

(ii) 15 CFR 930.95(c) is amended by removing the phrase, "and to the A-95 state and areawide clearinghouse."

(5) Former 15 CFR 930.95 is redesignated as new 15 CFR 930.94 and is revised to read as follows:

§ 930.94 State Intergovernmental Review Process for Consistency.

The process by which states with approved coastal management programs may review applications from state agencies and local governments for Federal assistance should be developed by each state in accordance with Executive Order 12372 and implementing regulations. In accordance with the Executive Order and regulations, states may use this process to review such applications for consistency with their approved coastal management programs.

(6) 15 CFR 930.96(a), 930.96(b) and 930.98(a) are amended by substituting the phrase "Intergovernmental Review Process" for the phrase "OMB A-95 process" wherever it occurs.

(7) 15 CFR 930.96(b) is amended by removing the word "clearinghouse" and substituting "state agency".

(8) 15 CFR 930.98(a) is amended by removing in the first sentence the phrase "the appropriate clearinghouse" and adding the phrase "any other agency or office which may be identified by the state in its Intergovernmental Review Process pursuant to Executive Order 12372." In the last sentence the phrase "clearinghouse and other" is removed so that the sentence reads as follows:

"State agencies must inform the parties . . ."

(9) 15 CFR 931.36(b)(2), 931.50(c)(4), 931.77(c)(4)(v) and 931.77(c)(5) are removed. 15 CFR 931.36(b)(3) and (4) are redesignated as 931.36(b)(2) and 931.36(b)(3), respectively.

(10) 15 CFR 931.91 is amended by removing the phrase, "A-95, 'Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects' (FR 2052, Jan. 13, 1976) and" so that the sentence reads, "Administrative procedures for grants and credit assistance are based to the maximum extent practicable upon the Office of Management and Budget Circular A-102 'Uniform Administrative Requirements for Grants-in-Aids to State and Local Governments' (34 CFR Part 256)."

§ 931.92 [Removed]

(11) 15 CFR 931.92 is removed.

(12) 15 CFR 932.42(a) is amended by substituting in the first sentence the phrase "E.O. 12372" for the phrase "Part I, Attachment A of OMB Circular A-95 (revised)". The remainder of the section is removed.

(13) 15 CFR 932.42(c) and 933.42(b) are amended by substituting the phrase "E.O. 12372" wherever they refer to "Office of Management and Budget Circular A-95," or "A-95."

(14) 15 CFR 933.42(a) is amended by substituting in the first sentence the phrase "E.O. 12372" for the phrase "OMB Circular A-95 (revised)."

PART 2301—[AMENDED]

(d) 15 CFR § 2301.8 is amended by revising paragraph (e) to read as follows:

§ 2301.8 Service of applications.

(e) The State office established to review applications under Executive Order 12372, if the State has established such an office and wishes to review these applications.

TITLE 50—[AMENDED]

PART 401—[AMENDED]

(e) 50 CFR § 401.5 is revised to read as follows:

§ 401.5 Coordination with States.

The Secretary will approve an Application For Federal Assistance only after he has coordinated the application with the State office established to review applications under Executive Order 12372 (if the State has established such an office and wishes to review these applications) and other non-Federal entities which have management authority over the resource to be affected.

Dated: June 17, 1983.

Malcolm Baldrige,
Secretary of Commerce.

[FR Doc. 83-16716 Filed 6-23-83; 8:45 am]

BILLING CODE 3510-CW-M

DEPARTMENT OF COMMERCE

Office of the Secretary

Intergovernmental Review of Federal Programs Under Executive Order 12372; Commerce Programs Subject to the Order

AGENCY: Office of the Secretary, Commerce.

ACTION: Notice of Commerce programs subject to the Order.

SUMMARY: In the final rules section of this issue of the *Federal Register* the Department is publishing its final regulations establishing new procedures for providing for intergovernmental review of its programs and activities as required by E.O. 12372. Under the new procedures, states are given flexibility to select which programs of the Department they want to review through the state E.O. 12372 process. This notice informs state and other interested individuals and organizations of the Commerce programs which are within the scope of E.O. 12372 and eligible for selection by the states.

FOR FURTHER INFORMATION CONTACT: Barry Bird, Office of General Counsel, 202-377-3084.

SUPPLEMENTARY INFORMATION: Section 1 of Executive Order 12372 requires the Department to provide opportunities to elected officials of state and local governments to consult on proposed federal financial assistance or direct federal development if the federal activity directly affects them or if they provide non-federal funds for the activity. The Executive Order and the Department's implementing regulations allow states to establish a state process to provide for that consultation and to select which Federal programs subject to section 1 of the Order they wish to cover by their process. This notice lists the programs at the Department which are subject to E.O. 12372 ("Included Programs"). The Department published a list of Commerce programs not subject to the Order in conjunction with the proposed rule (January 24, 1983, 48 FR 3101).

States may select (or not select) any of the included programs for review through the state process. As noted in the preamble to the final rule, states must send the initial list of selected Commerce programs to the Office of Management and Budget. Subsequently, states must send changes to the states list directly to the agencies affected (e.g., EDA) or to the Department's Office of Intergovernmental Affairs, U.S. Department of Commerce, Washington, D.C. 20230.

One of the changes made in the final regulations was to add provisions to implement section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3334). This section applies to programs for projects or activities located in metropolitan areas which involve assistance for carrying out open-space land projects or for the planning or construction of hospitals, airports, libraries, water supply or distribution facilities, sewerage facilities and waste treatment works, highways, transportation facilities, law enforcement facilities, and water development and land conservation projects. Programs at the Department which may involve projects subject to the requirements of section 204 of this Act and the relevant provisions in the Commerce final regulations implementing E.O. 12372 are marked with an asterisk (*).

In developing the list of Commerce programs subject to E.O. 12372, the Department has attempted to implement the requirements of section 1 of the Order fully. All Commerce programs which affect state and local governments directly or for which state and local governments supply the non-Federal share of funds have been included. Because several statutes administered by Commerce allow the Department to extend assistance to both public and private entities, however, some programs may be subject to the Order but only when the applicant is a state or local government. For example, the Economic Development Administration may extend technical assistance to various public and private entities. To the extent such assistance is extended to a state or local government it is clearly within the scope of the Order. To the extent the assistance is extended to a private business (to fund, for example, marketing studies or to provide management and operational assistance) and does not involve unusual aspects which directly affect a state or local government, it is not covered by the Order. Accordingly, certain programs listed below are only partially included. (Numbers refer to location in the Catalogue of Federal Domestic Assistance. For purposes of this notice, all universities and colleges are deemed nongovernmental.)

The Department would point out that every Commerce program currently subject to OMB Circular A-95 is eligible for state selection under the E.O. 12372 procedures. In addition, two programs are eligible which were not subject to A95—CFDA #11.301 (Economic Development Business Development) and #11.428 (Intergovernmental Climate

Program). Several other programs which were not subject to A-95 are partially included insofar as assistance is extended to state and local governments. These programs are #11.417 (Sea Grant Support), #11.426 (Marine Pollution Research), #11.427 (Fisheries Development and Utilization Research and Development) and #11.800 (Minority Business Development Assistance).

Included Programs

- *11.300 Economic Development—Grants for Public Works and Development Facilities
- 11.301 Economic Development—Business Development Assistance
- *11.302 Economic Development—Support for Planning Organizations
- *11.303 Economic Development—Technical Assistance (when the application is by or for the benefit of a state or local government)
- *11.304 Economic Development—Public Works Impact Projects
- *11.305 Economic Development—State and Local Economic Development Planning
- *11.306 Economic Development—District Operational Assistance
- *11.307 Special Economic Development and Adjustment Assistance Program Long-Term Economic Deterioration
- 11.405 Anadromous and Great Lake Fisheries Conservation (except for research projects involving nongovernmental entities)
- 11.407 Commercial Fisheries Research and Development
- 11.417 Sea Grant Support (state and local government applicants)
- *11.419 Coastal Zone Management Program Administration
- 11.420 Coastal Zone Management Estuarine Sanctuaries
- *11.421 Coastal Energy Impact Program—Formula Grants
- *11.422 Coastal Energy Impact Program—Planning Grants
- *11.423 Coastal Energy Impact Program—Loans and Guarantees
- *11.424 Coastal Energy Impact Program—Environmental Grants
- *11.425 Coastal Energy Impact Program—Outer Continental Shelf State Participation Grants
- 11.426 Financial Assistance for Marine Pollution Research (state and local government applicants)
- 11.427 Fisheries Development and Utilization Research and Development Grants and Cooperative Agreements Program (state and local government applicants)
- 11.428 Intergovernmental Climate Program
- 11.550 Public Telecommunications Facilities
- 11.800 Minority Business Development—Management and Technical Assistance (state and local government applicants)

Dated: June 17, 1983.

Malcolm Baldrige,
Secretary of Commerce.

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Federal Register

Friday
June 24, 1983

Part V

Department of Defense

**Office of the Secretary and Corps of
Engineers, Department of the Army**

**Intergovernmental Coordination of DOD
Federal Development Programs and
Activities; Final Rule and**

**Intergovernmental Review of the
Department of the Army Corps of
Engineers Programs and Activities; Final
Rule and**

**List of Programs Subject to Executive
Order 12372, Intergovernmental Review
of Federal Programs; Notice**

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 243

[DoD Directive 4165.61]

Intergovernmental Coordination of DOD Federal Development Programs and Activities

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This rule implements E.O. 12372, "Intergovernmental Review of Federal Programs." The rule applies to federal development programs and activities of the Department of Defense. E.O. 12372 and this rule are intended to replace the intergovernmental consultation system developed under Office of Management and Budget (OMB) Circular A-95. They also implement section 401 of the Intergovernmental Cooperation Act.

EFFECTIVE DATE: This rule is effective September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Colonel Michael D. Davies, USA, Office of Economic Adjustment, Rm. 3D968, Pentagon, Washington, D.C. 20301, tel. (202) 697-3006.

SUPPLEMENTARY INFORMATION: On January 24, 1983 (48 FR 3106) the Department of Defense, along with 25 other federal agencies, published Notices of Proposed Rulemaking (NPRM) to carry out E.O. 12372 or notices proposing that their programs not be subject to the Order. Later, two more agencies published NPRMs, bringing to 28 that total number of proposals subject to public comment. The Department of Defense, in conjunction with the other 27 federal agencies and OMB, published a notice in the *Federal Register* on April 21, 1983 (48 FR 17101), reopening the comment period, scheduling a public meeting for May 5, 1983, and requesting comments on several tentative responses to comments.

The Department of Defense received no comments specifically related to the inclusion or exclusion of DoD programs from the coverage of the Order or other issues pertaining only to the Department of Defense.

However, following consultation with OMB and the other 22 federal agencies that are issuing a final rule, the Department of Defense has made several changes from the proposed rule. The Department of Defense is fully committed to carrying out E.O. 12372, and intends through this rule to communicate effectively with state and local elected officials and to

accommodate their concerns to the greatest extent possible.

Several state, local, and regional agencies asked that the regulations not become effective on April 30, 1983, as the NPRM had contemplated. Postponing the effective date gives state and local elected officials more time to establish the state processes and to consider which federal programs they wish to select for coverage. Responding to these requests, the President amended the E.O. on April 8, 1983, extending the effective date of this final rule until September 30, 1983 (48 FR 15587, April 11, 1983). The Department's existing requirements and procedures under OMB Circular A-95 will continue in effect until September 30, 1983.

Introduction to the Rules

The President signed E.O. 12372, "Intergovernmental Review of Federal Programs," on July 14, 1982 (47 FR 30959, July 16, 1982). The objectives of the E.O. are 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 and direct federal development. The E.O.:

- Allows states, after consultation with local officials, to establish their own process for review and comment on proposed federal financial assistance and direct federal development;
- Increase federal responsiveness to state and local officials by requiring federal agencies to accommodate state and local views or explain why not;
- Revokes OMB Circular No. A-95.

Salient Features of the Policies Implementing E.O. 12372

Three major elements comprise the scheme for implementing the E.O. These are the state process, the single point of contact, and the federal agency's "accommodate or explain" response to state and local comments submitted in the form of a recommendation.

State Process

The state process is the framework under which state and local officials carry out intergovernmental review activities under the E.O. The rule requires only two components for the state process: (1) a state must tell the federal agency which programs and activities are being included under that state process, and (2) a state must provide an assurance that it has consulted with local officials whenever it changes the list of selected programs and activities. (The E.O. provides that

states are also to consult with local governments when establishing the state process.) Any other components are at the discretion of the state. This lack of prescription gives state and local officials the flexibility to design a process that responds to their interests and needs.

A state is not required to establish a state process. However, if no process is established, the provisions of the E.O. and the implementing rules (other than indicating how federal agencies will operate under such situations) are not applied. Existing consultation requirements of other statutes or regulations (except OMB Circular A-95) would continue in effect, including those of the Intergovernmental Cooperation Act of 1968. The intergovernmental consultation provisions of OMB Circular A-95 end as of September 30, 1983.

While not required by the rule, most state processes will likely include the following components:

- A designated single point of contact;
- Delegations of review and comment responsibilities to particular state, areawide, regional, or local entities;
- Procedures to coordinate and manage the review and comment on direct federal development, and to aid in reaching a state process recommendation;
- A means of consulting with local officials.

Federal agencies will list those programs and activities eligible for selection under the scope of the Order. After consulting with local elected officials, the state selects which of these federal programs and activities are to be reviewed through the state process and sends OMB the initial list of selected programs and activities. Subsequent changes to the list are provided directly to appropriate federal agencies.

The federal agency provides the state process with notice of proposed action for selected programs and activities.

For any proposed action under a selected program or activity, the state has among its options those of: preparing and transmitting a state process recommendation through the single point of contact; forwarding the views of commenting officials and entities without a recommendation; and not subjecting the proposed action to state process procedures.

For proposed actions under programs or activities not selected, the federal agency would provide notice, opportunities for review, and consideration of comments consistent with the provisions of other applicable statutes or regulations.

Single Point of Contact

The state single point of contact, which may be an official or organization, is the only party that can initiate the "accommodate or explain" response by federal agencies. The single point of contact does so by transmitting a state process recommendation. (The terms "accommodate to explain" and state process recommendation are explained later.) As indicated, there is to be only one single point of contact. The other functions undertaken by the single point of contact are submitting for federal agency consideration any views differing from a state process recommendation, and receiving a written explanation of a federal agency's nonaccommodation. No other responsibilities are prescribed by the federal government for the single point of contact, although a state could choose to broaden the single point of contact role.

The single point of contact need not submit for federal agency consideration those views sent to the single point of contact by commenting officials and entities regarding proposed actions where there is no state process recommendation. Commenting officials and entities can submit such views directly to the federal agency.

A state need not designate a single point of contact. However, if a state fails to designate a single point of contact, no other entity or official can transmit recommendations and be assured of an accommodation or explain response by the federal agency. Comments or views may be transmitted by these other entities or officials, but need only be considered by the federal agency in accordance with Section 401 of the Intergovernmental Cooperation Act and other relevant statutory provisions.

"Accommodate or Explain"

When a single point of contact transmits a state process recommendation, the federal agency receiving the recommendation must either: (1) accept the recommendation; (2) reach a mutually agreeable solution with the parties preparing the recommendation; or (3) provide the single point of contact with a written explanation for not accepting the recommendation or reaching a mutually agreeable solution, that is, nonaccommodation.

If there is nonaccommodation, the Department of Defense is generally required to wait 15 days after sending an explanation of the nonaccommodation to the single point of contact before taking final action.

A "state process recommendation" is developed by commenting state, areawide, regional, and local officials and entities participating in the state process and transmitted by the single point of contact. The recommendation can be a consensus, or views may differ. A state process recommendation which is a consensus, that is, the unanimous recommendation of the commenting parties, of areawide, regional, and local officials and entities can be transmitted. All directly affected levels of government need not comment on the proposed action being reviewed to form a state process recommendation. Also, the state government need not be party to a state process recommendation.

A state process recommendation can be transmitted on proposed actions under either selected or nonselected programs or activities.

Format Change From NPRM

To facilitate implementation by the DoD Components, maintain consistency with the previous DoD regulation on intergovernmental coordination of DoD land and facility, and allow incorporation of internal instructions the unique format of the NPRM is changed to the DoD standard in this final rule. The provisions of the NPRM, as changed in consultation with the other agencies and the April 8 amendment to the E.O., are contained in this regulation.

Appendices

Appendices may be changed without rulemaking but will be published as notices in the Federal Register.

List of Subjects in 32 CFR Part 243

Federal financial assistance; Federal development programs; Intergovernmental relations.

Accordingly, 32 CFR is amended by revising Part 243, reading as follows:

PART 243—INTERGOVERNMENTAL COORDINATION OF DOD FEDERAL DEVELOPMENT PROGRAMS AND ACTIVITIES

- Sec.
- 243.1 Purpose.
 - 243.2 Applicability and scope.
 - 243.3 Definition.
 - 243.4 Policy.
 - 243.5 Responsibilities.
 - 243.6 Procedures.

Appendices

- A. DoD Programs and Activities Included Under This Directive.
- B. Examples of Federal Programs and Activities That May Affect the Department of Defense.
- C. DoD Liaison Representatives for Intergovernmental Coordination of DoD

Federal Development Programs and Activities.

D. Procedures for DoD Federal Development Programs and Activities.

Authority: E.O. 12372 (July 14, 1982; 47 FR 30959); section 401(b) of Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(b)).

§ 243.1 Purpose.

This rule under E.O. 12372 and 31 U.S.C. Section 6506 et seq. updates policies, assigns responsibilities, and prescribes procedures for an intergovernmental process to assist coordination of appropriate DoD federal development programs and activities in the United States with state and local governments and federal agencies, and to encourage state and local governments and federal agencies to coordinate their programs and activities with the Department of Defense.

§ 243.2 Applicability and Scope.

(a) This rule applies to the Office of the Secretary of Defense, the Military Departments (excluding the civil works function of the U.S. Army Corps of Engineers) and the Defense Agencies (hereafter referred to collectively as "DoD Components").

(b) Neither E.O. 12372 nor this rule are intended to create any right or benefit enforceable at law by a party against the Department of Defense or its officials.

(c) This rule covers all programs and activities developed by DoD Components for military construction (as defined in DoD Instruction 7040.4), acquisition of real property, substantial changes in existing use of military installations and real property, and disposal of real property that may affect state and local government or other federal agency community development programs and activities, and state, local, and other federal agency programs and activities that may affect DoD activities.

(d) A list of the DoD programs and activities subject to E.O. 12372 is at appendix A. An illustrative list of other federal programs and activities that may affect the Department of Defense is at appendix B.

§ 243.3 Definition.

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

§ 243.4 Policy.

It is the policy of the Department of Defense to promote an intergovernmental partnership and a

strengthened Federalism by relying on state processes and on state, areawide, regional, and local coordination for review of proposed DoD federal development; and to encourage the opportunity to review other agency programs and activities that may affect the Department of Defense.

§ 243.5 Responsibilities.

(a) The *Executive Secretary to the Secretary of Defense*, having been designated by the Secretary of Defense as the DoD intergovernmental coordination point of contact, shall act as the focal point for all matters relating to E.O. 12372.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* (ASD(MRA&L)) shall develop policy and shall: (1) Have overall management responsibility for intergovernmental coordination of DoD federal development programs and activities, (2) Monitor the implementation of E.O. 12372 within the Department of Defense.

(c) The *Heads of DoD Components* shall:

(1) Establish and maintain an intergovernmental coordination management process concerning DoD federal development programs and activities described in appendix A.

(2) Monitor the application of policies, responsibilities, and procedures contained in this rule within their subordinate elements.

(3) Designate an official to be the point of contact for intergovernmental coordination and review matters covered by this rule and report his or her name, position, and office to the ASD(MRA&L).

(4) Develop procedures that will ensure that a record of state comments, reviews, determinations, recommendations, and the status of programs and activities are maintained.

(5) Designate an official, in accordance with appendix C, who shall serve as a DoD liaison representative to the states in the respective federal regions for all DoD intergovernmental coordination matters. The identification of the liaison representatives shall be provided to the ASD(MRA&L) who shall publish a directory of liaison representatives in the *Federal Register*. The liaison function shall be in addition to the representative's regular duties.

§ 243.6 Procedures.

DoD Components shall establish and maintain an intergovernmental coordination management process, reflected in a cooperative agreement when feasible, to achieve full consultation with state, regional, and

local entities for those programs and activities covered by this rule. DoD Components shall encourage reciprocal actions with regard to the state, regional, and local programs and activities.

(a) DoD Components shall establish and maintain an inter-agency coordination management process to ensure their development programs and activities are consistent and compatible with the development actions of federal agencies operating at the local levels. DoD Components shall encourage reciprocal actions by other federal agencies with regard to their programs and activities. Unresolved conflicts shall be brought to the attention of the ASD(MRA&L).

(c) DoD Components that conduct activities or operate installations that may be affected by the programs and activities of federal agencies shall take part in the community planning process by providing information, policy, and position statements on those programs and activities to the agencies concerned.

(d) The degree of public interest in a proposed program or activity shall be considered when deciding whether the Congress and the public shall be notified before offering information for comment as prescribed in this rule.

(e) In an emergency, provisions of this rule may be waived by the Secretary of the Military Department concerned. Such instances will be reported to the ASD(MRA&L).

(f) This rule does not affect normal cooperative community planning or coordination relationships between DoD installations and surrounding communities.

(g) Further procedures for DoD federal development programs are prescribed at appendix D.

Note.—Appendices A–D will not be published in the Code of Federal Regulations.

Appendix A—DoD Programs and Activities Included Under This Rule

1. Installation comprehensive master planning
2. Military construction
3. Family housing
4. Real property acquisition and disposal
5. Withdrawals of public domain land for military use
6. Substantial changes in existing use of installations
7. Notices of intent, findings of no significant impact, and draft and final environmental impact statements (EIS) (as part of the standard process)
8. Air installation compatible use zone (AICUZ) studies
9. Natural resource plans
10. Floodplain management and wetlands protection
11. Appropriate information and data for regional plans, programs, and projects.

Appendix B—Examples of Federal Programs and Activities That May Affect the Department of Defense

1. Environmental impact assessments and statements
2. Noise abatement and control
3. Coastal zone management
4. Areawide waste treatment management
5. Recreation
6. Fish and wildlife conservation
7. Air quality
8. Flood control
9. State and regional transportation
10. State and regional land use
11. Energy facility siting
12. FHA and VA mortgage insurance
13. Historic preservation
14. Primitive and wilderness area management

Appendix C—DoD Liaison Representatives for Intergovernmental Coordination of DoD Federal Development Programs and Activities

Standard Federal Regions	Component Furnishing Representative
I Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.	Air Force.
II New Jersey, New York, Puerto Rico, Virgin Islands.	Army.
III Delaware, Maryland, Pennsylvania, Virginia, West Virginia.	Navy.
IV Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.	Navy.
V Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.	Air Force.
VI Arkansas, Louisiana, New Mexico, Oklahoma, Texas.	Air Force.
VII Iowa, Kansas, Missouri, Nebraska.	Army.
VIII Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.	Air Force.
IX American Samoa, Arizona, California, Northern Mariana Islands, Guam, Hawaii, Nevada, Trust Territory.	Navy.
X Alaska, Idaho, Oregon, Washington.	Army.

Appendix D—Procedures for DoD Federal Development Programs and Activities

A. General.

1. State Selection of Programs and Activities.

a. A state may select any program or activity listed in appendix A of this rule for intergovernmental review. Each state, before selecting programs and activities, will consult with local elected officials.

b. Each state that adopts a process will notify the DoD liaison representative for the federal region in which that state is located of DoD programs and activities selected for that process.

c. A state may notify the liaison representative of changes in its selections at any time. For each change, the state will submit an assurance that the state has consulted with elected local officials regarding the change. The DoD Components may establish deadlines by which states are required to inform them of changes in their program selections.

d. DoD Components shall use a state's process as soon as feasible after notification of the state's selections.

2. Communication with State and Local Officials.

a. For those programs and activities covered by a state process, the DoD Components shall (1) use the official state process to determine views of state and local elected officials; and (2) communicate with state and local elected officials, through the official state process as early in a program planning cycle as is reasonably feasible to explain specific plans and actions (see section C., below).

b. DoD Components shall provide notice to directly affected state, areawide, regional, and local entities in a state of proposed DoD federal development if (1) the state has not adopted an official process; or (2) the development involves a program or activity not selected for the state process. This notice may be made by publication in the Federal Register or other appropriate means.

3. Opportunity To Comment.

a. Except in unusual circumstances, DoD Components shall give state processes 60 days from the date established by the Component to comment on DoD federal development programs and activities.

b. Subsection A.3. also applies to comments in cases in which the state has delegated the review, coordination, and communication responsibilities.

4. Receipt of and Response To Comments.

a. DoD Components shall follow procedures in subsection A.5., below if (1) a state office or official is designated to act as a single point of contact (SPOC) between a state process and all federal agencies; and (2) that office or official transmits a state process recommendation for a selected program.

b. The SPOC is not obligated to transmit comments from state, areawide, regional, or local officials and entities when there is no state process recommendation.

c. If a state process recommendation is transmitted by a SPOC, all comments from state, areawide, regional, and local officials and entities that differ from it will also be transmitted.

d. If a state has not established a review process, or is unable to submit a state process recommendation, state, areawide, regional, and local officials and entities may submit comments directly to the DoD Component.

e. If a program or activity is not selected for a state review process, state, areawide, regional, and local officials and entities may submit comments directly to the DoD Component. In addition, if a state process recommendation for a nonselected program or activity is transmitted by the SPOC to the DoD Component, the Component shall comply with subsection A.5., below.

f. DoD Components shall consider comments which do not constitute a state process recommendation and for which the Component is not required to comply with subsection A.5., below, when such comments are provided by a SPOC or directly by a commenting party.

5. Accommodation of Intergovernmental Concerns.

a. If a state process provides a state process recommendation to a DoD Component through its SPOC, the Component

either (1) accepts the recommendation; (2) reaches a mutually agreeable solution with the state process; or (3) provides the SPOC with a written explanation of the decision.

b. In any explanation, the SPOC shall be informed that (1) the decision will not be implemented for at least 10 days after the SPOC receives the explanation; or (2) the Secretary of the Military Department or Director of the Defense Agency concerned has reviewed the decision and determined that because of unusual circumstances the waiting period of at least 10 days is not feasible.

c. For purposes of computing the waiting period, a SPOC is presumed to have received written notification 5 days after the date of mailing of such notification.

6. Obligations in Interstate Situations.

DoD Components shall:

a. Identify DoD federal development that has an impact on interstate areas.

b. Notify appropriate officials and entities in states that have adopted a process and selected the particular program or activity.

c. Make efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process or selected the particular program or activity.

d. Respond to subsection A.5., above, if a recommendation is received from a designated areawide agency transmitted by a SPOC when the state has delegated the review, coordination, and communication responsibilities.

e. Use the procedures in subsection A.5., above, if a state process provides a state process recommendation through a SPOC.

7. Memoranda of Understanding.

The Department of Defense shall use cooperative agreements in the form of memoranda of understanding with states having a process to establish the information to be submitted to the SPOCs and the timing of the submittals. DoD Components shall contact their DoD liaison representatives to identify the SPOCs with whom the agreements shall be made. When it is determined that an agreement is practical, all DoD Components that have a presence in the state shall become parties to the agreement whenever possible. When such agreements are used, the content shall be uniform and shall be consistent with the policies and procedures contained in this Directive. Cooperative agreements that predate this Directive may continue in force until revised and shall be the basis for new agreements.

8. Records.

DoD Components shall maintain, as part of the records of each review, the comments received from all sources together with the status of the review.

9. Information To Be Provided.

The specific information to be provided to the states or federal agencies depends on the particular plan or project and must be determined by each DoD Component. Information normally available for construction projects such as site location, scope of work, type of construction and description of work, together with necessary site plans shall be provided. Normally, justification or rationale for the project in question shall not be furnished.

10. Requests for Information.

Requests for additional information from the public shall be handled in accordance with Parts 286 of this title and DoD Instruction 5400.10. If a request for additional information is refused, the requestor shall be informed in writing, with appropriate explanation, and the response placed in the record.

11. Classified Information.

Classified information shall not be provided to any non-DoD entity that does not have the authority to receive it.

12. Review of Other Programs and Activities.

Although a program or activity may not be included in the scope of this Directive, the DoD Component may still provide the public the opportunity to have its views considered. Many statutes involving DoD activities have their own consultation requirements and the DoD Components shall comply with them.

13. National Capital Region.

DoD Components responsible for federal development in the National Capital Region (as defined in the National Capital Planning Act of 1952) shall coordinate with the National Capital Planning Commission.

B. Scope.

1. Programs and Activities To Be Reviewed.

There are no minimum quantitative levels that can be used to determine whether comments shall be sought on a specific program or activity. Repair, maintenance, and rehabilitation projects are excluded from the scope of this Directive unless they result in a substantially changed capacity or function of facilities that could affect non-DoD entities. The following types of programs and activities are to be considered for inclusion:

a. Appropriate portions of the Military Department-approved installation master plans (such as land use plans) developed in accordance with DoD 4270.1-M.

b. Air Installation Compatible Use Zone (AICUZ) studies developed in accordance with part 248 of this title.

c. Military construction included in the budget fiscal year DoD military construction program that may affect community development, especially as regards utilities, transportation, and schools.

d. Real property acquisition projects approved by the Military Department concerned or included in the current fiscal year DoD military construction that may affect community development plans.

e. Military Department-approved programs and activities that change substantially the use of military installations and real property and may affect community development plans.

f. Real property disposal projects that may affect community development plans.

2. Responsibility for Community Impact Determination.

The DoD Component concerned shall make the judgment whether a particular program or activity affects community development plans.

3. Other Review Requirements.

The procedures contained in this Directive are in addition to compliance with the

requirements of the National Environmental Protection Act, and Federal Water Pollution Control Act.

C. Scheduling of notification.

Subject to provisions of other statutory and regulatory requirements, DoD Components shall offer their programs and activities for review at the planning stages indicated below.

1. Installation Master Plans.

The military installation master plan as described in DoD 4270.1-M shall be offered upon approval by the Military Department concerned. Significant changes to the installation master plan shall also be submitted for review. The intent of the review is to allow local officials to evaluate the impact of land and facility use on their own development plans. It will also help the review of later annual construction and real property acquisition and disposal projects.

2. Military Construction.

Information on military construction shall be submitted after approval of a design planning directive for project development to be accomplished either in-house or by contract. In the latter case, the information normally shall be provided upon the architect-engineer selection for project development as announced in the Commerce Business Daily. Substantive changes in project development shall be considered for additional review. Information may be provided to the states before transmission of a project to the Congress so care must be taken to ensure the year of funding and estimated project cost are not made public. On verification that a project is included in the budget fiscal year DoD military construction program submitted to Congress, additional information and documentation on the project (that is, DD Forms 1391) may be provided for review if it is consistent with the submission to the Congress. Proposed major military construction projects included in the Five-Year Defense Program shall not be provided to the states individually or collectively except as described above. DoD Components shall continue to comply with DoD Directive 8015.17 for military health facility projects. Each DD Form 1391 for projects covered by this Directive shall include a statement explaining the status of the intergovernmental review.

3. Real Property Acquisition.

Real property acquisition projects shall be submitted only upon verification that the project has been approved by the Secretary of the Military Department concerned, or, if congressional approval is required, only after the Congress has been notified of the project. In exceptional cases, this provision may be waived by the ASD(MRA&L). When real property acquisition is part of a military construction project, the acquisition may be coordinated as part of that project even though the above events have not occurred.

4. Mission Realignment.

Plans and projects that may change substantially the use of military installations and real property and may affect non-DoD facilities, services, and activities, shall be submitted only after approval by the head of the DoD Component concerned and, if congressional notification of the plan or action is required, only after the Congress has been officially notified.

5. Real Property Disposal.

Real property disposal projects that require prior Congressional approval shall be submitted only after required DoD screening has been completed and the disposal report required by 10 U.S.C. 2662 has been cleared by the Congress. In exceptional cases, this procedure may be waived by the ASD(MRA&L) to allow release for review at the time the disposal report is submitted to the Congress.

D. DoD Federal Region Liaison Representatives shall:

1. Serve as the ASD(MRA&L)'s local representatives.

2. Establish and maintain liaison with SPOCs in their regions to determine the state process for intergovernmental review, if one exists, and any special requirements or conditions.

3. Pursue cooperative agreements with the states by means of memoranda of understanding that specify the programs to be included and the process for review consistent with the policies and procedures of this Directive.

4. Keep the DoD Components within their regions informed of intergovernmental review activities.

5. To the extent possible, resolve intergovernmental review issues among DoD Components within their regions. If resolution is not possible at the regional level, submit the matter to the ASD(MRA&L).

6. Keep the ASD(MRA&L) informed of events, experiences and problem areas so that the DoD intergovernmental review process may be improved.

M. S. Healy,

OSD Federal Register Liaison Officer,
Department of Defense.

June 16, 1983.

[FR Doc. 83-17070 Filed 6-23-83; 8:45 am]

BILLING CODE 3810-01-M

Engineer Corps; Department of the Army

33 CFR Part 384

Intergovernmental Review of the Department of the Army Corps of Engineers Programs and Activities

AGENCY: Corps of Engineers, Department of the Army.

ACTION: Final rule.

SUMMARY: These regulations implement Executive Order 12372,

"Intergovernmental Review of Federal Programs." The regulations apply to federal financial assistance and direct federal development programs and activities of the U.S. Army Corps of Engineers. Executive Order 12372 and these regulations are intended to replace the intergovernmental consultation system developed under Office of Management and Budget (OMB) Circular A-95. They also implement section 401 of the Intergovernmental Cooperation Act.

EFFECTIVE DATE: September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Wolff, Assistant Chief, Planning Division, Directorate of Civil Works, Office of the Chief of Engineers (DAEN-CWP), Wash, DC 20314 (202) 272-0146.

SUPPLEMENTARY INFORMATION: On January 24, 1983 (48 FR 3111), the Corps of Engineers, along with 25 other federal agencies, published Notices of Proposed Rulemaking (NPRM) to carry out Executive Order 12372 or notices proposing that their programs not be subject to the Order. Subsequently, two more agencies published NPRMs, bringing to 28 the total number of proposals subject to public comment. The Corps of Engineers, in conjunction with the other 27 federal agencies and OMB, published a notice in the Federal Register on April 21, 1983 (48 FR 17101), reopening the comment period, scheduling a public meeting for May 5, 1983, and requesting comments on several tentative responses to comments.

Including comments received by OMB and other Federal agencies and which were also incorporated in the Corps of Engineers' rulemaking docket, the Corps of Engineers received approximately 160 comments on government-wide issues during the comment period. In addition, the Corps of Engineers received 2 comments specifically related to the inclusion or exclusion of the Corps of Engineers' programs from the coverage of the Order or other issues pertaining only to the Corps of Engineers.

In preparing the final rule, the Corps of Engineers considered these comments as well as testimony at public meetings held in Washington on March 2, 1983, and May 5, 1983, and a hearing before the Senate Intergovernmental Relations Subcommittee on March 3, 1983.

Following consultation with OMB and the other 22 federal agencies that are issuing a final rule, the Corps of Engineers has made several changes from the proposed rule. The Corps of Engineers is fully committed to carrying out Executive Order 12372, and intends through these regulations to communicate effectively with state and local elected officials and to accommodate their concerns to the greatest extent possible.

Several state, local, and regional agencies asked that the regulations not become effective of April 30, 1983, as the NPRM had contemplated. Postponing the effective date would give state and local elected officials more time to establish the state processes and to consider which federal programs they

wish to select for coverage. Responding to these requests, the President amended the Executive Order on April 8, 1983, extending the effective date of these final regulations until September 30, 1983 (48 FR 15567, April 11, 1983). The Corps of Engineers' existing requirements and procedures under OMB Circular A-95 will continue in effect until September 30, 1983.

Introduction to the Rules

The President signed Executive Order 12372, "Intergovernmental Review of Federal Programs," on July 14, 1982 (47 FR 30959, July 16, 1982). The objectives of the Executive Order are 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 and direct federal development. The Executive Order:

- Allows states, after consultation with local officials, to establish their own process for review and comment on proposed federal financial assistance and direct federal development;
- Increases federal responsiveness to state and local officials by requiring federal agencies to accommodate state and local views or explain why not;
- Allows states to simplify, consolidate, or substitute state plans; and,
- Revokes OMB Circular No. A-95.

Salient Features of the Policies Implementing E.O. 12372

Three major elements comprise the scheme for implementing the Executive Order. These are the state process, the single point of contact, and the federal agency's "accommodate or explain" response to state and local comments submitted in the form of a recommendation.

State Process

The state process is the framework under which state and local officials carry out intergovernmental review activities under the Executive Order. The rule requires only two components for the state process: (1) a state must tell the federal agency which programs and activities are being included under the state process, and (2) a state must provide an assurance that it has consulted with local officials whenever it changes the list of selected programs and activities. (The Executive Order provides that states are also to consult with local governments when establishing the state process.) Any other components are at the discretion of the state. This lack of prescriptiveness gives state and local

officials the flexibility to design a process that responds to their interests and needs.

A state is not required to establish a state process. However, if no process is established, the provisions of the Executive Order and the implementing rules (other than indicating how federal agencies will operate under such situations) are not applied. Existing consultation requirements of other statutes or regulations (except Circular A-95) would continue in effect, including those of the Intergovernmental Cooperation Act of 1968. The intergovernmental consultation provisions of Circular A-95 end as of September 30, 1983.

While not required by the rule, most state processes will likely include the following components:

- A designated single point of contact;
- Delegations of review and comment responsibilities to particular state, areawide, regional, or local entities;
- Procedures to coordinate and manage the review and comment on proposed federal financial assistance or direct federal development, and to aid in reaching a state process recommendation;
- A means of consulting with local officials; and
- A means of giving notice to prospective applicants for federal assistance as to how an application is to be managed under the state process.

Federal agencies will list those programs and activities eligible for selection under the scope of the Order. After consulting with local elected officials, the state selects which of these federal programs and activities are to be reviewed through the state process and sends OMB the initial list of selected programs and activities. Subsequent changes to the list are provided directly to the appropriate federal agencies.

The federal agency provides the state process with notice of proposed actions for selected programs and activities.

For any proposed action under a selected program or activity, the state has among its options those of: Preparing and transmitting a state process recommendation through the single point of contact; forwarding the views of commenting officials and entities without a recommendation; and not subjecting the proposed action to state process procedures.

For proposed actions under programs or activities not selected, the federal agency would provide notice, opportunities for review, and consideration of comments consistent

with the provisions of other applicable statutes or regulations.

Single Point of Contact

The state single point of contact, which may be an official or organization, is the only party that can initiate the "accommodate or explain" response by federal agencies. The single point of contact does so by transmitting a state process recommendation. (The terms "accommodate or explain" and state process recommendation are explained later.) As indicated, there is to be only one single point of contact. The other functions undertaken by the single point of contact are submitting for federal agency consideration any views differing from a state process recommendation, and receiving a written explanation of a federal agency's nonaccommodation. No other responsibilities are prescribed by the Federal Government for the single point of contact, although a state could choose to broaden the single point of contact role.

The single point of contact need not submit for federal agency consideration those views sent to the single point of contact by commenting officials and entities regarding proposed actions where there is no state process recommendation. Commenting officials and entities can submit such views directly to the federal agency.

A state need not designate a single point of contact. However, if a state fails to designate a single point of contact, no other entity or official can transmit recommendations and be assured of an accommodate or explain response by the federal agency. Comments or views may be transmitted by these other entities or officials, but need only be considered, and responded to, by the federal agency in accordance with Section 401 of the Intergovernmental Cooperation Act and other relevant statutory provisions.

"Accommodate or Explain"

When a single point of contact transmits a state process recommendation, the federal agency receiving the recommendation must either: (1) accept the recommendation; (2) reach a mutually agreeable solution with the parties preparing the recommendation; or (3) provide the single point of contact with a written explanation for not accepting the recommendation or reaching a mutually agreeable solution, i.e., nonaccommodation.

If there is nonaccommodation, the Federal agency is generally required to wait 15 days after sending an

explanation of the nonaccommodation to the single point of contact before taking final action.

A "state process recommendation" is developed by commenting state, areawide, regional, and local officials and entities participating in the state process and transmitted by the single point of contact. The recommendation can be a consensus, or views may differ. A state process recommendation which is a consensus—i.e., the unanimous recommendation of the commenting parties—of areawide, regional, and local officials and entities can be transmitted. All directly affected levels of government need not comment on the proposed action being reviewed to form a state process recommendation. Also, the state government need not be party to a state process recommendation.

A state process recommendation can

be transmitted on proposed actions under either selected or nonselected programs or activities.

Section-by-Section Analysis

In making changes from the NPRM to this final rule, the Corps of Engineers altered the section and paragraph numbers of various portions of the rule. So that these changes will be easier to follow, we are providing a table showing where each portion of the proposed rule is covered in the final rule:

Proposed rule (section)	Final rule (section)
384.1	384.1.
384.2	384.2.
384.3(a)	384.3.
384.3(b)	384.7(a).
384.4	384.4 (Reserved).
384.5(a)	384.6(b).
384.5(b)	384.6(d).
384.5(c)	384.6(c).
384.6(a)	384.8(b).
384.6(b)	384.7(a).

Proposed rule (section)	Final rule (section)
384.6(c)	384.8(a).
384.6(d)	Deleted.
384.6(e)	384.9.
384.7(a)	384.10(a).
384.7(b)	384.10(b), (c).
384.8	384.11.
384.9 (Reserved)	384.12 (Reserved).
384.10	384.13.

Portions of the final rule not listed in this table (§§ 384.5, 384.6(a), 384.7(b), and 384.8(c)) are new.

Section 384.1 What is the purpose of these regulations?

There is only one substantive change to this section, but it is an important one. The NPRM, while citing section 401 of the Intergovernmental Cooperation Act as authority, did not specifically contain provisions to implement some of its requirements. This statute, as amended, reads as follows:

BILLING CODE 3710-92-M

"Title IV—Coordinated Intergovernmental Policy Administration of Development Assistance Programs.

"Section 401. Development Assistance.

"(a) The economic and social development of the United States and the achievement of satisfactory levels of living depend on the sound and orderly development of urban and rural areas. When urbanization proceeds rapidly, the sound and orderly development of urban communities depends to a large degree on the social and economic health and the sound development of smaller communities and rural areas.

"(b) The President shall prescribe regulations governing the formulation, evaluation, and review of United States Government programs and projects having a significant impact on area and community development, (including programs and projects providing assistance to the States and localities) to serve most effectively the basic objectives of subsection (a) of this section.

The regulation shall provide for the consideration of concurrently achieving the following specific objectives and, to the extent authorized by law, reasoned choices shall be made between the objectives when they conflict:

"(1) appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes.

"(2) wise development and conservation of all natural resources.

"(3) balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other means to move people and goods.

"(4) adequate outdoor recreation and open space.

"(5) protection of areas of unique natural beauty and historic and scientific interest.

"(6) properly planned community facilities (including utilities for supplying power, water, and communications) for safely disposing of wastes, and for other purposes.

"(7) concern for high standards of design.

"(c) To the extent possible, all national, regional, State, and local viewpoints shall be considered in planning development programs and projects of the United States Government or assisted by the Government. State and local government objectives and objectives of regional organizations shall be considered within a framework of national public objectives expressed in laws of the United States. Available projections of future conditions in the United States and needs of regions, States, and localities shall be considered in plan formulation, evaluation, and review.

"(d) To the maximum extent possible and consistent with national objectives, assistance for development purposes shall be consistent with and further the objectives of State, regional, and local comprehensive planning. Consideration shall be given to all developmental aspects of our total national community, including housing, transportation, economic development, natural and human resources development, community facilities, and the general improvement of living environment.

"(e) To the maximum extent practicable, each executive agency carrying out a development assistance program shall, consult with and seek advice from all other significantly affected executive agencies in an effort to assure completely coordinated programs. To the extent possible, systematic planning required by individual United States Government programs (such as highway construction, urban renewal, and open space) shall be coordinated with and, to the extent authorized by law, made part of comprehensive local and areawide development planning.

"(f) When a law of the United States provides that both a special-purpose unit of local government and a unit of general local government are eligible to receive a loan or grant, the head of an executive agency shall make the loan or grant to the unit of general local government instead of the special-purpose unit of local government in the absence of substantial reasons to the contrary.

"(g) The President may designate an executive agency to prescribe regulations to carry out this action."

A broad spectrum of commenters, including state, local, and regional agencies, interest groups, and members of Congress, said that the regulations implementing Executive Order 12372 should also provide that federal agencies carry out their responsibilities under this statute. In response, paragraph (a) of this Section (as well as the authority citation for the entire regulation) now cites not only the Executive Order but also section 401 of the Intergovernmental Cooperation Act. Other provisions in these regulations carry out the Corps of Engineers responsibilities under these statutory provisions.

Section 401 emphasizes that federal actions should be as consistent as possible with planning activities and decisions at state, regional, and local levels. The Corps of Engineers, when considering and making efforts to accommodate comments and recommendations it receives under these regulations, recognizes its responsibilities under this section.

A few commenters suggested deleting the language in paragraph (c) of this section which says that the regulations were not intended to create any right of judicial review. The rule retains this language. Clearly, the purpose of the Executive Order and these regulations is to foster improved cooperation between the Corps of Engineers and other federal agencies on one hand, and state and local elected officials on the other. The Order and these regulations presuppose, and rely on, the good faith of federal, state and local officials in communicating with one another and seeking to understand one another's concerns. To regard these regulations as rigid procedures intended to provide new opportunities for litigation would be wholly contrary to their purpose. Agencies have statutory responsibilities under the laws on which these rules are based. In some cases, courts have held agency actions to be judicially reviewable under these statutes. By retaining paragraph (c) in the regulation, the Corps of Engineers is stating only that these regulations are not grounds for judicial review of agency action beyond those afforded by the underlying statutes.

Section 384.2 What definitions apply to these regulations?

Commenters did not object to the definitions in the proposed rule. However, a few commenters asked that various additional terms be defined. The Corps of Engineers does not believe that it is necessary to define any of these additional terms. The term "environmental impact statement" is a

well-known term of art in environmental law and planning, is mentioned in the National Environmental Policy Act, and is discussed in numerous court decisions. This term is not used in the regulation. In any event, the Corps of Engineers would not use the term in any but its commonly understood sense.

The Corps of Engineers chose not to include a definition of "direct federal development," or "federal financial assistance." Experience in other regulatory areas (e.g., civil rights regulations with respect to federal financial assistance) has shown that it is difficult to craft a concise, understandable, and comprehensive definition. An abstract definition always carries with it the danger of inadvertently leaving something in that should be excluded or leaving something out that should be included. Moreover, in these cases, the list of program inclusions accompanying this rulemaking provide adequate operational information upon which state and local elected officials can act.

The Corps of Engineers also decided not to try defining "emergency" and "unusual circumstances." With respect to terms like these, the dangers of overinclusiveness and underinclusiveness are particularly great. The purpose of an emergency waiver provision or discretion to deviate from certain requirements in unusual circumstances is to give federal agencies flexibility to deal with unforeseen situations and other problems beyond the agencies' control. As stated in the preamble to the proposed rules, the Corps of Engineers expects to use such provisions sparingly, and only when absolutely necessary. Thus, it would be counterproductive to attempt, through a definition, to limit this flexibility by anticipating all possible circumstances when it might be needed.

The Corps of Engineers also does not believe a definition of "accommodate" is necessary. The concept of accommodation is addressed in § 384.10. In this section, the Corps of Engineers accepts the state process recommendation or reaches a mutually agreeable solution. If the Corps of Engineers does not provide an accommodation in one of these two ways, it must provide an explanation. Since the Corps of Engineers believes the section describes sufficiently what is meant by accommodation, a further definition of the term is not helpful.

Finally, the Corps of Engineers considered whether to include a definition of the term "state process recommendation." The Corps of Engineers concluded that a definition of

this term would not materially help clarify those situations in which the Corps of Engineers has an obligation to "accommodate or explain" in response to comments and recommendations. The term's function is discussed at great length in earlier and subsequent sections of this preamble and this should provide sufficient information as to its meaning.

Section 384.3 What programs and activities of the Corps of Engineers are subject to these regulations?

This section is substantively very similar to paragraph 3(a) of the NPRM. A substantial number of commenters contended that it was contrary to the intent of the Order for the Federal Government to exclude any programs or activities from coverage under the Order and these regulations, and that elected officials participating through the state process are the only proper parties to decide what should be excluded from the state process. Other commenters objected to the various criteria used by the federal agencies in developing their lists of programs and activities that were being proposed for exclusion.

The Order does not purport to cover all federal programs and activities. Its scope is limited to federal financial assistance and direct federal development programs and activities, and the order mandates consultation only when state and local governments provide non-federal funds for, or are directly affected by the proposed federal action. Programs and activities not falling into either of these categories are clearly outside the scope of the Order (e.g., Coast Guard search and rescue activities, procurement of military weapon systems). It is appropriate for federal agencies to decide which of their activities are federal financial assistance or direct federal development.

There are also actions related to federal financial assistance or direct federal development activities where review and comment as provided by the Executive Order would be superfluous or futile. Certain basic Federal Government functions either have public participation procedures of their own (e.g., rulemaking under the Administrative Procedure Act) or are internal government processes in which state and local coordination and consultation are not appropriate (e.g., formulation of the Department's budget proposals transmitted to OMB, or OMB's recommendations to the President concerning budget formulation).

To provide information on the activities and programs eligible for

selection for state processes, the Corps of Engineers is publishing a notice listing these "included" programs and activities. This information is being published in a separate notice rather than as part of this rule to allow future changes to be made more conveniently. The Corps of Engineers will seek public comment on proposed future program or activity exclusions as these occur.

Section 384.4 What are the Corps of Engineers' general responsibilities under the Order?

There were no substantive comments about this section, which restates many of the provisions of the Executive Order. It is unchanged from the NPRM.

Section 384.5 What is the Corps of Engineers' obligation with respect to federal interagency coordination?

Some comments, including those suggesting a federal single point of contact, asked the Corps of Engineers and other federal agencies to do more in ensuring that federal agencies communicate not only with state and local elected officials but also with each other. The Corps of Engineers believes that this point is well taken. Many programs and projects require information or approvals from a number of federal agencies, and federal interagency communication is as important, in many cases, as intergovernmental communication. Consequently, the Corps of Engineers is adding a new section, the language of which is derived from subsection 401(d) of the Intergovernmental Cooperation Act. The section provides that the Secretary, to the extent practicable, will consult with and seek advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Corps of Engineers regarding programs and activities covered under these regulations.

Section 384.6 What procedures apply to the selection of programs and activities under these regulations?

Paragraph (a) of this section is new. It makes clear that any program or activity published in the Federal Register list prescribed by section 384.3 is eligible for selection for a state process. The paragraph also declares, more explicitly than the NPRM, that states are required to consult with local elected officials before selecting programs and activities for coverage. This addition responds to comments that asked that the states' obligation in this regard, as well as in the establishment of a state process, be spelled out in the rule. OMB previously wrote the Governors asking each to

provide such an assurance when the state submits its initial list of selected programs and activities.

Several commenters also suggested that these regulations should more firmly require local involvement (e.g., a letter of concurrence) in the establishment of state processes. The Executive Order requires, and OMB's letter to the Governors has reiterated, that there must be consultation between state and local elected officials in the establishment of the process. The Order clearly contemplates that official processes under the Order are established by state and local elected officials in cooperation and consultation with one another. The Corps of Engineers believes that these requirements are clear and that further administrative requirements imposed by regulations are unnecessary and would, in many cases, delay or interfere with the establishment of a state process. In particular, the Corps of Engineers does not believe that the Order contemplates so rigid a requirement as a sign-off by an official of each local jurisdiction in a state before a process may be valid.

Paragraphs (b), (c) and (d) of this section derive from paragraphs (a), (c) and (b), respectively, of § 384.5 of the NPRM. There were no comments objecting to the substance of these paragraphs in the NPRM. Language added to paragraph (c) of the final rule specifies that the state must submit to the Corps of Engineers with each change in its program selections an assurance that local elected officials were consulted about the change. This language emphasizes the continuing obligation of states to involve local elected officials in decisions concerning what programs are selected for the state process. The paragraph also allows the Corps of Engineers to establish deadlines for states to inform the Corps of changes in program selections. The primary reason for this provision is to expedite processing of assistance applications and to reach decisions on projects at times of heavy workload, such as the end of the fiscal year. For example, deadlines could be set to avoid having to make on short notice midstream changes in coordination procedures. In addition, the Corps of Engineers has made some editorial changes for better clarity.

A listing of Corps of Engineers Division Engineers, and the States for which they are responsible for coordination of this regulation, is provided as Appendix A to this preamble.

A number of commenters asked what procedures apply when a state chooses

not to adopt a process under the Order or when a particular program or activity is not selected for a state process. This question is answered in paragraph (b) of § 384.7, discussed below.

Section 384.7 How does the Corps of Engineers communicate with state and local officials concerning its programs and activities?

Paragraph (a) incorporates material from §§ 384.3(b) and 384.6(b) of the NPRM, except that the final regulation specifies that the Corps of Engineers' obligation to communicate with state and local elected officials applies to programs and activities subject to the Order that are covered by a state process. This change is intended to emphasize that it is with the state process, not just a Governor's office or other state government entity, that the Corps of Engineers will communicate.

The notice provided for by this section is not necessarily exclusive. For example, many programs and activities have independent consultation or notification requirements, which apply even if a program is not selected for a state process. The Corps of Engineers must pursue such notification and consultation practices under these authorities even where the program or activity is selected for a state process. The Corps of Engineers may also take the initiative at any time to contact any interested person or entity about one of the Corps of Engineers programs or activities. Further, the Corps of Engineers need not rely on the state process or the single point of contact to bring about this communication or consultation.

Paragraph (b) is new, and is intended to respond to concerns expressed by commenters on how the Corps of Engineers communicates with local elected officials in situations where a state does not have a state process or where the state process does not cover a particular program or activity. The Corps of Engineers will carry out its responsibilities in these situations by providing notice to state, areawide, regional or local officials or entities that would be directly affected by the proposed federal financial assistance or direct federal development. This notice may be either through publication (e.g., a notice in the Federal Register or in a publication widely available in the area potentially affected by the proposed federal action) or direct (e.g., a letter to the mayor of an affected city). The notice will alert the directly affected entities concerning the proposed action and identifying who in the Corps of

Engineers should be contacted for more information.

Section 384.8 *How does the Corps of Engineers provide states the opportunity of commenting on proposed federal financial assistance and direct federal development?*

More commenters—over a third of the total—addressed § 384.6(c) of the NPRM (redesignated § 384.8(a) in the final rule) than any other provision in the proposed regulation. The NPRM proposed that, except in unusual circumstances, the Secretary would give states at least 30 days to comment on any proposed federal financial assistance or direct federal development. Almost all commenters discussing this point felt 30 days was too brief a period to develop comments, particularly when disagreements among various interested parties within the state need to be resolved. Commenters requested a number of longer comment periods, including 35, 45, 50, and 60 days. Some commenters suggested that an additional period—normally between 15 and 30 days—be available to states either at their discretion or when disputes needed to be resolved.

In response to these comments, the Corps of Engineers has decided to lengthen the comment period to 60 days in all cases (including interstate matters).

The Corps of Engineers will establish, by notice to the single point of contact or to directly affected entities, a date from which the 60 day comment period will begin to run. Where a program or activity is not selected for the state process, the Corps of Engineers will provide notice, including any adjustments to the comment period that may be necessary, to directly affected state, areawide, regional and local entities regarding the proposed federal action. Because paragraphs (a) and (b) now provide that the Secretary will establish this starting date, the language of the NPRM permitting the Secretary to establish deadlines for submission of various materials is no longer necessary and has been deleted.

Paragraph (b) of this section is derived from § 384.6(a) of the NPRM. The provisions of this section apply to cases in which review, coordination, and communication with the Corps of Engineers have been delegated. This paragraph is intended to make clear that when this responsibility is delegated, these procedures apply just as if the matter were handled at the state level.

Paragraph (e) of § 384.6 of the NPRM has been dropped. A new § 384.9 of the final rule describes how the Corps of

Engineers receives and responds to comments.

Section 384.9 *How does the Corps of Engineers receive and respond to comments?*

This new section replaces § 384.6(e) of the NPRM and elaborates in substantially greater detail the Corps of Engineers obligations concerning the receipt of and response to comments. Section 384.6(e) had provided that the Corps of Engineers would respond 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 the federal agencies.

About a quarter of all comments received discussed this "single point of contact" concept, with a majority of those comments opposing the required establishment of a single point of contact or expressing serious concerns about how it would work. Some of these comments wanted to permit multiple points of contact within a state instead of only one. The reasons expressed for this opposition or concern fell into two major categories. First, some commenters felt that a single point of contact would be an unnecessary extra layer of bureaucracy imposed on their state process. Second, some commenters felt that the single point of contact could, in effect, veto recommendations made by local or regional entities or reduce the comments of such entities to second-class status. In other words, their view was that using a single point of contact would inhibit, rather than facilitate, transmission to federal agencies of the concerns of local elected officials and regional and areawide entities.

In response to these comments, and consistent with the amended Executive Order and the Corps of Engineers' decision explicitly to implement through these regulations section 401 of the Intergovernmental Cooperation Act, the Corps of Engineers has made substantial changes to this paragraph.

Nonetheless, the concept of the single point of contact is being retained. Satisfactory implementation of the Executive Order requires a means of handling the communication and information flow between federal-state/local and state/local-federal entities and officials in as simple and understandable a way as possible. Designating a single point of contact will serve this end better, in our view, than a multiplicity of communications channels. If all federal agencies and all parties within a state know that a particular office or official performs this

state/local-federal communications link for the state process, much confusion and guesswork which otherwise could occur can be eliminated.

We emphasize that, from our perspective, the primary role of the single point of contact is to act as a conduit—a means of transmission—for the comments of state and local elected officials on proposed federal actions. It is up to the state and local elected officials who establish each state process whether this single point of contact also has a substantive role in preparing comments.

Paragraph (a) obligates the Corps of Engineers to follow the "accommodate or explain" procedures of § 384.10 if two conditions are met. First, the state must have designated a single point of contact. Second, the single point of contact must have transmitted a state process recommendation. If these conditions are not met, the Corps of Engineers will still consider all comments received, but the "accommodate or explain" obligation will not apply.

The state process recommendation provision is intended to clarify the reciprocal responsibilities of the state and federal agencies under the Executive Order. The Order is an important part of the Administration's Federalism policy. Federalism means, among other things, that federal agencies should give greater deference to, and make greater efforts to accommodate, the concerns of state and local elected officials than has sometimes been the case in the past. But Federalism also means, in the Administration's view, that state and local officials themselves have a responsibility to attempt to solve intrastate problems without resort to intervention from the Federal Government. Where states and other directly affected parties carry out these responsibilities by forging a state process recommendation, it is highly appropriate for the Federal Government to give these recommendations the increased attention that the "accommodate or explain" process provides. We wish to emphasize that, in any case, the Corps of Engineers will always fully consider all comments it receives under these regulations.

The Corps of Engineers' practical, as well as theoretical, reasons for stressing consensus building were described in the NPRM. We expect that carrying out the Corps of Engineer's "accommodate or explain" responsibility will be greatly aided when a single, unified position is presented for response. However, several commenters said that it would

be difficult to achieve or undesirable to attempt consensus with respect to some projects or programs. Many of these comments were in connection with the 30-day review period proposed by the NPRM, saying that more than 30 days was needed if consensus were to be reached. The extension of the review period to 60 days in the final rule should mitigate this concern.

In addition, the Corps of Engineers will respond as provided in § 384.10 to a state process recommendation which does not represent a consensus. This means that the single point of contact will not have to submit a recommendation representing unanimous agreement for the recommendation to receive an "accommodate or explain" response from the Corps of Engineers under these rules. Moreover, because the single point of contact is required under paragraph (b)(2) of this section to pass through comments that differ from the state process recommendation, all officials and entities within a state are assured that comments that differ from the state process recommendation on a particular program as project will be seen and considered by the Corps of Engineers.

Paragraph (b)(1) provides that the single point of contact need not transmit comments from directly affected entities when there is no state process recommendation. However, the single point of contact should advise the commenting officials and entities when a state process recommendation is not being transmitted so that these entities will have sufficient time to send their views directly to the Corps of Engineers before the review and comment period ends. These entities may also choose to send their comments directly to the Corps of Engineers concurrently with their sending them to the state process.

Paragraph (b)(2) obligates the single point of contact to transmit to the Corps of Engineers all comments received concerning a selected program or activity that differ from a state process recommendation. This requirement will ensure that, as section 401 specifies, the Corps of Engineers considers all views from state, areawide, regional, and local entities or officials. It should also reassure commenters that the views of concerned officials are not subject to any "pocket veto" by the single point of contact.

In paragraphs (c) and (d), the Corps of Engineers makes provision for responding to comments in situations where there is no state process or for programs that are not selected for a state process. Paragraph (c) provides that in the absence of a state process, or

if the single point of contact does not transmit a state process recommendation, state, areawide, regional and local officials and entities may submit comments to the Corps of Engineers. The Corps of Engineers is obligated to consider these comments. Paragraph (d) makes a similar provision for situations where the state process does not cover a particular program or activity of the Corps of Engineers.

Paragraph (e) simply reiterates the Corps of Engineers obligation to consider all the comments it receives from state, areawide, regional and local officials and entities under these regulations, whether they are transmitted through a single point of contact or otherwise provided to the Corps of Engineers. This obligation derives directly from section 401.

Section 384.10 How does the Corps of Engineers make efforts to accommodate intergovernmental concerns?

Paragraph (a) of this section now provides that if a state process provides a state process recommendation to the Corps of Engineers through a single point of contact, the Corps of Engineers becomes obligated to accommodate or explain. This means that the Corps of Engineers need not accommodate or explain comments that (1) do not constitute or form the state process recommendation, or (2) are not provided through a single point of contact. The Corps of Engineers will fully consider all comments, but there will be no "accommodate or explain" obligation.

As under the proposed regulations, "accommodating" a state process recommendation means either accepting that recommendation or reaching a mutually agreeable solution with the state process. In response to a substantial number of comments, paragraph (a)(3) of the final rule provides that all explanations of nonaccommodation will be in writing. This is not to say that the Corps of Engineers may not also inform the single point of contact of a nonaccommodation by telephone, other telecommunication, or in a personal meeting. However, whether or not such conversation or communication occurs, the Corps of Engineers will always send a written explanation of the nonaccommodation.

As under the proposed rule, the Corps of Engineers will not implement a decision for ten days after the single point of contact receives the explanation. A few commenters suggested that this waiting period should be longer than ten days; however, the Corps of Engineers believes that to avoid unduly delaying the start of direct federal development, a

longer period should not be provided. The Corps of Engineers believes that ten days will be adequate time for the state process to formulate an appropriate political response if the issue is sufficiently important within the state.

The Corps of Engineers has included a new paragraph (c) in the regulation to clarify when the ten-day waiting period begins to run. If the Corps of Engineers has made a telephone call (or other oral communication) to the single point of contact advising of the nonaccommodation and providing an explanation, the ten-day period begins to run from the date of that communication, even though the written explanation arrives later. If the Corps of Engineers sends a letter but does not make a telephone call, the ten-day period begins on the date the single point of contact is presumed to have received it. This presumptive date of receipt is five days from the date on which the letter is sent, a period consistent with the longstanding successful practice of the Social Security Administration and longer than that used for presumptive receipt of official papers in many other legal contexts. In effect, the Corps of Engineers will be free to begin carrying out its decision on the sixteenth day after the day the Corps of Engineers sent the letter.

Some commenters indicated what they sought most was federal agency responsiveness to their comments. These commenters felt the lack of responsiveness was a significant failing of the intergovernmental process under OMB Circular A-95. In providing explanations of nonaccommodation, the Corps of Engineers will make an effort to be as responsive as practicable consistent with the Corps of Engineers responsibilities to accomplish program objectives and to expend funds in a sound financial manner.

Section 384.11 What are the Corps of Engineers' obligations in interstate situations?

This section is based on § 384.8 of the NPRM. One feature of the NPRM section—the provision of 45 days for comment in interstate situations—has been dropped because the comment period in the final rule is 60 days in all cases.

The Corps of Engineers received several comments on its handling of interstate situations. Most of these comments asked for greater federal guidance or involvement in interstate situations, especially when various affected states did not agree with one another. Some commenters also said that greater attention should be given to

the role of interstate metropolitan areas and the designated areawide entities that represent them.

The Corps of Engineers does not believe that it is necessary to change the proposed regulation to provide any particular procedure for resolving interstate conflicts. It is clearly in the Corps of Engineers' interest to have affected states mutually agree on the Corps of Engineers' programs and projects that affect interstate situations. On a case-by-case basis, as appropriate, the Corps of Engineers will work with officials of states involved in an interstate situation in an attempt to secure this agreement. This should not be a regulatory requirement, however.

The Corps of Engineers believes that designated areawide agencies in interstate metropolitan areas have an important role to play. Consequently, paragraph (a)(3) now specifically mentions designated areawide entities among those which the Corps of Engineers will make efforts to notify in interstate situations. OMB will periodically provide the Corps of Engineers with a list of designated interstate areawide entities. Paragraph (a)(4) provides that the recommendation of a designated interstate areawide entity will be given "accommodate or explain" treatment by the Corps of Engineers if it is sent through a state single point of contact, and if the areawide entity has been delegated a review and comment role for the program or activity being commented on by a state process.

For example, the Metropolitan Washington, D.C. Area Council of Governments (COG) represents jurisdictions in an interstate area including parts of Maryland, Virginia and the District of Columbia. If that Council of Governments was delegated a specific review role and makes a recommendation on a proposed action by the Corps of Engineers, and that recommendation is transmitted to the Corps of Engineers through the single point of contact of either Maryland, Virginia, or the District of Columbia, the Corps of Engineers is obligated to accommodate or explain. If a state process recommendation differing from the Washington COG recommendation is also transmitted by another state's single point of contact, the Corps of Engineers would also accommodate or explain that recommendation as well.

Section 384.13 May the Corps of Engineers waive any provision of these regulations?

The provision is unchanged from the NPRM, although the section number is changed. A few commenters objected to

this waiver provision, apparently in the belief that it was a loophole allowing federal noncompliance with the Executive Order. The Corps of Engineers is strongly committed to compliance with the Order, and will use the emergency waiver provision only in those rare instances where an unanticipated situation makes prompt action necessary without full compliance with all provisions of these regulations. If the Corps of Engineers uses the emergency waiver provision, the Corps of Engineers will attempt, to the extent feasible and meaningful, to involve the state process in subsequent decisionmaking concerning the matter which the waiver was used. In addition, the Corps of Engineers will keep records of all situations in which the emergency waiver was used, except in those cases of emergency actions under Pub. L. 84-99, which are categorically excluded in the regulation.

Other Comments

In addition to comments specifically pertaining to various features of these regulations, there are several other comments made to the Corps of Engineers to which the Corps of Engineers would like to respond. Several commenters said that the Office of Management and Budget should have a stronger oversight role, thus ensuring that federal agencies carry out their obligations under the Order and these regulations. Behind these comments seems to be a concern that federal agencies are not really interested in consulting with state and local governments and a view that, in the absence of an OMB "policing" role, agencies would tend to ignore these obligations.

The Corps of Engineers wants to state unequivocally that it is fully committed to implementing all of the provisions of the Order and these regulations, and will act quickly to respond to complaints from state, areawide, regional and local officials and entities that mistakes or omissions have been made with respect to the Corps of Engineers' obligations. Carrying out this Order faithfully and forcefully is an important part of the Administration's Federalism policy, and the Administration's policymaking officials intend the policy to be carried out fully by everyone in their agencies.

OMB will have a general oversight role with respect to federal agency implementation of the Order, including the required preparation of a report in late 1984 concerning the operation of the new process. OMB will periodically review agency records of nonaccommodations and waivers. OMB has advised the agencies, however, that

a detailed operating review or "policing" relationship would not be consistent with the role of OMB vis-a-vis the other federal agencies. OMB is not intended to have day-to-day operational responsibilities with respect to federal programs. Concerning these regulations, as with respect to other agency operational responsibilities, the officials of this Corps of Engineers are responsible to the Secretary of the Army, who in turn is responsible to the President for carrying out important Administration policy on the Civil Works Program of the Corps of Engineers.

Finally a number of commenters reminded the Corps of Engineers and other agencies that we should continue to follow existing statutory requirements that affect many federal agencies, with respect to environmental impact statements, historic preservation, civil rights, etc. The Corps of Engineers will continue to follow all such crosscutting requirements and other independent consultation requirements. To the extent that it is feasible to do so, the Corps of Engineers will work with states to integrate handling of some of these crosscutting requirements with the official state process. However, regardless of the structure of a state's process or whether there is a state process at all, the Corps of Engineers will continue to meet all legal requirements in these areas.

In a related question, some commenters asked how certain requirements concerning environmental impact statements, and coastal zone management, would be handled administratively under these regulations. Under the A-95 system, clearinghouses often coordinated responses to federal agencies relating to these matters. Under the Executive Order system, a state could, if it wished, designate the single point of contact or other entity to circulate documents and to bear the administrative responsibility for coordination. Federal agencies could also continue any arrangements or relationships with entities in the state that now exist to facilitate this review and comment. Where it is feasible, we encourage a coordinated response under these regulations and other coordination requirements.

Scope

Two commenters suggested that permit programs under the jurisdiction of the U.S. Army Corps of Engineers be included on the list of programs subject to E.O. 12372 and this regulation. As was pointed out in the preamble to the proposed rule, the regulatory programs

of the Corps of Engineers (Sections 9 and 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Ocean Dumping Act) do not constitute financial assistance or direct Federal development and are therefore not within the scope of the Order. We have reviewed our position in light of the two comments and have determined it to be correct; therefore, no changes have been made to the list of programs which is being published in the notice section of the Federal Register.

Executive Order 12291, Paperwork Reduction Act, and Regulatory Flexibility Act

The Corps of Engineers has determined that this is not a major rule under Executive Order 12291. The rule will simplify consultation with the Corps of Engineers and allow state and local governments to establish cost effective consultation procedures. For this reason, the Corps of Engineers believes that any economic impact the regulation has will be positive. In any event, it is unlikely that its economic impact will be significant. Consequently, the Corps of Engineers certifies, under the Regulatory Flexibility Act, that this rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to section 3504(h) of the Paperwork Reduction Act, since it does not require the collection or retention of data.

Dated: June 17, 1983.

James W. Ray,

Colonel, Corps of Engineers, Executive Director, Engineer Staff.

List of Subjects in 33 CFR Part 384

Intergovernmental relations.

Appendix A—Listing of U.S. Army Corps of Engineers Division Engineers

Assignments for Coordination of State Processes Under E. O. 12372

Division Engineer, U.S. Army Engineer Division, New England, 424 Trepelo Road, Waltham, MA 02254—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Division Engineer, U.S. Army Engineer Division, North Atlantic, 90 Church Street, New York, NY 10007—Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Virginia

Division Engineer, U.S. Army Engineer Division, South Atlantic, 510 Title Building, 30 Pryor Street SW., Atlanta, GA 30303—Alabama, Florida, Georgia, North Carolina, Puerto Rico, South Carolina, U.S. Virgin Islands

Division Engineer, U.S. Army Engineer Division, Ohio River, P.O. Box 1159, Cincinnati, OH 45201—Indiana, Kentucky, Ohio, Tennessee, West Virginia

Division Engineer, U.S. Army Engineer Division, North Central, 539 Clark Street, Chicago, IL 60605—Illinois, Iowa, Michigan, Minnesota, Wisconsin

Division Engineer, U.S. Army Engineer Division, Lower Mississippi Valley, P.O. Box 80, Vicksburg, MS 39180—Louisiana, Mississippi

Division Engineer, U.S. Army Engineer Division, Missouri River, P.O. Box 103, Downtown Station, Omaha, NE 68144—Colorado, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming

Division Engineer, U.S. Army Engineer Division, Southwestern, 1114 Commerce Street, Dallas, TX 75242—Arkansas, New Mexico, Oklahoma, Texas

Division Engineer, U.S. Army Engineer Division, North Pacific, P.O. Box 2870, Portland, OR 97208—Alaska, Idaho, Oregon, Washington

Division Engineer, U.S. Army Engineer Division, South Pacific, 630 Sansome Street, Room 1216, San Francisco, CA 94111—Arizona, California, Nevada, Utah

Division Engineer, U.S. Army Engineer Division, Pacific Ocean, Building 230, Ft. Shafter, HI 96858—American Samoa, Guam, Hawaii, Northern Mariana Islands, Trust Territory of the Pacific Islands

For the reasons set out in the Preamble, the Department of the Army, Corps of Engineers amends Title 33, Code of Federal Regulations, by adding a new Part 384, to read as follows:

PART 384—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF THE ARMY CORPS OF ENGINEERS PROGRAMS AND ACTIVITIES

Sec.

384.1 What is the purpose of these regulations?

384.2 What definitions apply to these regulations?

384.3 What programs and activities of the Corps of Engineers are subject to these regulations?

384.4 [Reserved].

384.5 What is the Corps of Engineers' obligation with respect to federal interagency coordination?

384.6 What procedures apply to the selection of programs and activities under these regulations?

384.7 How does the Corps of Engineers communicate with state and local officials concerning its programs and activities?

384.8 How does the Corps of Engineers provide states an opportunity to comment on proposed federal financial assistance and direct federal development?

384.9 How does the Corps of Engineers receive and respond to comments?

384.10 How does the Corps of Engineers make efforts to accommodate intergovernmental concerns?

384.11 What are the Corps of Engineers obligations in interstate situations?

384.12 [Reserved].

384.13 May the Corps of Engineers waive any provision of these regulations?

Authority: Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15887); and Section 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506).

§ 384.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Corps of Engineers, and are not intended to create any right or benefit enforceable at law by a party against the Corps of Engineers or its officers.

§ 384.2 What definitions apply to these regulations?

"Order" means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled "Intergovernmental Review of Federal Programs."

"Responsible Corps official" means a District Engineer, Division Engineer, or the Chief of Engineers, or a designated representative, who is considering a decision or recommendation on a proposed Federal action and is responsible for coordinating such action with the state process under the provisions of this regulation.

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

§ 384.3 What programs and activities of the Corps of Engineers are subject to these regulations?

The Chief of Engineers publishes in the Federal Register a list of the Corps of Engineers Civil Works programs and activities that are subject to these regulations.

§ 384.4 [Reserved]**§ 384.5 What is the Corps of Engineers' obligation with respect to federal interagency coordination?**

Responsible Corps officials, to the extent practicable, consult with and seek advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Corps of Engineers regarding programs and activities covered under these regulations.

§ 384.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the *Federal Register* in accordance with § 384.3 of this Part for intergovernmental review under these regulations. Each state, before selecting programs and activities shall consult with local elected officials.

(b) Each state that adopts a process shall notify the appropriate Division Engineer of the programs and activities selected for that process.

(c) A state may notify the appropriate Division Engineer of changes in its selections at any time. For each change, the state shall submit to the Division Engineer an assurance that the state has consulted with local elected officials regarding the change. The Division Engineer may establish deadlines by which states are required to inform the Corps of Engineers of changes in their program selections.

(d) The Corps of Engineers uses a state's process as soon as feasible, depending on individual programs and activities, after the Division Engineer is notified of its selections.

§ 384.7 How does the Corps of Engineers communicate with state and local officials concerning its programs and activities?

(a) For those programs and activities covered by a state process under § 384.6, the responsible Corps official, to the extent permitted by law:

- (1) Uses the state process to determine views of state and local elected officials; and
- (2) Communicates with state and local elected officials, through the state process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The District Engineer provides notice to directly affected state, areawide, regional, and local entities in a state of proposed Federal financial assistance or direct Federal development if:

- (1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process. This notice may be made by publication in the *Federal Register* or other appropriate means, which the District Engineer in his discretion deems appropriate.

§ 384.8 How does the Corps of Engineers provide states an opportunity to comment on proposed federal financial assistance and direct federal development?

(a) Except in unusual circumstances, the responsible Corps official gives state processes or directly affected state, areawide, regional and local officials and entities at least 60 days from the date established by such official to comment on proposed direct federal development or federal financial assistance.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Corps of Engineers have been delegated.

§ 384.9 How does the Corps of Engineers receive and respond to comments?

(a) The responsible Corps official follows the procedures in § 384.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 384.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments to the responsible Corps official.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments to the responsible Corps official. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the responsible Corps official by the single point of contact, such official follows the procedures of § 384.10 of this Part.

(e) The responsible Corps official considers comments which do not

constitute a state process recommendation submitted under these regulations and for which such official is not required to apply the procedures of § 384.10 of this Part, when such comments are provided by a single point of contact or directly to such official by a commenting party.

§ 384.10 How does the Corps of Engineers make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Corps of Engineers through its single point of contact, the responsible Corps official either:

- (1) Accepts the recommendation;
- (2) Reaches a mutually agreeable solution with the state process; or
- (3) Provides the single point of contact with a written explanation of the decision in such form as such Corps official in his or her discretion deems appropriate. The Corps official may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the responsible Corps official informs the single point of contact that:

- (1) The Corps of Engineers will not implement its decision for at least 10 days after the single point of contact receives the explanation; or
- (2) The Assistant Secretary of the Army (Civil Works), or the next higher level responsible Corps official, has reviewed the case and determined that, because of unusual circumstances, the waiting period of at least 10 days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 384.11 What are the Corps of Engineers obligations in interstate situations?

(a) The responsible Corps official is responsible for:

- (1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;
- (2) Notifying appropriate officials and entities in states which have adopted a process and which select the Corps of Engineers program or activity.
- (3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select

the Corps of Engineers program or activity;

(4) Responding pursuant to § 384.10 of this Part if the responsible Corps official receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Corps of Engineers has been delegated.

(b) The responsible Corps official uses the procedures in § 384.10 if a state process provides a state process recommendation to such official through a single point of contact.

§ 384.12 [Reserved]

§ 384.13 May the Corps of Engineers waive any provision of these regulations?

(a) Emergency and disaster recovery actions performed under Pub. L. 99, 84th

Congress, are excluded from the requirements of the Order and this regulation.

(b) In other emergencies, the Division Engineer may waive any provision of these regulations.

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