§ 652.141 Functions of DVOP staff.

Each DVOP specialist shall carry out the duties and functions for providing services to eligible veterans according to provisions of 38 U.S.C. 2003A (b) and (c).

§ 652.142 Stationing of DVOP staff.

DVOP specialists shall be stationed at various locations in accordance with 38 U.S.C. 2003A(b)(2).

Signed at Washingon, D.C., this 25th day of July 1983.

Raymond J. Donovan,

Secretary of Labor.

[FR Doc. 83-20745 Filed 7-29-83; 8:45 am]

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Part V

Department of Energy

Federal Energy Regulatory Commission

Sales and Transportation by Interstate Pipelines and Distributors; Final Rules

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

Interstate Pipeline Blanket Certificates for Routine Transactions and Sales and Transportation by Interstate Pipelines and Distributors

[Docket Nos. RM81-19-000; RM81-29-000; Order No. 234-B]

Issued: July 20, 1983.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its blanket certificate program for interstate pipelines at Subpart F of Part 157 of its regulations to authorize transportation under the blanket certificate for any end user, including those who use gas as a boiler fuel, until July 1, 1985. One purpose of this experimental program is to add flexibility to the market and thereby partially mitigate market distortions that currently may exist or that may emerge in the near future. This final rule is issued together with a companion final rule (Order No. 319) issued July 20, 1983, in Docket No. RM81-29-000, published elsewhere in this issue.

EFFECTIVE DATE: This final rule will become effective upon the effective date of Order No. 319 issued in Docket No. RM81-29-000. The Commission will publish a confirmation of effective date document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

I. Introduction

In a companion final rule issued by the Federal Energy Regulatory Commission (Commission),[1] the blanket certificate program for interstate pipelines was expanded to include transportation of gas to specific categories of end-users which would be designated from time to time, pursuant to § 157.209(e) of the Commission's regulations. This final rule designates all end-users to be eligible for the purpose of authorizing transportation service under the blanket certificate program, through June 30, 1985.

II. Background

Historically, industrial end-users located outside producing regions have purchased gas from interstate pipelines and local distribution companies. These pipelines and distributors generally sold gas from their system supplies rather than transported user-owned gas to end-users. Under these arrangements, pipelines and distributors who sold the gas on an interruptible basis were able to balance their sensitive high-priority loads so as to use their system capacity more efficiently. Moreover, large industrial users provided a reliable base of demand so that pipelines could contract for new long-term supplies. Under this industry structure, interstate pipelines generally assumed the responsibility for assuring that gas supply and demand remained in balance over the long term. Because an interstate pipeline bought gas from a large number of sources and served numerous end-users, pipelines could provide greater operational flexibility than would have resulted from matching specific production with specific end-users.

In 1978, Congress enacted the Natural Gas Policy Act (NGPA) which made major statutory changes to regulation of the natural gas industry. Under the incentive ceiling prices and monthly escalation mechanism established in Title I of the NGPA, the price of natural gas has risen steadily. At the same time, the price of fuel oil has fallen substantially so that the delivered price of natural gas appears to be approaching and, in some cases, exceeding the price of alternative fuels. Concurrently, interstate pipelines claim to have suffered loss of industrial loads due to, among other things, conservation, a decline in economic activity, and competition from alternative fuels.

These pipelines seemingly are unable to respond to price competition from alternative fuels and the corresponding loss of industrial loads. Under the rolled-in rate structures of most interstate pipelines, the price of natural gas offered to industrial end-users may be uncompetitive because this price reflects the average cost of all of the pipeline's gas supplies, including gas purchased under high-price contracts. In addition, some interstate pipelines entered into contracts with high percentage take-or-pay obligations, which may be exacerbating the pipelines' ability to keep gas costs competitive. As a result, some industrial end-users may be considering the use of alternative fuels, even though some individual producers may be willing to commit gas supplies to the end-users at competitive prices.

This disparity between the rolled-in delivered gas prices and the marginal price at which producers are willing to sell gas may have detrimental consequences to gas consumers in the interstate market. To the extent these distortions cause industrial end-users to switch to alternative fuels, the remaining users, which include residential, small commercial and industrial process customers, would be required to pay a higher share of the pipeline's costs. In addition, as the demand for gas becomes less certain due to competitively priced alternative fuels, some producers may choose not to explore for and develop new long-term gas supplies. Market forces appear not to have been able to avert this trend, perhaps because industry practices and the existing regulatory structure interfere with the responsiveness of wellhead prices to the recent decline in the price of alternative fuels.

The Commission is concerned that the current decline in demand for gas may have a long-term detrimental impact on the exploration and development of new domestic gas reserves. Moreover, changes in the price and availability of alternative fuels, changes in the level of national industrial activity and potential changes in the statutory framework of wellhead price regulations are adding a substantial element of uncertainty to the natural gas market.

In light of this dilemma, the Commission has considered a number of innovative responses to make wellhead gas markets more responsive to price signals from the industrial market. First, the Commission is considering proposals by interstate pipelines to sell gas at special discount rates to industrial users who would otherwise switch to alternative fuels.[2] A principal

[1] Order No. 319, issued July 20, 1983, Docket No. RM81-29-000.

[2] Michigan-Wisconsin Pipe Line Company, 22 FERC ¶ 61,210 (1983); Columbia Gas Transmission Corp., Docket No. CP82-485, 21 FERC ¶ 61,326 (1982), 22 FERC ¶ 61,139 (1983); Northwest Pipeline Corporation, 23 FERC ¶ 61,173; Northern Natural Gas Company, 21 FERC ¶ 61,324 (1982), rescinded, 22 FERC ¶ 61,173 (1983).

Commission concern in these cases is that nonindustrial customers not be compelled to subsidize such discount sales. Second, the Commission has approved a rate settlement in Transcontinental Gas Pipe Line Corporation [3] which permits an interstate pipeline to act as a broker between traditional producer-suppliers facing reduced takes and customers seeking gas at a delivered price competitive with alternative fuels.[4] Third, the Commission has issued the companion final rule in Docket No. RM81-29 which provides, among other things, expanded and expedited blanket authority to transport gas on behalf of high priority categories of end-users.

Finally, the Commission is issuing this Final Rule which has the effect of opening up for a limited period of time end-user transportation to all categories of end-users. The Commission believes that the use of the end-user transportation provision of the blanket certificate program is a further step which can be taken to partially mitigate the market distortions that currently may exist or that may emerge in the near future.

III. Discussion

Under § 157.209 of the blanket certificate rule adopted today in a companion order, interstate pipelines holding a blanket certificate would be authorized to transport gas to certain high-priority end-users, such as schools, hospitals, and process, feedstock and agricultural users. This final rule would expand the category of end-users eligible to receive direct sale gas transported under the expedited blanket certificate authorization to include industrial and boiler fuel users during a two-year experimental period extending through June 30, 1985. Each transportation arrangement to an industrial or boiler fuel user for a period of more than 120 days would be subject to the notice and protest procedure of § 157.205 of the blanket certificate regulations. As discussed further below, for transactions not exceeding 120 days in duration, the self-implementing authority under § 157.209 would be available.

In this manner, authorization of interstate pipeline transportation would be greatly expedited, and the Commission hopes that this flexibility will more easily permit gas to reach markets at prices reflective of the supply and demand characteristics of those markets. In addition, it may mitigate the pressures being felt by interstate pipelines because of high take-or-pay obligations and shield customers without alternative fuel capability from increased pipeline fixed costs. The Commission believes that this designation will encourage willing buyers and sellers of natural gas to enter into purchase contracts directly. At the same time, this rule should provide some stimulus to the exploration and development of long-term domestic gas reserves.

Under this rule, end-users would be able to contract directly with producers, intrastate pipelines, and distributors for categories of supplies specified in § 157.209(a)(1). Although individual direct sales to end-users would not be subject to the Commission's jurisdiction under the Natural Gas Act, in cases involving first sales, such sales would be subject to Title I ceiling prices under the NGPA.[5]

This designation is based upon the present market condition of excess deliverability as projected for the next two years. As a result, the duration of this designation shall be limited to a two-year experimental period extending through June 30, 1985. During the spring of 1985, the Commission will conduct a comprehensive review of gas markets to determine what, if any, future designations under the blanket certificate rule are appropriate.

IV. Summary of Comments

The Commission's decision to implement this experimental program is based, in part, on the comments received in response to its two blanket certificate proposed rulemakings. In addition, on May 12, 1981, the Secretary of Energy, acting through his delegate, the Administrator of the ERA, proposed a rule to the Commission pursuant to Section 403 of the DOE Organization Act requesting the Commission to incorporate the fuel oil displacement program established by Order No. 30 into the blanket certificate program. The Commission sought comments on the ERA proposal as well as petitions for rulemaking filed by Consolidated Edison Company of New York, *et al.* in Docket No. RM81-19.[6] The overwhelming majority of the comments received in response to the notice supported incorporating transportation to end-users with alternative fuel capability within the scope of a final blanket certificate rule.

The Order No. 30 program was a short-term experimental program addressed to a national need to displace fuel oil consumption. That national need no longer exists, and the Order No. 30 program will be terminated 90 days after the effective date of the companion final rule. However, the Commission does find a need to encourage the efficient operation of the wellhead market and to create the short-term demand for gas necessary to stimulate the exploration and development of new long-term gas reserves. Therefore, the Commission is designating all end-use categories, including those which were eligible for the Order No. 30 program, as eligible for transportation under the blanket certificate. The benefits of this experimental program will be maximized if all end-users are eligible to participate. Accordingly, the restrictions previously codified in 10 CFR Part 595, which were specifically designed for fuel oil displacement, are not continued under this program.

Several comments, however, oppose continuation of allowing boiler fuel users to obtain expedited authorization of transportation of gas supplies. They argue that the use of natural gas as boiler fuel should not be encouraged in light of declining domestic natural gas reserves, and they cite studies which project a return to natural gas curtailment before 1985. The Commission believes that these comments fail to distinguish between long-term natural gas reserves and current deliverability. At present, the available deliverability of gas exceeds current demand.

The annual demand for natural gas has not grown in proportion to the newly available supplies for the interstate market. This is due to a number of factors. First, many areas have suffered an economic decline resulting in less industrial gas consumption. Despite the addition of new high-priority loads, annual sales on many interstate pipelines have been declining. Second, many gas users who experienced curtailment in the 1970's have acquired alternative fuel capability, and current gas prices make continued use of other fuels economically advantageous. Third, the rising price of gas and other petroleum products has resulted in conservation and investment in more energy-efficient equipment.

[3] Docket Nos. RP83-11, RP83-30 (April 28, 1983) 23 FERC ¶ 61,199 and Docket No. CP83-279 (May 13, 1983) 23 FERC ¶ 61,221.

[4] The Transco experimental program is for a limited seven-month period and, with one exception, the purchasers are distributors rather than end-users.

[5] Some of these contracts would, of course, be subject to the NGPA Title I ceiling prices for as long as such ceiling prices apply. However, given present competition from alternative fuels, these new contracts would probably be at prices significantly below Title I ceiling prices.

[6] Order No. 30-F, 46 FR 30491 (June 9, 1981).

This decline in short-term demand has been accompanied by a reduction in the exploration and development of long-term gas reserves. This is of particular concern to the Commission because changes in domestic deliverability generally lag three to five years behind changes in exploration and development activity. Thus, in order to assure adequate gas supply in 1986 and following years (when the high-deliverability gas fields in the Gulf Coast are projected to decline), the Commission must assure a stable level of short-term demand today.

The Commission, therefore, does not believe that the need to assure long-term supplies is inconsistent with this program which facilitates transportation of gas to all end-users for a limited term. In fact, creating a short-term demand should encourage the exploration and development of new long-term gas reserves.

One comment opposes extending the Order No. 30 program on the grounds that it thwarts a national energy policy of converting boilers to use coal. However, because the burner-tip price of natural gas has been more expensive than coal, it is unlikely that the gas transported under this experimental program would displace coal. In addition, it is unlikely that an industrial user would base a long-term decision on whether or not to install coal burning capacity on the existence of a short-term experimental program.

Finally, one comment opposed extending the Order No. 30 program, contending that intrastate consumers will be placed at a disadvantage compared with end-users served by interstate pipeline. Given the present structure of the blanket certificate rule, transportation of direct sale gas is equally available to all end-users irrespective of whether the end-user was traditionally served by intrastate or interstate pipelines. Thus, we see no disadvantage to intrastate gas consumers under this rule.

Several commenters suggested authorizing transportation transactions for boiler fuel use under the blanket certificate, but making each individual transaction subject to the notice and protest procedure of § 157.205. The Commission generally agrees with this suggestion. The notice and protest procedure in § 157.205 procedure will permit all interested persons to participate in the review of these transactions. In addition, the § 157.205 procedure will serve the same goals which the hearing procedures under § 284.208 are currently serving. These goals include giving first priority to the system supplies of interstate pipelines by permitting interstate pipelines seeking to acquire gas for their own system supplies the opportunity to object to particular direct sale arrangements. Thus, any interstate pipeline which would seek to acquire the subject gas supplies for its system supply could raise an objection under § 157.205.

However, at the same time, the Commission recognizes that, because of the rapidly changing prices of alternative fuels, many of the potential purchasers of gas under this program are only willing to commit to these transactions on a short-term "spot" basis. In like manner, potential sellers may be willing to commit their excess deliverability only on a short-term basis. As a result, short-term direct sales to end-users will be subject to the 45 day delay inherent in the § 157.205 notice and protest procedure.

In recognition of the needs of the parties for prompt authorization, the Commission is authorizing these transactions on a self-implementing basis for a term of up to 120 days. The 120 day period is the same total duration authorized for emergency sales under § 157.45. If the parties contemplate a sale of longer than 120 days duration, the transaction could commence on a self-implementing basis. Within the 120 day period, the pipeline could also complete the notice and protest procedure of § 157.205 and obtain the long-term authorization.

For example, the first four months of a one-year arrangement can commence on a self-implementing basis under § 157.209(a)(2), while the notice and protest procedure is completed for the authorization of the eight month period. Because the second authorization would usually be obtained prior to the end of the first 120 days, the two separate authorizations would permit uninterrupted service for the entire year. In this manner, the 120 day self-implementing authorization can serve a role similar to that of a temporary certificate under section 7(c)(1)(B) of the Natural Gas Act. We also note however, that a transaction may be authorized under § 157.209(a)(2) only once, with no provision for renewal or rollover. If a customer seeks to engage in a transaction exceeding 120 days, it should simultaneously seek authorization of a separate long term transaction under the notice and protest procedure under § 157.209(b)(2).

The Commission believes that the public convenience and necessity supports such a self-implementing, experimental authorization under the blanket certificate. Because of the short-term nature of the transactions under this experiment, they would not raise the type of load growth and gas supply concerns which are inherent in longer term transactions. Furthermore, the market-ordering benefits which arise from the increased participation made possible by automatic authorization of such spot transactions warrant their inclusion in the blanket certificate program.

Because designation of end-uses for 120 day self-implemeting authorization is an integral part of the experiment discussed above, the authorization of 120 day transactions will expire on June 30, 1985, the same expiration date designated for transactions subject to the notice and protest procedure.

Several commenters attacked any extension of the so-called "curtailment immunity" provision of § 284.206. Section 284.206 provides that volumes of gas delivered under Order No. 30 would not be considered as either a supply or market in future natural gas curtailments. The commenters argue that, notwithstanding this provision, each curtailment plan must be considered on its own merits after an assessment of the plan's actual impact upon pipeline customers. The Commission agrees that § 284.206 should not be continued under the blanket certificate program. The purpose for which the exception was adopted—to provide an incentive to displace fuel oil during an emergency—is no longer present. Hence, deliveries under this rule will be treated as any other end-user direct sales program when formulating future curtailment plans. The nature of such future curtailment plans will be determined under section 4 in individual tariff proceedings, and such plans will be formulated after a consideration of each plan's actual impact.

V. Conclusion

The Commission has carefully considered the comments filed in Docket Nos. RM81-19 and RM81-29 before issuing this rule. By implementing this experimental program and incorporating it into the blanket certificate program, the Commission intends to add some flexibility to the natural gas markets and to stimulate the development of long-term reserves. This experiment will continue through June 30, 1985, at which time the Commission will evaluate the effects of this program and decide on appropriate modifications or extensions, as necessary.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act [7] requires the Commission to describe the impact that a proposed rule would have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The purpose of this rulemaking is to make the certificate process more efficient by streamlining and expediting the Commission's review of routine certificate applications by interstate pipelines. This blanket certificate program is specifically designed to reduce the regulatory burdens of the certificate process on all entities, large or small, who ultimately may be affected by the process, either directly or indirectly.

Therefore, in view of the nature of the blanket certificate program which is to reduce regulatory burdens, direct and indirect, on large and small entities, the Commission finds that the amendments to the program by this final rule do not impose any regulatory or administrative burdens on a significant number of small entities and that they do not require an expense of resources by such entities. Accordingly, the Commission certifies that the rule does not have a significant economic impact on a substantial number of small entities.

VII. Effective Date

This final rule relieves restrictions on interstate pipelines by providing streamlined procedures for obtaining authorization to engage in certain transactions. However, the designation in this rule cannot take effect without the regulations issued today in Docket No. RM81-29-000, which are subject to Office of Management and Budget review of their filing requirements under the Paperwork Reduction Act, 44 U.S.C. 3501-3520 (Supp. IV 1980), before becoming effective. Therefore, in accordance with section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d), the Commission waives the requirement for publication 30 days before the effective date and makes the final rule effective upon the effective date of the companion rule issued today in Docket RM81-29-000.

List of Subjects in 18 CFR Part 157

Natural gas.

(Natural Gas Act, 15 U.S.C. 717, Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. 3301; Public Utilities Regulatory Policy Act of 1978, Section 608, Pub. L. 95-617, 92 Stat. 3173, 15 U.S.C. 717f)

Accordingly, the Commission shall amend its regulations in Part 157, Chapter I, Title 18 Code of Federal Regulations, as set forth below.

By the Commission. Chairman Butler dissented. Commissioner Sheldon concurred with a separate statement attached.

Kenneth F. Plumb,
Secretary.

PART 157—[AMENDED]

Section 157.209 is amended by adding new paragraphs (e)(1) and (e)(2) to read as follows:

§ 157.209 Transportation.

* * * * *

(e) *Designation of end-uses.* * * *

(1) *Automatic authorization.* For the period beginning on [effective date] and ending on 11:59 p.m., June 30, 1985, any end-use of gas shall be eligible for transportation pursuant to § 157.209(a)(2) for a term that does not exceed 120 days, if the natural gas was purchased by the end-user from:

(i) A producer and such natural gas was not committed or dedicated to interstate commerce on November 8, 1978,

(ii) An intrastate pipeline, or

(iii) A local distribution company and the volumes purchased are attributable to the company's local supply.

(2) *Prior notice.* For the period beginning on [effective date] and ending on 11:59 p.m., June 30, 1985, any end-use of gas shall be eligible for transportation pursuant to § 157.209(b)(2), if the natural gas was purchased by the end-user from:

(i) A producer and such natural gas was not committed or dedicated to interstate commerce on November 8, 1978,

(ii) An intrastate pipeline, or

(iii) A local distribution company and the volumes purchased are attributable to the company's local supply.

* * * * *

SHELDON, Commissioner, *concurring:*

This rule includes certain off-system sales. the terms and conditions relating to an off-system sale under a blanket certificate are generaly in accord with the Commision's Statement of Policy issued April 25, 1983, in Docket No. PL83-2-000. I dissented to that Statement of Policy and continue to disagree with the majority in that matter. However, I do believe that off-system sales should be given blanket certificate authorization and for this reason, I concur with the majority in this Final Rule.

Georgiana H. Sheldon,
Commissioner.

[FR Doc. 83-20104 Filed 7-29-83; 8:45 am]

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18 CFR Parts 157 and 284

[Docket No. RM81-29-000; Order No. 319]

Sales and Transportation by Interstate Pipelines and Distributors; Expansion of Categories of Activities Authorized Under Blanket Certificate

Issued: July 20, 1983.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its blanket certificate program for interstate pipelines at Subpart F of Part 157 of its regulations. The final rule expands the categories of activities authorized under a blanket certificate to include the transportation of natural gas for high priority end users, for other categories of end users that may be designated by the Commission (see Order No. 234-B, issued July 20, 1983, in Docket Nos. RM81-19-000 and RM81-29-000 published elsewhere in this issue), and for the system supply of another pipeline or local distribution company. The final rule also includes in the blanket certificate program specified off-system sales transactions between interstate pipelines. In addition, Part 284 of the Commission's regulations is amended to expand the blanket certificate program established by § 284.222, presently applicable to Hinshaw pipelines, to include all local distribution companies served by interstate pipelines and to revise the regulations implementing section 311(a) of the Natural Gas Policy Act of 1978 (NGPA). The final rule further simplifies and streamlines the Commission's certificate procedures under section 7 of the Natural Gas Act and eases restrictions on transportation arrangements authorized under section 311(a) of the NGPA.

EFFECTIVE DATE: The final rule is effective upon Commission publication in the **Federal Register** of notice of the Office of Management and Budget's approval and control number under the Paperwork Reduction Act.

FOR FURTHER INFORMATION CONTACT:

Barbara K. Christin, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North

[7] 50 U.S.C. 601-612 (Pub. L. 96-354, September 19, 1980).

Capitol Street, NE., Washington, D.C. 20426, (202) 357-8033;

Robert J. Cupina, Office of Pipeline and Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, (202) 357-9036.

SUPPLEMENTARY INFORMATION:

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing this final rule to implement Phase II of the blanket certificate program at Subpart F of Part 157 of its regulations. This rule expands the category of activities authorized under a blanket certificate to include specified off-system sales transactions between interstate pipelines and certain transportation arrangements. In addition, the final rule amends Part 284 of the Commission's regulations to expand the blanket certificate program established by § 284.222, presently applicable to Hinshaw pipelines, to include all local distribution companies served by interstate pipelines and to revise the regulations implementing section 311(a) of the Natural Gas Policy Act of 1978 (NGPA).

II. Background

The Commission has instituted a blanket certificate program that comprehensively reforms and simplifies its certificate procedures under section 7 of the Natural Gas Act, 15 U.S.C. 717f. The first phase of this program was implemented by a final rule issued in Docket No. RM81-19-000 (Order No. 234, issued May 28, 1982, 47 FR 24254, June 4, 1982; Order on Rehearing, Order No. 234-A, issued August 31, 1982, 47 FR 38871, September 3, 1982). The final rule, which became effective July 6, 1982, established procedures for issuing to jurisdictional natural gas companies a one-time blanket certificate of public convenience and necessity. Upon acceptance of the certificate, an interstate pipeline is authorized to undertake certain routine activities subject only to reporting requirements and to undertake other activities subject to prior notice and protest procedures. The activities which are presently authorized under a blanket certificate include the construction and operation of certain facilities and sales taps, storage services, underground storage testing and development, abandonments, and delivery point and customer name changes. In the final rule implementing the first phase of the program (Order No. 234), the Commission deferred consideration of its proposals relating to transportation, stating that they would be considered in the final rule issued in this docket.

The Commission proposed the second phase of the blanket certificate program in a Notice of Proposed Rulemaking (Phase II Notice) issued in this docket on April 27, 1981 (46 FR 24585, May 1, 1981). In the Phase II Notice, the Commission proposed to expand the category of activities that an interstate pipeline is authorized to perform under the blanket certificate to include certain sales for resale to other interstate pipelines. In addition, the Commission proposed to eliminate the volumetric and end-use restrictions for transportation to high priority end users (such as schools, hospitals, essential agricultural users, commercial, process and feedstock users) that were proposed in the Phase I Notice (issued March 10, 1981, 46 FR 16903, March 16, 1981). The Phase II Notice also proposed several changes which do not relate to blanket certificates for interstate pipelines. These amendments to Part 284 of the regulations would permit successive extensions of self-implementing transportation arrangements authorized by section 311(a) of the NGPA and would make Order No. 63 blanket certificates (§ 284.222), presently available to Hinshaw pipelines, available to local distribution companies served by an interstate pipeline.

Many interested persons filed comments in response to the Phase I and the Phase II Notices. In addition, public hearings were held on May 4 and June 5, 1981. The Commission has considered the comments, both written and oral, filed in this docket and in Docket No. RM81-19-000 prior to the issuance of this final rule.

III. Transportation

The Notices proposed to authorize transportation services for certain end users and for the system supply of other pipelines and distributors.

A. Transportation to End Users

1. *Category of end users.* The Commission has a number of separate transportation programs to end users for different categories of uses. An interstate pipeline may transport gas sold by producers to the pipeline's existing commercial, process and feedstock users pursuant to § 2.79 of the Commission's regulations (the Order No. 2 program). Subpart E of Part 157, promulgated by Order No. 27, permits interstate pipelines to transport gas to schools, hospitals, and essential agricultural users. Another Commission program authorizes the transportation of fuel oil displacement gas during a designated fuel oil shortage emergency period. (Subpart F of Part 284, promulgated by Order No. 30). The eligibility criteria and certificate conditions are different for each program. Except for certain Order No. 30 transactions,[1] the regulations under each program require separate certification for each transaction.

Under the proposed rule in Phase I, high priority end users who are eligible to participate in the Order No. 2 and the Order No. 27 programs would be able to obtain pipeline transportation of their natural gas under the blanket certificate, thereby eliminating the need for separate certification of each transaction. Transportation to high priority end users for a term of five years or less would be automatically authorized. Transportation for a period greater than five years would be authorized under the prior notice and protest procedures in § 157.205 of the regulations. The proposed rule also retained the eligibility criteria and certificate conditions for each program.

In the Phase II Notice, the Commission proposed to consolidate the Order No. 2 and Order No. 27 transportation programs under the blanket certificate by eliminating the volumetric restrictions in the Order No 2 program and simplifying all end-use requirements consistent with the less restrictive Order No. 27 program. Neither the proposal nor this final rule affect the current regulations implementing those programs.

With respect to the Order No. 30 program, on May 21, 1981, the Commission issued Order No. 30-F (Docket No. RM79-34, 46 FR 30491, June 9, 1981) which extended the program until the 90th day following the effective date of the final rule for Phase I of the blanket certificate program. The Order also requested that comments be filed in the Phase I docket (RM81-19-000) on whether the Order No. 30 program should be incorporated into the blanket certificate program. Order No. 234, the Phase I final rule, deferred consideration of this question until the final rule is issued in this docket.[2]

[1] Certain transportation arrangements in the Order No. 30 program are authorized on a generic basis under section 311(a)(1) of the NGPA. (18 CFR 284.202.)

[2] Order No. 234 also extended the Order No. 30 program until 90 days after the effective date of the final rule in this docket.

Most of the commenters supported the Commission's proposals to include transportation for high priority end users in the blanket certificate program. Many of those who opposed inclusion of these transportation arrangements in the blanket certificate program were distributors. They expressed concern that adoption of the Commission's proposal might result in a diversion of substantial volumes of gas from interstate pipelines and could lead to a loss of a distributor's customers because an end user may decide to circumvent its distributor and make its own purchases. The distributors feared that such action would result in lower distributor sales and higher fixed costs that would be passed on to residential and other consumers.

The Commission recognizes that adoption of this proposal would allow high priority users to increase their natural gas consumption for high priority uses beyond their contract entitlements. However, the proposal would, nevertheless, protect the pipeline's other customers by requiring that the transporting pipeline have capacity sufficient to perform the service without detriment or disadvantage to the pipeline's other customers who are dependent on the pipeline's general system supply. In fact, such arrangements may be beneficial to the pipeline's customers because a pipeline authorized to transport under these programs would receive revenues for using capacity that, while paid for by its existing customers, might otherwise not have been fully utilized. These revenues would reduce the costs to be borne by other customers.

Furthermore, the Commission does not believe that there would be any significant load loss, as feared by some of the distributors, because these transportation arrangements can be accomplished only if the interstate pipeline and any distributor involved, which in most cases will be the distributor already serving the end user, agree to the arrangement.

The commenters that opposed the Commission's proposal also claimed that it is inconsistent with the original purpose of the Order No. 2 and the Order No. 27 programs, which were designed to provide temporary, not permanent, relief from curtailment for high priority users. They alleged that the present availability of natural gas supplies and the decrease in curtailments make inclusion of these programs in the blanket certificate unnecessary.

The Commission is not persuaded by these arguments. First, as noted in the Phase II Notice, the policies developed by the Commission with respect to these types of transactions were shaped by the Natural Gas Act's regulatory scheme that prevailed until the enactment of the NGPA in 1978. The enactment of the NGPA and the subsequent improvement in the available deliverability of gas supplies, however, has led us to reconsider these policies.

A direct sale program can serve a variety of policy objectives. Although these programs were originally designed to be a "stop-gap measure" rather than a permanent palliative to curtailment,[3] the emphasis of the programs has shifted. For example the primary objective of Order No. 30 was the reduction of fuel oil consumption. In the context of present natural gas markets, the primary objective of a direct sale program should be market-ordering. Direct sale arrangements make price competition from competing fuels directly felt in wellhead gas markets and serve to keep wellhead prices responsive to reductions in the burner tip price of other fuels.

By providing end users with an alternative to purchasing all of their gas requirements from the system supply of a distributor or interstate pipeline, these programs encourage pipelines to adopt gas purchasing practices which keep their delivered prices competitive. In addition, to the extent that an end user consumes gas purchased in a direct sale instead of switching to alternative fuels, the transportation service to the end user continues to bear some of the fixed costs of the transporting pipeline which might otherwise be shifted to the pipeline's remaining customers. For these reasons, the Commission finds transportation of direct sale gas to end users to serve the public convenience and necessity. This finding is consistent with the intent of section 608 of the Public Utility Regulatory Policies Act (PURPA) [4] and longstanding Commission policy to assure adequate gas supplies to high priority end users. In addition, the Commission's experience with these transactions in the past has been that they are relatively routine and noncontroversial and, therefore, appropriate for streamlined approval procedures.

Most of the commenters also supported the Phase II proposal to consolidate, in the blanket certificate, the Order No. 2 and the Order No. 27 programs in a manner consistent with the less restrictive requirements of the Order No. 27 program.

The Commission agrees with these commenters. Given the Commission's general policy to promote transportation on behalf of high priority end users and the present surplus of natural gas, there is no reason to maintain, in the blanket certificate program, the current distinctions between the two transportation programs. Therefore, for these reasons and the reasons discussed in the Notices, the Commission adopts its proposal to expand the blanket certificate program to include transportation of natural gas to high priority end users in a manner consistent with the requirements of the Order No. 27 program.

Accordingly, in the final rule, there is no limitation on the volumes of gas that may be transported for high priority end uses under the blanket certificate. In addition, as with the Order No. 27 program, transportation under the blanket certificate is not restricted to the certificate holder's existing customers, so that natural gas owned by an end user that is not presently served by the certificate holder is eligible for transportation under the blanket certificate.

Proposed § 157.202(l) defined those end uses that would be qualified for transportation authorization under a blanket certificate. Specifically, paragraph (l)(2) of the proposed definition referred to those users "eligible to receive gas" under the Order No. 2 program. Several commenters suggested that the definition be modified because it appeared to retain the eligibility criteria for the Order No. 2 program. The Commission agrees with these commenters and amends the proposed definition so as to eliminate the references to the Order No. 2 and the Order No. 27 programs. Section 157.202(l), now § 157.202(b)(13) of the final rule, defines high priority end uses as: the use of natural gas in a school or hospital or similar institution as defined in § 281.103(a) (11) or (12); any use certified by the Secretary of Agriculture in 7 CFR 2900.3 as an "essential agricultural use" under section 401(c) of the NGPA; the use of natural gas in a large commercial establishment (50 Mcf or more on a peak day); the process or feedstock use of natural gas; and natural gas used for plant protection.

Proposed §§ 157.202(l)(3) and 157.209(d)(4)(ii) authorized the Commission to specifically designate other end uses as eligible for

[3] Order No. 2, Docket No. RM75-25, issued February 28, 1978, FERC Stat. & Regs. ¶ 30,005 at 30,025.

[4] Section 608 of PURPA amended section 7(c) of the Natural Gas Act to authorize the Commission to issue a certificate of public convenience and necessity for the transportation of natural gas developed by an end user or purchased from a producer for high priority uses as defined, by rule, by the Commission.

transportation authorization under the blanket certificate. That proposal is adopted in the final regulations at § 157.209(e) and will provide the Commission with the flexibility to respond to changing market conditions by authorizing certain categories of transportation to end users on a temporary basis.[5]

2. *Order No. 30 Program.* Subpart F of Part 284 of the Commission's regulations, promulgated by Order No. 30, authorizes transportation to an end user of fuel oil displacement gas during a designated fuel oil shortage emergency period. Many of the Order No. 30 transactions may take place on a self-implementing basis. Others require separate certification for each transaction. Only end users certified by the Economic Regulatory Administration (ERA) of the Department of Energy as displacing fuel oil (rather than coal) are eligible to participate in the Order No. 30 program.

The Order No. 30 program was originally set to expire on May 31, 1980. However, on May 22, 1980, the ERA referred a proposed rule for a one-year extension to the Commission under section 403 of the Department of Energy Organization Act. As a result, Order No. 30-B was issued to extend the program for three months to give the Commission an opportunity to conduct a notice and comment rulemaking on the extension.

In Order No. 30-D, the Commission extended the program until May 31, 1981. The ERA then proposed inclusion of the fuel oil displacement program as a part of the Commission's comprehensive blanket certificate program (FERC Stat. & Regs. ¶ 37,509, 46 FR 27355 (May 19, 1981)), and Consolidated Edison filed a petition for a rulemaking to implement ERA's proposal.[6] As a result, in Order No. 30-F, issued May 1, 1981, the Commission requested comments in the Phase I docket (Docket No. RM81-19-000) on whether the Order No. 30 program should be incorporated into the blanket certificate program. At the same time, the Commission extended the Order No. 30 program until the ninetieth day following the effective date of the final rule for Phase I of the blanket certificate program. In Order No. 234, which implemented the Phase I blanket certificate rule, the program was extended until 90 days after the final rule is effective in Phase II.

After careful consideration of all the comments received on this question, the Commission has determined not to include the Order No. 30 program in its present form as a permanent part of the blanket certificate. The Order No. 30 program was established as a temporary response to a fuel oil shortage emergency. In light of the current abundant oil supplies and lower prices, there is no longer a basis for finding that a fuel oil shortage emergency exists.

Moreover, the companion order issued with this final rule authorizes transportation to all end users under the blanket certificate through June 30, 1985. This means that the types of transactions previously authorized under the Order No. 30 regulations may be authorized under a blanket certificate for the time being. Since the Order No. 30 program will not expire until 90 days after the effecive date of this final rule, there should not be a gap in authorization of these transactions.

A pipeline who chooses not to use these procedures may still request authorization for these types of transportation arrangements under section 7(c) of the Natural Gas Act or, in some instances, under section 311(a) of the NGPA.

3. *Eligible sellers.* As proposed, a certificate holder would be authorized to transport gas on behalf of a high priority end user if the gas is purchased from a producer or is owned and developed by the end user. A number of commenters, however, requested that blanket certificate authorization also apply to natural gas purchased by the end user from an intrastate pipeline or from the local supplies of a local distribution company.

When the Commission designed its previous direct sale programs, there was substantial concern that such arrangements potentially could divert needed new gas resources from the system supply of interstate pipelines and that, because direct sales were not subject to price regulation under the Natural Gas Act, such arrangements would generally bid-up wellhead prices. Neither concern remains relevant under the transition to decontrol instituted by the NGPA. A uniform set of ceiling prices applies to producers irrespective of the type of purchaser. In addition, the Commission expects the price for direct sale gas generally will not exceed the price of alternative fuels, so that it is unlikely that such sales to end users would bid-up wellhead prices.

The Commission believes that such an amendment would facilitate the transportation and delivery of excess supplies of natural gas, and is a logical extension of the blanket certificate transportation program to end users. Moreover, permitting intrastate pipelines and distributors to make such sales should increase competition between sellers and thereby minimize costs to end users seeking to acquire gas in direct sales arrangements.

The Commission believes that both of these additional sources of direct sale gas will not divert gas which would otherwise be available to interstate system supplies. Instead, these additional sources of direct sale gas may further encourage domestic exploration and development and may generally further the market ordering objectives of the direct sale program.

Accordingly, in response to comments, the Commission deletes the proposed first sale requirement and includes in § 157.209(a)(1) of the final regulations transportation authorization for gas owned and developed by a high priority end user and for gas purchased by the end user from a producer, an intrastate pipeline, or the local supplies of a local distribution company.

4. *Term of each transaction.* The Commission proposed that transportation to high priority end users for a term of five years or less be automatically authorized without further Commission approval, and that transportation to high priority end users for a term of greater than five years be authorized under the prior notice and protest procedures of § 157.205.

A number of commenters objected to the Commission's proposal for several reasons. Some commenters suggested that all transportation arrangements should be subject to the prior notice and protest procedures. They stated that, in this way, there is an opportunity to review and protest *any* proposed transaction before it is authorized. These commenters argued that the transportation arrangements proposed for inclusion in the blanket certificate are not routine and warrant prior review.

The Commission disagrees with these commenters. As previously stated, the Commission's experience is that transportation of gas purchased by a high priority end user for a term of not more than five years is fairly routine and noncontroversial and, therefore, appropriate for automatic authorization under § 157.209(a).

Other commenters suggested that there should be an exception in the final rule for reserves owned and developed by a high priority end user so as to automatically authorize transportation of this gas for terms in excess of five years. They suggested automatic

[5] In this regard, a companion order is being issued today in Docket Nos. RM81-19-000 and RM81-29-000 under which all end uses are designated as qualified for transportation services under the blanket certificate through June 30, 1985.

[6] Petition for Rulemaking, filed March 4, 1981, Docket No. RM81-22-000.

authorization for a term up to ten years or the life of the reserves, whichever is less.

The Commission agrees with these commenters that such authorization is justified by the inherent risk involved in exploration and the need for sufficient time to economically recover such reserves. In addition, such an approach, which is consistent with the standards of the Order No. 27 program, may encourage end users to explore for and develop their own reserves. (*See* 18 CFR 157.105(a)(2).) Accordingly, § 157.209(a)(1)(ii) of the final regulations allows automatic authorization for reserves owned and developed by a high priority end user for a term up to ten years or the life of the reserves, whichever is less.

A few commenters proposed an outer limit on the term of the transportation arrangements in § 152.209(b) that are authorized under the prior notice and protest procedures of § 157.205. They argued that a proposed term of more than ten years, for example, should not be eligible for blanket certificate authorization. The Commission believes that the prior notice and protest procedures for long term transactions provide adequate protection because a person has the opportunity to review and protest a proposed transaction, and, if the protest is not resolved, the transaction can only be authorized in a section 7 proceeding.

B. Transportation for System Supplies

In the Phase I notice, the Commission proposed to provide blanket certificate authorization for the transportation of natural gas on behalf of any local distribution company, interstate pipeline, or intrastate pipeline, where the local distribution company or pipeline receives such gas for its system supply. Authorization would be subject to the prior notice and protest procedures in § 157.205 and could be for any term.

These transactions currently may be authorized under other Commission regulations.[7] Those regulations limit self-implementing transactions to two years or less and require prior Commission approval under § 284.107 for terms longer than two years. In the Notice, the Commission stated its intention to retain the programs presently in effect, but to give a pipeline the option of proceeding under a blanket certificate instead of requesting prior Commission approval pursuant to § 284.107. The Commission deferred consideration of the proposal until this final rule.

No commenters opposed the Commission's proposal. The Commission believes that the proposal is a reasonable adjunct to the current regulations that limit self-implementing transactions to two year terms. In addition, as already noted, any such transportation arrangement could be authorized under the blanket certificate only after prior notice. In this way, staff and other interested persons would have the opportunity to review the proposed transaction before it could be authorized.

For these reasons, the Commission adopts proposed § 157.209(b)(2), now paragraph (b)(3), to authorize the transportation of natural gas on behalf of other pipelines and local distribution companies where such gas is received by the pipeline or local distribution company for its system supply. This authorization is subject to the prior notice and protest procedures of § 157.205. The final regulations at § 157.209(c)(2) describe the information that should be included in a request for authorization. This information is essentially the same as that required by the existing regulations in an application for prior approval under § 284.107.

C. Reporting Requirements

The information required by the final regulations is necessary in order to fully apprise the Commission of the transportation arrangemets that take place under the blanket certificate. Without this information, the Commission would be unable to fulfill its regulatory responsibilities. The information that is collected will aid the Commission in assessing the impact of the streamlined procedures and the blanket certificate program.

1. *Initial report for self-implementing transactions.* Section 157.209(g)(1) of the final regulations requires that a certificate holder file an initial report within thirty days of the commencement of any transportation arrangement that is automatically authorized under § 157.209(a). This requirement is consistent with the Commission's treatment of other types of self-implementing transportation arrangements in current Commission programs. (*See* 18 CFR 284.106.) The Commission needs the information contained in the initial reports in order to evaluate the extent to which these transactions are automatically authorized under the blanket certificate. The information required by § 157.209(g)(1) is similar to, but not as detailed as, the information required by § 284.106(a) relating to initial reports of self-implementing transportation arrangements under section 311(a)(1) of the NGPA.

2. *Content of request under prior notice and protest procedures.* The Commission proposed that requests for transportation authorization on behalf of end users include the information specified in § 157.103 of the regulations. That section describes the contents of an application for certification of end-users transportation arrangements under the Order No. 27 program.

The proposed regulations are amended in the final rule by deleting some of the information required by § 157.103. Moreover, the final regulations do not reference § 157.103, but specifically list the information that must be included in a request for authorization made pursuant to the prior notice and protest procedures in § 157.205.

3. *Annual report.* Section 157.207 establishes general reporting requirements applicable to all certificate holders. Paragraph (a) requires the certificate holder to file an annual report on or before May 1. The annual report provides information on arrangements authorized under the blanket certificate. This final rule adds a new subparagraph to § 157.207(a) to require the certificate holder include in its annual report the information specified in § 157.209(g)(2) of the final rule.

In the Notice, the Commission proposed that detailed information relating to individual transactions be included in the annual report. However, that information is not needed in the annual report because it is submitted in initial reports and in requests for authorization under §157.205. Therefore, the information described in the final regulations at § 157.209(g)(2) relates to total volumes and revenues for natural gas transported in the previous year pursuant to § 157.209.

4. *Final report.* As proposed, § 157.207(c) of the final regulations requires a certificate holder to file a final report at the conclusion of any transportation service authorized under § 157.209.

In the Phase I Notice, the Commission also proposed that, for end-user transportation arrangements, the information required by § 157.105(f) should be included in a final report.

The Commission has determined, however, that much of this information is unnecessary. Therefore, the final rule requires only some of the information specified in § 157.105(f) relating to the end use of the gas transported and the average delivered cost per MMBtu. In

[7] Subparts B and C of Part 284 authorize an interstate pipeline to transport natural gas on behalf of any local distribution company, intrastate pipeline, or interstate pipeline.

addition, the final rule requires that a description and the cost of any facilities that were constructed in order to provide the transportation service should be included in the final report.

D. Treatment of Revenues

In the Phase I Notice the Commission proposed § 157.206(g) for the treatment of revenues received for the transportation of natural gas (including storage service) authorized under the blanket certificate. Under that proposed section, a pipeline may choose (1) to include representative revenues or volumes in test period based rates and, to the extent the revenues or volumes attributable to such services fall within the representative levels, retain all transportation revenues, or (2) to exclude transportation volumes and revenues from the test period based rates and credit to Account No. 191 either all revenues in excess of one cent per MMBtu or all revenues in excess of demonstrated out-of-pocket expenses.

The Commission's proposal is identical to other regulations governing the treatment of transportation revenues in other Commission programs such as the Order No. 27 program (proposed for inclusion in the blanket certificate) and programs established in Part 284 of the regulations to facilitate transportation of natural gas by interstate pipelines. Historically, in these programs interstate pipelines charged cost-based transportation rates, and revenues or volumes from such transportation were considered in establishing the pipeline's subsequent sales and transportation rates. However, in some cases transportation volumes and revenues were excluded from test period data used to calculate interstate pipeline rates due to the short-term, non-recurring nature of the transportation service. In order to keep costs and revenues in balance, the Commission adopted § 284.103(d) (identical to proposed § 157.206(g)) to provide for a crediting of revenues from short-term transportation under certain circumstances. The one cent per MMBtu amount allowed to be retained by the transporter was designed to be a rough estimate of associated out-of-pocket costs.

The proposed regulations were meant to give the pipeline a choice. They were intended to allow a pipeline that chose to include representative levels of short-term transportation service in the test period data used to determine its base rates to retain all transportation revenues attributable to such services. If the pipeline chose not to treat short-term transportation services in its rate case, then it could retain either one cent per MMBtu or its demonstrated out-of-pocket costs, whichever was greater. All remaining revenues were required to be credited to Account No. 191, thereby flowing directly to the pipeline's sales customers under the PGA mechanism. The first alternative may be termed the "representative levels" option while the second may be referred to as the "revenue crediting" option.

It has come to the Commission's attention, however, that the wording of the proposed regulations is ambiguous and does not clearly reach the intended result. The interstate pipelines which addressed the revenue treatment issue in their comments in this proceeding indicated they interpreted our existing regulations, § 284.103(d) to require the crediting of transportation revenues to the extent actual transportation volumes or revenues exceeded representative test period levels. Under this interpretation, a pipeline would of course have only a limited incentive to elect to establish a representative level of transportation volumes: to the extent actual transportation fell *below* representative levels, the pipeline would under-recover its full cost of service, while revenues derived from *exceeding* the rate design transportation levels (except for one cent per MMBtu) would in effect be paid over to the pipeline's sales customers through crediting to the Account No. 191. Thus, under this interpretation of the regulations, the pipeline's reward for electing to risk under-recovery of costs is limited to one cent per MMBtu—the same benefit obtained without risk of under-recovery under the revenue crediting option.

The Commission recognizes that the regulations may be read to require revenue crediting if revenues or volumes exceed representative levels. However, in practice, the Commission has allowed a pipeline to retain all revenues if it includes representative levels of volumes or revenues in its rate case. This approach is consistent with traditional ratemaking principles and provides a corresponding reward for the risk that a pipeline takes when it chooses to include representative levels in its rate case. Therefore, in order to clarify the Commission's intent and remove any ambiguity, the final regulations at § 157.206(h) are modified from the proposal to clearly require revenue crediting only where a pipeline has not included representative levels in its rate case. Thus a pipeline which takes the risk of transportation levels under the blanket certificate falling below design levels may retain the benefits if those actual levels exceed design levels.

These regulations will provide an incentive for interstate pipelines to provide transportation service more readily in many cases. And in any event, if the pipeline elects the representative levels option, it has an undisputed incentive *between rate cases* to transport as much gas as possible, just as is the case with sales levels set in the ordinary rate proceedings.

But since a significant number of transportation tariffs on file with the Commission are at levels between 20 and 40 cents per Mcf or MMBtu, and because these amounts are either under- or over-recovered to the extent actual levels deviate from design levels, the risk of under-recovery of costs is a realistic possibility.

Accordingly, for one class of transportation customer, the industrial end user, a different type of incentive may be appropriate. What may be appropriate is an incentive mechanism which imposes no risk of under-recovery of costs while providing a more limited opportunity to increase revenues, as compared to the representative levels option. As explained in more detail below, the Commission has determined to allow pipelines to adopt such an option for a limited, experimental period.

The end user stands on a different footing from other shippers for several reasons. First, the volumes to be moved in individual transactions tend to be far less than the volumes to be transported for other interstate or intrastate pipelines or local distribution companies.[8] In addition, since most end users are served through local a distribution company, the pipeline may frequently be unfamiliar with the end user, its gas purchasing personnel, its particular service requirements or even its general business standing. It may not be surprising that in some instances, a pipeline may be less than enthusiastic about tailoring its overall operations to accommodate the requirements of such relatively unfamiliar, small volume shippers. Nor may it be surprising that a pipeline may have been reluctant to offer such a service where the penalty for overestimating volumes for this non-traditional service was substantial under-recovery on a unit basis but the reward for exceeding design volumes was minimal.

Thus end users would appear to have been confronted with greater

[8] For example, based on reports filed with the Commission, the total volume of gas transported for *all* customers under the Order No. 533/Order No. 2 programs has averaged below 19,000 Mcf/d since early in 1979. No gas has moved under these programs since late in 1981.

institutional and informational barriers in negotiating with pipelines for transportation than have been faced by larger and more established shippers.

This analysis is supported by the many commenters who argued that additional financial incentives are needed to encourage pipelines to undertake transportation to end users. In fact, all of the commenters who addressed this point, including the ERA, favored some type of financial incentive for interstate pipelines to engage in end-user transportation. End users pointed to the reluctance or the refusal on the part of the pipelines to transport their gas. As noted earlier, pipelines cited the regulations that allow only one cent per MMBtu to be retained as not providing a sufficient financial incentive. The comments do not state, however, how much more gas would have been transported for end users if there had been greater economic incentives.

To date, the Commission's programs to authorize transportation to end users seem to have met with only limited participation. During the height of curtailment, a total of 6,065,969 Mcf of natural gas was delivered under the Order No. 2 program during the November 1976–March 1977 period to over 100 industrial facilities in 16 states.[9] Since that time, participation in the program has dropped, due in part to the lack of available pipeline transportation,[10] as well as to a decline in curtailment of system supplies. In 1982, there were no ongoing Order No. 2 transportation arrangements and ten ongoing under Order 27.

The Commission has carefully considered these facts and the comments submitted on this issue. In view of the importance of removing impediments to transportation during this period of excess gas deliverability, as well as legislative and pricing uncertainty, the Commission has decided to initiate a short-term experiment in situations where the pipeline does not establish representative levels. As previously noted, a pipeline that establishes levels has an incentive to exceed those levels and retain all revenues. Although it is not certain that a financial incentive would greatly encourage transportation to end users, it is a reasonable assumption. The Commission's goal is to have the available data to hopefully answer that question at the conclusion of this experiment.

[9] Order No. 2, *supra* n.2, at n.7.

[10] *See, e.g.*, Cerro Wire & Cable Co. v. Transcontinental Gas Pipe Line Corp., 12 FERC ¶ 61.158; American Bakeries Company, 14 FERC ¶ 61.156.

The approach adopted by the Commission in this rule is similar to one which has been incorporated into some recent legislative proposals. Under this approach, an Additional Incentive Charge (AIC) of up to 5 cents per MMBtu is established which may be charged to end users for the transportation of gas. Such a charge would share the economic benefits received by an end user who has contracted for low-priced supplies with other on-system customers, because, under the AIC approach, revenues from end-user transportation arrangements would be used to offset a portion of the fixed costs of the pipeline which would otherwise be borne by sales customers. This incentive for the pipeline does not affect the appropriate sharing of cost responsibility between sales and transportation customers.

The final rule provides for the use of an AIC in conjunction with the revenue crediting requirements of § 157.206(h)(1) on an experimental basis for the period of approximately eighteen (18) months. Only end-user transportation arrangements authorized under § 157.209 (a), (b)(1), or (b)(2) performed before February 1, 1985, would be eligible for AIC treatment. The Commission is limiting this experiment only to these end-users transportation arrangements because the record in this proceeding indicates that these shippers are encountering problems in securing pipeline transportation. Intrastate pipelines and distributors appear to be receiving transportation service when requested, and such transportation is authorized generically under § 284.122(a).

In this regard, the Commission stresses the experimental value of this program. The courts have consistently granted us considerable latitude where we undertake a "justifiable experiment" in the course of a "continuing search for solutions" to critical problems facing the gas industry.[11] In allowing agency experimentation, the courts have emphasized that, to pass judicial muster, the agency action must be limited in duration and that the agency must subject the results to "meaningful review and analysis and evaluation before the experimental practice is allowed to continue or to become institutionalized as a more permanent procedure." [12]

[11] Public Service Comm. v. FPC, 467 F. 2d 361, 371 (D.C. Cir. 1972). *See also* APGA v. FPC, *supra*, 567 F. 2d at 1031 (the courts give extra deference to the Commission when it articulates a tentative balance on an issue, announcing that it is prepared to re-evaluate the equilibrium it sought to achieve.)

[12] *Id.*

The Commission will closely monitor transportation under the blanket certificate in order to ascertain the effectiveness of this financial incentive for end-user transportation and the effects of the program on sales customers and other shippers. Upon the conclusion of this experimental period, the Commission will determine what incentives, if any, may be appropriate for the future. To aid the Commission in its evaluation, § 157.209(g)(3) of the final rule requires a certificate holder to file an interim report midway through the program.

The final rule provides that an interstate pipeline that does not establish representative levels of transportation volumes or revenues for this type of service in its rate case may elect to participate in the AIC experiment by filing a tariff for end-user transportation under section 4 of the Natural Gas Act. This tariff would allow a pipeline to charge, collect and retain an additional charge which may exceed the blanket certificate holder's otherwise applicable transportation rate by an amount per MMBtu up to the AIC. No end user is required to pay the AIC. The final rule merely permits a certificate holder to collect and retain an incentive charge if the shipper agrees to make the payment. The maximum AIC is applied to each transaction as a whole regardless of the number of transporting pipelines. For example, if the AIC is five cents per MMBtu, and there are three pipelines transporting under a blanket certificate in the transaction, the five cents per MMBtu may be allocated among the pipelines in any proportion as the parties agree so long as the total amount does not exceed five cents per MMBtu.

The Commission is aware that a pipeline may have a rate settlement in effect under which the pipelines would be allowed to retain all revenues in excess of representative amounts for certain end-user transportation services. Since the settlements were negotiated prior to the implementation of this end-user transportation program in the blanket certificate, it is clear that the transportation services authorized by this rule could not have been included in representative levels. Therefore, because the election to use representative levels did not include services subject to this rule, volumes transported under the blanket certificate may not be counted towards those representative levels. Until such time as a certificate holder establishes representative levels reflecting these services in a new rate case, the pipeline must credit such revenues from this program in excess of the sum of any AIC charge and one cent per MMBtu to Account No. 191.

The question of choosing the appropriate AIC amount is difficult. The Office of Regulatory Analysis has evaluated the potential revenue impact of various AIC levels based on historical data. This evaluation has been made part of the public file of this proceeding. While this evaluation suggests that even a full five cent AIC amount collected from *all* end-user transportation in 1981 would have a modest impact on pipelines' rates of return, review of the data does not single out a particular AIC level suited to provide the requisite incentive for end-user transportation. Therefore, the Commission has examined the available data and tentatively finds that such evidence supports the reasonableness of the AIC level chosen for this experimental period. The Commission has attempted to choose an AIC level that is neither too high nor too low but in a zone of reasonableness that is sufficient to encourage transportation. If the level is too high for the market, the certificate holder and shipper can negotiate a lower incentive charge. If the rate is too low, it may not provide sufficient incentive. We note that the comments generally reflected that one cent was too low to provide any meaningful incentive. Ten cents per MMBtu was suggested as appropriate by Delhi Pipeline. We believe this is too high and, therefore, the Commission has adopted a range from one to five cents as just and reasonable. With this in mind, the Commission has exercised its discretion and selected a maximum AIC of five cents per MMBtu.

In evaluating the reasonableness of incentives levels, the Commission notes that the shippers who will be negotiating with the pipeline companies for transportation will be end users purchasing gas in transactions which are direct sales, not jurisdictional sales for resale under the Natural Gas Act.[13] We expect, moreover, the sales price to be below—and perhaps considerably below—the applicable ceiling prices under the NGPA.[14]

Under these circumstances, the end user's willingness to purchase natural gas for transportation under the blanket certificate is a function of competition in the burnertip or end-use markets. In other words, the amount an end user is willing to pay for natural gas is limited by the delivered price of available alternate fuels or gas supply sources. As a result, the end user is more concerned with the *delivered* price of the gas supply than with the allocation of that sum between the producer and any transporters. Unless the total amount paid to acquire the gas is less than the cost of available alternate fuels (or gas supply sources) the end user will not purchase the gas in the first instance and the issue of the appropriate transportation rate is moot.

While we must satisfy ourselves that the transportation rate, including any AIC, is "just and reasonable" under the NGA, the evolving conditions in the end-user markets appear to allow for a wider play of competitive forces in establishing such a rate.[15]

If we are generally correct in our assessment that natural gas is presently in surplus supply and overpriced in many of its marginal uses, then, effectively, it will be the producer who pays for the AIC, *not* the end user. This will result because the producer will be forced to accept a lower sales price for the gas than he would be able to negotiate if the transportation margin (including any AIC) were smaller.[16] Under these circumstances there would be no question but that the AIC rate is just and reasonable under the Natural Gas Act because the customer purchasing transportation service—the customer the Commission is obligated to protect from unjust and unreasonable charges—does not in economic fact pay for the incentive.

If, on the other hand, we are generally wrong in our assessment and it turns out that natural gas remains underpriced in many of its marginal uses, then the end users will indeed pay the full authorized AIC and will therefore pay more for transportation under the AIC approach than had no AIC amount been permitted. However, they will still be better off because they would not agree to pay the transportation rate unless the total gas cost was less than other available energy supplies. In any event, as the program is limited to an 18-month experimental period, the Commission will be able to revise the program in light of experience from all the contingencies being tested.[17]

Under any of these contingencies underlying the AIC option, however, the pipeline's sales customers will plainly benefit from any increase in end-user transportation because the bulk of the revenues will be credited to the Account No. 191 for their benefit. Moreover, the transportation charges retain their cost "anchor" departing therefrom only to the extent of the AIC.

The Commission of course is not limited solely to costs in establishing just and reasonable rates under the Natural Gas and Federal Power Acts. Court cases under these and other statutes make it clear that the Commission has broader flexibility to use its rate and price setting power functionally to advance sound public policy goals.[18]

As the Commission said very recently in Opinion No. 170, *Ohio Edison Company*:[19]

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[13] These sales in most cases will be "first sales" subject to maximum lawful ceiling prices under the NGPA.

[14] The current surplus of deliverability from lower-48 domestic supplies has been estimated by the Energy Information Administration to total at least 2.6 Tcf for the six-month period April through September 1983. *See* Memorandum from Diana Lique, Acting Director, Reserves and Natural Gas Division, Office of Oil and Gas, Energy Information Administration. A copy of this memorandum has been placed in the public files in this docket. While there may be some disagreement over the exact extent of the current surplus, it is clear that it is large and has been swelling over the last year. Allowing easier transportation for end users should help convert some of this excess supply into lower prices for delivered gas.

[15] Compare with Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3824 (May 16, 1983). (Regulatory forebearance upheld where competitive market forces found adequate to assure just and reasonable rates under section 201 of the Communications Act of 1934.)

[16] This situtation is directly comparable to determining the incidence of a sales tax. Regardless of whether the tax is legally imposed upon the buyer, elasticity of demand will determine the extent to which the tax is either absorbed by the seller through reduced margins or effectively passed on to the buyer. *See, e.g.*, Musgrave and Musgrave, *Public Finance in Theory & Practice* (1973) at 427–428.

[17] American Airlines v. CAB, 359 F.2d 624, 633 (1966). The court noted that "a month of experience will be worth a year of hearings." We concur. The court in that case proceeded to uphold a "blocked space" program as a reasonable projection, taking into account the agency's duty to re-evaluate in the light of experience.

[18] *See, e.g.*, Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 601 (1945); City of Detroit v. FPC, 230 F.2d 810 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956) (while cost "anchor" must be used as point of departure just and reasonable rates not limited solely to rate base cost methods); Permian Basin Area Rate Cases, 390 U.S. 747, 796 (1968) (Commission not limited solely to cost in establishing just and reasonable rates but may use price "functionally"); FPC v. Texaco, 417 U.S. 380, 399–400 (1974) (while Commission may not place exclusive reliance on market prices in setting just and reasonable rates, a market price "may certainly be taken into account along with other factors"). Tenneco Oil Co. v. FERC, 571 F.2d 834, 845 (5th Cir.), cert. dismissed, 439 U.S. 801 (1978) (same); American Public Gas Ass'n. v. FPC, 567 F.2d 1016, 1058 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) (Commission "not bound strictly to cost" in setting just and reasonable rates). See also American Public Power Ass'n v. FPC, 522 F.2d 142 (D.C. Cir. 1975) (approving Commission rule under Federal Power Act allowing for future test years for ratemaking purposes) and FPC v. Conway Corp., 426 U.S. 271 (1976) (Commission must take unregulated rates into account in setting just and reasonable rates under the Federal Power Act).

[19] 23 FERC ¶ 61,344 (June 3, 1983).

In coordination transactions, however, such as this case involves, the Commission allows rates which are less closely related to accounting costs but which approximate economic costs or serve other policy objectives. In these transactions, an "adder" is allowed as in incentive to the selling utility to engage in coordination transactions. Without some incentive above its incremental costs, a utility has no reason to undertake a coordination transaction. It is also important to note that such transactions usually reduce the cost of service to the buying utility and thus the ultimate consumer.

The AIC incentive is analogous.

Accordingly, the Commission finds that the AIC rate satisfies the just and reasonable standard of the Natural Gas Act and the sound public policy goals articulated herein.

The Commission recognizes that allowing this type of incentive rate to be charged may have the potential, over the long run, of encouraging pipelines to prefer to provide transportation for end users vis-a-vis other sales or transportation services. This, however, is not our intention.

But the uncertainty and novelty associated with providing such services in today's markets argue in favor of offering particular encouragement at present. The absence of established institutional relationships for providing these services argues likewise. The reporting requirements discussed above will assist the Commission and the public in monitoring developments between now and January 31, 1985, and enable the Commission to modify the program at that time as appropriate.

These are unusual times for the natural gas industry. With the transition to competitive wellhead prices, where competitive pressures from alternate fuels are pushing the price of more and more gas below the maximum lawful prices prescribed by law, end users confronted with the need to lower production costs may be expected to seek out the lowest priced, reliable gas supply available.

The AIC approach is designed to assist end users in this process by allowing for greater flexibility within the industry to move gas supplies more readily to marginal uses. Even if experience dictates the program be terminated in 1985, the AIC program will be valid while it is in operation, as an experiment.[20]

In addition, if, as a result of the rule, some users switch from another fuel to natural gas, this may help to relieve take or pay pressures and help stabilize industrial demand for gas. The promise of a market for gas may in turn assist in encouraging continued exploration and development efforts. As a result, incentives to encourage pipelines to transport such gas would serve an important national objective and would be consistent with Congressional objectives evidenced by section 608 of PURPA.[21] Moreover, in establishing the Department of Energy and the Commission, Congress expressly declared that one of its purposes was to "foster and assure competition among parties engaged in the supply of energy and fuels." [22] Given these public interest considerations, we reiterate our finding that the transportation rates that include an AIC are just and reasonable for this experimental period.[23]

IV. Off-System Sales

In the Phase II Notice the Commission proposed to permit certain sales for resale between interstate pipelines under the blanket certificate. The Phase II Notice proposed a new § 157.210 to authorize those transactions subject to the prior notice and protest procedures in § 157.205.

Most of the commenters supported the concept of including off-system sales in the blanket certificate. Others, however, objected to the Commission's proposal because they believe that the potential damage to the public interest from off-system sales are such that a case-by-case review is required. They argued, for example, that there is a need to examine the price in each proposed transaction to ensure that existing customers are not damaged by pipelines' buying "high" and selling "low". Interstate pipelines, it is argued, should be husbanding their gas supplies instead of selling off-system.

Sales under proposed § 157.210 are intended to permit the selling pipeline to alleviate problems resulting from excess deliverability or take-or-pay commitments and, at the same time, to make supplies available to interstate pipelines needing gas. The Commission believes that the public interest will be served by making it generally easier for interstate pipelines to make off-system sales subject to generic qualifications rather than requiring a case-by-case certification of each transaction.

The use of the prior notice and protest procedures in § 157.205 for off-system sales should provide adequate protection. Persons will have the opportunity to examine each proposed transaction and file a protest. If the protest is not withdrawn within the period of time specified in § 157.205, the certificate holder would be required to proceed under section 7(c). Accordingly, for the reasons discussed above and in the Notice, the final regulations authorize specified off-system sales transaction between interstate pipelines. Such authorization is subject to the prior notice and protest procedures in § 157.205.

The decision to include, in the blanket certificate program, certain off-system sales is consistent with the Commission's Statement of Policy issued April 25, 1983, in Docket No. PL83-2-000. Furthermore, the terms and conditions relating to an off-system sale under a blanket certificate are generally in accord with the Statement of Policy and supported by the record in this proceeding.

A. Take-or-Pay Liability

As already noted, some commenters are concerned that off-system sales may be detrimental to the selling pipeline's on-system customers, in the sense that contracted reserves are being sold away. In addition, it is argued that the effect of such sales may be to increase the on-system customers' average cost of gas.

In order to assure that the pipeline's customers receive some benefit from these sales, the final rule requires that the selling pipeline must have at least a potential take-or-pay liability.

B. Term

In § 157.210(a)(2) the Commission proposed to limit the term of each off-system sale that may be authorized under the blanket certificate to one year.

Several commenters objected to the one-year limitation. Some stated that it is unnecessary because the prior notice and protest procedures provide adequate protection. Others noted that, because a take-or-pay obligation prompting an off-system sale may extend longer than one year, the blanker certificate should either allow for a longer term or allow for extensions of the one-year term.

[20] Compare with APGA v. FPC, *supra*, 567 F.2d at 1055 (upholding validity of FPC advanced payments program during effective period notwithstanding subsequent termination).

[21] Section 608 gives the Commission express authority to certificate such end-user transportation arrangements. The end-user transportation authority for high priority users in the blanket certificate is an exercise of the Commission's authority under section 608 of PURPA as well as section 7(c) generally.

[22] *See* section 102(12) of the Department of Energy Organization Act, 42 U.S.C. 102(12) (Supp. II 1978). Even prior to enactment of the DOE Act, the courts have recognized the Commission's obligation, when establishing a just and reasonable rate, to "consider competitive factors." Central Iowa Power Cooperative v. FERC, 606 F. 2d 1156, 1162 (D.C. Cir. 1979). *See also* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); California v. FPC, 369 U.S. 482 (1962).

[23] Fuels Research Council, Inc. v. FPC, 374 F.2d 842 (7th Cir. 1967).

The Commission is unable to determine, at this time, whether the considerations that lead to authorization of an off-system sale now will continue to exist a year or more from now. The rapid changes that have taken place in the natural gas market during the last year have convinced the Commission that pipelines and interested persons should be given sufficient flexibility with respect to these transactions. In addition, a pipeline's gas supplies and take-or-pay exposure would be difficult to accurately forecast for periods more than one year in advance.

Accordingly, the Commission retains the one-year limit on the term of an off-system sale. After the one-year term, however, a certificate holder may request authorization for an additional year subject to the prior notice and protest procedures.

C. Volumetric Limit

In § 157.210(a)(3) the Commission proposed to limit the volume of gas sold under the blanket certificate to no more than 100,000 MMBtu per day.

The commenters generally opposed any volumetric limitation on off-system sales as too restrictive. They argued that the other conditions imposed by the proposed rule such as the system supply requirement and the one-year term make further restrictions on volume unnecessary. The commenters also noted that under the prior notice procedures in § 157.205, an interested person could file a protest to protect any interest that might be aggrieved by such a sale.

The Commission agrees with these commenters. The basic premise of the off-system sales program is that there is a surplus of natural gas. The imposition of a volumetric limitation is inconsistent with this premise. If there is surplus gas, it can be sold regardless of the volume sold to each buyer. In the event that gas supply declines and there is no longer a surplus, a sale cannot take place. Accordingly, the volumetric restriction proposed in § 157.210(a)(3) is deleted in the final rule, and a new paragraph (a)(3) is added which codifies the requirement that there be a surplus.

D. Price

The Commission proposed in § 157.210(a)(4) that the price for these sales would be established by a rate schedule that provides for a commodity charge and permits the selling pipeline to recover its average purchased gas costs and any transportation costs associated with delivery.

Many commenters opposed the Commission's proposal to set the sales price at the pipeline's average purchased gas price plus transportation costs. They argued that, because that price includes old gas, it is likely that the seller's customers would be subsidizing the sale, and new markets would be encouraged to switch to gas at an unrealistically low market price. In an environment with partial deregulation of wellhead prices, pipelines may buy deregulated gas at prices that are above prices for alternative fuels, yet still market this gas by rolling it in with the cost of cheaper regulated gas.

In considering the price, the Commission has balanced competing considerations. If the price of the off-system sale is so low that the selling interstate pipeline cannot recover its cost of purchasing the gas, then its on-system customers would carry the unrecovered costs. On the other hand, if the price is excessive, it may violate the statutory requirement that jurisdictional rates be "just and reasonable."

To ensure that the sales off-system would not be made at a price lower than is available to on-system customers, the Commission has determined that the price of a proposed transaction should be the higher of the system average load factor rate that was proposed by the Commission in § 157.210(a)(5) or the approximate replacement cost of the gas sold off-system.

The Commission believes that the selling pipeline generally could replace any gas it sold off-system through additional purchases of section 102 gas. Thus, the final rule provides that, for blanket certificate authorization, the transaction must be priced at the higher of the pipeline's system average load factor rate (based upon the rates in effect at the time the transaction is proposed) or its average section 102 gas acquisition cost (based upon the pipeline's most recent purchased gas adjustment filing at the time the transaction is proposed). Pursuant to § 157.205, interested persons have the opportunity to review the proposed transaction and file a protest if they believe that a higher price is warranted.

E. Treatment of Revenues

In the Phase II Notice, the Commission proposed to amend § 157.206(g) to include the treatment of sales revenues.

As discussed above, the Commission believes that a pipeline should have the option either to credit revenues in excess of one cent per MMBtu or to establish representative levels of off-system sales or revenues in its rates. A pipeline that chooses to assume a risk and establishes representative volumes or revenues in its general rate proceeding should not be required to forego a potential reward by crediting revenues that exceed the representative levels. This policy is consistent with the policy articulated above with respect to the treatment of transportation revenues. Accordingly, the final rule at § 157.206(h) determines the treatment of both transportation revenues and off-system sales revenues.

F. Other Conditions

Proposed § 157.210(a)(5) prohibits the sale of gas acquired by the certificate holder solely or primarily for the purpose of making a sale under proposed § 157.210.

This provision is retained in the final rule. Sales under § 157.210 are intended to permit the selling pipeline to alleviate problems posed by excess deliverability or take-or-pay commitments. If a series of pipelines were to sell repeatedly the same gas under the blanket certificate, such a series of sales would create undesirable rate consequences to the customers of participating pipelines.

Proposed § 157.210(a)(6) states that the buyer of natural gas in a given off-system sale must not be an interstate pipeline supplier of the seller during the duration of the sale.

One commenter asked that the term "supplier" be clarified as not including a pipeline that is providing a transportation or exchange service for the certificate holder or a pipeline that is a supplier of the certificate holder under a long term contract where there are no current sales. The Commission does not intend that the requirement apply to transportation or exchange services, but does intend that "supplier" mean any interstate pipeline currently authorized to sell gas to the certificate holder, even where there are no current sales. The final regulations are clarified in this respect.

The Commission also proposed in § 157.210(a)(7) that the sale shall be subject to interruption by the certificate holder to the extent that natural gas subject to the sale is required to provide adequate service to the certificate holder's other customers at the time of sale.

This condition is consistent with the Commission's treatment of off-system sales previously authorized on a case-by-case basis. Furthermore, the basic assumption in off-system sales is that the gas is surplus to the requirements of the pipeline's historic market. The final rule is clarified to mean adequate service to the certificate holder's *on-system* customers. The Commission does not take a position at this time on the relative priority to be accorded to more than one off-system sale, but will leave that to the contracting parties.

G. Reporting Requirements

The contents of a request for authorization subject to the prior notice and protest procedures are described in § 157.210(b). In addition to the contents proposed in § 157.210(b), the final rule requires the certificate holder to provide (1) a copy of the contract if the identity of the buyer is known, (2) a statement quantifying the extent of actual or potential take-or-pay liability, (3) a gas supply/requirements balance demonstrating sufficient surplus so that service to the certificate holder's on-system customers will not be affected, and (4) identification of the delivery points.

V. Other Amendments

A. Successive Transportation Arrangements Under Section 311(a) of the NGPA

Section 311(a)(1) of the NGPA permits the Commission to authorize interstate pipelines to transport natural gas on behalf of intrastate pipelines or local distribution companies. Section 311(a)(2) permits the Commission to authorize intrastate pipelines to transport natural gas on behalf of interstate pipelines or local distribution companies served by an interstate pipeline.

Subparts B and C of Part 284 of the Commission's current regulations implementing section 311(a) of the NGPA authorize such transportation arrangements without prior Commission approval if, among other things, the transported gas is for system supplies and the term of the transportation does not exceed two years. The regulations further provide for a single, two-year extension of these self-implementing arrangements. The transporting pipeline must file a request for an extension at least 90 days before the expiration of the initial authorization. If the Commission does not take contrary action during this period, the authorization is automatically extended for up to two years. Transportation arrangements for initial terms of longer than two years or extensions after the first two-year extension are subject to the procedures for prior Commission approval in §§ 284.107 and 284.127.

The Commission proposed in the Phase II Notice to amend § 284.105 in Subpart B and § 284.125 in Subpart C of its regulations implementing section 311(a) of the NGPA to allow unlimited, successive, two-year extensions of the self-implementing transportation arrangements. As with the first two-year extension, successive extensions would be subject to Commission review before becoming effective.

In addition, the Commission proposed to amend § 284.125(b) to clarify that, if the intrastate pipeline proposes to charge a rate during the extension which is different from the rate previously charged, the new rate is subject to the requirements and approval procedures of § 284.123.

All but one of the commenters that addressed the proposed successive two-year extensions supported such a change. The one commenter that did not support the proposal suggested that a prior notice and protest/settlement procedure, similar to that in § 157.205 of the blanket certificate program, should be included for successive two-year extensions. The final rule does not incorporate this suggestion. The Commission believes that the opportunity for prior Commission review of a proposed extension adequately protects the public interest. Each such extension is noticed in the **Federal Register** and interested persons have the opportunity to intervene and protest any extension. If there is a potential problem with such a transaction, the Commission could take action to deny or modify the proposed extension.

The Commission's past experience with proposed two-year extensions has been that they are fairly routine and non-controversial. The Commission agrees with the commenters that successive two-year extensions are appropriate for the proposed streamlined approval procedures. Accordingly, the Commission adopts its proposed revisions to §§ 284.105 and 284.125 to allow for unlimited, successive, two-year extensions of the self-implementing transportation arrangements.[24]

The regulations implementing section 311(a) of the NGPA have been in effect for approximately four years. The Commission is aware that many pipelines have already received the single extension allowed by the regulations and have applied for an additional extension. The current regulations require that the pipeline apply for such an extension under §§ 284.107 or 284.127 which require prior Commission approval. The amendments as proposed did not apply to future extensions of these transactions. This result was not intended by the Commission. Therefore, the final regulations provide that pipelines may apply for future, unlimited, successive, two-year extensions of these transactions under §§ 284.105 and 284.125 of the regulations.

In addition, the Commission adopts the proposed amendment to § 284.125(b) to clarify that if the intrastate pipeline proposes to charge a rate during the extension which is different from the rate previously charged, the new rate is subject to the procedures for approval in § 284.123. This clarifying language ensures that the 90-day review period for extension and the 150-day rate determination period in § 284.123(b)(2) do not conflict.

B. Transportation of Direct Sale Gas Under Section 311 of the NGPA

As previously discussed, in this final rule the Commission has expanded the blanket certificate program to include transportation by a certificate holder of direct sale gas to end users. Frequently, the seller's supply is located near an intrastate pipeline. Ordinarily, the intrastate pipeline would prefer authorization under section 311(a)(2) of the NGPA to permit it to transport the gas to the interstate pipeline without becoming subject to Natural Gas Act jurisdiction. Under the regulations implementing section 311(a)(2), however, this type of transportation would not qualify for self-implementing authorization because the gas is delivered to an end user and is not for the system supply of a pipeline or distributor.

In the Phase II Notice, the Commission proposed to amend § 284.122(b) to create an exception to the system supply test so as to permit such incidental intrastate transportation without prior Commission approval, if the transportation by the interstate pipeline is authorized under the blanket certificate.

The commenters supported the proposed amendment to § 284.122(b) because it provides the "missing link" in expeditiously moving end-user owned gas pursuant to blanket certificate authorization. The Commission agrees that without this intrastate capability, the streamlined authorization features of the blanket certificate would be frustrated. Accordingly, the Commission adopts the proposed change to § 284.122(b) to allow, on a self-implementing basis, intrastate pipeline transportation which is incidental to an interstate pipeline's transportation of end-user owned gas under a blanket

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[24] The Order No. 60 and Order No. 63 blanket certificate programs in Subpart G of Part 284 authorize certain transportation arrangements "to the same extent and in the same manner" that transportation on behalf of intrastate pipelines or by intrastate pipelines is authorized by Subparts B and C. (18 CFR 284.221(b) and 284.222(b).) Thus, the amendment to the Subpart B and C regulations allowing successive two-year extensions also applies to the Order Nos. 60 and 63 programs.

certificate. This amendment also applies to situations in which the transported natural gas is sold to the end user by the intrastate pipeline.[25]

C. Order No. 63 Blanket Certificate Program

Sections 311 and 312 of the NGPA permit the Commission to authorize intrastate pipelines to transport, sell, or assign natural gas to the interstate market. In Order No. 63 the Commission promulgated § 284.222 to establish a blanket certificate program under section 7(c) of the Natural Gas Act for Hinshaw pipelines. This program permits Hinshaw pipelines to perform the same kind of transactions intrastate pipelines are permitted to perform under sections 311 and 312 of the NGPA without jeopardizing the Hinshaw pipeline's exempt status under section 1(c) of the Natural Gas Act. These blanket certificates permit a Hinshaw pipeline to make its excess supplies available to the interstate market and to use its transportation facilities to transport gas, thereby eliminating the need for interstate pipelines to build duplicate facilities or use less direct transportation routes.

In the Phase II Notice, the Commission proposed to amend § 284.222 to expand the eligibility for the Order No. 63 blanket certificate to any local distribution company that is served by an interstate pipeline. Under the proposal, any local distribution company that is served by an interstate pipeline and holds a blanket certificate may transport natural gas on behalf of an interstate pipeline or a local distribution company served by an interstate pipeline, subject to the terms and conditions of Subpart C of Part 284. The certificate holder may also sell volumes attributable to local supplies and assign contractual rights to purchase surplus gas from local supplies, subject to the terms and conditions of Subparts D and E of Part 284.

Most of the commenters that addressed this issue supported the Commission's proposal as giving parity to distributors that may not be Hinshaw pipelines. Many noted that because such an amendment would facilitate short-term economic transactions to adjust surpluses and deficits of supply, the development of self-help supplies would be encouraged.

The Commission agrees that the policies underlying the blanket certificate program for Hinshaw pipelines should apply equally to local distribution companies. The relatively few local distribution companies that do not qualify as Hinshaw pipelines because they do not transport or sell gas for resale in interstate commerce, but are involved solely in the distribution function, are essentially similar to Hinshaw pipelines and, therefore, should not be treated differently with respect to eligibility for an Order No. 63 blanket certificate. Moreover, only volumes attributable to local supply are included in the sale authorization.

Two commenters raised a question concerning the status of municipally-owned distribution systems for purposes of eligibility for an Order No. 63 blanket certificate. Apparently, there is some confusion because, under the NGPA, the term "local distribution company" is defined as including municipally-owned distributors. Under the Natural Gas Act, however, "local distribution company" is not defined. In addition, "municipalities" are excluded from the definition of "person" under the Natural Gas Act. As already noted, the Order No. 63 blanket certificate program authorizes a certificate holder to perform the kinds of transactions intrastate pipelines are permitted to perform under sections 311 and 312 of the NGPA. The blanket certificate, however, is a certificate of public convenience and necessity issued to a natural gas company under section 7 of the Natural Gas Act. Section 2 of the Act defines "natural gas company" to mean a person engaged in the sale for resale or transportation of natural gas in interstate commerce. Municipalities are expressly excluded from the definition of "natural gas company." Therefore, municipalities cannot be issued certificates under section 7(c) of the Natural Gas Act and are not eligible to receive Order No. 63 blanket certificates.[26]

VI. Summary of Regulations

Paragraphs (a)(13) and (14) are added to § 157.202 to define "high priority end use" and "high priority end user," respectively, for purposes of new § 157.209, *Transportation*.

Section 157.204, *Application procedure*, is amended to require that any currently effective transportation rate schedules or off-system sales rate schedules to be applied to blanket certificate transactions be submitted with an application for a blanket certificate.

Section 157.206, *Standard conditions*, is amended by adding a new paragraph (h) for the treatment of transportation (including storage service) and off-system sales revenues.

A new paragraph (a)(2) is added to § 157.207(a) and the remaining paragraphs are renumbered accordingly. The new paragraph requires that the annual report include, for transportation arrangements authorized pursuant to § 157.209, the information specified in § 157.209(g)(2).

Section 157.207(e) is amended to require a final report within thirty days of the termination of a transportation arrangement authorized pursuant to § 157.209 or of an off-system sale authorized pursuant to § 157.210. The paragraph concerning final reports is further amended to describe the additional information that must be included for end-user transportation arrangements.

Section 157.209, *Transportation*, is added to the blanket certificate regulations. That section automatically authorizes transportation of natural gas to high priority end users for terms up to five years, or for terms up to ten years or the life of the reserves, whichever is less, for reserves owned and developed by the high priority end user. Transportation to high priority end users for longer terms is subject to the prior notice and protest procedures of § 157.205. Transportation for other end users, as designated by the Commission from time to time, may also be authorized by § 157.209.

Section 157.209(b)(3) authorizes a certificate holder to transport gas for the system supply of another interstate pipeline, an intrastate pipeline, or a local distribution company. Such authorization is also subject to the prior notice and protest procedures.

Section 157.209 describes the contents of a request for authorization under the prior notice procedures, the special conditions which must be satisfied in order for the transportation to be authorized, and the reporting requirements for initial and annual reports.

A new § 157.210, *Sales for resale*, is added to the blanket certificate regulations. That section authorizes off-system sales between interstate pipelines subject to the prior notice procedures in § 157.205.

Paragraph (a) describes the conditions that must be met in order for a proposed transaction to qualify for blanket

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[25] The amendment to § 284.122(b) is incorporated by reference, to apply to transactions authorized in § 284.222.

[26] Municipalities may engage in Order No. 63 activities without obtaining Commission authorization. *See* Panhandle Eastern Pipeline Co. v. City of Rolla, 26 FPC 736 (1961). This does not preclude the possibility that the Commission may nevertheless assert its Natural Gas Act jurisdiction in other types of transactions. *See* Public Service Company of North Carolina v. FERC, 587 F. 2d 716 (5th Cir. 1979).

certificate authorization. Paragraph (b) of § 157.210 describes the contents of a request for authorization.

In addition to the amendments to the above described blanket certificate regulations at Subpart F of Part 157, the final rule also amends the Part 284 regulations which implement other Commission transportation programs pursuant to sections 311(a) (1) and (2) of the NGPA. The Subpart B and Subpart C regulations are amended at §§ 284.105 and 284.125 to permit successive, two-year extensions of the self-implementing arrangements authorized under those subparts.

Section 284.122 is amended to permit, on a self-implementing basis, the transportation of natural gas by an intrastate pipeline where such transportation is incidental to transportation on behalf of an end user under § 157.209 of the blanket certificate regulations.

The final rule amends § 284.222 to expand the Order No. 63 blanket certificate program, presently applicable to Hinshaw pipelines, to include all local distribution companies served by interstate pipelines.

VII. Other Issues

The Commission has received two requests to re-open the proceeding in this docket to allow for additional comments by interested parties.[27] The requests allege that the record in this docket is more than two years old and may not accurately reflect current market conditions. They argue that additional comment would provide a more adequate record upon which to base a final rule.

The Commission is not persuaded that further public comment is necessary. The requests do not provide any data to support the allegations, nor do they argue that current market conditions require a rule different from the proposal. In fact, the company that filed one of the requests admits that its position as presented in comments filed early in the proceeding has not changed. In issuing this final rule, the Commission has carefully considered all of the comments filed in this proceeding in light of conditions prevailing at the time the comments were submitted as well as in light of current market conditions. For these reasons, the Commission believes that further public comment would serve no purpose and issues this final rule.

VIII. Procedures

After the final rule was issued in Phase I, many interstate pipelines applied for blanket certificates under the section 7(c) hearing procedure. Section 157.206(a)(1) of the standard conditions that attached to each blanket certificate reserved to the Commission the right to amend the requirements of Subpart F of Part 157 from time to time. In addition, each blanket certificate was expressly framed as follows:

> Upon the terms and conditions of this order, a certificate of public convenience and necessity is issued authorizing Applicant to perform the activities specified in Subpart F of Part 157 of the Commission's Regulations, as amended from time to time.[28]

Thus, the scope of the authority of each outstanding blanket certificate depends on the current scope of Subpart F of Part 157. This final rule amends Subpart F to include additional sales and transportation authority within the scope of the blanket certificate program. By amending Subpart F, the Commission is effectively expanding the scope of each outstanding blanket certificate which has been issued to date. Therefore, a pipeline which holds such a blanket certificate need not make further section 7 application to the Commission prior to engaging in the transactions added to Subpart F by this final rule.

Although no further certificate application is required, a blanket certificate holder may need to file additional tariffs with the Commission pursuant to section 4 of the Natural Gas Act. In particular, if the certificate holder does not have a generally applicable transportation tariff on file, the pipeline will have to establish such a tariff prior to transporting gas pursuant to § 157.209. Also, the certificate holder would have to establish a tariff to make off-system sales to other interstate pipelines pursuant to § 157.210 at a rate level which conforms to the requirements of § 157.210(a)(4).

Finally, certificate holders seeking to participate in the AIC experiment authorized by this final rule must file an AIC tariff pursuant to § 157.209(f) prior to engaging in end-user transportation where an AIC is collected.

In sum, although no further Commission certificate proceedings are required to grant certificate holders the additional authority provided by this rule, implementation of this rule will necessitate compliance tariff filings by each interstate pipeline seeking to engage in these newly authorized activities.

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act[29] requires the Commission to describe the impact that a proposed rule would have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The purpose of this rulemaking is to make the certificate process more efficient by streamlining and expediting the Commission review of routine certificate applications. This blanket certificate program is specifically designed to reduce the regulatory burdens of the certificate process on all entities, large and small, who ultimately may be affected by the process, either directly or indirectly.

In the Notice of Proposed Rulemaking in this docket, the Commission certificated that this rulemaking would not have a significant impact on a substantial number of small entities. This certification was based upon the nature of the blanket certificate program and the characteristics of the entities subject to the process.

Therefore, in view of the nature of the blanket certificate program which is to reduce regulatory burdens, direct and indirect, on large and small entities, the Commission finds that the amendments to the program by this final rule do not impose any regulatory or administrative burdens on a significant number of small entities and that they do not require an expense of resources by such entities. Accordingly, the Commission certifies that the rule does not have a significant economic impact on a substantial number of small entities.

X. Effective Date

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520 (Supp. IV 1980), and the Office of Management and Budget's (OMB) regulations, 48 FR 13,666, 13,694 (1983) (to be codified at 5 CFR Part 1320), require that OMB approve certain information collection requirements imposed by agency rule. The information collection provisions in Subpart F of Part 157 are being submitted to OMB for its approval. Interested persons can obtain information on these information collection provisions by contacting the Office of the General Counsel, Rulemaking and Legislative Analysis, Federal Energy Regulatory Commission,

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[27] Southern California Gas Company filed its petition on June 8, 1983, and Northern Indiana Public Service Commission's request was received on June 6, 1983.

[28] *See, e.g.*, Arkansas Louisiana Gas Company, 20 FERC ¶62,408 (1982); Tennessee Gas Pipeline Company, 20 FERC ¶62,409 (1982); Northern Natural Gas Company, 20 FERC ¶62,410 (1982); Natural Gas Pipeline Company of America, 20 FERC ¶62,415 (1982).

[29] 50 U.S.C. 601–612 (Pub. L. 96–354, September 19, 1980).

RC-421, 825 North Capitol Street, NE., Washington, D.C. 20426 (Attention: Barbara Christin) (202) 357-8033. Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission).

This final rule relieves restrictions on interstate pipelines by providing streamlined procedures for obtaining authorization to engage in certain transactions. Therefore, in accordance with section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d), the Commission waives the requirement for publication 30 days before the effective date and makes the final rule effective upon Commission publication in the **Federal Register** of notice of OMB's approval and control number under the PRA.

(Natural Gas Act, 15 U.S.C. 717-717w; Natural Gas Policy Act, 15 U.S.C. 3301-3432; Department of Energy Organization Act; 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR 142)

List of Subjects

18 CFR Part 157

Natural gas.

18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Parts 157 and 284 of Chapter I, Title 18 of the Code of Federal Regulations as set forth below.

By the Commission. Chairman Butler dissented. Commissioner Sheldon concurred with a separate statement attached.

Kenneth F. Plumb,

Secretary.

PART 157—[AMENDED]

1. Section 157.202 is amended by adding new paragraphs (b) (13) and (14) to read as follows:

§ 157.202 Definitions

* * * * *

(b) * * *

(13) "High priority end use" means any use of natural gas:

(i) Certified by the Secretary of Agriculture under 7 CFR 2900.3 as an "essential agricultural use" under section 401(c) of the Natural Gas Policy Act of 1978;

(ii) In a hospital or school or similar institution as defined in § 281.103(a) (11) and (12) of this chapter;

(iii) In a commercial establishment that uses 50 Mcf or more of natural gas on a peak day;

(iv) For plant protection; or

(v) For process and feedstock needs.

(14) "High priority end user" means any person who consumes natural gas in a high priority end use.

§ 157.203 [Amended]

2. Section 157.203(b) is amended by inserting "157.209(a)," between "§§ 157.208(a)," and "157.211(a)."

§§ 157.203 and 157.205 [Amended]

3. Sections 157.203(c) and 157.205(a) are amended by inserting "157.209(b), 157.210" between "§§ 157.208(b)," and "157.211."

4. Section 157.204(d)(4) is revised to read as follows:

§ 157.204 Application procedure.

* * * * *

(d) * * *

(4) A list of any currently effective rate schedules which would apply to any service authorized by §§ 157.209, 157.210, or 157.213 and an explanation of the treatment of revenues under such rate schedules.

* * * * *

5. Section 157.206 is amended by adding a new paragraph (h) to read as follows:

§ 157.206 Standard conditions.

* * * * *

(h) *Treatment of revenues.* (1) Except as provided in paragraphs (h) (2) and (3) of this section, all revenues received for transportation (including storage service) or for sales for resale authorized under the blanket certificate in excess of the sum of

(i) An allowance of one cent per MMBtu; and

(ii) The AIC per MMBtu that may be collected pursuant to § 157.209(f) for end-user transportation, shall be credited to Account No. 191 and flowed back to the certificate holder's customers.

(2) A certificate holder is not required to credit revenues to Account No. 191 pursuant to paragraph (h)(1) of this section:

(i) If representative levels of revenues attributable to such services have been credited in arriving at a test period cost of service; or

(ii) If representative levels of volumes transported have been included in billing determinants for the purpose of establishing rates.

A certificate holder that treats end-user transportation revenues in accordance with this subparagraph may not elect to collect an AIC authorized in § 157.209(f).

(3) The certificate holder may elect to forego the one cent per MMBtu allowance provided in paragraph (h)(1) of this section. In such a case the certificate holder is not required to credit to Account No. 191 any amount which, upon application, the Commission finds to have been demonstrated as representing the out-of-pocket expenses of the certificate holder in connection with a transaction authorized under this Subpart.

6. Section 157.207 is amended by adding a new paragraph (a)(2) and renumbering paragraphs (a)(2) through (a)(8) as (a)(3) through (a)(9). The new paragraph (a)(2) reads as follows:

§ 157.207 General reporting requirements.

(a) * * *

(2) For each transportation arrangement authorized pursuant to § 157.209, the information specified in § 157.209(g);

* * * * *

7. Section 157.207(c) is amended by removing "§ 157.213" and inserting instead "§§ 157.209, 157.210, or 157.213"; by adding "sold or" after "natural gas" in paragraph (c)(4); by removing the word "and" after the semicolon in paragraph (c)(5), changing the period to a semicolon and inserting the word "and" after the semicolon at the end of paragraph (c)(6), and adding a new paragraph (c)(7), to read as follows:

§ 157.207 General reporting requirements.

* * * * *

(c) * * *

(7) In the case of transportation to an end user authorized under §§ 157.209 (a), (b)(1), or (b)(2):

(i) The end use of such volumes;

(ii) The cost, description, and completion date of any facilities that were constructed in order to provide the services, and their locations; and

(iii) The average delivered price per MMBtu paid, itemized by amounts paid to:

(A) The seller;

(B) Each pipeline and distributor involved in transporting the natural gas; and

(C) Any other parties; and

(iv) The AIC per MMBtu collected pursuant to § 157.209(f).

* * * * *

8. Subpart F of Part 157 is amended by adding new §§ 157.209 and 157.210 to read as follows:

§ 157.209 Transportation.

(a) *Automatic authorization.* (1) The certificate holder is authorized to transport natural gas on behalf of a high priority end user for a high priority end use, for a term that does not exceed:

(i) Five years, if such natural gas was purchased from

(A) A producer and was not committed or dedicated to interstate commerce on November 8, 1978,

(B) An intrastate pipeline, or

(C) A local distribution company and the volumes purchased are attributable to the company's local supply; or

(ii) Ten years or the life of the reserves, whichever is less, if the natural gas reserves are owned and developed by the high priority end user.

(2) The certificate holder is authorized to transport natural gas on behalf of an end user for the end uses designated by the Commission in paragraph (e)(1) of this section.

(b) *Prior notice.* Subject to the notice requirements of § 157.205, the certificate holder is authorized to transport natural gas:

(1) As described in paragraph (a)(1)(i) of this section, but for a term in excess of five years, or as described in paragraph (a)(1)(ii) of this section, but for a term in excess of ten years or the life of reserves, whichever is less;

(2) On behalf of an end user for the end uses designated by the Commission in paragraph (e)(2) of this section; or

(3) On behalf of any:

(i) Local distribution company;

(ii) Interstate pipeline; or

(iii) Intrastate pipeline.

(c) *Contents of request.* (1) In addition to the requirements of § 157.205(b), requests for activities described in paragraphs (b)(1) and (b)(2) shall contain:

(i) The name of the end user;

(ii) The volumes of gas to be transported on a peak day, average day, and annual basis;

(iii) A copy of the proposed transportation agreement indicating the proposed transportation rate, including the AIC separately stated, together with a breakdown and justification of the proposed rate level to the extent indicated in § 284.106 of this chapter for interstate pipelines or § 284.126 of this chapter for intrastate pipelines;

(iv) A statement by the distributor or intrastate pipeline that it has capacity sufficient to perform the transportation service without detriment or disadvantage to its other customers;

(v) A description, projected cost, and location of any facilities that will be constructed in order to provide the transportation service, as well as any other facilities that will be utilized;

(vi) The proposed end use and a statement that it is a qualified end use;

(vii) The total end-use requirements profile for natural gas at the location where the transported gas will be used;

(viii) A copy of the gas purchase contract with the seller underlying the proposed transaction;

(ix) If an intermediary participates in the transaction between the end user and the seller and charges a fee, the amount of the fee and terms of payment and the intermediary's affiliation, if any, with the producer, pipeline and/or distributor; and

(x) If the end user assumes the cost of the construction of any facilities in order to consummate the purchase, the cost, terms of payment, ownership, and date of construction of the facilities.

(2) In addition to the requirements of § 157.205(b), requests for activities described under paragraph (b)(3) of this section shall contain: a description of the transportation service, including:

(i) The identity of the parties;

(ii) The dates of commencement and termination of the service;

(iii) The estimated total and maximum daily quantities of natural gas to be transported;

(iv) The points between which the natural gas is to be transported; and

(v) The basis for any rates and charges, as provided under § 284.103 of this chapter.

(d) *Special conditions.* (1) Any transportation authorized under either paragraphs (a) or (b) of this section shall be subject to the following conditions:

(i) Except as provided in paragraph (f) of this section, the rates and charges shall be subject to the requirements of § 284.103 of this chapter; and

(ii) The contract for the transportation shall provide that service under the contract shall be subject to the availability of capacity sufficient to provide the service without detriment or disadvantage to the certificate holder's existing customers who are dependent upon the certificate holder's general system supply.

(2) Any transportation authorized under paragraph (b)(3) of this section is conditioned upon the transported natural gas being delivered directly or indirectly to the interstate pipeline, intrastate pipeline, or local distribution company, which receives such natural gas for its system supply for resale.

(e) *Designation of end uses.* The Commission may authorize transportation of natural gas under this section for other categories of end uses described below.

(1) *Automatic authorization.* [Reserved]

(2) *Prior notice.* [Reserved]

(f) *Added incentive charge tariffs.* (1) The certificate holder may file a special added incentive charge (AIC) tariff applicable to transportation authorized by paragraphs (a), (b)(1) and (b)(2) of this section which is performed on or before January 31, 1985.

(2) Any AIC tariff filed pursuant to this paragraph shall contain:

(i) An express termination date, no later than January 31, 1985;

(ii) A one-part transportation charge stated in terms of the quantity of gas transported which is based upon the following components which are separately stated:

(A) The per unit cost of transportation derived from the certificate holder's last general rate case, and

(B) An incentive allowance not to exceed five cents per MMBtu for each transaction.

(3) In any subsequent general rate filing by the certificate holder, the revenues derived from the incentive allowance shall be separately reflected and identified in any test period revenues studies.

(g) *Reporting requirements.*—(1) *Initial report.* Within thirty days after commencing a transportation arrangement authorized by § 157.209(a), the certificate holder shall file with the Commission an initial report, under oath, signed by a senior official of the company, containing a description of the transportation service which includes:

(i) The identity of the parties;

(ii) The dates of commencement and projected termination of the service;

(iii) The estimated total and maximum daily quantities of natural gas to be transported;

(iv) The end use of the gas and a justification of the basis for its heligibility for transportation under this Subpart;

(v) The price the end user is paying for the purchased natural gas;

(vi) The points between which the natural gas is to be transported; and

(vii) The rate to be charged, including the AIC separately stated, together with a breakdown and justification of the rate level to the extent indicated in § 284.106 of this chapter.

(2) *Annual report.* The annual report filed by the certificate holder shall contain, for transactions authorized under § 157.209(a)(1), (a)(2), (b)(1), (b)(2), and (b)(3) the following information specified for each of these authorizing paragraphs:

(i) Total volumes transported and the source of such volumes;

(ii) Total revenues received, including AIC amounts separately stated;

(iii) The average delivered price per Mcf paid, itemized by amounts paid to:

(A) The seller;

(B) Each pipeline and distributor involved in transporting the gas, including AIC amounts separately stated; and

(C) Any other parties; and

(iv) The total cost and completion dates for any facilities constructed in order to provide the services.

(3) *Interim report.* On or before June 1, 1984, the certificate holder shall file an interim report, under oath, signed by a senior official of the company, which states, for the period from [effective date of final rule] through April 31, 1984:

(i) Actual volumes of natural gas transported pursuant to paragraphs (a), (b)(1), and (b)(2) of this section;

(A) To which the AIC tariff authorized by paragraph (f) of this section was applicable;

(B) To which § 157.206(h)(2) was applicable for the treatment of the revenues received from the transportation of such volumes; and

(C) To which neither the AIC nor § 157.206(h)(2) was applicable, together with a statement explaining how such revenues were treated;

(ii) For the volumes of natural gas stated pursuant to paragraph (g)(3)(i)(A) of this section;

(A) The average AIC per MMBtu paid by the end user to the certificate holder for each transaction; and

(B) The average AIC per MMBtu paid by the end user for each transaction.

§ 157.210 Sales for resale.

(a) *Prior notice.* Subject to the notice requirements of § 157.205, the certificate holder is authorized to sell natural gas in interstate commerce for resale, if:

(1) The buyer is an interstate pipeline acquiring the gas for its system supplies;

(2) The sale does not exceed a period of one year;

(3) The certificate holder has a surplus of gas supplies that is in excess of the amount required to serve the certificate holder's existing on-system customers and that is at least equal to the volumes to be sold in the proposed transaction;

(4) The sale is made at the higher of the certificate holder's:

(i) System average load factor rate (based upon the rates in effect at the time the request is filed pursuant to § 157.205); or

(ii) Average section 102 gas acquisition cost (based upon the certificate holder's most recent purchased gas adjustment filing at the time the request is filed pursuant to § 157.210);

(5) The sale does not involve the sale of any natural gas acquired by the certificate holder solely or primarily for the purpose of making a sale under this section;

(6) The buyer is not an interstate pipeline authorized to sell gas to the certificate holder during the duration of the sale;

(7) The certificate holder has actual or potential take or pay liability; and

(8) The sale is subject to interruption by the certificate holder to the extent that natural gas subject to the sale is required to provide adequate service to the certificate holder's on-system customers at the time of the sale.

(b) *Contents of request.* In addition to the requirements of § 157.205(b), requests filed for activities described in paragraph (a) of this section shall contain:

(1) The identity of the seller and buyer;

(2) The dates of commencement and anticipated termination of the sale;

(3) The estimated total and daily quantities (in MMBtu's) of natural gas to be sold in the transaction;

(4) The rate to be charged and the applicable rate schedules;

(5) An affidavit that service pursuant to the sale is subject to interruption to the extent that natural gas subject to the sale under this section is required to enable the certificate holder to provide adequate service to its on-system customers;

(6) The total quantity of gas being sold in transactions authorized by this section at the time of the request;

(7) A copy of the contract, if the identity of the buyer is known;

(8) A statement quantifying the extent of actual or potential take-or-pay liability;

(9) A gas supply/requirements balance demonstrating a sufficient surplus such that service to the certificate holder's on-system customers will not be affected by the proposed sale; and

(10) Identification of delivery points.

PART 284—[AMENDED]

10. Section 284.105 is amended by revising paragraph (a) to read as follows:

§ 284.105 Extensions.

(a) *General rule.* An interstate pipeline seeking to extend a transportation arrangement (1) initially authorized under § 284.102(a), (2) subsequently extended under this section, or (3) extended for an additional two year term under § 284.107 shall file an extension report as required in § 284.106(c).

* * * * *

§ 284.106 [Amended]

11. Section 284.106(c) is amended by inserting "including those subsequently extended under §§ 284.105 or 284.107," after "§ 284.102(a)."

12. Section 284.106 is amended by removing the word "and" after the semicolon in paragraph (c)(1), changing the period to a semicolon and inserting the word "and" after the semicolon at the end of paragraph (c)(2), and adding a new paragraph (c)(3), to read as follows:

§ 284.106 Reporting requirements.

* * * * *

(c) * * *

(3) The actual volumes transported for the period commencing with the first day of the initial authorization or previous extension and ending with the date of the report.

* * * * *

13. Section 284.122 is amended by revising paragraph (b)(1) to read as follows:

§ 284.122 Transportation by intrastate pipelines.

* * * * *

(b) *Limitations.* (1) Authorization under paragraph (a) is limited to an arrangement:

(i)(A) which does not exceed a period of two years, and

(B) in which the transported natural gas is delivered directly or indirectly to an interstate pipeline, intrastate pipeline, or local distribution company, which receives such natural gas for its system supply for resale, or

(ii) in which natural gas is purchased by a qualified end user and transported by an interstate pipeline pursuant to a blanket certificate issued under Subpart F of Part 157 of this chapter.

* * * * *

14. Section 284.125 is amended by revising paragraphs (a) and (b) to read as follows:

§ 284.125 Extensions.

(a) *General rule.* An intrastate pipeline seeking to extend a transportation arrangement (1) initially authorized under § 284.122(a), (2) subsequently extended under this section, or (3) extended for an additional two year term under § 284.127 shall file an extension report as required in § 284.126(c).

(b) *Approval.* (1) If an extension report as required in § 284.126(c) is duly filed, the proposed extension may take effect unless the Commission, prior to the beginning of the proposed extension, and after opportunity for written comments, determines, by order, that the proposed extension is not authorized. If the intrastate pipeline proposes to charge a rate during the extension which is different than the rate previously charged, the new rate is subject to the requirements and approval procedures of § 284.123.

(2) If the Commission determines, by order, that the proposed extension shall be modified, the extension may take effect only as modified.

* * * * *

§ 284.126 [Amended]

15. Section 284.126(c) is amended by inserting "including those subsequently extended under §§ 284.125 or 284.127," after "§ 284.122(a)."

16. Section 284.126 is amended by removing the word "and" after the semicolon in paragraph (c)(1), changing the period to a semicolon and inserting the word "and" after the semicolon at the end of paragraph (c)(2), and adding a new paragraph (c)(3) to read as follows:

§ 284.126 Reporting requirements.

* * * * *

(c) * * *

(3) The actual volumes transported for the period commencing with the first day of the initial authorization or previous extension and ending with the date of the report.

* * * * *

17. Section 284.222 is amended by revising the section heading in paragraphs (a) through (e) to read as follows:

§ 284.222 Certain transportation, sales and assignments by local distribution companies.

(a) *Applicability.* This section applies to local distribution companies served by interstate pipelines, including persons who are not subject to the jurisdiction of the Commission, by reason of section 1(c) of the Natural Gas Act.

(b) *Blanket certification.* Any local distribution company served by an interstate pipeline or any Hinshaw pipeline may apply for a blanket certificate under this section. Upon application therefore, the Commission will conduct a hearing pursuant to section 7(c) of the Natural Gas Act and § 157.11 and Subpart H of Part 385 of this chapter and, if required by the present or future public convenience and necessity, the Commission will issue a blanket certificate to such local distribution company or Hinshaw pipeline. Such certificate will authorize the certificate holder to engage in the sale, transportation, or assignment of natural gas, that is subject to the Commission's jurisdiction under the Natural Gas Act, to the same extent and in the same manner that intrastate pipelines are authorized to engage in such activities by Subparts C, D, and E and § 284.203 of this Part (as amended from time to time), except as otherwise provided in paragraph (e)(2) of this section.

(c) *Application procedure.* Applications for blanket certificates shall state:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation or otherwise; the state under the laws of which it is organized or authorized; the agency having jurisdiction over rates and tariffs; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed;

(2) The volumes of natural gas which:

(i) Were received during the most recent 12-month period by the applicant within or at the boundary of a state, and

(ii) Were exempt from the Natural Gas Act jurisdiction of the Commission by reason of section 1(c) of the Natural Gas Act, if any;

(3) The total volume of natural gas received by the applicant from all sources during the same time period;

(4) Citation to all currently valid declarations of exemption issued by the Commission under section 1(c) of the Natural Gas Act if any;

(5) A statement that the applicant will comply with the conditions in paragraph (e) of this section;

(6) A form of notice suitable for publication in the **Federal Register**, as contemplated by § 157.9 of this chapter, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose; and

(7) A statement of the methodology to be used in calculating rates for services to be rendered, setting forth any elections under § 284.123 or paragraph (e)(2) of this section and a sample calculation employing the methodology using current data. If a rate election is made under paragraph (e)(2) of this section, this statement shall contain the following items (reflecting the 12-month period used to justify costs in the most recently approved rate case conducted by an appropriate state regulatory agency):

(i) Total operating revenues,

(ii) Purchase gas costs,

(iii) Distribution costs (which include that portion of the common costs allocated to the distribution function),

(iv) The volume throughput of the system categorized by sales, transportation and exchange service, and

(v) A study which determines transportation costs on a unit revenue basis in accordance with paragraph (e)(2) of this section, including any supporting work papers.

(d) *Effect of certificate.* (1) A certificate issued pursuant to this section will authorize the certificate holder to engage in transactions of the type authorized by Subparts C, D, and E and § 284.203 of this part.

(2) Acceptance of a certificate or conduct of an activity authorized thereunder will:

(i) Not impair the continued validity of any exclusion under section 1(c) of the Natural Gas Act which may be applicable to the certificate holder, and

(ii) Not subject the certificate holder to the Natural Gas Act jurisdiction to the Commission except to the extent necessary to enforce the terms and conditions of the certificate.

(e) *General conditions.* (1) Except as provided in paragraph (e)(2) of this section, any transaction authorized under a blanket certificate shall be subject to the same rates and charges, terms and conditions and reporting requirements that would apply if the transaction were authorized for an intrastate pipeline by Subparts C, D, and E and § 284.203 of this part (as amended from time to time).

(2) *Rate election.* If the certificate holder does not have any existing rates on file with the appropriate state regulatory agency for city-gate service, the certificate holder may make the rate election specified in § 284.123(b)(1) only if:

(i) The certificate holder's existing rates are approved by an appropriate state regulatory agency,

(ii) The rates and charges for any transportation are computed by using the portion of the certificate holder weighted average annual unit revenue (per MMBtu) generated by existing rates which is attributable to the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service), and

(iii) The Commission has approved the method for computing rates and charges specified in paragraph (e)(2)(ii) of this section.

(3) *Incremental pricing.* Prior to engaging in any sale or assignment under the blanket certificate to a buyer subject to the incremental pricing provisions of Title II of the NGPA and Part 282 of this chapter, the selling pipeline shall receive an undertaking from the buyer to incrementally price the gas volumes sold to the same extent required for transactions authorized under section 311(b) or 312 of the NGPA.

(4) *Volumetric test.* The volumes of natural gas sold or assigned under the blanket certificate may not exceed the volumes obtained from sources other than interstate supplies.

(5) *Filings.* Any filings made with the Commission that report individual transactions shall reference the docket number of the proceeding in which the blanket certificate was granted.

(6) *Tariff filings.* (i) The tariff filing requirements of Part 154 of this chapter shall not apply to transactions authorized by the blanket certificate.

(ii) The certificate holder shall file with the Commission a copy of all contracts applicable to a transaction authorized by the blanket certificate as a part of the initial full report required by §§ 284.126 and 284.148. The certificate holder shall also file with the Commission each amendment to such contracts, within 30 days of the execution of the amendment.

* * * * *

SHELDON, Commissioner, *concurring:*

This rule includes certain off-system sales. The terms and conditions relating to an off-system sale under a blanket certificate are generally in accord with the Commission's Statement of Policy issued April 25, 1983, in Docket No. PL83-2-000. I dissented to that Statement of Policy and continue to disagree with the majority in that matter. However, I do believe that off-system sales should be given blanket certificate authorization and for this reason, I concur with the majority in this Final Rule.

Georgiana H. Sheldon,

Commissioner.

[FR Doc. 83-20105 Filed 7-29-83; 8:45 am]

BILLING CODE 6717-01-M

federal register

Monday
August 1, 1983

Part VI

Department of Transportation

Federal Highway Administration
Urban Mass Transportation Administration

Environmental Impact and Related Procedures; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 622

Urban Mass Transportation Administration

23 CFR Part 771

[FHWA Docket No. 83-20]

Environmental Impact and Related Procedures

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The FHWA and UMTA are proposing changes to their regulation which covers the preparation of environmental impact statements and related documents and compliance with other Federal environmental requirements. The changes are intended to streamline the project development process for FHWA and UMTA grant programs and provide increased decisionmaking authority to agency field offices. The essential elements of the environmental process are governed by the regulations of the Council on Environmental Quality and would not be affected by these proposed changes.

DATE: Comments must be received on or before September 30, 1983.

ADDRESS: Submit written comments, preferably in triplicate to FHWA Docket No. 82-12, Federal Highway Administration, Room 4205, HCC-10, 400 Seventh Street, SW., Washington, D.C. 20590. All comments received will be available for examination at the above address between 7:45 a.m. and 4:15 p.m. ET, Monday through Friday. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. R. E. Gatz, Office of Environmental Policy (202-426-0106), or Mr. E. Kussy, Office of the Chief Counsel (202-426-0791), in the Federal Highway Administration (FHWA); or in the Urban Mass Transportation Administration (UMTA), Mr. A. Marner, Office of Planning Assistance (202-426-2360), all at 400 Seventh Street, SW., Washington, D.C. 20590. The FHWA and UMTA hours are from 7:45 to 4:15 p.m. Monday through Friday.

SUPPLEMENTARY INFORMATION: The FHWA and the UMTA are proposing a number of changes to the joint FHWA/UMTA environmental regulation which was published in the **Federal Register** on October 30, 1980 (45 FR 71968). This regulation was effective for all Administration actions taken after December 29, 1980. In the Subsequent 18 months, FHWA and UMTA have received a number of suggestions from their field offices relative to proposed changes which would eliminate duplicative requirements contained in the present environmental regulation and other FHWA and UMTA regulations and would also provide increased flexibility to project applicants and increased decisionmaking authority to the Administration's field offices. Recommendations made as the result of FHWA's priority review of the environmental process are also being proposed at this time (46 FR 21620, April 13, 1981).

The environmental process followed by FHWA and UMTA is governed by the regulation which was issued by the Council on Environmental Quality (CEQ) on November 29, 1978 (40 CFR Parts 1500-1508) and by DOT Order 5610.1C, which was issued on September 18, 1979. The changes being proposed by FHWA and UMTA would not affect the process required by the CEQ regulation and the DOT Order.

In addition to those proposed changes which are designed to streamline the project development process, numerous modifications would be made throughout the regulation in order to eliminate excess verbiage, update references, clarify existing provisions, and generally improve the readability of the regulation. Because of the large number of changes proposed and their pervasiveness, the full text of the regulation with revisions is being published as part of this notice of proposed rulemaking. Recent changes made by the FHWA as a result of the elimination of the environmental action plan requirement (47 FR 21780, May 20, 1982) have been incorporated in the text of the regulation.

The most important proposed changes are discussed below. This includes changes which would improve the environmental process as well as the most noteworthy editorial revisions. The FHWA and UMTA are particularly interested in receiving comments on these proposed changes, suggestions for additional revision that would eliminate duplication and delay in the environmental aspects of the project development process, and any other suggestions that would further the objectives of NEPA.

Section 771.103 of the existing regulation consists of a listing of statutes and Executive Orders that provide authority for or otherwise relate to the FHWA/UMTA environmental process. On February 24, 1982, the FHWA issued Technical Advisory T 6640.8, Guidance Material for the Preparation of Environmental Documents (47 FR 10698, March 11, 1982), which includes a detailed list and annotated description of various environmental laws, regulations, and Executive Orders which could be applicable to FHWA and UMTA projects. The Technical Advisory can be easily updated and is readily available to the public as prescribed in 49 CFR Part 7. For these reasons, it is proposed to delete this section from the regulation. The principal statutes covered by the regulation would be referenced in the authority citation and the purpose section (proposed § 771.101).

Section 771.113(a) of the existing regulation places limits on the kinds of project development activities which can be undertaken prior to completion of the NEPA process. Only preliminary design and property acquisition in carefully limited circumstances are permitted before the environmental process is completed. The language in this paragraph supports, and should be read in conjunction with, § 1506.1 of the CEQ regulation, "Limitations on actions during NEPA Process." These provisions ensure that the Administration's decision on whether to implement an alternative under consideration in the environmental document will not be influenced by a previous commitment to a particular course of action. This limitation on actions supports one of the primary purposes of the National Environmental Policy Act—that Federal agencies consider environmental effects, including alternative courses of action, before reaching a decision to proceed with major construction projects.

It is important to note that the limitation on premature commitments applies to actions that may be proposed entirely for local funding by an applicant or prospective applicant for Federal funds. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and advanced as a separate proposal for funding purposes or matters of convenience.

The Surface Transportation Assistance Act of 1982 amended Section 3(a)(1)(A) of the Urban Mass Transportation Act by adding a provision that gives UMTA the discretion to make grants or loans for "* * * the acquisition of rights-of-way, and relocation, for fixed guideway corridor development for projects in advanced stages of * * * alternatives analyses or preliminary engineering." For UMTA's major fixed guideway projects, the draft and final EIS's are developed during alternatives anlayses and preliminary engineering. A blanket authorization for land acquisition during alternatives analysis or preliminary engineering would, therefore, create a conflict with NEPA compliance since such acquisition could result in a substantial commitment to a particular course of action before the NEPA process is completed.

The UMTA has considered how this new authority to make grants for advance land acquisition and relocation can be implemented consistent with its responsibilities under NEPA and the results or pertinent litigation (*National Wildlife Federation v. Snow*, 561 F. 2d 227 (D.C. Cir., 1976)) and has decided not to expand the language governing early property acquisition. The UMTA has concluded that this amendment was not intended to override the existing requirements of the NEPA process. Accordingly, prior to the completion of the NEPA process, property acquisition will be limited to "hardship" or "protective" buying. These terms are defined in 23 CFR 712.204(d) and repeated here for convenience. Hardship acquisition is done to "alleviate particular hardship to a property owner, on his request, in contrast to others because of an inability to sell his property."

Early relocation would occur in such cases. Protective buying is done to "prevent imminent development and increased costs of a parcel which would tend to limit the choice of alternatives." The FHWA has issued guidelines and UMTA will prepare similar guidance describing the documentation needed to support requests for hardship and protective buying. As in the past, this type of land acquisition is reserved for extraordinary or emergency situations involving a particular parcel or a limited number of parcels within the proposed transportation corridor. Documentation supporting these claims will continue to be reviewed in the Regional Offices of FHWA and UMTA.

Section 771.113(c) of the existing regulation dealing with UMTA Letters of Intent has been changed by deleting the sentence specifying that the scope of the environmental document must address the entire project covered by the proposed Letter of Intent. The proper scope of environmental documents is a continuing concern of UMTA; however, the sentence was deleted here because it was out of place in the section on timing of Administration actions.

Sections 771.111(e), 771.123(k) and 771.125(i) of the existing regulation include coordination requirements notification of the A-95 clearinghouse in the adjoining State when a pending project has the potential to affect that State. This requirement would be deleted in the proposed regulation. The A-95 agency was eliminated by Executive Order 12372 (47 FR 30959, July 16, 1982). However, FHWA and UMTA believe that an institution for information exchange, similar to an A-95 type clearinghouse, is one of the best vehicles achieve this necessary early coordination. These institutions are herein referred to as "clearinghouses." The final rule will be consistent with regulations implementing E.O. 12372.

The paragraph in the existing regulation (§ 771.111(g)) which discusses tiered environmental impact statements (EIS's) would be modified slightly. Because of the nature of its program, FHWA believes the tiered EIS has only very limited application to the highway program and considers the discussion of tiering in § 1502.20 of the CEQ regulation to be adequate for FHWA applicants. Because of the types of projects it funds, UMTA believes additional information on tiering could be helpful to its applicants. Accordingly, the section on tiered EIS's would be modified to better reflect the tiered EIS approach as it relates to the UMTA program (see proposed § 771.109(g)).

The UMTA is proposed to revise the list of actions which normally require EIS's (Class I Actions). New construction or extention of fixed guideway systems, including raillines and busways, have normally required EIS's in the past. Proposed § 771.113(a) would eliminate exclusive busways from Class I because of the potential to construct a busway on or a alongside an existing highway facility where the environmental impacts may not be significant. In such cases, an environmental assessment (EA) would be required. It should be noted that UMTA will require an EIS for the construction of a fixed guideway for buses which is not integrated with an existing highway facility. It is also proposed to delete the Class I Action involving the construction of major transportation related developments. In the past, this category covered a variety of urban redevelopment projects related to urban transit needs. Often the UMTA assistance was used by the applicant in conjunction with funds from the Department of Housing and Urban Development and the Economic Development Administration. Because of budget limitations, funding for these projects is rarely pursued.

Instead, UMTA is focusing its resources on basic transit improvements. The deletion of this Class I Action should add flexibility in handling any such urban development projects. In the future, the environmental process will be determined by UMTA on a case-by-case basis. If the proposed project involves substantial demolition, displacement of a large number of individuals or businesses, or substantial disruption to local traffic patterns, an EIS will usually be required.

Since issuance of the current regulation in 1980, the FHWA and UMTA have received numerous suggestions for additional categorical exclusions and for modifications to existing categorical exclusions. These suggestions have been reviewed and it has been determined that many of them warrant adoption.

In order to accommodate these and future suggestions with a minimum of redtape and delay and to streamline the categorical exclusion process, it is proposed to divide the list of categorical exclusions into two separate lists, each with its own set of review procedures.

The first list is in the regulation under proposed § 771.113(b)(1). Once a class of actions is placed on that list, individual actions proposed for funding by applicants would not require documentation or approval under proposed § 771.115(b) if they fall within one or more of the listed classes.

The majority of actions on this list would be taken from the list of categorical exclusions in existing § 771.115(b). These actions primarily involve administrative, planning, design and some very light construction activities which, on the basis of past experience with similar action, do not involve significant environmental impacts or substantial planning, time or resources.

Proposed categorical exclusion 1 in § 771.113(b)(1) represents a combination of nonconstruction categorical exclusions taken from § 771.115(b)(1)-(7) and (23) of the existing regulation. Similarly, proposed categorical exclusions 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15 and 17 are taken respectively from § 771.115(b) (8), (10), (11), (12), (15), (17), (19), (20), (21), (23), (24), (26) and (29) of the existing regulation.

The existing categorical exclusion for certain aspects of the rural public transportation program, § 771.115(b)(18), would be modified in proposed categorical exclusion 8 to include the purchase of vehicles with rural public transportation (Section 18) funds. This proposed revision would not change current policy or procedure, but would clearly identify the purchase of vehicles as a categorical exclusion in keeping with instructions previously issued on this subject.

Proposed categorical exclusion 12 would modify existing § 771.115(b)(22) to permit the use of minor amounts of additional land in conjunction with the rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities. The proposed revision to this categorical exclusion would cover proposed actions where the reconstruction of transit facilities could result in an insignificant expansion of the property line. This minor expansion of an existing facility would not be expected to cause significant traffic, noise or air quality effects, provided the facility is compatible with the surrounding land use.

Proposed categorical exclusions 17 and 18 are new and relate primarily to FHWA activities. Proposed categorical exclusion 17 would allow the FHWA to approve the use of highway right-of-way for other than highway purposes (see 23 CFR 1.23(c)) as a categorical exclusion where the permitted use would not have impacts of a sufficient magnitude to require the preparation of either an EIS or an EA. An example of such a joint use of highway right-of-way might be the proposed construction of a parking lot on highway right-of-way under a bridge.

Proposed categorical exclusion 18 would permit the acquisition of property interests known as scenic easements adjacent to the highway right-of-way.

Proposed categorical exclusion 19 is new and relates primarily to UMTA funded activities. It would permit bus and rail car rehabilitation work to proceed as a categorical exclusion.

The second list of categorical exclusions would be included in proposed § 771.113(b)(2) of the regulation and would contain examples of activities which would generally be considered categorical exclusions, but which would require approval by the Administration on a project-by-project basis under proposed § 771.115(b). This is the procedure currently required for all categorical exclusions.

Although the FHWA and UMTA believe that the examples on this list meet the criteria for categorical exclusion, these actions would generally involve a greater degree of construction activity than the actions to be listed on a nationwide basis under proposed § 771.113(b)(1). Because of the possible scale of these actions, individual Federal approval is deemed warranted, with supporting information required as needed.

In addition to the examples of categorical exclusions listed in proposed § 771.113(b)(2), this section would also permit applicants to recommend additional actions for processing as categorical exclusions. If the Administration determines that such an action meets the criteria for categorical exclusion as defined in § 1508.4 of the CEQ regulation and proposed § 771.115(a), the action would be processed as a categorical exclusion.

A discussion of the examples of categorical exclusions included in proposed § 771.113(b)(2) follows.

Existing § 771.115(b)(9) covers the reconstruction of modification of existing bridge structures, but specifically exempts bridges which are on or eligible for the National Register of Historic Places or which provide access to barrier islands. Proposed § 771.113(b)(2)(i) would eliminate these two exceptions. Full compliance with the requirements of the National Historic Preservation Act of 1966 would continue to be required for all bridges on or eligible for the National Register. However, a National Register listing would not automatically preclude the Administration from processing the action as a categorical exclusion as provided by the existing regulation. The FHWA and UMTA also believe that the constraints placed on the use of this categorical exclusion in the existing regulation provide adequate protection with respect to barrier islands. Both the present and the proposed provision limit this categorical exclusion to the reconstruction or modification of an existing bridge on essentially the same alignment or location. These limitations would continue to prohibit the processing of a project to provide new access to a barrier island as a categorical exclusion.

Proposed § 771.113(b)(2)(ii) would modify existing § 771.115(b)(13) to allow certain highway reconstruction projects to be processed as categorical exclusions and to specifically include the reconstruction of existing ramps and ramp configurations. Reference to the amount of additional right-of-way and the degree of changes in access control required would be deleted from the example. Phrases such as "minor amounts of right-of-way" and "substantial changes in access control" have proven difficult to apply on a national basis. However, right-of-way acquisition and changes in access control are factors that would continue to be considered in determining the appropriateness of categorical exclusion. Proposed § 771.113(b)(2)(iii) would modify existing § 771.115(b)(14) by deleting identical references to right-of-way and access control.

Proposed § 771.113(b)(2) (iv) and (v) are taken without change from § 771.115(b) (16) and (25) respectively.

Proposed § 771.113(b)(2)(vi) is new and would permit the construction of truck weigh stations, rest areas and rest area improvements to be processed as categorical exclusions with Administration approval.

Proposed § 771.113(b)(2)(vii) is new and is being proposed in response to problems that have developed under § 771.115(b)(24) with respect to bus transfer facilities. The existing exclusion covers the installation of small passenger and bus shelters where no substantial land acquisition or traffic disruption would occur. In the past, project applicants have proposed that bus transfer facilities be processed under this categorical exclusion. Rather than encourage this broad interpretation, UMTA is now proposing a new categorical exclusion to cover bus transfer facilities. It has been UMTA's experience that these facilities do not normally cause significant environmental impacts. In this regard, the proposed categorical exclusion would apply only where there is compatability with surrounding land use and adequate road capacity. Bus transfer facilities proposed for residential neighborhoods would not be exempted from environmental analysis.

Proposed § 771.113(b)(2)(viii) covers the construction of rail storage and maintenance facilities. It is recognized that such facilities can normally be built and operated without adverse impact on the surrounding community. However, this judgement must take into consideration the existing land use and zoning, the size of the proposed facility, and the potential for noise impacts. Comments are specifically invited on the conditions or criteria that should apply to this categorical exclusion.

Proposed § 771.113(b)(2)(ix) covers rulemaking actions. We have found that rulemaking actions which do not meet the criteria requiring regulatory impact analysis under Executive Order 12291, meet the criteria for categorical exclusion. This convenient relationship between the regulatory procedures of Executive Order 12291 and the environmental procedures of this regulation is continued from the current rule. The reference in the existing rule to Executive Order 12044, is changed to reflect that Executive Order 12291 has superseded Executive Order 12044.

Proposed § 771.117(h) would continue to require a 30-day public review period for an EA for a proposed action which would normally require an EIS under § 771.113(a). However, the penultimate sentence in the present regulation has been revised and the last sentence has been deleted because some offices incorrectly interpreted the existing language as requiring two sequential 30-day time periods.

Proposed § 771.121 would address the procedures associated with draft EIS's. The most important changes to existing § 771.123 are discussed below.

Scoping is the process used to determine the scope of issues to be addressed and for identifying the significant issues related to a proposed action (40 CFR 1501.7). Since the existing regulation took effect in December 1980, UMTA has had mixed results from its scoping meetings. Some meetings have raised new issues and provided a forum for previously unknown public opinion. Other meetings have been characterized by a perfunctory information exchange between project sponsors and the public. Flexibility would be added to the scoping requirement for UMTA EIS's in proposed § 771.121(b). Scoping would be achieved by soliciting comments by mail on the proposed scope of the EIS or by holding meetings. Decisions on how scoping will be achieved would be made jointly by the applicant and UMTA.

Proposed § 771.121(g) retains the basic requirements concerning public hearings held in conjunction with the circulation of the draft EIS. The minimum period of availability of the draft EIS prior to the public hearing would be reduced from 30 days to 15 days in order to be fully consistent with the CEQ regulation (40 CFR 1506.6(c)(2)). Applicants for most UMTA grants are encouraged to coordinate the preparation of the draft EIS with the submission of the grant application so that the EIS can be distributed for comment prior to the grant application public hearing. This would permit the applicant to hold a single hearing for purposes of the grant application and the draft EIS. This approach would generally not be feasible in the case of major urban transportation investments, because applicants are encouraged not to select a preferred alternative at the draft EIS stage, which occurs early in the planning process. Draft EIS's undertaken at this early stage, prior to submission of a grant application, would require a separate hearing. The intention is to encourage early preparation of the EIS and to solicit input from the public on the potential environmental effects of project alternatives.

Proposed § 771.123 would address the procedures associated with final EIS's. The most important changes to existing § 771.125 are discussed below.

Paragraph (a)(1) would require the final EIS to identify the environmental mitigation measures that are to be incorporated into the proposed action, but would no longer require the final EIS to include when appropriate a description of the procedure to be followed to assure that all environmental mitigation measures are implemented. Implementation and monitoring of mitigation measures are required under §§ 1505.2(c) and 1505.3 of the CEQ regulation. Since FHWA and UMTA continue to be bound by the CEQ regulation, consolidation of this Section will merely avoid duplication. In addition, proposed § 771.107(b) of this regulation would retain the existing FHWA/UMTA requirements which assign responsibility for these functions in accordance with the CEQ regulation. In light of these existing requirements, the inclusion of implementation procedures in the EIS itself is duplicative and unnecessary.

Proposed § 771.123(c) would require the final EIS to be reviewed for compliance with applicable laws, regulations and policies. This would replace the requirement in § 771.125(d) for a legal sufficiency review by the Administration's Chief Counsel or designee. The requirement for agency legal review comes from DOT Order 5610.1C. This requirement has not been changed and FHWA and UMTA continue to believe that a review by agency Counsel to assure compliance with applicable legal requirements is essential. Each Administration will issue appropriate internal operating instructions to implement this requirement. This change would be made in the regulation because the legal review reflects an internal procedural requirement not affecting the responsibilities of grant applicants. An identical change would be made in proposed § 771.133(j) with respect to Section 4(f) documents.

771.123(d) would revise the requirements concerning prior concurrence in certain final EIS's. Section 771.125(e) currently requires prior concurrence by the Administration Washington Headquarters and the Office of the Secretary of Transportation in final EIS's prepared for actions in one or more of the following categories:

(1) Any highway project on a new location in an urbanized area of over 100,000 population or bypassing such area.

(2) Any new controlled access freeway.

(3) New construction or extension of a fixed guideway transit system.

(4) Any major transportation related development whose construction requires the preparation of an EIS (see § 771.115(a)(4)) if the proposed Administration grant assistance exceeds $5 million or if the proposed total cost of publicly and privately funded construction is expected to exceed $50 million.

(5) Any action to which a Federal, State or local government has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(6) Any action for which the Administration or the Office of the Secretary of Transportation requests that the FEIS be reviewed at the Washington Headquarters office.

Recently, the Office of the Secretary determined that prior concurrence would no longer be required by that office. Accordingly, § 771.123(d) would limit prior concurrence to the Administration Washington Headquarters. Based on past experience with the concurrence process, the FHWA and UMTA are also proposing to revise the categories for which prior concurrence would be required. The proposed categories in § 771.123(d) would allow the Administration to exercise greater discretion in selecting those environmental documents that warrant review and would permit resources in the Headquarters office to be concentrated on the areas of greatest need.

As an example of the type of actions for which a request would be made under § 771.123(d)(i), the FHWA intends to require prior concurrence for all final EIS's prepared for gaps in the Interstate system. Both the FHWA and UMTA intend to issue supplemental guidance to their field offices to clearly identify those categories of actions which require prior concurrence.

Proposed § 771.125 would continue existing requirements with respect to the record of decision in existing § 771.127 with one exception. The requirement for a preliminary record of decision would be eliminated. That particular requirement goes beyond the requirements of the CEQ regulation and is considered to be unnecessary. Reference to the preliminary record of decision would also be dropped from the section on final EIS's.

Existing § 771.129, Reevaluation, would be revised and retitled as § 771.127, Reevaluation and supplemental statements. The proposed section would be substantially shorter than the existing version and would provide for greater consistency with requirements of the CEQ regulation. Existing provisions concerning the circumstances under which a supplement is necessary would be clarified; the need to periodically reevaluate the anticipated impacts of a proposed action would be emphasized; and the requirements and responsibilities concerning reevaluations would be clarified.

Proposed § 771.127(a) would clearly provide that a draft or final EIS may be supplemented at any time. Proposed § 771.127(b) would require the applicant to prepare a written reevaluation if an acceptable final EIS is not submitted to the Administration within 3 years from the date of circulation of the draft EIS. A significant worsening of the anticipated adverse impacts of the proposed action would require either a supplement to the draft EIS or a new draft EIS.

In proposed § 771.127(c), UMTA is proposing that a supplemental draft EIS may be warranted for major urban mass transportation investments where the alternative analysis/draft EIS had been circulated during the early planning stage, well before specific project details are known. If the original draft EIS contained sufficient detail on alternatives, a final EIS would be prepared during the preliminary engineering phase as outlined in the UMTA major investment procedures (45 FR 71987; October 30, 1980). If a significant time period had elapsed since the draft EIS and the project impacts had been refined substantially, UMTA would use its discretion to prepare and circulate a supplemental draft EIS. This option would be required in order to preserve the opportunity for agencies and the public to offer comments on a document that had been substantially changed.

In the case of actions with approved final EIS's, proposed § 771.127(d) would require the applicant to prepare a written evaluation prior to proceeding with major project approvals or authorizations and prior to filing any application for a Federal permit. If the evaluation shows significant changes in the anticipated adverse environmental impacts, a supplemental EIS would be required. Written evaluations are currently required at 3- and 5-year intervals where major steps have not occurred to advance an action after approval of the final EIS. These evaluations would no longer occur automatically at 3- and 5-year intervals under the proposed regulation.

Existing § 771.131, Emergency action procedures, has been reprinted in its present format. However, FHWA is considering changes to this section to also permit the Administrator, after consultation with the CEQ to waive certain requirements in order to accelerate certain transportation projects in accordance with the requirements of Section 129 of the Surface Transportation Assistance Act of 1982. This Act requires the Secretary to seek ways to "reduce the time required from the request for project approval through the completion of construction." The FHWA seeks suggestions concerning how § 771.129 can be rewritten to achieve the objectives of the National Environmental Policy Act and Section 129. Such acceleration would be in addition to the special procedures now available for emergency actions.

Proposed § 771.133 would address the procedures for compliance with Section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f), 23 U.S.C. 138). The most important changes to existing § 771.135 are discussed below.

Paragraph (f) would modify existing regulatory language concerning the applicability of Section 4(f) requirements to archeological sites. Currently, Section 4(f) does not apply to archeological resources which do not warrant preservation in place and are, in fact, recovered. Frequently, the State Historic Preservation Officer and the Advisory Council on Historic Preservation suggest that resources of mimimal importance be preserved in place rather than recovered so that the resources will be preserved for future study. Often resources are so umimportant that, once catalogued, the expense of a recovery effort is not warranted. This proposed change would make it clear that so long as an archeological site is important chiefly for the materials which it contains and the appropriate State and Federal historic preservation officials agree with the proposed mitigation effort, Section 4(f) would not apply. Recovery of a resource would not be required in order for an action to be advanced without a Section 4(f) determination in appropriate instances.

As previously noted, § 771.133(j) would require review of the final Section 4(f) document for compliance with applicable laws, regulations and policies, but would delete reference to internal FHWA operating responsibilities.

Two new regulatory provisions would be added to recognize current policy and procedure with respect to the preparation and circulation of separate Section 4(f) evaluations. Section 771.133(l)(2) would require a separate Section 4(f) evaluation when the 4(f) property is identified after the categorical exclusion, finding of no significant impact or final EIS has been processed. It should be noted that a separate evaluation is required only where § 771.133 (f) or (g) requires consideration under Section 4(f). Section 771.133(m) would indicate that preparation and circulation of a separate Section 4(f) evaluation does not necessarily require preparation of an EIS or supplemental EIS or withdrawal of any previous approvals for those aspects of the proposed action not directly affected by the Section 4(f) property.

The FHWA and UMTA have received a number of comments on the application of Section 4(f) to existing transportation facilities. Examples include highway bridges and certain mass transit facilities which are on or eligible for the National Register of Historic Places and proposed for improvement with Federal funds. Many commenters have suggested that Section 4(f) requirements should not be applicable to such facilities. Proposed § 771.133(o) would clarify existing FHWA and UMTA practice on this issue. While Section 4(f) clearly applies to work which impairs the historic significance of an existing historic transportation facility, work which does not damage historic significance, such as repair and restoration work, does not require the application of Section 4(f). Properties on or eligible for inclusion on the National Register will continue to receive full consideration under the requirements of the National Historic Preservation Act. Comments are invited on this proposed clarification and on any other actions that FHWA and UMTA could take in an attempt to address the applicability of Section 4(f) to existing transportation facilities.

In addition to the proposed changes discussed above, most sections of the existing regulation would be revised in one or more of the following respects: deletion of superfluous and redundant language, editorial corrections, and updating of obsolete references.

Changes are proposed throughout the document to eliminate duplication between this regulation and the provisions of other regulations. As an example, existing § 771.105(f) would be deleted because those requirements exist in various other regulations. In addition, reference to metropolitan planning organizations (MPO's) would be deleted throughout the regulation since the role of the MPO in the project development process is clearly defined in FHWA/UMTA planning regulations (23 CFR Part 450, 49 CFR Part 613).

In order to clarify requirements for preparation of environmental documents, the discussion of the preparation of the draft EIS in proposed § 771.121(c) would be consistent with instructions for the preparation of the final EIS in proposed § 771.123(a)(1).

Provisions in § 771.109 which excluded EIS's submitted prior to the effective date of the FHWA regulation which implemented the CEQ regulation have been eliminated. The FHWA believes that all EIS's now submitted must comply with the new regulation and, thus, these provisions are no longer required.

A Table of Sections which cross-references the current sections of 23 CFR 771 with the proposed sections in this notice of proposed rulemaking follows.

CROSS-REFERENCE TABLE OF SECTIONS (23 CFR PART 771)

Current section	Proposed section
771.101	771.101
771.103 (deleted)	771.101
771.105	771.103
771.107	771.105
771.109	771.107
771.111	771.109
771.113	771.111
771.115	771.113
771.117	771.115
771.119	771.117
771.121 (no change)	771.119
771.123	771.121
771.125	771.123
771.127	771.125
771.129	771.127
771.131	771.129
771.133	771.131
771.135	771.133
771.137 (no change)	771.135

These proposed amendments are considered to be significant under DOT regulatory policies and procedures because the effected regulation involves important departmental policy as implemented by the FHWA and UMTA. An evaluation of the environmental impact procedures is available for inspection in the public docket and a summary may be obtained by contacting Mr. Gatz at the address provided above under the heading "For Further Information Contact." Although the proposed amendments are designed to streamline the project development process, it is not anticipated that they would have a significant economic effect. Accordingly, the FHWA and UMTA have determined that this document does not contain a major proposal under Executive Order 12291. For the same reason and because the impact of the proposed amendments would fall on Federal and State governments, under the criteria of the Regulatory Flexibility Act, it is certified that these amendments, if promulgated, will not have a significant economic impact on a substantial number of small entities.

This proposed regulation would apply to both FHWA and UMTA actions. It would be published as Part 771 of Title 23 of the Code of Federal Regulations (CFR) with a cross-reference in Part 622 of Title 49 of the CFR. No amendments would be required to the provisions of Part 622 as such.

In consideration of the foregoing and under the authority of 42 U.S.C. 4321 *et seq.*, 23 U.S.C. 101 *et seq.*, 49 U.S.C. 1601 *et seq.*, 49 U.S.C. 1653(f), and the delegations of authority at 49 CFR 1.48(b) and 1.51, it is proposed to amend Chapter I of Title 23, Code of Federal Regulations, by revising Part 771 as set forth below.

(Catalog of Federal Domestic Assistance Program Numbers: 20.205, Highway Research, Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501, Urban Mass Transportation Capital Improvement Loans; 20.502, Urban Mass Transportation Grants for University Research and Training; 20.503, Urban Mass Transportation Managerial Training Grants; 20.504, Urban Mass Transportation Technology; 20.505, Urban Mass Transportation Technical Studies Grants; 20.506, Urban Mass Transportation Demonstration Grants; 20.507, Urban Mass Transportation Capital and Operating Assistance Formula Grants; 20.509, Public Transportation for Rural and Small Urban Areas; 20.510, Urban Mass transportation Planning Methods, Research and Development; 23.003, Appalachian Development Highway Systems; 23.008, Appalachian Local Access Roads)

The regulations implementing EO 12372 or OMB Circular No. A-95 (whichever is applicable) on intergovernmental consultation on Federal programs and activities apply to these programs.

List of Subjects in 23 CFR Part 771 and 49 CFR Part 622

Environmental impact statements, Grant programs—transportation, Highways and roads, Mass transportation, Historic preservation, National parks, Public lands—multiple use, Recreation areas, Wildlife refuges.

Issued on July 27, 1983.

G. Kent Woodman,

Acting Administrator, Urban Mass Transportation Administration.

R. A. Barnhart,

Federal Highway Administrator, Federal Highway Administration.

It is proposed to revise Part 771 to read as set forth below.

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 138, and 315; 49 U.S.C. 1602(d), 1604(h), 1610, and 1653(f); 40 CFR Part 1500, *et seq.*; 49 CFR 1.48(b) and 1.51.

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Urban Mass Transportation Administration (UMTA) for implementing the National Environmental Policy Act of 1969, as amended (NEPA), and the regulations of the Council on Environmental Quality (CEQ), 40 CFR Parts 1500–1508. This regulation sets forth all FHWA, UMTA, and Department of Transportation (DOT) requirements under NEPA for the processing of transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h) and 49 U.S.C. 1604(h)(2) and 1610 to make the certifications required by 49 U.S.C. 1602 and 1604(i).

§ 771.103 Policy.

It is the policy of the Administration that:

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated into a single process, and compliance with all applicable environmental requirements be reflected in the appropriate environmental document require by this regulation; [1]

[1] FHWA Technical Advisory T 6640.8, February 24, 1982, provides detailed guidance on the format and content of FHWA NEPA documents. It also includes a detailed list and annotated description of various environmental laws, regulations, and executive Orders which could be applicable to FHWA projects. The Technical Advisory is available for inspection and copying as prescribed

(b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation and of national, State, and local environmental protection goals;

(c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions;

(d) Measures necessary to mitigate adverse impacts be incorporated into the proposed action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when it is determined that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action;

(2) The proposed mitigation represents a reasonable public expenditure when considered in light of the severity of impacts of the action and the social, economic, and environmental benefits of the proposed mitigation measures; and

(3) The proposed measures would assist in complying with a statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred by the applicant which are directly related to the preparation of environmental documents requested by the Administration be eligible for Federal assistance in accordance with Administration procedures.

§ 771.105 Definitions.

The definitions contained in the CEQ regulation and in titles 23 and 49 of the United States Code are applicable to this regulation. In addition, the following definitions apply:

(a) Environmental studies—the investigations of potential environmental impacts made to determine the appropriate environmental process to be followed and subsequent investigations that assist in the preparation of the appropriate environmental document.

(b) Action—the approval of construction of highway or transit projects with funds administered by FHWA or by UMTA. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) Administration—the FHWA or UMTA, whichever is the designated lead agency for the proposed action.

in 49 CFR Part 7, Appendixes D and G, from FHWA Headquarters and field offices.

§ 771.107 Applicability and responsibilities.

(a)(1) The provisions of this regulation and the CEQ regulation apply to proposals for Administration action over which the Administration exercises sufficient control and responsibility to alter the action being proposed. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan, are not Administration actions.

(2) The provisions of this regulation do not apply to, affect, or alter decisions, approvals, authorizations, or other actions made by the Administration prior to the effective date of this regulation.

(3) Environmental documents accepted or prepared by the Adminstration after the effective date of this regulation will be developed in accordance with this regulation.

(b) It shall be the responsibility of the applicant, in cooperation with the Administration, to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation. The FHWA will assure that this is accomplished through reviews and approvals of designs, plans, specifications, and estimates (PS&E) and construction inspections. The UMTA will assure implementation of committed mitigation measures through incorporation by reference in the grant agreement.

(c) The Administration, in cooperation with the applicant, has the responsibility to manage the preparation of the appropriate environmental document. The role of the applicant is determined by the Administration in accordance with the CEQ regulation as described below.

(1) *Statewide agency*. If the applicant is a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or is a local unit of government acting through a State agency and meets the requirements of § 102(2)(D) of NEPA, the applicant may prepare the EIS and other environmental documents with the Administration furnishing guidance, participating in the preparation, and independently evaluating the document in accordance with § 102(2)(D) of NEPA. All applicants in this group qualify as joint lead agencies with the Administration (all FHWA applicants qualify under this paragraph).

(2) *Joint lead agency*. If the applicant is a public agency and is subject to State or local requirements comparable to NEPA, then the Administration and the applicant may prepare the EIS and other environmental documents as joint lead agencies. The applicant will initially develop substantive portions of the environmental document although the Administration will be responsible for its scope and content.

(3) *Cooperating agency*. If the applicant is a local public agency that has special expertise in the proposed action, the applicant may be a cooperating agency. A local applicant for capital assistance under the Urban Mass Transportation Act (UMT Act) of 1964, as amended, is presumed to be a cooperating agency. During the environmental process, the Administration will determine the scope and content of the appropriate environmental document with the applicant before decisions are made on the scope and depth of the environmental analysis. The applicant may be directed to carry out these decisions.

(4) *Other*. In all other cases, the role of the applicant is limited to providing environmental studies and commenting on environmental documents. All private institutions or firms are limited to this role.

(d) States operating under an approved certification in accordance with 23 CFR Part 640 may substitute for projects which are the subject of such certification, State laws, regulations, directives, and standards which meet the objectives in this regulation in lieu of §§ 771.111(a)(2) and 771.111(b).

§ 771.109 Early coordination, public involvement, and project development.

(a) Early coordination involves the input from and exchanges of information with the public and public agencies from the inception of proposals for actions to the preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental document.

(b) Any requested identification of the probable class of action will be made at the Transportation Improvement Program (TIP) approval stage, or at an earlier stage, if sufficient information is available to identify the probable impacts of the proposed action (23 CFR Part 450).

(c) When the FHWA and UMTA are involved in the development of multimodal projects, the agencies will be joint lead agencies or one agency will be designated as the lead ageny. When the FHWA or UMTA acts as a joint lead agency with another Federal agency, mutually acceptable procedures will be established on a case-by-case basis.

(d) During the early coordination process, the Administration, in cooperation with the applicant, may request other appropriate agencies to become cooperating agencies. Agencies with jurisdiction by law should be requested to become cooperating agencies.

(e) Early notification to and solicitation of views from other States and Federal land management entities significantly affected by the proposed action or any alternative thereto shall be accomplished by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any issues identified which indicate a significant disagreement and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are evaluated, the project evaluated in each EIS or finding of no significant impact (FONSI) prepared for a proposed action shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be useable and a reasonable expenditure even if no additional transportation improvements in the area are accomplished; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major urban mass transportation investments, the tiering of EIS's, as discussed in the CEQ regulation (40 CFR 1502.20), may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implication of the major alternatives. The second tier EIS would address site-specific details on project impacts, costs, and mitigation measures.

(h) In lieu of the procedures required by 23 CFR Part 790, a State may, to comply with 23 U.S.C. 128, adopt public involvement/public hearing and other procedures, subject to FHWA acceptance, which include provisions for one or more public hearings to be held at a convenient time and place, or the opportunity for such hearings, for any Federal-aid project which requires the acquisition of significant amounts of right-of-way; substantially changes the layout or functions of connecting roadways or of the facility being improved; has a significant adverse impact on abutting real property; or otherwise has a significant social, economic, environmental, or other effect. The public involvement/public hearing procedures accepted hereunder must assure reasonable notice to the public of the hearing opportunity as well as the availability of explanatory information. These procedures must be fully coordinated with the NEPA process. Approvals made by FHWA prior to May 11, 1982, of procedures for use in lieu of Part 790 remain valid. Changes in such procedures require FHWA acceptance.

(i) Information on the UMTA environmental process may be obtained from: Director, Office of Planning Assistance, Urban Mass Transportation Administration, Washington, D.C. 20590. Information on the FHWA environmental process may be obtained from: Director, Office of Environmental Policy, Federal Highway Administration Washington, D.C. 20590

§ 771.111 Timing of Administration actions.

(a) The Administration, in cooperation with the applicant, will complete all work, including any necessary design work, required to make those decisions necessary to complete a FONSI or an EIS and to comply with other related laws and regulations, which to the extent possible, must be accomplished coincidently with the NEPA process. However, final design activities, property acquisition (other than hardship or protective buying pursuant to 23 CFR 712.204(d)), or construction shall not proceed until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion, or

(ii) A FONSI has been adopted, or

(iii) A final EIS has been approved and available for the prescribed period of time, and a record of decision, when required, has been prepared and signed; and

(2) For FHWA actions, the FHWA Division Administrator has received and accepted the public hearing transcripts, reports, and certifications required by 23 U.S.C. 128.

(b) For FHWA actions, the completion of the requirements set forth in paragraph (a) of this section is considered acceptance of the general location of the proposed action unless otherwise specified by the appropriate FHWA official. For those categorical exclusions which require location approval, this approval will be made by the FHWA after consultation with the applicant.

(c) Letters of Intent issued under the authority of Section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multiyear capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

§ 771.113 Classes of actions.

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EIS's).* Actions that may significantly affect the environment require an EIS (40 CFR 1508.27). Examples of these actions are:

(1) Any new controlled access freeway.

(2) Any highway project of four or more lanes on a new location.

(3) New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).

(b) *Class II (Categorical exclusions).* Actions that do not individually or cumulatively have a significant effect on the environment may be categorically excluded from the requirement to prepare an EA or EIS. They include:

(1) The following actions meet the criteria for categorical exclusions in the CEQ regulation (§ 1508.4) and § 771.115(a) of this regulation and may be advanced as categorical exclusions by the Administration without subsequent action under § 771.115(b).

(i) Activities which do not involve or lead directly to construction such as planning and technical studies; grants for training and reserach programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required on the planning process pursuant to 23 U.S.C. 134; approval of TIP's under 23 CFR Part 450 and statewide programs under 23 CFR Part 630; approval of project concepts under 23 CFR Part 476; engineering to define the elements of a proposal or alternate so that environmental effects can be assessed; and Federal-aid system revisions under 23 U.S.C. 103, which establishes classes of highways on the Federal-aid highway system.

(ii) Approval of utility installations along or across a transportation facility.

(iii) Construction of bicycle and pedestrian lanes, paths, and facilities.

(iv) Activity included in the State's "highway safety plan" under 23 U.S.C. 402.

(v) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action.

(vi) Alterations to existing buildings to provide for noise reduction and the installation of noise barriers.

(vii) Landscaping.

(viii) Program administration, technical assistance activities, and the purchase of vehicles by the applicant to administer Section 18 funds (rural public transportation program).

(ix) Project administration and operating assistance to transit authorities to continue existing service or increase service to meet demand.

(x) Purchase of vehicles of the same type (same mode) either as replacements or to increase the size of the fleet where such increase can be accommodated by existing facilities or by new facilities which themselves are within a categorical exclusion.

(xi) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(xii) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(xiii) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant physical impacts off the site.

(xiv) Installation of signs, small passenger and bus shelters, and traffic signs where no substantial land acquisition or traffic disruption will occur.

(xv) Acquisition of land in which the property will not be modified, the land use will not be changed, and displacements will not occur. For projects other than UMTA advance land loans, this categorical exclusion is limited to the acquisition of minor amounts of land. This is undertaken for the purpose of maintaining the current land use and preserving alternatives to be considered in the environmental process. Advance land acquisition shall not limit the evaluation of alternatives, including shifts in alignment for a construction project, which may be required in the NEPA process.

(xvi) Emergency repairs under 23 U.S.C. 125 which do not substantially change the design and are commenced during or immediately after the occurrence of a natural disaster of catastrophic failure.

(xvii) Administration approvals of permits for joint use of transportation rights-of-way where the permitted use does not have impacts of sufficient magnitude to require preparation of an EIS or EA.

(xviii) Acquisition of scenic easements.

(xix) Bus and rail care rehabilitation.

(2) Additional actions which meet the criteria for categorical exclusion in the CEQ regulation (§ 1508.4) and § 771.115(a) of this regulation. Such actions may be treated as categorical exclusions upon Administration approval under § 771.115(b). Examples of such actions include:

(i) Reconstruction or modification of an existing bridge structure or modification of an existing bridge structure on essentially the same alignment or location. This categorical exclusion includes projects to widen a one-lane bridge to two lanes when the approach roadway is a two-lane facility.

(ii) Modernization of an existing highway by resurfacing, restoration, rehabilitation, reconstruction, widening less than a single-lane width, adding shoulders, adding auxiliary lanes for localized purposes (e.g., weaving, turning, climbing), correcting substandard curves and intersections, and reconstructing existing ramps and ramp configurations.

(iii) Highway safety or traffic operations improvement projects including the correction or improvement of high-hazard locations, elimination of roadside obstacles, highway signing, pavement marking, traffic control devices, railroad warning devices, and lighting.

(iv) Ridesharing activities and transportation corridor fringe parking facilities.

(v) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(vi) Truck weigh stations and rest area construction and improvements.

(vii) Construction of bus transfer facilities when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus use.

(viii) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(ix) Promulgation of rules, regulations, and directives for which a regulatory impact analysis is not required by Section 3 of Executive Order 12291.

(c) *Class III (EA's).* Actions in which the significance of the impact on the environment is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required. In the case of rules, regulations, or directives for which a regulatory impact analysis is required by Executive Order 12291, the EA may be contained in the regulatory impact analysis and need not be a separate document.

§ 771.115 Categorical exclusions.

(a)(1) Categorical exclusions are actions which meet the definition contained in § 1508.4 of the CEQ regulation and (based on past experience with similar actions) do not involve significant environmental impacts. These actions will not induce significant foreseeable alterations in land use, planned growth, development patterns, or natural or cultural resources.

(2) Any action which may be classified as a categorical exclusion but which involves extraordinary circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies and determine whether an EIS is needed. For purposes of this paragraph extraordinary circumstances include situations that are likely to involve:

(i) Significant impacts on the environment;

(ii) Substantial controversy on environmental grounds;

(iii) Significant impacts on properties protected by Section 4(f) of the DOT Act and Section 106 of the National Historic Preservation Act; or

(iv) Inconsistencies with any Federal, State, or local law or administrative determination relating to the environment.

(b) Except as provided in § 771.113(b)(1), a recommendation by an applicant that a proposed action be processed as a categorical exclusion must be approved by the Administration. The Administration may require sufficient information to determine if the proposal meets the criteria for a categorical exclusion.

§ 771.117 Environmental assessments.

(a) The EA shall be prepared by the applicant in consultation with the Administration for each action that is not a categorical exclusion and does not clearly require the preparation of an EIS or where, in the opinion of the Administration, the EA would assist in determining the need for an EIS.

(b) For actions that require an EA, the applicant, in consultation with the Administration, will, at the earliest appropriate time, begin consultation with interested agencies and others to achieve the following objectives: define the scope of the project, identify alternatives, determine which aspects of the proposed action have potential for environmental impact, identify measures and alternatives which might mitigate adverse environmental impacts, and identify other environmental review and consultation requirements which should be performed concurrently with the EA. The applicant will accomplish this through an early coordination process (i.e., procedures under § 771.109) or through a scoping process. A summary of the contacts made and comments received will be included in the EA.

(c) The EA is subject to Administration approval before it is made available to the public as an Administration document.

(d) The EA need not be circulated for comment, but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of the availability of the EA shall be sent by the applicant to the State and areawide clearinghouses.

(e) When a public hearing is required as part of the application for Federal funds, the EA will be prepared in advance of the notice of the public hearing. The notice of the public hearing in local newspapers will announce the availability of the applicant's EA and where it may be obtained or reviewed. The FHWA public hearing requirements are as described in 23 CFR Part 790 unless other procedures have been adopted and accepted in accordance with 23 CFR 771.109(h). The UMTA public hearing requirements are found in 49 U.S.C. 1602(d) and 1604(i).

(f) When a public hearing is not required, the applicant shall place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action advising the public of the availability of the EA and where information concerning the action may be obtained. The notice shall invite comments from all interested parties. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the publication of the notice unless the Administration determines a shorter period is warranted.

(g) If no significant impacts are identified, the applicant will furnish the Administration a copy of the EA, revised as appropriate, the public hearing transcript when a public hearing was held, and a summary of any comments received and responses thereto and recommend a FONSI.

(h) If, at any point in the EA process, the Administration determines that the proposed action may have a significant impact on the environment, the preparation of an EIS will be required. Actions in § 771.113(a) will normally require preparation of an EIS. If an action in these categories is processed with an EA, copies of the EA will be made available for public review (including State and areawide clearinghouses) for 30 days before the Administration makes its final decision. (See CFR 1501.4(e)(2).) This public availability will be announced by a notice similar to a public hearing notice.

§ 771.119 Findings of no significant impact.

(a) The Administration, after review of the EA and any public hearing comments or other comments received regarding the EA, and if in agreement with the applicant's recommendations pursuant to § 771.117(g), will make a separate written FONSI incorporating the EA and any other appropriate environmental documents.

(b) After a FONSI has been made by the Administration, a notice of the availability of the FONSI shall be sent by the applicant to State and areawide clearinghouses and the document will be available from the applicant or the Administration upon request by the public.

(c) If another Federal agency has issued a FONSI on an action which includes an element proposed for Administration funding, the Administration will evaluate the FONSI, and if it is determined that the proposed Administration-funded action and its environmental impacts are adequately identified and assessed, the Administration will issue its own FONSI incorporating the other agency's FONSI.

§ 771.121 Draft environmental impact statements.

(a) A draft EIS will be prepared when the Administration determines that the action may cause significant impacts on the environment. When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent for publication in the **Federal Register**. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the Administration, in cooperation with the applicant, will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.109, and through other early coordination activities. For UMTA, scoping is achieved by soliciting agency and public responses to the proposed action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The draft EIS shall discuss all reasonable alternatives to the proposed action and summarize the studies, reviews, consultations, and coordination required by environmental laws and Executive Orders to the extent appropriate at this stage in the enviromental process.

(d) An applicant which is a "joint lead" or "cooperating" agency may select a consultant to assist in the preparation of an EIS subject to the concurrence of the Administration to assure compliance with 40 CFR 1506.5(c). A "statewide" agency may select a consultant in accordance with applicable procedures. The Administration will select any such consultant for "other" applicants. (See 23 CFR 771.107(c) for definitions of these terms.)

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the title page.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The UMTA requires a public hearing during the circulation period of all draft EIS's. The FHWA public hearing requirements are as described in 23 CFR Part 790 unless other procedures have been adopted and accepted in accordance with § 771.109(h). If a public hearing is required, the draft EIS shall be available for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be included in any public hearing notice and mentioned at any public hearing presentation with a request for public comments. If a public hearing is not required, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(h) The draft EIS shall be circulated to:

(1) Public officials, private interest groups, and members of the public known to have an interest in the proposed action or the draft EIS; and

(2) Government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the proposed action. Comments should be obtained directly from appropriate State and local agencies, except where review is secured through a mechanism established pursuant to the regulations implementing EO 12372 or OMB Circular A-95 (whichever is applicable).

(i) The **Federal Register** public availability notice (40 CFR 1506.10) shall establish a period of not less than 45 days for the return of comments on the draft EIS. The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) The applicant shall furnish copies of the draft EIS to those States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

§ 771.123 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The final EIS shall identify the preferred alternative, discuss substantive comments received on the draft EIS and all reasonable alternatives considered, summarize citizen involvement, and identify the environmental mitigation measures that are to be incorporated into the proposed action. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders or provide reasonable assurance that their requirements can be met.

(2) For UMTA-funded major urban mass transportation investments (new construction or extension of a fixed guideway), the applicant shall prepare a report identifying a locally preferred alternative. Approval may be given to begin preliminary engineering on the principal alternative(s) currently under consideration. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS.

(b) Every reasonable effort shall be made to resolve interagency disagreements on proposed actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and the consultations and other efforts made to resolve them.

(c) The final EIS shall be reviewed for compliance with applicable laws, regulations, and policies.

(d) The Administration will indicate approval of the final EIS for an action by signing and dating the title page. However, final EIS's prepared for actions in one or more of the following categories shall be subject to prior concurrence by the Administration Washington Headquarters.

(1) *For FHWA and UMTA projects:*

(i) Any action for which the Administration requests that the final EIS be reviewed at the Washington Headquarters office.

(ii) Any action to which a Federal, State, or local government has indicated objections on environmental grounds or any action with major unresolved issues.

(2) *For FHWA projects:* All programmatic final EIS's or programmatic Section 4(f) statements.

(3) *For UMTA projects:* Major urban mass transportation investments as defined by UMTA's September 22, 1976, policy on major investments (41 FR 41512).

(e) The signature of the UMTA approving official on the title page constitutes UMTA authorization to circulate the final EIS; compliance with Section 14 of the UMT Act and fulfillment of the grant application requirements of Sections 3(d)(1) and (2) and Sections 5(h) and 5(i) of the UMT Act. The approval of the final EIS does not commit UMTA to approval of any grant request for future funding of the preferred alternative.

(f)(1) After review of a draft EIS on an action in one or more of the categories in paragraph (d) of this section, the Administration may determine that the final EIS may be processed without prior concurrence of the Administration Headquarters office. This determination will include consideration of:

(i) Adequacy of early coordination with other Federal, State, and local government agencies; and

(ii) Adequacy of the draft EIS in identifying environmental impacts of, and reasonable alternatives to, the proposed action.

(2) Any determination under this paragraph is subject to review and withdrawal at any time prior to approval of the final EIS.

(g) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(h) At the time the final EIS is distributed and filed with EPA, the applicant is responsible for making the final EIS available through the mechanism established pursuant to the regulations implementing EO 12372 or to OMB Circular A-95 (whichever is applicable). The applicant shall also publish a notice of availability in local newspapers and furnish the document to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy. At the time the final EIS is filed with EPA, the final EIS shall also be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

§ 771.125 Record of decision.

(a) The Administration shall complete and sign a record of decision (ROD) (40 CFR 1505.2) no sooner than 30 days after publication of the final EIS notice in the **Federal Register** or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD should document any required Section 4(f) approval in accordance with § 771.133(k). No further approvals may be given except for administrative actions taken to secure further project funding and other actions consistent with 40 CFR 1506.1 until any required ROD has been signed. An ROD is not required for those EIS's where the draft EIS was filed with EPA prior to July 30, 1979 (for FHWA, November 30, 1979).

(b) If the Administration subsequently wishes to take an action which was not identified as the proposed action in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be subject to review by those Administration offices which would review the final EIS under § 771.123(d).

§ 771.127 Reevaluation and supplemental statements.

(a)(1) The draft EIS or final EIS may be supplemented at any time. A supplemental EIS will be required only when:

(i) Changes to the proposed action would result in significant adverse environmental impacts not previously identified; or

(ii) New information or circumstances, changes to the proposed action, changes in the project area, or changes to the proposed mitigation measures indicate there will be a significant worsening of the anticipated adverse impacts described in the EIS. If there is uncertainty whether the changes are significant enough to warrant a supplemental EIS, the applicant will develop appropriate environmental studies to assess the impacts of the changes. If it is determined that the changes result in significant adverse environmental impacts which were not identified in the EIS, a supplemental EIS will be prepared. If no supplemental EIS is required after the studies have been made, the Administration shall so indicate in the project file.

(2) A supplemental EIS will not be necessary if the Administration decides to fund an alternative adequately covered in the final EIS but not identified as the proposed action.

(3) A decision to prepare a supplement to the final EIS shall not require withdrawal of the previous approvals for those aspects of the proposed action not directly affected.

(4) A supplement is to be developed in the same manner (except that scoping is not required) as a new EIS (draft and final, with a ROD).

(b) If an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation, a written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the administration prior to the submission of the final EIS. The purpose of this evaluation is to determine whether a supplement to the draft EIS or a new draft EIS is needed pursuant to (a)(1) of this section.

(c) A supplemental draft EIS may be prepared for UMTA major urban mass transportation investments if there is a substantial change in the level of detail on project impacts and costs developed during the environmental process. When tiering is used, the supplemental draft EIS will not reevaluate issues addressed in the original draft EIS. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original EIS.

(d) The applicant shall consult with the Administration and prepare a written evaluation to assure that the anticipated environmental impacts of the proposed action as described in the final EIS have not significantly changed prior to proceeding with major project approvals or authorizations and prior to filing any application for a Federal permit. If there have been significant changes in the anticipated adverse environmental impacts, a supplemental EIS shall be prepared.

§ 771.129 Emergency action procedures.

Requests for deviations from the procedures in this regulation because of emergency situations shall be referred to the Administration's Washington Headquarters for evaluation and decision after consultation with CEQ, through DOT, in accordance with 40 CFR 1506.11 for evaluation and decision.

§ 771.131 Compliance with other requirements.

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive Orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document by the Administration constitutes approval of any required findings and determinations that are contained therein.

§ 771.133 Section 4(f) of the Department of Transportation Act.

(a)(1) No Administration action will use land from a significant publicly owned park, recreation area, or wildlife and waterfowl refuge or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The proposed action includes all possible planning to minimize harm to the property resulting from such use.

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives and that the cost, environmental impacts, or community disruption resulting from such alternatives reaches extraordinary magnitudes.

(b) The Administration will determine the application of Section 4(f). Any use of lands from a Section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under Section 4(f) is not required when the Federal, State, or local official having jurisdiction over a park, recreation area, or refuge determines that it is not significant. The Administration will review the official's determination to assure its reasonableness. In the absence of a satisfactory determination, the Section 4(f) land will be considered to be significant.

(d) In determining the application of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer and local officials and will identify properties on or eligible for the National Register of Historic Places. For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the National Register, unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(e) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, Section 4(f) applies only to portions of such lands which are being used for or are designated in the plans of the administering agency as being for park, recreation, wildlife or waterfowl refuge, or historic purposes. The determination of significance shall be made by the official having jurisdiction over the lands. The Administration will review the agency's determination to assure its reasonableness.

(f)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction except as follows. Section 4(f) does not apply if the Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed to not immediately recover the resource) and has minimal value for preservation in place.

(2) For sites discovered during construction, where Section 4(f) applies, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made and the review process, including the consultation with other agencies, will be shortened as appropriate.

(g) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made and determinations of significance changed late in the development of a proposed action. With the exception of the treatment of archeological resources in paragraph (f) of this section, an action may proceed without consideration under Section 4(f) if the property interest in the Section 4(f) type lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition.

(h) The evaluations of alternatives to avoid the use of Section 4(f) land and of possible measures to minimize harm to such lands shall be presented in the draft EIS or EA or, for those projects classified as categorical exclusions, in a separate document. The document containing the Section 4(f) evaluation shall be provided for coordination and comment to the official having jurisdiction over the Section 4(f) property and to the Department of the Interior, and as appropriate, to the Department of Agriculture and the Department of Housing and Urban Development. A time limit of 45 days shall be established by the Administration for receipt of comments.

(i) The discussion in the final EIS, FONSI, or separate Section 4(f) evaluation shall specifically address:

(1) The reasons why alternatives to avoid a Section 4(f) property are not feasible and prudent; and

(2) All measures which will be taken to minimize harm to the Section 4(f) property.

(j) The final Section 4(f) document shall be reviewed for compliance with applicable laws, regulations and policies.

(k) The Administration will document and make the Section 4(f) approval either in its approval of the final EIS or in the ROD for actions processed with EIS's. In those cases where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property and proposed to be processed with a FONSI or classified as a categorical exclusion shall not proceed until notified by the Administration of Section 4(f) approval. For those actions processed with FONSI or classified as a categorical exclusion, any required Section 4(f) approval will be documented separately.

(l) Circulation of a separate Section 4(f) evaluation will be required when:

(1) A modification of the alignment or design requires the use of section 4(f) property after the categorical exclusion, FONSI, or final EIS has been processed;

(2) The Section 4(f) property is identified after the categorical exclusion, FONSI, or final EIS has been processed;

(3) A modification of the alignment or design which significantly increases the use of Section 4(f) land is found to be necessary after the original Section 4(f) approval; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the Section 4(f) evaluation.

(m) If the Administration determines under § 771.131(l) (1), (2), or (3) that Section 4(f) is applicable after the categorical exclusion, FONSI, of final EIS has been processed, the decision to prepare and circulate a Section 4(f) evalution shall not necessarily require the preparation of an EIS or supplemental EIS, nor shall it require withdrawal of any previous approvals for those aspects of the proposed action not directly affected by the Section 4(f) property.

(n) An analysis required by Section 4(f) may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS.

(1) When the first tier broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation may be made on the potential impacts that a proposed action will have on Section 4(f) land and whether those impacts could have a bearing on the decision to be made. A preliminary determination may be made at this time as to whether there are feasible and prudent locations or alternatives for the action to avoid the use of Section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm to the extent that the level of detail available at the first tier EIS stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first tier EIS stage. This preliminary determination is then incorporated into the first tier EIS.

(2) A Section 4(f) approval made when additional design details are available shall include a determination that:

(i) The preliminary Section 4(f) determination made pursuant to paragraph (n)(1) of this section is still valid,

(ii) There are no feasible and prudent design alternatives to the use of such Section 4(f) land,

(iii) The proposed action includes all possible planning to minimize harm.

(o) Section 4(f) does not apply to work on transportation facilities that are on or eligible for inclusion on the National Register provided that:

(1) the Administration determines that such work will not adversely affect the historic qualities of the property that caused it to be on or eligible for the National Register, and

(2) the Administration determination has not been objected to by a State or Federal agency charged by law with responsibilities in the area of historic preservation in accordance with the National Historic Preservation Act.

§ 771.135 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans and Antarctica).

(2) Administration actions significantly affecting the environment of a foreign nation not participating in the actior or not otherwise involved in the action.

(3) Administration actions which significantly affect the environment of a foreign nation and which provide a product or action producing a toxic emission or effluent that is prohibited or strictly regulated in the United States by Federal law.

(4) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

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