(2) Require the contractor to pay costs reasonably incurred by the United States in taking necessary corrective action, or

(3) Equitably reduce the contract price.

(d) Any written warranty shall specifically exclude coverage of combat damage.

1246.770–2 Tailoring warranty terms and conditions.

As the objectives and circumstances vary considerably among major system acquisition programs, contracting officers shall appropriately tailor the required warranties on a case-by-case basis, including remedies, exclusions, limitations and duration; provided such are consistent with the specific requirements of this section (see FAR 46.706). Contracting officers for major system acquisitions may exclude from the terms of the warranty certain defects for specified supplies (exclusions) and may limit the contractor's liability under the terms of the warranty (limitations), as appropriate, if necessary to derive a cost-effective warranty in light of the technical risk, contractor financial risk, or other program uncertainties. Contracting officers are encouraged to structure broader and more comprehensive warranties where such are advantageous. Likewise, the contracting officer may narrow the scope of a warranty when appropriate (e.g., where it would be inequitable to require a warranty of all performance requirements because a contractor had not designed the system). It is the Department's policy not to include in warranty clauses any terms that require contractor liability for loss, damage or injury to third parties.

1246.770–3 Warranties on government-furnished property.

A prime contractor for a major system acquisition shall not be required to provide the warranties specified in section 1246.770–2 of this part on any property furnished to that contractor by the United States except for defects in installation, and installation or modification in such a manner that invalidates a warranty provided by the manufacturer of the property.

1246.771 Cost benefit analysis.

It is the Department's policy to obtain warranties for a major system acquisition only when they are cost beneficial in accordance with 1246.703(c). If a specific warranty is considered not to be cost beneficial by the contracting officer, a waiver request shall be initiated under section 1246.772 of this part.

1246.772 Waiver and notification procedures.

The Secretary of Transportation may waive the requirement for a written warranty for Coast Guard major acquisition systems when such waiver is in the interest of national defense or if the warranty obtained would not be cost beneficial. Waivers may be granted provided that the Committees on Appropriations of the Senate and the House of Representatives are notified in writing of the Secretary's intention to waive the warranty requirement and the reasons supporting such a determination prior to granting the waiver. The written request for Secretarial waiver of the warranty requirement shall include, at a minimum:

(a) A brief description of the major system and its stage of production, e.g., the number of units delivered and anticipated to be delivered during the life of the program;

(b) The specific waiver requested, the duration of the waiver if it is to involve more than one contract, and the rationale for the waiver; and

(c) All documentation supporting the request for waiver, such as a cost-benefit analysis.

All waivers shall be forwarded via the Office of Acquisition and Grants Management for submission to the Secretary. The Coast Guard shall maintain a written record of each waiver granted and the Congressional notification and report made, together with supporting documentation, for use in answering inquiries.

[FR Doc. 88–17963 Filed 8–9–88; 8:45 am]
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federal register

Wednesday
August 10, 1988

Part III

Department of Education

34 CFR Part 675

College Work-Study and Job Location and Development Programs; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 675

College Work-Study and Job Location and Development Programs

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations for the College Work-Study (CWS) program. This program is authorized by the Higher Education Act of 1965 (HEA). These regulations will reduce administrative burden and provide institutions with greater flexibility in administering the College Work-Study Program.

EFFECTIVE DATE: Section 675.19 (published December 1, 1987) as amended by this regulation takes effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Margaret O. Henry or Kathy S. Gause, U.S. Department of Education, Office of Student Financial Assistance, Division of Policy and Program Development, (Regional Office Building 3, Room 4018), 400 Maryland Avenue, SW., Washington, DC 20202. Telephone (202) 732–4490.

SUPPLEMENTARY INFORMATION: The General Accounting Office (GAO) conducted a review of the College Work-Study program from July through December of 1982. The purpose of the review was to assess how well the program was being administered at selected colleges and universities. The review involved five institutions. The GAO found three areas in which some of the schools did not administer the program effectively: Failure to monitor class and work schedule conflicts, failure to resolve deficiencies in CWS timekeeping and payroll practices, and instances where students were not productively employed or adequately supervised. As a result of their review, the GAO published a report entitled, "Review of Institutional Management of the Federal College Work-Study Program."

The Secretary believed it was necessary to emphasize the schools' need to increase their monitoring of students' reported work hours and improve the adequacy of timekeeping and payroll practices. The existing regulations required an institution to maintain a time record showing the cumulative hours each student worked. On February 27, 1985 the Secretary published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**, 50 FR 8050–8086, that proposed to require institutions to maintain time records, for students paid on an hourly basis, which show the hours each student worked in clock time sequence. These records would show the specific times each student worked. Many of the commenters who responded expressed concern over the administrative burden associated with this proposal.

Based on comments received regarding the administrative burden associated with the proposal, the Secretary modified the provision in the final regulations published in the **Federal Register** of December 1, 1987, 52 FR 45738–45782. In order to complement existing payroll processes, the final regulations provided that the time record certification must contain, or be supported by, time records in clock time sequence. Institutions would not be required to implement a "punch in and out" procedure; however, time records must show the specific time each student worked each day.

While conducting a final review of the regulations for approval of recordkeeping and paperwork burden requirements, the Office of Management and Budget received additional public comments regarding the requirement that expressed concern over both the administrative burden associated with this provision and the need for it. OMB reviewed the GAO's report and concluded that the report was not extensive enough to warrant this mandatory change in institutional timekeeping practices. OMB also concluded that restricting an institution to only one method of maintaining its timekeeping and payroll records was burdensome and would adversely affect those institutions that would be required to reprogram payroll systems, thus leading to delays in the delivery of student aid. Based on its findings, OMB withheld approval of the burden and recordkeeping requirements contained in § 675.19 of the December 1, 1987 regulations. Consequently, when other sections of the regulations became effective on February 3, 1988, the Secretary agreed to modify § 675.19 and subsequently issue new regulations.

These final regulations amend § 675.19 of the December 1 regulations by incorporating the suggestion that institutions be allowed the option of maintaining time records in clock time sequence, or records which show the total hours worked per day. This revision is intended to reduce administrative burden and improve the timeliness of financial aid delivery without diminishing the effort to improve the adequacy of timekeeping and payroll practices. Although the Secretary is revising the regulations, the institution continues to be responsible for ensuring that CWS students work and earn the amount being paid, and that the work is performed in a satisfactory manner.

The public was invited to comment when the Notice of Proposed Rulemaking (NPRM) was published on February 26, 1985. The Office of Management and Budget did not approve § 675.19, therefore this section did not become effective on February 3, 1988 as did all other sections contained in the December 1, 1987 regulations. The publication of these amendments to § 675.19 as a final regulation is part of the same rulemaking process begun by the publication of the February 1985 NPRM for the College Work-Study program.

Executive Order 12291

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

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and its own review, the Department has determined that the regulations in this document do not require transmission of information that is also being gathered by other agencies or authorities of the United States.

List of Subjects in 34 CFR Part 675

Education loan programs—education, Student aid, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number: College Work-Study Program, 84.033)

Dated: June 29, 1988.

William J. Bennett,

Secretary of Education.

The Secretary amends Part 675 of Title 34 of the Code of Federal Regulations as follows:

PART 675—COLLEGE WORK-STUDY AND JOB LOCATION AND DEVELOPMENT PROGRAMS

1. The authority citation for Part 675 is revised to read as follows:

Authority: 42 U.S.C. 2751–2756a, unless otherwise noted.

2. Section 675.19 is amended by revising the last sentence of paragraph (b)(2)(i) to read as follows:

§ 675.19 Fiscal procedures and records.

* * * * *

(b) * * *

(2) * * *

(i) * * * The certification shall include or be supported by, for students paid on an hourly basis, a time record showing the hours each student worked in clock time sequence, or the total hours worked per day;

* * * * *

[FR Doc. 88–17933 Filed 8–9–88; 8:45 am]

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Wednesday
August 10, 1988

Part IV

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

24 CFR Parts 50, 58, 575 and 576

Emergency Shelter Grants Program: Stewart B. McKinney Homeless Assistance Act; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

24 CFR Parts 50, 58, 575 and 576

[Docket No. R-88-1359; FR-2387]

Emergency Shelter Grants Program: Stewart B. McKinney Homeless Assistance Act

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This final rule implements the Emergency Shelter Grants Program established by the Stewart B. McKinney Homeless Assistance Act. The program authorizes HUD to make grants to States, units of general local government, and private nonprofit organizations for the rehabilitation or conversion of buildings for use as emergency shelter for the homeless, and for the payment of certain operating expenses and essential social service expenses in connection with emergency shelter for the homeless.

The purpose of the program is to help improve the quality of emergency shelters for the homeless, to make available additional emergency shelters, and to meet the costs of operating emergency shelters and of providing essential social services to homeless individuals, so that these individuals have access not only to safe and sanitary shelter, but also to the supportive services and other types of assistance they need to improve their situations.

EFFECTIVE DATE: October 6, 1988.

FOR FURTHER INFORMATION CONTACT: James R. Broughman, Director, Entitlement Cities Division, Room 7282, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 755-5977. For matters relating to Emergency Shelter Grants to States, James N. Forsberg, Director, State and Small Cities Division, Room 7184, telephone (202) 755-6322. Hearing or speech impaired individuals may call HUD's TDD number: (202) 426-0015. (These are not toll-free telephone numbers).

SUPPLEMENTARY INFORMATION:

Background

On December 17, 1986, the Department published a proposed rule and program requirements (51 FR 45278) implementing the Emergency Shelter Grants ("ESG") program contained in Title V, Part C of HUD's appropriation act for the 1987 fiscal year (H.R. 5313).[1] A final rule published on October 19, 1987 (52 FR 38864) replaced the 1986 proposed rule and program requirements and continues to govern the use and reallocation of funds appropriated for the 1986 ESG program.

On July 22, 1987, President Reagan approved the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100-77) (the "McKinney Act") reauthorizing with amendment the Emergency Shelter Grants program.[2] A proposed rule for the 1987 ESG program was published on November 6, 1987 (52 FR 42664). Under section 416(a) of the McKinney Act, HUD is required to operate the 1987 ESG program (and, thereafter, the ongoing ESG program) in accordance with the 1986 requirements until this final rule takes effect.

However, because the Department perceived that certain McKinney Act provisions required immediate implementation, a series of notices was published in the **Federal Register**. On August 14, 1987, the Department published a notice (52 FR 30628) implementing the Comprehensive Plan requirements contained in Subtitle A of the McKinney Act. On September 4, 1987, the Department published a notice (52 FR 33790) identifying the McKinney Act provisions that it intended to implement immediately, as well as those that would take effect under the final rule. Finally, on October 19, 1987, the Department published a notice (52 FR 38864) implementing the authority to waive the 15% limitation on essential services by units of local government.

Discussion of Public Comments and Changes Made in the Final Rule

The Department received six public comments in response to its November 6, 1987 proposed rule. There follows a discussion of these comments and a review of the changes made in the final rule, both in response to public comments and to internal departmental initiatives.

[1] Sec. 101(g), Pub. L. 99-500 (approved October 18, 1986), Pub. L. 99-591 (approved October 30, 1986), making appropriations as provided for in Part C of Title V of H.R. 5313, 99th Cong., 2d Sess. (1986) (as passed by the House of Representatives and by the Senate), to the extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986). For ease of reference, this rule refers to the Emergency Shelter Grants program established by the Homeless Housing Act of 1986 as the "1986 ESG program."

[2] For ease of reference, this rule refers to the Emergency Shelter Grants program authorized by the McKinney Act as the "1987 ESG program."

Restriction on the Use of Grant Amounts with Respect to Buildings Owned by Primarily Religious Organziations

In the final rule for the 1986 ESG program published on October 19, 1987, HUD modified its original ban on the use of grant funds to "renovate, rehabilitate, or convert buildings owned by primarily religious organizations or entities." The Department determined that the use of ESG funds for such capital improvements would be constitutionally permissible under certain conditions. One of these conditions required that the building (or portion of the building) to be improved with ESG funds be leased to a wholly secular entity, although the lessee could enter into a management contract authorizing the lessor religious organization to operate the facility.

The Department believes that this construct strikes a careful balance between avoiding constitutionally impermissible assistance to religious entities on the one hand, and allowing Emergency Shelter Grant funds to be used to renovate, rehabilitate or convert buildings owned by primarily religious organizations. This belief is supported by the fact that only three comments were received when this approach to the issue was again used in the proposed McKinney Act ESG rule published on November 6, 1987.

Moreover, one of these commenters—the Baptist Joint Committee on Public Affairs (BJCPA)—*opposed* relaxing the provisions that now enable religious organizations to undertake capital improvements under the ESG program. The BJCPA was particularly critical of § 576.21(c)(2), which provides that grant amounts may be used for the rehabilitation or renovation of buildings owned by primarily religious organizations only if "the building (or portion thereof) that is to be improved with the grant amounts has been leased to an existing or newly established, wholly secular entity."

The BJCPA contends that the words "(or portion thereof)" authorize the use of Federal funds for capital improvements of mixed-use facilities. It asserts that while it might be constitutionally permissible to use public funds to renovate a separate building that is religiously owned but wholly dedicated to a secular purpose, a mixed-use facility with a lessor religious organization operating the shelter "makes a mockery of the First Amendment's prohibition against government programs which directly and immediately advance religion."

Conversely, New Castle County in the State of Delaware objected to the requirement contained in the proposed rule that a secular entity must be established before grant amounts can be used to renovate, rehabilitate or convert a building owned by a primarily religious organization. It argued that a secular entity is not constitutionally required, and that adequate First Amendment protection can be provided by requiring an agreement between the grantee or State recipient and the nonprofit recipient, stipulating that the premises are to be used solely for secular purposes.

The City of Indianapolis also criticized the proposed capital improvement restrictions as they pertain to primarily religious organizations. It urged that the restrictions be made "more flexible" to allow "more discretion on the part of local officials" to determine whether use of the funds by a religious organization violates the constitutional mandate for separation of Church and State.

As previously discussed, the Department has undertaken an exhaustive constitutional analysis regarding the proper nature and scope of the capital improvement restrictions contained in the ESG program. It is the Department's view that the requirements established in this rule provide sufficient safeguards against providing impermissible assistance to religious organizations (*e.g.*, through the establishment of a wholly secular entity to receive the benefit of the ESG capital improvement funds, with any residual value of improvements reverting back to the original grantee if the property is not maintained as an emergency shelter for at least the useful life of the improvements), while still enabling religious organizations to respond to the urgent need for homeless shelters. Consequently, the Department has adopted the proposed requirements of § 576.21(c)(2) without modification.

Continued Use Requirements

Three comments were received opposing the continued use requirements established under §576.73 of the proposed rule. The City of Portland objected to the proposed requirement that any building in which ESG amounts are used to undertake activities described at §576.21(a)(3) (*i.e.*, maintenance, operation costs, insurance, utilities, furnishings) must be maintained as a shelter for the homeless for not less than three years. This objection was based on the assertion that Federal subsidy programs have historically required continued use requirements only as a condition of capital expenditures, and not for purposes of operating subsidies.

A similar view was expressed by New Castle County, which commented that while the use of ESG funds for major rehabilitation or conversion should invoke the 10-year use requirement specified in §576.73, the activities listed at §576.21(a)(3) should not trigger any use requirement, since they do not constitute "a direct improvement to the shelter's physical plant." New Castle would require, instead, that the grantee provide comparable living space (either in the existing shelter or in some other facility) for the applicable regulatory period.

On the other hand, the Minnesota Department of Jobs and Training (MDJ&T) objected to such language when included at § 576.51(b)(2)(iv)(A) for emergency shelters located in commercial facilities. Under that provision, the grantee (or State or nonprofit recipient) is required to execute an agreement with the provider of the commercial space that comparable living space will be available for use as an emergency shelter in the facility for at least the applicable period specified in § 576.73. The MDJ&T contended that such a requirement is unreasonable, given the fluctuating demand for the housing, and should not be made applicable to commercial facilities.

Section 415(c) of the McKinney Act provides that:

> Each recipient shall certify to the Secretary that * * * it will *maintain any building for which assistance is used* under this subtitle as a shelter for homeless individuals for not less than a 3-year period or for not less than a 10-year period if such assistance is used for the major rehabilitation or conversion of such building * * * (Emphasis added).

Upon reconsideration, the Department has determined that this statutory language triggers a use requirement only for ESG activities that involve capital improvements to the shelter facility (*see* § 576.21(a)(1) of this final rule). Specifically, a statutory three-year use requirement would be imposed whenever ESG funds are used to renovate a building for use as an emergency shelter. A 10-year use requirement would apply whenever ESG grant funds are used to undertake the major rehabilitation or conversion of a building for use as an emergency shelter.

The Department will continue its policy to exempt from any use requirement the provision of essential services under § 576.21(a)(2).

While HUD has determined that the use requirements under the McKinney Act are limited to activities involving capital improvements, it is imposing a *regulatory* (rather than statutorily mandated) three-year use requirement on the leasing of commercial facilities to provide emergency shelter. Under § 576.51(a)(2)(iv), emergency shelters located in commercial facilities must be rented for a period of at least three years (either the identical space, or comparable rooms). In the event of a dramatic and unforeseen shortage in the availability of emergency shelters (i.e., in the case of a natural disaster), the grantee or recipient may apply to HUD for a waiver of the three-year use requirement. However, it should be noted that where ESG grant funds are used for the renovation, major rehabilitation or conversion of hotel or motel space to facilitate its use as an emergency shelter, the three- or ten-year (as applicable) *statutory* use requirement under § 576.73 continues to apply.

For activities under § 576.21(a)(3), other than the leasing of commercial facilities, the Department is imposing a *regulatory* one-year use requirement in place of the three-year requirement included under the proposed rule. The Department's intent in imposing this one-year requirement is to provide consistency and continuity in the provision of emergency shelter services to the homeless.

The MDJ&T commented that the definition of "emergency shelter" contained in the proposed rule—with its emphasis on providing temporary shelter for the homeless—is at odds with the practice in Minnesota of using ESG funds "to rehabilitate permanent housing." The Department believes that there is no inconsistency between the definition of emergency shelter provided in the proposed rule and the fact that permanent housing is being rehabilitated under the program. The ESG program is intended to provide temporary shelter for the homeless, without any requirement that the shelter itself be of a temporary nature. In fact, the continued use requirements established in this rule are designed to ensure a certain degree of continuity and permanency in the provision of shelter services to the homeless. As a result, the Department has retained the definition of "emergency shelter" without modification.

The MDJ&T also requested that the term "obligated" be clarified in the final rule to indicate that a grant award by a unit of local government to a private nonprofit organization under a written agreement *requires payment from the grant amount.* Since the proposed definition of "obligated" incorporated

similar language with respect to grantees and State recipients that undertake certain types of actions (*e.g.*, place orders, award contracts, etc.) the Department has made the requested clarification at § 576.3 of this final rule.

With regard to the limitation on units of local government to provide essential services (§ 576.21(a)(2)(i)(B)), MDJ&T requested a modification of the current standard. It contended that the proper standard should be whether there is a quantifiable increase in the level of a service beyond that provided by the unit of government during the 12 calendar months immediately before it received *initial* grant amounts. This modification was urged on the basis that it would be unreasonable to expect an increase in essential services above that attributable to ESG funding. The Department agrees with, and has adopted, this suggestion.

The New York State Department of Social Services (NYS) asserted that the rule is ambiguous as to whether the 15 percent limitation applies strictly to units of local government, or whether no more than 15 percent of the entire State allocation can be used to provide essential services without the State requesting a waiver. The Department wishes to clarify that the 15 percent limitation applies to the *total* of each grant amount provided to a unit of general local government. It is not necessary, in each instance, that an award by a unit of local government to a nonprofit recipient comply with the 15 percent limitation. Consequently, although there is no direct limitation on a nonprofit recipient's use of grant amounts for essential services, a unit of local government may have to impose such restrictions on one or more of its nonprofit recipients to ensure that the unit of local government is itself in compliance with the 15 percent limitation.

NYS also objected to the proposed rule's prohibition on the use of ESG funds for the acquisition or construction of emergency shelters, and urged that proposed new construction not exceeding a 25 percent increase in square footage be considered an eligible expense under the program. In light of the fact that the McKinney Act does not provide for ESG grant funds to be used for acquisition or construction expenses, the Department does not have the discretion to modify this aspect of the rule. However, it should be noted that the definition of "rehabilitation" (§ 576.3 of this final rule) includes additions to existing buildings when such additions are incidental to the rehabilitation of the building.

With regard to the requirement under § 576.23 that a State make available its ESG formula allocation to units of local government in the State, the MDJ&T commented that Minnesota has found it extremely difficult to carry out this obligation. It asserted that because of the scattered migrant and farmworker population across some 57 counties, Minnesota was experiencing considerable difficulty in making ESG funds available to this segment of the homeless population. MDJ&T requested a waiver of the requirement so that the State of Minnesota could contract directly with farmworker organizations. While the Department appreciates the additional burden involved where a State is required to deal with a highly dispersed homeless population, the requirement that a State make available its ESG allocation to units of local government is statutory and, as such, is not subject to waiver by HUD.

New Castle County urged the Department to require States to notify each unit of local government of the availability of ESG funds. The Department did not adopt this suggestion, since administrative funds are not provided under the ESG program to reimburse States for this expenditure. The Department is aware, however, that States have made substantial efforts to advertise the availability of ESG funds, and believes that discretionary activity of this kind should be encouraged.

New Castle County also suggested a modification of the proposed requirement at § 576.31(a)(2) that ESG reallocated funds can only be made available to units of local government that are non-formula cities and counties, and to private nonprofit organizations, if the jurisdiction in which the proposed activities are to be located has a Comprehensive Homeless Assistance Plan (CHAP). The suggested language would require a CHAP for "* * * the jurisdiction in which the proposed activities are to be located or the service area of the proposed location * * *".

The Department has instead adopted a modification of this suggested language. Under Subpart A of the McKinney Act (dealing with CHAP requirements), section 401(f) refers to a CHAP certification "* * * for the jurisdiction to be served by the proposed activities * * *". In this final rule, §§ 576.31(a)(2) and 576.51(b)(2)(i) have been modified to parallel this statutory language. This rule will require the following: (1) A State, formula city or county, or Territory that is applying for ESG funding for the proposed activities would provide the CHAP certification that the proposed activities are consistent with the Plan; (2) in the case of a formula city or county, there must be an additional certification that before any of the grant funds are used for an activity conducted outside the applicant's jurisdiction, the applicant will secure and provide to HUD a certification that the proposed activities are consistent with the CHAP submitted by one of the following: (i) If the activity is conducted within the boundaries of a city or urban county having its own CHAP, then a certification from the appropriate official of that jurisdiction; or (ii) if the activity is not conducted within a unit of local government having its own CHAP, a certification from the appropriate State official.

Another comment concerning the CHAP was NYS' request that all entities receiving direct entitlements under the ESG program be required to submit their CHAPS to the State for purposes of certifying consistency with the State CHAP. The Department has not adopted this suggestion. The emergency nature of the ESG program clearly dictates that funds be allocated as expeditiously as possible, as evidenced by McKinney's 30-day mandatory review period. To require formula cities and counties to submit their CHAPS for review to the State, as well as to the local HUD field office, would be inconsistent with the legislative intent reflected in the McKinney Act and, consequently, has not been adopted in this rule.

New Castle County suggested that certifications of CHAP consistency that are submitted to local HUD field offices under § 576.51(c) (substantial changes in the proposed use of ESG funds), provide for a 30-day review period. If, at the expiration of the 30-day review period, HUD fails to respond to the certification, it should be considered approved. The Department believes that this suggestion is consistent with the legislative intent to expedite the use of ESG funds and has made the necessary revisions in this final rule.

The MDJ&T objected to the requirement under § 576.51(b)(2)(ii) of the proposed rule that a State must describe the sources and amounts of matching supplemental funds in its interim report. Its objection was based on the fact that nonprofit recipients, which may provide supplemental matching funds, may not have "drawn down" available ESG funds at the time the State is required to submit its interim report. This comment misconstrues the matching supplemental funds requirement. Initially, it should be noted that it is not required under the ESG program that matching funds be provided by a nonprofit recipient. When

the grantee is a State, the matching funds may be provided by the State's own resources, or through funds provided by a State recipient. Matching funds can also include amounts spent on activities that are ineligible under the ESG program, such as expenditures for building acquisition or staff costs related to operating an emergency shelter. Consequently, it is not necessary that the nonprofit recipient have "drawn down" ESG grant funds at the time the State is required to submit its interim report and, accordingly, the Department has retained the proposed requirement without amendment.

The 65-day deadline for States to make ESG grant funds available to their State recipients (under § 576.55(a) of the proposed rule) was objected to by NYS on the basis that it failed to take into account the competitive application process used to obligate the funds. The Department disagrees. It is imperative that ESG funds be obligated as rapidly as possible. The Department's experience has been that the 65-day deadline is reasonable, and that most States are able to comply with it. If a situation arises in which a grantee believes that complying with the 65-day deadline is impossible, it should request a waiver of the requirement under § 576.5 of this final rule.

The MDJ&T requested that the criteria listed under § 576.55(a)(2) for determining when a State recipient has timely obligated ESG grant amounts should also be specified for ESG funds expended by a third party (*e.g.*, one other than the initial State recipient). The Department believes that this commenter has misconstrued the requirement to obligate grant funds under this provision. Section 576.55(a)(2) requires that *"[E]ach State recipient* must have all grant amounts obligated within 180 days of the date on which the State made the grant amounts available to it". (Emphasis added). The 180-day obligation deadline does not attach to third parties that receive ESG grant funds from the State recipient. Consequently, there is no need to specify criteria establishing when the third party has obligated its ESG grant funds.

New Castle County urged that lead based paint removal under § 576.76(c) of the proposed rule be considered an eligible expense, regardless of whether ESG funds are being used to otherwise renovate, rehabilitate, or convert a particular room. It bears noting that the Department has always considered the abatement of lead based paint to be an eligible rehabilitation activity under § 576.21(a)(1), so long as the relevant use requirements under § 576.73 are satisfied.

Section 576.83 of the proposed rule authorizes the payment to a grantee of an initial capital advance for 30 days' cash needs, or an advance of $5,000, whichever is greater. Thereafter, the grantee is reimbursed for the amount of its actual cash disbursement needs. NYS commented that because of the shortage of working capital (particularly in the case of nonprofits), each grantee should be given a 25 percent advance against which claims can be submitted when goods or services are received. This suggestion was not adopted because it would be inconsistent with the U.S. Treasury Department requirements (see Fiscal Requirements Manual § 6–2075.20) which normally require a working capital advance to cover cash requirements for a period not to exceed 30 days.

New Castle County expressed concern over the timing of the annual performance report (§ 576.85(b)(2)) which, under the proposed rule, must be submitted no later than 30 days after the December 31 cutoff date. This commenter cited two alternative reporting dates: (1) Allowing the ESG grant year to coincide with the local fiscal year; or (2) allowing the annual reporting period to coincide with the grantee's CDBG reporting period. The Department has not adopted either of these alternative dates for submission of the annual performance report. It is anticipated that the date established in the 1987 proposed rule will provide a uniform reporting cycle that will enable HUD to report to Congress on the progress of the ESG program in meeting the needs of the homeless.

Finally, the U.S. Department of Justice provided comments to HUD on rule provisions related to persons with handicaps. The phrases "handicapped individual" and "transitional housing for the mentally ill" have been revised in this final rule to read "individuals with a handicap" and "persons with mental illness", respectively.

Other Regulatory Changes

On its own initiative, the Department wishes to make the following clarifications or changes in this final rule implementing the 1987 ESG program.

Under § 576.21(c)(2), grant amounts may not be used to renovate, rehabilitate or convert buildings owned by primarily religious organizations unless the lessor of the building enters into a binding agreement requiring the lessee to retain the use of the leased premises for a wholly secular purpose for at least the useful life of the improvements. In the event this requirement is not satisfied, the lessor is obligated to pay the lessee an amount equal to the residual value of the improvements. Under paragraph (vii) of this section, the lessee must remit this amount to the original grantee from which the ESG amounts were derived. The Department wishes to clarify that, following the close of the ESG grant period, these funds are to be used to alleviate homelessness in the original grantee's jurisdiction (i.e. to "further the objectives of this part"), but that it is not necessary that the grant funds be used in conformance with the requirements of the ESG program. This language has been included at § 576.21(c)(2)(vii) of the final rule.

The Department has modified the proposed requirement at § 576.43(b) that any allocation to a metropolitan city or urban county of less than .05 percent of the amounts appropriated for the ESG program *for any fiscal year*, would be added to the allocation for the State in which the city or county is located. The revised language provides that reallocation will occur whenever there is an allocation to a metropolitan city or urban county of less than .05 percent of each appropriation under the ESG program in any fiscal year. This revision more accurately reflects the actual allocation of ESG program funds, which is initiated upon the appropriation of funding under the program and *not* necessarily at the conclusion of the fiscal year.

In § 576.85, the Department has changed the period for a State to submit its interim performance report from 90 days from the date of a State's distribution of funds to its recipients, to 30 days. HUD does not believe that there is any advantage in providing an additional two months for the State to submit its interim report, and that it would be better to coincide the time allowed for submission of the interim performance report with that of the annual performance report under paragraph (b)(2).

In addition, while the Department retained the proposed timing for submission of the annual performance report under § 576.85(b)(2), the provision has been modified to state that the final report is to be submitted 90 days after all ESG funds are expended and all activities are completed.

This final rule includes clarifying language to indicate that staff costs related to providing essential services are eligible ESG expenses under § 576.21(a)(2). (It should be noted, however, that the regulation already provides that staff costs related to the

operation of the shelter under § 576.21(a)(3) are *not* eligible expenses.) This raises the issue whether a prorated portion of a staff member's salary can be considered an eligible expense if the staff member is providing an eligible activity, such as maintenance or an essential service. For example, if a shelter operator provides transportation for shelter residents by driving the shelter's van, can that portion of his or her time spent on this transportation service be considered an eligible expense? The answer to this question is "no". The payment of a shelter staff member's salary—whether or not a portion of the staff member's time is devoted to providing an eligible activity—should not be considered an eligible expense. Because the Department believes that, in most shelters, the operator typically provides a variety of services and functions, to determine otherwise would compromise the statutory prohibition.

Finally, for the sake of clarity, the Department is modifying the language of § 576.21(a)(2)(ii) relating to the 15 percent limitation on the provision of essential services by units of local government. Clarifying language has also been added to § 576.21(b)(i) relating to waiver of the 15 percent limitation. These clarifications are intended to reflect the following: No more than 15 percent of the *total* of each grant amount provided to a unit of local government can be used to provide essential services under the ESG program. However, a unit of local government is not required to comply with the 15 percent limitation with regard to each grant amount provided to a nonprofit recipient, so long as the limitation is observed for the total grant award. Furthermore, the 15 percent limitation may be waived if the unit of local government is able to demonstrate that:

(1) Activities other than essential services (*e.g.*, renovation, major rehabilitation and conversion activities under § 576.21(a)(1), and operating expenses under § 576.21(a)(3)) are already being adequately provided by the unit of government through private or public resources. These resources may include that portion of each ESG grant amount provided to the unit of local government under this part for which a waiver is not being requested; and

(2) The amount that the unit of local government proposes to use for essential services—and that exceeds the 15% limitation—cannot practicably be used for eligible ESG activities other than essential services.

The following example is illustrative: Assume that a unit of general local government has $100,000 in emergency shelter grant amounts and wishes to spend 20 percent of this amount ($20,000) on essential services. The unit of government is free under section 414(a)(2)(B) of the McKinney Act to spend 15 percent ($15,000) on essential services, so that this amount is automatically excluded from any waiver determination. To qualify for a waiver for the additional $5,000 that the unit of government proposes to use for essential services, it must demonstrate to HUD that:

Other shelter grant activities under § 576.21(a)(1) and (a)(3) are already adequately provided from public and private resources (which resources may include that portion of each ESG grant amount provided to a unit of local government under this part for which a waiver is not being requested—$85,000); and

(2) The $5,000 cannot practicably be expended for activities other than essential services.

Waiver requests from units of general local government receiving grant amounts from a State would first have to be forwarded to the State. The State would be required promptly to forward all such requests to HUD, together with any recommendations or other comments the State may have. This would give States an opportunity to give HUD the benefit of their views on their recipients' requests for waiver, while ensuring that State recipients' requests will receive full and prompt attention by the Department.

Lead-Based Paint

Section 566 of the Housing and Community Development Act of 1987 (Pub. L. 100–242, approved February 5, 1988) amended the Lead-Based Paint Poisoning Prevention Act, and mandated that HUD publish a final rule amending the Department's lead-based paint standards at 24 CFR Part 35. On June 6, 1988, the Department published this final rule in accordance with the statutory mandate (53 FR 20790).

The primary changes resulting from the 1987 Housing Act are: (1) A uniform requirement that lead-based paint standards apply to all housing constructed before 1978; and (2) that the definition of "applicable surfaces" be uniformly expanded to include all interior and exterior surfaces.

The revised lead-based paint standards affect the 1986 and 1987 ESG programs in the following manner. For purposes of the 1986 ESG program, HUD's October 19, 1987 final rule (52 FR 38864) adopted, by cross-reference, the lead-based paint requirements contained in 24 CFR Part 35. As a result, the revised lead-based paint standards under Part 35 will apply automatically to all 1986 ESG program funds.

Similarly, the 1987 ESG program (and, thereafter, the ongoing ESG program) incorporates by cross-reference the lead-based paint provisions contained in Part 35, with two additional requirements (both of these requirements were contained in the Department's proposed 1987 ESG rule). These additional provisions relate to inspection and abatement of defective lead-based paint surfaces and require that the grantee (or in the case of States, the State recipient): (1) Undertake treatment of defective paint surfaces before final inspection and approval of any renovation, rehabilitation or conversion activity under the ESG program; and (2) take appropriate action to protect shelter occupants from the hazards associated with lead-based paint abatement procedures.

Nondiscrimination

Two of the nondiscrimination requirements with which use of emergency shelter grants must comply as provided in § 576.79(a) are Title VIII of the Civil Rights Act of 1968 and Executive Order 11063, which prohibit discrimination in housing on the basis of race, color, religion, sex, or national origin. It may well be that some emergency shelters assisted under this program are not actually covered under these authorities. The prohibitions against discrimination in Title VIII relate only to a "dwelling", which is defined in section 802(b) of that Act to mean, in part, "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families * * *" (the word "family" includes a single individual). Judicial interpretations (e.g., *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975)) regarding whether a temporary residence is a "dwelling" within the meaning of Title VIII appear to turn on whether the occupant of a place intend to remain for a substantial period of time or whether the place is rather one of temporary sojourn or transit visit. A similar issue arises under Executive Order 11063, which covers certain "housing and related facilities". Since the operation and usage of emergency shelters may vary greatly across the nation, it seemed prudent to deem these authorities generally applicable to shelter assisted under this program.

In any event, under § 576.79(a), all such shelters are subject to the Federal statutory prohibitions against

discrimination with respect to race, color, national origin, age, sex and handicap in programs involving Federal financial assistance. Consistent with the statutory intent of Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968, the Department has included in this final rule a requirement at § 576.79(a)(6) that the ESG grantee (or in the case of a State, the State recipient) make known that emergency shelter facilities and services are available to all on a nondiscriminatory basis. Where the procedures that a grantee (or State recipient) intends to use are unlikely to reach persons of any particular race, color, religion, age, sex or national origin within its service area who may qualify for ESG services, the grantee (or recipient) is required to establish additional procedures to ensure that these persons are made aware of the availability of the facilities and services.

Under § 576.79(a)(2), all shelters covered by this part must comply with the prohibitions against discrimination against otherwise qualified individuals with a handicap under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations to be codified at 24 CFR Part 8 (53 FR 20215, June 12, 1988). Subpart C of 24 CFR Part 8 sets forth detailed program accessibility requirements for both housing and non-housing facilities. The Department believes that shelters are "housing facilities" within the meaning of 24 CFR Part 8. Accordingly, 24 CFR 8.22 (New Construction—housing facilities), § 8.23 (Alterations of existing housing facilities) and § 8.24 (Existing housing programs) apply to grantees in the emergency shelter grants program. Specifically, 24 CFR 8.22 and 8.23 require that a percentage of newly constructed and substantially altered "dwelling units" be readily accessible to and usable by individuals with handicaps. In addition, 24 CFR 8.23(b) requires that, to the maximum extent feasible, alterations to "dwelling units" be made readily accessible to, and usable by, individuals with handicaps. Since shelters may or may not be regarded as "dwelling units", the second sentence of § 576.79(a)(2) states that, for purposes of the ESG program, the term "dwelling units" in 24 CFR Part 8 includes sleeping accommodations. In addition, grantees (or the State recipient) under 24 CFR 8.6(d) must adopt and implement procedures to make available to interested persons information concerning the existence and location of services and facilities which are accessible to individuals with handicaps.

Environmental Requirements and Site Selection

Section 576.51(b)(2)(vi) of this final rule requires that HUD conduct an environmental review of the specific project activities proposed by an applicant before the grantee can be authorized to undertake these activities. On the basis of an application from a State or formula grantee, HUD will make a conditional grant. The "condition", while assuring the availability of funds to applicants, requires applicants to provide HUD with specific information on the nature and location of proposed activities. This information will assist HUD in conducting its environmental review, so that the Department can evaluate the effect of the grantee's proposed activities and to, thereafter, authorize the grantee to proceed with its proposed activities.

This requirement reflects the Department's determination that proposed program activities are subject to the National Environmental Policy Act (NEPA). The proposed ESG rule contemplated that the NEPA exemption provided by the Council on Environmental Quality (CEQ) for the ESG program under the Homeless Housing Act of 1986 would be continued. This exemption was approved by the CEQ on the basis of statutory conflict, since the 1986 Act imposed time limitations that precluded compliance with NEPA. HUD has determined that the restrictions imposed by the 1986 Homeless Housing Act on the ESG program no longer pertain. In the absence of statutory conflict, NEPA and CEQ's implementing regulations apply, and it is HUD's responsibility to conduct the required review in accordance with 24 CFR Part 50. The HUD review may rely on NEPA provisions for "categorical exclusions", although HUD must complete an "environmental assessment" for proposed activities that are not totally excluded, or otherwise present environmental site problems.

While this change in the environmental procedures for the Emergency Shelter Grant Program would appear to have the effect of delaying the provision of assistance, HUD does not expect that result will occur. The $8 million appropriated for FY 1988 for Emergency Shelter Grants has already been awarded and therefore will not be delayed by these procedures. Emergency Shelter Grants for FY 1989 are expected to be governed by revised environmental procedures included in both the pending House and Senate amendments to the McKinney Act. These amendments call for responsibility for environmental reviews to be delegated to the grantee, as provided in the Community Development Block Grant program. Such a delegation of responsibility would permit grantees to undertake most Emergency Shelter Grant program activities without delay.

Second, with respect to NEPA and program objectives, § 576.53(c)(2) provides that HUD will not approve funds for any program whose activities would result in significant impact on the human environment. Such approval would constitute a "major Federal action" and require HUD to prepare an environmental impact statement (EIS). HUD has determined that the length of time required to prepare an EIS would run counter to the objective of timely delivery of ESG Program services and activities. Where significant impact would result, HUD expects the applicant to select different activities or a different location that HUD may determine not to have such an impact. This assures the State or formula grantee of its fund allocation while assuring the environmental quality of its program.

Third, with respect to environmental authorities other than NEPA, HUD has determined that its environmental review must take into account all the related authorities cited at 24 CFR 50.4. This has led to the following changes in this final rule:

1. The final rule does not contain the provisions for an environmental assurance by applicants that was contained in the proposed ESG rule at § 576.51(b)(3)(i).

2. Under the environmental assurance, applicants certified to HUD that they would avoid sites with certain environmental problems (specifically, historic properties and floodplains) and that activities would not be inconsistent with the State's Coastal Zone Management Plan (where applicable). HUD has determined that the listed environmental resources included only the most common resources, but did not list all the resources and authorities cited in 24 CFR 50.4. Accordingly, the final rule contemplates that, in conducting its environmental review, HUD will take account of all the authorities cited under this provision.

3. The final rule deletes § 576.79(k) of the proposed rule, "Conformance with HUD environmental standards." These standards, issued under 24 CFR Part 51, are included in the authorities of 24 CFR 50.4 and so automatically are covered in HUD's environmental review. Separate

listing as an "other requirement" therefore is unnecessary.

These changes are predicated upon the Department's determination that environmental review, both under NEPA and the related authorities of Part 50.4, is a responsibility best retained under direct HUD control, and that these reviews should not be delegated to ESG grantees. Similarly, an asurance by an ESG applicant that it will avoid impact on certain environmental resources calls for a determination that HUD, not the applicant, should make under the applicable environmental regulations. Thus, the determination as to whether proposed activities will have a significant impact on the environment is a HUD determination, and the necessary changes are made in this final rule.

Fourth, HUD has deleted from the final rule the provisions that were contained in the proposed rule at § 576.53(f). The provision allowed HUD to authorize formula grantees and State recipients to incur costs at their own risk prior to HUD's approval of the grant. HUD has determined that such a provision would violate legal requirements for prior environmental review, and that preapproved activities and expenditures would limit the consideration of alternatives and entail the possibility of irreversible impacts on the environment even if HUD, after environmental review, decided not to approve the activities or their location.

Fifth, as part of this rule-making, HUD is amending for immediate effect its environmental regulations, 24 CFR Part 50 and 58. These changes simply add to the previous list of NEPA-related categorically excluded activities. The new exclusions reflect certain activities under the ESG program and other homeless assistance programs which HUD believes lack potential effect on the human environment. Specifically, these activities consist of such services as health, substance abuse and counseling services, the provision of meals and payment of rent, utility and maintenance costs, and similar activities that do not involve physical change to buildings or sites.

The amendment to Part 58 recognizes that many communities also invest their Community Development Block Grant funds in shelter activity. As the use of CDBG funds is subject to environmental review by the community under Part 58, this amendment will assure consistency with Part 50 while enabling communities to undertake and utilize Part 58 environmental reviews for the CDBG program which HUD may also accept for purposes of the ESG program. This is particularly advantageous to local planning efforts, and implicitly recognizes that under Part 50 HUD may accept a prior adequate environmental review undertaken in another program.

Displacement

An ESG grantee or State or nonprofit recipient is prohibited from expending grant funds for any activities that would result in the displacement of persons or businesses. The requirements of the Uniform Relocation Act (as proposed to be revised) will govern any unanticipated or unavoidable displacement occurring after initial approval of the ESG application.

Other Matters

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the General Counsel, Rules Docket Clerk, at the above address.

This rule would not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it would not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In accordance with the provisions of 5 U.S.C. 605(b), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities, because most statutorily eligible grantees and State recipients are relatively larger cities, urban counties, or States. In addition, the grant amounts to be made available to any ultimate user of a grant are relatively small.

The information collection requirements contained in this rule have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3502), and assigned OMB control number 2506–0089.

This rule was listed as item number 999 in the Department's Semiannual Agenda of Regulations published on April 25, 1988 (53 FR 13854, 13858) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number for the Emergency Shelter Grants Program is CFDA No. 14.231.

List of Subjects

24 CFR Part 50

Environmental assessments, Environmental impact statements, Environmental policies and review procedures.

24 CFR Part 58

Environmental assessments, Environmental impact statements, Community Development Block Grant Program, Environmental policies and review procedures.

24 CFR Part 575

Grant programs—Housing and community development, Emergency shelter grants, Reporting and recordkeeping requirements.

24 CFR Part 576

Grant programs—Housing and community development, Emergency shelter grants, Reporting and recordkeeping requirements.

Accordingly, the Department amends 24 CFR Part 50 as follows:

PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

1. The authority citation for 24 CFR Part 50 continues to read as follows:

Authority: Sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)).

2. Section 50.20 is revised by adding a new paragraph (o), to read as follows:

§ 50.20 Categorical exclusions.

* * * * *

(o) The following supportive services, maintenance and administrative activities *under all HUD programs which support shelter or housing for the homeless*: The provision of physical or mental health, substance abuse, social, educational or counseling services; the provision of meals or food; the payment of rent, utility, maintenance or administrative costs; and similar activities that do not involve physical change to buildings or sites.

PART 58—ENVIRONMENTAL REVIEW PROCEDURES COMMUNITY DEVELOPMENT BLOCK GRANT, RENTAL REHABILITATION AND HOUSING DEVELOPMENT BLOCK GRANT PROGRAMS

3. The authority citation for 24 CFR Part 58 is revised to read as follows:

Authority: Sec. 7(d) of the Department of HUD Act (421 U.S.C. 3535(d)); sec. 104(g) of title I, Housing and Community Development Act of 1974 (42 U.S.C. 5304(g)) as amended; sec. 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) as amended; secs. 17(i) (1) and (2) of the United States Housing Act of 1937 (42 U.S.C. 1437o(i) (1) and (2)); Executive Order 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by Executive Order 11991, May 24, 1977.

4. Section 58.35 is amended by adding a new paragraph (a)(6), to read as follows:

§ 58.35 Categorically excluded activities.

(a) * * *

(6) The following service, maintenance and administrative activities, to the extent eligible, *which are undertaken to support housing and shelter programs for the homeless:* The provision of physical or mental health, substance abuse, social, educational, or counseling services; the provision of meals or food; the payment of rent, utility, maintenance or administrative costs; and similar activities that do not use grant funds for making physical changes to buildings or sites.

5. 24 CFR Part 575 is amended, and a new 24 CFR Part 576 is added to read as follows.

6. The part heading of 24 CFR Part 575 is revised to read as follows:

PART 575—EMERGENCY SHELTER GRANTS PROGRAM: HOMELESS HOUSING ACT OF 1986

7. The authority citation for 24 CFR Part 575 is revised to read as follows:

Authority: Sec. 525(a) of the Homeless Housing Act of 1986 (sec. 101(g), Pub. L. 99–500 (approved October 18, 1986) and Pub. L. 99–591 (approved October 30, 1986), making appropriations as provided for in H.R. 5313, 99th Cong., 2d Sess. (1986) (as passed by the House of Representatives and by the Senate), to the extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986)); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

8. In § 575.1, paragraph (a) is revised to read as follows:

§ 575.1 Applicability and purpose.

(a) *General.* This part implements the Emergency Shelter Grants program contained in the Homeless Housing Act of 1986 (section 101(g), (Pub. L. 99–500 (approved October 18, 1986) and Pub. L. 99–591 (approved October 30, 1986), making appropriations as provided for in Part C of Title V of H.R. 5313, 99th Cong., 2d Sess. (1986) (as passed by the House of Representatives and by the Senate), to extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986)). The program authorizes the Secretary of Housing and Urban Development to make grants to States, units of general local government, and private nonprofit organizations, for the rehabilitation or conversion of buildings for use as emergency shelter for the homeless, and for the payment of certain operating and social service expenses in connection with emergency shelter for the homeless. The Emergency Shelter Grants program authorized by Subtitle B of Title IV of the Stewart B. McKinney Homeless Assistance Act is contained in 24 CFR Part 576.

9. A new 24 CFR Part 576 is added, to read as follows:

PART 576—EMERGENCY SHELTER GRANTS PROGRAM: STEWART B. McKINNEY HOMELESS ASSISTANCE ACT

Subpart A—General

Sec.

576.1 Applicability and purpose.
576.3 Definitions.
576.5 Waivers.

Subpart B—Eligible Activities

576.21 Eligible activities and ineligible activities.
576.23 Who may carry out eligible activities.

Subpart C—Comprehensive Homeless Assistance Plan

576.31 Comprehensive Homeless Assistance Plan.

Subpart D—Allocations

576.41 Overall allocation of grant amounts.
576.43 Allocation of grant amounts to States, metropolitan cities, and urban counties.
576.45 Allocation of grant amounts to Territories.

Subpart E—Award and Use of Grant Amounts

576.51 Application requirements.
576.53 Review and approval of applications.
576.55 Deadlines for using grant amounts.

Subpart F—Reallocations

576.61 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; formula cities and counties.
576.63 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; States.
576.65 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; Territories.
576.67 Reallocation of grant amounts; returned or unused amounts.

Subpart G—Program Requirements

576.71 Matching funds.
576.73 Use as an emergency shelter.
576.75 Building standards.
576.77 Assistance to the homeless.
576.79 Other Federal requirements.

Subpart H—Grant Administration

576.81 Responsibility for grant administration.
576.83 Method of payment.
576.85 Performance reports.
576.87 Recordkeeping.
576.89 Sanctions.
Appendix to Part 576 Reallocation of Grant Funds.

Authority: Sec. 416 of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100–77, approved July 22, 1987); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General

§ 576.1 Applicability and purpose.

(a) *General.* This part implements the Emergency Shelter Grants program contained in Subtitle B of Title IV of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100–77, approved July 22, 1987). The program authorizes the Secretary of Housing and Urban Development to make grants to States and units of general local government (and to private nonprofit organizations providing assistance to homeless individuals in the case of grants made with reallocated amounts) for the rehabilitation or conversion of buildings for use as emergency shelter for the homeless, and for the payment of certain operating and social service expenses in connection with emergency shelter for the homeless. The Emergency Shelter Grants program authorized by the Homeless Housing Act of 1986 is contained in 24 CFR Part 575.

(b) *Purpose.* The program is designed to help improve the quality of existing emergency shelters for the homeless, to help make available additional emergency shelters, and to help meet the costs of operating emergency shelters and of providing certain essential social services to homeless individuals, so that these persons have access not only to safe and sanitary shelter, but also to the supportive services and other kinds of assistance they need to improve their situations.

§ 576.3 Definitions.

Comprehensive Homeless Assistance Plan or *Comprehensive Plan* means the Comprehensive Homeless Assistance

Plan established by Subtitle A of Title IV of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100-77, approved July 22, 1987).

Conversion means a change in the use of a building to an emergency shelter for the homeless under this part, where the cost of conversion and any rehabilitation costs exceed 75 percent of the value of the building before conversion.

Emergency shelter means any facility with overnight sleeping accommodations, the primary purpose of which is to provide temporary shelter for the homeless in general or for specific populations of the homeless.

Emergency shelter grant amounts or *grant amounts* mean grant amounts made available under this part.

Formula city or county means a metropolitan city or urban county that is eligible to receive an allocation of grant amounts under § 576.43.

Grantee means the entity that executes a grant agreement with HUD under this part. For purposes of this part, grantee is (a) any State, metropolitan city, or urban county that receives a grant allocation under § 576.43; (b) any Territory that receives a grant allocation under § 576.45; and (c) any State, Territory, unit of general local government, or private nonprofit organization that receives a grant based on a reallocation under Subpart F.

Homeless means:

(a) An individual or family which lacks a fixed, regular, and adequate nighttime residence; or

(b) An individual or family which has a primary nighttime residence that is:

(1) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for persons with mental illness);

(2) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(3) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. The term does not include any individual imprisoned or otherwise detained pursuant to an Act of the Congress or a State Law.

HUD means the Department of Housing and Urban Development.

Major rehabilitation means rehabilitation that involves costs in excess of 75 percent of the value of the building before rehabilitation.

Metropolitan city means a city that was classified as a metropolitan city under section 102(a)(4) of the Housing and Community Development Act of 1974 for the fiscal year immediately preceding the fical year for which emergency shelter grant amounts are made available.

Nonprofit recipient means any private nonprofit organization providing assistance to the homeless, to which a unit of general local government distributes emergency shelter grant amounts.

Obligated means that the grantee or State recipient, as appropriate, has placed orders, awarded contracts, received services, or entered similar transactions that require payment from the grant amount. Grant amounts that are awarded by a written agreement by a unit of general local government that require payment from the grant amount to a private nonprofit organization providing assistance to the homeless are obligated.

Private nonprofit organization means a secular or religious organization described in section 501(c) of the Internal Revenue Code of 1986 which (a) is exempt from taxation under Subtitle A of the Code; (b) has an accounting system and a voluntary board; and (c) practices nondiscrimination in the provision of assistance.

Rehabilitation means labor, materials, tools, and other costs of improving buildings, including repair directed toward an accumulation of deferred maintenance; replacement of principal fixtures and components of existing buildings; installation of security devices; and improvement through alterations or incidental additions to, or enhancement of, existing buildings, including improvements to increase the efficient use of energy in buildings.

Renovation means rehabilitation that involves costs of 75 percent or less of the value of the building before rehabilitation.

State means each of the several States and the Commonwealth of Puerto Rico.

Territory means each of the following: The Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

State recipient means any unit of general local government to which a State makes available emergency shelter grant amounts.

Unit of general local government means any city, county, town, township, parish, village, or other general purpose political subdivision of a State.

Urban county means a county that was classified as an urban county under section 102(a)(6) of the Housing and Community Development Act of 1974 for the fiscal year immediately preceding the fiscal year for which emergency shelter grant amounts are made available.

Value of the building means the monetary value assigned to a building by an independent real estate appraiser, or as otherwise reasonably established by the grantee or the State recipient.

§ 576.5 Waivers.

The Secretary of HUD may waive any requirement of this part that is not required by law, whenever it is determined that undue hardship will result from applying the requirement, or where application of the requirement would adversely affect the purposes of the Emergency Shelter Grants Program under this part.

Subpart B—Eligible Activities

§ 576.21 Eligible and ineligible activities.

(a) *Eligible activities.* Emergency shelter grant amounts may be used for one or more of the following activities relating to emergency shelter for the homeless.

(1) Renovation, major rehabilitation, or conversion of buildings for use as emergency shelters for the homeless.

(2) Provision of essential services, including (but not limited to) services concerned with employment, physical health, mental health, substance abuse, education, or food, including the staff salary necessary to provide such services. Grant amounts provided to a unit of general local government may be used to provide an essential service only if—

(i) The service is:

(A) A new service or

(B) A quantifiable increase in the level of a service above that which the unit of general local government provided with local funds during the 12 calendar months immediately before it received initial grant amounts; and

(ii) Not more than 15 percent of the total of each grant amount provided to a unit of general local government is used for these services (whether or not the unit of local government provides some or all of these grant funds to a nonprofit recipient).

(3) Payment of maintenance, operation (including rent, but excluding staff), insurance, utilities, and furnishings.

(b) *Waiver of limit on essential services.* (1) HUD may waive the 15 percent limitation on the use of grant amounts for essential services in paragraph (a)(2)(ii) of this section, if the unit of general local government demonstrates to HUD that:

(i) Activities other than essential services are adequately provided from other private or public resources (which

resources may include that portion of each grant amount provided to the unit of government under this part for which a waiver is not being requested); and

(ii) The amount that is in excess of 15 percent of each grant amount that the unit of government proposes to use for essential services (and for which a waiver is requested), cannot practically be used for eligible activities other than essential services.

(2) Waiver requests from State recipients under this paragraph (b) must first be sent to the State. The State must promptly send the requests to HUD, together with any comments or recommendations the State may have on them.

(c) *Ineligible activities.* (1) Emergency shelter grant amounts may not be used for activities other than those authorized under paragraphs (a) and (b) of this section. For example, grant amounts may not be used for:

(i) Acquisition or construction of an emergency shelter for the homeless;

(ii) The costs of staff involved in operating the shelter; or

(iii) Rehabilitation services performed by the staff of a grantee or recipient, such as preparation of work specifications, loan processing, or inspections.

(2) Grant amounts may not be used to renovate, rehabilitate, or convert buildings owned by primary religious organizations or entities, unless the following conditions are met:

(i) The building (or portion thereof) that is to be improved with the grant amounts has been leased to an existing or newly established, wholly secular entity (which may be an entity established by the religious organization);

(ii) The HUD assistance is provided to the lessee (and not the lessor) to make the improvements;

(iii) The leased premises will be used exclusively for secular purposes, and will be available to all persons regardless of religion;

(iv) The lease payments do not exceed the fair market rent for the premises, as they were before the improvements are made;

(v) The portion of the cost of any improvements that also serve a non-leased part of the building will be allocated to, and paid for by, the lessor; and

(vi) The lessor enters into a binding agreement that, unless the lessee, or a qualified successor lessee, retains the use of the leased premises for a wholly secular purpose for at least the useful life of the improvements, the lessor will pay to the lessee an amount equal to the residual value of the improvements.

(vii) The lessee must remit the amount referred to in paragraph (c)(2)(vi) of this section to the original grantee from which the amounts used to renovate, rehabilitate, or convert the building under this paragraph (c)(2) were derived: *e.g.*, if the amounts used under this paragraph initially were made available to a State or to a unit of general local government as a formula allocation (§ 576.43) or a reallocation (Subpart F), the amount that the lessor provides to the lessee must be remitted to the State or unit of general local government, as appropriate. While the original grantee is expected to use this amount to alleviate homelessness in the original grantee's jurisdiction, there is no requirement that funds received after the close of the grant period be used in accordance with the requirements of this part. If, however, a private nonprofit organization is the lessee as well as the grantee, the organization must remit the amount referred to in paragraph (c)(2)(vi) of this section to HUD.

(viii) The lessee may also enter into a management contract authorizing the lessor religious organization to operate the facility, including the provision of essential services, in carrying out the secular purpose. In such case, the religious organization must agree in the management contract to carry out its contractual responsibilities in a manner free from religious influences pursuant to conditions prescribed by HUD.

(Approved by the Office of Management and Budget under control 2506–0089.)

§ 576.23 Who may carry out eligible activities.

(a) *Grantees and State recipients.* All grantees (except States) and State recipients may carry out activities with emergency shelter grant amounts. All of a State's formula allocation must be made available to units of general local government in the State, which may include formula cities or counties, whether or not such cities or counties receive grant amounts directly from HUD.

(b) *Nonprofit recipients.* Units of general local government—both grantees and State recipients—may distribute all or part of their grant amounts to nonprofit recipients to be used for emergency shelter grant activities.

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Subpart C—Comprehensive Homeless Assistance Plan

§ 576.31 Comprehensive Homeless Assistance Plan.

(a) *Prohibition of assistance.* (1) Grant amounts may be made available to the following jurisdictions, only if they have a HUD-approved Comprehensive Plan:

(i) States, for allocations under § 576.43 and reallocations under §§ 576.61, 576.63, and 576.67.

(ii) Formula cities and counties, for allocations under § 576.43 and reallocations under §§ 576.63 and 576.67; and

(iii) Territories, for allocations under § 576.45 and reallocations under §§ 576.65 and 576.67.

(2) Reallocation amounts may be made available under § 576.67 to units of general local government that are not formula cities and counties, and to private nonprofit organizations, only if the area that would be served by the proposed activities is covered by an approved Comprehensive Plan, as outlined below: For units of general local government, the State must have an approved Plan; for nonprofit organizations, if the proposed activities are to serve a formula city or county or Territory, the city, county or Territory must have an approved Plan; if the proposed activities are not to serve such city or county, the State or Territory must have an approved plan.

(3) Grant amounts may not be made available to, or within the jurisdiction of, any State or forumla city or county that does not annually—

(i) Review its progress in carrying out its Comprehensive Plan and

(ii) Report the results of the review to HUD.

(b) *Notification of Plan requirements.* HUD will publish the requirements that pertain to the Comprehensive Plan (including the progress review and report specified in paragraph (a)(3) of this section and Plan amendments referred to in § 576.53(c)) in the **Federal Register** as necessary. Prospective grantees should familiarize themselves with these requirements. HUD will also provide notice of the Plan's requirements when HUD notifies prospective grantees of their grant allocations under subpart D or the availability of reallocation amounts under subpart F.

(c) *Reallocations.* Sections 576.61, 576.63, and 576.65 govern the reallocation of grant amounts initially allocated to a State or a formula city or county under § 576.43, or to a Territory under § 576.45, if the jurisdiction does not obtain approval of its Plan within

the time periods specified in those sections.

Subpart D—Allocations

§ 576.41 Overall allocation of grant amounts.

(a) *Territories.* HUD will set aside for allocation to the Territories under § 576.45 an amount equal to 0.2 percent of the total amount of each appropriation under this part in any fiscal year.

(b) *States, metropolitan cities and urban counties.* HUD will allocate the amounts that remain after the set-aside to Territories under paragraph (a) of this section to States, metropolitan cities, and urban counties under § 576.43.

§ 576.43 Allocation of grant amounts to States, metropolitan cities, and urban counties.

(a) *Calculation of allocations.* In determining the amount of the allocation for each State, metropolitan city, and urban county, HUD will provide that the percentage of the total amount available for allocation to any State, metropolitan city, or urban county is equal to the percentage of the total amount available for section 106 of the Housing and Community Development Act of 1974 for the prior fiscal year that was allocated to such State, metropolitan city, or urban county.

(b) *Reallocation to State.* Except as othewise provided by law, if an allocation to a metropolitan city or urban county would be less than .05 percent of each appropriation under this part in any fiscal year, the amount is added to the allocation for the State in which the city or county is located.

(c) *Notification of allocation amount.* HUD will notify in writing each State, metropolitan city, and urban county that is eligible to receive an allocation under this section, of the amount of its allocation.

§ 576.45 Allocation of grant amounts to Territories.

(a) *Each Territory.* HUD will allocate amounts set aside for Territories under § 576.41 to each Territory, based upon its proportionate share of the total population of all Territories.

(b) *Notification of allocation amount.* HUD will notify each Territory of the amount of its allocation under this section.

Subpart E—Award and Use of Grant Amounts

§ 576.51 Application requirements.

(a) *Application deadlines.* To receive grant amounts, a State or formula city or county that elects to receive an emergency shelter grant on the basis of an allocation under § 576.43, and a Territory that elects to receive an emergency shelter grant on the basis of an allocation under § 576.45, must submit an application that meets the requirements of paragraph (b) of this section. The application must be submitted to the responsible HUD field office, no later than 45 days after the date of the notification to the State, city or county, or the Territory, of its grant allocation, as provided by § 576.43(c) or § 576.45(b), respectively.

(b) *Application.* The application must contain:

(1) A Standard Form 424. Item (7) of Standard Form 424 must contain a description of the proposed use of the emergency shelter grant amounts. In the case of a formula city or county, or a Territory, the proposed use must be identified for each of the three categories of eligible activities under §§ 576.21 (a)(1), (a)(2), and (a)(3). In the case of a State, the proposed use must identify:

(i) How the State intends to implement the requirement in § 576.23(a) that the grant be made available to units of general local government in the State, or

(ii) The specific units of general local government in the State that will receive the grant.

(2) The following certifications and assurances:

(i) A certification by the public official responsible for submitting the Comprehensive Plan for the State, formula city or county, or Territory that is applying for ESG funding for the proposed activities that the activities are consistent with the Plan. In the case of a formula city or county, there must be an additional certification that before any of the grant funds are used for an activity conducted outside the applicant's jurisdiction, the applicant will secure and provide to HUD a certification that the activity is consistent with the CHAP submitted by the following jurisdiction, as applicable:

(A) If the activity is conducted within the boundaries of a city or urban county having its own CHAP, then a certification from its appropriate official of that jurisdiction; or

(B) If the activity is not conducted within a unit of local government having its own CHAP, then a certification from the appropriate State official.

(ii) A certification that the State, formula city or county, or Territory will provide the matching supplemental funds required by § 576.71. The certification must describe the sources and amounts of the supplemental funds. A State's matching supplemental funds certification is to be submitted with its interim performance report, as provided by § 576.85.

(iii) A certification that the formula city or county, or Territory, will comply, and that the State will ensure that its State recipients comply, with:

(A) The requirements of § 576.73 concerning the continued use of buildings, for which emergency shelter grant amounts are used, as emergency shelter for the homeless;

(B) The building standards requirements of § 576.75; and

(C) The requirements of § 576.77 concerning assistance to the homeless.

(iv) If grant amounts are proposed to be used to provide emergency shelter for the homeless in hotels or motels, or other commercial facilities providing transient housing, a certification from the State, metropolitan city, or urban county that:

(A) The grantee, or State recipient or nonprofit recipient (as appropriate), has executed (or will execute) an agreement with the provider of such housing that comparable living space (in terms of quality, available amenities, and square footage) will be rented in the facility for use as an emergency shelter for not less than a three-year period as calculated under § 576.73(b);

(B) Leases negotiated between the grantee, or State recipient or nonprofit recipient (as appropriate), and providers of such housing provide (or will provide) that the living space will be rented at substantially less than the daily room rate otherwise charged by the facility; and

(C) The grantee, or State recipient or nonprofit recipient (as appropriate), has considered using other facilities as emergency shelter, and has determined that use of the facilities referred to in this paragraph (b)(2)(iv) provides the most cost-effective means of providing emergency shelter for the homeless in its jurisdiction.

(v) A certification that the formula city or county, or Territory, will conduct its emergency shelter grant activities under this part, and that the State or unit of general local government (as appropriate) will ensure that State recipients or nonprofit recipients conduct their activities under this part, in conformity with the nondiscrimination and equal opportunity requirements contained in § 576.79(a) and the other requirements of this part and of other applicable Federal law.

(vi) An assurance by the State, formula city, county or Territory that neither the grantee nor recipient will undertake, or

commit funds to, any activities to be funded under this part until:

(A) The grantee transmits to HUD a description of the proposed activities and of any properties to be renovated, rehabilitated or converted, including their location, and an identification of any environmental conditions that may require particular consideration;

(B) HUD either completes an environmental review of the proposed activities, properties and locations or, pursuant to 24 CFR Part 50, accepts an adequate and relevant prior review completed for another HUD program or project under 24 CFR Parts 50 or 58, and thereafter authorizes the grantee to proceed, in accordance with any mitigation requirements; and

(C) An assurance by the State, formula city, county or Territory that if, subsequent to HUD authorization to proceed on the basis of environmental review and mitigation requirements, the nature or location of funded activities changes, HUD will be so advised in the same manner as provided in § 576.51(b)(2)(vi)(A).

(vii) A certification by the State, formula city or county, or Territory that the submission of the application required by this paragraph (b) is authorized under applicable provisions of law, and that the grantee possesses the legal authority to carry out emergency shelter grant activities in accordance with the provisions of this part.

(c) *Substantial change in proposed use of funds.* (1) If at any time after submission of an application under this section, there is a substantial change in the proposed use of funds, there must be submitted to the responsible HUD field office a certification (as required by paragraph (b)(2)(i) of this section) that the proposed use of funds is consistent with the applicable Comprehensive Homeless Assistance Plan. The certification will be approved as expeditiously as possible, and will be deemed approved 30 days after HUD receives it unless, notification is provided by HUD within that period that the certification is not approved, and the basis for the denial of approval. ESG funds may not be obligated by a grantee or by a nonprofit recipient for the revised proposed use of funds until HUD accepts the new certification;

(2) In the case of a State, a State may not obligate funds until the revised proposed use of grant funds has been approved by HUD; and

(3) Submission of the certification under this paragraph (c) may require amendment of the applicable Comprehensive Homeless Assistance Plan. Requirements for Plan amendments may be found in the notification that HUD provides for Plans. (See § 576.31(b)).

(Approved by the Office of Management and Budget under control number 2506–0089.)

§ 576.53 Review and approval of applications.

(a) *Time for approval.* An application from a State, formula city or county, or Territory will be processed and approved as expeditiously as possible, and will be deemed approved 30 days after HUD receives it, unless within that period HUD notifies the applicant that the application is not approved.

(b) *Review of applications.* HUD will approve an application, unless it determines that the application:

(1) Was not received or postmarked within the time period specified in § 576.51(a);

(2) Does not contain the items required by § 576.51(b); or

(3) Does not otherwise comply with the requirements of this part or of other Federal law.

(c) *Conditional grant.* HUD may make a conditional grant restricting the obligation and use of emergency shelter grant amounts. Conditional grants may be made:

(1) Where there is substantial evidence that there has been, or there will be, a failure to meet the requirements of this part. In such a case, the reason for the conditional grant, the action necessary to remove the condition, and the deadline for taking those actions will be specified. Failure to satisfy the condition may result in imposition of a sanction under § 576.89, or in any other action authorized under applicable Federal law.

(2) Where HUD determines that the application itself does not include evidence of an acceptable prior environmental review or specific descriptions, as defined at § 576.51(b)(2)(vi), HUD will condition the grant so that activities shall not commence until HUD completes environmental review requirements and, on the basis of such review and needed mitigation measures, authorizes the grantee to proceed.

(3) In no case will HUD authorize the use of grant funds for activities, properties or locations that would result in unavoidable significant impact on the human environment, as determined by HUD environmental review; but in the event of such a determination, HUD will advise the State or formula grantee so that the grantee may select an alternative that may be found after HUD review to be without significant impact.

(d) *Grant agreement.* The grant will be made by means of a grant agreeement executed by HUD and the grantee.

(e) *Reallocation amounts.* Any emergency shelter grant amounts that are under § 576.51(a) or (2) an application disapproval under paragraph (b) of this section will be reallocated under § 576.67.

§ 576.55 Deadlines for using grant amounts.

(a) *States and State recipients.* (1) Each State must make available to its State recipients all emergency shelter grant amounts that it was allocated under § 576.43, within 65 days of the date of the grant award by HUD.

(2) Each State recipient must have all its grant amounts obligated (as that term is defined at § 576.3) within 180 days of the date on which the State made the grant amounts available to it. Funds to be expended by the State recipient itself (not through a third party) for the provision of assistance to the homeless will be considered to have met this timing requirement, if the recipient:

(i) Budgets the funds for a stated eligible activity;

(ii) Makes initial expenditures for the eligible activity within 180 days of the date on which the State made the grant amounts available to the recipient; and

(iii) Expends all funds for the budgeted activity within one year of the date on which the State made the grant amounts available to the recipient.

(b) *Formula cities and counties, and Territories.* Each formula city and county, and each Territory, must have all grant amounts that it was allocated under § 576.43 or § 576.45 obligated by 180 days of the date of the grant award by HUD. Funds to be expended by the formula city or county, or Territory, itself (not through a third party) for the provision of assistance to the homeless will be considered to have met this timing requirement, if the jurisdiction:

(i) Budgets the funds for a stated eligible activity;

(ii) Makes initial expenditures within 180 days of the date of the grant award by HUD; and

(iii) Expends all funds for the budgeted activity within one year of the date of the grant award by HUD.

(c) *Reallocation amounts.* (1) Any emergency shelter grant amounts that are not made available or obligated within the time periods specified in paragraphs (a)(1) (State distributions to State recipients) or (b) (formula city or county or Territory allocation) of this section, respectively, will be reallocated under § 576.67.

(2) The State must recapture any grant amounts that a State recipient does not obligate within the time period specified in paragraph (a)(2) (State recipients) of this section. The State, at its option, must make these grant amounts and other amounts returned to the State (except amounts referred to in § 576.21(c)(2)(vii)) available as soon as practicable to other units of general local government for use within the time period specified in paragraph (a)(2) of this section, or to HUD for reallocation under § 576.67.

Subpart F—Reallocations

§ 576.61 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; formula cities and counties.

(a) *Applicability.* This section applies where a formula city or county fails to obtain approval of its Comprehensive Plan within 90 days of the date upon which amounts under this part first become available for allocation under § 576.43 in any fiscal year.

(b) *Grantee.* HUD will make available the amounts that a city or county referred to in paragraph (a) of this section would have received to the State in which the city or county is located.

(c) *Notification of fund availability.* The responsible HUD field office will promptly notify the State of the availability of any reallocation amounts under this section.

(d) *Eligibility for reallocation amounts.* In order to receive reallocation amounts under this section, the State must:

(1) Execute a grant agreement with HUD to receive grant amounts allocated to the State under § 576.43 for the fiscal year for which the amounts to be reallocated were initially made available.

(2) If necessary, submit an amendment to its application for that fiscal year for the reallocation amounts it wishes to receive. The amendment must (to the extent necessary) meet the requirements of § 576.51(b), and must be submitted to the responsible HUD field office no later than 30 days after notification is given to the State under paragraph (c) of this section.

(e) *Review and approval.* (1) Section 576.53 (except paragraph (e)) governs the review and approval of application amendments under this section.

(2) HUD will endeavor to make grant awards within 30 days of the application amendment deadline, or as soon thereafter as practicable.

(f) *Deadlines for using reallocated grant amounts.* Section 576.55 governs the use of amounts reallocated under this section.

(g) *Amounts that cannot be reallocated.* Any grant amounts that cannot be reallocated to a State under this section will be reallocated to formula cities and counties located in the State and then to other States and Territories, as provided by § 576.63. Amounts that are reallocated under this section, but that are returned or unused, will be reallocated under § 576.67.

§ 576.63 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; States.

(a) *Applicability.* This section applies where:

(1) A State fails to obtain approval of its Comprehensive Plan within 90 days of the date upon which amounts under this part first become available for allocation in any fiscal year; or

(2) Grant amounts cannot be reallocated to a State under § 576.61.

(b) *Grantees.* HUD will reallocate the amounts that a State referred to in paragraph (a) of this section would have received, first, to formula cities and counties located in the State that demonstrate extraordinary need or large numbers of homeless individuals and if grant amount remain, then to other States and Territories that meet this criterion.

(c) *Notification of fund availability.* HUD will make reallocations under this section by direct notification or Federal Register Notice that will set forth the terms and conditions under which grant amounts under this section are to be reallocated and grant awards made.

(d) *Eligibility for reallocation amounts.* In order to receive reallocation amounts under this section, the formula city or county, or State or Territory, must:

(1) Submit an amendment to its application for that fiscal year for the reallocation amounts it wishes to receive. The amendment must meet—

(i) To the extent necessary, the requirements of § 576.51(b) and

(ii) Such additional requirements as HUD may specify in the notification under paragraph (c) of this section.

The amendment must be submitted to the responsible HUD field office no later than 30 days after such notification is given.

(2) Execute a grant agreement with HUD to receive grant amounts allocated under § 576.43 or § 576.45 (as appropriate) for the fiscal year for which the amounts to be reallocated were initially made available.

(e) *Review and approval.* (1) Section 576.53 (except paragraph (e)), and such additional requirements as HUD may specify in the notification under paragraph (c) of this section, govern the review and approval of application amendments under this section. HUD will rank the amendments and make grant awards under this section on the basis of the following factors:

(i) The nature and extent of the unmet homeless need within the jurisdiction in which the grant amounts will be used;

(ii) The extent to which the proposed activities address this need; and

(iii) The ability of the grantee to carry out the proposed activities promptly.

(2) HUD will endeavor to make grant awards within 30 days of the application amendment deadline, or as soon thereafter as practicable.

(f) *Grant amounts.* HUD may make a grant award for less than the amount applied for or for fewer than all of the activities identified in the application amendment, based on competing demand for grant amounts and the extent to which the respective activities address the needs of the homeless.

(g) *Deadlines for using reallocated grant amounts.* Section 576.55 governs the use of amounts reallocated under this section.

(h) *Amounts that are not reallocated.* Any grant amounts that are not reallocated under this section, or that are reallocated, but are unused, will be reallocated under § 576.67(d). Any amounts that are reallocated, but are returned, will be reallocated under § 576.67(c).

§ 576.65 Reallocation of grant amounts; lack of approved Comprehensive Homeless Assistance Plan; Territories.

(a) *Applicability.* This section applies where a Territory fails to obtain approval of its Comprehensive Plan within 90 days of the date upon which amounts under this part first become available for allocation in any fiscal year.

(b) *Grantees.* HUD will make available the amounts that a Territory referred to in paragraph (a) of this section would have received to other Territories that demonstrate extraordinary need or large numbers of homeless individuals.

(c) *Notification of fund availability.* The responsible HUD field office will promptly notify each Territory of the availability of any reallocation amounts under this section, and will indicate the terms and conditions under which such amounts are to be made available and grant awards made.

(d) *Eligibility for reallocation amounts.* In order to receive reallocation amounts under this section, the Territory must:

(1) Execute a grant agreement with HUD to receive grant amounts allocated under § 576.45 for the fiscal year for which the amounts to be reallocated were initially made available.

(2) If necessary, submit an amendment to its application for that fiscal year for the reallocation amounts it wishes to receive. The amendment must meet—

(i) To the extent necessary, the requirements of § 576.51(b) and

(ii) Such additional requirements as HUD may specify in the notification under paragraph (c) of this section.

The amendment must be submitted to the responsible HUD field office no later than 30 days after such notification is given.

(e) *Review and approval.* (1) Section 576.53 (except paragraph (e)) governs the review and approval of application amendments under this section. HUD will rank the amendments and make grant awards under this section on the basis of the following factors:

(i) The nature and extent of the unmet homeless need within the jurisdiction in which the grant amounts will be used;

(ii) The extent to which the proposed activities address this need; and

(iii) The ability of the grantee to carry out the proposed activities promptly.

(2) HUD will endeavor to make grant awards within 30 days of the application amendment deadline or as soon thereafter as practicable.

(f) *Grant amounts.* HUD may make a grant award for less than the amount applied for or for fewer than all of the activities identified in the application amendment, based on competing demand for grant amounts and the extent to which the respective activities address the needs of the homeless.

(g) *Deadlines for using reallocated grant amounts.* Section 576.55 governs the use of amounts reallocated under this section.

(h) *Amounts that are not reallocated.* Any grant amounts that are not reallocated under this section, or that are reallocated, but are unused, will be reallocated under § 576.67(d). Amounts that are allocated, but are returned, will be reallocated under § 576.67(c).

§ 576.67 Reallocation of grant amounts; returned or unused amounts.

(a) *General.* From time to time, HUD will reallocate emergency shelter grant amounts that are returned or unused, as those terms are defined in paragraph (f) of this section. HUD will make reallocations under this section by direct notification or Federal Register Notice that will set forth the terms and conditions under which the grant amounts are to be reallocated and grant awards are to be made.

(b) *FEMA boards.* HUD may use State and local boards established under the Emergency Food and Shelter Program administered by the Federal Emergency Management Agency, as a resource to identify potential applicants for reallocated grant amounts.

(c) *Reallocation—returned grant amounts.* (1) States and formula cities and counties. HUD will endeavor to reallocate returned emergency shelter grant amounts that were initially allocated under § 576.43 to a State or a formula city or county, for use within the same jurisdiction. Reallocation of these grant amounts is subject to the following requirements:

(i) Returned grant amounts that were allocated to a State will be made available (A) first, to units of general local government within the State and (B) if grant amounts remain, then to other States.

(ii) Returned grant amounts that were allocated to a formula city or county will be made available—

(A) First, for use in the city or county, to units of general local government that are authorized under applicable law to carry out activities serving the homeless in the jurisdiction;

(B) If grant amounts remain, then to the State in which the city or county is located;

(C) If grant amounts remain, to units of general local government in the State; and

(D) If grant amounts remain, to other States.

(2) *Territories.* Returned grant amounts that were allocated to a Territory will be made available—

(i) First, to other Territories and

(ii) If grant amounts remain, then to States.

(3) *Further reallocation: States, formula cities and counties, and Territories.* Any grant amounts that—

(i) Remain after applying the preceding provisions of this paragraph (c), or

(ii) Are returned to HUD after reallocation under such provisions, will be further reallocated under paragraph (d) of this section.

(4) *Other grantees.* Returned grant amounts that were initially made available to private nonprofit organizations, units of general local government and States under paragraph (d) of this section will be made available under that paragraph.

(5) The responsible HUD field office will announce the availability of returned grant amounts. The announcement will establish deadlines for submitting applications, and will set out other terms and conditions relating to grant awards, consistent with this part. The announcement will specify the application documents to be submitted, which include:

(i) A Standard Form 424;

(ii) Certifications required at § 576.51(b)(2)(iv); and

(iii) Other certifications and assurances similar to those required from a formula city or county, or a Territory, under §§ 576.51(b) (2), (3) and (4), as appropriate.

(6) The responsible HUD field office may establish maximum grant amounts, considering the grant amounts available, and will rank the applications using the criteria in paragraph (e) of this section.

(7) HUD may make a grant award for less than the amount applied for or for fewer than all of the activities identified in the application, based on competing demands for grant amounts and the extent to which the respective activities address the needs of the homeless.

(8) HUD will endeavor to make grant awards within 30 days of the application deadline or as soon thereafter as practicable.

(d) *Reallocation—unused grant amounts.* Unused grant amounts will be available, in HUD's discretion, for reallocation from time to time to:

(1) Units of general local government and States demonstrating extraordinary need or large numbers of homeless individuals; and

(2) Private nonprofit organizations providing assistance to the homeless.

(e) *Selection criteria.* HUD will award grants under paragraphs (c) and (d) of this section based on consideration of the following criteria:

(1) The nature and extent of the unmet homeless need within the jurisdiction in which the grant amounts will be used;

(2) The extent to which the proposed activities address this need; and

(3) The ability of the grantee to carry out the proposed activities promptly.

(f) *When grant amounts are returned or unused.* (1) For purposes of this section, emergency shelter grant amounts are considered "returned" when they become available for reallocation because a grantee does not execute a grant agreement with HUD for them, *e.g.*, when a grantee for which an allocation is made under § 576.43 or § 576.45 fails to meet the application deadlines under § 576.51(a), or has its application disapproved under § 576.53(b), or approved with a reduced grant amount in accordance with §576.89.

(2) For purposes of this section, emergency shelter grant amounts are considered "unused" (i.e., Federal deobligation) when they become available for reallocation by HUD after

a grantee has executed a grant agreement with HUD for them: *e.g.*, where—

(i) A State fails to make its grant amounts available to State recipients within the time period specified in § 576.55(a)(1);

(ii) A formula city or county fails to obligate grant amounts within the time specified in § 576.55(b);

(iii) A State recaptures grant amounts from a State recipient and makes them available to HUD as provided in § 576.55(c)(2);

(iv) Grant amounts become available as a result of imposition of a sanction (other than a reduction of grant amounts) under § 576.89 or the close-out of a grant; or

(v) A grantee referred to in paragraph (b) of this section fails to obligate grant amounts within the time period specified in its grant agreement.

Amounts that remain after reallocation under § 576.63, § 576.65, or § 576.67(c) are considered unused for purposes of this section.

Subpart G—Program Requirements

§ 576.71 Matching funds.

(a) *General.* Each grantee must supplement its emergency shelter grant amounts with an equal amount of funds from sources other than under this part. These funds must be provided after the date of the grant award to the grantee. Funds used to match a previous emergency shelter grant award may not be used to match a subseqyent grant award under this part. A grantee may comply with this requirement by providing the supplemental funds itself, or through supplemental funds or voluntary efforts provided by any State recipient or nonprofit recipient (as appropriate).

(b) *Calculating the matching amount.* In calculating the amount of supplemental funds, there may be included the value of any donated material or building; the value of any lease on a building; any salary paid to staff of the grantee or to any State recipient or nonprofit recipient (as appropriate) in carrying out the emergency shelter program; and the time and services contributed by volunteers to carry out the emergency shelter program, determined at the rate of $5 per hour. For purposes of this paragraph (b), the grantee will determine the value of any donated material or building, or any lease, using any method reasonably calculated to establish a fair market value.

§ 576.73 Use as an emergency shelter.

(a)(1) *General.* Any building for which emergency shelter grant amounts are used for one or more of the eligible activities described in §§ 576.21(a)(1) must be maintained as a shelter for the homeless for not less than a three-year period, or for not less than a 10-year period, if the grant amounts are used for major rehabilitation or conversion of the building.

(2) Using emergency shelter grant amounts for eligible activities described in § 576.21(a)(2) does not trigger either the three- or 10-year period.

(3) Using emergency shelter grant amounts for the leasing of commercial facilities under § 576.21(a)(3) to provide emergency shelter requires that the commercial facilities be maintained as a shelter for the homeless for not less than a three-year period.

(4) For all other eligible activities described at § 576.21(a)(3), the building for which ESG grant amounts are used must be maintained as a shelter for the homeless for not less than a one-year period.

(b) *Calculating the applicable period.* The one-, three- and 10-year periods referred to in paragraph (a) of this section begin to run:

(1) In the case of a building that was not operated as an emergency shelter for the homeless before receipt of grant amounts under this part, on the date of initial occupancy as an emergency shelter for the homeless.

(2) In the case of a building that was operated as an emergency shelter before receipt of grant amounts under this part, on the date that grant amounts are first obligated for the shelter.

§ 576.75 Building standards.

Any building for which emergency shelter grant amounts are used for renovation, conversion, or major rehabilitation must meet local government safety and sanitation standards.

§ 576.77 Assistance to the homeless.

Homeless individuals and families must be given assistance in obtaining:

(a) Appropriate supportive services, including permanent housing, medical health treatment, mental health treatment, counseling, supervision, and other services essential for achieving independent living; and

(b) Other Federal, State, local, and private assistance available for such individuals.

§ 576.79 Other Federal requirements.

Use of emergency shelter grant amounts must comply with the following additional requirements:

(a) *Nondiscrimination and Equal Opportunity.* (1) The requirements of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–19 and implementing regulations; Executive Order 11063 and implementing regulations at 24 CFR Part 107; and Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4) and implementing regulations issued at 24 CFR Part 1;

(2) The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101–07) and implementing regulations at 24 CFR Part 146 and the prohibitions against discrimination against otherwise qualified individuals with handicaps under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR Part 8. For purposes of the emergency shelter grants program, the term "dwelling units" in 24 CFR Part 8 shall include sleeping accommodations.

(3) The requirements of Executive Order 11246 and the regulations issued under the Order at 41 CFR Chapter 60;

(4) The requirements of section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701u (see § 570.607(b) of this Chapter);

(5) The requirements of Executive Orders 11625, 12432, and 12138. Consistent with HUD's responsibilities under these Orders, the grantee must make efforts to encourage the use of minority and women's business enterprises in connection with activities funded under this part; and

(6) The requirement that the grantee (or in the case of States, the State recipient) make known that use of the facilities and services is available to all on a nondiscriminatory basis. Where the procedures that a grantee or recipient intends to use to make known the availability of such facilities and services are unlikely to reach persons of any particular race, color, religion, sex, age or national origin within their service area who may qualify for them, the recipient or grantee must establish additional procedures that will ensure that these persons are made aware of the facilities and services. Grantees and recipients must also adopt and implement procedures designed to make available to interested persons information concerning the existence and location of services and facilities that are accessible to persons with a handicap.

(b) *Applicability of OMB Circulars.* The policies, guidelines, and requirements of 24 CFR Part 85 (codified pursuant to OMB Circular No. A–102),

and OMB Circular No. A-87,[1] as they relate to the acceptance and use of emergency shelter grant amounts by States and units of general local government, and Nos. A-110 and A-122[1] as they relate to the acceptance and use of emergency shelter grant amounts by private nonprofit organizations.

(c) *Lead-based paint.* The requirements, as applicable, of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846) and implementing regulations at 24 CFR Part 35. In addition, the grantee (or in the case of States, the State recipient) must also meet the following requirements relating to inspection and abatement of defective lead-based paint surfaces:

(1) Treatment of defective paint surfaces must be performed before final inspection and approval of the renovation, rehabilitation or conversion activity under this part; and

(2) Appropriate action must be taken to protect shelter occupants from the hazards associated with lead-based paint abatement procedures.

(d) *Conflicts of interest.* In addition to conflicts of interest requirements in OMB Circulars A-102 and A-110,[1] no person-

(1)(i) Who is an employee, agent, consultant, officer, or elected or appointed official of the grantee, State recipient, or nonprofit recipient (or of any designated public agency) that receives emergency shelter grant amounts and

(ii) Who exercises or has exercised any functions or responsibilities with respect to assisted activities, or

(2) Who is in a position to participate in a decisionmaking process or gain inside information with regard to such activities, may obtain a pesonal or financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for him or herself or for those with whom he or she has family or business ties, during his or her tenure, or for one year thereafter.

HUD may grant an exception to this exclusion as provided in §§ 570.611(d) and (e) of this chapter.

(e) *Use of debarred, suspended, or ineligible contractors.* The provisions of 24 CFR Part 24 relating to the employment, engagement of services, awarding of contracts, or funding of any contractors or subcontractors during any period of debarment, suspension, or placement in ineligibility status.

(f) *Flood Insurance.* No site proposed on which renovation, major rehabilitation, or conversion of a building is to be assisted under this part, other than by grant amounts allocated to States under § 576.43, may be located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(1)(i) The community in which the area is situated is participating in the National Flood Insurance Program and the regulations thereunder (44 CFR Parts 59 through 79) or

(ii) Less than a year has passed since FEMA notification regarding such hazards; and

(2) The grantee will ensure that flood insurance on the structure is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*).

(g) *Coastal Barriers.* In accordance with the Coastal Barrier Resources Act, 16 U.S.C. 3501, no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(h) *Audit.* The financial management system used by a State or unit of general local government that is a grantee or State recipient must provide for audits in accordance with 24 CFR Part 44. A private nonprofit organization is subject to the audit requirements of OMB Circular A-110.[1]

(i) *Intergovernmental review.* The requirements of Executive Order 12372 and the regulations issued under the order at 24 CFR Part 52, to the extent provided by **Federal Register** notice in accordance with 24 CFR 52.3.

(j) *Displacement.* A grantee or State or nonprofit recipient may not expend ESG grant funds for any activities that would result in the displacement of persons or businesses.

Subpart H—Grant Administration

§ 576.81 Responsibility for grant administration.

Grantees are responsible for ensuring that emergency shelter grant amounts are administered in accordance with the requirements of this part and other applicable laws. In the case of States making grant amounts available to State recipients, and in the case of units of general local government distributing grant amounts to nonprofit recipients, the States and the units of local government are responsible for ensuring that their respective recipients carry out the recipients' emergency shelter grant programs in compliance with all applicable requirements.

§ 576.83 Method of payment.

Payments are made to a grantee upon its request, and may include a working capital advance for 30 days' cash needs or an advance of $5,000, whichever is greater. Thereafter, the grantee will be reimbursed for the amount of its actual cash disbursement needs. If a grantee requests a working capital advance, it must base the request on a realistic, firm estimate of the amounts required to be disbursed over the 30-day period in payment of eligible activity costs. Payments with respect to grants of $120,000, or more, will be made by letter of credit, if the grantee meets the requirements of OMB Circular A-102.[1]

§ 576.85 Performance reports.

(a) *Interim performance report.*—(1) *Timing of report.* (i) A formula city or county, or Territory, must submit its interim performance report to HUD no later than 30 days after the end of the 180-day period allowed for the obligation of grant amounts under § 576.55(b), or 30 days after the date when all grant amounts are obligated, whichever comes first.

(ii) A State must submit its interim performance report not later than *30 days* from the date of the State's distribution of funds to its State recipients; except that where the responsible field office grants a State an extension of the 65-day deadline for obligating its grant funds under § 576.55(a)(1) a corresponding extension for filing of the interim report will automatically be granted.

(iii) A grantee referred to in § 576.67, Reallocation of funds, must submit its interim performance report to HUD within the period specified in its grant agreement.

(2) *Report content.* (i) In the case of a grantee other than a State, the interim performance report must contain information on the amount of funds obligated for each of the three categories of eligible activities described in §§ 576.21(a)(1), (2), and (3).

(ii) A State interim performance report must provide this information for each State recipient.

(3) *Matching funds certification.* A State must submit with its interim performance report the matching funds certification required by § 576.51(b)(2)(ii).

(b) *Annual performance report.*—(1) *Report content.* A grantee other than a State must provide HUD with an annual performance report on the obligation and expenditure of funds for each of the

[1] OMB Circulars referenced in this section are available at the Entitlement Cities Division, Room 7282, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

three categories of eligible activities described in §§ 576.21(a)(1), (2), and (3). A State must provide this information for each State recipient.

(2) *Timing of report.* The initial annual performance report is required for the period ending December 31 following the submission of the interim report, and is due no later than 30 days after December 31. A grantee must continue to submit this report annually until all emergency shelter grant amounts are reported as expended, except that the final report is to be submitted 90 days after all ESG funds are expended and all activities are completed.

(Approved by the Office of Management and Budget under control number 2506–0089.)

§ 576.87 Recordkeeping.

Each grantee must ensure that records are maintained as necessary to document compliance with the provisions of this part.

(Approved by the Office of Management and Budget under control number 2506–0089.)

§ 576.89 Sanctions.

(a) *HUD sanctions.* If HUD determines that a grantee is not complying with the requirements of this Part or of other applicable Federal law, HUD may (in addition to any remedies that may otherwise be available) take any of the following sanctions, as appropriate:

(1) Issue a warning letter that further failure to comply with such requirements will result in a more serious sanction;

(2) Condition a future grant;

(3) Direct the grantee to stop the incurring of costs with grant amounts;

(4) Require that some or all of the grant amounts be remitted to HUD;

(5) Reduce the level of funds the grantee would otherwise be entitled to receive; or

(6) Elect not to provide future grant funds to the grantee until appropriate actions are taken to ensure compliance.

(b) *State sanctions.* If a State determines that a State recipient is not complying with the requirements of this Part or other applicable Federal laws, the State must take appropriate actions, which may include the actions described in paragraph (a) of this section. Any grant amounts that become available to a State as a result of a sanction under this section must, at the option of the State, be made available (as soon as practicable) to other units of general local government located in the State for use within the time periods specified in § 576.55(a)(2), or to HUD for reallocation under § 576.67(d).

(c) *Reallocations.* Any grant amounts that become available to HUD as a result of the imposition of a sanction under this section will be reallocated under § 576.67(d).

Appendix to Part 576—Reallocation of Grant Funds

	Reallocating event	Reallocation grantee	Reallocated amounts not awarded	Reallocated amounts awarded, but returned [1]	Reallocated amounts awarded, but unused [2]
§ 576.61	Formula city or county fails to obtain CHAP approval.	State in which city or county located.	Reallocate to formula cities and counties and States and Territories under § 576.63.	Reallocate under § 576.67(c)	Reallocate under § 576.67(d).
§ 576.63	State fails to obtain CHAP approval.	First, formula cities and counties in State; and if grant amounts remain, other States and Territories.	Reallocate under § 576.67(d)	Reallocate under § 576.67(c)	Reallocate under § 576.67(d).
§ 576.65	Territory fails to obtain CHAP approval.	Other Territories	Reallocate under § 576.67(d)	Reallocate under § 576.67(c)	Reallocate under § 576.67(d).
§ 576.67(c)(1)(i)	"Returned" amounts—State.	First, units of general local government in the State; if grant amounts remain, then other States.	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d).

	Reallocating event	Reallocation grantee	Reallocated amounts not awarded	Reallocated amounts awarded, but returned [1]	Reallocated amounts awarded, but unused [2]
§ 576.67(c)(1)(ii)	"Returned" amounts—formula cities and counties.	First, units of general local government to carry out homeless activities in city or county; if amounts remain, then the State in which the city or county located; if amounts remain, then units of general local government in the States and if amounts remain, other States.	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d).
§ 576.67(c)(2)	Returned amounts—Territories.	First, other Territories; if grants remain, then States.	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d).
§ 576.67(c)(4)	Returned amounts—reallocation grantees under § 576.67(d).	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d).
§ 576.67(d)	"Unused" amounts	Units of general local government, Sates and private nonprofits.	Reallocate under § 576.67(d)	Reallocate under § 576.67(d)	Reallocate under § 576.67(d).

[1] As provided in § 576.67(f), emergency shelter grant amounts are considered "returned" when they become available for reallocation because a grantee does not execute a grant agreement with HUD for them, *e.g.*, when a grantee for which an allocation is made under § 576.43 fails to meet the application deadlines under § 576.51(a), or has its application disapproved under § 576.53(b) or approved with a reduced grant amount in accordance with § 576.89.

[2] As provided in §§ 576.67(d), grant amounts are considered "unused" when they become available for reallocation by HUD after a grantee has executed a grant agreement with HUD for them: *E.g.*, where (i) a State fails to make its grant amounts available to State recipients within the time period specified in § 576.55(a)(1); (ii) a formula city or county fails to obligate grant amounts within the time specified in § 576.55(b); (iii) a State recaptures grant amounts from a State recipient and makes them available to HUD as provided in § 576.55(c)(2); (iv) grant amounts become available as a result of imposition of a sanction (other than a reduction of grant amounts) under § 576.89 or the close-out of a grant; or (v) a grantee referred to in paragraph (b) of this section fails to obligate grant amounts within the time period specified in its grant agreement.

Date: July 18, 1988.

Nancy C. Silvers,

Acting General Deputy Assistant Secretary for Community Planning and Development.

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Part V

Department of Housing and Urban Development

24 CFR Parts 905, 941, 965, and 968

Preemption of Certain State-Determined Prevailing Wage Rates Applicable to Public Housing Projects; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 905, 941, 965, and 968

[Docket No. R-88-1353, FR -2231]

Office of the Assistant Secretary for Public and Indian Housing; Preemption of Certain State-Determined Prevailing Wage Rates Applicable to Public Housing Projects

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule preempts any prevailing wage rate that is determined under State law and would otherwise be applicable to an employee in any trade employed on a public or Indian housing project whenever the State wage rate exceeds the corresponding Federally-determined prevailing wage rate. Specifically, the rule requires bid documents and contracts let by the HUD-assisted public housing agency or Indian housing authority for the project to contain a statement that any State rate that exceeds the corresponding Federal rate is inapplicable and shall not be enforced. In addition, the public housing agency or Indian housing authority shall not be required to pay the higher State wage rates to its own employees who may be engaged on the project. The rule prohibits enforcement of the State requirements regarding higher State rates on the project. The rule also preempts wage rates that are determined to be prevailing under Indian tribal law and exceed the applicable Federal wage rates. The rule will restrain the costs of operation of the public housing program and will enable the Federal government to make the most effective use of limited budget resources.

EFFECTIVE DATE: October 6, 1988.

FOR FURTHER INFORMATION CONTACT: Justin L. Logsdon, Assistant to the Secretary for Labor Relations, Room 7106, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 755-5370. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On October 21, 1987, HUD published in the **Federal Register** (52 FR 39233) a Notice of Proposed Rulemaking to amend portions of 24 CFR Parts 905, 941, 965, and 968. This rule proposed to preempt the application and enforcement of prevailing wage rates determined under State law on projects assisted by HUD under the United States Housing Act of 1937, as amended (USHA), whenever the State wage rate exceeded the corresponding Federally-determined prevailing wage rate for that trade. (Under section 12 of the USHA, the Federal prevailing wage rate is determined either by the U.S. Department of Labor pursuant to the Davis-Bacon Act, in the case of project development, or by HUD in the case of project operation). Under the proposal, a State or local wage rate would not apply to a project if the State- or locally-determined rate for a trade to be used on the project exceeded the corresponding Federally-determined rate. Any bid documents for project work that would otherwise be subject to State law requiring payment of State- or locally-determined prevailing wage rates would be required to contain a statement that whenever any State- or locally-determined rate exceeds the corresponding Federally-determined wage rate, the State- or locally-determined rate is inapplicable to the contract and shall not be enforced. In addition, the PHA or IHA would not be required to pay its own employees engaged on the project at higher State wage rates. The rule also proposed to prohibit enforcement of such rates against contractors or subcontractors and PHAs or IHAs. Because HUD-determined prevailing wage rates are limited in all cases to basic hourly rates without consideration of fringe benefits, the rule proposed to provide that fringe benefits determined under State law would be excluded from the comparison with the HUD-determined wage rate; in that situation, preemption of the entire State-determined rate (both fringe benefits and the basic hourly rate) would occur if the basic hourly rate determined under State law, exclusive of fringe benefits, exceeded the HUD-determined rate. The rule also proposed to apply to IHAs and to tribal prevailing wage laws.

Discussion of Public Comments and Changes Made in the Final Rule

HUD received 81 comments in response to the proposed rule, including 55 comments generally supporting the issuance of a preemption rule, 23 opposing the rule, and 3 that did not express a clear position supporting or opposing the rule. The comments included 49 from housing authorities, 10 directly from labor organizations or their counsel (in addition to other labor organization comments forwarded with Congressional comments), 7 from Congressional representatives, 5 from States or State agencies or officials, and several from trade, redevelopment and other organizations.

Cost Savings

A large number of comments concerned the question of whether the rule would result in cost savings in construction and rehabilitation and/or the ability to perform work on a greater number of units with the same amount of Federal funds. For example, one labor organization commented that it appeared HUD lacks any real evidence supporting its conclusion that it is necessary to preempt higher State-determined prevailing wage rates, since the fact that some State rates are higher does not prove that labor costs on such projects are higher or that the costs of such projects are higher than they might otherwise be. A state law department commented that evidence of higher State-determined wage rates alone does not lead logically to HUD's conclusion about the effect of these rates on the cost or number of lower income housing units. Another labor organization asserted that HUD ignored the findings of three of its own investigations, two by the Office of Inspector General finding a direct correlation between prevailing wage requirement violations and poor quality construction due to use of inexperienced and unskilled workers, and one by its Office of Program Planning and Evaluation finding a low correlation between average wage rates and average dwelling costs on a sample of Indian housing projects.

HUD rejects the notion that wage rates, which may constitute one-third or more of the total cost of rehabilitation work, can be increased as much as 50 to 100 percent (depending on location, job classifications, and nature of work), without affecting overall project cost or the amount of renovation work performed. Indirect confirmation of this is found in the comment of a labor organization, which objected to the proposed rule for the following reason:

> Where the federal Davis-Bacon or HUD rates are substantially lower than the wage rates contained in collective bargaining agreements contractors who are parties to such agreements would be competitively disadvantaged in obtaining work on federally funded housing projects. This will result in a deprivation of work for employees covered by collective bargaining agreements and will undermine the wage and benefit standards in the locality.

Moreover, at least 18 PHAs commented that the proposed rule preempting higher State wage rates would result in cost savings. For example, three California PHAs commented that the rule could, in some cases, reduce the cost of new construction and modernization under the Comprehensive Improvement

Assistance Program (CIAP) by 15 to 30 percent, and that cost savings in labor would directly translate into either more units being modernized or constructed within the same budget amounts or improvements in the materials used and a longer life for the units, with less operating costs. A PHA in New York State commented that:

> Our comparisons of State and Davis-Bacon wage rates as applicable to our rehabilitation, modernization and new development projects indicate that the State rates exceed the Federal rates by a substantial percentage and, in many cases, would have permitted us to accomplish only half of our original project scope. This would obviously undermine our efforts to meet the needs of the low-income and homeless people in our area. Furthermore, it would be counter productive to our attempts to stretch the ever-diminishing dollars we have to work with.
>
> Mandatory use of State wage rates would increase the overall cost of our competitively bid projects to the point of making them unfeasible within the limits of our budget. The end result would be diminished decent, safe and sanitary housing opportunities for the people we serve.

Another PHA in New York State noted that New York State rates had substantial impact on the PHA's "residential" work (generally, residential buildings of four stories or less) but very little impact on "commercial" (residential high rise) work. The authority cited a heating system replacement project which fit both HUD's and the State's respective definitions of "residential" work and was first bid with Federal "residential" rates; however, after a lawsuit in State court, the project was required to be rebid with State rates. Because of New York's methodology for determining wage rates, the new rates deemed applicable by the court and the State in the absence of a separate collectively bargained "residential" rate were actually the higher "commercial" rates, which were merely labeled as "residential". The PHA reported that the following changes were made in the project when it was rebid:

> The scope of project was then completely downgraded to offset the anticipated increase in labor costs. Some of the changes included the elimination of thermostatic valves on convectors, lesser quality convectors, a decrease from cast iron to copper piping, the encapsulation of asbestos rather than its complete removal, etc. An estimated $800,000 of work and product quality was cut from the project. The second bids totaled $4,667,000—an increase of $56,000—in spite of the cost containment measures. Thus, the wage rate issue cost the Housing Authority and HUD about 19% in lost improvements for public housing.

Nine PHAs commented that additional indirect cost savings would be achieved by eliminating administrative burdens associated with applying State rates to projects.

A trade association comment included examples of higher State wage rates leading to overall higher bid costs, including the statement of a member contractor in California, operating in the Sacramento, Los Angeles and San Francisco areas, that California State rates were 10 to 20 percent higher than Federal rates and that such wage differentials would increase the contractor's total job cost by 3 to 4 percent, which would be reflected in its bid prices.

Also, in recent Buffalo, New York federal court litigation challenging HUD's refusal to apply state rates, and expert witness for the plaintiff unions admitted, on the basis of certain HUD-verified assumptions, that HUD's annual Comprehensive Improvement Assistance Program (CIAP) costs in the State would increase by 28 percent or $30,200,000; HUD's witnesses calculated the amount at about $50,000,000. In other words, using all available funds, HUD's main program for rehabilitating public housing in New York would have to be slashed by more than one quarter if State rates are imposed on PHA projects there.

With respect to the labor organization comments concerning HUD's own studies, two HUD Inspector General reports (Internal Audit: Monitoring and Enforcement of Labor Standards, Region IX, 85-SF-179-0003, January 16, 1985; National Audit Report: Monitoring and Enforcement of Labor Standards, 86-TS-179-005, November 6, 1985) stated that there is a correlation between labor standards violations and construction deficiencies in the jurisdication of some Regional Offices. The contractors cited in these reports failed to pay federally-determined prevailing wage rates. The simple response is that these studies provide no support for the contention that poor quality construction is linked to failure to pay State-imposed wage rates that exceed federally required levels, since the reports concerned only violations of Federal labor standards.

The labor organization also mentioned a HUD Office of Program Planning and Evaluation study ("Evaluation of the High Cost of Indian Housing", December 1979), which it said indicated a low correlation between average wage rates and dwelling construction costs. This analysis involved wage rates for projects on 20 reservations. While this report did not find a correlation between wage rates and overall costs for those projects with the highest wage rates, it did find some correlation between wage rates and project costs for the remaining three quarters of the sample with lower wage rates. In any event, the sample—restricted to a few Indian Housing Authorities a decade ago—is wholly insufficient to support a conclusion that high wage rates do not affect construction costs in light of the recent, already recited evidence to the contrary.

Other comments relating to the overall cost of a project referred to HUD's suggestion that imposition of higher State rates could result in a cutback by contractors in the cost or quality of equipment and supplies, resulting in poorer quality work. One of the comments, received from a labor organization, suggested that HUD's hypothesis was without factual support and asserted that the quality of work is largely dependent on the workers' skill and training, which would be lacking at the wage rates applying after preemption of State rates. Another labor organization commented that the contract will specify the standards of materials required, precluding substitution of lesser quality by the contractor.

HUD's discussion, in the preamble to the proposed rule, of the possibility of cutbacks in the cost or quality of materials and supplies due to higher State wage rates indicated that this possibility was less likely than that higher bids must be accepted for the work. Nevertheless, HUD believes that the quality of the work is dependent on the skill and workmanship of the workers—*as well as* the quality of materials. The comment of the New York State PHA quoted above regarding cutbacks in quality of materials and quality of work to be performed is an example—albeit reflected in revised specifications rather than initiated by a contractor—of lesser quality work resulting from imposition of higher State wage rates. Moreover, the labor organizations' comments, along with two other comments asserting that preemption would result in shoddy workmanship due to substandard wages, essentially suggest that the Federally-determined wage rates (HUD-determined or Davis-Bacon rates), are insufficient to protect against unskilled "bargain basement" workers or resulting poor quality work, not only in the handful of States with higher applicable State rates, but also in the overwhelming majority of States where Federal rates exeed (or apply in the absence of) State-determined rates. HUD rejects this assertion as without foundation since the Federally-

determined rates are required by law to reflect rates prevailing in the locality.

Accuracy of Federal and State Rates

Other comments suggested that HUD and/or Davis-Bacon wage rates are inaccurate or too low. Two comments suggested that preemption of rates determined under State law would undermine the labor market; another comment suggested that the rule was not in the best interest of the worker and would result in workers on PHA projects becoming low-income earners. HUD rejects these comments because both types of Federal wage rates are required by law to reflect the wage rates prevailing in the locality. Moreover, appeal procedures are available to challenge Davis-Bacon rates determined by the Department of Labor for project development, as well as those determined by HUD for project operation. Workers and other interested persons, including contractors and labor organizations, may request that DOL reconsider a Davis-Bacon wage determination. Formal appeals may be submitted to the Administrator, Wage and Hour Division. 29 CFR 1.8. The Administrator's decisions may be appealed to the Department of Labor's Wage Appeals Board. 29 CFR 1.9. HUD-determined wage rates may also be appealed, first to the Regional or Field Office, and then to the Assistant to the Secretary for Labor Relations in Washington, DC.

On the other hand, comments from PHAs in New York and California stated that certain of the State determined wage rates were excessive and unrealistic.

HUD notes that State laws vary in their methodology for determining the "prevailing" wage rate. One recent study characterized that variation among these laws as follows:

> State prevailing wage laws are highly dissimilar. They are alike only in that all of them set some level of super-minimum wage rates for construction workers on public works. Even those state prevailing wage laws patterned on the federal Davis-Bacon Act usually contain concepts, definitions, procedures, or rules so changed from the original that no standard form can be said to exist. The thirty-five little Davis-Bacon acts (those of thirty-four states plus that of the District of Columbia) are all effectively different, tied together by little more than a common name. [A. Thieblot, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and The Service Contract Act* 137 (Labor Relations and Public Policy Series No. 27, University of Pennsylvania 1986).]

The methodology mandated by the New York State labor law, in particular, varies from the DOL methodology for determining Davis-Bacon wage rates in ways that tend to result in State-determined wage rates that are higher than the Davis-Bacon rates. As amended in 1983, section 220 of the New York State Labor Law defines "prevailing rate of wage" as:

> the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined * * * In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage. [NY Lab. law § 220, subdivision 5a (McKinney)]

Only employers may contest a wage determination:

> An employer may contest a determination by the fiscal officer under paragraphs a and c of subdivision five of this section. The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers and mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer. [*Id.* subdivision 6]

As a result of the 1983 amendments, the following differences in methodology between New York State and Davis-Bacon wage rates tend to result in higher State-determined wage rates:

1. New York State establishes as prevailing the rates paid to 30 percent of the workers in the trade in the locality if they are subject to collective bargaining agreements, although the remaining 70 percent of the workers may be receiving lower wage rates. In contrast, the majority of the workers in a trade must be paid at the same rate in order to establish that rate as prevailing for Federal Davis-Bacon purposes; if the same wage rate is not paid to a majority, the Davis-Bacon prevailing wage is the average of the wages paid, weighted by the total employed in the trade. 29 CFR 1.2(a)(1).

2. The New York law does not require a survey to determine whether the collective bargaining agreements considered by the State actually cover at least 30 percent of the workers in the trade, nor does it specify the methodology by which such a survey would be conducted; rather, it places the burden on employers to individually challenge wage determinations. Accordingly, it is likely that New York State determinations may represent collectively bargained wage rates paid to *less* than 30 percent of the employees in the locality.

3. In the absence of a separate collectively bargained wage rate for "residential" structures (apartment buildings of up to four stories) in areas where there is little or no union activity on this type of construction, the State will require payment of the higher collectively bargained "building" wage rates, although Davis-Bacon wage determinations, as a result of a survey of local rates and practices, would recognize separate "residential" wage rates as prevailing for such structures.

For these reasons, the New York statute mandates wages that bear little resemblance to rates determined by the Federal government to prevail in areas where a small percentage of workers in a given trade are subject to collective bargaining agreements.

HUD received two comments concerning Alaska, one suggesting that the preemption rule would have a devastating effect due to the high cost of living and high unemployment there, and the other requesting special consideration for Alaska because of its significantly higher cost of living and correspondingly higher State wage rates. As noted above, however, Federal wage rates are required by law to reflect the wage rates already prevailing in the locality. Accordingly, the final rule does not include any special provisions for Alaska.

The Massachusetts Secretary of Labor and Commissioner of Labor and Industries filed a comment opposing the proposed rule. However, the rule will have no effect upon Massachusetts, because that State's highest court has ruled that, in enacting the State prevailing wage law, the legislature did not intend that it apply to federally funded public housing projects. *Commissioner of Labor v. Boston Housing Authority*, 345 Mass. 406, 188 N.E.2d 150 (1963).

Authority to Preempt

Several comments addressed HUD's authority for preempting the application of State prevailing wage rates on HUD-

assisted PHA projects. A few comments suggested that there is no Congressional intent to preempt State prevailing wage laws or that there is Congressional intent not to preempt those laws. Several comments cited the provision in section 12 of the USHA requiring payment of "not less than" the Federal rates as evidence that the Federal rates are a minimum only; two comments suggested that an amendment to the USHA in 1949 that for the first time added the "not less than" language was significant in that it incorporated the "fundamental" Davis-Bacon concept that the Federal wages are a floor rather than a ceiling. These comments further suggest that the statutory purpose of the USHA is not frustrated by the imposition of higher State wage rates. Specifically, they state that nothing in the USHA suggests Congress intended its statutory purpose to be accomplished at the expense of locally prevailing wage standards; rather, Congress expressly provided that laborers and mechanics on HUD-assisted PHA development and operation are entitled to the local prevailing rate. The comments also refer to the States' long and deep statutory concern about payment of prevailing wages.

A discussion of the legal basis for preemption of higher State-determined prevailing wage rates on HUD-assisted PHA projects was set out in the preamble to the proposed rule and need not be repeated in detail here. HUD's determination to preempt higher State wage rates is made under its responsibility to carry out the Congressional purpose of the USHA as a whole, and is based on its determination that the imposition of higher State rates on public and Indian housing projects assisted under the Act conflicts with the Act. The overall purpose of HUD's assistance under the Act is to maintain the lower income character of public and Indian housing projects and assure that they continue to be available to serve lower income families. *See, e.g.*, USHA, sections 5, 9 and 14. The Act also declares that it is the policy of the United States to employ its funds and credit, as provided in the Act, to assist the States and their political subdivisions to "remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income" and, consistent with the objectives of the Act, to vest in local PHAs the maximum amount of responsibility in the administration of their housing programs. USHA, section 2. The imposition on a project of State wage rates that exceed the Federally-determined prevailing wage rates establishes an excessive wage floor, and these higher wage costs must ultimately be funded with HUD assistance through the acceptance of higher bids or proposals or payment of higher wages to PHA or IHA employees. Since Federal funds are limited, the number of lower income housing units to be constructed, maintained, modernized or repaired is lowered, thus frustrating the purpose of the Act. Another effect of the imposition of higher State wage rates can be to force a cutback in the cost and quality of materials and supplies because of the greater proportion of project costs required for the labor component, a result equally inimical to the purposes of the USHA. Finally, in providing for locally prevailing wage rates, Congress in section 12 of the Act specifically requires a determination or adoption by the *Federal* government of rates reflecting the locally prevailing practice.

To summarize, HUD's basis for preempting State prevailing wage laws is that application of the State laws conflicts with the requirements of the Act and stands as an obstacle to the execution of the purposes and objectives of the Act. HUD does not preempt simply because the State laws impose some additional costs on PHA/IHA projects. Rather, HUD has determined that the aggregate impact of the substantial increase in expenditures resulting from application of such laws seriously impairs the Department in discharging its statutory responsibility to provide and maintain lower income housing.

In specific response to the above comments, HUD agrees that Congress did not intend its statutory purpose to be accomplished at the expense of locally prevailing labor standards and that Congress explicitly provided for such standards. However, Congress' provision in section 12 of the USHA for wages meeting such standards specifically requires a determination or adoption by the *Federal* government of rates reflecting the locally prevailing practice. Adoption of the rule preempting higher State rates clearly leaves in place the protection of locally prevailing wage standards, determined or adopted by the respective Federal agencies as Congress required.

While there is evidence that Congress in the Davis-Bacon Act and related provisions intended to permit employers (whether as the result of negotiations or voluntarily) to pay higher than the Federally determined wage rates, HUD is aware of no legislative history indicating that Congress intended for the States to be free to compel the payment of such higher rates in Federally-funded PHA/IHA projects. Congressman Bacon of New York, the Davis-Bacon Act's sponsor in the House, stated that the Act

> does not put the Government in the position of price fixing or of anticipating wage levels * * *. It leaves that to employer and employee, where it belongs. [74 Cong. Rec. at 6511, February 28, 1931]

Thus, to construe the statute as permitting State-compelled higher rates would not only undercut Congress' grant of express authority to the Federal government to determine prevailing wage rates, but would also interfere with private bargaining which can result in rates higher than the Federally-determined minimum and lower than the State-mandated rate.

HUD recognizes that some States may have long evidenced a statutory concern about payment of prevailing wages. However, the relative importance to a State of its own law is not material when the state law conflicts with Federal law. See *Felder v. Casey*, 56 USLW 4689, 4791 (1988). In any event, this rule preempts only those State prevailing wage rates that certain States have made applicable to PHA/IHA projects receiving HUD assistance, and only to the extent that any of the rates for specific trades on a project exceed the corresponding Federal wage rates. The rule is narrowly drawn to eliminate the conflict with the USHA that is posed by State mandating of higher wage floors. States remain free to impose as well as enforce on HUD-assisted PHA/IHA projects those State rates that are equal to or lower than the corresponding Federal wage rates; more importantly, the rule in no way affects the States' ability to enforce their own State-mandated wage rates on the vast majority of State public works projects that is the subject of the States' traditional concern—*i.e.*, every "public work" except Federally-funded PHA/IHA projects.

Related to the matter of the States' concern with setting wage rates is the concept of federalism, which two comments from labor organizations suggest runs counter to the proposed rule. The comments point out the Supreme Court's affirmation of the value of permitting each State to be its own "laboratory for experimentation", and one of the comments cites several Federal labor standards statutes that explicitly permit or acknowledge the authority of the States to enact and enforce equivalent or higher standards. The comment also cites the Tenth Amendment to the Constitution ("The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The concept of federalism is integral to, and not apart from, the determination of a Federal agency's authority to preempt state law in carrying out its responsibility to implement a Federal law that was within the U.S. Congress's constitutional authority to enact. Thus the legal basis upon which HUD relies in preempting higher State wage takes the concept of federalism into account in determining the permissible scope of preemption. The Supreme Court, in *Lawrence County v. Lead-Deadwood School District No. 40–1*, 469 U.S. 256 (1985), upheld the preemption of a State statute where a Federal statute provided that a local government recipient of Federal payments in lieu of taxes "may use the payment for any governmental puprose"; the State statute held to be preempted required local governments to distribute payments in lieu of taxes in the same way they distribute general tax revenues, likely resulting in a windfall for entities such as schools that were already fully funded by local revenues. In determining that the statute was preempted, the Supreme Court rejected "federalism" arguments opposing Federal intrusion into a State's efforts to provide fiscal guidance to its subdivisions, and noted that under the Spending Clause of the Constitution, Congress may impose conditions on the receipt of Federal funds absent some independent constitutional bar. There is no area in which the State's police and health-and-welfare authority is greater than in connection with its schools, or in which its core government functions are greater than in providing fiscal direction to its local governmental subdivisions. Nonetheless, in *Lead-Deadwood*, the Supreme Court determined that a State law mandating the manner of revenue allocation by its subdivisions, and clearly designed, from the State's perspective, to benefit school systems in counties receiving aid in lieu of taxes, was preempted. Thus, even if wage and hour standards are viewed as areas of traditional State concern, the result in *Lead-Deadwood* indicates this matters not in considering whether the Federal goal of providing an adequate supply of lower-income housing would be frustrated by imposition of higher State wage rates, or in determining that Federal preemption is a legitimate response to such frustration.

HUD notes that the fact that Congress has, in other labor standards statutes, permitted a State to enact or enforce equal or stricter standards does not suggest that the same applies to the USHA, where Congress has *not* provided for higher State wage rates. Congress' principal purpose in enacting the USHA was to remedy an acute shortage of decent, safe and sanitary lower income housing, maintain the lower income character of PHA and IHA projects and assure their continued availability to serve lower income families. Application of State-compelled wage rates would clearly frustrate this purpose.

A State agency comment questioned HUD's authority to override State wage and hour laws by regulation. As discussed in the preamble to the proposed rule, HUD's preemption in the narrow circumstances set out in the rule is authorized where State law stands as an obstacle to the accomplishment and execution of the purposes of the USHA, and in those circumstances the U.S. Supreme Court has indicated that Federal regulations have no less preemptive effect than Federal statutes, regardless of express Congressional authorization to displace State law.

Another State agency commenting in opposition to the proposed rule cited Congress' desire to preserve as much local autonomy as possible, as evidenced by the statement in section 2 of the USHA that one of the Act's purposes was "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs" (42 U.S.C. 1437) and by a 1949 Senate report stating that "the primary responsibility for the provision of low rent housing is in the hands of the various localities" with a limited Federal role.

Vesting of the maximum amount of responsibility in PHAs is unquestionably one of the policies of the Act. Contrary to the comment, however, this Congressional policy supports, rather than conflicts with, the preemption of State-mandated wage rates, which *furthers* the goal of local autonomy. Moreover, the overwhelmingly favorable comments from PHAs support this view. Preemption under the proposed rule would *eliminate* requirements imposed by the State on the local PHA/IHA. One PHA in New York State commented that "[t]his proposed rule should be considered as an additional step towards decontrol [of PHAs]." Another commented that while, from their observation, the difference in wage scales was minimal, these mandates have caused serious and controversial negotiations with contractors, delays in getting programs started and an "overall nuisance" in the bidding process. In any event, HUD notes that the policy of vesting the maximum amount of responsibility in local PHAs is established by section 2 of the USHA only to the extent "consistent with the objectives of this Act." There is no conflict with this policy in a rule which preempts State requirements that are inconsistent with the stated goal of remedying the acute shortage of lower income housing.

One State agency commented that under the law of the State, the agency is required to bring suit to enjoin the award of a contract, or any further work or payments thereunder where the contract is already awarded, if a public authority has not included a schedule of the (State) prevailing wages in its contracts for public works. The State agency suggested that the proposed rule would therefore lead to an expensive and time-consuming legal battle that would defeat HUD's objectives by causing delays and additional legal costs. HUD notes that the rule does not direct the PHA/IHA to physically exclude State wage rates from the contract; the contract must, however, indicate that any State rates that exceed the Federal rates are inapplicable to the contract and unenforceable. Assuming, however, that the State law would still otherwise require some State legal enforcement action in these circumstances, the rule would prohibit enforcement of preempted State requirements whether or not they were included in the contract. There shoyld not be any expensive and time-consuming State challenges because the rule would preempt any State law that would require legal action or other enforcement of the higher State rates, as a matter of law, thereby eliminating the asserted duty under State law to bring suit to enjoin contract award or work or payments under the contract.

A labor organization comment asserted that HUD does not allege an inherent conflict between the Federal and State laws in question, but rather a conflict by virtue of the manner in which the prevailing wage provisions of the respective statutes are interpreted and applied, and that the labor organization knew of no reported case involving preemption on the grounds that the respective regulatory schemes were not harmonious under the particular facts of a specific case. As indicated above, HUD believes there is an inherent conflict here between the Federal and State laws. Moreover, HUD notes that this comment cites no case suggesting that preemption is warranted only where an obstacle to the

accomplishment of the Federal statutory purpose is "inherent" in the State and Federal laws, but is unwarranted where the same obstacle results from the manner in which the respective statutes are interpreted and applied. In fact, a recent Supreme Court case repeats the established rule that preemption may be based upon the *effect* a State law, neutral on its face, has upon a Federal objective. *Felder* v. *Casey*, 56 USLW 4689 (1988). The effect of State laws that prescribe higher-than-Federal wage rates is to divert funds from the provision or maintenance of a greater number of lower income housing units to the payment of higher wages and thus obstruct the Federal objective.

Effect on Competition

Several comments concerned the proposed rule's effect on competition. The Chief Counsel for Advocacy of U.S. Small Business Administration commented that if HUD believes the impact of the rule is not expected to be significant in terms of both the number of small entities affected and the magnitude of the expected savings, HUD's Regulatory Flexibility Act certification accompanying the final rule should at least recognize that the changes brought about by the rule will clearly be beneficial to small businesses. The Chief Counsel stated that regulatory reform which reduces disparities caused by artificially inflated wage determinations can reasonably be expected to encourage greater small business participation in bidding on PHA projects, since many small firms have foregone bidding on public projects because of dislike for having to maintain a two-tier wage system with "higher wages for regulated projects and competitive wages on private projects". A trade association commented that the proposed rule is a step toward making the procurement process more competitive and would encourage more subcontractors, the overwhelming majority of which are small businesses, to take part. Another trade association commented that individual state laws are creating determinations of "prevailing" wages that are not true ongoing wages in a locality, and that such laws discriminate against small contractors because they are unable to compete with the capabilities and resources of larger firms to comply with such "inflated" rates and their paperwork requirements. Five PHAs also indicated that the proposed rule would stimulate competition. On the other hand, as noted earlier, a labor organization in New York State commented that the proposed rule would have an adverse effect on competition in bidding on PHA work by effectively precluding contractors that are parties to collective bargaining agreements from competitive bidding for such work, since in general the wage rate determined under New York law is the collectively bargained rate.

HUD recognizes that when a State law designates a collectively bargained wage rate as prevailing in a locality and the Federal government determines that a lower wage rate prevails, some contractors that are contractually bound to pay at the level of the State-determined wage rates would be competitively disadvantaged, since their labor costs would be reflected in an overall higher bid on the job, as the comment of the New York labor organization suggests. This may be an unavoidable effect on preempting State laws that would otherwise require HUD to fund excessive wage floors through the acceptance of higher bids or proposals for PHA work. In any event, the other comments cited support HUD's conclusion that the overall effect of the rule would be to increase competition because it would lead to a net increase in the number of firms willing to bid on PHA/IHA work at the Federally determined wage rates once higher State wage rates are preempted.

Proposals for Alternatives and Modifications to the Proposed Rule

Several comments suggested modifications or alternatives to the proposed rule or requested clarifications of the rule. Several PHAs in California and a regional association commented that the final rule should clarify whether or not Department of Labor (DOL) wage rates include fringe benefits, and the effect of these benefits upon the issued wage rate, *i.e.*, whether their value is in addition to, apart from, or to be subtracted from the Davis-Bacon wage rate.

In the context of this rule, DOL wage rates are the "Davis-Bacon" wage rates. Davis-Bacon wage rates include fringe benefits where DOL determines that more than 50 percent of the employees in the craft in the locality receive fringe benefits; in other areas Davis-Bacon wage rates do not include any fringe benefits and reflect only the prevailing basic hourly rate. See, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Davis-Bacon Construction Wage Determinations Manual of Operations* 63–65 (1986). Davis-Bacon wage rates that include fringe benefits so indicate and Federal law and regulations require that the fringe benefits must be provided or the hourly monetary equivalent listed in the DOL wage determination must be added to the basic hourly rate paid to the workers. HUD believes it is unnecessary for the final rule to include this explanation of what Davis-Bacon/DOL rates contain, however, because each DOL wage decision itself indicates whether fringe benefits are included in the wages that must be paid. As the proposed rule and its preamble indicated, State wage rates would be preempted on work that is subject to Davis-Bacon wage rates if the total State wage rate—including fringe benefits, if any, as well as basic hourly rate—exceeds the total DOL wage rate—including fringe benefits, if any, and basic hourly rate. The final rule has not been changed in this regard. Thus, where a State rate includes fringe benefits and the DOL rate does not (because DOL has determined that fringe benefits do not prevail for that trade in that locality), the total State rate including fringe benefits will be compared to the basic hourly rate determined by DOL to be prevailing, and will be preempted if it exceeds the DOL rate.

The same PHAs also commented that the issue of wage rates for apprentices and the ratio of apprentices to journeymen should also be addressed in the final rule. In addition, a New York State PHA commented that HUD, in conjunction with DOL and the Equal Employment Opportunity Commission, should consider preemption of New York State Labor Law section 220 to the extent that it precludes the payment of lower-than-journeyman State-determined wage rates to trainees enrolled under Federally-approved trainee programs. The PHA cited the case of *Monarch Electrical Contracting Corporation v. Roberts*, 510 N.E.2d 795, 517 NYS.2d 711, 70 NY2d 91 (NY Ct. of App. 1987), in which the Court of Appeals of New York held that section 220 recognized only two categories of workers—journeymen and State-registered apprentices—thus precluding payment of apprentice-level wage rates to trainees notwithstanding their participation in a U.S. DOL-registered trainee program. The court in that case indicated that the trainee program was functionally equivalent to an apprenticeship program but was designed in its entrance requirements to promote minority group participation, and invited the legislature to reexamine section 220, noting that its application "unexpectedly frustrates the very important policy of reducing discrimination in the workplace."

Apprentice and trainee wage rates and the allowable ratio of apprentices or

trainees to journeymen are not set out in Davis-Bacon wage determinations; they are set out in the apprenticeship program approved by the DOL Bureau of Apprenticeship and Training or a State Apprenticeship Agency recognized by the Bureau, or in the trainee program certified by the DOL Employment and Training Administration, although States may also legislate ratios. Apprentice and trainee wage rates are generally expressed as percentages of the DOL determined (journeymen) Davis-Bacon rate. The proposed rule did not address the issue of apprentice or trainee ratios because HUD did not intend to preempt State non-wage labor standards. In any event, HUD does not view as a significant difficulty the possibility that a State-legislated ratio might allow a lower proportion of apprentices or trainees than the relevant apprenticeship or trainee program. Accordingly, the final rule is unchanged in this regard.

With regard to the wage rates of apprentices and trainees, the final rule has been clarified in response to the above comments by referring explicitly to wage rates for apprentices and trainees under approved programs (in addition to the DOL-determined rates) on work that is subject to Davis-Bacon wage rates.

One PHA requested clarification as to whether other funds used in the development or operation of a public housing project, such as Community Development Block Grant, Emergency Shelter Grant or other HUD program funds, Farmers Home Administration funds, or State and local funds, would be subject to the preemption rule.

HUD does not intend that higher State wage rates be preempted unless the work in question is assisted in whole or in part with assistance for lower income public housing under the USHA. Thus, for example, modernization work funded in part with CIAP funds under section 14 of the USHA and in part with State funds would be subject to the preemption provisions of the rule; however, HUD does not intend that work on HUD-assisted public housing would be subject to preemption of State wage rates if the work in question is assisted entirely by, *e.g.*, State funds, Community Development Block Grant funds, or private donations. Accordingly, in those parts of the regulations that otherwise cover work that may receive no HUD assistance for public housing under the USHA (Parts 905 and 965), the final rule has been revised to exclude such non-USHA assisted work from the preemption provisions; no revision has been made in this regard to the final rule provisions in Parts 941 and 968, since those parts only cover work that is at least partially assisted with USHA assistance for public housing. HUD notes that section 12 of the USHA requires the payment of at least HUD-determined rates in the operation of the project and Davis-Bacon rates in the development of the project, without regard to the source of funds for the specific work involved.

The same PHA suggested that all HUD programs be subject to the preemption rule, and that the Community Development Block Grant and Emergency Shelter Grant programs were also intended to be administered in an efficient and economical answer to assure assistance to the greatest number of low income families. HUD has not adopted this suggestion because it is beyond the scope of this rulemaking, which is limited to work on public housing projects that are receiving assistance under the public housing programs of the USHA.

Two New York State PHAs commented that the rule should be expanded to preempt New York State Housing Law section 32, which requires the compensation fixed by the PHA for its officers, agents and employees to be approved by the local legislative body. The argument for such preemption was that some local governments may not be willing to approve salaries guaranteeing the best qualified workers.

HUD presumes that section 32 is intended to govern compensation for executive and administrative PHA personnel rather than laborers and mechanics who may be subject to the New York State prevailing wage law. The issue of compensation for executive and administrative personnel is outside the scope of this rule. HUD notes that such compensation has long been addressed by a provision in the Annual Contributions Contract between HUD and a PHA, which requires adoption of a statement of personnel policies, including salary and wage rates, that are comparable with pertinent local public practice.

One PHA commented that if the proposed rule is adopted, HUD must take into consideration local market conditions, trends, and adjustments in States with prevailing wage statutes in order to compete with trades that might be drawn away as a result of a higher wage scale in a specific trade. Another PHA, while supporting the rule, suggested the possibility of not receiving an adequate number of well qualified bidders on construction projects due to lower wage rates. HUD believes no modification to the proposed rule is warranted in this regard for two reasons. First, adoption of the rule leaves Federal wage rates, which are by definition a determination of the prevailing wage rates, applicable to PHA work. Second, this rule does not impose a cap on what PHAs or contractors may choose to pay their employees.

A housing and redevelopment association proposed several modifications to the rule. First, the association stated that various pressures could force PHAs to continue to pay (higher) State determined rates even with preemption in place, *e.g.*, because city and State funds will also be used on the project or because contracts and workers could be lost to competition with local government's housing construction or modernization. The association suggested that in these situations, PHAs should be provided a special waiver or an assurance that HUD will allow the costs of paying the State wages.

HUD believes no modification to this rule to include a special waiver is necessary. A State law that requires State-determined prevailing wage rates on public housing projects in general applies with no less force when solely Federal funds are used than when a mixture of Federal and State or city funds is used to carry out specific work on a HUD-assisted project, and the preemptive force of this rule is the same in both cases. However, neither the prevailing wage provisions of section 12 of the USHA nor this rule precludes a PHA (or its contractors) from paying rates higher than the Federally-determined prevailing wage for the locality.

For purposes of clarifying this point, HUD has decided to add provisions to the rule to state explicitly that the rule will not affect the applicability of wage rates established in collective bargaining agreements where the rates equal or exceed the Federal wage rate, nor does the rule impose a ceiling on wage rates the PHA or IHA or its contractors or subcontractors may choose to pay independent of State law. With regard to HUD allowance of the costs of paying the State wages, HUD budgetary review is not governed by this rule; PHA and IHA operating budgets are reviewed in accordance with outstanding instructions, and the provision added to this final rule does not imply automatic HUD allowance of all wage expenses.

Second, the association, noting that PHAs and IHAs would not be required to pay their own employees at the higher State rates, asserts that the rule could

create personnel problems for employers which would be "forced to reduce salaries of employees if in fact they begin to pay the lower [Federal] wage rate to others in the same classification." The association suggests grandfathering current employees into this rule change. HUD has not adopted this suggestion. While the rule would make higher State wage rates no longer mandatory or enforceable, nothing in the rule legally "forces" PHAs or IHAs to reduce wages to no more than the Federal prevailing wage level, nor does HUD have any general administrative policy that would force such a result.

Finally, the association commented that it strongly supported the statement in the preamble to the proposed rule that applicability of wage rates established in collective bargaining agreements with a PHA or its contractors will not be affected by the rule, regardless of whether those rates equal or exceed rates determined under State or Federal law; however, the association urged that this provision be spelled out in the rule itself and clarified to state that: (1) It pertains to any current or future agreements and (2) under such circumstances, HUD will recognize cost differences between State and Federal requirements as an eligible expenditure.

As discussed above, in response to this comment and another of the association's comments, HUD has decided to incorporate a provision into each of the sections of the rule to the effect that the rule shall not affect the applicability of wage rates established in collective bargaining agreements with a PHA or IHA or its contractors or subcontractors where such wage rates exceed the applicable Federal wage rate. HUD believes it is clear that these provisions pertain to current and future agreements. HUD has also added a clause indicating that the rule does not impose a ceiling on wages the PHA or IHA or its contractors or subcontractors may choose to pay independent of State law; this provision would apply in the absence of collectively bargained wage rates. As to recognition of eligible expenditures, that issue (which appears limited to wages paid by PHAs and IHAs to their own employees) is not the subject of the regulation sections added by this rule. In any event, the proper measure of costs for which the association requests recognition is not the difference between State and Federal rates, but the actual difference between the collectively bargained rates and the Federal rates. However, the Department is not willing to commit unconditionally to recognize such cost differences as an eligible expenditure in all cases.

A New York State PHA commented that the rule should be amended to apply a residential wage rate to all housing projects and that such rate should be issued by DOL. HUD cannot adopt either suggestion in this rule. First, the application of residential rates (as opposed to "building" rates) under the Davis-Bacon related acts, which is generally limited to work on residential structures of up to four stories, is a matter for determination by DOL and not HUD. Second, Section 12 of the USHA gives HUD, rather than DOL, the authority to determine prevailing wage rates for work involved in the operation of a public housing project (including routine and non-routine maintenance work), as opposed to development of the project which is subject to Davis-Bacon rates.

A Washington State PHA commented that PHAs need to be exempted from the State prevailing wage law, since without a complete exclusion the State rates must be requested and included in the bid documents, the contractor must accurately distinguish among the wage exhibits that which will apply, and the general contractor must submit for itself and its subcontractors "Intent to Pay Prevailing Wages" documents and "Affidavits of Wages Paid" at $12.50 each payable by the PHA. HUD has not adopted this suggestion because HUD does not view inclusion of State-determined prevailing rates that are equal to or lower than Federal wage rates as an obstacle to the purposes of the USHA; accordingly, HUD does not view State monitoring and enforcement of such State rates as in conflict with the USHA. However, HUD notes that the rule provides that State prevailing rates may not be enforced against contractors or subcontractors. To the extent that the State rates on a project exceed the corresponding Federal rates, HUD takes the position that it would be contrary to this provision in the rule for a State to require a contractor to submit a statement that it intends to pay the higher State rate.

Comparison of Certain State Wage Rates to Federally-Determined Wage Rates

The preamble to the proposed rule did not provide examples of the differences between Federally-determined prevailing wage rates and State-determined wage rates in the State of Washington. However, HUD has now had an opportunity to develop information regarding these differences in Washington State. For five common trade classifications in three principal counties, the following chart shows the differences between HUD-determined, Davis-Bacon, and State-determined wage rates which would be applied to residential (up to four story) construction, and indicates the percentage difference between Davis-Bacon and State rates (Column 4) and HUD-determined and State rates (Column 5):

Trade	HUD rates[1]	Davis-Bacon rates	State rates	Percentage by which State rates exceed Davis-Bacon rates	Percentage by which State basic hourly rates exceed HUD rates[2]
	(1)	(2)	(3)	(4)	(5)
King County:					
Bricklayers	$13.95	$12.48	$21.73	+74.1	+33.0
Carpenters	13.95	13.66	13.30	−2.6	−4.7
Electricians	13.95	11.505	15.08	+31.1	−5.0
Painters	11.20	11.02	14.66	+33.0	+30.9
Plumbers	13.95	12.70	14.12	+11.2	−23.9
Pierce County:					
Carpenters	12.38	16.45	12.56	−23.6	+1.5
Cement Masons	12.38	12.89	21.86	+69.6	+48.7
Electricians	12.38	13.38	21.64	+61.7	+51.1
Painters	11.085	11.87	12.50	+5.3	+12.8
Plumbers	12.38	11.24	14.12	+25.6	−14.2
Spokane County:					
Carpenters	12.16	13.29	11.36	−14.5	−6.6
Cement Masons	12.16	13.58	19.92	+46.7	+30.9

Trade	HUD rates[1]	Davis-Bacon rates	State rates	Percentage by which State rates exceed Davis-Bacon rates	Percentage by which State basic hourly rates exceed HUD rates[2]
	(1)	(2)	(3)	(4)	(5)
Electricians	12.16	10.61	21.93	+106.7	+48.0
Painters	9.91	9.57	9.55	−0.2	−3.6
Plumbers	12.16	12.20	11.72	−3.9	−23.7

[1] Wage rates assigned to classifications through conformance based on position descriptions.
[2] Some State-determined wage rates include fringe benefits as well as basic hourly rates. Since HUD rates do not include fringe benefits, this column compares the State rates in Column 3 less any fringe benefits determined as part of the State rate, to HUD rates. This methodology was also incorporated in the proposed rule for purposes of determining whether preemption of State-determined wage rates would occur on work that is subject to HUD-determined wage rates, and has been adopted in the final rule as well.

Data Sources: (As in effect May 2, 1988, except for HUD rates in Pierce County, which became effective July 1, 1988):
HUD Maintenance Wage Rate Schedules (Seattle, Pierce County, Spokane).
U.S. Department of Labor Wage Decisions WA 88-4 (King County), 88-WA-0024 (Pierce County), 87-WA-0156 (Spokane County).
State of Washington Prevailing Minimum Hourly Wage Rates.

HUD has also updated its information regarding the extent to which rates determined by the State of California exceed Federally-determined wage rates in certain counties. The updated information, showing wage rates in effect as of March 1, 1988, covers a number of common trade classifications for PHA projects in three California urban counties—Sacramento, San Diego and San Francisco Counties:

Trade	HUD rates[3]	Davis-Bacon rates	State rates	Percentage by which State rates exceed Davis-Bacon rates	Percentage by which State basic hourly rates exceed HUD rates[4, 6]
	(1)	(2)	(3)	(4)	(5)
Sacramento County:					
Bricklayer	$12.52	$31.05	$23.96	−22.8	+56.9
Carpenter	12.52	25.995	26.47	+1.8	+52.4
Cement Mason	12.52	25.12	25.09	−0.1	+51.0
Drywall Hanger	12.52	26.485	27.47	+3.6	+56.4
Electrician	12.52	22.75	20.55	−9.7	+37.8
Laborer (Gen.)	7.40	22.32	22.12	−0.9	+119.0
Painter	12.52	22.04	23.14	+5.0	+41.1
Plasterer	12.52	25.56	25.55	0	+37.8
Plumber	12.52	29.37	28.84	−26.8	+32.6
PEO (Group 1)	NA	33.87	33.87	0	NA
San Diego County:					
Bricklayer	NA	23.45	23.95	+2.1	NA
Carpenter	10.85	19.54	25.60	+31.0	+83.4
Cement Mason	NA	24.23	24.23	0	NA
Drywall Hanger	10.85	20.28	23.65	+16.6	+79.2
Electrician	10.85	15.48	23.53	+52.0	+79.3
Laborer (Gen.)	9.52	22.24	22.59	+1.6	+61.6
Painter	9.52	23.04	25.13	+9.1	+106.6
Plasterer	10.85	19.96	23.21	+16.3	+59.2
Plumber	10.85	30.90	30.30	−1.9	+125.0
PEO (Group 1)	NA	26.80	26.79	0	NA
San Francisco County:					
Carpenter	19.95	27.48	29.10	+5.9	+8.8
Cement Mason	19.95	25.12	25.09	−0.1	−5.2
Drywall Hanger	19.95	28.615	29.60	+3.3	+8.8
Electrician	21.54	35.57	36.67	+3	+22.6
Laborer (Gen.)	14.33	23.32	23.12	−0.9	+20.1
Painter	18.55	25.46	28.51	+10.7	+24.1
Plasterer	18.55	30.96	31.48	+1.7	+22.2
Plumber	21.75	43.51	42.40	−2.6	+23.4
PEO (Group 1)	NA	33.87	33.87	0	NA

[3] Wage rates assigned to construction classifications through conformance based on position descriptions.
[4] See footnote 2.
[5] Wage rates assigned to Bricklayer, Cement Mason, Drywall Hanger and Plasterer based on conformance.
[6] See footnote 2.

Data Sources: (as in effect on March 1, 1988):
HUD Maintenance Wage Rate Schedules (Sacramento, and San Francisco and San Diego Counties).
U.S. Department of Labor General Wage Determinations CA88-1/2 (San Diego County) and CA88-4/2 (Sacramento and Francisco Counties).
State of California General Prevailing Wage Determination (Statewide).

These data are presented as a further indication that in some cases, State-determined wage rates substantially exceed the Federally-determined prevailing wage rates that would be applicable work to PHA projects.

Cross References

As a technical matter and for ease of reference, the Department has

determined to cross-reference the new paragraph § 941.503(d) and § 968.19, respectively, by adding an additional sentence at the end of existing paragraph (d) (Prevailing wages) of § 941.208 and a new paragraph (4) to paragraph (h) (Wage rates) of § 968.9.

Other Matters

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule could affect the wage rates payable by small business construction firms, or the competitive position of such firms that choose to continue to pay higher wage rates that would no longer be required; it is also expected to result in a net increase in the number of small businesses bidding for work on PHA projects and therefore is expected to be beneficial to small businesses. However, it would only affect firms bidding on certain PHA and IHA projects in the small number of States with applicable rates exceeding the corresponding Federal rates, and contracts for work on such PHA and IHA projects would generally comprise only a part of the firms' total business.

A Finding of No Significant Impact with respect to the environment has been made in accordance with Part 50 of this title, which implements section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule was listed as Sequence Number 1037 in the Department's Semiannual Agenda of Regulations published on April 25, 1988 (53 FR 13854), under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Parts 905, 941, 965, and 968

Energy conservation, Grant programs: Housing and community development, Grant programs: Indians, Home ownership, Indians, Loan programs: Housing and community development, Loan programs: Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements, Utilities.

Accordingly, 24 CFR Parts 905, 941, 965 and 968 are amended as follows:

PART 905—INDIAN HOUSING

1. The citation of authority for Part 905 continues to read as follows:

Authority: Secs. 3, 4, 5, 6, 9, 11, 12, and 16, U.S. Housing Act of 1937 (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437g, 1437i, 1437j, 1437n); sec. 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. A new paragraph (d) is added to § 905.211, as follows:

§ 905.211 Contracts in connection with development.

* * * * *

(d)(1) A prevailing wage rate determined under State or tribal law shall be inapplicable to the development of a Project whenever:

(i) The development of the Project: (A) Is otherwise subject to State or tribal law requiring the payment of wage rates determined by a State, local, or tribal government or agency to be prevailing and (B) is assisted with funds for lower income public housing under the Act; and

(ii) The wage rate (including fringe benefits, if any, and basic hourly rate) determined under State or tribal law to be prevailing with respect to an employee in any trade employed in the development of a Project exceeds: (A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade, (B) an applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency or (C) an applicable trainee wage rate based thereon specified in a DOL-certified trainee program.

(2) Whenever paragraph (d)(1)(i) is applicable:

(i) Any solicitation of bids or proposals issued by the IHA and any contract executed by the IHA for development of the Project shall include a statement that any prevailing wage rate determined under State or tribal law to be prevailing with respect to an employee in any trade employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever such prevailing wage rate exceeds:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade,

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency or

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(ii) The IHA itself shall not be required to pay any prevailing wage rate determined under State or tribal law and described in paragraph (d)(1)(ii) to any of its own employees who may be engaged in the development of the Project; and

(iii) No prevailing wage rate determined under State or tribal law and described in paragraph (d)(1)(ii) shall be enforced against the IHA or any of its contractors or subcontractors with respect to employees engaged in the development of the Project.

(3) Nothing in this paragraph (d) shall affect the applicability of any wage rate established in a collective bargaining agreement with an IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable prevailing wage rate determined by the Secretary of Labor or an applicable apprentice or trainee wage rate based thereon, nor does this paragraph (d) impose a ceiling on wage rates an IHA or its contractors or subcontractors may choose to pay independent of State law.

(4) The provisions of this paragraph (d) shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of an IHA on or after October 6, 1988.

3. A new § 905.314 is added, as follows:

§ 905.314 Preemption of State or tribal prevailing wage requirements.

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law shall be inapplicable to a contract or IHA-performed work item for the maintenance or improvement of a Project whenever:

(1) The contract or work item: (i) Is otherwise subject to State or tribal law requiring the payment of wage rates determined by a State, local, or tribal government or agency to be prevailing and (ii) is assisted with funds for lower income public housing under the Act; and

(2) The wage rate determined under State or tribal law to be prevailing with respect to an employee in any trade or position employed in the maintenance or improvement of a Project exceeds whichever of the following Federal wage rates is applicable:

(i) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276 *et seq.*) to be prevailing in the locality with respect to such trade;

(ii) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(iii) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(iv) The wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(v) For the purpose of ascertaining whether a wage rate determined under State or tribal law for a trade or position exceeds the Federal wage rate: (A) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and (B) where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(b) Whenever paragraph (a)(1) is applicable:

(1) Any solicitation of bids or proposals issued by the IHA and any contract executed by the IHA for maintenance or improvement of the Project shall include a statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law to be prevailing with respect to any employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever either of the following occurs:

(i) Such nonfederal prevailing wage rate exceeds:

(A) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq*) to be prevailing in the locality with respect to such trade;

(B) an applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or

(C) an applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(ii) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(2) The IHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) to any of its own employees who may be engaged in the work item for maintenance or improvement of the Project; and

(3) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) shall be enforced against the IHA or any of its contractors or subcontractors with respect to employees engaged in the contract or IHA-performed work item for maintenance or improvement of the Project.

(c) Nothing in this section shall affect the applicability of any wage rate established in a collective bargaining agreement with an IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (a)(2), nor does this section impose a ceiling on wage rates an IHA or its contractors or subcontractors may choose to pay independent of State law.

(d) The provisions of this section shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of an IHA on or after October 6, 1988.

PART 941—PUBLIC HOUSING DEVELOPMENT

4. The citation of authority for Part 941 continues to read as follows:

Authority: Secs. 4, 5, and 9 of the U.S. Housing Act of 1937 (42 U.S.C. 1437b, 1437c, and 1437g); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

5. In § 941.208, paragraph (d) is revised to read as follows:

§ 941.208 Other Federal requirements.

* * * * *

(d) *Prevailing wages.* Participation in this program requires that not less than the wages prevailing in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276) shall be paid to all laborers and mechanics employed in the development of a project. All architects, technical engineers, draftsmen and technicians shall be paid not less than the wages prevailing in the locality as determined or adopted by HUD (42 U.S.C. 1437j). Prevailing wages determined under State law are inapplicable under the circumstances set out in § 941.503(d).

6. A new paragraph (d) is added to § 941.503, as follows:

§ 941.503 Construction requirements.

* * * * *

(d)(1) A prevailing wage rate determined under State law shall be inapplicable to the development of a project whenever:

(i) The development of the project is otherwise subject to State law requiring the payment of wage rates determined by a State or local government or agency to be prevailing; and

(ii) The wage rate (including fringe benefits, if any, and basic hourly rate) determined under State law to be prevailing with respect to an employee in any trade employed in the development of a project exceeds:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade,

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with

the Department of Labor or a DOL-recognized State Apprenticeship Agency or

(C) An applicable trainee wage rate based thereon specified in an DOL-certified trainee program.

(2) Whenever paragraph (d)(1)(i) is applicable:

(i) Any solicitation of bids or proposals issued by the PHA and any contract executed by the PHA for development of the project shall include a statement that any prevailing wage rate determined under State law to be prevailing with respect to an employee in any trade employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever such prevailing wage rate exceeds:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade,

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency or

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(ii) The PHA itself shall not be required to pay any prevailing wage rate determined under State law and described in paragraph (d)(1)(ii) to any of its own employees who may be engaged in the development of the project; and

(iii) No prevailing wage rate determined under State law and described in paragraph (d)(1)(ii) shall be enforced against the PHA or any of its contractors or subcontractors with respect to employees engaged in the development of the project.

(3) Nothing in this paragraph (d) shall affect the applicability of any wage rate established in a collective bargaining agreement with a PHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable prevailing wage rate determined by the Secretary of Labor or an applicable apprentice or trainee wage rate based thereon, nor does this paragraph (d) impose a ceiling on wage rates a PHA or its contractors or subcontractors may choose to pay independent of State law.

(4) The provisions of this paragraph (d) shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of a PHA on or after October 6, 1988.

PART 965—PHA-OWNED OR LEASED PROJECTS—MAINTENANCE AND OPERATION

7. The citation of authority for Part 965 continues to read as follows:

Authority: Secs. 2, 3, 6, and 9, U.S. Housing Act of 1937 (42 U.S.C. 1437, 1437a, 1437d and 1437g); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846).

8. A new Subpart A, consisting of § 965.101 is added as follows:

Subpart A—Preemption of State Prevailing Wage Requirements With Respect to Maintenance and Operation of Projects

§ 965.101 Preemption of State prevailing wage requirements with respect to maintenance and operation of projects.

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State law shall be inapplicable to a contract or PHA-performed work item for the maintenance and operation (including modernization) of a project whenever:

(1) The contract or work item: (i) Is otherwise subject to State law requiring the payment of wage rates determined by a State or local government or agency to be prevailing and (ii) is assisted with funds for lower income public housing under the U.S. Housing Act of 1937, as amended; and

(2) The wage rate determined under State law to be prevailing with respect to an employee in any trade or position employed in the maintenance and operation of a project exceeds whichever of the following Federal wage rates is applicable:

(i) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade;

(ii) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(iii) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(iv) The wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(v) For the purpose of ascertaining whether a wage rate determined under State law for a trade or position exceeds the Federal wage rate: (A) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and (B) where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(b) Whenever paragraph (a)(1) is applicable:

(1) Any solicitation of bids or proposals issued by the PHA and any contract executed by the PHA for maintenance and operation of the project shall include a statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever either of the following occurs:

(i) Such nonfederal prevailing wage rate exceeds: (A) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade; (B) an applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency or (C) an applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(ii) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(2) The PHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State law and described in paragraph (a)(2) to any of its own employees who

may be engaged in the work item for maintenance and operation of the project; and

(3) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State law and described in paragraph (a)(2) shall be enforced against the PHA or any of its contractors or subcontractors with respect to employees engaged in the contract or PHA-performed work item for maintenance and operation of the project.

(c) Nothing in this section shall affect the applicability of any wage rate established in a collective bargaining agreement with a PHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (a)(2), nor does this section impose a ceiling on wage rates a PHA or its contractors or subcontractors may choose to pay independent of State law.

(d) The provisions of this section shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of a PHA on or after October 6, 1988.

PART 968—COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

9. The citation of authority for Part 968 continues to read as follows:

Authority: Secs. 6 and 14 of the U.S. Housing Act of 1937 (42 U.S.C. 1437d and 1437*l*), sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

10. A new paragraph (h)(4) is added to § 968.9, as follows:

§ 968.9 Other program requirements.

* * * * *

(h) * * *

(4) Prevailing wage rates determined under State or tribal law are inapplicable under the circumstances set out in § 968.19.

* * * * *

11. A new § 968.19 is added, as follows:

§ 968.19 Preemption of State or tribal prevailing wage requirements.

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law shall be inapplicable to the modernization of a project whenever:

(1) The modernization of the project is otherwise subject to State or tribal law requiring the payment of wage rates determined by a State, local, or tribal government or agency to be prevailing; and

(2) The wage rate determined under State or tribal law to be prevailing with respect to an employee in any trade or position employed in the modernization of a project exceeds whichever of the following Federal wage rates is applicable:

(i) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade;

(ii) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(iii) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(iv) In the case of non-routine maintenance, the wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(v) For the purpose of ascertaining whether a wage rate determined under State or tribal law for a trade or position exceeds the Federal wage rate: (A) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and (B) where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(b) Whenever paragraph (a)(1) is applicable:

(1) Any solicitation of bids or proposals issued by the PHA or IHA and any contract executed by the PHA or IHA for modernization of the project shall include a statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or tribal law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever either of the following occurs:

(i) Such nonfederal prevailing wage rate exceeds (A) the applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade; (B) an applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or (C) an applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(ii) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(2) The PHA or IHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) to any of its own employees who may be engaged in the modernization of the project; and

(3) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or tribal law and described in paragraph (a)(2) shall be enforced against the PHA or IHA or any of its contractors or subcontractors with respect to employees engaged in the modernization of the project.

(c) Nothing in this section shall affect the applicability of any wage rate established in a collective bargaining agreement with a PHA or IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (a)(2), nor does this section impose a ceiling on wage rates a PHA or IHA or its contractors or subcontractors may choose to pay independent of State law.

(d) The provisions of this section shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of a PHA or IHA on or after October 6, 1988.

Dated: August 2, 1988.

James E. Baugh,

General Deputy Assistant Secretary for Public and Indian Housing.

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