.

(b) The term "aircraft" means a machine or device that is used or intended to be used to carry persons or objects in flight through the air, including, but not limited to, airplanes, helicopters and gliders.

(c) "Alaska National Wildlife Refuges" means all lands, waters and interests therein administered by the United States Fish and Wildlife Service within the following National Wildlife Refuges in Alaska: Alaska Maritime, Arctic, Alaska Peninsula, Becharof, Innoko, Kanuti, Kenai, Kodiak, Koyukuk, Nowitna, Selawik, Tetlin, Izembek, Togiak, Yukon Delta and Yukon Flats.

(d) "Downed aircraft" means an aircraft that as a result of mechanical failure or accident cannot take off.

(e) "Fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international

agreement), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or dead body or part thereof.

(f) "Off-road vehicle" means any motor vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, wetland, or other natural terrain, except snowmobiles as defined in this section.

(g) "Person" means any individual, firm, corporation, society, association or partnership.

(h) "Public lands" means lands situated in Alaska which are federally owned lands, except:

(1) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act (72 Stat. 339) and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(2) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act (85 Stat. 688) which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(3) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(i) "Refuge Manager" means any Fish and Wildlife Service official in charge of an Alaska National Wildlife Refuge, the Alaska Regional Director of the Fish and Wildlife Service, or an authorized representative of either.

(j) "Snowmobile" means a self-propelled vehicle intended for off-road travel primarily on snow having a curb weight of not more than 1,000 pounds (450 kg), driven by track or tracks in contact with the snow and steered by a ski or skis in contact with the snow.

(k) "Subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and, for customary trade. For purposes of this paragraph, the term—

(1) "Family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "Barter" means the exchange of fish or wildlife or their parts taken for subsistence uses—

(i) For other fish or game or their parts; or

(ii) For other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature; and

(3) "Customary trade" shall be limited to the exchange of furs for cash.

(l) "Take" or "taking", as used with respect to fish and wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm or attempt to engage in any such conduct.

Subpart B—Subsistence Uses

§ 36.11 Purpose and policy.

(a) Consistent with the management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each Alaska National Wildlife Refuge was established, designated, or expanded, the purpose of this subpart is to provide the opportunity for local rural residents engaged in a subsistence way of life to do so pursuant to applicable State and Federal law.

(b) Consistent with sound management principles and the conservation of healthy populations of fish and wildlife, the utilization of Alaska National Wildlife Refuge areas is to cause the least adverse impact possible on local rural residents who depend upon subsistence uses of the resources on the public lands in Alaska.

(c) Nonwasteful subsistence uses of fish, wildlife and other renewable resources by local rural residents shall be the priority consumptive uses of such resources over any other consumptive uses permitted within Alaska National Wildlife Refuge areas. Such nonwasteful subsistence uses shall be in accordance with applicable State and Federal law.

(d) Nothing in this subpart shall be construed as permitting a level of subsistence uses of fish and wildlife within Alaska National Wildlife Refuges which is inconsistent with the conservation of healthy populations of fish and wildlife.

§ 36.12 Use of snowmobiles, motorboats and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses.

(a) Notwithstanding any other provision of Subchapter C of Title 50, Code of Federal Regulations, the use of snowmobiles, motorboats and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses is permitted within Alaska National Wildlife Refuges except at those times and in those areas restricted or closed by the Refuge Manager.

(b) The Refuge Manager may restrict or close a route or area to the use of snowmobiles, motorboats, or other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses if the Refuge Manager determines that such use is causing or may cause adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, protection of endangered or threatened species, or other purposes and values for which the refuge was established.

(c) No restrictions or closures shall be imposed without notice and a public hearing in the affected vicinity. In the case of emergency situations, restrictions or closures shall be for a period not to exceed sixty (60) days and shall not be extended unless the Refuge Manager establishes, after notice and public hearing in the affected vicinity, that such extension is justified according to the factors set forth in paragraph (b) of this section. Notice of the proposed or emergency restrictions or closures and the reasons therefor shall be published in at least one newspaper of general circulation within the State and in at least one local newspaper if appropriate, and information about such proposed or emergency actions shall also be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All restrictions and closures shall be designated on a map which shall be available for public inspection at the office of the Refuge Manager of the affected refuge and the post office or postal authority of every affected community within or near the refuge area, or by the posting of signs in the vicinity of the restrictions or closures, or both.

(d) Snowmobiles, motorboats and other mean of surface transportation traditionally employed by local rural residents engaged in subsistence uses shall be operated (1) in compliance with applicable State and Federal law, (2) in such a manner as to prevent waste or damage to the refuge or any parts or values thereof, and (3) in such a manner as to prevent the herding, harassment, hazing or driving of wildlife for hunting or other purposes.

(e) At all times when not engaged in subsistence uses, local rural residents may use snowmobiles, motorboats and other means of surface transportation in accordance with Subpart C of this part.

§ 36.13 Subsistence fishing.

Fish may be taken by local rural residents for subsistence uses in

compliance with applicable State and Federal law. To the extent consistent with the provisions of this part and other Federal law, applicable State laws and regulations governing the taking of fish which are now or will hereafter be in effect are hereby incorporated by reference as a part of these regulations.

§ 36.14 Subsistence hunting and trapping.

Local rural residents may hunt and trap wildlife for subsistence uses in compliance with applicable State and Federal law. To the extent consistent with the provisions of this part and other Federal law, applicable State laws and regulations governing the taking of wildlife which are now or will hereafter be in effect are hereby incorporated by reference as a part of these regulations.

§ 36.15 Subsistence uses of timber and plant material.

(a) Notwithstanding any other provisions of this part or Subchapter C, the noncommercial cutting of live standing timber and the noncommercial gathering of fruits, berries, mushrooms and other plant material by local rural residents for subsistence uses shall be permitted in compliance with applicable Federal law.

(b)(1) Notwithstanding any other provision of this part, the Refuge Manager, after notice and public hearing in the affected vicinity, may temporarily close all or any portion of an Alaska National Wildlife Refuge to subsistence uses of a particular plant population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. For purposes of this section, the term "temporary" shall mean only as long as reasonably necessary to achieve the purpose of the closure.

(2) If the Refuge Manager determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular plant population, the Refuge Manager may immediately close all or any portion of an Alaska National Wildlife Refuge to the subsistence uses of such population. Such emergency closure shall be effective when made, shall be for a period not to exceed sixty (60) days, and may not subsequently be extended unless the Refuge Manager establishes, after notice and public hearing in the affected vicinity, that such closure should be extended.

(3) Notice of administrative actions taken pursuant to this section, and the reasons justifying such actions, shall be published in at least one newspaper of general circulation within the State, and in at least one local newspaper if

appropriate, and information about such actions and reasons therefor also shall be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All closures shall be designated on a map which shall be available for public inspection at the office of the Refuge Manager of the affected refuge and the post office or postal authority of every affected community within or near the refuge, or by the posting of signs in the vicinity of the restrictions, or both.

§ 36.16 Closure to subsistence uses of fish and wildlife.

(a) Notwithstanding any other provision of this part, the Refuge Manager, after consultation with the State and adequate notice and public hearing in the affected vicinity, may temporarily close all or a portion of an Alaska National Wildlife Refuge to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. For the purposes of this section, the term "temporarily" shall mean only so long as reasonably necessary to achieve the purpose of the closure.

(b) If the Refuge Manager determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, he may immediately close all or any portion of a refuge to the subsistence uses of such population. Such emergency closure shall be effective when made, shall be for a period not to exceed sixty (60) days, and may not subsequently be extended unless the Refuge Manager establishes, after notice and public hearing in the affected vicinity, that such closure should be extended.

(c) Notice of administrative actions taken pursuant to this section and the reasons justifying such actions shall be published in at least one newspaper of general circulation within the State, and in at least one local newspaper if appropriate, and information about such actions and justifying reasons shall be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All closures shall be designated on a map which shall be available for public inspection at the office of the Refuge Manager of the affected refuge area and the post office or postal authority of every affected community within or near the refuge area, or by the posting of signs in the vicinity of the closures, or both.

Subpart C—Use of Motorized Vehicles and Access

§ 36.21 Use of snowmobiles, motorboats, and aircraft.

(a) The use of snowmobiles (during periods of adequate snowcover or frozen river conditions), motorboats and aircraft is permitted on Alaska National Wildlife Refuges, except where such use is prohibited or otherwise restricted by the Refuge Manager in accordance with the provisions of § 13.42, or as provided for in § 36.12.

(b) In imposing any prohibitions or restrictions on aircraft use, the Refuge Manager shall: (1) comply with the procedures set forth in § 36.42; (2) publish notice of prohibitions or restrictions as "Notices to Airmen" issued by the Department of Transportation; and (3) publish permanent prohibitions or restrictions as a regulatory notice in the United States Government Flight Information Service "Supplement Alaska".

(c) The operation of aircraft, at altitudes and in flight paths resulting in the herding, harassment, hazing, or driving of wildlife is prohibited.

(d) Except as provided in paragraph (f) of this section, the owners of any aircraft, downed after December 2, 1980, shall remove the aircraft and all component parts thereof in accordance with procedures established by the Refuge Manager. In establishing a removal procedure, the Refuge Manager is authorized to: (1) establish a reasonable date by which aircraft removal operations must be completed; and (2) determine times and means of access to and from the downed aircraft.

(e) The Refuge Manager may waive the requirements of § 36.21(d) when it is determined that: (1) the removal of downed aircraft would constitute an unacceptable risk to human life; or (2) the removal of a downed aircraft would result in extensive resource damage; or (3) the removal of a downed aircraft is otherwise impracticable or is impossible.

(f) Salvaging, removing, possessing or attempting to salvage, remove or possess any downed aircraft or component parts thereof is prohibited, except in accordance with a permit issued by the Refuge Manager, *provided, however*, that the owner or an authorized representative thereof may remove valuable component parts from a downed aircraft at the time of rescue without a permit.

§ 36.22 Use of off-road vehicles.

(a) The use of off-road vehicles on Alaska National Wildlife Refuges in locations other than established roads

and parking areas is prohibited, except on routes or in areas designated by the Refuge Manager or subject to a valid access permit as prescribed in §§ 36.23, 36.24 and 36.41. Such designations shall be made in accordance with procedures in this section.

(b)(1) In determining whether to designate a route or area for off-road travel, the Refuge Manager shall consider the criteria contained in Section 3 of Executive Order 11644, as amended (37 FR 2877), and such factors as other public uses, public health and safety, environmental and resource protection, research activities, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species and other management considerations necessary to ensure that off-road vehicle use is compatible with the purposes for which the refuge was established.

(2) Route or area designations shall be designated on a map which shall be available for public inspection at the office of the Refuge Manager of the affected refuge and the post office or postal authority of every affected community within or near the refuge area, or by the posting of signs in the vicinity of the designated route or area, or both.

(3) Notice of routes or areas on which off-road travel is permitted shall be in accordance with the provisions of section 36.42(d).

(4) The closure or restrictions on use of designated routes or areas to off-road vehicles use shall be in accordance with the provisions of § 36.42.

§ 36.23 Access to inholdings.

(a) *Purpose.* Where adequate and feasible access is otherwise restricted pursuant to the provisions of this part (e.g. §§ 36.22 and 36.42), it is the purpose of this section to ensure access across Alaska National Wildlife Refuges for any person who has a valid property or occupancy interest in lands or structure which are located within a refuge area or are effectively surrounded by federally owned lands. These regulations are not intended to grant an interest in or otherwise alienate Federal property, but rather to provide specific relief from other regulatory provisions that may unreasonably restrict access to non-federal property.

(b) *Application and administration.*

(1) Applications for a permit designating methods and routes of access across any Alaska National Wildlife Refuge not affirmatively provided for in this part shall be submitted to the Refuge Manager as specified under § 36.41.

(2) The access permit application shall contain the name and address of the applicant, documentation of the relevant property or occupancy interest held by the applicant, a map or physical description of the relevant property or occupancy interest, a map or physical description of the desired route of access, a description of the desired method of access, and the purpose for which access is sought, and such other information deemed necessary by the Refuge Manager for consideration of the application.

(3) The Refuge Manager shall specify in a renewable permit, adequate and feasible routes and methods of access across refuge lands for any person who meets the criteria of paragraph (a) of this section. The Refuge Manager shall designate the routes and methods desired by the applicant unless it is determined that:

(i) The route or method of access would cause significant adverse impacts on natural or other values of the refuge, and adequate and feasible access otherwise exists; or

(ii) The method or route of access would jeopardize public health and safety, and adequate and feasible access otherwise exists; or

(4) If the Refuge Manager makes one of the findings described in paragraph (b)(3) of this section, he shall specify such other alternate methods and routes of access as will provide adequate and feasible access to the applicant, while minimizing damage to natural and other values of the refuge.

(5) Routes and methods of access permitted pursuant to this section shall be available for use by guests and invitees of the permittees.

(c) *Special Information Requirements for Access for Mineral Exploration, Assessment or Development.*

(1) *Applicability.* This subsection is applicable only when a person requires a permit for access (e.g. situations where § 36.21 does not already provide adequate and feasible access) across a refuge area to non-federally owned lands or interests therein or valid unpatented mining claims located within the exterior boundaries of a refuge, for mineral exploration, assessment or development purposes.

(2) *Access Permit Application.* Any person described in paragraph (c)(1) of this section shall apply to the Refuge Manager for an access permit and shall provide the following information:

(i) The name, mailing address and phone number of the permit applicant;

(ii) The claim(s) name; a description of type of claim(s) (e.g., patented claim, mill site, unpatented claim, etc.); and a description of the kind of mine and

minerals produced (e.g., placer, lode, copper, gold);

(iii) A map, preferably a topographic map with a scale of not less than one inch to a mile (1:63,360), or a sketch, showing the survey or projection grids on which there will be depicted the location of the claim(s). Contiguous claims and groups of claims in the same general area may be depicted on a single map so long as the individual claims are clearly identified;

(iv) The date(s) of location along with a copy of location notice(s); and the date and place of recordation and book and page number of recordation;

(v) A description of the proposed mining operations, the proposed routes and methods of access, period of intended occupancy and operation at the claim site; and major equipment to be used in the operations;

(vi) A brief environmental summary which: (A) discusses the anticipated environmental impacts of the proposed mining operations and routes and methods of access; and (B) describes those measures which will be incorporated into the proposed mining operations and the construction and use of access routes to minimize the anticipated adverse impacts upon the refuge and its related values.

(3) Whenever an unpatented mining claim is located within the exterior boundaries of a refuge area, the person shall also submit the following information:

(i) The last year in which there was production from this claim or claim group and the amount of production (e.g., pounds, tons, market value, etc.);

(ii) The person or company to whom the ore or concentrates were shipped;

(iii) The quantity of known reserves on the claim remaining to be mined (e.g., cubic yards, tons, etc.) plus a description of the tests conducted and documents which support this estimation of quantity; and

(iv) The grade or quality of the known reserves on the claim remaining to be mined (e.g., ounces per cubic yard, assay, etc.) plus a description of the tests conducted and documents which support this estimation of grade or quality.

(4) Permit Approval. The Refuge Manager shall utilize the permit granting standards of paragraph (b) of this section to grant such adequate and feasible access for economic purposes to nonfederally owned lands or interests therein or valid unpatented mining claims within the boundaries of a refuge, while minimizing damage to the natural and other values of the refuge area.

(d) *Construction of Permanent Improvements.* The establishment or

modification of a route or method of access which requires the construction of permanent improvements, including, but not limited to, the construction of concrete bridges or runways is prohibited unless authorized pursuant to the provisions of 50 Code of Federal Regulations, Chapter 1, Subchapter C, Part 29, Subpart B.

§ 36.24 Temporary access.

(a) *Applicability.* This section is applicable to State and private landowners who desire temporary access across an Alaska National Wildlife Refuge for the purposes of survey, geophysical, exploratory and other temporary uses of such non-federal lands, and where such temporary access is not affirmatively provided for in §§ 36.22 or 36.23 of this part. State and private landowners meeting the criteria of § 36.23(a) are directed to utilize the procedures of § 36.23 to obtain temporary access.

(b) *Temporary Access for Mineral Exploration.*

(1) Application. A landowner requiring temporary access across a refuge area for mineral survey, geophysical, exploratory or similar mineral activities shall apply to the Refuge Manager for an access permit and shall provide the relevant information contained in § 36.23(c)(2) concerning the planned access and mineral exploration activities.

(2) Permit Standards, Stipulations and Conditions. The Refuge Manager shall grant the desired temporary access whenever he determines that such access will not result in permanent harm to refuge area resources. The Refuge Manager shall include in any permit granted such stipulations and conditions on temporary access as are necessary to ensure that the access granted would not be inconsistent with the purpose for which the refuge was established and to ensure that no permanent harm will result in refuge resources.

(c) *Temporary Access for Other Purposes.*

(1) Application. A landowner requiring access across a refuge area for survey, geophysical, exploratory or other temporary uses unrelated to mineral exploration shall apply to the Refuge Manager for an access permit. The applicant shall state the proposed method and route of access, and the temporary use the applicant proposes to undertake on his land.

(2) Permit Standards, Stipulations and Conditions. The permit granting standards, stipulations and conditions of paragraph (b)(2) of this section shall be applicable here.

(d) *Definition.* For the purposes of this section, "temporary access" shall mean limited, short-term, non-successive access, which does not require permanent facilities for access, to undeveloped State or private lands.

Subpart D—Other Refuge Uses

§ 36.31 Recreational activities.

(a) Public recreational activities within the Alaska National Wildlife Refuges are authorized as long as such activities are conducted in a manner compatible with the purposes for which the areas were established. Such recreational activities include, but are not limited to, sightseeing, nature observation and photography, sport hunting, sport fishing, boating, camping, hiking, picnicking and other related activities. Any existing special regulations now in force and effect shall continue to apply to the applicable refuge lands in Alaska National Wildlife Refuges.

(b) Recreational activities may be prohibited or otherwise restricted in accordance with the provisions of § 36.42.

§ 36.32 Taking of fish and wildlife.

(a) The taking of fish and wildlife for sport hunting, trapping and sport fishing is authorized in accordance with applicable State and Federal law and such laws are hereby adopted and made a part of these regulations; *provided however*, that for trapping, sport hunting and sport fishing the Refuge Manager, pursuant to § 36.42, may designate areas where, and establish periods when, no taking of a particular population of fish or wildlife shall be permitted.

(b) The exercise of valid commercial fishing rights or privileges obtained pursuant to existing law, including any use of refuge areas for campsites, cabins, motorized vehicles and aircraft landing directly incident to the exercise of such rights or privileges, is authorized; *provided, however*, that the Refuge Manager may restrict or prohibit the exercise of these rights or privileges or uses of federally owned lands directly incident to such exercise if he determines, after conducting a public hearing in the affected locality, that they are inconsistent with the purposes of the refuge and that they constitute a significant expansion of commercial fishing activities within such refuge beyond the level of such activities in 1979.

(c) The following provisions shall apply to any person while engaged in the taking of fish and wildlife within an Alaska National Wildlife Refuge:

(1) Trapping and Sport Hunting

(i) Each person shall secure and possess all required State licenses and shall comply with the applicable provisions of State law unless further restricted by Federal law;

(ii) Each person shall comply with the applicable provisions of Federal law;

(iii) In addition to the requirements of paragraphs (a) and (b) of this section, each person shall continue to secure a trapping permit from the appropriate Refuge Manager prior to trapping on the Kenai, Izembek and Kodiak Refuges and the Aleutian Islands Unit of the Alaska Maritime Refuge.

(2) Sport and Commercial Fishing

(i) Each person shall secure and possess all required State licenses and shall comply with the applicable provisions of State law unless further restricted by Federal law;

(ii) Each person shall comply with the applicable provisions of Federal law.

(d) Nothing in these rules shall be interpreted as waiving the requirements of other fish and wildlife conservation statutes such as the Airborne Hunting Act or those provisions of Subchapter C of Title 50, Code of Federal Regulations, regarding the taking of depredating wildlife. Animal control programs shall only be conducted in accordance with a special use permit issued by the Refuge Manager.

§ 36.33 Cabins and other structures.

(a) *New Cabins.*

(1) The construction of new cabins on federally owned lands within an Alaska National Wildlife Refuge is prohibited except as may be authorized pursuant to a nontransferable, five-year special use permit issued by the Refuge Manager.

(2) Such special use permit shall only be issued upon a determination that the proposed use, construction, and maintenance of a cabin is compatible with the purposes for which the refuge was established and that the use of the cabin is either directly related to the administration of the refuge or is necessary to provide for a continuation of an ongoing activity or use otherwise allowed within the refuge where the permit applicant has no reasonable alternative site for constructing a cabin outside of the Refuge. In determining whether to permit the use, occupancy, construction, reconstruction or maintenance of cabins or other structures, the Refuge Manager shall be guided by factors such as other public uses, public health and safety, environmental and resource protection, research activities, protection of historic or scientific values, subsistence uses, endangered or threatened species conservation and other management considerations necessary to ensure that

the activities authorized pursuant to this section are compatible with the purpose for which the refuge was established. No special use permit shall be issued to authorize the construction of a cabin for private recreational use.

(b) *Existing Cabins.*

(1) Traditional and customary uses of existing cabins and related structures on federally owned lands within a refuge may be allowed to continue in accordance with a nontransferable, renewable five-year special use permit issued by the Refuge Manager. Such special use permit shall be issued only upon a determination that the traditional and customary uses are compatible with the purposes for which the refuge was established. No special use permits shall be issued to authorize the use of an existing cabin for private recreational use.

(2) Where a valid permit or lease was in effect on December 2, 1980, for cabins, homesites or similar structures on federally owned lands within a refuge, the Refuge Manager shall provide for the continuation of the permit or lease, unless a finding is made, following notice and an opportunity for the leaseholder or permittee to respond, that the continuation of the lease or permit will directly threaten or significantly impair the purposes for which the refuge was established.

(c) No special use permit shall be issued under paragraphs (a) or (b)(1) of this section unless the permit applicant:

(1) In the case of existing cabins or structures, reasonably demonstrates by affidavit, bill of sale or other documentation, proof of possessory interests or right of occupancy in the cabin or structure;

(2) Submits an accurate sketch or photograph of the existing or proposed cabin or structure and a map showing its geographic location;

(3) Agrees to vacate the cabin or structure and remove all personal property from it upon nonrenewal or revocation of the permit;

(4) Acknowledges in the permit application that the applicant has no interest in the real property on which the cabin or structure is located or will be constructed; and

(5) Submits a list of the names of all immediate family members residing in the cabin or structure.

(d) Permits authorized under the provisions of this section shall be renewed every five years until the death of the last immediate family member of the claimant residing in the cabin or structure under permit. Renewal will occur unless the Refuge Manager determines after notice of hearing, on the basis of substantial evidence in the

administrative record as a whole, that the use under the permit has caused or may cause significant detriment to the principal purposes for which the refuge area was established. The Refuge Manager's decision may be appealed pursuant to the provisions of 43 CFR 4.700.

§ 36.34 Firearms.

The possession, use and transporting of firearms is authorized for hunting and personal protection in accordance with State and Federal laws unless prohibited or otherwise restricted by the Refuge Manager in accordance with the provisions of § 36.42.

§ 36.35 Unattended property.

(a) Leaving any snowmobile, vessel, off-road vehicle or other personal property unattended for longer than 12 months without the prior permission of the Refuge Manager is prohibited, and any property so left may be impounded by the Refuge Manager. This prohibition does not apply to personal property left unattended in a cache or cabin when used in conjunction with an authorized activity.

(b) In the event unattended property interferes with the safe and orderly management of part of the refuge or causes damage to refuge resources, it may be impounded by the Refuge Manager.

§ 36.36 Sled dogs and household pets.

The general trespass provisions of 50 CFR 26.21 shall not apply to household pets and sled or pack dogs under the control of their owners or handlers, but such activities may be prohibited or otherwise restricted pursuant to the provisions of § 36.42.

§ 36.37 Subsistence and land use decisions.

(a) In determining whether to lease or otherwise permit the use or occupancy of refuge lands under any provision of the regulations of this part or other law authorizing such actions, the Refuge Manager shall evaluate the effect of such use or occupancy on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which reduce or eliminate the use or occupancy of refuge lands needed for subsistence purposes. No such lease, permit or other use or occupancy of such lands which would significantly restrict subsistence uses shall be effected until the Refuge Manager:

(1) Gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to Section 805 of

the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (December 2, 1980);

(2) Gives notice of and holds a hearing in the vicinity of the area involved; and

(3) Determines that (i) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the refuge lands, (ii) the proposed activity will involve the minimal amount of refuge lands necessary to accomplish the purposes of such use or occupancy, and (iii) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act is required with respect to the proposed use or occupancy, the notice, hearing and findings required by paragraph (a) of this section shall be provided as part of such environmental impact statement process.

(c) After compliance with the procedural requirements of this section and other applicable laws, the Refuge Manager may manage refuge lands for any of those uses or purposes authorized by law.

Subpart E—Permits and Public Participation

§ 36.41 Permits.

(a) Application.

(1) Regulations generally applicable to the National Wildlife Refuge System and these regulations provide in several sections that permits may be obtained from the Refuge Manager. For activities on the Arctic and Yukon Flats Refuges, such permits are to be obtained from the Refuge Manager in Fairbanks, Alaska. For activities on the Becharof, Kodiak, Kenai, Izembek and Yukon Delta Refuges and for the Aleutian Islands Unit of the Alaska Maritime Refuge, such permits are to be obtained from the Refuge Manager, headquartered, respectively, in King Salmon, Kodiak, Soldotna, Cold Bay, Bethel and Adak, Alaska. For activities on all other Alaska Refuges, permits are to be obtained from the designated Refuge Manager in Anchorage, Alaska.

(2) The Refuge Manager shall promptly acknowledge in writing the receipt of all requests for permits, access routes, or other requirements of this section.

(b) *Denial and Appeal Procedures.* A person who has been denied a permit has the right to have the application reconsidered by the Regional Director by contacting him within sixty (60) days

of the issuance of the denial. For purposes of reconsideration, the permit applicant shall present the following information:

(1) Any statement or documentation, in addition to that included in the initial application, which demonstrates that the applicant satisfies the criteria set forth in the section under which the permit application is made;

(2) The basis for the permit applicant's disagreement with the prior findings and conclusions; and

(3) Whether or not the permit applicant requests an informal hearing before the Regional Director, and if the permit applicant does request a hearing, the applicant shall provide also:

(i) A description of any information, in addition to that included in the initial application and any written materials presented to the Regional Director, which the permit applicant intends to present at the hearing;

(ii) The name, address and brief description of the proposed presentation of any person which the applicant intends to present at the hearing on his/her behalf, and the name and addresses of any person the applicant would like to question at the hearing;

(iii) If, after examining the information submitted by the applicant in support of a request for an oral hearing, it is clear that the applicant would present relevant information which is substantially distinguishable from or supplementary to the information presented to the Refuge Manager, the Regional Director shall grant the permit applicant's request for a hearing. After consideration of the written materials and oral hearings, if granted, the Regional Director shall affirm, reverse or modify the denial of the Refuge Manager and shall set forth in writing the basis for the decision. A copy of the decision shall be forwarded promptly to the applicant and shall constitute final agency action.

§ 36.42 Public participation.

(a) *Criteria.* In determining whether to close an area or restrict an activity otherwise allowed, the Refuge Manager shall be guided by factors such as public health and safety, resource protection, protection of historic or scientific values, subsistence uses, endangered or threatened species conservation, and other management considerations necessary to ensure that the activity or area is being managed in a manner compatible with the purposes for which the Alaska National Wildlife Refuge area was established.

(b) *Emergency closures or restrictions.* (1) Emergency closures or restrictions relating to the use of

aircraft, snowmobiles or motorboats shall be made after notice and hearing; (2) emergency closures or restrictions relating to the taking of fish and wildlife shall be accompanied by notice with a subsequent hearing; (3) other emergency closures or restrictions shall become effective upon notice as prescribed in § 36.42(d); and (4) no emergency closure or restriction shall be for a period exceeding 60 days, unless, after notice and public hearing in the affected vicinity, such closure or restriction is extended by the Refuge Manager, upon a determination that such extension is justified according to the factors set forth in paragraph (a) of this section.

(c) *Permanent closures or restrictions.*

(1) Permanent closures or restrictions relating to the use of aircraft, snowmobiles or motorboats, or the taking of fish or wildlife, shall not be effective prior to notice and hearing in the vicinity of the areas directly affected by such closures and restrictions; (2) other permanent closures or restrictions shall become effective upon notice as prescribed in § 36.42(d).

(d) *Notice.* Emergency or permanent closures or restrictions shall be (1) published in at least one newspaper of general circulation in the State and in at least one local newspaper if appropriate, posted at community post offices within the vicinity affected, made available for broadcast on local radio stations in a manner reasonably calculated to inform residents in the affected vicinity, and designated on a map which shall be available for public inspection at the office of the Refuge Manager and other places convenient to the public; or (2) designated by the posting of appropriate signs; or (3) both.

(e) *Openings.* In determining whether to open an area to a public use or activity otherwise prohibited, the Refuge Manager shall first provide notice as prescribed in paragraph (d) of this section, and shall, upon request, hold a hearing in the affected vicinity prior to making a final determination.

Table I—Summary Listing of The National Wildlife Refuges in Alaska as Established by The Alaska Lands Act

(Pub.L.96-487, December 2, 1980)

1. Alaska Maritime, including: Aleutian Islands,* Bering Sea,* Bogoslof,* Chamiasso,* Forrester Island,* Hazy Islands,* Pribilof,* Saint Lazaria,* Semidi,* Simeonof,* Tuxedni.*
2. Alaska Peninsula.
3. Arctic, including: William O. Douglas.*

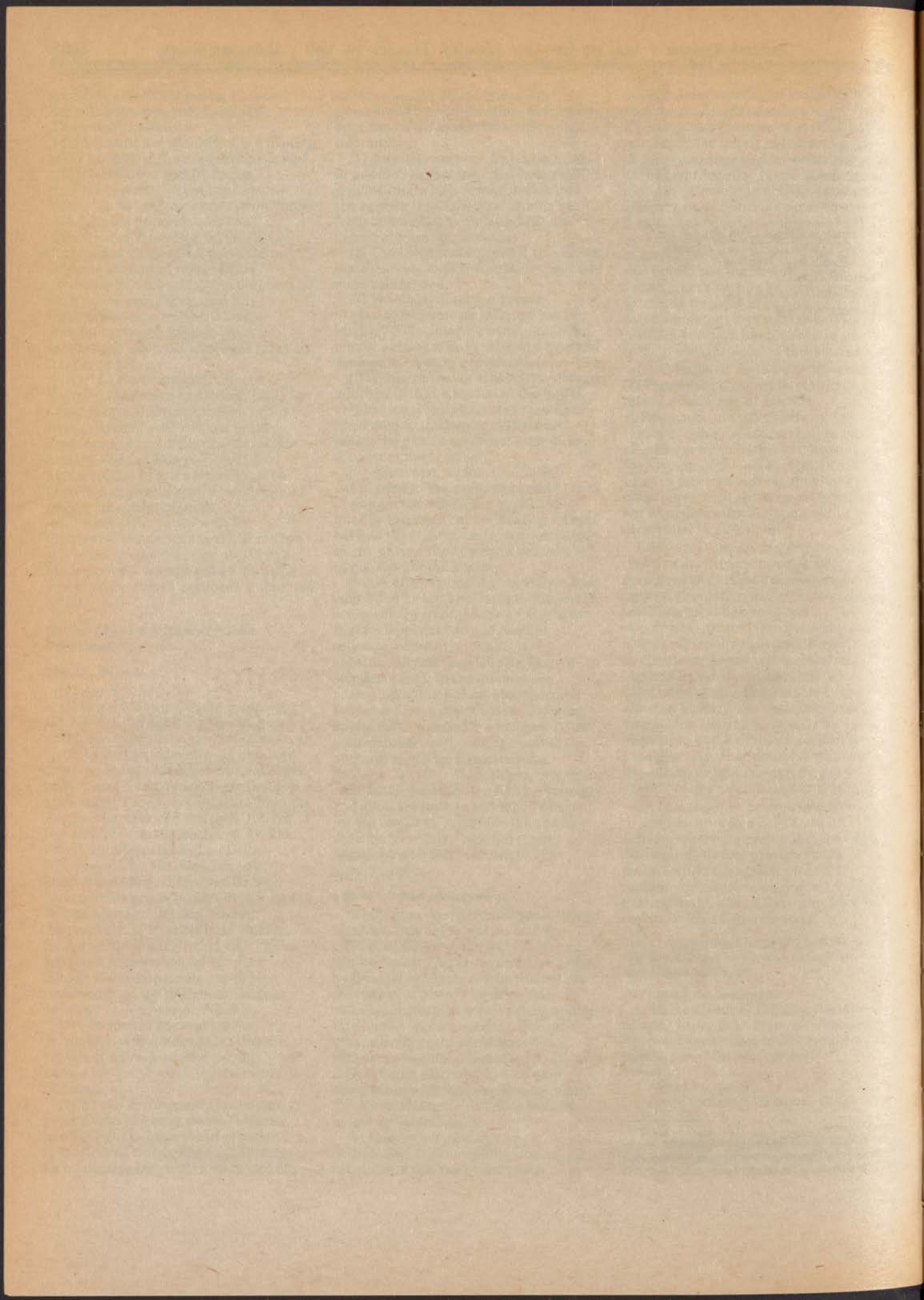
*These indicated units were previously existing refuges before the Alaska Lands Act of December 2, 1980, and are now part of the 16 National Wildlife Refuges established by the Alaska Lands Act.

4. Becharof.**
5. Innoko.
6. Izembek.
7. Kanuti.
8. Kenai.
9. Kodiak.
10. Koyukuk.
11. Nowitna.
12. Selawik.
13. Tetlin.
14. Togiak, including: Cape Newenham.*
15. Yukon Delta, including: Clarence
Rhode,* Hazen Bay,* Nunivak.*
16. Yukon Flats.**

[FR Doc. 81-1926 Filed 1-16-81; 8:45 am]

BILLING CODE 4310-55-M

**Units proclaimed National Monuments on December 1, 1978, were redesignated as National Wildlife Refuges by the Alaska Lands Act.



Monday
January 19, 1981

Part XXVII

Environmental Protection Agency

Intent To Issue Revised Minority
Business Enterprise Policy for the
Construction Grants Program, Technical
Amendments to Women's Business
Enterprise Policy for the Construction
Grants Program, and Procedures for
Implementation of Minority Business
Enterprise and Women's Business
Enterprise Policies

ENVIRONMENTAL PROTECTION AGENCY

[AS-FRL 1683-3]

Intent To Issue Revised Minority Business Enterprise Policy for the Construction Grants Program, Technical Amendments to the Women's Business Enterprise Policy for the Construction Grants Program, and Procedures for the Implementation of the Minority Business Enterprise and Women's Business Enterprise Policies

AGENCY: The Environmental Protection Agency.

ACTION: Proposed Policy Revisions and Proposed Program Requirements Memorandum.

SUMMARY: This Notice proposes revisions to the Policy for Increased use of Minority Consultants and Construction Contractors, 43 FR 60220 (December 26, 1978), technical amendments to the Women's Business Enterprise Policy, 45 FR 51490 (August 1, 1980), and proposes procedures for implementing both policies. EPA invites interested persons to review and comment on the policy revisions and procedures proposed below.

DATE: Comments must be submitted on or before March 20, 1981.

ADDRESSES: Comments (in duplicate, if possible) may be mailed to: Central Docket Section (A-130), ATTN: Docket No. G-80-5, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460

FOR FURTHER INFORMATION CONTACT: Robert J. Knox, (Director, Office of Small and Disadvantaged Business Utilization), (202) 755-1127, Sylvia Horwitz (Office of General Counsel), (202) 426-4690, 401 M. Street, S.W., Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION:

Background

The purpose of this Notice is to propose revisions to EPA's Policy for Increased Use of Minority Consultants and Contractors (MBE policy), to propose technical amendments to the Women's Business Enterprise Policy (WBE policy), and to propose uniform procedures for the implementation of both policies.

EPA published the MBE policy on December 26, 1978, and it became effective on February 1, 1979. The MBE policy established a goal-oriented system to encourage increased MBE participation in EPA's sewage treatment works construction grants program, and required grantees, consultants, and

prime construction contractors to make good faith positive efforts to utilize MBEs in EPA funded projects. This policy provided guidance for meeting the "positive efforts" requirement of Office of Management and Budget (OMB) Circular A-102, Attachment O, Section 3(c)(3), which was incorporated into EPA's construction grants regulations at 40 CFR 35.936-7. Each EPA Region was given the responsibility to set goals as targets for MBE participation, representing a percentage of the total dollar amount of contracts approved, and to develop procedures to implement the policy. The WBE policy was published on August 1, 1980, and will apply to projects funded after January 31, 1981.

EPA is proposing these revisions and procedures for two reasons. First, OMB revised Attachment O, requiring grantees and their contractors to take five "affirmative steps" to contract with MBEs. 44 FR 47874 (August 15, 1979). The policy revisions and new implementing procedures bring EPA's MBE policy into conformity with revised Attachment O. The second reason for revision is to make needed adjustments in the administration of the MBE policy, in both EPA headquarters and the Regions. These adjustments and uniform procedures are necessary for the efficient administration of both the MBE and WBE policies.

The MBE policy has now been in effect for nearly two years. During the past year, public meetings were held in each Region and in most States to review the Regional goals and to receive public comment on the MBE program. The public meetings were most useful in helping EPA assess the impact of the MBE program and in illuminating the specific aspects of the policy requiring revision.

The primary difficulty is the lack of uniform procedures for regional administration of the MBE policy. Because each Region was responsible for developing a program of policy implementation, a variety of procedures evolved. The development of the WBE policy reinforces the need for uniform procedures, because lack of national guidance will result in diverse regional WBE policy implementation as well. To insure consistent application of the policies, the Agency is proposing uniform procedural guidance to be followed in every Region in administering both the MBE and the WBE policies.

MBE Policy Revisions

The revisions of the MBE policy are primarily clarifications of the existing policy. It remains EPA's policy to

encourage increased participation of businesses owned and controlled by minority architects, engineers, consultants, and contractors in work performed with EPA construction grant funds. The policy continues to focus on the efforts of grantees, and bidders and offerors seeking prime consultant and construction contracts with grantees, to utilize MBEs. Goals for MBE participation will also continue to be established by the Regions to serve as benchmarks for measuring MBE participation resulting from the affirmative efforts to contract with MBEs. Goals are not quotas and need not be met in order for contract award of grant funding, nor do they represent a percentage of the work that must be set aside for MBEs.

Thresholds are proposed for the applicability of the MBE policy. EPA proposes that contracts for architectural and engineering services in excess of \$25,000 and prime construction contracts in excess of \$250,000 be subject to the policy.

Definitions of "Minority Business Enterprise" and "Minority Group Member" have been modified to clarify existing definitions. Some additional definitions, as well as references to definitions in EPA's construction grants regulations are also included for clarification of the policy.

The responsibilities of EPA, grantees, contractors, consultants, and MBEs are abbreviated in the proposed policy. The proposed uniform procedures spell out the steps to be taken by each to implement the policy.

Proposed Procedures

The proposed procedures incorporate many of the existing methods of MBE policy implementation. Day-to-day management of EPA's responsibilities will remain in the Regions, and grantees continue to be responsible for implementing the MBE (and WBE) program through their procurement activities. The procedures will give guidance for carrying out these responsibilities in a number of areas previously unaddressed on a national level.

Because the program focuses on the procurement process, EPA proposes explicit requirements for contacting and negotiating with MBE/WBEs. The procedures state what steps must be taken, when those activities must occur, and how the fulfillment of those requirement must be demonstrated. The procedures address procurement through negotiation and through the competitive bidding process.

Procedures for certifying MBEs and WBEs and for challenging the

qualifications of businesses as MBEs and WBEs are included. In addition, the procedures provide for the development of source lists and require the collection of specific data in order to compile and update these lists.

Data collection is also essential for monitoring compliance with the policy requirements and success of the MBE and WBE programs. Related to that end, procedures for calculating MBE and WBE participation are also proposed.

The calculation procedures include a section concerning suppliers of materials and equipment. A definition of supplier is proposed to address the problem of fronts established as "suppliers" for the purpose of meeting the MBE policy requirements. Emphasis is placed on counting distributorships only when their participation is part of the custom and practice of the industry manufacturing the material or equipment supplied. Suppliers of products that are not generally distributed through suppliers will not be counted in calculating MBE participation. We understand, for example, that the manufacture of concrete pipe is such an industry. In addition, any supplier counted in MBE or WBE participation calculations must serve a useful business function.

This discussion highlights the major areas of change and clarification. EPA solicits the comments of interested persons on these areas, and on any other aspects of the proposed documents. Since EPA is not required by 5 U.S.C. § 553 or any other law to publish the proposed MBE policy revisions, technical amendments to the WBE policy, or procedures as a general notice of proposed rulemaking, no regulatory flexibility analysis is required to be provided under 5 U.S.C. §§ 603 or 604. Because a substantial number of small businesses in the construction industry may be significantly affected by the proposals, EPA invites small business owners to comment on the economic effect these proposals may have on their businesses and whether such economic effects are expected to be significant.

Dated: January 13, 1981.

Douglas M. Costle,
Administrator.

Minority Business Enterprise Policy

Introduction

The Environmental Protection Agency (EPA) published the Policy for Increased Use of Minority Consultants and Construction Contractors on December 26, 1978 at 43 Fed. Reg. 60220. (MBE policy). The following policy statement and implementing procedures (PRM#

), supersedes the December 26, 1978 policy. The new policy does not impose any additional requirements. It is a clarification of existing policy and a consolidation of EPA Regional interpretation.

I. Authority

The December 26, 1978 policy was authorized by Attachment O to Office of Management and Budget Circular A-102, Section 3(c)(3), 42 Fed. Reg. 45890 (September 12, 1977). EPA implemented section 3(c)(3) of Attachment O, by promulgating in its construction grants regulations a provision identical in language to that in section 3(c)(3):

Postive efforts shall be made by grantees to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources to maximum feasible opportunity to compete for subagreements and contracts to be performed using Federal grant funds. 40 C.F.R. § 35.936-7.

The MBE policy provided guidance to EPA Regions, grantees, consultants and contractors with respect to "positive efforts" to be made in the Construction Grants Program.

On August 15, 1979, OMB promulgated a revised Attachment O, expanding the requirements for MBE participation, 44 FR 47874. Section 9(a) of Attachment O provides:

a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

1. Including qualified small and minority businesses on solicitation lists.
2. Assuring that small and minority businesses are solicited whenever they are potential sources.
3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
4. Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.
5. Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required.
6. If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in 1 through 5 above.

EPA's revised MBE policy implements the affirmative steps required by section 9 of Attachment O and provides guidance for compliance with the EPA grant regulation at 40 CFR 35.936-7.

II. Policy

The policy of EPA is to encourage increased MBE participation in prime contracts and subcontracts in projects for construction of publicly-owned treatment works funded under Title II of the Clean Water Act. EPA encourages opportunities for immediate participation of MBEs of all sizes and promotes development of new minority-owned businesses. EPA's objective is to provide the opportunity for MBEs to compete in a free and open marketplace.

This policy conforms to Presidential direction as stated in President Carter's message to Congress on National Urban Policy dated March 27, 1978 and furthers the objectives of Title VI of the Civil Rights Act of 1964.

EPA will require, as a grant condition, that grantees carry out this policy. Grantees have the responsibility to take affirmative steps to assure that MBEs have opportunities to compete for prime contracts under Step 1, Step 2, Step 3 and Step 2 + 3 grants and that all prime contractors make good faith positive efforts to utilize MBEs. This policy and implementing procedures describe the affirmative steps and good faith positive efforts to be taken. The policy should not be misconstrued as a mandatory set-aside policy or one that requires a particular quota to be met.

III. Applicability

This policy applies to all prime contracts over \$25,000 for architectural and engineering services and all prime contracts over \$250,000 for construction. This policy applies separately to Step 1, Step 2, Step 3, and Step 2 + 3, and Step 3 segments. These steps include the following activities: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures or other necessary actions, or erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or inspection or supervision of any of the foregoing items.

IV. Definitions

(Unless specified below, the definitions provided in 40 CFR 30.135, 35.905 and 35.936-1 shall apply to this policy.)

A. *Minority Business Enterprise (MBE)*—An MBE is an independent business concern which is at least 51% owned and controlled by minority group members; is or has the potential to be an independent and continuing enterprise; and meets the following requirements:

1. The minority ownership's interest in the firm must be real, substantial and continuing. Such interest is characterized by:

- a. risk of loss/share of profit commensurate with the proportional ownership; and
- b. receipt of the customary incidents of ownership, such as salary and/or intangible benefits.

2. A minority owner must have and exercise the authority to independently control the business decisions of an MBE. The minority owner need not be continually present to be deemed in control. Characteristics of control include, but are not limited to:

- a. authority to sign bids and contracts;
- b. decisions in price negotiations;
- c. incurring liabilities for the firm;
- d. final staffing decisions;
- e. policy-making; and
- f. general company management decisions.

3. Only those firms performing a useful business function according to custom and practice in the industry are qualified as MBEs. Acting merely as a passive conduit of funds to some other, non-minority firm where such activity is unnecessary to accomplish the project does not constitute a "useful business function according to custom and practice in the industry".

4. Joint ventures of MBE firms with non MBE firms shall be credited towards the grantee's percentage of MBE participation by crediting the proportion of the dollar amount of the joint venture's subcontract equal to the proportion of the MBE's share in the profit. Share of profit should reflect the MBE's proportion of risk of loss and control/management responsibilities in the joint venture. Percentage of the joint venture's contract credited as MBE participation may be adjusted to reflect risk of loss and/or control and management where the MBE's share of profit is not commensurate with its overall contribution to performance of the joint venture's contract.

B. Minority Group Member—An individual who is a citizen or permanent resident alien (as defined by the Immigration and Naturalization Service) of the United States, and is at least one of the following:

1. **American Indian or Alaskan Native**: A person having origins in any of the original groups of North America including the Aleutian Islands, or who maintains cultural identification through tribal affiliation or community recognition, or who demonstrates at least one quarter descent from such groups;

2. **Asian or Pacific Islander**: A person having origins in any of the original

groups of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. For example, this area includes China, India, Japan, Korea, the Phillippine Islands and American Samoa;

3. **Black**: A person having origins in any of the black groups of Africa; or

4. **Hispanic**: A person of Spanish culture with origins from Mexico, Puerto Rico, Cuba, Central America, South America or Spain.

C. Project—The scope of work from which a grant or grant amendment is awarded under Section 201(g) of the Clean Water Act. The scope of work is defined as Step 1, Step 2, or Step 3 or Step 2 + 3 of treatment works construction or segments (see definition of "treatment works segment" in 40 CFR 35.905 and 40 CFR 35.930-4).

D. Contractor—A party who enters into a written agreement with an EPA grantee for the furnishing of services, supplies, or equipment necessary to complete the project for which a grant under Section 201(g) of the Clean Water Act was awarded, including contracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements subject to state or local personnel systems.

E. Subcontractor—A party who enters into a written agreement with a contractor or subcontractor of an EPA grantee for the furnishing of services, supplies, or equipment necessary to complete the project funded under Section 201(g) of the Clean Water Act including contracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements.

F. Affirmative Steps—Affirmative steps as used in this policy and implementing procedures refer to those activities to be taken by the grantee to assure MBE participation in the EPA construction grants program.

G. Good Faith Positive Efforts—Good faith positive efforts as used in this policy and implementing procedures refer to those activities to be taken by bidders/offerors and contractors during bid and proposed preparation to assure MBE participation in the EPA construction grants program.

H. Bidder—A party seeking to obtain a contract with a grantee through a competitive advertised sealed bid process.

I. Offeror—A party seeking to obtain a contract with a grantee through a negotiated procurement process.

V. Goals for MBE Participation

A. The Administrator has delegated to each Regional Administrator the

responsibility for establishing an appropriate Regional goal for MBE participation in that Region. Goals will not serve as quotas to be met by grantees or prime contractors, but will provide an estimate of the level of MBE participation that should result from good faith efforts to utilize MBEs.

B. Regional goals for MBE participation in EPA funded projects will be established to reflect both current MBE availability and market conditions, as well as anticipated growth in the number of new MBE firms and capacity of existing firms.

C. Each grantee shall establish a project goal for MBE participation in consultation with the EPA Regional Office.

D. Characteristics of individual projects will be taken into consideration in determining appropriate project goals.

VI. Responsibilities

A. **EPA Responsibilities**—1. Headquarters is responsible for providing uniform interpretation of this policy and basic implementing procedures, to oversee implementation, and to give guidance to the Regions.

2. Regions are responsible for carrying out the national policy in accordance with the implementing procedures.

3. Regions are responsible for setting Regional goals, approving project goals proposed by grantees, and insuring that grantees implement the policy.

4. Regions will review annually and revise when appropriate their MBE goals in accordance with 40 CFR Part 25. Public participation includes notice and opportunity for interested and affected persons and organizations to express their views. Public meetings or hearings are not required however; informed means of public consultation, in accordance with 40 CFR 25.4(d) may be appropriate.

5. Functions under the policy and implementing procedures may be delegated by the Regions to appropriate agencies. This includes, delegation pursuant to section 205(g) of the Clean Water Act. EPA has final responsibility which is nondelegable.

B. Applicant/Grantee

Responsibilities—1. The applicant/grantee is responsible for proposing a project goal to the Regional Office for review and approval by the Regional Administrator. This responsibility extends to actions taken during the grant application process.

2. The grantee accepts, as a condition of its grant, responsibility to implement the policy.

3. The grantee shall take affirmative steps to insure adequate opportunity for MBE participation, as prime and sub-

contractors, in all procurement actions of each construction project, including engineering and consultant services in Step 1, Step 2, Step 3, and Step 2 + 3.

4. The grantee shall insert copies of this policy and procedural guidance in all solicitation documents, and review procurement documents to insure that no other provisions conflict or are inconsistent with this policy and implementing procedures.

C. Bidders/Offers/Contractor Responsibilities—Bidders, offerors, and contractors under EPA grants are each responsible to the grantee to make positive efforts towards fulfillment of MBE requirements.

D. MBE Responsibilities—MBEs are encouraged to seek opportunities to participate in EPA funded projects, initiate contacts, and submit self-certification information to grantees and EPA Regional Office for review.

VII. Enforcement

A. EPA requires grantees and invites interested parties to bring to the attention of the EPA Regional Administrator any perceived non-compliance by a grantee, bidder/offeror, contractor, or MBE, or EPA with the requirements of the policy or implementing procedures.

B. A bidder/offeror or MBE with an adversely affected direct financial interest may file a bid protest with the grantee pursuant to 40 C.F.R. § 35.939. Bid protest procedures are not available to challenge the certification of an MBE.

C. Any interested person or organization may challenge the certification of a firm claiming MBE status by bringing a challenge before the grantee in the case of self-certification, through procedures established by a recognized certifying agency, or through EPA Regional procedures as appropriate and provided for in the EPA implementing procedures.

D. Upon a finding by EPA that any party has not complied with the requirements of this policy, including misrepresenting a firm as an MBE, EPA may:

1. Declare the grantee non-responsible under 40 CFR 30.340 *et seq.*

2. Declare the bidder/offeror non-responsible and therefore ineligible for contract award.

3. Declare grantee or contractor non-responsible for future grants under 40 CFR 35.965(e).

4. Disallow any grant or contract costs associated with the non-compliance.

5. Invoke any and all sanctions and remedies specified in EPA regulations, including terminating the grant and/or withholding funds under 40 CFR 30.900 *et seq.*

6. Refer any matter which may be fraudulent to the Inspector General.

7. Refer any matter which may lead to criminal prosecution or a claim for funds to the Department of Justice.

VIII. State and Local Law

Nothing in this policy prevents a grantee from imposing more stringent MBE requirements in work procured under EPA grants or procurement obligations which pertain to bid responsiveness or percentage of MBE participation, where provided for by State or local law or ordinances.

Women's Business Enterprise Policy: Technical Amendments

The following technical amendments to the Women's Business Enterprise Policy for the construction Grants Program (WBE policy) are proposed:

1. Section B.4. is amended by striking all of section B.4 and inserting in lieu thereof "Certification. Certification as WBE under this policy shall be accomplished in accordance with EPA's implementing procedures."

2. Section C.4. is amended by striking "of \$500,000 or more and all prime contracts for architectural engineering, and related services of \$10,000 or more" and inserting in lieu thereof "over \$250,000 and all prime contracts for architectural, engineering and related services over \$250,000."

3. Section H is amended by striking all of section H and inserting in lieu thereof the following:

"H. Enforcement—1. EPA requires grantees and invites interested parties to bring to the attention of the EPA Regional Administrator any perceived noncompliance by a grantee, bidder/offeror, contractor, or WBE, or EPA with the requirements of the policy or implementing procedures.

2. A bidder/offeror or WBE with an adversely affected direct financial interest may file a bid protest with the grantee pursuant to 40 CFR 35.939. Bid protest procedures are not available to challenge the certification of a WBE.

3. Any interested person or organization may challenge the certification of a firm claiming WBE status by bringing a challenge before the grantee in the case of self-certification, through procedures established by a recognized certifying agency, or through EPA Regional procedures as appropriate and provided for in the EPA implementing procedures.

4. Upon a finding by EPA that any party has not complied with the requirements of this policy, including misrepresenting a firm as a WBE, EPA may:

a. Declare the grantee non-responsible under 40 CFR 30.340 *et seq.*

b. Declare the bidder/offeror non-responsible and therefore ineligible for contract award.

c. Declare grantee or contractor non-responsible for future grants under 40 CFR 35.965(e).

d. Disallow any grant or contract costs associated with the non-compliance.

e. Invoke any and all sanctions and remedies specified in EPA regulations, including terminating the grant and/or withholding funds under 40 CFR 30.900 *et seq.*

f. Refer any matter which may be fraudulent to the Inspector General.

g. Refer any matter which may lead to criminal prosecution or a claim for funds to the Department of Justice.

4. Section J. is amended by striking all of section J. and inserting in lieu thereof the following:

"J. State and Local Law—Nothing in this policy prevents a grantee from imposing more stringent WBE requirements in work procured under EPA grants or procurement obligations which pertain to bid responsiveness or percentage of WBE participation, where provided for by State or local law or ordinances."

5. Section K.2. is amended by striking "October 1, 1983" and inserting in lieu thereof "October 1, 1984."

Construction Grants Program Requirements [Memorandum PRM No. 81-3]

Effective Date:

To: Regional Administrators, Regions I-X.

Attn: Water Division Directors, Office of Civil Rights Directors.

From: Barbara Blum, Deputy Administrator (A-100); Eckardt C. Beck, Assistant Administrator for Water and Waste Management (WH-556).

Subject: Procedures for the Implementation of the Minority Business Enterprise and Women's Business Enterprise Policies.

This proposed PRM sets forth the procedures to be followed in all projects to which the Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) policies apply. These procedures replace the procedures developed in each Region to implement the Policy for Increased Use of Minority Consultants and Construction Contractors, 43 Fed. Reg. 60220 (December 28, 1978).

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I. Regional Goals

A. The Regional Administrator shall establish regional goals for MBE and WBE participation. MBE and WBE goals shall be separate and not interchangeable. The goal for WBE participation must be at least as high as the national goal. In establishing MBE and WBE goals, the Regional Administrator shall:

1. relate the goals to the objectives of the MBE/WBE policies.
2. take into consideration in setting regional goals such factors as:
 - a. availability* of MBE/WBE's
 - b. the previous regional experience in implementing the Policy for Increased Use of Minority Consultants and Construction Contractors, 43 Federal Register 60220 (December 26, 1978).
 - c. input from public participation.
 - d. types of projects on State priority lists.
 - e. other appropriate data.

B. Regional goals shall take the form of a range.

1. In a range goal system the Region sets the numerical boundaries of the specific percentage to be established by grantees for MBE and WBE participation.
2. As part of its application, the grantee must propose, for approval by the Region, a fixed numerical goal within the Regional range to apply to the step or segment covered by the grant or grant amendment. Under unusual circumstances, the Regional Administrator may approve a proposed project goal outside the Regional goal range. Where the proposed goal is lower than the bottom of the Regional range. The grantee must establish that the deviation from the Regional goal is justified.

II. Certification of MBE/WBE

A. Means of Certification—Certification as MBE or WBE under EPA's policies shall be accomplished by self-certification, by a state or federally-funded agency recognized and designated by the Regional Administrator, or by the Regional Office, as follows:

1. Self-certification. Self-certification shall be through submission of a statement signed by the minority/women owner(s). Standard EPA forms for this certification should be used. A signed statement by the minority/women owner(s) which provides at least the same information requested on the EPA form will also be accepted, although use of the EPA form is strongly encouraged and recommended. Self-certification shall be the method of certification only where no state or federally funded agency has been recognized by the Regional Administrator or no Regional certification procedure exists.

2. Certification by State or federally-funded agency. The Regional Administrator with the Director of OSDBU in Headquarters may recognize any state or federally-funded agency, as the certifying agency in its jurisdiction. Criteria for qualifying as MBE or WBE for any such recognized agency must be equivalent to EPA's criteria.

3. Certification by EPA Regional Office. The Regional Administrator may establish procedures for certifying MBEs and WBEs in the Regional Office.

B. Certification Review Procedures—1. Self-certification. The grantee shall review the certification form submitted by each MBE/WBE firm. If, on the basis of that review or other information brought to the grantee's attention, the grantee determines that the firm does not meet the definition in the applicable EPA policy, the grantee shall notify the firm in writing of its initial determination, the basis of its decision, the firm's right to respond within 15 calendar days of receipt of the initial decision, and that failure to respond will result in the initial decision becoming the final grantee decision with no right of appeal. The firm will have 15 calendar days to respond in writing to the grantee's initial determination of its status and may request an informal hearing. The grantee shall review any written submissions and oral presentations as expeditiously as possible, and on the basis of its review, shall issue its final determination concerning the MBE/WBE status of the firm. The final determination shall be in writing, stating the reasons for the determination and the right to appeal an adverse determination to the Regional Administrator.

2. Certification by recognized State or federally funded agency. Where a state or federally funded agency is recognized by the Regional Administrator and the Director of OSDBU as the certifying agency for that jurisdiction, the procedures of that agency will be the exclusive means available for certification and review of MBE/WBE status of a firm in that jurisdiction. Final determinations of a recognized agency may be appealed to the Regional Administrator.

3. EPA Regional Certification. Regional Certification procedures must be developed in consultation with the Director of OSDBU. Such procedures must provide for initial review of MBE/WBE status to take place on a Regional staff office level, with appeal to the Regional Administrator.

C. Appeal to the Regional Administrator—

1. Who may appeal. Only a firm claiming MBE/WBE status under EPA policies which received a final determination from the grantee, recognized agency, or EPA Regional staff office that it does not qualify as MBE/WBE under EPA policies may file an appeal with the Regional Administrator.

2. Time and manner of appeal. An appeal of an adverse grantee, recognized agency, or EPA Regional staff office determination must be filed with the Regional Administrator within 10 calendar days of the firm's receipt of the adverse determination. Notice of appeal must be provided to the grantee, recognized agency, or EPA Regional staff office in writing at the time of appeal to the Regional Administrator. The appeal shall consist of a written statement of the firm's qualifications as MBE/WBE under EPA policy and supporting documents, if any, together with a copy of the grantee's, recognized agency's or EPA Regional staff office's final determination.

3. Regional Administrator's Determination. On the basis of the grantee's, recognized agency's, or EPA Regional staff office's final

determination and the written submission by the firm, the Regional Administrator shall issue a written determination as to the MBE/WBE status of the firm. The decision of the Regional Administrator shall constitute the final decision of the agency and may not be appealed further within the Agency.

III. Source Lists

A. EPA Regions shall maintain, supplement continually, and update annually lists of those firms which have certified themselves as MBE/WBEs. Such lists are for information purposes only, and shall carry a clear and prominent statement that the firms listed have certified themselves as MBE/WBEs and are neither endorsed nor guaranteed by EPA as bona fide MBE/WBEs. It is not necessary to be on any lists in order to qualify as a bona fide MBE/WBE.

B. Grantees should develop project source lists for MBE/WBEs.

1. The grantee may wish to use available list such as those of the EPA Regional Office, adjacent municipalities, appropriate minority/women associations and agencies, and available industry associations. Names of these agencies with address and phone number should also be included on the grantee's source list.

2. The grantee may also wish to engage an MBE/WBE liaison to compile the list. These services are grant eligible pursuant to PRM 80-7, but may not be credited toward meeting a project's MBE/WBE goals.

C. Bidders/Offers must obtain the grantee's source lists, may obtain lists from appropriate MBE/WBE agencies and associations, and may seek additional names by advertising, for example in industry association publications, and MBE/WBE trade letters.

D. MBW/WBE should make efforts to be included on appropriate source lists by contacting EPA Regional Offices, potential grantees and appropriate agencies and associations.

IV. Calculation of MBE/WBE Participation

A. Credit for MBE/WBE participation under these policies shall be granted for MBE/WBEs performing a useful business function according to custom and practice in the industry. No credit will accrue for a MBE/WBE acting merely as a passive conduit of funds to some other, non-minority firm where such activity is unnecessary to accomplish the project.

B. Goals for MBE/WBE participation shall be calculated as a percentage of total eligible contract costs.

C. Credit for MBE/WBE project-related work that is not eligible for EPA assistance may be included in the calculation of MBE/WBE participation.

D. Joint Ventures. Joint ventures shall be credited towards the grantee's percentage of MBE/WBE participation by crediting the proportion of the dollar amount of the joint venture's subcontract equal to the proportion of the MBE/WBE's in the profit of the joint venture. Where the MBE/WBE's risk of loss, control or management responsibilities are not commensurate with the share of profit, the Regional Administrator may direct an adjustment in the percentage of the joint

*Availability includes those MBE/WBE's which find it to be in their interest to come into an area for a contract/subcontract.

venture's contract to be credited as MBE/WBE participation. In the case of a joint venture which includes a MBE and WBE, credit will be calculated towards their respective goals.

E. Suppliers—1. Suppliers are defined as follows: A supplier is a business which acts as a distributor of materials or equipment, and which provides a commercially useful function, when such activity is traditional in the industry manufacturing the material or equipment supplied.

Commercially useful function will normally include:

- Providing technical assistance to the purchaser prior to the purchase, during installation and after the supplies or equipment are placed in service;
- Charging and billing directly for all supplies and equipment not manufactured by the supplier;
- Manufacturing or being first tier below manufacturer of the supplies or equipment supplied;
- Providing functions other than just accepting and referring requests for supplies or equipment to another party for direct shipment to a contractor.

2. MBE/WBE suppliers shall be credited as follows:

- One hundred percent for MBE/WBE suppliers who manufacture the goods supplied.
- All MBE/WBE suppliers who are wholesalers warehousing the goods supplied or who are manufacturers' representatives will be credited with one hundred percent (100%) of the price of their subcontract; however, only 25% of the MBE/WBE goal may be attained with non-manufacturing supplier contract to MBE/WBEs.

3. In those contracts of which an extraordinarily large proportion of the contract price is for equipment or supplies, the grantee may propose a lower project goal than otherwise would be required, or request the Regional Administrator to increase the 25% limit for suppliers, or a combination of the two.

F. Total dollar value of a contract with an MBE owned and controlled by a minority woman or women may be credited as MBE participation or as WBE participation, or allocated, but may not be credited fully as both.

V. EPA Responsibilities

A. Headquarters. The Office of Small and Disadvantaged Business Utilization (OSDBU) and the Office of Water Program Operations (OWPO) shall be responsible, as follows:

- OWPO and OSDBU shall review MBE and WBE national policies by October 1, 1984, and every three years thereafter, and modify them if appropriate. The WBE national goal shall be reviewed annually.
- The Deputy Assistant Administrator for OWPO and the Director of OSDBU shall assure that regional goals for MBE and WBE participation are consistent with national policy.
- OSDBU shall provide to OWPO an overview of the MBE and WBE policies and procedures to assure the objectives of these policies are achieved.

4. OWPO shall make available for distribution upon request State Project Priority Lists by January 1 of each year.

5. OSDBU shall establish and maintain a liaison relationship with other federal agencies involved in MBE and WBE activities to take advantage of other Federal programs and work toward Federal uniformity.

6. OWPO shall maintain records of MBE/WBE participation as supplied by or collected from the Regions.

7. Headquarters shall maintain computer MBE/WBE source lists from data supplied by the Regions and OSDBU.

B. Regional Responsibilities—Each Regional Administrator shall:

- Establish separate Regional goals for MBE and WBE participation and provide them to OSDBU and OWPO for review.
- Review MBE/WBE goals annually.
- Approve grantee-proposed project goals.
- Provide guidance and advice to grantees as requested.
- Review grantee procurement documents (invitations for bids (IFB) and requests for proposals (RFP)) pertaining to MBE/WBE requirements.
- Review grantees' proposed contract awards to insure that apparent low bidders and apparent successful offerors have either met the project goal or made good faith positive efforts.
- Monitor grantees for compliance with MBE/WBE requirements after contract award, through the life of the project.
- Maintain, supplement continually, and update annually separate source lists of MBEs and WBEs from data supplied by grantees and self-certifying MBE/WBEs, and provide such lists to grantees and headquarters. Lists should provide the following information:

- name;
- address;
- telephone number;
- type(s) of work capable of performing, and
- designation of category of firm by ethnic group.

VI. Grantee Responsibilities

A. The grantee shall take affirmative steps to contract with MBE/WBEs and ensure that its contractors make positive efforts to contract with MBE/WBEs during all phases of work funded or to be funded under an EPA grant. These affirmative steps are the following:

- Include qualified MBE/WBEs on solicitation lists by drawing from the source lists of EPA Regional Offices, appropriate minority/women associations and agencies, and industry associations.
- Assured that MBE/WBEs are solicited whenever they are potential sources by:
 - holding pre-bid conferences, with interested MBE/WBEs in attendance when possible, to highlight the requirements of the MBE/WBE policies and procedures to prospective bidders.
 - including MBE/WBE policies and procedures and project goals in requests for proposals (RFP) and invitations for bids (IFB).
 - publishing announcement(s) of MBE/WBE opportunities for work on EPA funded projects.

d. providing grantee's source list to prospective bidders/offers.

e. providing liaison services between MBE/WBEs and prospective bidders/offers. Such services are recognized by EPA to be an allowable cost. Liaison services should not be delegated to consultants where a potential or possibility for a conflict of interest exists.

3. When feasible divide the total contracted work into smaller tasks in the solicitation documents to permit maximum MBE/WBE participation.

4. When the project requirements permit, establish delivery schedules which encourage participation by MBE/WBE.

5. Used the services and assistance of the Small Business Administration (SBA), the Minority Business Development Administration (MBDA), the Community Service Administration (CSA) and other federal, state and local agencies whenever appropriate.

B. Consult with the Regional Office for guidance when necessary, and in its application for a grant for each project, proposed separate project goals for MBE and WBE participation. Where the grantee proposes a project goal for MBE and/or WBE participation below the low end of the regional goal range, the grantee must justify the need for a lower goal.

C. After bid opening or receipt of proposal(s), evaluate bids to determine whether they are responsive with respect to MBE/WBE requirements, determine whether offers contain the requisite MBE/WBE information, and determine whether apparent low responsive bidders are responsible and offerors are qualified under the policies.

D. Forward the MBE/WBE documentation submitted with the bid to EPA (or State agency, if delegation under section 205(g) has occurred) for review after bid opening.

E. Monitor work in progress to insure that:

- prime contractors are utilizing MBE/WBEs for work as designated in bids and in any subsequent documentation of anticipated MBE/WBE participation.

2. MBE/WBE members of joint ventures for which MBE/WBE credit is allowed are actually participating in the performance of the joint venture's subcontract.

F. Maintain records of MBE/WBE participation and supply data upon request by the Region.

VII Bidder and Offeror Activities

A. Good Faith Positive Efforts: Activities during preparation of bids and offers. Bidders/offers shall make positive efforts, prior to bid submission or closing date for receipt of initial offers, to encourage participation in projects by MBE/WBEs. These efforts to provide opportunities for, discover, solicit and negotiate with MBE/WBEs must occur during bid/proposal preparation. Such efforts shall include, but need not be limited to:

- Segmenting total work requirements to provide sufficient opportunities for subcontracting so that, as a minimum, MBE/WBE goals specified in procurement documents can reasonably be expected to be met.
- Sending letters to or making other personal contacts with MBEs and WBEs; e.g.,

those who appear on lists prepared by the grantee and other MBE/WBEs known to the bidder/offeree. Sending letters or making other personal contacts with local, state, federal and private agencies and MBE/WBE associations relevant to the project. Those letters or other contacts must communicate the following:

- a. Specific description of the work to be subcontracted
- b. How and where to obtain a copy of plans and specifications or other detailed information needed to prepare a detailed price quotation
- c. Date the quotation is due to the bidder/offeree
- d. Name, address, and phone number of the person in the bidder/offeree's firm whom the prospective MBE/WBE subcontractor should contact for additional information.
- e. Letters should be sent or contacts made with potential MBE/WBE subcontractors at the time the bidder/offeree solicits quotations from non-MBE/WBE prospective subcontractors, but not later than 15 calendar days prior to submission of the bid or closing date for receipt of initial offer. MBE/WBEs contacted in this manner must be allowed at least ten calendar days to prepare a quotation.
3. Making available in a timely manner appropriate additional information for preparation of quotations to those MBE/WBEs that have submitted competitive quotations.

4. Up to the time of bid submission or throughout the negotiated procurement process, the bidder/offeree must make a reasonable effort to negotiate with all MBE/WBEs that have submitted reasonable quotations or offers. For competitive bidding, negotiations with all MBE/WBEs must be completed by bid submission.

B. Demonstration of Positive Efforts: Bid/ Offer submission requirements. Bidders/offerees must demonstrate that the requisite positive efforts have been made adequately. In order to demonstrate the performance of positive efforts, the following is required:

1. Competitive Bidding (e.g. Step 3 Construction Contracts)—a. All bidders must submit the following in the bid in order for the bid to be responsive:

1. Names, addresses, and phone numbers of certified MBE/WBE(s) to perform work. MBE/WBE(s) included must either be previously certified under Section II of this PRM or must have submitted a certification to the proper party (i.e. grantee, state or federally funded agency or EPA Regional Office) prior to bid opening.

2. Work to be performed by the MBE/WBEs.

3. Aggregate dollar amount of work to be performed by MBE/WBEs, showing aggregate to MBEs and aggregate to WBEs separately.

4. Percentage amount of total bid represented by MBE/WBE participation showing percentages for MBE and WBE participation separately.

b. If the bidder has not met the project goal(s) for MBE and/or WBE participation, the following documentation of positive efforts to utilize MBEs and/or WBEs must also be submitted with the bid in order for the bid to be responsive:

1. Description of scope of subcontract work and the percentage of total bid representing the segmented work.

2. Names and addresses of all a) MBE/WBEs b) local, state, federal, and private agencies which service minority/women business organizations, and c) minority associations which were contacted by the bidder.

3. Dates on which letters were sent or other contacts were made by the bidder.

4. Names of WBE/MBEs who initiated contact with the bidder, requesting information, the bidder provided such information, and when the information was provided.

5. Names of MBE/WBEs who submitted quotations to bidder and the amount of their final quote.

6. Description of negotiations which occurred with non-selected MBE/WBEs who submitted quotes and why they were not selected. Merely rejecting a quotation as "too high" without further negotiations as to essential elements of the quotation shall not constitute reasonable or adequate efforts. The bidder shall accompany his bid with a justification for the rejection of each MBE/WBE quotation or offer which was rejected and the date of the final action in the negotiation process prior to the time the bid was submitted.

Failure to submit the documentation of positive efforts pursuant to the requirements of a. and b. above shall render the bid nonresponsive and shall cause rejection of the bid.

c. The low, responsive bidder will be deemed responsible with respect to MBE/WBE requirements and may be awarded the contract if:

1. The low, responsive bidder submits within 2 days (48 hours) of bid opening letters of intent signed by MBE/WBEs listed in the bid, stating the work to be performed, price of the work and intent of the bidder and MBE/WBE to enter into a contract under those terms if the bidder is awarded the prime contract by the grantee and;

2. The low responsive bidder who has not attained the project goal(s) at the time of bid submission has demonstrated in the documentation in the bid that adequate positive efforts had been made prior to bid submission.

d. Failure to make the requisite positive efforts prior to bid submission cannot be cured after bid opening, except as provided in section X, Exception Provision, of this PRM.

2. Negotiated Procurement (e.g. architect/engineer and consultant contracts)

a. The following documentation must be submitted to the grantee by the offeror, regardless of the method of negotiated procurement:

1. Names, addresses, and phone numbers of certified MBE/WBE(s) to perform work. MBE/WBE(s) included must either be previously certified under Section II of this PRM or must have submitted a certification to the proper party (i.e. grantee, state or federally funded agency or EPA Regional Office) prior to proposal.

2. Work to be performed by the MBE/WBEs.

3. Aggregate dollar amount of work estimated to be performed by MBE/WBEs.

4. Percentage amounts of total offer estimated to be represented by MBE/WBE participation.

b. If the offeror does not meet the MBE and/or WBE goal, the following documentation must also be submitted at the same time:

a. Description of scope of subcontract work and the percentage of total offer representing the segmented work.

b. Names and addresses of all (a) MBE/WBEs (b) local, State, Federal, and private agencies which service minority/women business organizations, and (c) minority associations which were contacted by the offeror.

c. Dates on which letters were sent or other contacts were made by the offeror.

d. Names of WBE/MBEs who initiated contact with the offeror and to whom the offer provided information.

e. Names of MBE/WBEs who submitted quotations or offers to offeror and the amount of their final quote.

f. Description of negotiations which occurred with non-selected MBE/WBEs who submitted offers and why they were not selected. Merely rejecting an offer as "too high," where price is a factor without further negotiations shall not constitute reasonable or adequate efforts.

3. Documentation required under 2. above must be submitted at the following times:

a. At the deadline for receipt of initial offers in the case of competitive negotiated procurement, offerors must submit the documentation for the offers to be considered technically acceptable.

b. At the beginning of discussions held with not less than three of the most highly qualified architect-engineering firms in the case of negotiated procurements conducted in accordance with procedures based upon Pub. S. No. 92-582, 40 U.S.C. § 541-544 (1976) (commonly known as the "Brooks Bill"), architect-engineering firms must submit the documentation order to be considered qualified.

4. The offeror will be deemed responsible with respect to MBE/WBE requirements and may be awarded the contract if:

a. Letters of intent signed by MBE/WBEs proposed by the offeror are submitted to the grantee prior to contract award, and;

b. Positive efforts made by the offeror and documented in the proposal are adequate.

VIII. Exception Provision

Under exceptional circumstances, the Regional Administrator may, either upon the written recommendation of the grantee, or following EPA's own review, authorize the award of the contract to an apparent low bidder who would otherwise be rejected as non-responsible owing to specific remediable deficiencies in the MBE positive efforts performed by it prior to the submission of its bid. "Remediable deficiencies" are those that may be cured by continuing negotiations begun prior to bid submission and do not include initiation of negotiations with known MBE/WBEs or a search for MBE/WBE firms. Authority to grant such exceptions shall be limited to situations where:

a. There would otherwise be serious hardship to the grantee owing to the rejection of the apparent low bid or all bids; and

b. The apparent low bidder has expeditiously remedied or will remedy all such deficiencies in the period immediately following bid opening.

IX. Post Contract Award Compliance

A. Within 15 days after the date of contract award, the contractor must submit executed subcontracts with MBE/WBE(s) identified in the letters of intent to the EPA Regional Office.

B. The contractor shall notify the grantee in writing if listed MBE/WBE's will not be performing work proposed. Notice shall include:

- (1) Name of MBE/WBE not being utilized
- (2) Work designated to have performed by MBE/WBE.
- (3) Dollar value of that work
- (4) Reason(s) for not utilizing MBE/WBE.
- (5) Name of business to perform the work instead of the MBE/WBE.

(6) Unless a MBE/WBE is named to perform the work, the prime contractor must make reasonable positive efforts to find a MBE/WBE replacement. These positive efforts must be documented by providing in writing to the grantee:

- (a) name, address, and contact person of MBE/WBE contacted;
- (b) quotations provided by MBE/WBE(s) to perform work; and
- (c) evidence of negotiation with MBE/WBE(s) (e.g., meetings, phone calls, counter offer)

X. MBE/WBE Activities

MBEs/WBEs interested in working on EPA funded construction projects are encouraged to take the following steps:

- A. Submit information to the Region and grantees to identify status as a MBE/WBE.
- B. Use the appropriate method under these procedures to become certified as MBE/WBE under EPA policy.
- C. Enter into state and local planning processes.
- D. Contact Federal, State and local MBE/WBE liaison offices to obtain information on potential jobs.
- E. Provide capability statements to EPA, State agencies, grantees, consulting engineers, and contractors, stating type(s) of work performed by the firm, size of job that the firm could handle, bonding information, and any special skills.
- F. Make every effort to establish contacts and relationships with contractors for potential future business.
- G. Contact EPA Regional offices or appropriate state offices to obtain information on planned construction projects.
- H. Respond promptly to solicitation requests.

XI. Data Collection

A. Regions are responsible for collecting data from grantees and reporting to Headquarters MBE/WBE information. This information will be needed for two separate existing computer files. These files will be modified to include the following information:

1. MBE/WBE Source List File—General Information

- (a) name of firm
- (b) name of contact
- (c) address, city, state and zip code

- (d) whether MBE or WBE firm
 - (e) telephone number
 - (f) type(s) of work capable of performing
 - (g) capacity of firm, e.g., size of project capable of performing or bond capacity
 - (h) ethnic breakout (Black, Spanish or other)
 - (i) percent (%) or MBE/WBE ownership
2. *Contract Management File*—Specific information on each prime contract showing level and details of MBE/WBE participation. Required information for each individual prime contract is as follows:
- (a) total dollar amount of A/E or prime construction contract awarded
 - (b) total projected dollar level of MBE/WBE participation in contract at time of prime contract award
 - (c) planned/actual dollar level and type of participation for each MBE/WBE

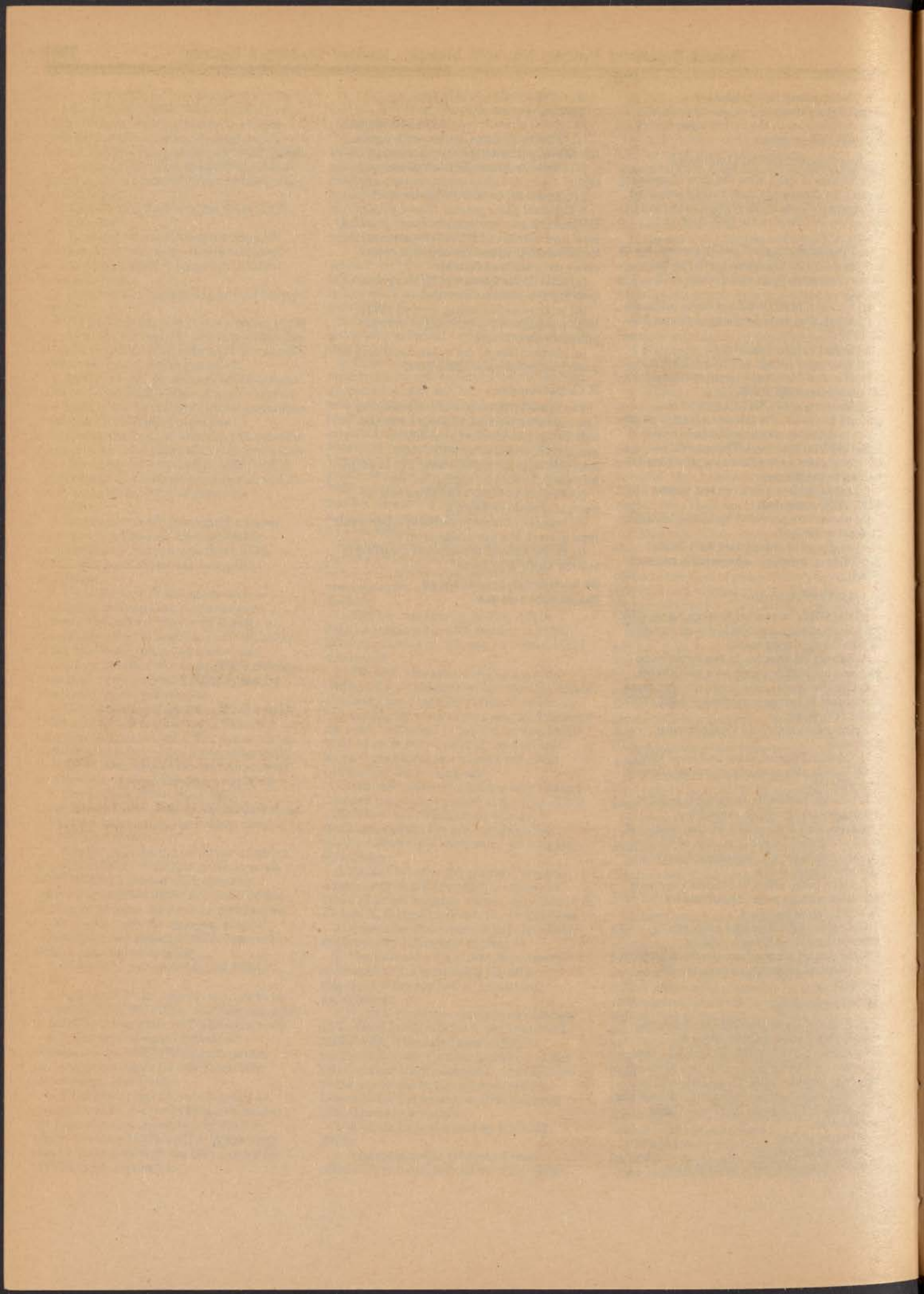
B. Output Reports

The MBE/WBE Source List File and the Contract Management File will be linked together to provide the capability to manipulate and display MBE/WBE information in various formats. For example, information could be aggregated on:

- (a) number of MBE/WBE firms in a particular State or Region;
- (b) number of firms performing a particular type of work in a particular area; or
- (c) dollar amount of contracts awarded to certain MBE/WBE firms.

[FR Dec. 81-1931 Filed 1-16-81; 8:45 am]

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Environmental Protection Agency

Monday
January 19, 1981

Part XXVIII

**Environmental
Protection Agency**

**Regulations for the Enforcement of the
Federal Insecticide, Fungicide and
Rodenticide Act; Classification of Uses
of Active Ingredients for Restricted Use**

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 162**

[OPP-30029B; PH-FRL 1674-6]

**Regulations for the Enforcement of
the Federal Insecticide, Fungicide and
Rodenticide Act; Classification of Uses
of Active Ingredients for Restricted
Use****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Final rule.**SUMMARY:** This final rule adds certain
uses of eight active ingredients to the
list of uses which the Agency has
classified for restricted use. The current
list is contained in 40 CFR 162.31 and
this final rule will amend that section.**EFFECTIVE DATE:** This rule will not take
effect before the end of 60 calendar days
of continuous session of Congress after
the date of publication of this rule. EPA
will publish a notice of the actual
effective date of this rule. See
Supplementary Information for further
details.**FOR FURTHER INFORMATION CONTACT:**
Mr. Walter Waldrop (TS-767), Office of
Pesticide Programs, Environmental
Protection Agency, 401 M Street, S.W.,
Washington, D.C. 20460, (202-426-2510).**SUPPLEMENTARY INFORMATION:** EPA
issued a notice which was published in
the Federal Register of August 1, 1979,
(44 FR 45219) and requested comment on
its proposal to classify certain uses of 21
active ingredients for restricted use.
EPA took this action pursuant to Section
3(d) of the Federal Insecticide, Fungicide
and Rodenticide Act (FIFRA), as
amended, 7 U.S.C. 136a(d), and 40 CFR
162.30. 40 CFR 162.30 provides that a use
shall be classified for restricted use if
the Administrator determines that the
incremental risk of unrestricted use, i.e.,
those over and above the risks of
restricted use, outweigh the incremental
benefits of unrestricted use, i.e., those
over and above the benefits of restricted
use. Applying that criterion, the
Administrator preliminarily determined
to classify for restricted use certain uses
of the 21 active ingredients referred to
above and accordingly published in the
Federal Register notice proposing a
regulation to that effect in 44 FR 45219.Comments on the proposed regulation
were received from interested parties.
Of the comments received none
contained objections to the action
proposed by EPA with respect to eight
of 21 active ingredients in question.
However, comments were received
which were adverse to the actionproposed by EPA on the other 13 active
ingredients. In this group the principal
criticism was EPA's reliance on residue
effects on avian species as a basis for
proposing to classify certain granular
formulations for restricted use. Another
common criticism was submitted by a
number of mosquito control districts
which objected to EPA's proposed
restricted use classification of temephos
for mosquito control uses. These
comments are currently under
consideration by the agency.Since the agency received no adverse
comments on its proposal with respect
to the eight active ingredients referred
to, it has determined to classify those for
restricted use by amending 40 CFR
162.31 at this time rather than
unnecessarily delaying their
classification while it considers the
comments received on the other 13
active ingredients. Comments on the
remaining 13 active ingredients will be
addressed by the agency in a future
Federal Register notice and a final
regulation with respect to them will be
promulgated at that time, if warranted.Only one specific comment was
received on any of the eight active
ingredients which are the subject of this
final rule. The comment related to the
agency's proposed restricted use
classification of certain uses of
methidathion. The registrant was
concerned that any future data
developed to support a general use
classification would be reviewed and
acted upon by the Agency. The agency
notes that it is prepared to review any
new data developed by a registrant or
other party for purposes of reclassifying
a previously restricted product. See
FIFRA section 3(d)(3), as amended, 7
U.S.C. 136a(d)(3). Further, all restricted
use classification decisions made under
these procedures will be reviewed at the
time of reregistration.The agency also notes that it has
withdrawn from this final regulation the
restricted use classification of EPN
granular formulations 2 percent and
greater based on residue effects on
avian species. There were no comments
submitted on the proposed restriction of
these formulations, but the agency has
decided to consider them with the other
granular formulations still under review.It is important to note that this
regulation only classifies uses for
restricted use. If a use is not classified
for restricted use by this regulation, it
does not mean that it is classified for
general use under section 3(d) of FIFRA,
as amended; it merely means that the
use has not yet been classified for either
general use or restricted use. However,
as a practical matter, a use which
remains unclassified will be generallyavailable to all consumers since
certification would not be required for
purchase and use. The agency is not
classifying uses for general use by
regulation primarily because such a
decision requires an evaluation of
chronic data. Review of chronic data
has not been a part of classification by
regulation since much of that data has
yet to be generated and submitted to the
agency.The agency has also indicated in this
final rule that all uses of formulations
containing 0.027 percent to 4 percent of
cycloheximide are "under evaluation."
This indicates that these uses are still
under active review for purposes of
classification by regulation. The
practical effect of the "under
evaluation" designation is the same as
that of "unclassified," i.e., the use will
be generally available to all consumers.
Further, any use/formulation that is
"under evaluation" would require no
action on the part of any potentially
affected registrant. A final classification
determination of those uses/
formulations which are "under
evaluation" may be made through these
optional classification-by-regulation
procedures or may be deferred until the
time of reregistration.Any product use classified for
restricted use under these regulations is
limited to use by or under the direct
supervision of a certified applicator.
Registrants of pesticide products with
uses classified for restricted use by this
final rule must comply with the
requirements of 40 CFR 162.30 within the
deadlines specified in those regulations.Further information on Effective Date
of this rule. On December 17, 1980,
President Carter signed the Federal
Insecticide, Fungicide, and Rodenticide
Act Extension Bill (Pub. L. 96-539). This
bill amended several sections of FIFRA,
including sec. 25 on rulemaking. Section
4 of the Extension Act adds a new
paragraph, sec. 25(e), to FIFRA which
requires EPA to submit final regulations
to Congress for review before the
regulation becomes effective. Copies of
this rule have been transmitted to
appropriate offices in both Houses of
Congress.Pursuant to sec. 4 of the 1980 FIFRA
Extension Act, and in accordance with
President Carter's statement on signing
the bill (Weekly Compilation of
Presidential Documents, p. 2814,
December 22, 1980), this rule will not
take effect before the end of 60 calendar
days of continuous session of Congress
after the date of publication of this rule.
Since the actual length of this waiting
period may be affected by
Congressional action, it is not possible,
at this time, to specify a date on which

this regulation will become effective. Therefore, EPA, at the appropriate time, will publish a notice in the **Federal Register** announcing the end of this "report and wait" period and notifying the public of the actual effective date of this regulation.

Regulatory Analysis

The agency has determined that this document does not contain a major proposal requiring preparation of a regulatory analysis under Executive Order 12044.

Evaluation Plan

Section 2(d)(8) of Executive Order 12044 requires that each new significant regulation have a plan for evaluating its effectiveness. All restricted use classification decisions promulgated under this final rulemaking will be reviewed by the agency at the time of reregistration as part of the overall risk-benefit analysis to be undertaken at that time. For a discussion of the difference between the overall risk-benefit analysis, and the incremental risk-benefit analysis performed under 40 CFR 162.30, see 42 FR 44170.

In connection with the agency's obligations under section 2(d)(8) of Executive Order 12044, one commenter questioned the agency's intent to review classification decisions at the time of reregistration, citing the anticipated length of time required to complete this process. Because of the projected length of time required, the commenter suggested that the agency include a statement about the anticipated time involved in completing the reregistration process.

While it is true that it will take at least 10-15 years to complete the reregistration of all active ingredients, the agency still believes that reregistration is the most appropriate time to review the effectiveness of these classification decisions. However, the agency will consider evaluating the effectiveness of the restricted use classification of any specific active ingredient(s) prior to reregistration if there is a demonstrated need to do so.

Statutory Review

The U.S. Department of Agriculture has reviewed the final regulation in accordance with Section 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) as amended and concurs with its publication in the **Federal Register**. The FIFRA Scientific Advisory Panel has reviewed the final regulation in accordance with Section 25(d) of FIFRA and concurs with its publication in the **Federal Register**. The panel also offered an additional special comment which is discussed below.

The panel expressed concern about the potential serious threat to public health posed by the designation of formulations of nicotine and zinc phosphide as unclassified for domestic and non-domestic uses. The panel cited the history of accidental poisoning over a long period of time with such toxicants and indicated that in its opinion, making them available to the general public while certain field uses are restricted tends to give the public a false sense of security. The panel recommended that in the future all use patterns be appropriately addressed. The panel further suggested that the technical merits of the current classification procedure be reevaluated, if necessary, to ensure that the availability of highly toxic poisons in domestic situations for use by unskilled persons is not promoted.

With respect to the panel's concern that the agency's classification decisions on certain active ingredients tend to give the public a false sense of security and that the classification procedures themselves promote the use of highly toxic poisons in domestic situations for use by unskilled persons, the agency notes the following:

1. While it is true that in some classification decisions agricultural and non-domestic uses of certain active ingredients have been classified restricted while domestic uses have remained unclassified, products with domestic use patterns are generally much less concentrated than those with agricultural crop uses and consequently pose a lesser degree of risk. This is true for the formulations of zinc phosphide and nicotine (alkaloid) addressed in this regulation.

2. During the classification-by-regulation process, all of the use patterns and formulations of an active ingredient under review are evaluated (as recommended by the panel) and subjects to the classification criteria of 40 CFR 162.11(c)(20) which impose more rigid safety limits on domestic uses than non-domestic uses. In fact, the classification criteria provide for a safety factor ten times greater for pesticides used in domestic use situations than that for pesticides used in non-domestic use situations. For instance, pesticide products are considered to be candidates for restricted use in *non-domestic* use situations if the acute dermal LD₅₀ is 200 mg/kg or less while such products are considered to be candidates for restricted use in *domestic* use situations if the acute dermal LD₅₀ is 200 mg/kg or less.

3. With it is true that only a limited number of domestic uses have been classified for restricted use when

compared to agricultural uses, most of the active ingredients reviewed in the classification-by-regulation process do not have any domestic uses.

While respect to the panel's recommendation that highly toxic pesticides such as zinc phosphide and nicotine not be allowed in the home environment for use by unskilled persons, the agency notes that those formulations of zinc phosphide (2% and less) and nicotine (alkaloid) (1.5% and less) identified in this rulemaking as unclassified did *not* meet the risk criteria for restricted use. An examination of the accident history of both active ingredients (which also can be grounds for classifying formulations or uses for restricted use under § 162.11(c)(4)), as shown by the agency's Pesticide Incident Monitoring System (PIMS) revealed a total of thirteen incidents for each active ingredient. Although there were two reported fatalities with nicotine (alkaloid) both were ruled to be suicide. (The PIMS data file represents slightly over 34,000 reported incidents covering the period 1966 to the present.) No other serious incidents with zinc phosphide or nicotine (alkaloid) were reported. Therefore, neither the risk criteria nor accident data gave the agency reason to believe there was sufficient reason to classify either of these two active ingredients (at the percentage concentration indicated) for restricted use.

The broader policy issue of whether or not zinc phosphide and nicotine (alkaloid) should be prohibited from domestic use regardless of formulation or concentration, is not one that can be addressed in the classification by regulation process. This process was designed to focus on the incremental risks and benefits of unrestricted use and was not meant to be a comprehensive evaluation of overall risks and benefits. This more comprehensive evaluation of risks and benefits for zinc phosphide and nicotine (alkaloid) will be accomplished during reregistration.

The provisions of 40 CFR 162.16, imposing a requirement for child-resistant packaging, also are pertinent. Products which meet certain acute toxicity criteria and are labeled to allow them to be used in residential settings must be packaged in a way which will lessen the ability of small children to obtain access to the product's contents.

One further point needs to be noted. Just as the agency is concerned about the health and safety of people who use and are exposed to pesticides, there is also concern that homeowners and domestic users have a selection of available pesticides that will provide

effective and affordable pest protection and still be within "acceptable" risk limits.

The Scientific Advisory Panel report is published in its entirety below.

Scientific Advisory Panel Review of Final Rulemaking

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Scientific Advisory Panel completed review of final rulemaking for classification of certain uses of eight active ingredients as restricted uses during the thirty-third meeting of the Panel, held in Arlington, Virginia, during the period June 26-27, 1980.

Maximum public participation was encouraged for discussion of the document under review. During the meeting, public comments were received from representatives of EPA and the pesticide industry. Public notice of the meeting was published in the *Federal Register* on June 10, 1980. In addition, special mailings and telephonic notices were sent to persons who had previously indicated an interest in activities of the Panel.

In consideration of all matters brought out during the meeting and careful review of all documents submitted by the Agency, the Panel submits the following report:

The FIFRA Scientific Advisory Panel unanimously concurs with the document submitted on June 5, 1980, outlining final rulemaking for classification of pesticides.

Special comment: The Panel is alarmed by the potential serious threat to public health posed by designation of formulations of nicotine and zinc phosphide as unclassified for all domestic and non-domestic uses. The Panel is of the opinion that such highly toxic poisons should not be allowed in the home environment for use by unskilled persons. The history of accidental poisoning over a long period of time with such toxicants would indicate their hazard potential in a variety of situations and conditions.

Permitting such formulations to remain on the market in an unclassified status while field uses of the same toxicants are classified as restricted tends to give the public a false sense of security. The Panel recommends that this problem be avoided in the future by ensuring that whenever a highly toxic material is classified as restricted on the basis of toxicity that all use patterns be appropriately addressed (i.e., field, domestic, non-domestic, etc.). The Panel urges the Agency to make this a generalized viewpoint for rulemaking and if necessary reevaluate the technical merits of current classification procedures which tend to promote the

availability of highly toxic poisons in domestic situations for use by unskilled persons.

For the Chairman:

Certified as an accurate Report of Findings:
H. Wade Fowler, Jr., Ph.D., Executive Secretary, FIFRA Scientific Advisory Panel.
Date: July 15, 1980.

Persons wishing to review the comments and other information relating to this rulemaking are referred to the Document Control Officer (TS-777), Office of Pesticides and Toxic Substances, Rm. E447, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The material is available for reviewing from 8:00 a.m. to 4:00 p.m. daily, Monday through Friday, excluding holidays.

(Secs. 3(d), 25(a), 92 Stat. 826-7, 89 Stat. 751-2, 92 Stat. 836; (7 U.S.C. 136 et seq.))

Dated: January 12, 1981.

Douglas M. Costle,
Administrator.

Part 162, Subpart A, § 162.31 is amended by alphabetically inserting chloropicrin, cycloheximide, dicrotophos, EPN, methamidophos, methidathion, nicotine (alkaloid), and zinc phosphide in the table to read as follows:

§ 162.31 Pesticide use classification.

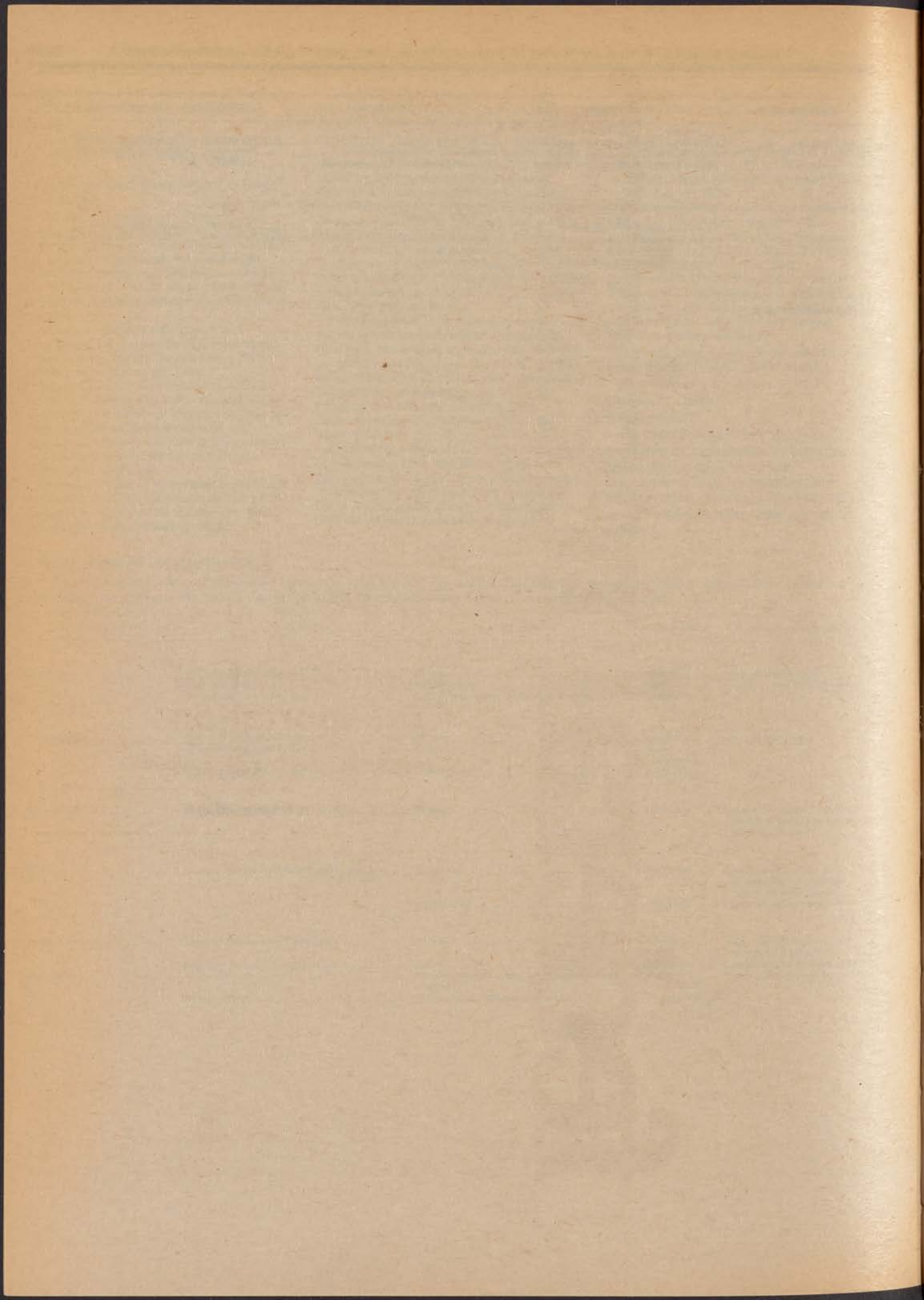
The following uses of pesticide products containing the active ingredients specified below have been classified for restricted use and are limited to use by or under the direct supervision of a certified applicator.

Active ingredient	Formulation	Use patterns	Classification	Criteria influencing restriction
Chloropicrin	All formulations greater than 2%	All uses	Restricted	Acute inhalation toxicity
	All formulations	Rodent control	Restricted	Hazard to non-target organisms.
	All formulations 2% and less	Outdoor uses (other than rodent control)	Unclassified	
Cycloheximide	All formulations greater than 4%	All uses	Restricted	Acute dermal toxicity
	All formulations 0.027% to 4%	All uses	Under evaluation	
	All formulations 0.027% and less	Domestic uses	Unclassified	
Dicrotophos	All liquid formulations 8% and greater	All uses	Restricted	Acute dermal toxicity; residue effects on avian species (except for tree injections)
EPN	All liquid and dry formulations greater than 4%	All uses	Restricted	Acute dermal toxicity; acute inhalation toxicity; residue effects on avian species.
		Aquatic uses	Restricted	Effects on aquatic organisms
Methamidophos	Liquid formulations 40% and greater	All uses	Restricted	Acute dermal toxicity; residue effects on avian species.
Methidathion	Dust formulations 2.5% and greater	All uses	Restricted	Residue effects on avian species.
	All formulations	All uses except nursery stock, safflower and sunflower	Restricted	Residue effects on avian species.
	All formulations	Nursery stock, safflower and sunflower	Unclassified	

Active ingredient	Formulation	Use patterns	Classification	Criteria influencing restriction
Nicotine (alkaloid)	Liquid and dry formulations 14% and above	Indoor (greenhouse)	Restricted	Acute inhalation toxicity.
	All formulations	Applications to cranberries	Restricted	Effects on aquatic organisms.
	Liquid and dry formulations 1.5% and less	All uses (domestic and non-domestic)	Unclassified	
Zinc Phosphide	All formulations 2% and less	All domestic uses and non-domestic uses in and around buildings.	Unclassified	
	All dry formulations 60% and greater	All uses	Restricted	Acute inhalation toxicity.
	All bait formulations	Non-domestic outdoor uses (other than around buildings).	Restricted	Hazard to non-target organisms.
	All dry formulations 10% and greater	Domestic uses	Restricted	Acute oral toxicity.

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Part XXIX

Department of Transportation

Federal Highway Administration

Urban Mass Transportation

Urban Mass Transportation
Administration

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Urban Mass Transportation Administration

23 CFR Parts 450 and 630

49 CFR Part 613

[FHWA Docket No. 80-24, Notice 2]

Urban Transportation Planning

AGENCIES: Federal Highway Administration (FHWA) and Urban Mass Transportation Administration (UMTA), DOT.

ACTION: Final rule; request for public comments.

SUMMARY: The purpose of this document is to issue amendments to existing regulations governing urban transportation planning under FHWA and UMTA programs. The changes are intended to (1) integrate the FHWA/UMTA policy for decisions on major urban transportation investments with the ongoing urban planning process; (2) reflect changes in the planning process necessitated by recent environmental requirements and agreements between the Department of Transportation (DOT) and the Environmental Protection Agency (EPA) relative to air quality; (3) emphasize the importance of Transportation System Management (TSM) in conserving energy and improving the efficiency of our transportation resources; and (4) simplify the administration of the planning process, particularly for areas under 200,000 population. Public comments on these amendments are invited. The need for future revisions to these regulations will be considered on the basis of comments received and the experience gained by the FHWA and UMTA under these regulations.

DATES: These amendments are effective on or before February 18, 1981. Written comments must be received on or before January 19, 1982.

ADDRESS: Submit written comments to FHWA Docket No. 80-24, Notice 2, Federal Highway Administration, Room 4205, HCC-10, 400 Seventh Street, SW., Washington, D.C. 20590. All comments received will be available for examination at the above address between 7:45 a.m. and 4:15 p.m. ET, Monday through Friday. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: FHWA: Sam W. P. Rea, Jr., Urban Planning Division, (202) 426-2961, or

Gary Maring, Public Transportation Management Division, (202) 426-0210, or Stanley Abramson, Office of the Chief Counsel, (202) 426-0762; or UMTA: Robert Kirkland, Office of Planning Assistance, (202) 426-4991, or James Ryan, Office of Planning Assistance, (202) 426-2360, or Anthony Anderson, Office of Chief Counsel, (202) 426-1906, all located at 400 Seventh Street, SW., Washington, D.C. 20590. FHWA office hours are from 7:45 a.m. to 4:15 p.m. ET; UMTA office hours are from 8:30 a.m. to 5 p.m. ET, Monday through Friday.

SUPPLEMENTARY INFORMATION: This document amends the FHWA/UMTA regulations for urban transportation planning (23 CFR 450 and 49 CFR 613) and the FHWA regulations for Federal-aid program approval and project authorization (23 CFR 630, Subpart A). These amendments are considered to be significant under the criteria established by the Department of Transportation pursuant to Executive Order 12044 because they involve important Departmental policy and major urban investments by FHWA and UMTA. A regulatory evaluation is available for inspection in the public docket (No. 80-24, Room 4205). Copies of the evaluation may be obtained by contacting Mr. Sam W. P. Rea, Jr., at the address provided above under the heading "For further information contact."

On September 17, 1975, FHWA and UMTA jointly issued final regulations (40 FR 42976) implementing the urban transportation planning process that is mandated under the Federal-Aid Highway Acts (23 U.S.C. 101 et seq.) and the Urban Mass Transportation Act of 1964, as amended (UMT Act) (49 U.S.C. 1601 et seq.).

Central to the joint planning regulations is the designation of a metropolitan planning organization (MPO) for each urbanized area. The MPO is the forum through which principal elected officials of general purpose local government cooperatively decide transportation issues. State and local responsibilities for cooperatively carrying out transportation planning and programming must be clearly identified.

The MPO in cooperation with the State and publicly owned operators of mass transportation services is responsible for carrying out the continuing, comprehensive and cooperative (3C) urban transportation planning process mandated by the Congress, and for developing the planning work programs, transportation plan and transportation improvement program required by the joint planning regulations. The transportation improvement program is a multiyear

program of transportation improvements, including an annual element, and must be endorsed annually by the MPO. Federal assistance for mass transit or highway projects in an urbanized area is given only to those projects which appear in the TIP.

The UMTA and FHWA review and evaluate the transportation planning process in each urbanized area. Federal certification of the process does not constitute approval or rejection of any given transportation project, but simply constitutes the formal recognition that an acceptable 3C process exists. This certification is a prerequisite to subsequent Federal approvals of individual project proposals.

Although these regulations have been implemented effectively, the revisions issued today are intended to promote consistency between national and local objectives, to improve decisionmaking by providing for greater coordination between the planning and project development processes for major urban transportation investments, to implement various transportation-related legislative requirements, such as air quality and energy conservation, and to simplify the administration of the planning process, particularly for areas under 200,000 population. In many cases, these revisions simply formalize what has already taken place on an informal basis.

Disposition of Comments

A notice of proposed rulemaking (NPRM) for the urban transportation planning regulations was published in the Federal Register on October 30, 1980 (45 FR 71990). Over 119 comments were received, including 54 from metropolitan planning organizations, 39 from State and local governments, 12 from national organizations and groups, 9 from transit operators and authorities, 3 from other Federal agencies, and 3 from private citizens and other interested parties. Several commenters submitted more than one response to the docket.

The majority of commenters were very positive and supportive of the proposed revisions. Many suggested editorial and other relatively minor changes and clarifications. Some commenters criticized certain proposed revisions and questioned the basis for these actions, particularly with respect to major urban transportation investments.

In the preparation of the final regulations, set forth below, consideration was given to all comments received as of January 9, 1981, insofar as they relate to matters within the scope of the NPRM. Except for editorial changes, and except as specifically

discussed herein, these regulations and the reasons therefore, are the same as contained in the NPRM. The great majority of the changes are clarifications rather than substantive alterations; however, certain comments did result in substantive alterations to the regulations.

A number of requests were received for extensions of time to submit comments on the NPRM or for an opportunity to review and comment on a subsequent refinement of the regulations in proposed form. These requests were denied due to the overriding interest in the timely improvement of the urban transportation planning process. An additional consideration was the fact that the policies and procedures for major urban transportation investments were the subject of a previous NPRM (43 FR 57478, December 7, 1978), which was fully discussed in the Supplementary Information section of the urban transportation planning NPRM published on October 30, 1980. However, in partial response to these requests and in accordance with the regulatory policies and procedures established by DOT pursuant to Executive Order 12044, public comments on these final regulations are being invited and may be submitted to FHWA Docket No. 80-24, Notice 2 during the 12 months following publication of the regulations. The need for future revisions to these regulations will be considered on the basis of comments received and the experience gained by the FHWA and UMTA in operating under these regulations.

In view of the interest expressed in these regulations, each section of these regulations which has been revised or which was the subject of major commentary or concern is discussed below. The General heading provides a discussion of major topics which go beyond individual sections, including Major Urban Transportation Investments, Air Quality and Transportation System Management. Individual sections and appendices are then discussed under the headings of the parts or subparts in which they are found.

General

Major Urban Transportation Investments

The final rule includes a number of provisions that deal with planning activities for major urban transportation investments. These provisions accomplish three objectives. First, the revised regulation ensures involvement of local officials, acting through the MPO, in corridor planning studies.

Second, the regulation establishes uniform FHWA and UMTA requirements for the analysis of major urban transportation investments. Finally, the regulation makes clear the role of major investment analyses in the transportation planning process.

In the past, projects proposed for funding by FHWA have been developed through the areawide planning effort, followed by highway location studies and preparation of environmental impact statements (EIS's). The location studies have in some instances been conducted by State highway agencies with only secondary involvement of local officials, usually acting through the Metropolitan Planning Organization (MPO). Projects proposed for UMTA funding have been assessed in the areawide analysis and then studied in more detail in corridor level alternatives analysis, documented in a draft EIS. Alternatives analyses have typically been conducted by the local transit operator, again in some instances without full MPO involvement.

The separate corridor level analyses by the implementing agencies have tended to constrain full consideration of various transportation "modes" (e.g., automobiles, mass transit). To address this problem, the requirements for the analysis of major investments are included within the cooperative planning process established in § 450.112. Section 450.112 defines responsibility for urban transportation planning as a cooperative effort among the MPO, the State, and local public transit operators. This section is modified in the final rule to include within the fully cooperative process all planning activities for major investments leading to the development of the draft EIS. The intent is to ensure cooperation without prescribing specific responsibilities or degrees of involvement for each agency. This flexibility permits local officials to decide the specific institutional arrangements and procedures to be used in the consideration of transportation alternatives. These procedures would be tailored to the range of alternatives being considered, their stage of advancement in the process, and other local considerations. It is anticipated that the degree of responsibility and involvement of the various agencies will vary with the status of development of implementation proposals. For example, the responsibility of MPOs would be heaviest at the areawide planning level, with appropriate input from implementing agencies. As proposals become more definitive, implementing agency responsibility would increase

and become predominant as the project nears implementation.

Several commenters expressed concern about the role of the MPO in the development of corridor refinement studies and the lack of clarity in the proposed rules regarding the relationships between the Federal, State, and local governments. A number of commenters interpreted the revised regulation as assigning to the MPO lead responsibility for corridor refinement studies. As discussed above, the provisions of this regulation require the involvement of MPOs, in the development of proposed highway and transit projects, as well as in the urban transportation planning process itself. The Department's authority to ensure the involvement of local elected officials, acting through the MPO, beyond the areawide planning stage has been firmly established by the Congress under the provisions of the Federal-Aid Highway Acts (23 U.S.C. 101 et seq.), the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.), and the Clean Air Act, as amended (42 U.S.C. 7401 et seq.). However, the Department has no intention of dictating the respective roles of the MPO, the State and the publicly owned operators of mass transportation services in such project-related activities. The regulation requires only that the MPO be involved. The nature and extent of that involvement has always been a matter of State and local discretion. This regulation does not alter the roles and responsibilities of the applicants for FHWA and UMTA funding, which are clearly established by law. Furthermore, with respect to the Federal-aid highway program, the involvement of the MPOs in the project development process is not intended to infringe upon the sovereign rights of the States to determine which projects are proposed for Federal-aid funding under the provisions of Title 23, U.S.C. The Federal-aid highway program remains a federally assisted State program.

Although this regulation specifically provides for MPO involvement at more stages than the previous rule, particularly with respect to major urban transportation investments, the basic premise for this involvement remains the same. The regulation seeks to foster cooperation and consensus among local elected officials as to the appropriate priorities among proposed highway and transit projects, and to harmonize the planning and programming of these projects, particularly where they affect the entire urbanized area.

To clarify the intention to provide complete flexibility in the conduct of

corridor refinement studies, § 450.112 is amended in the final rule to include a new paragraph (b) that specifically states that the MPO, the State, and public transit operators will determine their appropriate degree of responsibility for corridor refinement studies.

Requirements for major investment planning set forth in § 450.122 rely upon planning activities required by the regulations since 1975. While past planning efforts have included considerations of cost and effectiveness, the final rule ensures that a consistent approach will be employed in all analyses of major investments. Section 450.122 requires that the costs and effectiveness of major new transportation facilities be explicitly considered in the areawide assessment of transportation needs. This assessment will then be used to narrow the range of options to a number of reasonable and potentially cost-effective alternatives. The range of the remaining alternatives may be quite narrow or very broad. For example, a narrow range of alternatives would be expected if the investments only involve increasing the capacity of existing facilities. Where major widening of an existing freeway is proposed the capital intensive alternatives might differ only in the number of lanes to be added and the possible restriction of these lanes to high-occupancy vehicles. Similarly, where additional parallel tracks are proposed for an existing rail facility, the major capital alternatives might differ only in the number of miles of facility to which tracks are added. In other cases, however, the range of alternatives might be quite broad and could include such varied projects as a new freeway, a busway, a light rail line, and a heavy rail line.

Section 450.122 also requires that the narrowed range of alternatives be further evaluated in corridor refinement studies. These studies ensure that the selection of an alternative is based on more reliable cost and effectiveness information developed for all remaining alternatives in the corridor. For any freeway or busway project included within the range of alternatives, corridor refinement studies assess their location, degree of grade separation and access control, approximate right-of-way requirements, interchange locations, number of lanes, and general operating characteristics. For any heavy rail, light rail, or automated guideway projects among the alternatives, corridor studies examine the transit technology, degree of grade separation, station locations, operating characteristics, and general

alignment of the facility. The same level of detail is employed for all alternatives, regardless of their nature. Corridor refinement studies are analogous to highway location studies. Corridor refinement studies are also analogous to transit alternatives analyses, with greater detail used in the specification and assessment of the alternatives. The greater level of detail yields more reliable estimates of costs and effectiveness than have been developed in past alternative analyses. This detail provides greater confidence in the selection of an alternative with which to proceed into preliminary engineering.

Section 450.122 makes clear that the draft EIS is the document in which the results of corridor refinement studies are to be presented. This procedure is consistent with current environmental requirements and with the joint environmental regulation published on October 30, 1980 (45 FR 71968). Some commenters expressed uncertainty about the relationship of the areawide analysis of alternatives and the corridor refinement study leading to the draft environmental impact statement. To express this relationship graphically a simple flow chart has been prepared and is included at the end of this discussion.

Section 450.122 also identifies the FHWA and UMTA funds that may be used for corridor refinement studies. In the past, highway location studies have been funded by FHWA construction funds while transit alternatives analyses have used UMTA Section 8 funds. In order to support the more detailed analysis undertaken in a corridor refinement study, UMTA recognizes that additional funding may be required. Consequently, this section implements the provision of the Surface Transportation Assistance Act of 1978 that UMTA Section 3 funds may be used to support detailed alternatives analyses. Specific funding arrangements will be established on a case-by-case basis by Federal, State, and local officials.

The final rule amends § 450.114 to require that the Unified Planning Work Program (UPWP) describe corridor planning activities, regardless of funding source and implementation responsibility. In the past, the UPWP has usually described areawide planning activities, as well as UMTA Section 8 funded alternatives analyses. Highway location studies proposed for FHWA funding were included in the Transportation Improvement Program (TIP) but were not described in the UPWP. Conversely, alternatives analyses proposed for UMTA Section 8

funding were described in the UPWP but not included in the TIP. The final rule will provide better coordination of corridor planning activities through comprehensive UPWP documentation.

Several commenters questioned the need for this requirement. They observed that corridor studies using FHWA construction funds would have to be documented in both the UPWP and the TIP. However, for the reasons noted above, full coordination of planning and project development activities would be enhanced by a closer tie between the UPWP and the TIP. The level of detail of UPWP documentation is not prescribed and should be determined by the participating parties. Therefore, to ensure full coordination of all planning and project development activities, the final rule retains the UPWP documentation requirement.

It is important to note that the certification review required by § 450.124 encompasses Subpart A of the regulations (23 CFR 450). Therefore, planning for major investments is explicitly subject to the certification review process, and the review is expected to assess the soundness of the entire process leading to preparation of a draft EIS for major investments.

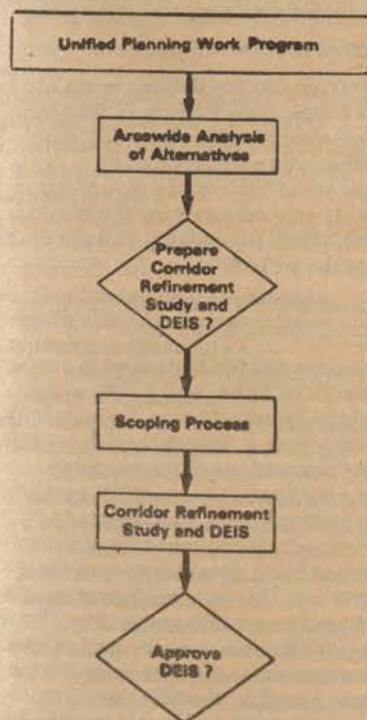
A new appendix has been prepared to provide advisory information on FHWA and UMTA procedures in administration of corridor refinement studies. In the past, major investments have been subject to separate UMTA and FHWA administrative procedures. To support the uniform major investment planning revisions included in this document, FHWA and UMTA have developed a single set of procedures that is identified in Appendix C to 23 CFR 450, Subpart A.

Several commenters asked for clarification of the range of planning activities to which this appendix applies. Consequently, the title of the appendix has been changed to denote that the appendix deals with the administration of planning for major urban transportation investments. Other commenters expressed reservations on the nature of federal approvals of proposed methodologies for corridor refinement studies, as described in paragraph 2. The intent of this paragraph is to ensure consistency of FHWA and UMTA administration of corridor refinement studies. The paragraph does not prescribe how the federal reviews and approvals will be accomplished. Therefore, the introduction to the appendix has been revised to indicate that FHWA and/or UMTA will determine the appropriate nature of Federal reviews and approvals during refinement studies. Finally, paragraph 1(c) has been modified to

make clear that the information used to demonstrate the need for further study at the corridor level would usually be taken from the areawide assessment of transportation needs, rather than from a separate planning study.

In view of the changes to the joint planning regulations, UMTA has reevaluated its existing policy statements on major urban investments. Every effort has been made to streamline the relevant policy and procedure statements to minimize duplication with the proposed revisions to the joint planning regulations. As a result, the 1976 Major Urban Mass Transportation Investment Policy (41 FR 41512, September 22, 1976) and the 1978 Policy Toward Rail Transit (43 FR 9428, March 7, 1978) have been superseded. Section 613.204 now includes the requirement, formerly in the Major Investment Policy, that major urban mass transportation projects must be determined to be cost-effective before they are eligible for Federal support. Remaining elements of these policies and procedures that are unique UMTA requirements are incorporated in 49 CFR Part 613 as an appendix. The procedural

Planning Process for Major Urban Transportation Investments



elements of this appendix are fully compatible with the procedures outlined

in the joint FHWA/UMTA environmental regulation (23 CFR 771), and supersede the Notice of Revised Policy published by UMTA on October 30, 1980 (45 FR 71986).

Finally, FHWA and UMTA wish to ensure a smooth transition to these changes in the ongoing planning and project development efforts. Consequently, those corridors for which a draft EIS has been filed with EPA or will be filed within 90 days of the effective date of the final rule, will not be affected by the revised regulation. The revised regulations will apply, however, to corridors where the draft EIS is supplemented under the FHWA/UMTA environmental process, unless the Administrator of FHWA and/or UMTA determines that it is not necessary. In corridors where a draft EIS is under preparation, FHWA and/or UMTA will work with State and local officials to identify any appropriate actions on a case-by-case basis.

Air Quality

Sections 104, 108, 112, 114, 120, and 124 in Subpart A of Part 450 and Sections 304, 312, 316, and 320 in Subpart C of Part 450 contain revisions related to the transportation/air quality planning and programming roles and responsibilities of the MPO. The changes reflect modifications required by the Clean Air Act Amendments of 1977 (Pub. L. 95-95) as well as a series of agreements reached between DOT and EPA as they relate to the urban transportation planning process and Federal review and approval responsibilities. These revisions identify those actions necessary for the enhanced coordination of the air quality and transportation planning processes.

Several commenters questioned and noted confusion about a proposed revision to § 450.106 which specified that the MPO should, where feasible, be designated as the organization responsible for the transportation portion of the SIP. One commenter pointed out that such a requirement ignored several important State responsibilities in the SIP process. We agree that including this designation within this regulation is confusing and have eliminated it from the final rule. The specific SIP designation procedure is fully covered by EPA in its rulemaking (40 CFR, Part 51, Subpart M).

In response to concerns about EPA's role in the certification process, § 450.124 has been changed to refer to

the DOT/EPA Memorandum of Understanding of June 14, 1978 which outlines EPA's role.

Commenters also questioned the proposed requirement in §§ 450.112(e) and 450.316(b) that prohibits an MPO from endorsing any project, program, or plan which does not conform with the SIP. This requirement is specifically stated in Section 176(c) of the Clean Air Act and is thus retained in the final rule.

One commenter requested that specific Federal air quality conformity requirements be included in this rulemaking. As noted in the preamble to the NPRM, FHWA and UMTA are revising 23 CFR 770, Air Quality Guidelines, in a separate action. This revision will provide the detailed procedures necessary to implement the conformity and priority requirements (Section 176(c) and (d)) of the Clean Air Act. Since there is significant linkage between planning, programming, and project conformity findings, we believe it is important that the entire conformity procedure be included as a single document. Thus, the revised urban transportation planning regulations incorporate this requirement by reference rather than separate planning requirements.

Transportation System Management (TSM)

Since the original joint regulations were published in 1975, a number of questions have arisen regarding the definition of TSM and the distinction between the TSM element and the long-range element. To clarify the definition and scope of TSM, revisions have been made to Part 450 and conventional terms for elements of the plan, i.e., short- and long-range elements, are not used. It should be noted that the importance of TSM is in no way diminished with the revisions; in fact, § 450.116(a) has been revised to include TSM as a key component of the transportation plan. In addition, since TSM pervades the whole process it is included as the first element required in § 450.120(a). The revisions particularly recognize the national concern for energy conservation in response to Executive Order 12185 on energy conservation (44 FR 75093, December 19, 1979).

The regulations have been revised to clarify the purpose of TSM as primarily addressing operational and service issues both short- and long-range. Changes to § 450.116(b) emphasize the synergistic effect possible with systematic applications of TSM actions and highlight the applicability of a

problem area-oriented approach to TSM. Section 450.116(c)(2) has been revised in order to emphasize that the long-range planning process should be just as sensitive to potential major regulatory policy changes or, in fact, long-term operational measures as is the short range element. This change is consistent with § 450.120(a)(8) which was recently changed in a similar manner in a rulemaking (45 FR 58022, August 29, 1980) connected with Executive Order 12185 on Energy Conservation.

The joint planning regulations specifically address urban goods movement issues, because it is clear that these issues directly affect the quality of transportation services in urban areas. A modification, consisting of an additional technical activity item, to § 450.120(a)(8) provides the framework for urban goods movement planning, emphasizing a problem identification, site-specific approach. The modification also specifically recognizes the need for involvement of the private sector in goods movement planning activities. In addition to the specific modification to § 450.120(a)(8), the new "TSM Appendix" presents the movement of goods as an integral part of the planning process. Also, the phrase "persons and goods" is used in the description of the short-range and long-range elements of the planning process.

Most of the comments related to the proposed TSM changes were favorable. However, one commenter suggested that the goal "to improve mobility" be included in § 450.120(a)(8)(ii). We agree and have changed to reflect this suggestion.

Also, one commenter expressed concern with § 450.120(a)(7) regarding the number of agencies involved in the planning process. These agencies do not have to participate in every issue; however, they must be involved where their interests are affected. We believe no change to the wording is necessary.

The new Appendix A replaces the 1975 version completely. Therefore, it is designed to stand alone as guidance on the intent, goals, scope and requirements of TSM. This appendix is organized into seven sections covering the goals of FHWA and UMTA in requiring TSM, the scope of what TSM includes, roles and responsibilities in addressing TSM requirements, necessary technical activities, documentation requirements, programming, and funding.

The section on goals clearly lays out the rationale for TSM and its emphasis on system operations and services. New issues are facing the planning process and an approach for recognizing these new issues is provided.

The scope of TSM is then discussed. The range of tactics available is described. This listing is arranged in a general way and replaces the list in the 1975 appendix. That list has been misinterpreted as a checklist of tactics which every area must assess, one-by-one, and accept or discard based on local conditions. The new list illustrates the kinds of actions that fall into the service and operational improvement categories represented in general by TSM. Also discussed are some issues regarding the definition of TSM, particularly the relationship of short-term/long-term and high-cost/low-cost distinctions to the intent of TSM. The concept of different operating environments (or problem areas) is also introduced.

The section on roles and responsibilities recognizes that the MPO has lead responsibility for coordinating all TSM activities. However, the need to include a broad range of actors in the planning process is now explicit. This is needed to reflect the range of public and private operating agencies and authorities responsible for implementing TSM actions and programs.

Technical activities to be included in the Unified Planning Work Programs are described more explicitly than in the 1975 appendix. However, the activities listed are intended to be illustrative, not a mandatory checklist.

The requirements for documentation of area TSM planning are clarified in the next section of the appendix. No new documentation is required for TSM, rather, TSM is to be documented in the normal products of the planning process. Much discretion is left to localities to decide how best to report on TSM activities.

Finally, a section on programming is added to better describe the kinds of results which would be expected of TSM planning. This section should help localities understand the types of projects which will be emphasized in reviewing implementation efforts in TSM.

Most of the comments received on the appendix A were very positive. However, there were some significant suggestions made and some points that need further clarification. There were several comments in support of the emphasis given to urban goods movement in appendix A. Some clarification on urban goods movement funding was desired. HPR and PL funds are available for planning studies and technical analyses of urban goods movement projects.

Many comments suggested that a number of the TSM items contained in the UPWP be eliminated, such as a

description of goals and objectives as well as the planning process. We agree with this comment. The appendix now advises that "the UPWP should only describe TSM planning to be undertaken during the period it covers."

Several comments were made regarding the use of motorcycles as a transportation mode. We agree that it is a significant mode. As a result we have listed motorcycle and moped provisions along with bicycle provisions in the range of tactics presented in the appendix.

23 CFR Part 450, Subpart A

Section 450.100 Purpose

Section 450.100 describes the general purpose of the final regulation. The purpose of the regulation is to implement certain sections of 23 U.S.C. and the UMT Act of 1964, as amended, which require urbanized areas to have a continuing, cooperative, and comprehensive transportation planning process as a condition of receipt of Federal capital or operating assistance.

Section 450.102 Applicability

Section 450.102 provides that this subpart is applicable to the transportation planning process for urbanized areas, and that certification under this subpart is necessary prior to urbanized area program approvals.

Section 450.104 Definitions

Section 450.104 defines terms used in this subpart. Definitions of the terms, "cost-effectiveness analysis," and "major urban transportation investment" as well as several air quality-related terms have been added by this final rulemaking without change from the NPRM.

Section 450.106 Metropolitan planning organization: Designation

Section 450.106 is revised to conform to Sections 169(a) and 305(b) of the Surface Transportation Assistance Act of 1978 (Pub. L. 95-599) which provides that designations of metropolitan planning organizations (MPOs), after November 7, 1979, shall be made by agreement among the units of general purpose local government and the Governor. This section, however, is not intended to mandate new or reaffirmed designation action on the part of local governments or the Governor. To the extent possible, the MPO designated shall be established under specific State legislation, State enabling legislation or by Interstate compact. In addition, the principal elected officials of the general purpose local governments shall be adequately represented on the MPO.

Several commenters requested that we more clearly define what constitutes "agreement" between units of general purpose local government and the Governor in the designations or redesignations made after that point in time. We have used the precise language of the legislation. We expect State and local officials to develop mutually acceptable procedures for making MPO designations. We are not imposing a Federal mandate on the definition of "adequate representation" of principal elected officials on the MPO policy body. In the spirit of a cooperative planning process, we expect State and local officials to develop mutually acceptable organizational structure and representation.

Several commenters requested that the geographical scope of the transportation planning process as identified in § 450.110 and the geographical requirement relating to the representation on the MPO (§ 450.106(d)) be identical. We do not believe that such a requirement would be appropriate. The existing regulation requires that, as a minimum, the jurisdiction of the metropolitan planning organization encompass the urbanized area, as this boundary relates to the eligibility requirements of FHWA and UMTA capital and operating assistance programs. However, it is good planning practice to include areas likely to be urbanized when conducting long-range planning. To integrate transportation planning with other planning activities in the area, and to permit flexible institutional arrangements, we intend to retain the permissive language of the existing regulation.

Section 450.108 Metropolitan planning organization: Agreements

Section 450.108 requires that the responsibilities for the cooperative transportation planning and programming shall be identified in an agreement or memorandum of understanding between the State and the MPO. The responsibilities of the MPO and the publicly owned operators of mass transportation services shall also be specified by agreement. Where the MPO and the A-95 agency are different, there shall be an agreement which coordinates their activities. If the MPO is not designated for air quality planning under section 174 of the Clean Air Act, there shall be an agreement between the two organizations on their respective responsibilities. To the extent possible, these agreements must be contained in a single cooperative agreement. The requirement of an agreement between the MPO, the State, the publicly owned transit operators,

and the air quality agency may be met if the parties agree to document their responsibilities in a unified planning work program. In order to minimize red tape, the requirement that agreements be sent to FHWA and UMTA (section 450.108(g)), proposed in the NPRM, is deleted in the final rule.

Section 450.110 Metropolitan planning organization: Geographic scope

Section 450.110 requires that the transportation planning process at least cover the urbanized area and the area likely to be urbanized in the period covered by the long-range element of the transportation plan.

Section 450.112 Metropolitan planning organization: Responsibilities

Section 450.112 provides that the MPO, in cooperation with the State and the local mass transit operators, be responsible for the urban transportation planning process specified in §§ 450.120 and 450.122. The MPO is also responsible for developing the unified planning work program (§ 450.114), the transportation plan (§ 450.116), and the transportation improvement program (TIP) (§ 450.118). In addition, the MPO is required to develop, or assist in developing, the transportation control measures of the State implementation plan (SIP) in nonattainment areas. In accordance with the Clean Air Act, the MPO is prohibited from endorsing any project, program or plan which does not conform to the SIP.

The MPO, the State, and publicly owned operators of mass transportation services determine the responsibility of each in the conduct of corridor refinement studies described in § 450.122. The discussion, including the response to comments, relating to the responsibilities for § 450.122 activities is contained under the heading, "Major Urban Transportation Investments."

Section 450.114 Urban transportation planning process: Planning work programs

Section 450.114 states that the urban transportation planning process must include a Unified Planning Work Program (UPWP). The UPWP includes: (1) a discussion of the area's important transportation issues; (2) a description of all transportation and transportation-related planning activities, including corridor planning activities (§ 450.122), regardless of funding sources; (3) a description of transportation-related air quality planning activities, regardless of funding sources or which agency conducts such activities; and (4) documentation of all work to be performed with planning assistance

provided under Section 8 of the UMTA Act (49 U.S.C. 1607(a)) and 23 U.S.C. 104(f) and 307(c).

Several commenters expressed concern that elimination of the prospectus and the subsequent inclusion of some of its elements in the UPWP might result in an increase in paperwork and staff effort. Therefore, we have revised § 450.114 of the regulations to make the development of a prospectus optional.

One commenter noted that the revised section 450.114 no longer contains language which encourages combining UPWP requirements with those of other planning programs. We do want to continue this encouragement and are, therefore, reinstating the language of the previous section which is still applicable.

Section 450.116 Urban transportation planning process: Transportation plan

Section 450.116 provides that the urban transportation planning process include the development of a transportation plan consisting of both a short-range element and a long-range element. Transportation system management, which is described in Appendix A to Subpart A, is a key component of both the short-range and the long-range elements. The short-range must (1) provide for the near term transportation needs of persons and goods in the urbanized area; (2) identify TSM actions that present a systematic approach to solving urban transportation problems; and (3) be included in the transportation improvement program (TIP). The long-range element must (1) provide for the long-term transportation needs of persons and goods in the urbanized area through capital investments, strategies, and policy changes; (2) identify new transportation policies, strategies, facilities, or major changes in existing facilities, in sufficient detail to identify the location and mode to be implemented; and (3) fully explore TSM as a policy and investment strategy for long-range transportation and development plans in the particular area. The transportation plan must be consistent with the area's long-range land use plan; urban development objectives; and its social, civil rights, economic, environmental, system performance, and energy conservation objectives.

The majority of the commenters responded favorably to the change to the more conventional terms for the elements of the plan (i.e., long- and short-range elements). However, others were confused with the terminology. They contend that short-range element

as defined is limited only to TSM actions. This is not our intent. Therefore, § 450.116(b) has been changed to reflect the intent that the short-range element contain all investments and strategies to serve near-term transportation needs, including TSM actions. Likewise, § 450.116(c) has been changed to reflect the long-term focus of the long-range element.

Section 450.118 Urban transportation plan process: Transportation improvement program

Section 450.118 provides that the urban transportation planning process include development of a transportation improvement program (TIP), including an annual element prescribed in Subpart C—Transportation Improvement Program. The program is a staged multiyear program of transportation improvement projects consistent with the transportation plan developed under § 450.116.

Section 450.120 Urban transportation planning process: Elements

Section 450.120 requires that the urban transportation planning process include: (1) consideration of TSM strategies in all phases; (2) consideration of social, economic and environmental effects, including transportation-related air quality problems; (3) provisions to ensure meaningful citizen participation in local transportation planning; (4) participation of all persons regardless of race, color, sex, national origin, or physical handicap; (5) special efforts to plan public mass transportation facilities that can be utilized by elderly and handicapped persons; (6) consideration of energy conservation goals; (7) provisions for involvement of traffic, ridesharing, parking and enforcement agencies, airport and port authorities, and appropriate private transportation providers.

Section 450.120(a)(3) stresses the importance of citizen participation by clarifying the scope of the citizen participation which is desirable. This provision is necessary in order to comply with the Departmental Policy Statement on Citizen Participation in Local Transportation Planning. It does not address financial support for citizen participation in local planning and project development. Section 450.120(a)(3) was modified to emphasize the continuing and meaningful participation of the public, especially minorities, women and other interested persons, in the 3C planning process. It should be noted, therefore, that the certification review process is expected to assess citizen participation in the planning process in light of this

increased emphasis on continuing and meaningful participation.

Section 450.120(a)(8) provides that the urban transportation planning process include the following activities as necessary and to the degree appropriate for the size of the metropolitan area and the complexity of its transportation problems; (1) analysis of conditions of travel, transportation facilities, vehicle fuel consumption and systems management; (2) evaluation of alternative TSM improvements and development of the short-range element of the transportation plan; (3) projections of the urban area economic, land use, and demographic activities, in order to project potential transportation demands; (4) examination of the distribution of the costs and impacts of transportation plans and programs; (5) analysis of alternative transportation investments or strategies to meet areawide needs and to aid in development of the long-range element of the transportation plan; (6) refinement of the transportation plan by conducting corridor, transit technology, staging, sub-area, feasibility, location, legislative, fiscal, functional, classification, institutional, air quality impact, and energy impact studies; (7) monitoring and reporting of urban development, transportation and energy consumption indicators; (8) programming which merges the plan refinements of the long-range element and the short-range element improvements to produce a TIP as specified in subpart C; and (9) analysis of goods and services movement problem areas.

Several commenters requested greater precision in the language for paragraph (a)(8)(iv) particularly, regarding the phrase "various segments of the population." Consequently, this section has been rewritten with the phrase deleted. This new section requires an examination of the distribution of costs and impacts. This examination should be tailored to the issues and problems encountered in each urban area. In some instances, this may be the distribution among various communities. In others, this may be the distribution among various population segments by income or ethnic origin. The term "transportation alternatives" has been changed to "transportation plans and programs" to better express the intent of this section.

Section 450.122 Urban transportation planning process: Major urban transportation investments

Section 450.122 requires that the analysis of alternatives, to meet areawide needs for new transportation

facilities, shall include consideration of the cost and effectiveness of the proposed major urban investments. At the corridor refinement studies level, the analysis of alternatives will also include consideration of cost-effectiveness, in addition to evaluation of location, degree of grade separation, and the operating characteristics of the alternatives. The corridor refinement studies will serve as the basis for the draft environmental impact statement (DEIS) and will be eligible for funding under sections 3 and 8 of the UMT Act of 1964, as amended, and under the planning and construction funding sections of 23 U.S.C., as appropriate. The discussion, including the responses to comments relating to this section, is contained in the preamble under the heading "Major Urban Transportation Investments."

Section 450.124 Urban transportation planning process: Certification

Section 450.124 provides that the UMTA and the FHWA Administrators will jointly review the transportation planning process for each urbanized area to determine if it meets the requirements of subpart A. In nonattainment areas, the administrators will review to ensure conformance with the SIP and afford the U.S. Environmental Protection Agency the opportunity to review the adequacy of the planning process.

Several comments were concerned with the elimination of the requirement for an annual certification. We believe this change to be appropriate given the relatively slow rate of change occurring in the planning process on a yearly basis. We intend that while a formal certification review should not be needed annually, informal assessments of the need for a certification review would be a continuing function in the FHWA and UMTA administration of the planning process.

Appendix A

Appendix A is discussed under the heading, "Transportation System Management."

Appendix B

Appendix B to 23 CFR Part 450, Subpart A on transportation for elderly and handicapped persons will be revised. That revision will be published at a later date.

Appendix C

Appendix C is discussed under the heading, "Major Urban Transportation Investments."

Appendix D

As part of a joint FHWA/UMTA effort to reduce redtape and simplify administrative and technical requirements in small metropolitan areas, FHWA and UMTA issued guidance on August 1, 1980, related to meeting the minimum requirement of the joint planning and programming regulations for urbanized areas of less than 200,000 population. This guidance was published in the *Federal Register* on October 23, 1980 (49 FR 70249). The guidance has been revised to make it consistent with this rulemaking and is included as Appendix D. Many commenters reacted favorably to the guidance.

23 CFR Part 450, Subpart B

The revisions to Subpart B are of purely editorial nature. These revisions were not included in the NPRM as their publication is proposed form would have served no useful purpose.

23 CFR Part 450, Subpart C

As discussed in the NPRM, the provisions of 23 CFR Part 450, Subpart C are being revised in order to: (a) reflect recent amendments to this subpart which were issued in connection with amendments to the Interstate substitution and withdrawal regulations (23 CFR Part 476, Subpart D), published by FHWA and UMTA on October 20, 1980, (45 FR 69390); (b) make technical revisions to this subpart to make it consistent with the proposed modification in Subpart A; and (c) revise provisions relating to the transportation/air quality planning and programming roles and responsibilities of the MPO and Federal review and approval responsibilities.

23 CFR Part 630, Subpart A

Section 630.106 Policy

Section 630.106(b) is added to prescribe that Federal support is available only for those major urban transportation investment alternatives that meet local, State and national goals.

49 CFR Part 613, Subpart B

Section 613.204 Additional Criteria for Urban Mass Transportation Administrator's Approvals Under 23 CFR 450.320

Section 613.204 requires that the UMT Administrator will grant program approval only if the projects meet local, State, and national goals in a cost-effective manner.

(Catalog of Federal Domestic Assistance Program Numbers 20.205, Highway Research, Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501,

Urban Mass Transportation Capital Improvement Loans; and 20.507, Urban Mass Transportation Capital and Operating Assistance Formula Grants. The provisions of OMB Circular No. A-95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects apply to these programs)

Issued on: January 14, 1981.

John S. Hassell, Jr.,

Federal Highway Administrator,

Theodore C. Lutz,

Urban Mass Transportation Administrator.

Title 23—Highways

In consideration of the foregoing, Chapter I of Title 23, Code of Federal Regulations, and Chapter VI of Title 49, Code of Federal Regulations, are amended as set forth below.

1. Part 450, Subpart A of 23 CFR is revised to read as follows:

PART 450—PLANNING ASSISTANCE AND STANDARDS

Subpart A—Urban Transportation Planning

Sec.

450.100 Purpose.

450.101 Applicability.

450.104 Definitions.

450.106 Metropolitan planning organization: Designations.

450.108 Metropolitan planning organization: Agreements.

450.110 Metropolitan planning organization: Geographic scope.

450.112 Metropolitan planning organization: Responsibilities.

450.114 Urban transportation planning process: Planning work programs.

450.116 Urban transportation planning process: Transportation plan.

450.118 Urban transportation planning process: Transportation improvement program.

450.120 Urban transportation planning process: Elements.

450.122 Urban transportation planning process: Major urban transportation investments.

450.124 Urban transportation planning process: Certifications.

Appendix A—Advisory information on transportation system management.

Appendix B—[Reserved]

Appendix C—Advisory information on the administration of corridor refinement studies for major urban transportation investments.

Appendix D—Advisory information on the simplification of administrative requirements for planning in metropolitan areas of less than 200,000 population.

Authority: 23 U.S.C. 104(f)(3), 134, and 315; Sections 3, 5, and 8 of the Urban Mass Transportation Act of 1964, as amended, (UMTA Act) (49 U.S.C. 1602, 1604, and 1607); Sections 110, 172, 174, 176 of the Clean Air Act; and 49 CFR 1.48(b) and 1.51.

SUBPART A—URBAN TRANSPORTATION PLANNING

§ 450.100 Purpose.

The purpose of this subpart is to implement 23 U.S.C. 134, and Sections 5(l) and 8(a) and (c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1604(l) and 1607(a) and (c)), which require that each urbanized area, as a condition to the receipt of Federal capital or operating assistance, have a continuing, cooperative, and comprehensive transportation planning process that results in plans and programs consistent with the comprehensively planned development of the urbanized area.

§ 450.102 Applicability.

The provisions of this subpart are applicable to the transportation planning process in urbanized areas. Certification under this subpart shall be a prerequisite for program approvals in urbanized areas pursuant to 23 U.S.C. 105(d) and 134(a), Section 8(a) of the UMT Act (49 U.S.C. 1607(a)), and Subpart C of this part.

§ 450.104 Definitions.

(a) Except as otherwise provided, terms defined in 23 U.S.C. 101(a) are used in this subpart as so defined.

(b) As used in this subpart:

"Cost-effectiveness analysis" of major urban transportation investments means an analysis of the costs of several alternatives and their effectiveness in meeting local, State, and national goals and objectives. In the analysis: (1) costs are capital, operating, and maintenance expenditures estimated with sufficient detail to distinguish between alternatives; and (2) effectiveness measures assess the degree of attainment of local, State and national transportation, social, economic, and environmental goals. These include, but are not restricted to, mobility, safety, environment, energy, goals related to central city viability, neighborhood preservation, employment, housing and accessibility for minority, elderly and lower income residents, and land use and development.

"Governor" means the Governor of any one of the fifty States, or Puerto Rico, and includes the Mayor of the District of Columbia.

"Major urban transportation investment" means a project that involves new construction or extension of a freeway segment, busway, or fixed guideway transit facility; adding lanes to a freeway segment or busway; or adding tracks to a fixed guideway transit facility. It does not include: (1) lesser localized improvements to

existing freeway, busway, or fixed guideway transportation facilities; (2) safety improvements or resurfacing, restoration, or rehabilitation of existing facilities; (3) added lanes to short freeway and busway segments (normally less than 1 mile) to alleviate specific, localized traffic flow problems; (4) added segments to fixed guideway transit facilities to provide specific localized improvements to system operations; (5) projects that are part of a demonstration program; and (6) the emergency replacement of facilities damaged or destroyed as a result of a natural disaster or catastrophic failure.

"Metropolitan planning organization (MPO)" means that organization designated as being responsible, together with the State, for carrying out the provisions of 23 U.S.C. 134, as provided in 23 U.S.C. 104(f)(3), and capable of meeting the requirements of Sections 3(e)(1), 5(l), and 8(a) and (c) of the UMT Act (49 U.S.C. 1602(e)(1), 1604(l), and 1607(a) and (c)). This organization is the forum for cooperative decisionmaking by principal elected officials of general purpose local government.

"Nonattainment area" means a region as defined in Section 171 of the Clean Air Act.

"State implementation plan (SIP)" means a plan approved or promulgated under Section 110 of the Clean Air Act.

§ 450.106 Metropolitan planning organization: Designations.

(a) Designations of metropolitan planning organizations (MPO's) made after November 7, 1979, shall be made by agreement among the units of general purpose local governments and the Governor. To the extent possible, only one MPO shall be designated for each urbanized area or group of contiguous urbanized areas.

(b) Funds authorized by 23 U.S.C. 104(f) shall be made available by the State to the MPO, as required by 23 U.S.C. 104(f)(3). To the extent possible, the MPO shall be eligible to receive planning funds authorized by Section 8 of the UMT Act of 1964, as amended (49 U.S.C. 1607a).

(c) To the extent possible, the MPO designated shall be established under specific State legislation, State enabling legislation, or by Interstate compact, with authority to carry out metropolitan transportation planning, and should perform the functions required by the Office of Management and Budget (OMB) Circular A-95 "Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects" (41 FR 2052, Jan. 13, 1976).

(d) Principal elected officials of general purpose local government within the jurisdiction of the MPO shall have adequate representation on the MPO.

(e) Nothing herein shall be deemed to prohibit the MPO from utilizing, through contractual agreements, the staff resources of other agencies to carry out selected elements of the planning process.

(f) An MPO designated under the provisions of this section shall remain designated until another MPO is designated under the provisions of this section.

§ 450.108 Metropolitan planning organization: Agreements.

(a) The responsibilities for cooperatively carrying out transportation planning and programming shall be clearly identified in an agreement or memorandum of understanding between the State and the MPO.

(b) Where the MPO is different from the A-95 agency, there shall be an agreement between the two organizations which prescribes the means by which their activities will be coordinated, as required by Part IV of OMB Circular A-95. This agreement shall specify how transportation planning and programming will be part of the comprehensively planned development of the urbanized area.

(c) There shall be an agreement between the MPO and publicly owned operators of mass transportation services which specifies cooperative procedures for carrying out transportation planning and programming as required by this subpart.

(d) If the MPO is not designated for air quality planning under Section 174 of the Clean Air Act, there shall be an agreement between the MPO and the designated agency describing their respective roles and responsibilities for air quality related transportation planning.

(e) To the extent possible, there shall be one cooperative agreement containing the understandings required by this section among the State, MPO, publicly owned operators of mass transportation services and, where necessary, the A-95 agency and the agency responsible for air quality planning.

(f) Where parties involved agree, the requirement for an agreement specified in paragraphs (a), (c) and (d) of this section may be satisfied by including the responsibilities and procedures for carrying out a cooperative process in the unified planning work program.

§ 450.110 Metropolitan planning organization: Geographic scope.

The transportation planning process shall, as a minimum, cover the urbanized area and the area likely to be urbanized in the period covered by the long-range element of the transportation plan described in § 450.116.

§ 450.112 Metropolitan planning organization: Responsibilities.

(a) The MPO in cooperation with the State, and in cooperation with publicly owned operators of mass transportation services, shall be responsible for carrying out the urban transportation planning process specified in § 450.120 and § 450.122 and shall develop the planning work programs, transportation plan, and transportation improvement program specified in §§ 450.114 through 450.118. The MPO shall be the forum for cooperative decisionmaking by principal elected officials of general purpose local government.

(b) The MPO, the State, and publicly owned operators of mass transportation services shall determine the responsibility of each in the conduct of the corridor refinement studies described in § 450.122.

(c) The MPO shall develop or assist in developing the transportation control measures of the SIP in nonattainment areas which require transportation control measures.

(d) The MPO shall annually endorse the plans and programs required by §§ 450.114 through 450.118.

(e) In nonattainment areas which require transportation control measures the MPO shall not endorse any project, program, or plan which does not conform with the SIP.

§ 450.114 Urban transportation planning process: Planning work programs.

(a) The urban transportation planning process shall include the development of a unified planning work program (UPWP) which:

- (1) Discusses the important transportation issues facing the area;
- (2) Describes all urban transportation and transportation-related planning activities, including the corridor refinement activities discussed in § 450.122, anticipated within the area during the next 1- or 2-year period regardless of funding sources;
- (3) Describes the transportation-related air quality planning activities anticipated, regardless of funding sources or agencies conducting such activities; and

(4) Documents work to be performed with planning assistance provided under Section 8 of the UMT Act (49 U.S.C. 1607(a)) and 23 U.S.C. 104(f) and 307(c).

(b) Arrangements may be made to combine the unified planning work program requirements of other Federal sources of physical planning funds (e.g., Department of Housing and Urban Development and Department of the Interior).

(c) The urban transportation planning process may include the development of a prospectus. To the extent that the prospectus satisfies the requirements of § 450.108 and paragraph (a)(1) of this section, it may be included by reference in the UPWP.

§ 450.116 Urban transportation planning process: Transportation plan.

(a) The urban transportation planning process shall include the development of a transportation plan consisting of a short-range element and a long-range element. Transportation system management (TSM), as described in Appendix A to this subpart, shall be a key component of these elements. The transportation plan shall be reviewed annually to confirm its validity and its consistency with current transportation and land use conditions.

(b) The short-range element of the transportation plan shall:

(1) Provide for the near-term transportation needs of persons and goods in the urbanized area;

(2) Identify TSM actions such as traffic engineering, ridesharing, pedestrian and bicycle facilities, alternative work schedules, goods movement, high occupancy vehicle treatments, and public transportation improvements (including regulatory, pricing, management, and operational options), that present a systematic approach in addressing problem areas; and

(3) Be reflected in the transportation improvement program.

(c) The long-range element of the transportation plan shall:

(1) Provide for the long-term transportation needs of persons and goods in the urbanized area;

(2) Identify new transportation policies, strategies, or facilities or major changes in existing facilities and may be in sufficient detail to identify location and mode to be implemented; and

(3) Fully explore TSM as a policy and investment strategy for the long-range transportation and development plans for the area.

(d) The transportation plan shall be consistent with the area's comprehensive long-range land use plan and urban development objectives, with local, State, and national goals and objectives, and with the area's overall social, civil rights, economic, environmental, system performance, and

energy conservation goals and objectives.

§ 450.118 Urban transportation planning process: Transportation improvement program.

(a) The urban transportation planning process shall include development of a transportation improvement program (TIP) including an annual element as prescribed in Subpart C of this part.

(b) The program shall be a staged multiyear program of transportation improvement projects consistent with the transportation plan developed under § 450.116.

§ 450.120 Urban transportation planning process: Elements.

(a) The urban transportation planning process shall:

(1) Provide for the consideration of TSM strategies or actions in all phases of the planning process;

(2) Provide for the consideration of social, economic, and environmental effects, with appropriate emphasis on consideration of transportation-related air quality problems and in support of the requirements of 23 U.S.C. 109(h), and Sections 5(h)(2) and 14 of the UMT Act (49 U.S.C. 1604(h)(2) and 1610), and Section 174(b) of the Clean Air Act;

(3) Include provisions to ensure early and continuing involvement of the public, as actively supported and strongly encouraged by the Departmental Policy Statement on Citizen Participation in Local Transportation Planning (45 FR 71938, October 30, 1980). Individuals and groups should have full access to all relevant information. Citizens should be provided such assistance as appropriate to assure meaningful participation in the process. Minorities, women and other interested persons should have an adequate opportunity for full participation in the process and representation on advisory committees;

(4) Be consistent with Title VI of the Civil Rights Act of 1964 and the Title VI assurance executed by each State under 23 U.S.C. 324 and 29 U.S.C. 794, which ensure that no person shall on the grounds of race, color, sex, national origin, or physical handicap be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under any program receiving Federal assistance from the Department of Transportation;

(5) Include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons pursuant to Section 16 of the UMT Act (49 U.S.C. 1612), Section 165(b) of the

Federal-Aid Highway Act of 1973, as amended, and 49 CFR 27;

(6) Provide for the consideration of energy conservation goals, objectives, and where established, energy conservation targets;

(7) Provide for the involvement of the traffic, ridesharing, parking, and enforcement agencies; airport and port authorities; and appropriate private transportation providers;

(8) Include the following activities as necessary and to the degree appropriate for the size of the metropolitan area and the complexity of its transportation problems:

(i) An analysis of existing conditions of travel, transportation facilities, vehicle fuel consumption, and systems management;

(ii) An evaluation of alternative TSM improvements in the development of the transportation plan to:

(A) Improve mobility;

(B) Make more efficient use of existing transportation resources;

(C) Assist in improving air quality;

(D) Reduce energy consumption for transportation overall; and

(E) Respond to short-term disruptions in the energy supply;

(iii) Projections of urban area economic, demographic, and land use activities consistent with urban development goals, and projections of potential transportation demands based on these levels of activity;

(iv) Examination of the distribution of costs and impacts of transportation plans and programs;

(v) Analysis of alternative transportation investments or strategies to meet area wide needs for transportation facilities and to aid in the development of the long-range element of the transportation plan, such analysis to include estimates of the air quality impacts, impacts on the economic vitality of existing commercial centers and the energy consumption of each alternative;

(vi) Refinement of the transportation plan through the conduct of corridor, transit technology, and staging studies; and sub-area, feasibility, location, legislative, fiscal, functional classification, institutional, air quality impact and energy impact studies;

(vii) Monitoring and reporting of urban development, transportation, and energy consumption indicators and a regular program of reappraisal of the transportation plan implementing programs;

(viii) Implementation programming which merges the results of plan refinement of the long-range element and the improvements recommended in the short-range element of the

transportation plan to produce a TIP as specified in Subpart C of this part; and

(ix) An analysis of goods and services movement problem areas, as determined in cooperation with appropriate private sector involvement, including, but not limited to, port access and traffic impacts of urban goods and services operations.

(b) The urban transportation planning process shall include preparation of technical reports to assure documentation of the development, refinement, and reappraisal of the transportation plan.

§ 450.122 Urban transportation planning process: Major urban transportation investments.

(a) The analysis of alternatives for transportation investments to meet areawide needs for new transportation facilities described by § 450.120(a)(8)(v) shall consider the cost and effectiveness of proposed major urban investments in attaining local, State, and national goals and objectives.

(b) In corridors where a major urban transportation investment is proposed in the long-range element of the urban transportation plan, the corridor studies described in § 450.120(a)(8)(vi) shall further refine the analysis of alternatives at the corridor scale. These studies shall include an evaluation of the cost-effectiveness, the location (i.e., general alignment), the degree of grade separation, and the operating characteristics of the alternatives under consideration. Studies involving transit alternatives shall also include an evaluation of transit technology.

(c) Corridor refinement studies shall serve as the basis for the draft environment impact statement which is prepared pursuant to 23 CFR 771.

(d) Corridor refinement studies are eligible to receive funds authorized under Sections 3 and 8 of the UMT Act of 1964, as amended, and planning and construction funds apportioned under 23 U.S.C., as appropriate.

§ 450.124 Urban transportation planning process: Certification.

(a) The Federal Highway and Urban Mass Transportation Administrators jointly will review and evaluate as appropriate the transportation planning process in each urbanized area to determine if the process meets the requirements of this subpart.

(b) In nonattainment areas requiring transportation control measures, the FHWA and UMTA Administrators will:

(1) Review and evaluate the transportation planning process to assure conformance with the SIP in

accordance with procedures contained in 23 CFR 770, and

(2) Afford the Environmental Protection Agency (EPA) the opportunity to review the adequacy of the planning process in accordance with the Memorandum of Understanding of June 14, 1978, between DOT and EPA regarding the integration of transportation and air quality planning.*

(c) If, upon the review and evaluation conducted under paragraphs (a) and (b) of this section, the FHWA and UMTA Administrators jointly determine that the transportation planning process in an urbanized area meets or substantially meets the requirements of this subpart, they may take one of the following actions, as appropriate:

(1) Certify the transportation planning process; or

(2) Certify the transportation planning process subject to one of the following conditions:

(i) That certain specified corrective actions be taken; or

(ii) That the process is a basis for approval of only those categories of programs or projects that the Administrators may jointly determine and that certain specified corrective actions be taken.

(d) The State and the MPO shall be notified of the actions taken under paragraph (c) of this section.

(e) A certification under paragraph (c) of this section will remain in effect until a new certification determination is made.

Appendix A—Advisory Information on Transportation System Management Under UMTA and FHWA Joint Regulations, 23 CFR Part 450, Subparts A and C, and 49 CFR 613, Subparts A and B

1. *Purpose.* To implement the updated urbanized area planning requirements contained in Title 23 of the United States Code and the Urban Mass Transportation Act of 1964, as amended, UMTA and FHWA have jointly issued revised regulations (23 CFR Part 450 and 49 CFR Part 613). These regulations require that the transportation planning process in each urbanized area develop (1) a plan addressing Transportation System Management (TSM) in both the long- and short-range elements and (2) a Transportation Improvement Program (TIP).

This appendix provides additional guidance on the intent and scope of the requirement for Transportation System Management. Criteria that the U.S. Department of Transportation will use in reviewing the adequacy of the TSM activities in planning and programing are also included.

2. *Goals.* Transportation plans and programs are, to an increasing extent, being called upon to address a host of issues, such as energy conservation, air quality,

environmental problems and urban revitalization. At the same time, increasing costs of transportation facilities and decreasing fiscal resources make funding major new investments extremely difficult. These factors have made it increasingly important that transportation resources—facilities, equipment and services—be operated in the most efficient manner possible. It is this need that led to the concept of TSM and its inclusion as a required feature of transportation plans for urbanized areas.

When originally introduced, the TSM concept represented a significant change in the direction of transportation planning and programing. TSM requires the planning process to expand its focus to include assessments of improved service and operations, as well as facilities, as a potential means to maximize mobility. TSM also requires the process to address both supply and demand. The TSM concept requires viewing the transportation system as a whole with all modes receiving attention. The philosophy calls for addressing the transportation of people and goods, not merely movement of vehicles.

TSM accounts more explicitly for new factors in transportation decisionmaking such as energy, environment, air quality, and fiscal limitations. These constraints on mobility must be dealt with if it is to be maintained or expanded. In addition, opportunities to enhance mobility exist in urban revitalization efforts that the process should be capable of stimulating.

TSM should be tied to planning required by the Clean Air Act and planning specified by a variety of other statutes covering energy conservation. Consistency in plans undertaken to meet these goals is best developed at the local level.

3. *Scope.* Transportation System Management is a philosophy about planning, programing, implementation and operations that calls for improving the efficiency and effectiveness of the transportation system by improving the operations and/or services provided. TSM aspects of the Transportation Plan address services and operations of the system and identify management and operational changes needed to improve efficiency and effectiveness.

A range of tactics (actions) is available to meet the goals outlined. Examples are:

- Traffic operations improvements.
- Ridesharing.
- Incentives to use of high occupancy vehicles (such as buses, carpools and vanpools), including preferential parking, reserved lanes, exclusive ramps, etc.
- Pedestrian provisions.
- Bicycle, motorcycle, and moped provisions.
- Parking management programs, including enforcement, pricing, supply management, zoning changes, permit systems, etc.
- Work schedule changes, including flexitime, staggered hours, compressed work weeks.

- Goods movement measures.
 - Pricing actions.
 - Paratransit services.
 - Transit route and schedule changes.
 - Transit management improvements.
 - Innovative transit services types.
- In every case, these tactics address the operations or services provided by the

* Available for inspection and copying from FHWA and UMTA as prescribed in 49 CFR Part 7.

transportation system. In addition, some of these tactics can affect transportation demand, as opposed to only supply.

Transportation System Management is applicable to a number of operating environments and with a wide range of agencies and groups participating. For example, the central business district (CBD) is a likely site for high occupancy vehicle parking preferences, bus lanes, pedestrian facilities, auto restrictions, etc., while neighborhoods are appropriate for parking permit programs and traffic operational actions discouraging through travel. Further, a radial corridor is an appropriate place for high occupancy vehicle lanes, express bus services and park and ride lots. Each of these actions need the support and coordination of a broad range of agencies and interest groups.

Transportation System Management measures often have synergistic effects. In other words, several tactics applied together may often be more effective as a group than individual actions taken in an uncoordinated manner. Therefore, there should be a systematic approach to TSM planning rather than a piecemeal approach. For example, a package of measures to improve the efficiency of a corridor as a whole should be developed as opposed to only looking at individual problem areas in the corridor in an isolated manner.

Since Transportation System Management actions involve operations and services on existing facilities rather than development of major new facilities, they are generally *low cost*. Certain actions such as high occupancy vehicle incentives or development of a transit mall, may involve substantial sums, however.

TSM involves both short and long-term actions. Service and operation changes generally can be implemented more quickly than construction of new facilities and thus can have a short-range focus. However, TSM strategies may also involve *long-term* facility improvements (e.g., dedication of a new facility to high occupancy vehicle use) and have long-term impacts.

4. Roles and Responsibilities. A wide range of agencies is likely to participate in addressing TSM considerations in the planning process. While the MPO is primarily responsible for TSM coordination, other agencies, including State DOTs, city traffic departments, public transit operators and enforcement agencies, as well as the private sector, should also be involved. These agencies generally have better knowledge of the operations of specific system elements under their control and can be called on to implement improvements. Private sector involvement in programs such as ridesharing, work schedule changes, goods movement, auto restricted zones, etc., is vital to their success.

The metropolitan planning organization (MPO) has lead responsibility for the coordination of the TSM activities called for by the joint planning regulations. This does not mean, however, that the MPO must conduct all TSM work itself. Rather, local agencies, such as city traffic departments, the State DOT and the area's public transit operators should be involved. The decision on which agency should conduct needed

analyses should be made locally and should be based on the scale and level of the particular project or problem under study. For example, it is probably most appropriate that operators conduct route and schedule studies and other similar transit management analyses and that local traffic departments undertake signalization studies. In order to support these efforts, MPOs are encouraged to pass Federal planning assistance funds through to such agencies.

Private sector involvement is also important. Employers should be involved in ridesharing or transit-use promotions or in work rescheduling to spread peaks. Also, private providers of mass transit services should be considered for new services, such as paratransit or special user operations. Studies of goods movement management issues, such as truck routes, port access, downtown delivery, etc., should involve the private sector and port authorities.

Ensuring that all likely participants have an appropriate role can be critical to the success of a specific strategy. For example, a downtown parking management program would require participation of a variety of city agencies such as planning and zoning, traffic, and administration. Police involvement early in the planning process would ensure that enforcement is given adequate attention. Downtown businessmen, whose operations might be affected, should be involved. Support from such a group could be critical. The transit operator could suggest key bottlenecks where parking changes could be beneficial. Finally, the MPO can analyze regional impacts and serve to coordinate the overall effort.

5. Technical Activities. To adequately address the goals of the requirement for TSM, a number of key technical activities should be undertaken in each urbanized area as part of the continuing planning process.

Each area's Unified Planning Work Program (UPWP) should reflect as necessary, and to the extent appropriate, the following critical activities:

- System monitoring and data collection, including traffic and auto occupancy counts and transit ridership monitoring and surveys;

- Regional scale problem identification, allowing for selection of areas for detailed study of person and goods movement problems;

- Transit service planning, including reviews of service area, route, schedules, etc., on a continuing basis;

- Transit management analyses, covering maintenance practices, organization, personnel policies, financial planning, training, labor relations, etc.;

- Ridesharing and high occupancy vehicle analyses for HOB lanes, parking management, alternative work schedules, etc.;

- Analysis of signal timing optimization and other traffic engineering measures;

- Coordination of local agency activities to ensure that these will result in a plan that is internally consistent;

- Selective post-project evaluations to determine the effectiveness of implemented projects and areas for modification;

- Energy contingency planning.

UMTA and FHWA will review each area's UPWP closely to ensure that sufficient attention is given to these critical activities.

6. Documentation. No new documentation products are required to address TSM. The plans and programing implications of TSM will be documented in the normal products of the urbanized area planning process.

The Unified Planning Work Program (UPWP) should describe TSM planning to be undertaken during the period it covers, including treatment of the critical technical areas outlined above.

Individual technical reports, such as short-range transit plans or traffic engineering studies, should document the procedures that were used to develop, refine or reappraise TSM aspects of the plan; the evaluation of alternative strategies; and the strategies recommended for implementation.

The transportation plan report(s) should describe TSM aspects, including a brief description of system problem areas, goals and objectives, and recommended TSM improvements. This documentation should provide local officials with a clear understanding of what is being recommended, e.g., type of improvements, locations, financial aspects, etc.

The Transportation Improvement Program/Annual Element (TIP/AE) should identify implementation costs and schedules, funding sources, and agency responsibilities for TSM projects to be implemented.

The manner in which TSM is documented should not be confused with the need for project justification. Technical information that may be needed for justifying certain types of transit projects should be provided in technical reports on those projects and is not required in the document(s) describing TSM aspects of the transportation plan.

The joint planning regulations require that the plan be reviewed and endorsed periodically. Certification reviews will ensure that TSM is adequately addressed in the plan and that it is updated and endorsed properly.

7. Programming. Effective planning for Transportation Systems Management should result in the programming and implementation of TSM type projects. One measure of the adequacy of the TSM planning effort conducted in an urbanized area is the level of TSM activity found in the area's Transportation Improvement Program (other measures include past progress in TSM implementation, and most importantly, the overall efficiency of existing system service and operations). While FHWA and UMTA will not prescribe the number of types of projects that must appear in an area's TIP, an adequate level of effort in TSM planning will usually result in programs and projects in the following areas, regardless of the source of funds:

- Ridesharing.

- Traffic control signalization.

- High occupancy vehicle incentives.

- Pedestrian and bicycle facilities.

In addition, an adequate level of effort in TSM planning focused on the efficiency of existing services will generally result in the existence, on an ongoing basis, of programs covering transit service monitoring and assessment, transit service adjustments, transit maintenance programing, financial

management programs and management and organizational improvement programs. Progress in these activities will receive close attention from UMTA and FHWA.

8. *Funding.* A variety of funding sources are available to support planning and implementation for TSM. UMTA places priority on use of Section 8 technical studies funds for TSM planning as does FHWA on use of PL and HP&R funds. Implementation funds are available from UMTA through the Section 3 discretionary capital grant program, the Section 4(i) innovative techniques and methods program and the Section 5 urban mass transportation formula grant program. Federal-aid highway funds may also be used to implement a wide range of TSM-type projects. Federal Aid Urban System funds offer the greatest flexibility for use for TSM-type projects including traffic operations, ridesharing, pedestrian and bicycle facilities, high occupancy vehicle incentives, and transit. Traffic control signalization projects may be funded at the 100 percent Federal share level.

Appendix B—[Reserved]

Appendix C—Advisory Information on the Administration of Corridor Refinement Studies For Major Urban Transportation Investments

The following procedures will apply in FHWA and UMTA administration of corridor refinement studies for major urban transportation investments. The nature of the various Federal reviews and approvals will be determined by FHWA and/or UMTA, as appropriate.

1. When an applicant requests approval for a corridor refinement study, the request will be supported by:

(a) An identification of the corridor(s) in which major transportation investments may be warranted;

(b) A description of a number of reasonable alternative major investments for the corridor(s); and

(c) Information, summarized from the results of areawide planning activities, that demonstrates the need for further study of major urban transportation investments.

2. As part of the scoping process and as early as possible, FHWA and/or UMTA will reach agreement with the applicant on the following aspects of the study:

(a) The range of the alternatives to be studied including, at a minimum, a no action alternative and TSM alternatives;

(b) Procedures to be used to estimate the cost and effectiveness of each alternative;

(c) The evaluation methodology;

(d) The process for citizen involvement; and

(e) The administrative arrangements among the MPO, the State, and the public transit operator(s) for conduct of the study.

3. Federal administrative responsibility for the corridor refinement studies depends primarily upon the range of alternatives to be considered. The administration of the study may involve both FHWA and UMTA as joint lead agencies. A joint lead agency agreement will normally result where:

(a) The range of alternatives include a mix of highways and mass transportation investments;

(b) It is uncertain whether FHWA or UMTA will be requested to fund the investment; or

(c) The FHWA and UMTA Administrators decide to establish joint lead agency agreements.

4. During joint corridor refinement studies, FHWA and UMTA will review and monitor the progress of the studies and provide guidance as necessary. Preparation of the draft EIS will conform to the provisions of the FHWA/UMTA environmental regulations (23 CFR Part 771).

Appendix D—Advisory Information on the Simplification of Administrative Requirements For Planning in Metropolitan Areas Less Than 200,000 Population

Introduction

The simplification of Federal program requirements has been given a high priority by the Administrators of FHWA and UMTA and by the Office of the Secretary. The objective in developing the guidance was to: (1) reduce the burden of Federal planning requirements in all urbanized areas under 200,000 population; (2) reduce the administrative burden on FHWA and UMTA staffs; and (3) aid newly designated urbanized areas in developing a planning process which is adequate to address their unique needs while avoiding excessive detail and wasteful expenditures.

This appendix provides for an appropriate level of effort for smaller urbanized areas.

Advisory Guidance

There will be no need for a formal agreement except where the MPO and the A-95 agency are different. The requirements of other agreements may be satisfied through description of roles and responsibilities in the work program and/or TIP.

The Unified Planning Work Program (UPWP) may be a brief summary of the important transportation issues facing the area, and the work activities in the UPWP addressing these issues. The review of the UPWP need only be by the Federal funding agencies. Joint review and approval procedures should be worked out by these agencies.

In accordance with Section 134, Title 23, U.S.C., the transportation plan must be based on transportation needs and consider long-range land use plans, overall goals and objectives, and their impact on future development. In small urbanized areas the long-range plan may be a simple statement about land use policy and the location of major public facilities, and transportation improvements. The focus should be on the development of the short-range element and TSM improvements.

The level of technical effort should be commensurate with the problems being addressed. Maximum use should be made of simplified planning techniques, which are discussed in several planning manuals specifically developed for small areas.

The transportation improvement program/annual element of the plan should be scaled to the needs of the area. If only a few projects can be funded annually, the document may need only be a single page with the coming year's projects clearly identified.

The certification review of the small area planning process should be as simple as possible and should be based to the maximum extent on previously submitted data. In new areas (those added as a result of the 1980 Census), the determination of planning adequacy should recognize that extensive planning may not be ongoing in these areas. In most cases, we would expect new urbanized areas to be certified initially with appropriate conditions.

While the regulations under subpart C call for specific initiation procedures, the key to local involvement is the MPO endorsement. This should also be the focus of Federal review.

The only nonfederally funded TSM projects that need to be included in the TIP/AE are those which local officials determine will have a substantial impact on federally-funded projects in TIP/AE.

2. Part 450, Subpart B of 23 CFR is amended as follows:

§ 450.200 [Amended]

a. By amending § 450.200(b) to remove the phrase "by the Governor" in the third sentence.

§§ 450.202, 450.204, and 450.206 [Amended]

b. By amending §§ 450.202, 450.204, and 450.206 to remove term "Pub. L." wherever it appears therein and to substitute in lieu thereof the term "PL"

§§ 450.202, and 450.206 [Amended]

c. By amending §§ 450.202(c) and 450.206(b) to remove the phrase "section 9" wherever it appears therein and to substitute in lieu thereof the phrase "section 8".

3. Part 450, Subpart C of 23 CFR is revised to read as follows:

* * * * *

Subpart C—Transportation Improvement Program

Sec.	
450.300	Purpose.
450.302	Applicability.
450.304	Definitions.
450.306	Transportation improvement program: General.
450.308	Transportation improvement program: Content.
450.310	Annual element: Project initiation.
450.312	Annual element: Content.
450.314	Annual element: Modification.
450.316	Action required by metropolitan planning organization.
450.318	Selection of projects for implementation.
450.320	Program approval.
* * * * *	

Authority: 23 U.S.C. 105, 134(a), and 135(b); Sections 3, 5, and 8(c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602, 1604, and 1607(c)); Sections 110, 172, 174, and 176 of the Clean Air Act; and 49 CFR 1.48(b) and 1.51.

Subpart C—Transportation Improvement Program**§ 450.300 Purpose.**

The purpose of this subpart is to establish guidelines for the development, content, and processing of a cooperatively developed transportation improvement program in urbanized areas and to prescribe guidelines for the selection by implementing agencies of annual programs of projects to be advanced in urbanized areas.

§ 450.302 Applicability.

(a) This subpart applies to projects in or serving urbanized areas with funds made available under:

- (1) 23 U.S.C. 104(b)(6) (urban systems projects);
- (2) 23 U.S.C. 103(e)(4) (Interstate substitution projects);
- (3) Sections 3 and 5 of the Urban Mass Transportation Act of 1964, as amended (UMTA Act) (49 U.S.C. 1602 and 1604—UMTA capital and operating assistance projects);
- (4) 23 U.S.C. 104(b)(1) (projects on extensions of primary systems in urbanized areas), except as provided in this subpart;
- (5) 23 U.S.C. 104(b)(5) (projects on the Interstate System), except as provided in this subpart.

(b) Projects under paragraphs (a)(4) and (5) of this section, which are included in the highway safety improvement program, may be excluded from the transportation improvement program at the option of the State.

§ 450.304 Definitions.

(a) Except as otherwise provided, terms defined in 23 U.S.C. 101(a) are used in this subpart as so defined.

(b) As used herein:

"Annual element" means a list of transportation improvement projects proposed for implementation during the first program year.

"Governor" means the Governor of any one of the fifty States, or Puerto Rico, and includes the Mayor of the District of Columbia.

"Highway safety improvement program" means a program prepared by the State pursuant to 23 CFR 924.

"Interstate substitution projects" means projects funded under 23 U.S.C. 103(e)(4) (Withdrawal of Interstate segments and substitution of either nonhighway public mass transit projects or highway projects, or both).

"Interstate System projects" means projects funded under 23 U.S.C. 104(b)(5).

"Metropolitan planning organization (MPO)" means that organization

designated as being responsible, together with the State, for carrying out the provisions of 23 U.S.C. 134, as provided in 23 U.S.C. 104(f)(3), and capable of meeting the requirements of Sections 3(e)(1), 5(1), and 8(a) and (c) of the UMT Act (49 U.S.C. 1602(e)(1), 1604(l), and 1607(a) and (c)). This organization is the forum for cooperative decision-making by principal elected officials of general purpose local government.

"Nonattainment area" means a region as defined in Section 171 of the Clean Air Act.

"State implementation plan (SIP)" means a plan approved or promulgated under Section 110 of the Clean Air Act.

"Transportation improvement program (TIP)" means a staged multiyear program of transportation improvements including an annual element.

§ 450.306 Transportation improvement program: General.

(a) The transportation improvement program (TIP) shall be developed and updated annually under the direction of the metropolitan planning organization (MPO) in cooperation with:

- (1) State and local officials;
- (2) Regional and local transit operators;
- (3) Recipients authorized under Section 5(b) (2) or (3) of the UMT Act (49 U.S.C. 1604(b) (2) or (3)); and
- (4) Other affected transportation and regional planning and implementing agencies.

(b) The TIP shall consist of improvements recommended from the short-range and long-range elements of the transportation plan developed under § 450.116.

(c) The TIP shall cover a period of not less than 3 years, but may at local discretion cover up to 5 or more years.

§ 450.308 Transportation improvement program: Content.

The TIP shall:

- (a) Identify transportation improvements recommended for advancement during the program period;
- (b) Indicate the area's priorities;
- (c) Group improvements of similar urgency and anticipated staging into appropriate staging periods;
- (d) Include realistic estimates of total costs and revenues for the program period.

§ 450.310 Annual element: Project initiation.

Federally funded projects shall be initiated for inclusion in the annual element at all stages in the development of the transportation improvement for which program action is proposed.

These projects shall be initiated as follows:

(a) Proposed urban system highway projects shall be initiated by local officials in whose jurisdiction the project is located.

(b) Proposed urban system nonhighway public mass transit projects and Interstate substitution nonhighway public mass transit projects shall be initiated by principal elected officials of general purpose local governments in consultation with local transit operating officials or by local transit operating officials.

(c) Proposed UMTA Section 3 projects (49 U.S.C. 1602) shall be initiated by recipients authorized under Section 5(b) (1) or (2) of the UMT Act (49 U.S.C. 1604(b) (1) or (2)), by local transit operating officials, or by principal elected officials of general purpose local governments in cooperation with local transit operating officials.

(d) Proposed UMTA Section 5 projects (49 U.S.C. 1604) shall be initiated by recipients authorized under Section 5(b) (1) or (2) of the UMT Act (49 U.S.C. 1604(b) (1) or (2)). Nothing in this paragraph is intended to prohibit or discourage the initiation by such recipients of projects recommended by local transit operating officials or by principal elected officials of general purpose local governments in cooperation with local transit operating officials.

(e) Proposed urban extension and Interstate System projects shall be initiated by the State highway agency.

(f) Proposed Interstate substitution highway projects shall be initiated according to the provisions of this section for the Federal-aid system of which they will be a part.

§ 450.312 Annual element: Content.

(a) Except as provided in § 450.302(b), the annual element shall contain:

- (1) Projects initiated under § 450.310 and endorsed under § 450.316; and
- (2) For informational purposes, all nonfederally funded transportation systems management projects.

(b) With respect to each project under paragraph (a) of this section the annual element shall include:

- (1) Sufficient descriptive material (i.e., type of work, termini, length, etc.) to identify the project;
- (2) Estimated total cost and the amount of Federal funds proposed to be obligated during the program year;
- (3) Proposed source of Federal and non-Federal funds; and
- (4) Identification of the recipient and State and local agencies responsible for carrying out the project.

(c) Projects proposed for Federal support that are not considered by the State and MPO to be of appropriate scale for individual inclusion in the annual element may be grouped by functional classification, geographic area, and work type.

(d) The annual element shall be reasonably consistent with the amount of Federal funds expected to be available to the area. Federal funds that have been allocated to the area pursuant to 23 U.S.C. 150 shall be identified.

(e) The total Federal share of projects included in the annual element and proposed for funding under Section 5 of the UMT Act (49 U.S.C. 1604) may not exceed apportioned Section 5 funds available to the urbanized area during the program year.

(f) In nonattainment areas which require transportation control measures, the annual element shall give priority to projects identified in the transportation control portion of the SIP in accordance with procedures contained in 23 CFR 770.

§ 450.314 Annual element: Modification.

The annual element may be modified at any time consistent with the procedures established in this subpart for its development.

§ 450.316 Action required by the metropolitan planning organization.

(a) The TIP, including the annual element, shall be endorsed annually by the MPO.

(b) In nonattainment areas which require transportation control measures, the MPO shall not endorse any project or program which does not conform to the SIP.

(c) The MPO shall submit the TIP including the annual element:

- (1) To the Governor and the Urban Mass Transportation Administrator, and
- (2) Through the State to the Federal Highway Administrator.

§ 450.318 Selection of projects for implementation.

(a) The projects proposed to be implemented with Federal assistance under Sections 3 and 5 of the UMT Act (49 U.S.C. 1602 and 1604) and nonhighway public mass transit projects under 23 U.S.C. 103(e)(4) shall be those contained in the annual element of TIP submitted by the MPO to the Urban Mass Transportation Administrator.

(b) Upon receipt of the TIP, the State shall include in the statewide program of projects required under 23 U.S.C. 105:

- (1) Those projects drawn from the annual element and proposed to be implemented with Federal assistance

under 23 U.S.C. 104(b)(6) (Federal-aid urban system) in which it concurs; provided, however, that in any case where the State does not concur in a nonhighway public mass transit project, a statement describing the reasons for the nonconcurrence shall accompany the statewide program of projects; and

(2) Those projects drawn from the annual element and proposed to be implemented with Federal assistance under 23 U.S.C. 104(b)(1) (Projects on urban extensions of the Federal-aid primary system) and 23 U.S.C. 104(b)(5) (Interstate System projects in urbanized areas); and

(3) Those projects not drawn from the annual element that are proposed to be implemented with Federal assistance under 23 U.S.C. 104(b)(1) (Projects on urban extensions of the Federal-aid primary system) and 23 U.S.C. 104(b)(5) (projects on the Interstate System) provided that:

- (i) Such project or projects were initiated pursuant to § 450.310(e); and
- (ii) Such project or projects are for highway transportation improvements for which there has been a Federal authorization to acquire right-of-way or Federal approval of physical construction or implementation where right-of-way acquisition was not previously federally funded.

(c) For each project under paragraph (b)(3) of this section a statement shall accompany the statewide program of projects which shall:

- (1) Include the views of the MPO; and
 - (2) Indicate how the requirements of 23 U.S.C. 134(a) have been met.
- (d) The preparation and endorsement of the TIP and the selection of projects in accordance with this subpart will meet the requirements of 23 U.S.C. 105(d), 23 U.S.C. 134(a), and Section 8(a) of the UMT Act (49 U.S.C. 1607(a)).
- (e) The State shall notify the MPO of actions taken under paragraph (b) of this section.

§ 450.320 Program approval.

(a) Upon the determination of the Federal Highway Administrator and the Urban Mass Transportation Administrator that the TIP or portion thereof is in conformance with this subpart and that the area is under planning certification, programs of projects selected for implementation under § 450.318 will be considered for approval as follows:

(1) Federal-aid urban system projects included in the statewide program of projects under 23 U.S.C. 105 will be approved by:

- (i) The Federal Highway Administrator with respect to highway projects;

(ii) The Urban Mass Transportation Administrator with respect to nonhighway public mass transit projects; and

(iii) The Federal Highway Administrator and the Urban Mass Transportation Administrator jointly in any case where the statewide program of projects submitted pursuant to 23 U.S.C. 105 does not include all Federal-aid urban system nonhighway public mass transit projects contained in the annual element.

(2) Interstate substitution nonhighway public mass transit projects included in the annual element of the TIP will be approved by the Urban Mass Transportation Administrator.

(3) Projects proposed to be implemented under Sections 3 and 5 of the UMT Act (49 U.S.C. 1602 and 1604) included in the annual element of the TIP will be approved by the Urban Mass Transportation Administrator after considering any comments received from the Governor within 30 days of the submittal required by § 450.316(b)(1).

(4) Federal-aid urban extension and Interstate projects included in the statewide program of projects under 23 U.S.C. 105 will be approved by the Federal Highway Administrator.

(b) Approvals by the Federal Highway Administrator or joint approvals by the Federal Highway Administrator and Urban Mass Transportation Administrator will be in accordance with the provisions of this subpart and with 23 CFR 630, Subpart A. Approvals granted under this section will constitute:

- (1) The approval required under 23 U.S.C. 105; and
- (2) A finding that the program is based on a continuing, comprehensive transportation planning process carried on cooperatively by the States and local communities in accordance with the provisions of 23 U.S.C. 134.

(3) In nonattainment areas which require transportation control measures, a finding that the program conforms with the SIP and that a priority has been given to transportation control measures contained in the SIP in accordance with procedures contained in 23 CFR 770.

(c) Approvals by the Urban Mass Transportation Administrator will be in accordance with the provisions of this subpart and with other applicable provisions of 49 CFR 613, Subpart B. These approvals will constitute:

(1) The approval required under Section 8(a) of the UMT Act (49 U.S.C. 1607(a));

- (2) A finding that the projects are based on a continuing, cooperative and comprehensive transportation planning process carried on in accordance with

the provisions of Section 8 of the UMT Act (49 U.S.C. 1607), as applicable;

(3) A finding that the projects are needed to carry out a program for a unified or officially coordinated urban transportation system in accordance with the provisions of Sections 5(l) or 8(c) of the UMT Act (49 U.S.C. 1604(l) or 1607(c)), as applicable; and

(4) In nonattainment areas which require transportation control measures, a finding that the program conforms with the SIP and that a priority has been given to transportation control measures contained in the SIP in accordance with procedures in 23 CFR 770.

PART 630—FEDERAL-AID PROGRAMS APPROVAL AND PROJECT AUTHORIZATION [AMENDED]

4. In Part 630, Subpart A, § 630.106 is amended by redesignating paragraphs (b) and (c) as (c) and (d) respectively, and adding a new paragraph (b) to read as follows:

§ 630.106 Policy.

(b) Federal support is available only for those major urban transportation investment alternatives that meet local, State, and national goals and objectives in a cost-effective manner.

Title 49—Transportation

PART 613—PLANNING ASSISTANCE AND STANDARDS

5. Part 613, Subpart A of 49 CFR is amended by revising the authority statement to read as follows:

Authority: 23 U.S.C. 104(f)(3), 134, and 315; Sections 3, 5, and 8(c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602, 1604, and 1607(c)); Sections 110, 172, 174, and 176 of the Clean Air Act; and 49 CFR 1.48(b) and 1.51.

6. Part 613, Subpart B of 49 CFR is revised to read as follows:

Subpart B—Transportation Improvement Program

Sec.

613.200 Transportation improvement program.

613.202 Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

613.204 Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

Appendix—Policy and procedures for major urban transportation investments.

Authority: 23 U.S.C. 105, 134(a), and 135(b); Sections 3, 5, and 8(c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602, 1604, and 1607(c)); Sections 110,

172, 174, and 176 of the Clean Air Act; and 49 CFR 1.48(b) and 1.51.

Subpart B—Transportation Improvement Program

§ 613.200 Transportation improvement program.

The transportation improvement program regulations establishing guidelines for the development, content, and processing of a cooperatively developed transportation improvement program in urbanized areas and also prescribing guidelines for the selection, by implementing agencies, of annual programs of projects to be advanced in urbanized areas which are set forth in 23 CFR Part 450, Subpart C, are incorporated into this subpart.

§ 613.202 Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

(a) This section establishes certain additional criteria to be considered by the Urban Mass Transportation Administrator in his/her program approval pursuant to 23 CFR 450.320(a)(3) for all projects proposed for implementation with Federal assistance under Sections 3 and 5 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602 and 1604), in urbanized areas having a population of 200,000 or more.

(b) The Urban Mass Transportation Administrator will grant program approval for projects under paragraph (a) of this section only after he/she has determined that:

(1) The transportation plan developed pursuant to 23 CFR 450.116 contains TSM strategies and actions which are reflected in the annual element of the transportation improvement program; and

(2) Reasonable progress has been demonstrated in implementing previously programmed projects.

§ 613.204 Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

The Urban Mass Transportation Administrator will grant project approvals for major urban investments pursuant to 23 CFR 450.320(a)(3) only if he/she determines that the projects meet local, State, and national goals and objectives in a cost-effective manner.

Appendix—Policy and Procedures for Major Urban Mass Transportation Investments

Since the beginning of the 1970's, the Federal Government has provided an increasing share of the Nation's capital investment in urban mass transportation. In the years ahead, as more and more communities seek Federal financial aid to improve and expand their mass

transportation systems, it is more essential than ever that Federal funds be effectively and efficiently utilized.

Since each metropolitan area has differing characteristics, Federal mass transportation assistance cannot be based on standardized prescriptions. Rather, Federal support should be flexible, relying heavily on local ability to assess present and anticipated transportation needs, identify and evaluate alternative opportunities for improvement, and initiate needed actions.

The Federal Government does, however, have a strong interest in ensuring that Federal funds available for mass transportation investments be used prudently and with maximum effectiveness. While there are no simple or standard procedures that will guarantee this outcome, a careful and systematic evaluation of the implications of alternative courses of action in advance of a Federal commitment should improve the quality of decisions. To this end, a completed corridor refinement study will be required as a condition of eligibility for Federal assistance for a major mass transportation investment.

A major mass transportation investment is any project which involves new construction or extension of a fixed guideway system (rapid rail, light rail, commuter rail, automated guideway transit) or a busway, except where such projects are part of a demonstration program. Rehabilitation and modernization projects are not included in the scope of this definition.

Rail transit means all forms of rail passenger transportation serving metropolitan areas. It includes "rail rapid transit", "light rail" and "commuter (or regional) rail" technology operating on surface, elevated or sub-surface rights-of-way. The definition excludes busways and "people movers" or other types of automated guideway technology (AGT), although similar rigorous standards are also applicable to those investments.

"Rail Lines" means both extensions to existing metropolitan rail systems and initial segments of new urban or metropolitan rail systems.

I. Increasing the Effectiveness of Rail Transit Investments

The Federal Government has a strong obligation to ensure that the Federal assistance dollars are spent prudently and with maximum effectiveness. To this end, UMTA will adhere to the following set of policies which will apply to all rail transit proposals:

1. Any approval for preliminary engineering of a rail transit proposal must be preceded by a federally approved corridor refinement study which considers a full range of modal alternatives such as rapid transit, light rail, busway, people mover and transportation system management (TSM) options, and service and alignment alternatives, as well as a no action alternative. Applicants will be required to show clearly and convincingly the need for partially or fully grade-separated transit service and to demonstrate that the proposed transit solution is, on balance, superior to other options, considering such factors as

ridership, capital and operating expenses, transportation service, and social environmental, urban revitalization, and energy conservation objectives.

2. Urban areas will have to demonstrate a compelling need for high-performance transit service in order to obtain Federal assistance for rail rapid transit. The use of partially or fully on surface rights-of-way, may offer a substantially less costly, less disruptive, and more flexible rail transit option, and should be seriously considered, especially in places where extensive underground or elevated construction would otherwise be required.

3. Where the long range element of an areawide plan calls for the construction of an area-wide network or rail lines, UMTA will require that the system be analyzed, approved and built in stages. Initial segments of the system should be proposed in corridors which can justify the need for fixed guideway service within 15 years of the date of the analysis. Each segment should be capable of justification on its own merits. This incremental approach to construction of urban rail transit is aimed at insuring that the burden of financing the system is spread out in time, that high volume corridors receive priority attention, that benefits of the public investment begin to accrue as soon as possible, that an appropriate balance is maintained between long and short range needs for transportation improvements, and that maximum flexibility is preserved to modify the system in response to advances in technology, changes in growth patterns, and other unforeseen circumstances.

This policy encourages the construction of the most effective segments first and discourages localities from relying on a continued flow of Federal funding to complete unworthy or marginally justified segments of a system.

Each successive segment will normally be subject to a corridor refinement study. Corridors which cannot justify fixed guideway transit service within 15 years of the analysis should be provided with levels and types of service appropriate to their needs, with the level of service being progressively upgraded as demand develops.

4. UMTA will give preference to initial rail segments serving densely populated central portions of metropolitan areas including central cities and close-in suburbs. This policy is designed to target Federal transit investment in areas with the greatest potential payoff, in terms of ridership, relief of congestion, help to transit dependents, energy conservation and air quality improvements.

5. Localities proposing to build rail transit with Federal assistance will be required to commit themselves to the development and implementation of a program of local supportive policies and actions designed to enhance the proposed system's cost-effectiveness, patronage and prospect for economic viability. The Department will require evidence of reasonable progress in carrying out this program of supportive policies as a condition of initial and subsequent construction funding approvals.

The supportive actions shall include the following:

Zoning policies and development incentives to stimulate high density private

real estate development around selected transit stations;

Land use plans that support or reinforce the developmental impact and shaping influence of the rail transit system;

Station area improvements in the form of plazas, malls, walkways, open spaces and other pedestrian amenities that might help reverse the physical deterioration of the central business district or revitalize declining residential neighborhoods;

Coordinated bus and/or paratransit feeder services to the rail system especially in low density suburban areas;

Adequate parking and other mode transfer facilities at suburban transit stations;

Pricing, regulatory or traffic control measures aimed at managing the peak-period use of automobiles within rail corridors (e.g., traffic metering, tolls, higher parking fees, elimination of employer-subsidized parking).

6. UMTA will require localities to develop realistic estimates of future operating expenses and to identify and reach a local consensus on the specific means of funding these expenses. In particular, UMTA will require, as a condition of Federal capital assistance, the development of a stable and reliable source of local revenue to cover operating deficits.

7. Full funding contracts will be negotiated with a fixed ceiling on the Federal contribution, subject to a defined method of adjustment for inflation. Localities will be required to complete the project as defined and absorb any additional costs incurred, except under certain specific extraordinary circumstances.

8. UMTA will strengthen its role in monitoring projects in order to prevent over-design, the introduction of unnecessary embellishments, and the use of untested technologies, subsystems, and components which might adversely affect system performance and future operating and maintenance costs.

II. Procedures for Major Urban Mass Transportation Investments

This section outlines the procedures which UMTA will normally follow in reviewing corridor refinement studies, in implementing the Environmental Impact Statement (EIS) requirement of the National Environmental Policy Act of 1969, and in making funding commitments.

1. The procedures set forth in Appendix C of 23 CFR 450, Subpart A are used in the development of alternative major urban mass transportation investments in areawide and corridor refinement studies. They are supplemented by the following procedures.

2. After the end of the circulation period for the draft EIS, the applicant should designate, in a separate document, the locally preferred alternative and state a rationale for the choice. This document should clearly state that any recommendation is solely that of the applicant and that UMTA's judgment is reserved until the environmental process is complete.

3. Upon review of the locally preferred alternative report and the comments received on the draft EIS, UMTA will decide whether the corridor refinement study requirements have been satisfied and whether the locally

preferred alternative warrants funds for preliminary engineering. This decision will be based upon an appraisal of the cost-effectiveness of the locally preferred alternative compared to the other alternatives examined in the analysis. The grant may be for preliminary engineering of the locally preferred alternative as well as other promising alternatives evaluated in the draft EIS. Approval of the preliminary engineering grant does not imply any commitment to finance construction of the project.

Preliminary engineering should develop system cost, effectiveness and impact information, with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. The final EIS should be developed during preliminary engineering. The final EIS may consider a smaller set of alternatives but no action should be taken which would limit the choice of reasonable alternatives studied in the draft EIS until completion of the circulation of the final EIS.

UMTA may admit projects into preliminary engineering whose combined cost exceeds available Federal authorization levels. This will be done in anticipation of any of several possibilities: the withdrawal of projects as a result of changing local priorities; a local decision to use non-Federal resources to finance more than 20 percent of total cost; enactment of additional authorizations; or changing conditions such as the availability of detailed cost estimates which might lead to a later decision that a particular project should not be federally financed.

4. During the execution of preliminary engineering, the applicant will complete all the steps which must precede a Federal indication of intent to fund the project. These steps include providing evidence of firm commitment of the non-Federal capital share, providing evidence of State and/or local consensus regarding the financing of operating deficits, and planning for and gaining financing of operating deficits, and planning for and gaining financial commitment to necessary supportive actions to promote effective utilization of the proposed fixed guideway system.

A letter of intent may be issued for construction in a specific dollar amount only upon completion of the circulation of the final EIS and review of the capital grant application, the transcript of the public hearing, and the detailed cost estimates emerging from preliminary engineering. The decision to issue such a letter will be based upon a comparison of projects then pending.

5. If UMTA determines that the project warrants Federal support, UMTA will also develop with the locality a full funding contract which will (1) fix the total amount of the Federal contributions, subject to a defined method of adjusting for inflation; (2) include a mutually agreeable schedule for anticipating Federal contributions during the life of the project; and (3) require the locality to complete construction of the project as defined, and to absorb any additional cost incurred, except under certain specific "extraordinary" circumstances.

6. Specific annual contributions under the letter of intent and full funding contract will

be subject to the availability of appropriations and the ability of the grant recipient to use the funds effectively. UMTA will limit the sum total of letters of intent to the sum of the future Section 3 authorizations, less an amount which is necessary for those portions of the Section 3 program which are not covered by letters of intent.

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