(c) States may change their program choices under the Order at any time.

§ 384.6 How do states comment on proposed Corps Civil Works programs and activities?

(a) This section applies to all comments received from a state pursuant to an official process it has established under the Order, including comments where the state has delegated to local officials the review, coordination and communication with the Corps.

(b) With respect to programs and activities that are subject to the Order and these regulations and that a state chooses to cover under § 384.5, the Corps, to the extent permitted by law, communicates with state and local elected officials as early in a program or planning cycle as is reasonably feasible to explain specific plans and actions.

(c) Except in unusual circumstances, the Corps gives states at least 30 days to comment on any proposed action (see § 384.8 for comment periods pertaining to interstate situations).

(d) Subject to paragraph (c) of this section, the Corps may establish deadlines for states to complete their review of proposed Corps actions and to submit their comments to the Corps.

(e) The Corps Commander at the level at which the action takes place or the decision is made responds, as provided in § 384.7, to all comments from a state that are provided through a state office or official that acts as a single point of contact under the Order between the state and all Federal agencies.

§ 384.7 How does the Corps make efforts to accommodate state and local concerns?

(a) If a state provides comments to the Corps in accordance with § 384.6(e), the Corps Commander at the level at which the action takes place or the decision is made:

(1) Accepts the state's comments;

(2) Reaches a mutually agreeable solution with the state; or

(3) Provides the state with a timely explanation of the basis for the Corps decision. If requested by the Governor, the Corps Commander provides the explanation in writing. If the state has designated a state office or official as a single point of contact between the state and all Federal agencies, the Corps Commander at the level at which the action takes place or the decision is made provides an explanation to that office or official.

(b) In any explanation under paragraph (a)(3) of this section, the Corps Commander informs the state that:

(1) The Corps will not implement its decision for ten days after the state receives the explanation; or

(2) The Assistant Secretary or the Corps Commander above the level taking the action or making the decision has reviewed the decision and determined that, because of unusual circumstances, the ten-day waiting period is not possible.

§ 384.8 What are the Corps obligations in interstate situations?

The Corps is responsible for:

(a) Identifying proposed Corps activities and programs covered by the Order that have an impact on interstate areas;

(b) Notifying the affected states, including states that have not adopted a process under the Order; and

(c) Except in unusual circumstances, providing the affected states an opportunity of at least 45 days to comment.

§ 384.9 [Reserved]

§ 384.10 In an emergency, what are the requirements for compliance with the Order and this regulation?

(a) Emergency and disaster recovery actions performed under Public Law 99, 84th Congress, are excluded from the requirements of the Order and this regulation.

(b) Other emergency actions may be excluded from the requirements of the Order and this regulation, as determined by the appropriate Division Commander, where delays may endanger life or property.

[FR Doc. 83-1870 Filed 1-21-83; 8:45 am]

BILLING CODE 3710-92-M

federal register

Monday
January 24, 1983

Part VII

Department of Education

Intergovernmental Review of Department of Education Programs

DEPARTMENT OF EDUCATION

34 CFR Parts 75, 76, and 79

Intergovernmental Review Of Department of Education Programs

AGENCY: Education Department.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to adopt rules to implement Executive Order 12372, titled "Intergovernmental Review of Federal Programs." The Executive Order and these regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance from the Department. The regulations will replace the intergovernmental consultation system developed under Office of Management and Budget Circular A-95.

DATE: Comments must be submitteed on or before March 10, 1983.

ADDRESSES: Written comments should be submitted to Mr. Chester Glod, Assistance Management and Procurement Service, 400 Maryland Avenue, SW. (Regional Office Building No. 3, Room 5082), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Chester Glod at (202) 245-7810.

SUPPLEMENTARY INFORMATION:

Background

For many years, formal consultation between State and local officials and Federal agencies concerning Federal programs and activities has taken place through an elaborate regulatory and organizational framework created under OMB Circular A-95. The A-95 system required State and local governments to follow prescribed review procedures and only provided for review of certain specified Federal programs, regardless of the circumstances affecting particular State and local governments. The system was limited to review of Federal programs by State and local agencies without regard to the priorities of their elected leadership. Although few programs of the Department of Education were subject to the A-95 process, for the Government as a whole the process became highly bureaucratic, burdensome, and costly. States and localities had to process too much paperwork, and, as a result, the impact of substantive comments was sometimes lost. A network of State and area clearinghouses was created to manage this paperwork. State and local elected officials found it difficult to exert significant influence on Federal decisions through this system, and Federal agencies found the system a cumbersome method of obtaining information about, and responding appropriately to, State and local concerns.

On July 14, 1982, President Reagan signed Executive Order 12372, "Intergovernmental Review of Federal Programs." The Executive Order is reproduced as Attachment A to the OMB notice published in today's **Federal Register**. The Order directs the revocation of OMB Circular A-95, and provides for a new, more effective intergovernmental consultation system that is consistent with the President's policies concerning Federalism and regulatory relief. Under the Order, States and localities will take the initiative for establishing their own review procedures and priorities. State and local elected officials will determine, from a list of programs to be covered under the Order, which Federal programs and activities to review. When State and local elected officials bring their concerns to a Federal agency's attention through this process, the agency will have to make efforts to accommodate the concerns, and, if it does not accommodate them, explain why not. This provision to "make efforts to accommodate or explain" should give greater weight to State and local views than under OMB Circular A-95. In addition, States will have the opportunity, to the extent permitted by law, to simplify, consolidate, or substitute federally required State plans.

Across the whole range of Federal programs and activities, the Federally required procedures for consultation under OMB Circular A-95 created a substantial regulatory burden. The Executive Order's system of consultation is intended to significantly reduce that burden, as well as opening opportunities for States to reduce administrative burdens in Federal programs requiring State plans. In contrast to the A-95 system, which relied heavily on clearinghouses, planning organizations, and other bodies which are not elected by the jurisdictions they serve, the Order, consistent with the President's Federalism policy, emphasizes the role of elected State and local officials.

OMB Guidance to States

In order to assist States as they begin to implement the Order, OMB wrote to each concerning the establishment of an official State process. This letter will be reproduced in the **Federal Register** in the next few days. This letter explains the role of the "single point of contact". A "single point of contact" is the office or official in a State that transmits the results of the State's review and coordination to the Department and other Federal agencies and to which the Department and other Federal agencies would direct official communications (e.g., explanations of nonaccommodations) to the State under the Order. A State may have as few or as many entities as it chooses to perform review and coordination. However, States are encouraged to have only one point of contact to communicate with all Federal agencies under the Order. It is up to the State whether the single point of contact plays a substantive role with respect to the State's views, or simply acts as a focal point for communications. Under the proposed rules, the Secretary would only be required to respond as provided in the Excutive Order to a State's concerns if those concerns are sent through a single point of contact. Of course, the Secretary may choose to follow the provisions of the regulations even if a State chose not establish such a point of contact.

It is also worth emphasizing that States are not required to adopt an official State process at all. However, after final regulations implementing the Order become effective (Final regulations are scheduled to be published on April 30, 1983), the existing A-95 consultation system will no longer be in effect, although other existing statutory and regulatory consultation requirements would not be affected by these regulations. The Department may propose changes in those other existing statutes and regulations at a later date. An inventory of these existing requirements will be available.

This Department and other Federal agencies have the responsibility of ensuring that their programs and activities are carried out in conformity with the Order. The Office of Management and Budget will have general Government-wide oversight responsibility for the implementation of the Order, but will not attempt to exercise any day-to-day, operational control or agency actions. Nor will OMB act as a forum for "appeals" by non-Federal parties of agency actions.

Development of Proposed Rules

If the objectives of the Executive Order are to be met, Federal agencies must ensure that they deal with State and local elected officials in a consistent and understandable way. To this end, OMB and the Federal agencies affected by the Order have worked together to make common policy decisions and, to

the extent feasible, to draft common regulatory language. The resulting regulations are intended to minimize the regulatory burden on non-Federal parties. For the most part, these proposed rules spell out the Department's obligations in response to the views expressed by State and local elected officials. A paper discussing the policy decisions made by OMB and the agencies was made available to the public on December 23, 1982 (47 FR 57369). Following the close of the comment period, OMB and the agencies will again work together with the aim of promulgating final regulations that are substantially consistent with one another. It is the Federal Government's intention that there will be no further rulemaking with respect to this Executive Order.

Withdrawal of Regulations Implementing OMB Circular A-95

In connection with these proposed rules the Department is proposing to withdraw its existing regulations implementing OMB Circular A-95. Executive Order 12372 directed OMB to withdraw the Circular itself, and the OMB directive withdrawing the Circular told Federal agencies to leave their A-95 regulations in place only until new regulations implementing the Order were promulgated on April 30, 1983. In order to carry out this directive, the Department is listing in this NPRM those regulatory provisions implementing Circular A-95 that it proposes to withdraw. Final regulations carrying out the withdrawal will be published on April 30, 1983, in conjuction with the Department's final regulations implementing the Executive Order.

Executive Order 12291

These proposed rules have been reviewed in accordance with Executive Order 12291. They are classified as non-major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act

The proposed rules would simplify consultation with the Department and allow State and local governments to establish cost-effective consultation procedures. For this reason, the Department believes that any economic impact will be insignificant, in any case. Consequently, the Department certifies under the Regulatory Flexibility Act, that these proposed rules would not have a substantial economic impact on a significant number of small entities.

Paperwork Reduction Act

These proposed rules are not subject to Section 3504(h) of the Paperwork Reduction Act since it would not require the collection or retention of information.

Section-by-Section Analysis

Section 79.1 What is the purpose of these regulations?

This section briefly states the purpose of the regulations, which is to implement Executive Order 12372 and foster an improved system of intergovernment consultation. Paragraph (c) states the important point that the Order, and these regulations, are intended only to improve the Department's internal management of its consultation with State and local governments. Neither the Order nor these regulations are intended to create any right of judicial review of the Department's action. For example, it is not intended that these regulations would create a right of a State or local government to sue the Department if the Department failed to explain a nonaccommodation of a State recommendation.

Section 79.2 What definitions apply to these regulations?

This section defines several terms used frequently in the proposed rules. "Department" means the Department of Education. "Order" means Executive Order 12372. "Secretary" means the Secretary of Education or an official or employee of the Department acting under a delegation of authority from the Secretary. This does not mean that there must be a new delegation pertaining to Executive Order 12372. Any official who has existing authority to act concerning a program or activity under a delegation could act under the Order concerning that program or activity. "State" means any of the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands. The definition of "State" means that the District of Columbia, Puerto Rico, and other jurisdictions mentioned may create an official consultation process and consult with Federal agencies on the same basis as each of the 50 States.

In addition to these definitions, three other terms—"simplify," "consolidate," and "substitute"—are defined in § 79.9, relating to State plans. Several other terms appearing in the Order are not defined in this section, but are used or implemented in the proposed rules in a way that makes their meaning clear (e.g., "accommodate" and "explain" in § 79.7).

Section 79.3 What programs and activities of the Department are subject to these regulations?

The intent of the Order is that State and local elected officials should have the opportunity to consult under the Order concerning Federal programs of their choice. This section provides that the Department will publish a **Federal Register** notice listing the Department's programs that are subject to the Order. Attachment A to this document contains the list of programs to be included under the Order. If necessary, that list will be revised and republished when these proposed rules are published in final form. An updated list will be published as necessary to let States know which of the Department's programs they may choose to cover.

The progams followed by an asterisk (*) in Attachment A are formula grant programs to the States. Although they are subject to these regulations, it should be noted that the Department has no discretion under these programs concerning who will receive the grants (the States are the only eligible applicants), the amount of funding to be provided to each grantee (the distribution of funds is established by statutory formula), the selection of specific sites or projects (the States make those decisions), or whether to provide funding (the States are entitled to receive program funds as long as Congress appropriates funds and the States meet the legal requirements of those programs). The Department reviews the State plans mandated by the formula grant program statutes only to insure that they meet the requirements established by those statutes and their implementing regulations. However, to the extent that the Department has any discretion with regard to the formula grant programs, they are subject to these regulations.

Attachment B to this document contains a list of those programs and activities that the Department proposes to exclude from coverage under the Order. The reason for each proposed exclusion is also listed. Exclusions are based on Government-wide criteria, and the reasons given for exclusion reflect those criteria. In the future, if the Department wants to exclude new or additional programs or activities from coverage under the Order, it will publish a **Federal Register** notice requesting comments on the proposed exclusions.

The Order and these proposed rules do not apply to the preparation of regulations, legislation, or budgets, or to classified programs or activities where

formal consultation would endanger national security.

Even if a program or activity is excluded from the consultation system established by the Order, State and local officials would still have an opportunity to have their views considered by the Department through normal channels. Statutory requirements for consultation, including Section 401(b) of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(b)), would continue to require Federal agencies to consider the views of State and local governments. Many of the Department's program statutes have their own consultation requirements, and the Department will, of course, comply with all existing or future statutory requirements of this kind. However, the Department is not obligated to follow the provisions of the Order and these regulations with respect to excluded programs and activities. If at any time a State believes that any official of the Department has not made appropriate use of the official State process, the State is invited to raise its concerns directly with the Secretary.

Section 79.4 What are the Secretary's general responsibilities under the order?

This section would incorporate the most important portions of Executive Order 12372 into the Department's regulations, emphasizing the Department's obligations under the Order. The mechanisms by which the Department will carry out many of these general obligations are developed further in other sections of the proposed rule. For example, paragraph (b)(4) of this section is further elaborated in § 79.9, concerning State plans.

Paragraph (b)(2) of this section means the Department is obligated to make efforts to ensure that information on proposed actions or decisions of the Department is available to the States in sufficient time to be able to exert meaningful influence on the Department's course of action. For example, the Department would make sure that States learn of assistance announcements, including decision criteria, in time to make a meaningful response.

Section 79.5 What procedures apply to a State's choice of programs under the order?

States may choose to consult with the Department under the Order concerning any of the Department's programs and activities that the Department's **Federal Register** notice lists as subject to the Order. However, these proposed rules do not require States to consult with the Department concerning any particular program or activity. This is an important distinction between the Order's consultation system and the system establish under OMB Circular A-95, which gave States no discretion concerning program selection. Under the Order, each State may choose whether to use the consultation system with respect to any particular program or activity. This gives States increased flexibility to determine how best to allocate their resources. For example, some Federal programs have existing statutory consultation requirements. If a State decides that an existing consultation system is adequate, the State might choose not to cover the program under its Executive Order process, thereby avoiding duplication and saving resources for use on other programs. A State also might want to decline to cover a program which has only minor effects on the State and its people.

The Department emphasizes that the choice of whether to cover a particular program or activity listed in the Department's **Federal Register** notice is entirely up to each State. While the Department will be happy to discuss with States the most effective ways of carrying out consultation concerning its programs and activities, the Department will not attempt to constrain the State's discretion with respect to program selection from the published list.

To begin the consultation process under the order, the State notifies the Secretary of the programs and activities it chooses to cover. When it first establishes its official process, the State can meet this requirement by sending to OMB, along with other information required to establish the State's official process under the Order, a list of the Federal programs and activities of that agency that the State has chosen to cover. Subsequently, the State should send all information regarding the Department's programs (additions, deletions, or other changes) directly to the Department. This information will enable the Departmeent's personnel who work on a particular program or activity to know which States they must consult with under the provisions of the Order.

Paragraph (b) provides that, once a State has established a process and made its program selections known to the Department, the Department will use the State's process concerning the programs and activities selected by the State as soon as feasible. While the Department will make every effort to use the State's process as soon as the State gives the notice of its program selections, there may be situations, on individual programs or projects or groups of programs, where the Department may not be able to do so for a time. For example, it would not be possible to interrupt ongoing Nation-wide grant competitions, and coverage would have to await the next competition cycle. The Department will make determinations concerning when to begin using the State's official process on a case-by-case basis and will let the State know when it will start to use the State's process.

Paragraph (c) provides that the Department may establish deadlines for changes by States in the program selection choices. A State may add or delete a program or activity from those it wishes to cover under the Order at any time. However, in order for meaningful consultation to occur under the Order, the Department may need a certain amount of "lead time" before it can adapt its procedures to the changed circumstances. For this reason, the Department may find it necessary to establish deadlines for program selection changes. These deadlines would simply be notifications to the States that, for example, if they wished to have consultation under the Order begin during a particular fiscal year, they would have to inform the Department of their program selection changes by a certain date.

Section 79.6 How does the Secretary give States an opportunity to comment on proposed Federal financial assistance?

Paragraph (a) of this section points out that the Order would apply not only to comments prepared under the official State process but also to comments formulated by local elected officials to whom the State's consultation role has been delegated in specific instances. Section 3(a) of the Order permits States to delegate to local elected officials, in specific instances, the review, coordination, and communication with Federal agencies that normally take place under the State process. This means that States may choose not only which programs and activities to cover but also who within the State has the opportunity to carry out the consultation. States have complete discretion cocerning delegation of their consultation role.

For example, a State could delegate to a mayor the State's consultation role with respect to a project occurring in his or her city. The State could delegate all consultation under a particular program to elected officials of the local governments whose jurisdictions are affected by projects under the program. The State could delegate its consultation

role for a particular program to local elected officials in cities above 250,000 population but not to local officials in smaller jurisdictions, or vice-versa. In any case of delegation, the local elected official to whom the State's consultation role is delegated stands in the shoes of the State with respect to the Department. For example, efforts by the Department to reach a negotiated solution with the local elected official will be pursued directly with the official, not with the State itself.

Paragraph (b) states that, as a general rule, States that choose to cover a particular program or activity will have at least 30 days (45 days in the case of interstate situations—see § 79.8) to comemnt on proposed Federal financial assistance under that program before the Department commits itself to a given course of action. The Department, on a case-by-case basis, may allow a shorter period necessary. Among the kinds of unusual circumstances that might necessitate a shorter comment period are the necessity to make a grant or cooperative aggreement decision before the end of a fiscal year or a statutory deadline.

In order to meet the Order's objective of ensuring States a meaningful opportunity to influence decisions by the Department, the Department may need to establish deadlines for comment on particular actions or types of actions. Any deadlines would be consistent with the rule of giving State at least 30 days to comment.

Under the Department's discretionary grant programs, applications are sent directly to the Department for consideration, usually in response to an application notice published in the **Federal Register.** For programs covered by the Order, the Department will inform applicants of the procedures to be followed in obtaining State review of their applications, either in the application notice itself, or in the application package that is provided to prospective applicants.

In order to ensure timely completion of Federal decisionmaking, the Department generally will require States to complete their review of applications and to submit their comments to the Secretary by a particular date. This is intended to prevent undue delays in Federal decisions affecting the State and to ensure timely grant awards.

Paragraph (d) makes an important point with respect to the way that communications between States and the Department would work. Under the Order, a State may organize its consultation process any way it chooses. However, in order to ensure efficient communications between the Department and the State, the Department strongly encourages States to establish a "single point of contact" for State communications with Federal agencies. Channeling communications from the States to Federal agencies and from agencies back to the States through a single point has obvious benefits from the point of view of administrative simplicity. In addition, it will enable the Department to know which communications to treat as official under the provisions of the Order. A local official to whom the State's consultation role has been delegated would not send his or her comment directly to the Department if the State has designated a single point of contact. Rather, the official would send the comment to the Department through the State's single point of contact. The Department would work with the local official in attempting to reach an accommodation, but, if efforts at accommodation were unsuccessful, the Department would explain the nonaccommodation to the single point of contact. The Department needs a means of separating the letters from State and local elected officials to which it will respond through normal correspondence channels from those letters to which it must respond under the provisions of the Order. A State's use of a single point of contact will permit the Department to make this necessary administrative distinction. However, if a State chooses to adopt a process under the Order without a single point of contact, the Secretary may choose at his discretion to follow the provisions of the Order and these regulations with respect to that State.

Where a State chooses not to adopt a process under the Order, or where a State has chosen not to cover a particular program, the Department will work with the State, consistent with existing legal requirements, through normal channels. The provisions of the Order and these regulations will not apply, however.

The proposed rules do not include any constraints on the content of comments that States send to the Department. However, the Department makes its grants under statutory and regulatory constraints that limit its discretion to accommodate State and local concerns.

To affect the Department's decisions, comments provided under the Order must address the statutes, regulations, or other legal requirements that govern the Department's selection and approval of applications. For example, the Department's regulations generally include specific criteria for selecting applications under discretionary grant programs. Unless a State's comments address these selection criteria or other legal requirements that govern selection of applications, the Department would be precluded from accommodating the State's concerns. States are therefore strongly encouraged to relate their comments to the selection criteria, funding priorities, or other applicable legal requirements on which the Department bases its decisions.

States can also assist the Department's implementation of the Order by clearly specifying the magnitude of the State's concerns. It would be very useful if a State would indicate whether it is firmly recommending a given course of action, has a mild preference for or reservation about the action, or is simply seeking clarification of the Department's position. The Order directs Federal agencies to make efforts to accommodate State concerns. The Department's ability to do so is dependent, to a significant degree, on the clear articulation of concerns by the States.

The Department would also be in a better position to accommodate State and local concerns if the State speaks with one voice in its comments. The Department recognizes that different State and local officials and agencies may not always agree among themselves concerning the course of action the Department should follow. However, if the Department receives conflicting comments, it will probably be necessary to seek clarification concerning which set of views the State wants the Department to accommodate. In the absence of such a clarification, the Department may find it necessary to simply inform the single point of contact of the reasons for its decision. The process will work much better if the Department does not receive conflicting positions in comments from a State.

Section 79.7 How does the Secretary make efforts to accommodate State and local concerns?

Paragraph (a) of this section provides that when a State comments to the Department under the Order, the Department has three choices. First, the Department can accept the State's comments (i.e., do as the State recommends). Second, it can reach a mutually agreeable solution with the State. This solution can differ from the original State or Federal position on the matter. Third, if the Department does not accept the State's comments or reach a mutually agreeable solution, the Department is obligated to give the State an explanation of the Department's reasons for not doing so. While the

Department is not required to accommodate a State's concerns by accepting the State's comments or by reaching another solution, in such a case the Department does have an obligation to provide an explanation of its decision.

The explanation could take the form of a telephone call, a meeting, or a letter. The Department has the discretion to choose the most appropriate mode of communicating the explanation in each case unless the Governor of the State has previously requested that the explanation be in writing.

Paragraph (a)(3)(iii) explains the role of the single point of contact in receiving explanations from the Department. The Department will direct all explanations to the single point of contact in each State that has one. This is true even where accommodation discussions have occurred between the Department and another office or official of the State.

Paragraph (b) concerns safeguards to ensure that the interests of the State are protected in nonaccommodation situations. Normally, as provided in paragraph (b)(1), an explanation will state that the Department will not implement its decision until ten days after the single point of contact receives the explanation. This waiting period is intended to permit States to respond to the Department in cases of nonaccommodation before the Department has awarded a grant or other financial assistance. In a case in which the Department has provided a verbal explanation of a decision to the single point of contact and the Governor subsequently requests a written explanation the ten day period runs from the date of the verbal explanation, not from the date of any subsequent letter.

Paragraph (b)(2) recognizes that there may be some situations in which the Department cannot observe the ten-day waiting period. These unusual circumstances could include, for example, a statutory deadline or the end of a fiscal year that makes it infeasible for the Department to wait ten days before implementing its decision. In a situation where the Department cannot observe the waiting period, the Secretary or a high-level designee of the Secretary will review the decision before the nonaccommodation explanation is made and before the Department implements the decision. The nonaccommodation explanation will include the Department's reasons for determining that the ten-day waiting period is not feasible.

Section 79.8 What are the Secretary's obligations in interstate situations?

In some cases, an action taken by the Department under a Federal financial assistance program has an impact on an interstate area. In these situations, the Department has certain additional obligations. First, the Department must identify its proposed financial assistance that has such an impact. Having done so, the Department would, as provided in paragraph (b) of this section, notify the potentially affected States, whether or not they have established an official State process under the Order. Except in unusual circumstances (e.g., emergencies such as grant awards at the end of the fiscal year), the Department must provide the affected States an opportunity for comment of at least 45 days before the Department commits itself to a course of action. The increase in the minimum comment period from 30 to 45 days in interstate situations allows extra time for States to coordinate among themselves before providing views to the Department.

The Department would not require States to Coordinate with each other on proposed Federal assistance having an impact on an interstate area. However, the Department strongly encourages each affected State to share its comments with and obtain the views of other affected States, using the other State's single point of contact, if there is one, or an appropriate State official if there is not a single point of contact. The Department encourages States to reconcile any differences so that the States can present the Department with a unified position. If the affected States provide the Department with conflicting recommendations, the Department will, with respect to States that have established a process under the Order, either accommodate recommendations or explain its nonaccommodation as provided in § 79.7.

Section 79.9 How may a State simplify, consolidate, or substitute State plans?

This section carries out section 2(d) of the Order, which directs Federal agencies to the extent permitted by law, to allow States to consolidate or simplify plans and to encourage States to substitute their own plans for Federally required State plans.

Paragraph (a) defines three terms used in this section. For a State to "simplify" a plan means that a State develops its own format, chooses its own submission date, and selects the planning period covered by the plan. "Consolidate" means that the State combines two or more plans into one document. The State may also select the format, submission date, and planning period for a consolidated plan. "Substitute" means that a State uses a plan or other document that is developed for its own purposes to meet Federal requirements in place of a plan that is only designed to meet Federal requirements. State plans required by the Department that are eligible for modification (i.e., simplification, consolidation, or substitution) under the Order will be listed by the Department in a **Federal Register** notice accompanying the final regulations.

For purposes of State plan modification, it is necessary to draw a distinction between the State's decision concerning which plans it wants to try to modify and the Department's decision concerning whether it may accept those modified plans. Paragraph (b) deals with the first of these issues. A State may decide to try to simplify, consolidate or substitute State plans without prior approval by the Department. The State's discretion in this respect is complete.

Paragraph (c) recognizes that the Department must review the content of any State proposals to simplify, consolidate, or substitute State plans to ensure that they meet all applicable Federal requirements. Generally, under the statutes that govern the Department's State plan programs, the Department could only disapprove a modified plan if the plan failed to meet the requirements of the program statute. The Department does not expect ever to have to disapprove a State plan. However, if such a disapproval were ever necessary, the State would have recourse to an appeal process in accordance with existing law.

Paragraph (c) is not intended to give the Department any new authority it does not already have to review, approve, or disapprove State plans. The paragraph does emphasize, however, that these regulations also do not impair the Department's existing authority to review and, if ever necessary, disapprove State plans. This section also does not affect any existing statutory or regulatory requirements concerning submission dates, planning periods, or formats of State plans. The Department will review and make appropriate future modifications in regulatory requirements to allow more State flexibility.

The Department encourages States which wish to simplify, consolidate or substitute State plans to inform the Department of their intentions well in advance. Early discussions between State officials and the Department regarding proposed modifications of

plans will help to avoid later problems, including unnecessary delays in approvals. The Department is very willing to work closely with State officials on plan modifications and, where feasible, will provide technical assistance or advice in plan modification efforts.

List of Subjects

34 CFR Part 75

Grant programs—education, Grants administration.

34 CFR Parts 76 and 79

Grant programs—education, Grants administration, Intergovernmental relations, State-administered programs.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. Written comments and recommendations may be sent to the address given at the beginning of this document. All comments received on or before March 10, 1983, will be considered before the Secretary issues the final regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Regional Office Building No. 3, Room 5680, 7th and D Streets, SW., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Citation of Legal Authority

A citation of legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

Dated: January 17, 1983.

T. H. Bell,

Secretary of Education.

(Catalog of Federal Domestic Assistance does not apply)

Attachments—List of Proposed Inclusions under Scope; List of Proposed Exclusions from Scope.

ATTACHMENT A—DEPARTMENT OF EDUCATION PROGRAMS PROPOSED FOR INCLUSION UNDER EXECUTIVE ORDER 12372 **

Program name	CFDA reference
Adult education—State administered program*	84.002
Bilingual education	84.003
Title IV of the Civil Rights Act of 1964	84.004
Program for education of handicapped children in State operated or supported schools*	84.009
Migrant education program—State formula grant program*	84.011
Follow Through	84.014
Handicapped early childhood assistance	84.024

ATTACHMENT A—DEPARTMENT OF EDUCATION PROGRAMS PROPOSED FOR INCLUSION UNDER EXECUTIVE ORDER 12372 **—Continued

Program name	CFDA reference
Handicapped media services and captioned films	84.026
Handicapped preschool and school programs*	84.027
Handicapped regional resource centers	84.028
Handicapped teacher recruitment and information	84.030
Public library services*	84.034
Interlibrary cooperation*	84.035
School assistance in federally affected areas—Construction	84.040
Vocational education—Basic grants to States*	84.048
Vocational education—Consumer and homemaking education*	84.049
Vocational education—Program improvement and supportive services*	84.050
Vocational education—Special programs for the disadvantaged*	84.052
Vocational education—State advisory councils*	84.053
Indian education—Entitlement grants to local educational agencies and tribal schools	84.060
Indian education—Adult Indian education	84.062
Bilingual vocational training	84.077
Regional education programs for deaf and other handicapped persons	84.078
Women's educational equity	84.083
Strengthening research library resources	84.091
Bilingual vocational instructor training	84.099
Bilingual vocational instructional materials, methods, and techniques	84.100
Fund for the improvement of postsecondary education	84.116
Vocational education—State planning and evaluation	84.121
Territorial teacher training assistance program	84.124
Rehabilitation services—Basic support	84.126
Rehabilitation services—Client assistance projects	84.128F
Rehabilitation services—Migratory worker vocational rehabilitation service projects	84.129G
Centers for independent living	84.132
Migrant education—interstate and intrastate coordination program	84.144
Federal real property assistance program	84.145
Transition program for refugee children*	84.146
The following programs authorized subchapter D of chapter 2 of the Education Consolidation and Improvement Act	84.151
National diffusion network program	
Law related education program	
Inexpensive book distribution program	
Arts in education program	
Alcohol and drug abuse program	
Neglected or delinquent transition services	84.152
General assistance for the Virgin Islands*	***

* Formula grant programs to the States.

** Financial assistance transactions with Federally recognized Indian Tribal governments and nongovernmental entities, including State postsecondary educational institutions, are excluded from coverage under the Order.

***Number not assigned.

Attachment B—General Criteria Used by Federal Agencies in Identifying the Scope of Executive Order 12372

The categories of exclusions were prepared to help agencies identify which program or activities should be subject to the provisions of E.O. 12372. Three categories of exclusions are presented: generic, class, and individual. Subcategories list the types of programs or activities covered within each category.

To help in the identification, two examples of inclusion—programs and activities subject to the provisions of the Executive Order—are also described. These are not the only programs and activities subject to the Executive Order. These examples are presented because related programs and activities are covered in the class exclusion category.

1. *Generic Exclusions:* Those programs or activities excluded by previously announced administration policy are:

a. Proposed federal legislation, regulations, and budget formulation.

b. Direct payments to individuals. (See also 2d.)

c. Classified programs or activities where formal consultation would endanger national security.

d. Financial transfers for which federal agencies have no funding discretion or direct authority to approve specific sites or projects. (Examples include):

(1) General Revenue Sharing;

(2) Payments in lieu of taxes;

(3) Funds, allocated by formula, from sale receipts or proceeds from products/resources on federal lands;

(4) Block grants which are characterized by:

(a) Substantial flexibility being given state and local governments to allocate funds among different areas of effort and between state and locally derived priorities; and

(b) An absence of requirements that the recipient submit satisfactory plans or proposals for the use of these grant monies before the funds are provided.

e. Programs and activities directly administered by a federally recognized tribal government.

2. *Class Exclusions:* Those additional activities or programs determined not to be within the definition of financial assistance, direct federal development, or federal licensing or permitting under the Executive Order and thereby excluded are:

a. Certain financial transactions such as: standard procurement contracts; letter contracts; basic ordering agreements; purchase orders; joint ventures; job orders; acceptance of offers; operating funds for government-owned/contractor-operated facilities (GOCO); subawards under contracts, grant, or cooperative agreements; public utility contracts; consulting services; commodity purchases; payment of claims; leases and easements of a non-major nature; purchase of notes, stock, or bonds; and land grants.

b. Research, development, and demonstration other than that specified in the description of inclusions below.

c. Criminal or civil enforcement matters.

d. Direct financial assistance between the federal government and a *non-governmental entity*, such as a non-profit organization, business, corporation, association, private school or university. However, certain research, development, and demonstration awards to such non-governmental entities may be included (see 4 below). (A *governmental entity* is any state; independent state organization, board or commission; general purpose local government; special purpose local or regional government; council of government; non-profit organization established by state law or local ordinance exclusively to provide a governmental service and the substantial portion of the funding for which is federal. State and municipal colleges and universities are considered a non-governmental entity for the purposes of this memorandum.

Programs or activities with eligible recipients who may be either governmental or non-governmental entities: Some programs or activities have as eligible recipients both governmental and non-governmental entities, including individuals and private section organizations. Under this paragraph programs or activities providing assistance to non-governmental entities can be excluded. The issue raised was whether such a program or activity should be excluded in its entirety because some of the potential recipients would qualify it for an exclusion. Our determination is that such a mix of recipients does not, by itself, allow the exclusion of a program or activity. Instead, agencies may choose either of two alternatives: 1.) to include these nongovernmental entities within the scope and subject some to the state process by not excluding the program, or, 2.) to exempt transactions with non-governmental entities from the intergovernmental review and consultation requirements by referencing such an exemption in their rulemaking.

e. Academic training and institutional aid grants; receipts from federally financed fellowships; scholarships; and student loans by institutions of higher education.

f. Federal rate-setting for utility services provided to state or local governments by the Federal Government.

g. A non-governmental entity's consultation with state or local government officials or securing state or local government review, approval, or certification, as a condition of receiving a federal or federally authorized license or permit.

3. *Individual Exclusions:* Those programs or activities that may be excluded on request of a federal agency. Requests for exclusions will be evaluated against the following qualifying factors and criteria:

a. A federal constitutional or statutory preemption precludes any state or local government jurisdiction over or responsibility for the individual federal program or activity, and recommendations or views of state or local governments can have little or no bearing on federal decisions in this area;

b. Meaningful consultation for the program or activity would breech financial, business, or trade secret confidentiality required by federal statute;

c. Affects other countries, particularly on matters of common interest to the United States and Canada or Mexico, and the consultation requirements of the Executive Order would interfere with the conduct of foreign policy;

d. Intergovernmental review consistent with the Executive Order would substantially impede the achievement of Presidentially or Congressionally established national goals.

4. *Selected Examples of Included Programs and Activities:* These programs and activities are considered as being *within* the scope of the Executive Order and subject to its intergovernmental review provisions.

a. The following forms of federal assistance or financial transactions with government entities: grants; cooperative agreements; subsidies; loans; loan guarantees; insurance; technical assistance; expert information or counseling; property donations; real property acquisition or disposal; including obtaining major leases or easements; program or activities (other than General Revenue Sharing) receiving an exception to the provisions of the Federal Grant and Cooperative Agreement Act of 1977, Public Law 95–224.

b. A research, development, or demonstration program or activity;

(1) which has a unique geographic focus and is directly relevant to the governmental responsibilities of a state or local government within that geographic area; or

(2) which necessitates the preparation of an Environmental Impact Statement under NEPA; or

(3) which is to be newly initiated at a particular site or location and does not necessitate the preparation of an Environmental Impact Statement, but requires unusual measures to limit the possibility of adverse exposure or hazard to the general public (for example: special protective containment of shielding facilities or air, land, or water buffer zones).

DEPARTMENT OF EDUCATION PROGRAMS PROPOSED FOR EXCLUSION FROM EXECUTIVE ORDER 12372 [1]

Program name	Basis for exclusion (category)	CFDA reference
Interest Subsidy Grants for Academic Facilities Loans.	2(d)	84.001.
Bilingual Education-Fellowship Program.	2(e)	84.003.
Bilingual Education—School of Education Projects.	2(e)	84.003.
College Library Resources	2(d)	84.005.
Supplemental Education Opportunity Grants.	2(d), (e)	84.007.
Chapter 1 of the Education Consolidation and Improvement Act—Projects Operated by Local Educational Agenices.	1(d)	84.010.
Chapter 1 of ECIA, State Administration.	1(d)	84.012.
Chapter 1 of ECIA, Projects Operated by SEA's for Children in State-Oriented Institutions for Neglected or Delinquent Youth.	1(d)	84.013.
National Resource Center	2(d)	84.015.
National Resource Fellowships	2(e)	84.015.
Undergraduate International Studies and Foreign Language Program.	2(d)	84.016.
International Research and Studies.	2(e)	84.017.
Teacher Exchange	2(e)	84.018.
Fulbright-Hays Faculty Research Abroad Program in Foreign Language and Area Studies.	2(e)	84.019.
Foreign Curriculum Consultants.	2(e)	84.020.
Group Projects Abroad for Non-Western Language and Area Studies.	2(e)	84.021.
Fulbright-Hays Doctoral Dissertation Research Abroad Program for Foreign Language and Area Studies.	2(e)	84.022.
Handicapped Research and Demonstration.	2(b)	84.023.
Handicapped Innovative Program-Deaf-Blind Centers.	2(b)	84.025.
Training personnel for the Handicapped.	2(e)	84.029.
Special Needs Program	2(d)	84.031.
Strengthening Program	2(d)	84.031.
Challenge Grant Program	2(d)	84.031.
Guaranteed Student Loan Program Special Allowance/Interest Payments.	1(d)	84.032.

DEPARTMENT OF EDUCATION PROGRAMS PROPOSED FOR EXCLUSION FROM EXECUTIVE ORDER 12372 [1]—Continued

Program name	Basis for exclusion (category)	CFDA reference
Federally Insured Student Loan.	1(d)	84.032.
Auxiliary Loans (PLUS) Special Allowance.	1(d)	84.032.
College Work-Study	2(d), (e)	83.033.
Library Training	2(d)	84.036.
National Defense/Direct Student Loan Cancellations.	2(d), 2(e)	84.037.
National Direct Student Loan	2(d), 2(e)	84.038.
Library Research and Demonstration.	2(d)	84.039.
School Assistance in Federally Affected Areas—Maintenance and Operations.	1(d)	84.041.
Special Services for Disadvantaged Students.	2(d)	84.042.
Talent Search	2(d)	84.044.
Continuing Postsecondary Education Program and Planning.	1(d)	84.046.
Upward Bound	2(d)	84.047.
Vocational Education—Program Improvement Projects.	2(a)	84.051.
Cooperative Education Programs.	2(d)	84.055.
Cooperative Education and Supplemental College Work-Study.	1(d), 2(d)	84.055.
Indian Education Act—Special Programs and Projects.	2(e)	84.061.
Pell Grants	1(b)	84.063.
Veterans Cost-of-Instruction	2(d)	84.064.
Educational Opportunity Centers.	2(d)	84.066
State Student Incentive Grant Program.	1(d)	84.069.
State Student Incentive Grant Program.	3(a)	84.069.
Indian Education Act, Grants to Indian Controlled Schools.	1(e)	84.072.
Innovative Programs for Severely Handicapped Children.	2(b)	84.086.
Indian Education Act, Fellowships.	2(e)	84.087.
Fellowships for Graduate and Professional Study.	2(d)	84.094.
Institutional Grants for Graduate and Professional Study.	2(d)	84.094.
Law School Clinical Experience Program.	2(d)	84.097.
Vocational Education—Program for Indian Tribes and Indian Organizations.	1(e)	84.101.
Staff Training for Professional Development.	2(d)	84.103.
Biomedical Sciences	2(d)	84.112.
Capacity-Building Grants to Universities by the National Center for Education Statistics.	2(d)	84.114(b).
Capacity-Building Grants to Vocational Education Institutions by the National Center for Education Statistics.	2(d)	84.114(c).
Research, Development, and Demonstration Activities and Programs of the National Institute of Education.	2(b)	84.117.
Minority Institution Science Improvement Program.	2(d)	84.120.
Rehabilitation Services:		
Projects & Demonstrations for Services to Severely Handicapped Individuals.	2(d)	84.126A.
Projects with Industry	2(d)	84.126B.
Comprehensive Rehabilitation Centers.	2(d)	84.126C.
Helen Keller National Center	3(b)	84.126D.
Special Projects—Spinal Cord Injury Centers.	2(d)	84.126E.
Handicapped American Indian Vocational Rehabilitation Service Program.	1(e)	84.126H.
Projects for Initiating Special Recreation Programs.	2(d)	84.126J.
Rehabilitation Training Program.	2(e)	84.129.

DEPARTMENT OF EDUCATION PROGRAMS PROPOSED FOR EXCLUSION FROM EXECUTIVE ORDER 12372 [1]—Continued

Program name	Basis for exclusion (category)	CFDA reference
National Institute of Handicapped Research.	2(b)	84.133.
Aid to Land-Grant Colleges	1(d), 2(b)	84.135.
Legal Training for the Disadvantaged.	2(d)	84.136.
Title IV, Higher Education Act, High School Equivalency Program.	2(e)	84.141.
College Housing Loans	2(d)	84.142.
Allen J. Ellender Fellowships	2(d)	84.148.
Title IV, Higher Education Act, College Assistance Migrant Program.	2(e)	84.149.
Chapter 2 of the Education Consolidation and Improvement Act—Except the Chapter 2 programs listed in attachment A to the preamble.	1(d), 2(b), 2(e)	84.151.
Research Activities of the National Center for Educational Statistics.	2(b)	(2).
Research, Development, and Demonstration Activities and Programs of the Center for Educational Improvement (Incorporating the Office of Libraries and Learning Technology and the Professional Development and Dissemination Programs).	2(b)	(2).
Educational Technology Program in the Office of the Assistant Secretary, Including Research, Development and Demonstration.	2(b)	(2).

[1] Financial assistance transactions with non-governmental entities, including State Postsecondary educational institutions, and Federally recognized Indian Tribal governments, are proposed for exclusion from Executive Order 12372.
[2] Number not assigned.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by adding a new Part 79 to read as follows:

PART 79—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS

Sec.

Authority: Executive Order 12372 (July 14, 1982; 47 FR 30959); section 401(b) of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(b)).

§ 79.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, issued July 14, 1982, and titled "Intergovernmental Review of Federal Programs."

(b) Executive Order 12372 is intended to foster an intergovernmental partnership and a strengthened Federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

(c) The Order and these regulations are intended only to improve the internal management of the Department's consultation with State and local governments. Neither the Order nor these regulations are intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(42 U.S.C. 4231(b))

§ 79.2 What definitions apply to these regulations?

"Department" means the U.S. Department of Education.

"Order" means Executive Order 12372, issued July 14, 1982, and titled "Intergovernmental Review of Federal Programs."

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

"State" means any of the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(42 U.S.C. 4231(b))

§ 79.3 What programs and activities of the Department are subject to these regulations?

The Secretary publishes in the **Federal Register** a list of the Department's programs and activities that are subject to the Order and these regulations.

(42 U.S.C. 4231(b))

§ 79.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from the Department.

(b) If a State adopts a process under the Order to review and coordinate proposed Federal financial assistance, the Secretary, to the extent permitted by law—

(1) Uses the State process to determine official views of State and local elected officials;

(2) Communicates with State and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance that are communicated through the State process;

(4) Allows the States to simplify and consolidate existing Federally required State plan submissions;

(5) Where State planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for Federally required State plans;

(6) Seeks the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports State and local governments by discouraging the reauthorization or creation of any planning organization which is Federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

(42 U.S.C. 4231(b))

§ 79.5 What procedures apply to a State's choice of programs under the Order?

(a) Each State that adopts a process under the Order notifies the Secretary of the Department's programs that the State chooses to cover under the Order.

(b) The Secretary uses a State's process under the Order as soon as feasible, depending on individual programs and projects, after the State notifies the Secretary of its program choices.

(c) States may change their program choices under the Order at any time. The Secretary may establish deadlines by which States are required to inform the Secretary of changes in their program choices.

(42 U.S.C. 4231(b))

§ 79.6 How does the Secretary give States an opportunity to comment on proposed Federal financial assistance?

(a) This section applies to all comments received from a State under an official process the State has established under the Order, including

comments where the State has delegated to local elected officials the review, coordination, and communication with the Department.

(b) Except in unusual circumstances, the Secretary gives States at least 30 days to comment on any proposed Federal financial assistance. (See § 79.8 on comment periods pertaining to interstate situations.)

(c) Subject to paragraph (b) of this section, the Secretary may establish deadlines for—

(1) Applicants to submit copies of their applications to the States; and

(2) States to complete their review of applications under a program and to submit their review of applications under a program and to submit their comments to the Department.

(d) The Secretary responds as provided in the Order to all comments from a State that are provided through a State office or official that acts as a single point of contact under the Order between the State and all Federal agencies.

(42 U.S.C. 4231(b))

§ 79.7 How does the Secretary make efforts to accommodate State and local concerns?

(a) If a State provides comments to the Department in accordance with § 79.6(d), the Secretary either—

(1) Accepts the State's comments;

(2) Reaches a mutually agreeable solution with the State; or

(3)(i) Provides the State with a timely explanation of the basis for the Department's decision.

(ii) If previously requested by the Governor, the Secretary provides the explanation in writing.

(iii) If the State has designated a State office or official as a single point of contact between the State and all Federal agencies, the Secretary provides any explanation under paragraph (a)(3) of this section to that office or official.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the State that—

(1) The Department will not implement its decision for ten days after the State received the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the ten-day waiting period is not feasible.

(42 U.S.C. 4231(b))

§ 79.8 What are the Secretary's obligations in interstate situations?

The Secretary is responsible for—

(a) Identifying proposed Federal financial assistance that has an impact on interstate areas;

(b) Notifying the affected States, including States that have not adopted a process under the Order; and

(c) Except in unusual circumstances, providing the affected States an opportunity of at least 45 days to comment.

(42 U.S.C. 4231(b))

§ 79.9 How may a State simplify, consolidate, or substitute Federally required State plans?

(a) As used in this section—

(1) "Simplify" means that a State develops its own format, chooses its own submission date, and selects the planning period for a State plan.

(2) "Consolidate" means that a State meets statutory and regulatory requirements by combining two or more plans into one document and that the State selects the format, submission date, and planning period for the consolidated plan.

(3) "Substitute" means that a State uses a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) To the extent consistent with law, a State may decide to try to simplify, consolidate, or substitute Federally required State plans without prior approval by the Secretary.

(c) The Secretary reviews each State plan that a State has simplified, consolidated, or substituted to ensure that the plan meets Federal requirements.

(42 U.S.C. 4231(b))

§ 79.10 [Reserved]

The Secretary also proposes to amend Title 34 of the Code of Federal Regulations by removing §§ 75.170, 75.171, 75.172, 75.173 and 76.105.

PART 75—[AMENDED]

§§ 75.170 through 75.173 [Removed]

PART 76—[AMENDED]

§ 76.105 [Removed]

[FR Doc. 83-1671 Filed 1-21-83; 8:45 am]
BILLING CODE 4000-01-M

federal register

Monday
January 24, 1983

Part VIII

Department of Energy

Intergovernmental Review of Department of Energy Programs and Activities and Financial Assistance Rules

DEPARTMENT OF ENERGY

10 CFR Parts 600 and 1005

Intergovernmental Review of Department of Energy Programs and Activities and Financial Assistance Rules

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would implement Executive Order 12372, "Intergovernmental Review of Federal Programs." It applies to Federal financial assistance and direct Federal development programs and activities of the Department of Energy. Executive Order 12372, and these proposed regulations, are intended to replace the intergovernmental consultation system developed under Office of Management and Budget (OMB) Circular A-95. They provide for a new, more effective intergovernmental consultation system. Under the Order, State and local elected officials, not the Federal Government, will determine what Federal programs and activities to review and the procedures by which the review will take place. In addition, a conforming amendment to 10 CFR 600.11 is proposed.

DATE: Comments must be received on or before March 10, 1983.

ADDRESS: Interested persons should submit comments to the Financial Assistance Policy Branch (MA-931.2), Procurement and Assistance Management Directorate, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT:

Thomas Reynolds, Chief, Financial Assistance Policy Branch (MA-931.2), Procurement and Assistance Management Directorate, Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 252-6191

Mary Ann Masterson, Office of the Assistant General Counsel for Procurement and Incentives (GC-44), Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 252-1526.

SUPPLEMENTARY INFORMATION:

Background

For many years, consultation between state and local officials and Federal agencies concerning Federal programs and activities has taken place through an elaborate regulatory and organizational framework created under OMB Circular A-95, "Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects." (41 FR 2052, January 13, 1976). The A-95 system required state and local governments to follow prescribed review procedures and to review specified Federal programs, regardless of the circumstances affecting particular state and local governments. The system also required review of Federal programs by state and local agencies without regard to the priorities of their elected leadership. The A-95 process became highly bureaucratic, burdensome, and costly. States and localities had to process too much paperwork, and, as a result, the impact of substantive comments was sometimes lost. A network of state and area clearinghouses was created to manage this paperwork. State and local elected officials found it difficult to exert significant influence on Federal decisions through this system, and Federal agencies found the system a cumbersome method of obtaining information about, and responding appropriately to state and local concerns.

On July 14, 1982, President Reagan signed Executive Order 12372, "Intergovernmental Review of Federal Programs." The Executive Order is reproduced as Attachment A to the OMB notice published in today's **Federal Register**. The Order directs the revocation of Circular A-95, and provides for a new, more effective, intergovernmental consultation system that is consistent with the President's policies concerning Federalism and regulatory relief. Under the Order, states and localities will take the initiative for establishing review procedures and priorities. State and local elected officials, not the Federal Government, will determine, within the scope of the Order, what Federal programs and activities to review and the procedures by which the review will take place. When state and local elected officials bring their concerns to a Federal agency's attention through this process, the agency will have to make efforts to accommodate the concerns, and, if it does not accommodate them, explain why not. This "accommodate or explain" provision gives greater weight to state and local views than Circular A-95 did. In addition, states will have the opportunity to simplify, consolidate, or substitute Federally required state plans.

Across the whole range of Federal programs and activities, the Federally required procedures for consultation under Circular A-95 created a substantial regulatory burden. The Executive Order's system of consultation will significantly reduce that burden, as well as opening opportunities for states to reduce administrative burdens in Federal programs requiring state plans. In contrast to the A-95 system, which relied heavily on clearinghouses, planning organizations, and other bodies which are not elected by the jurisdictions they serve, the Order, consistent with the President's Federalism policy, emphasizes the role of elected state and local officials.

OMB Guidance to States

In order to assist states as they begin to work in implementing the Order, OMB on or before today wrote to each state concerning the establishment of an official state process. This letter will reproduced in the **Federal Register** in the next few days. This letter explains the role of the "single point of contact." A "single point of contact" is the one office or official in a state that transmits the result of the state review and coordination with recommendations that differ from the Federal proposal to the Department and other Federal agencies and to which the Department directs official communications (e.g., explanation of nonaccommodation) to the state under the Order. A state may have as few or as many entities as it chooses to perform review and coordination and to conduct discussions with the Department. However, there should be only one point to contact to officially transmit recommendations for change to all Federal agencies under the Order. It is up to the state whether the single point of contact plays a substantive role with respect to the state's views, or simply acts as a focal point for official communications.

It is also worth emphasizing that states are not required to adopt an official state process at all. However, after final rules implementing the Order become effective (they will be published on or about April 30, 1983), the existing Federal A-95 consultation regulations will no longer be in effect. Other existing statutory consultation requirements are not affected by this proposed rule. An inventory of these existing requirements will be available.

This Department and other Federal agencies have the basic responsibility of ensuring that their programs and activities are carried out in conformity with the Order's provisions. OMB will have general government-wide oversight responsibility for the implementation of the Order, but will not attempt to exercise any day-to-day, operational control of agency actions. Nor will OMB

act as forum for "appeals" of agency actions by non-Federal parties.

Development of Proposed Regulations

If the objectives of the Executive Order are to be met, Federal agencies must ensure that they deal with state and local elected officials in a consistent and understandable way. To this end, the Federal agencies affected by the Order have worked together to make common policy decisions and, to the extent feasible, to draft common regulatory language. The agencies involved chose an approach that minimizes the imposition of regulatory requirements on non-Federal parties. For the most part, these proposed regulations will spell out the Department's obligations and procedures in response to the views expressed by the state and local elected officials. A paper discussing the policy decisions resulting from the OMB-led effort was made available to the public (47 FR 57369, December 23, 1982). Following the close of the comment period, the agencies will again work together with the aim of promulgating final rules that are substantially consistent with one another. It is the Federal Government's intention that there will be no further rulemaking with respect to this Order.

The Executive Order mandates the implementation of final regulations by April 30, 1983. It will not be possible to have an adequate comment period and meet this deadline if the normal 30-day delay between the publication date of a final rule and its effective date is observed. Consequently, the Department proposes to make the final rule effective immediately upon its publication on April 30.

As a matter of style, the proposed rules use the present tense when describing the Department's obligations. For example, when the proposed regulation says that the Secretary "provides the State with a timely written explanation," the regulation means that the Secretary is obligated to do so.

Removal of Regulations Implementing OMB Circular A-95

In connection with this proposed rulemaking, the Department is proposing to remove its existing regulations implementing former OMB Circular A-95. Executive Order 12372 directed OMB to revoke the Circular itself, and the OMB directive revoking the Circular told Federal agencies to leave their A-95 regulations in place only until new regulations implementing the Order were promulgated on April 30, 1983. In order to carry out this directive, the Department proposes to amend 10 CFR 600.11, which implements OMB Circular A-95, to state that intergovernmental review of the Department's grant and cooperative agreement transactions shall be conducted in accordance with today's proposed rule (10 CFR 1005) implementing Executive Order 12372. Final rules carrying out this amendment will be published on or about April 30, 1983, in conjunction with the Department's final rule implementing Executive Order 12372.

Executive Orders 12291 and 12372, Regulatory Flexibility Act and Paperwork Reduction Act

The Department has determined that this is not a major rule under Executive Order 12291. The Office of Management and Budget has approved the proposed rule pursuant to Section 5(a) of Executive Order 12372. The proposed rule would simplify consultation with the Department and allow state and local governments to establish cost-effective consultation procedures. For this reason, the Department believes that any economic impacts will not be significant, in any case. Consequently, the Department certifies, under the Regulatory Flexibility Act, that this rule would not have a substantial economic impact on a significant number of small entities. This proposed rule is not subject to section 3504(h) of the Paperwork Reduction Act, since it would not require the collection or retention of information.

Public Hearing

The Department has concluded that this proposed rule does not involve a substantial issue of fact or law and that the proposed rule should not have a substantial impact on the nation's economy or large numbers of individuals or businesses. Therefore, pursuant to Pub. L. 95-91, the DOE Organization Act, the Department does not plan to hold a public hearing on this proposed rule. Interested persons are invited to participate in this rulemaking by submitting in writing, data, views, or arguments with respect to the proposals set forth in this notice.

Section-by-Section Analysis

Section 1005.1 What is the purpose of these regulations?

This section briefly states the purpose of the regulations, which is to implement Executive Order 12372 and foster an improved system of intergovernmental consultation. Paragraph (c) states the important point that the Order, and these regulations, are intended only to improve the Department's internal management of its consultation with state and local governments. Neither the Order not these regulations are intended to create any right of judicial review of the Department's action. For example, it is not intended that a state or local government would have the right to sue the Department because the Department failed to explain a nonaccommodation of a state recommendation.

Section 1005.2 What definitions apply to these regulations?

This section defines several terms used frequently in the proposed rule. "Department" means the Department of Energy. "Order" means Executive Order 12372. "Secretary means the Secretary of Energy or an official or employee of the Department acting under a delegation of authority from the Secretary. This does not mean that there must be a new, specific, formal delegation pertaining to Executive Order 12372. Any official who has existing authority to act concerning a program or activity under a delegation could act under the Order concerning that program or activity. "State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands. The definition of "state" means that the District of Columbia, Puerto rico, and the other jurisdictions mentioned may create an official consultation process and consult with Federal agencies on the same basis as the 50 states.

In addition to these definitions, three other terms—simplify, consolidate and substitute—are defined in § 1005.9, State Plans. Several other terms appearing in the Order are not defined in this section, but are used in the regulation in a way that makes their operational meaning clear (e.g., accommodate and explain in § 1005.7).

Section 1005.3 What programs and activities of the Department are subject to these regulations?

Paragraph (a) provides that the Department will publish a **Federal Register** notice, in conjunction with the publication of its final Executive Order 12372 rule, listing the programs and activities that are subject to the Order. Updated lists will be published when necessary in order to let states know which of the Department's programs and activities they may choose to cover.

The attachment to this preamble contains a list of those programs and activities that the Department proposes to exclude from coverage under the

Order. The reason for each proposed exclusion is also listed. The Department seeks comments on the proposed exclusions. After promulgation of the final rules, if the Department wants to exclude new or additional programs or activities from coverage under the Order, it will publish a **Federal Register** notice requesting comment on the proposed exclusion.

At this time, states should assume that all of the Department's other Federal financial assistance and direct Federal development programs will be subject to the Order. Of course, activities and programs that clearly are neither Federal financial assistance nor direct Federal development (e.g., operating funds for government-owned, contractor-operated facilities, procurement by the Department) are not subject to the Order. Also, the Order and these regulations do not apply to proposed regulations, legislation, budget formulation, or classified programs or activities where formal consultation would endanger national security.

Even if a program or activity is excluded from the consultation system established by the Order, state and local officials would still have an opportunity to have their views considered by the Department. Indeed, statutory requirements for consultation, such as section 401(b) of the Intergovernmental Cooperation Act of 1968 (42 USC 4231(b)), require Federal agencies to consider the views of state and local governments. Many of the Department's program statutes have their own consultation requirements, and the Department will, of course, comply with all existing or future statutory requirements of this kind. However, the Department is not obligated to follow the provisions of the Order and these regulations with respect to excluded programs and activities. If at any time a state believes that any official of the Department has not made appropriate use of the official state process, the state is invited to raise its concerns directly with the Secretary.

In addition to the programs and activities proposed in the attachment to this preamble for exclusion, proposed § 1005.3(b) establishes a class exclusion for the Department's financial assistance transactions with other than state and local governments. The class exclusion affects the Department's financial assistance activities in two ways.

First, for certain Departmental financial assistance programs, state and local governments are precluded from eligibility by Federal statute or regulation (e.g., Loans for Bid or Proposal Preparation by Minority Business Enterprises). Generally, state and local governments neither provide non-Federal funds for, nor are directly affected by, such programs. As a result, the Department proposes in the attachment to this preamble to exclude such programs from coverge under the proposed regulations. Occasionally however, Departmental financial assistance to a non-governmental entity may directly affect a state or local government (e.g., major energy development project necessitating the preparation of an environmental impact statement). Paragraph (b) thus provides that the Department, in such infrequent cases, will identify such projects in the **Federal Register** listing of programs and activities subject to the regulations.

Second, in other Departmental financial assistance programs, state and local governments are eligible to compete with non-governmental entities (e.g., non-profit organizations, colleges and universities) for discretionary financial assistance awards. In these cases, the Department is concerned that any opportunity for a state to comment on the application of a competing non-governmental entity (see proposed § 1005.6) could provide, at a minimum, an appearance of an unfair competitive practice. The Department is committed to maintaining the highest standards of impartiality and integrity in the award of public funds. Thus, the Department proposes to exclude financial assistance transactions with non-governmental entities for those programs under which both governmental and non-governmental entities are eligible recipients. The proposed regulations would apply, however, to financial assistance transactions with state and local governments under such programs. In this context, a governmental entity is any state, independent state organization, board, or commission; general purpose local government; special purpose local or regional government; council of governments; or non-profit organization established by state law or local ordinance exclusively to provide a governmental service and the substantial portion of the funding for which is federal. State and local colleges and universities are considered non-governmental entities for this purpose.

The class exclusion for non-governmental entities is not proposed to apply to the Department's direct development activities since it is the nature of the project not the organizational-type of any involved entity which should determine the coverage for direct development.

Section 1005.4 What are the Secretary's general responsibilities under the Order?

This section incorporates the most important portions of Executive Order 12372 into the Department's regulation, emphasizing the Department's obligations under the Order. The mechanisms by which the Department will carry out many of these general obligations are developed further in other sections of the rule. For example, paragraph (b)(4) of this section is further elaborated in § 1005.9, concerning state plans.

Paragraph (b)(2) means the Department is obligated to make efforts to ensure that information on proposed actions or decisions of the Department is available to the states in sufficient time to be able to exert meaningful influence on the Department's course of action. For example, the Department would endeavor to make sure that the state learned of assistance announcements including decision criteria, proposed Federal development project decisions, and so forth, in time to make a meaningful response.

Section 1005.5 What procedures apply to a state's choice of programs under the Order?

States may choose to consult with the Department under the Order concerning any of the Department's programs and activities that the department identifies by **Federal Register** notice as subject to the Order. However, these regulations do not require states to consult with the Department concerning any particular program or activity. This is an important distinction between the Order's policy system and the system established under Circular A-95, which gave states no discretion concerning program selection. Under the Order, states may choose whether to use the consultation system with respect any particular program or activity. This gives states increased flexibility to determine how best to allocate their resources. For example, many programs have existing statutory consultation systems. If a state decides that an existing consultation system is adequate, the state might choose not to cover the program under its E.O. 12372 process, thereby avoiding duplication and saving resources for use on other programs. A state also might want to decline to cover a program which has only minor effects on the state and its people.

The Department emphasizes that the choice of whether to cover a particular program or activity listed in the Department's **Federal Register** notice is

entirely up to each state. While the Department will be happy to discuss with states the most effective ways of carrying out consultation concerning its programs and activities, the Department will not attempt to constrain the state's discretion with respect to program selection.

Paragraph (a) of this section sets out a purely administrative requirement pertaining to program selection. The state must notify the Secretary of the programs and activities it chooses to cover. When it first establishes its official process, the state can meet this requirement by sending to OMB, along with other information required to establish the process, a list of the Federal programs and activities it wishes to cover. OMB will inform each Federal agency of the programs and activities of each that the state has chosen to cover. Subsequently, the state should send all program coverage information (additions, deletions, other changes) directly to the Department. This information will enable the Department's personnel who work on a particular program or activity to know which states they must consult with under the provisions of the Order.

Paragraph (b) provides that, once a state has established a process and made its program selections known to the Department, the Department will use the state's process concerning the programs and activities selected by the state as soon as feasible. While the Department will make every effort to use the state's process, there may be situations, on individual programs or projects, where the Department may not be able to do so for a time. The Department will make determinations concerning when to begin using the state's official process on a case-by-case basis and will let the state know when it will start to use the state process.

Paragraph (c) provides that the Department may establish deadlines for changes by states in the program selection choices. A state may add or delete a program or activity from those it wishes to cover under the Order at any time. However, in order for meaningful consultation to occur under the Order, the Department may need a certain amount of "lead time" before it can adapt its procedures to the changed circumstances. For this reason, the Department may find it necessary to establish deadlines for program selection changes. These deadlines would simply be notifications to the state that, if they wished to have consultation under the Order begin with respect to a particular program on a given date, they would have to inform the Department of their program selection change a certain time (e.g., 30 days, 45 days) prior to that date.

Section 1005.6 How does the Secretary give states an opportunity to comment on proposed Federal financial assistance and direct Federal development?

Paragraph (a) points out that the Order would apply not only to comments prepared pursuant to the official state process, but also the comments formulated by local elected officials to whom the state's consultation role has been delegated in specific instances. Section 3(a) of the Order permits states to delegate, to local elected officials in specific instances the review, coordination, and communication with Federal agencies that normally take place under the state process. This means that states may chose not only which programs and activities to cover but also who within the state has the opportunity to carry out the consultation. States have complete discretion concerning delegation of their consultation role.

For example, a state could delegate to a mayor the state's consultation role with respect to a project occurring in his or her city. The state could delegate all consultation under a particular program to officials of the local governments whose jurisdictions are affected by products under the program. The state could delegate its consultation role for a particular program to local elected officials in cities above 250,000 population but not to local officials in smaller jurisdictions, or vice versa. In any case, of delegation, the local official to whom the state's consultation role is delegated acts on behalf of the official state process with respect to the Department. For example, the Department's efforts to accommodate the concerns expressed by the local official will be pursued directly with the official, not with the state itself.

The local official to whom the state's consultation role had been delegated would not send his or her comment directly to the Department. Rather, the official would send the comment to the Department through the state single point of contact. The Department would work with the local official in attempting to reach an accommodation, but, if efforts at accommodation were unsuccessful, the Department would explain the nonaccommodation to the single point of contact. Routing the delegated comment through the state single point of contact would alert the Department to the fact that the local official's comments should be dealt with under the provisions of the Order and make unnecessary a separate communication from the state to the Department informing the Department that the comment was an official comment of the state.

It is difficult to specify, in advance, the precise time frames that will implement the Order's notification requirement for the Department's widely varied program and activities. However, paragraph (b) states that, as a general rule, states choosing to cover a particular program or activity will have at least 30 days (45 days in the case of interstate situations) to comment on proposed Federal financial assistance or direct Federal development before the Department commits itself to a given course of action. The Department, on a case-by-case basis, may allow a shorter period for comment if unusual circumstances make the shorter period necessary. Among the kinds of unusual circumstances that might necessitate a shorter comment period are an emergency, the necessity to make a grant or cooperative agreement decision before the expiration of an appropriation, or a statutory deadline.

In order to meet the Order's objective of ensuring states a meaningful opportunity to influence decisions by the Department, the Department may need to establish deadlines or time frames for comment on particular actions or types of actions. Consequently, as provided in paragraph (c), the Department may define, for its varying programs and activities, the length of comment periods and the starting points from which comment periods would begin to run. States and localities would still have at least 30 days to comment (45 days in interstate situations), except under unusual circumstances. For example, time frames may differ among different types of programs (e.g., one-year grants, multi-year grants, direct development projects), for different stages of the same program (e.g., first application, renewal), or at different times (e.g., end of fiscal year).

In some of the Department's programs, a basic decision to go forward with a project may be the key decision that determines a subsequent course of action by the Department. Once the initial decision is made, the Department has little discretion with respect to the subsequent decisions. The Department could inform states of the key decision points on which their comments are essential if the states are to have a meaningful role in influencing the Department's decision.

In most financial assistance programs, an organization applies to the Department for a grant or otherwise

seeks Departmental approval for financial assistance to be provided. In order to receive notification of applications for financial assistance from the Department, the state should work with applicant organizations to ensure that applications are provided to the state in a timely manner. If it becomes necessary, the Department may establish requirements for applicants to submit copies of their applications to the state.

In order to ensure timely completion of Federal decisionmaking, the Department may require states to complete their reviews of applications and to submit their comments to the Secretary by a particular date. The intent of this provision is to prevent undue delays in Federal decisions affecting the state. A similar provision, in paragraph (c)(3), permits the Secretary to establish deadlines for state review of the Department's direct development activities.

Paragraph (d) makes an important point with respect to the way that communications between states and the Department would work. Under the Order, a state may organize the mechanics of its consultation process any way it chooses. However, in order to ensure that communications between the Department and the official state process flow efficiently, the Department strongly encourages states to establish a "single point of contact" for state communications with Federal agencies. States would identify this single point of contact in their initial submission to OMB. Channeling communications from the states to Federal agencies and from agencies back to the states through a single point has obvious benefits from the point of view of administrative simplicity. In addition, it will enable the Department to know which communications to treat as official under the provisions of the Order. The Department needs a means of separating the letters from state and local elected officials to which it will respond through normal correspondence channels from those letters to which it must respond under the provisions of the Order. State's use of a single point of contact will permit the Department to make this necessary administrative distinction.

In the absence of a state process or single point of contact, or with respect to a program that a state has not selected for coverage, the Department will work with the state in its normal manner, consistent with existing legal requirements. The provisions of the Order and these regulations will not apply, however.

The proposed regulation would not impose any constraints on the content of comments that states send to the Department. However, the Department would strongly encourage commenters under the Order to follow three policies which are important for the efficient operation of the Order's consultation system.

First, comments should address statutes, regulations and other requirements governing a specific program or decision. Often, the Department is required by statute to make a decision based on certain statutorily established factors. In other cases, the Department, through regulation or guidance, has established decisionmaking criteria for various actions. It is unlikely that the Department would be able to accomodate concerns that do not address these requirements and standards, or which are not relevant to the decisionmaking process. In order to have meaningful influence on the Department's decisions, comments must be relevant to the factors, on which the Department is required to base its decisions. For example, if a Department's standards call for a decision to be made at a certain stage only on the technical merits of financial assistance proposals, before consideration is given to costs, the Department could not accommodate a state comment addressing costs during the technical review.

Second, states can assist the Department's implementation of the Order by clearly specifying the magnitude of the state's concerns. Often, it may be difficult for the Department to tell whether a state is firmly recommending a given course of action, has a mild preference for or reservation about the action, or is simply seeking clarification of the Department's position. For example, if a state wants the Department to recognize the state's priorities, accept only a modified financial assistance application, or deny a financial assistance application, it would be very helpful if the state identified its position as clearly as possible. The Order directs Federal agencies to make efforts to accomodate state concerns. The Department's ability to do so successfully is dependent, to a significant degree, on the clear articulation of concerns by the states.

Third, the Department may not be in a good position to accomodate state and local concerns unless the state speaks with one voice in its comments. The Department recognizes that different state and local officials and agencies often will not always agree among themselves concerning the course of action the Department should follow. The single point of contact should reconcile conflicting views before transmission to avoid the Department having to seek clarification concerning which set of views the state wants the Department to accommodate. The process will work much better if the Department receives a single set of comments.

Section 1005.7 How does the Secretary make efforts to accommodate state and local concerns?

Paragraph (a) provides that when a state comments to the Department under the Order, the Department has three choices. The Department can accept the state's comments (i.e., do as the state recommends). Second, it can reach a mutually agreeable solution with the state. This solution can differ from the original state position on the matter. Third, if the Department cannot accept the state's comments or reach a mutually agreeable solution, the Department is obligated to give the state a timely, simple explanation of the Department's reasons for not doing so. While the Department is not required to accept the state's comments or to begin discussion towards another solution, the Department does have an obligation to provide a simple explanation of its decision.

Normally, the explanation could take any form which adequately communicates the Department's reasons for its decision to the state. A telephone call, a meeting, or letter would perform this function. The Department has the discretion to choose the most appropriate mode of communicating the explanation in each case. The explanation is made by a designee of the Secretary.

There is one exception to the Department's discretion to choose the mode of communicating the explanation. As paragraph (a)(3)(ii) provides, the Governor of the state may request, in advance of the time the explanation is made or after it is communicated to the single point of contact, that an explanation of nonaccommodation be made in writing. When it receives such a request from a Governor, the Department's explanation will be in a letter.

Paragraph (a)(3)(iii) spells out the role of the single point of contact in receiving explanations from the Department. The Department will direct all such explanations to the single point of contact in each state that has one. This is true even where accommodation discussions have occurred between the Department and another party in the state.

Paragraph (b) concerns safeguards to ensure that the interests of states are protected in nonaccommodation situations. Paragraph (b)(1) provides that the nonaccommodation explanation will state that the Department will not implement its decision until ten days after the single point of contact receives the explanation, except as provided in paragraph (b)(2). This waiting period is intended to permit states to respond to the Department in cases of nonaccommodation before the Department has awarded a grant or cooperative agreement, begun construction of a facility, or otherwise irrevocably carried out the decision. In a case in which the Department has provided a verbal explanation of a decision to the single point of contact, and the Governor subsequently has requested a written explanation, the ten day period will start to run from the date of the original explanation to the single point of contact.

Paragraph (b)(2) recognizes that there will be some situations in which the Department cannot observe the ten-day waiting period. These unusual circumstances could include, for example, a statutory deadline, emergency, or end of a fiscal year situation that may make it infeasible for the Department to wait ten days before implementing its decision. In a situation where the Department cannot observe the waiting period, the Secretary will review the decision before the nonaccommodation explanation is made and before the Department implements the decision. The nonaccommodation explanation will include the Department's reasons for determining that the ten-day waiting period is not feasible.

Section 1005.8 What are the Secretary's obligations in interstate situations?

In some cases, action taken by the Department in Federal financial assistance and direct Federal development programs may have an impact on interstate areas. In these situations, the Department has certain additional obligations. First, the Department must identify its direct Federal development or Federal financial assistance actions or decisions that may affect interstate areas. Having done so, the Department must, as provided in paragraph (b), notify the potentially affected states, whether or not they have established an official state process under the Order. Except in unusual circumstances (e.g., emergencies, financial assistance awards at the end of the fiscal year), the Department must provide the affected states an opportunity for comment of at least 45 days before the Department commits itself to a course of action. The increase in the minimum comment period from 30 to 45 days in interstate situations allows extra time for states to coordinate among themselves before providing views to the Department.

The Department cannot require states to coordinate with each other on proposed Federal financial assistance or direct Federal development having an impact on an interstate area. However, the Department strongly encourages each affected state to share its comments with and obtain the views of other affected states, using the other state's single point of contact, if there is one, or an appropriate state official if there is not a single point of contact. The Department encourages states to reconcile differences where they exist, so that the states provide the Department with a unified position. If the affected states provide the Department with conflicting recommendations, the Department will, with respect to states that have established a process under the Order, accommodate recommendations to the extent possible and explain its nonaccommodations of other points of view as provided in § 1005.7.

Section 1005.9 How may a state simplify, consolidate or substitute Federally required state plans?

This section, which applies only to the Department's financial assistance programs, carries out section 2(d) of the Order, which directs Federal agencies to "allow" states to consolidate or simplify plans and to "encourage" states to substitute their own plans for Federally required state plans.

Paragraph (a) defines three terms used in this section. For a state to "simplify" a plan means that a state can develop its own format, choose its own submission date, and select the planning period covered by the plan. "Consolidate" means that the state can meet statutory and regulatory requirements by combining two or more plans into one document. The state can also select the format, submission date, and planning period for a consolidated plan. "Substitute" means that a state can use a plan or other document that is developed for its own purposes to meet Federal requirements in place of a plan mandated by the Department. State plans required by the Department that are eligible for modification (i.e., simplification, consolidation, or substitution) under the order will be listed by the Department in an OMB notice published in today's **Federal Register**. The Department is willing to consider other plans for eligibility for modification (i.e., simplification, consolidation, or substitution) under this section.

For purposes of state plan modifications, it is necessary to draw a distinction between the state's decision concerning which plans it wants to try to modify and the Department's decision concerning whether the accept modified plans. Paragraph (b) deals with the first of these issues. A state may decide to try to simplify, consolidate or substitute state plans without prior approval by the Department. The state's discretion in this respect is complete.

Paragraph (c) points out that the Department will review the content of state proposals to simplify, consolidate, or substitute state plans to ensure that they meet all applicable Federal requirements. Under this provision, the Department could disapprove the content of a modified plan on the basis of legal insufficiency. If the Department disapproves a state plan, the state may have recourse to any existing appeal process of the Department applicable to the program in question. However, the Department does not propose any special appeal process for situations in which the Department does not accept a modified plan.

This paragraph is not intended to give the Department any new authority it does not already have to review or disapprove state plans. For example, if a statute limits the grounds on which the Department may disapprove a state plan submission, this paragraph is not intended to expand those limits. The paragraph does emphasize, however, that these regulations do not impair the Department's existing authority to review and, if necessary, disapprove state plans. This section also does not affect any existing statutory or regulatory requirements (e.g., submission dates, planning periods, or formats of state plans). The Department intends to review and as appropriate, make modifications in regulatory requirements without a statutory basis to allow more state flexibility.

The Department's ability to review state plans is important not only for the Department's ability to administer its programs effectively but also to prevent states from inadvertently causing delays in Departmental funding decisions. In many financial assistance programs, required program standards must be met through a state plan before Federal funds are awarded. The Department may not be in a position to award funds, if a plan does not meet legal requirements.

The Department encourages states who wish to simplify, consolidate or

substitute state plans to inform the Department well in advance of their intentions. Early discussions between state officials and the Department regarding proposed modifications of plans will help to avoid later problems, including unexpected delays or disapprovals of modifications. The Department is very willing to work closely with state officials on plan modifications and, where feasible, will provide technical assistance or advice in plan modification efforts.

Section 1005.10 May the Secretary waive any provision of these regulations?

This section allows the Secretary to waive any provision in these regulations in an emergency. The Department expects to use this provision sparingly, since the Department's policy is to carry out the Order as fully as it can.

List of Subject in 10 CFR Part 1005

Intergovernmental relations.

Issued at Washington, D.C., January 17, 1983.

Donald Paul Hodel,

Secretary of Energy.

Attachment—List of Proposed Department of Energy Programs Excluded From Coverage

The Department proposes to exclude from coverage under Executive Order 12372 and this regulation the following programs and activities. The reasons for these exclusions are that state and local governments neither provide the non-Federal funds for, nor are directly affected by, these programs and activities.

The Department's research, development and demonstration programs and activities are proposed for exclusion from coverage under the Executive Order and this regulation except when such programs or activities (1) have a unique geographic focus and are directly relevant to the governmental responsibilities of a state or local government within that geographic area; (2) necessitate the preparation of an Environmental Impact Statment under NEPA; or (3) are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public. These programs include:

1. Electric and Hybrid Vehicle Research Development, Demonstration and Production Loan Guarantees, Pub. L. 94–413, as amended, 15 U.S.C. 2501; CFDA 81.060.

2. Energy-Related Inventions, Pub. L. 93–577, 42 U.S.C. 5913; CFDA 81.036.

3. Basic Energy Sciences, High Energy/Nuclear Physics, Fusion Energy, Health and Environmental Research, Program Analysis and Field Operations Management, Pub. L. 83–703, 42 U.S.C. 2051; Pub. L. 93–438, 42 U.S.C. 5812; CFDA 81.049.

Programs which involve direct financial assistance between the Department and a non-governmental entity are proposed for exclusion from coverage under the Executive Order and this regulation. These include:

1. Coal Loan Guarantee Program, Pub. L. 94–163, as amended, CFDA 81.056.

2. Loans for Bid or Proposal Preparation by Minority Business Enterprises, Pub. L. 95–619, 42 U.S.C. 7141(e); CFDA 81.063.

3. Small Business Innovation Research Program, Pub. L. 97–219.

1. For the reasons set out in the Preamble, the Department of Energy proposes to amend Title 10, Code of Federal Regulations, by adding a new Part 1005, to read as follows:

PART 1005—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF ENERGY PROGRAMS AND ACTIVITIES

Sec.

Authority: Executive Order 12372 (47 FR 30959, July 16, 1982); Section 401(b) of Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(b)).

§ 1005.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, issued July 14, 1982 and titled "Intergovernmental Review of Federal Programs."

(b) Executive Order 12372 is intended to foster an intergovernmental partnership and a strengthened federalism by relying on state and local processes for the state and local government coordination and review of proposed Federal financial assistance and direct federal development.

(c) The Order and these regulations are intended only to improve the internal management of the Department. Neither the Order nor these regulations are intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 1005.2 What definitions apply to these regulations?

As used in this part:

"Department" means the U.S. Department of Energy.

"Order" means Executive Order 12372, issued July 14, 1982 and titled "Intergovernmental Review of Federal Programs."

"Secretary" means the Secretary of the U.S. Department of Energy or an official or employee of the Department acting for the Secretary under a delegation of authority.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands or the Trust Territory of the Pacific Islands.

§ 1005.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the **Federal Register** a list of the Department's programs and activities that are subject to the Order and these regulations.

(b) Unless otherwise stated in the **Federal Register** listing identified in paragraph (a) of this section, these regulations do not apply to the Department's financial assistance transactions with other than state and local governments.

§ 1005.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from, or direct Federal development by, the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed Federal financial assistance and direct Federal development, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate state and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing Federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of state plans for Federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is Federally-funded, which has a Federally-prescribed membership, which is established for a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

§ 1005.5 What procedures apply to a state's choice of programs under the Order?

(a) Each state that adopts a process under the Order notifies the Secretary of the Department's programs that the state chooses to cover under the Order.

(b) The Secretary uses a state's process under the Order as soon as feasible, depending on individual programs and projects, after the state notifies the Secretary of its program choices.

(c) States may change their program choices under the Order at any time. The Secretary may establish deadlines by which state are required to inform the Secretary of changes in their program choices.

§ 1005.6 How does the Secretary give states an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) This section applies to all comments from a state pursuant to an official process it has established under the Order, including comments where the state has delegated to local elected officials the review, coordination, and communication with the Department.

(b) Except in unusual circumstances, the Secretary gives states at least 30 days to comment on any proposed Federal financial assistance or direct Federal development (see § 1005.8 for comment periods pertaining to interstate situations).

(c) Subject to paragraph (b) of this section, the Secretary may establish deadlines for:

(1) Applicants to submit copies of their applications to the states; and

(2) States to complete their review of applications under a financial assistance program and to submit their comments to the Department.

(3) States to complete their review of proposed direct Federal development and to submit their comments to the Department.

(d) The Secretary responds as provided in the Order to all comments from a state that are provided through a state office or official that acts as a single point of contact under the Order between the state and all Federal agencies.

§ 1005.7 How does the Secretary make efforts to accommodate state and local concerns?

(a) If a state provides comments to the Department in accordance with § 1005.6(d), the Secretary:

(1) Accepts the state's comments;

(2) Reaches a mutually agreeable solution with the state; or

(3) (i) Provides the state with a timely explanation of the basis for the Department's decision.

(ii) If requested by the Governor, the Secretary provides the explanation in writing.

(iii) The Secretary provides any explanation under paragraph (a)(3) of this section to the state office or official designated as a single point of contact between the State and all Federal agencies.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the state that:

(1) The Department will not implement its decision for ten days after the state receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the ten-day waiting period is not feasible.

§ 1005.8 What are the Secretary's obligations in interstate situations?

The Secretary is responsible for:

(a) Identifying proposed Federal financial assistance and direct Federal development that has an impact on interstate areas;

(b) Notifying the affected states, including states that have not adopted a process under the Order; and

(c) Except in unusual circumstances, providing the affected states an opportunity of at least 45 days for comment.

§ 1005.9 How may a state simplify, consolidate, or substitute Federally required State plans?

(a) As used in this section:

(1) "Simplify" means that a state can develop its own format, choose its own submission date, and select the planning period for a state plan;

(2) "Consolidate" means that a state can meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan; and

(3) "Substitute" means that a state can use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute Federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified consolidated or substituted and accepts the plan only if it meets Federal requirements.

§ 1005.10 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

PART 600—FINANCIAL ASSISTANCE RULES

2. The Department also proposes to amend § 600.2(e)(1)(iii), and revise § 600.11 of the DOE Financial Assistance Rules, 10 CFR Part 600 (revised at 47 FR 44076, October 5, 1982), as follows:

a. The table of contents of Subpart A is amended by revising the section heading for § 600.11 to read as follows:

Subpart A—General

Sec.

* * * * *

600.11 Intergovernmental review.

* * * * *

b. In § 600.2, paragraph (e)(1)(iii) is removed and (e)(1)(iv) through (vii) are redesignated as (e)(1) (iii) through (vi) and are revised to read as follows:

§ 600.2 Applicability.

* * * * *

(e) *OMB Circulars.* * * *

(1) * * *

(iii) OMB Circular A-124, Patents—Small Business Firms and Nonprofit Organizations (47 FR 7556, February 19, 1982).

(iv) OMB Circular A-21, Cost Principles Applicable to Grants, Contracts and Other Agreements with Institutions of Higher Education (44 FR 12368, March 6, 1979 as amended by 47 FR 33658, August 3, 1982).

(v) OMB Circular A-87, Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments (46 FR 9548, January 28, 1981).

(vi) OMB Circular A-122, Cost Principles Applicable to Grants, Contracts and Other Agreements with Nonprofit Organizations (45 FR 46022, July 8, 1980).

* * * * *

c. Section 600.11 is revised to read as follows:

§ 600.11 Intergovernmental review.

Intergovernmental review of DOE financial assistance shall be conducted in accordance with 10 CFR Part 1005.

[FR Doc. 83-1672 Filed 1-21-83; 8:45 am]
BILLING CODE 6450-01-M