

information collection complies with the provisions of the law which require lenders to report to the Administrator on loans guaranteed or insured.

5. On occasion.
6. Individuals or households.
7. 193,000 responses.
8. 96,500 hours.
9. Not applicable.

[FR Doc. 89-12 Filed 1-3-89; 8:45 am]

BILLING CODE 8320-01-M

Veterans' Advisory Committee on Rehabilitation; Meeting

The Veterans Administration gives notice that a meeting of the Veterans'

Advisory Committee on Rehabilitation, authorized by 38 U.S.C. 1521, will be held in Room 1010, Veterans Administration Central Office, 810 Vermont Avenue, NW., Washington, DC 20420, January 31 and February 1, 1989. The sessions will begin at 9 a.m. The Committee will be discussing issues related to the administration of veterans' rehabilitation programs.

The meeting will be open to the public up to the seating capacity of the conference room. Because of the limited seating capacity, it will be necessary for those wishing to attend to contact Dr. Carole J. Westerman, Executive Secretary, Veterans' Advisory

Committee on Rehabilitation (phone 202-233-2888) prior to January 24, 1989.

Interested persons may attend, appear before, or file statements with the Committee. Statements, if in written form, may be filed before or within 10 days after the meeting. Oral statements will be heard at 9:30 a.m. on February 1, 1989.

Dated: December 23, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 89-13 Filed 1-3-89; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 54, No. 2

Wednesday, January 4, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Monday, January 9, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street

entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE

INFORMATION: Mr. Joseph R. Coyne,

Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: December 30, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-30263 Filed 12-30-88; 11:31 pm]

BILLING CODE 6210-01-M

Corrections

Federal Register

Vol. 54, No. 2

Wednesday, January 4, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 998

Marketing Agreement Regulating the Quality of Domestically Produced Peanuts and Implementing Regulations

Correction

In rule document 88-11917 beginning on page 20290 in the issue of Friday, June 3, 1988, make the following correction:

On page 20294, in the second column, immediately preceding the last paragraph, insert:

§ 998.36 Indemnification.

BILLING CODE 1505-01-D

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China

Correction

In notice document 88-28759 beginning on page 50276 in the issue of Wednesday, December 14, 1988, make the following corrections:

1. On page 50277, in the fifth column, in the fourth footnote, in the second line, "6103.43.30.30" should read "6103.42.20.20"; and in the fifth line "6211.43.00.10" should read "6211.42.00.10".

2. On page 50278, in the first column, in the 25th footnote, in the first line,

"all" should read "only"; and "except" should be removed.

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP89-410-000, et al.]

Texas Gas Transmission Corp., et al.; Natural Gas Certificate Filings

Correction

In notice document 88-29842 beginning on page 52475 in the issue of Wednesday, December 28, 1988, make the following correction:

On page 52475, in the third column, under "3. Texas Gas Transmission Corporation", the docket number "DP90-411-000" should read "CP89-411-000".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP82-114-013]

Williams Natural Gas Co.; Proposed Changes in FERC Gas Tariff

Correction

In notice document 88-29044 beginning on page 50998 in the issue of Monday, December 19, 1988, make the following correction:

On page 50998, in the third column, in the headings, the docket number was printed incorrectly and should appear as above.

BILLING CODE 1505-01-D

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 336

Employee Responsibilities and Conduct

Correction

In rule document 88-27423 beginning on page 47929 in the issue of Tuesday, November 29, 1988, make the following corrections:

§ 336.12 [Corrected]

1. On page 47933, in the third column, in § 336.12(c)(2), in the first line, "an" should read "any".

§ 336.16 [Corrected]

2. On page 47935, in the second column, in § 336.16(c), in the third line from the bottom of the paragraph, "any" should read "may".

§ 336.17 [Corrected]

3. On page 47936, in § 336.17(b)(1)(i), in the second column, in the second line, "material" should read "martial".

§ 336.24 [Corrected]

On page 47938, in the first column, in the heading for § 336.24, "back" should read "bank".

BILLING CODE 1505-01-D

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Reg. Z; TII-1]

Truth in Lending; Proposed Update to Official Staff Commentary

Correction

In proposed rule document 88-27858 beginning on page 48925 in the issue of Monday, December 5, 1988, make the following corrections:

Commentary to Subpart A [Corrected]

1. On page 48927, in the third column, in the paragraph designated 3., in the second line, "changes" should read "charges".

2. On page 48928, in the first column, in the first complete paragraph, in the 12th line, "sole" should read "sold".

3. On the same page, in the second column, in the first complete paragraph, in the 10th line, "single" was misspelled.

4. On the same page, in the third column, in the third complete paragraph, in the fifth line, "balloon" was misspelled.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 182 and 184

[Docket Nos. 79N-0141 and 79N-0142]

GRAS Status of Corn Sugar, Corn Syrup, Invert Sugar, and Sucrose

Correction

In rule document 88-25583 beginning on page 44862 in the issue of Monday, November 7, 1988, make the following corrections:

1. On page 44863, in the first column, in the first complete paragraph, in the sixth line, "prescribed" should read "practiced".

2. On page 44866, in the second column, in the second complete paragraph, in the next to the last line, "stale" should read "stable".

3. On page 44867, in the second column, in the second complete paragraph, in the eighth line, "emergency" should read "emergence".

4. On page 44873, in the 1st column, in the 3rd complete paragraph, in the 14th line, "affects" should read "efforts".

5. On the same page, in the third column, in the second complete paragraph, in the fourth line from the bottom, "168.20 and 168.21" should read "168.120 and 168.121".

§ 184.1854 [Corrected]

6. On page 44876, in the first column, in § 184.1854(b), in the last line, "parity" should read "purity".

§ 184.1859 [Corrected]

7. On the same page, in the second column, in § 184.1859(a), in the fifth line, insert "than" after "more".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 182 and 184

[Docket No. 85N-0548]

Proposed Affirmation of GRAS Status of High Fructose Corn Syrup

Correction

In proposed rule document 88-25584 beginning on page 44904 in the issue of

Monday, November 7, 1988, make the following corrections:

1. On page 44904, in the first column, under **ADDRESS**, in the last line, the zip code should read "20857".

2. On the same page, in the 2nd column, in the 2nd complete paragraph, in the 9th line, "syrup" should read "starch". In the 10th line, "hydrolysate" was misspelled, and in the 14th line, "§ 184.1374" should read "§ 184.1372".

3. On page 44906, in the 1st column, in the 3rd complete paragraph, in the 10th line, "complete" should read "comparable".

4. On the same page, in the same column, in the last complete paragraph, in the next to last line, after "sucrose," insert "corn sugar,".

BILLING CODE 1505-01-D

Registered Project Federal

Wednesday
January 4, 1989

Part II

Department of Housing and Urban Development

Office of the Assistant Secretary for
Housing—Federal Housing Commissioner

24 CFR Parts 247, 882, and 888
Section 8 Certificate Program—Project-
Based Assistance; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 247, 882, and 888

[Docket No. R-88-1394; FR-2502]

Section 8 Certificate Program—Project-Based Assistance

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule establishes the regulations under which a Public Housing Agency (PHA) may provide Section 8 project-based assistance from assistance provided to the PHA for the Section 8 Certificate Program. The rule implements a recent statutory amendment directing the Department to permit a PHA to "attach to structures" up to 15 percent of the Section 8 existing housing assistance provided by the PHA. The rule requires that the term of the PHA Contract for the structure not extend beyond the term of the HUD funding commitment, and that the owner must agree to do rehabilitation involving a minimum of \$1,000 for each project-based unit.

DATES: Effective date: January 4, 1989. The comment due date for this rule will be set in a related interim rule amending 24 CFR Part 882 that will be published by February 6, 1989. See the "Background" under **SUPPLEMENTARY INFORMATION** for more details concerning the related interim rule.

ADDRESSES: Comments on rule: Interested persons are invited to submit comments regarding this rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Lawrence Goldberger, Director, Office of Elderly and Assisted Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-8000, telephone (202) 755-5720. Hearing- or speech-impaired individuals may call HUD's TDD number (202) 426-0015. (These telephone numbers are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 and have been assigned OMB control number 2502-0388. Public reporting burden for each collection of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the preamble heading, *Other Matters*. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

A. The Statute. This rule implements that portion of section 8(d)(2) of the United States Housing Act of 1937 (the 1937 Act) that concerns the attachment of Section 8 assistance to existing structures that have been rehabilitated. Section 208 of the Housing and Urban-Rural Recovery Act of 1983 (HURRA) (Pub. L. 98-181, approved November 30, 1983) amended section 8(d)(2) to permit the attachment of assistance to an existing structure only if (1) the owner agrees to rehabilitate the structure other than with assistance under the 1937 Act, and (2) HUD and the PHA approve the attachment. Section 102(a)(6) of the Housing and Community Development Technical Amendments of 1984 (the Technical Amendments Act) (Pub. L. 98-479, approved October 17, 1984) further amended section 8(d)(2) to clarify that the 1983 amendment's "conditions for tying the assistance to a particular structure or project do not apply to the circumstances under which HUD provides Section 8 existing assistance in connection with loan management property disposition, or conversion from other assistance programs to project-based subsidies administered by HUD nor do they apply to the Section 8(e) moderate rehabilitation program." (H.R. Conf. Rep. No. 1103, 98th Cong., 2d Sess. 22-23 (1984)). The activities enumerated in the Conference Report describe situations where the Department was

attaching Section 8 existing housing assistance to structures before the HURRA limitations were imposed. To date, the Department has not authorized the attachment of Section 8 existing housing assistance for other purposes, and thus the limitation on attachment of Section 8 assistance added by HURRA has not been triggered.

Section 146 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988 (HCD Act of 1987)) further amended section 8(d)(2) to require the Secretary to permit a PHA to approve attachment of no more than 15 percent of the assistance provided by the PHA, subject to meeting the statutory rehabilitation requirements.

Section 8(d)(2) was further amended by section 1005 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100-628, approved November 7, 1988) (1988 McKinney Act)). Section 1005(a) directs the Department to issue regulations that take effect not later than 30 days after date of enactment of the 1988 McKinney Act to implement the amendment made by section 146 of the HCD Act of 1987 (redesignated as section 8(d)(2)(A) of the 1937 Act). The Department was unable to meet the December 7th statutory publication deadline, as a result of issues arising out of the collections of information in this rule. In accordance with section 1005(a), however, the Department, pending effectiveness of this rule, has been ready to consider applications received from PHAs to attach Certificate Program assistance to structures, and to approve applications that met the statutory requirements.

Section 1005(b)(1) of the 1988 McKinney Act adds a new subparagraph (B) to section 8(d)(2) of the 1937 Act to permit attachment of assistance to a newly constructed structure (Section 1005(b)). This amendment is not implemented by this rule. The Department intends to implement this provision in a regulation to take effect within 90 days after enactment of the 1988 McKinney amendments, in accordance with section 1005(b)(2).

Section 8(d)(2)(A), as amended by the sections referred to above, reads as follows:

(2)(A) Each contract for an existing structure entered into under this section shall be for a term of not less than one month nor more than one hundred and eighty months. Where the Secretary enters into an annual contributions contract with a public housing agency pursuant to which the agency will enter into a contract for assistance payments with respect to an existing structure, the

contract for assistance payments may not be attached to the structure unless (i) the Secretary and the public housing agency approve such action, and (ii) the owner agrees to rehabilitate the structure other than with assistance under this Act and otherwise complies with the requirements of this section, except that the Secretary shall permit the public housing agency to approve such attachment with respect to not more than 15 percent of the assistance provided by the public housing agency if the requirements of clause (ii) are met. (The pertinent text is in italic.)

The 1987 Act amendment is derived from section 149(b) of H.R. 4, 100th Cong., 1st Sess. (1987), which differed from the enacted provision only in the applicable percentage (25 percent rather than 15 percent). The accompanying Report of the Committee on Banking, Finance, and Urban Affairs (H. Rep. No. 122, 100th Cong., 1st Sess. 33 (1987)) describes the purpose of the amendment as follows:

Sec. 149(b) of the bill enables the Secretary to permit public housing agencies to attach up to 25 percent of the Sec. 8 assistance they provide to specific properties, provided that the owners rehabilitate the properties. The Committee has added this authority for the express purpose of facilitating the use of Sec. 8 Certificates in connection with projects which, when matched with the value of Sec. 8 Existing Certificates, would be able to provide decent, affordable housing to very low income people. The Committee is especially interested in seeing this authority used to provide Sec. 8 Certificates for properties which are rehabilitated or constructed using the low-income housing tax credit, and in properties developed as limited-equity, low income cooperatives. In both cases, owners can more easily develop economically feasible projects for very low income occupancy if they can be assured of the availability of Sec. 8 rental assistance for the very low income tenants. The Committee expects HUD to implement this provision as quickly as possible, and to encourage its use by PHAs for these purposes.

B. Justification for Interim Rule. It is Department policy to implement substantive rules by providing notice of proposed rulemaking giving at least 60 days for submission of public comments, unless the Department determines that such notice and public procedure are impracticable, unnecessary, or contrary to the public interest (see 24 CFR 10.1). In addition, section 7(o)(3) of the Department of Housing and Urban Development Act provides that no rule may become effective until after the first period of 30 calendar days of continuous session of Congress following its publication. Under section 7(o)(3), this rule could not take effect until mid-March 1989. The Department cannot comply with section 7(o)(3) and also meet the mandate in section 1005(a) of

the McKinney Act to issue regulations that take effect not later than 30 days after the effective date of the Act, i.e., take effect not later than December 7, 1988. The Department is publishing this rule for immediate effect because it interprets the specific mandate in section 1005(a) as implicitly overriding the more general requirements of section 7(o)(3) and the Department's general rulemaking policies.

These regulations, however, are being published as an interim rule in order to permit public comment. The comment due date has been left open, because, as noted above, the Department must publish another rule for effect by February 6, 1989 to implement the new construction component of project-based assistance. That interim rule will announce the comment due date for both interim rules. The Department will then publish a final rule that takes into consideration the public comment received on both interim rules.

C. This Rule. This rule adds a new Subpart G to 24 CFR Part 882 to implement the authority to attach project-based assistance to units. The requirements for project-based assistance have been placed in Subpart G of Part 882 because project-based assistance involves the use of funds derived from the Section 8 Certificate Program, the pertinent rules for which are in Subparts A, B, and F of Part 882. In order to avoid unnecessarily repeating provisions common to both the "finders-keepers" Certificate Program and for project-based assistance, wherever practicable, this Subpart G incorporates by cross-references pertinent provisions in Subparts A and B. Certain provisions in the Section 8 Moderate Rehabilitation Program rules (Subparts D and E of Part 882) are also incorporated by cross-reference.

In general, the modifications of Part 882, Subparts A and B requirements for project-based assistance fall within the following areas: policies needed to determine the 15-percent limit under which the PHA must be permitted to attach assistance to units; policies implementing the statutory rehabilitation requirement; and inapplicability of those Section 8 Certificate Program policies that are unique to a "finders-keepers" program and, therefore, not pertinent to project-based assistance. There follows a section-by-section description of this interim rule.

Section 882.701 Purpose and Applicability

Under the "finders-keepers" policy, a holder of a Certificate of Family

Participation is responsible for finding suitable housing and the PHA may not reduce the family's opportunity to choose among available units. In addition, a family assisted under the Section 8 Certificate Program who chooses to move is entitled (subject to certain conditions) to another Certificate. Because under these policies the Section 8 assistance essentially moves with the assisted family, the Certificate Program (as well as the Section 8 Housing Voucher Program) is characterized as providing "tenant-based" assistance. In the Certificate Program, the PHA enters into a HAP Contract and makes assistance payments on behalf of the family after the family locates a suitable unit and an owner willing to execute a HAP Contract with the PHA and a lease with the tenant. By contrast, under project-based assistance, the "finders-keepers" policy does not apply. Certificates are not used. With project-based assistance, the PHA enters a HAP Contract with the owner to make housing assistance payments for a specified term provided the unit is occupied by an eligible family (the unit may be vacant for a limited time). To fill vacant, project-based units, the PHA refers families from its waiting list to the project owner. Because the assistance is tied to the unit, a family that moves from the unit does not have any right to continued assistance. To implement these policies § 882.701(c) expressly makes § 882.103, "Finders-Keepers" policy; § 882.208, Activities to encourage participation by Owners and others; and § 882.209(m), Continued participation when Participant Family moves, inapplicable to project-based assistance provided under this Subpart G.

Section 882.703 Additional Definitions

Subpart G cross-references the definitions in Subpart A of Part 882. It also cross-references the definition of "Agreement to Enter into Housing Assistance Payments Contract", as used in the Moderate Rehabilitation Program. The Agreement is necessary to ensure that the rehabilitation work is performed.

Two new terms are defined: "15-Percent Limit" and "Funding Source."

The former term is defined to mean: Fifteen percent of the total of the number of units for which funding is reserved by HUD for the PHA's Section 8 Certificate Program. This definition uses the number of units reserved for the PHA's Certificate Program in the calculation of the 15-Percent Limit.

Under the ACC, HUD agrees to pay annual contributions for funding

increments (or "projects"), representing successive funding commitments by HUD for the PHA's program. Under the form of ACC used in a PHA's Certificate Program, the ACC terminates on the same day for all funding increments appropriated by Congress before Federal fiscal year 1988. However, for funding increments appropriated in Federal fiscal year 1988 and subsequent Federal fiscal years, there is a separate ACC termination date for each funding increment. The establishment of a separate ACC term for each post-Federal fiscal year 1987 funding increment implements section 8(b)(1) of the 1937 Act, as amended by section 141 of the HCD Act of 1987. A PHA must identify the ACC expiration date for the funding that is the source of the project-based assistance, and must ensure that the HAP Contracts do not extend beyond the applicable ACC expiration date. Because pre-Federal fiscal year 1988 funding increments for the PHA all have the same ACC expiration date, they are treated as one funding source. Accordingly, the definition of "Funding Source" specifies that funding authority provided before Federal fiscal year 1988 constitutes a single funding source.

Section 882.705 Information To Be Submitted to HUD by the PHA

Section 882.705(a) sets out the basic requirements which must be met by a PHA for HUD to approve a PHA's application to attach assistance to units. The requirements are: the number of project-based units in the PHA Certificate Program does not exceed the 15-Percent Limit; the unit sizes for units to which assistance will be attached are consistent with the unit size distribution for the Funding Source; and the rehabilitation period and HAP Contract term are within the ACC term for the Funding Source.

Section 882.705(b) identifies the information that must be submitted for any PHA request to attach assistance to units. It is limited to the minimum information needed by HUD to ensure that the statutory requirements will be met, in order to permit attachment of assistance to units when the 15-percent limit is not exceeded.

Section 882.707 HUD Review of PHA Plans To Attach Assistance to Units

HUD reviews the information submitted by the PHA under § 882.705(b) and approves the application to attach assistance if the requirements of § 882.705(a) are met. If the requirements have not been met HUD notifies the PHA of the reasons for disapproval.

Section 882.709 Annual Contributions Contract; Schedule of Leasing

This section incorporates by cross-reference § 882.206, but also makes it clear that the schedule of leasing may take into account the time needed to complete the rehabilitation.

Section 882.711 Housing Quality Standards

This section incorporates by cross-reference the housing quality standards in § 882.109. Because rehabilitation is site-specific, this section also incorporates by cross-reference § 882.404(b), the site and neighborhood performance requirements for the Moderate Rehabilitation Program.

Section 882.713 Eligible and Ineligible Properties; Rehabilitation Requirement

This section substitutes for § 882.110, *Types of housing*. A major difference between this section and § 882.110 is that this section implements the rehabilitation requirement in section 8(d)(2) of the 1937 Act. Section 882.713(a) provides that in order for a property to be eligible housing, it must require a minimum expenditure of \$1000 per assisted unit, including work on common areas. The rehabilitation must involve:

- (1) Upgrading the property to decent, safe, and sanitary condition to comply with the Housing Quality Standards or other standards approved by HUD, from a condition below those standards;
- (2) Repairing or replacing major building systems or components in danger of failure;
- (3) Making essential improvements to the property to permit use of the property by handicapped persons; or
- (4) Converting or merging units to provide housing for large Families.

Paragraph (b) of § 882.713 identifies specific ineligible housing types that are comparable to the ineligible housing types listed in § 882.401(c) (2)(ii) and (3) for the Moderate Rehabilitation Program. Assistance, however, may be attached to units in subsidized housing projects. Paragraphs (f) and (g) of this section, therefore, contain provisions similar to § 882.111 (e) and (f) to avoid payment of a double subsidy.

Paragraphs (c) and (d), respectively, contain restrictions on when project-based assistance may be attached to a highrise project for families with children and to single room occupancy housing. Again, these requirements are modeled after comparable Moderate Rehabilitation provisions (see § 882.401(c) (5) and (6)).

Section 882.715 Relocation

The relocation requirements are generally modeled on the relocation requirements for the Moderate Rehabilitation Program (§ 882.406), but with a significant difference. Under the Moderate Rehabilitation Program, there may be permanent displacement (and § 882.406 sets out terms under which permanent displacement may occur, including the assistance that must be provided to displacees.) Under this Subpart G, however, permanent displacement is prohibited. The Department believes that a project that cannot be rehabilitated without permanently displacing tenants should not be assisted with project-based assistance, and has prohibited such assistance in § 882.715(a). (Because permanent displacement is prohibited, there is no cross-reference in § 882.715 to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.)

Section 882.717 Other Federal Requirements

This section lists the various applicable Federal statutes and other Federal authorities, including civil rights and environmentally-related statutes and authorities.

HUD is responsible for ensuring compliance with Federal environmental laws and authorities with respect to activities under this Subpart G. Section 882.717(b)(1) encourages PHAs to select projects that will not require, or entail the delay of, compliance with the National Environmental Policy Act or with the authorities listed in 24 CFR 50.4, by setting out the conditions under which a PHA may authorize the rehabilitation of a project in connection with project-based assistance without a prior HUD environmental review. A PHA should contact the environmental officer in the HUD Field Office concerning the type of information a State Historic Preservation Officer may need to respond to a PHA's request about a particular project under § 882.717(b)(1)(ii). A PHA may authorize rehabilitation of a project that exceeds the thresholds in § 882.717(b)(1), but the PHA must first notify HUD so that HUD may carry out the necessary environmental review, as provided in § 882.717(b)(2).

Section 882.719 Initial Contract Rents

This section contains the requirements for establishing the Contract Rents that the PHA must list in the Agreement. The Contract Rents listed on execution of the Agreement, subject to reduction under § 882.731(c),

must be the Contract Rents upon execution of the HAP Contract (i.e., the initial Contract Rents). Unlike the Moderate Rehabilitation Program, there is no authority for increases in the initial Contract Rents during rehabilitation (contrast § 882.408(d)).

This section is based on § 882.106, with modifications reflecting the project-based character of the assistance provided under Subpart G and other differences from the Certificate Program. Thus, HUD, under § 882.719(a), will not authorize an initial Contract Rent exceeding the Fair Market Rents based on grounds permitted in the Certificate Program under paragraphs (iv), (v), or (vi) of § 882.106(a)(4). Those paragraphs authorize the use of an exception rent based, in part, on a showing by the PHA that leasing the unit is necessary to meet the unique needs of a particular family. That basis for allowing an exception rent is not appropriate when the assistance is project-based and does not follow the family.

Paragraph (b)(3) conforms to the purpose of a recent statutory amendment to section 8(c)(2)(C) of the 1937 Act, by providing that, for units that are not subject to local rent control while they are assisted, comparable units used to determine rent reasonableness are other units that are exempt from rent control. A similar revision has been made to § 882.106(b)(2). (See section 142(c)(1) of the HCD Act of 1987 and H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 177 (1987).) Wherever the concept of comparability is used in this section, it, of course, means comparable to the assisted unit as it will be after it is rehabilitated.

There are no provisions similar to paragraph (f) of § 882.106, which concerns shared housing. Under § 882.713(b)(3), shared housing is not eligible for project-based assistance. This rule makes a conforming change to § 882.106(a)(2) to make it clear that the 20 percent limitation on the number of units for which the PHA may approve initial Gross Rents that exceed applicable FMRs is a limit on the combined total number of units so approved under both the Certificate Program and this project-based assistance. This rule also makes a conforming revision to § 888.111, Fair market rents for existing housing and moderate rehabilitation: applicability, to specify that existing housing Fair Market Rents apply to assistance provided under Subpart G.

Section 882.719(a)(1) also contains provisions concerning utility allowances similar to the provisions in § 882.209(f). These provisions are placed in this

section because they involve the determination of the initial Contract Rents.

Section 882.721 Contract Rent Adjustments

This section contains the requirements for adjusting the Contract Rents during the term of the HAP Contract after the Contract Rents have been established by execution of the HAP Contract. This section is based on § 882.108.

Section 882.723 PHA Selection and Initial Inspection of Units

This section provides PHAs with broad discretion in establishing procedures for selecting units to which assistance is to be attached. Under paragraph (a), PHAs must establish written policies for selecting units. In addition, paragraph (a) also encourages PHAs to establish preferences for units to be used as limited equity cooperatives. This provision reflects congressional intent (see H.R. Conf. Rep. No. 122, 100th Cong., 1st Sess. 33 (1987)). The Department has not encouraged PHAs to establish preferences for units receiving tax credits, a preference also referred to in the Conference Report, because the Department is conducting an evaluation of the low-income tax credit, including the issue of the extent to which the tax credit requires additional assistance. This rule, however, does not limit the ability of PHAs to utilize Section 8 project-based assistance in conjunction with the tax credit.

The Department also encourages PHAs to establish preferences for HUD-insured subsidized multifamily housing projects that are financially troubled and to work closely with their HUD Field Office in this regard. The use of project-based assistance for this purpose may prove very helpful in maintaining the supply of subsidized housing.

Section 882.725 Prohibition Against Rehabilitation With 1937 Act Assistance; Pledge of Agreement or HAP Contract

Section 8(d)(2) of the 1937 Act provides that the owner may not use any assistance provided under the 1937 Act to rehabilitate the structure to which assistance will be attached. Section 882.725(a) implements this prohibition by prohibiting attaching assistance to units that have been in the five years before execution of the Agreement, or will be, rehabilitated with other assistance under the 1937 Act. It also identifies examples of 1937 Act

assistance that may not be used to rehabilitate the structure.

Paragraph (a) also prohibits the use of flexible subsidy under 24 CFR 219 to finance the rehabilitation of the units. Under the Flexible Subsidy Program, HUD may provide financial assistance to owners of troubled projects that are assisted by HUD under the Section 236, Section 221(d)(3) Below Market Interest Rate, or Rent Supplement Programs. The assistance is to be used to induce and assist owners to maintain the financial soundness and the low- and moderate-income character of the projects by, among other means, physically upgrading the project. A PHA could attach project-based assistance under this Subpart G to these types of projects in order to induce the owner to rehabilitate the project. The Department believes, however, that each Program, by itself, is a sufficient inducement for owners to rehabilitate projects and that permitting the Programs to be used in conjunction would result in fewer projects being rehabilitated.

Paragraph (b) of § 882.725 sets out the conditions under which an owner may pledge its Agreement to Enter into a Housing Assistance Payments Contract or its Housing Assistance Payments Contract as security for financing. The financing documents may not purport to pledge or give greater rights to any party against the PHA than the contractual rights of the Owner under the Agreement or HAP Contract. The financing documents may not include any requirements inconsistent with the Agreement or HAP Contract. The PHA may not be a party to any of the financing documents and may undertake no obligations (other than those already specified under the Agreement or HAP Contract) in connection with the financing. No modification or alteration may be proposed or made to the Agreement or HAP Contract.

Section 882.727 Owner Selection of Contractor

This section contains similar policies to those stated in § 882.504(g) for the Moderate Rehabilitation Program.

Section 882.729 Work Write-Ups and Agreement to Enter into Housing Assistance Payment Contract

The work write-up provisions and the requirements for the Agreement are based on similar provisions in the Moderate Rehabilitation Program, although their presentation has been reorganized. HUD is prescribing no specific form or format for the work write-ups. The PHA has the flexibility to

determine the appropriate content and documentation for the work write-ups.

Increases in initial Contract Rents during rehabilitation are not permitted under this section. They are permitted in the Moderate Rehabilitation Program (see § 882.408(d)). Increases are not appropriate when project-based assistance is involved because the initial Contract Rents are established on the basis of a rent reasonableness test, not on the cost of rehabilitation.

Section 882.731 Rehabilitation Period, and Section 882.733 Rehabilitation Completion

These provisions are modeled on the Moderate Rehabilitation Program, §§ 882.506 and 882.507, respectively.

Section 882.735 Housing Assistance Payments Contract (Contract)

This section sets out HAP Contract requirements that are specific to assistance provided under this Subpart G. It provides more flexibility to PHAs to set the term of the Contract than is provided under the Moderate Rehabilitation Program (see § 882.403(c)). (All Moderate Rehabilitation Contracts have 15 year terms.) With project-based assistance, PHAs may set the term between 2 and 15 years, but the Contract term may not exceed the ACC expiration date for the Funding Source.

The owner may also terminate the HAP Contract after two years. If the owner "opts out," the remaining funding authority would again be available for Certificates and the families that had been receiving project-based assistance may be issued Certificates (see § 882.745(e)).

Section 882.737 Reduction of Number of Units Covered by Contract, Section 882.739 Responsibilities of the PHA, § 882.741 Responsibilities of the Owner, and Section 882.743 Obligations of the Family

These sections simply incorporate by cross-reference pertinent provisions under the Certificate Program and Moderate Rehabilitation Program, without making substantive changes.

Section 882.745 Family Participation

This section implements the Certificate Program tenant selection policies in § 882.209, as modified to take into account the fact that the assistance is likely to be used in projects with occupied units and families are assisted in a specific project under a HAP Contract. Paragraph (b) is intended to ensure that an eligible tenant residing in a unit to be assisted is afforded the opportunity to lease that unit or another

assisted unit of appropriate size, regardless of whether the family qualifies for a Federal preference. The Department does not believe that Congress intended that project-based assistance and the Federal preferences interact in a way that could result in the displacement of eligible families from units with project-based assistance, only to fill the vacancies created with other eligible families. In addition, to avoid permanent displacement, the PHA and Owner may not select a unit if the unit is occupied by persons not eligible for admission to the program.

A family that is leasing a unit, with Certificate Program assistance, in a project that is to be rehabilitated with project-based assistance and which chooses to move has the right to continued participation in the Certificate Program provided by § 882.209(m). If such a family signs a lease for a project-based unit, the family would no longer be a participant in the Certificate Program.

Section 882.747 Maintenance, operation, and inspections, Section 882.749 Reexamination of Family income and composition, Section 882.751 Overcrowded and underoccupied units, Section 882.753 Informal review or hearing, and Section 882.755 Grounds for denial or termination of assistance

These sections, in general, either incorporate by cross-reference or restate comparable policies in the Certificate Program or the Moderate Rehabilitation Program.

Section 882.757 Termination of Tenancy

This section incorporates by cross-reference Subpart A of 24 CFR Part 247, Evictions from Certain Subsidized and HUD-Owned Projects, which applies to other project-based rental assistance programs administered by HUD. The section also adds provisions that limit the grounds for terminating tenancy for good cause during the first year of the lease. Part 247 may be obtained from HUD Field Offices.

This rule also makes a conforming amendment to Part 247 by revising § 247.1 and by adding reference in § 247.2(e) to this Subpart G. This rule also makes a technical revision to § 247.2(e) to distinguish between those forms of subsidy that are project-wide and those that apply to particular units within a project.

D. Recent Proposed Rulemaking on Section 16(b) Limitations. Section 16 of the 1937 Act limits the number of families that are lower income but are not very low-income that may be initially assisted under several of the

1937 Act programs, including the Section 8 Certificate Program and this project-based component of that Program.

Under section 16(b), admission of non-very low-income families is limited to not more than 5 percent of the dwelling units that become available for occupancy under the affected programs. Section 103(a) of the HCD Act of 1987 amended section 16 to require HUD to establish, as appropriate, differing percentage limitations on admission of these families in the separate assistance programs. On April 29, 1988, at 53 FR 15412, the Department published a proposed rule to implement section 103(a). HUD also published, on the same date, a notice (53 FR 15466) proposing the respective percentage limitations for each of the affected programs. The notice proposed a one percent limitation for the Section 8 Certificate Program. The notice did not separately address project-based assistance. (Section 1001(a) of the 1988 McKinney Act amended section 16, but maintains the requirement for percentages for each program.) HUD invites comment on whether the proposed one percent limitation for the Certificate Program should be revised as a result of implementing this Subpart G. Readers, in considering this issue, should bear in mind that any change in the percentage limitation for the Certificate Program may necessitate a change in the percentage limitation for one or more of the other assistance programs subject to section 16, because the sum of the number of non-very low-income families, resulting from the use of these program-specific percentage limitations, may not exceed 5 percent nationally.

E. Other Information. 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 does 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 provisions of 5 U.S.C. 605(b), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities, because this rule does not alter the amount of funding a PHA may receive. The rule, in accordance with the statutory mandate, merely permits, but does not require, a PHA to attach a portion of the assistance it provides under the Section 8 Certificate Program to units rather than have the assistance move with the families.

HUD has determined, in accordance with E.O. 12612, *Federalism*, that this

rule does not have a substantial, direct effect on the States or on the relationship between the Federal government and the States, or on the distribution of power or responsibilities among the various levels of government because this rule conforms HUD regulations to a statutory requirement to permit PHAs to provide project-based assistance, for projects that are rehabilitated. To the extent that particular revisions have altered responsibilities, these revisions are in response to statutory changes and have increased the discretion of the non-Federal governmental entities.

HUD has determined that this rule is not likely to have a significant impact on family formation, maintenance, and general well-being within the meaning of E.O. 12606, *The Family*, because the rule concerns only a PHA's discretion to

attach Certificate Program assistance to units. It does not affect the terms and conditions under which a family may qualify for assistance under the Certificate Program. The Certificate Program, itself, is a benefit to families because it assists eligible families to afford decent safe and sanitary housing.

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520. Currently approved requirements have been assigned the OMB Control Number 2502-0388.

In accordance with 5 CFR 1320.21, the following table discloses the Department's estimated burden for each of the collections of information in this rule.

New requirements applicable program ref.	Description of information collection	Form used	No. of respondents + No. of responses per respondent	Hours per response + total annual burden hours	Average cost per PHA or owner per hour	Estimated cost annually
882.707—PHA application for HUD approval to attach assistance to units.	Total No. of units; units proposed for project—based by bedroom size and funding source w/end date; rehab period and proposed termination date of HAP contract.	No prescribed form.	200 PHAs.....	2 hrs. (400 hours) ...	\$13.00 (average cost per hr. for PHA mgmt. staff).	\$5,200.00
882.721(a)(2)—Special rent adjustment.	Special adjustments—financial statements submitted by owner to support request for rent increase.	No prescribed form.	10 owners.....	2 hrs. (20 hrs.).....	\$13.00 (average cost per hr. for owner property mgmt. staff).	260.00
882.729(a)—Work write-up requirement.	Work write-ups prepared by owners.	No prescribed form.	200 owners.....	5 hrs. (1,000 hrs.) ...	\$13.00.....	13,000.00
882.731(d)—Notification of families on waiting list + vacancies.	Notification of families on waiting list of vacant units.	No prescribed form.	50 projects.....	1/2 hr. per property (25 hrs.).....	\$13.00.....	325.00
882.733(a) + (b)—Owner notification of completion.	Notification and evidence of completion submitted by owner.	Owner certification and certificate of occupancy.	200 owners.....	5 hrs. (1,000 hrs.) ...	\$13.00.....	13,000.00
882.723(a)—PHA selection of units.	Adoption of written selection policy.	No prescribed form.	200 PHAs.....	5 hrs. (1,000 hrs.) ...	\$13.00.....	13,000.00

New requirements applicable program reference	Description of information collection	Form used	Estimated No. of respondents	Hours per response plus (annual burden hours)	Average cost per PHA or owner per hour	Estimated cost annually
882.715(b)(1)(i)—relocation.	Relocation notice to family.	Letter.....	10 owners.....	4 hrs. (40 hrs.).....	\$13.00	\$520.00
882.719(a)(2)—FMR exceptions.	Approval of rents up to 110 percent FMR.	Log or other control mechanism.	40 PHAs.....	5 mins. or .083 hr. (3.3 hrs.).....	13.00	43.00
882.719(a)(3) and (4)—FMR exceptions.	Requests for FMR exception up to 120 percent FMR.	Letter.....	10 PHAs.....	8 hrs. (80.00 hrs.).....	13.00	1,040.00
882.719(b)—rent reasonableness.	Certification of rent reasonableness (rents are established by projects and not by units.).	No prescribed format for certification.	200 projects.....	5 mins. or .083 hr. (16.7 hrs.).....	13.00	217.00
882.725—pledging contracts.	Owner submittal of financial documents if pledging agreement or HAP contract as security for financing and PHA review.	Lender documents.....	10 projects.....	2 hrs. (20 hrs.).....	13.00	260.00
882.733 delayed completion.	Written agreement pertaining to items of delayed completion.	No prescribed format.....	10 projects.....	2 hrs. (20 hrs.).....	13.00	260.00
882.735 HAP contract.	HAP contract.....	Prescribed format.....	200 owners and 200 PHA's.....	1/4 hr. (50 hrs.)..... 1/4 hr. (50 hrs.).....	13.00 13.00	¹ 650.00 ² 650.00

New requirements applicable program reference	Description of information collection	Form used	Estimated No. of respondents	Hours per response plus (annual burden hours)	Average cost per PHA or owner per hour	Estimated cost annually
882.719(b)(2) HUD approval of rents.	PHA submittal of contract rents for projects of 50 or more units.	Letter	25 PHA's	¼ hr. (6.25 hrs.)	13.00	81.00
882.713(b)(6) eligible properties.	Flood hazards	Record of observation of insurance policy.	25 PHA's	¼ hr. (6.25 hrs.)	13.00	81.00
882.713(c) eligible property.	Highrisers ineligibility	Letter request	5 PHA's	¼ hr. (1.25 hrs.)	13.00	16.00
882.717(c)(7) other Federal requirements.	Davis-Bacon	SF308, HUD 4230A, WH Pub 1321, WH-347, WH-348, HUD-11.	150 owners	40 hrs. (6,000 hrs.)	13.00	78,000.00
882.717(b) other Federal requirements.	NEPA and historic preservation.	File documentation	100 PHA's	4 hrs. (400 hrs.)	13.00	5,200.00

¹ Owners.

² PHA's.

This rule was listed as Sequence Number 974 in the Department's Semiannual Agenda of Regulations published on October 24, 1988, (53 FR 41974, 41993) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance Program number and title is: 14.156, Lower Income Housing Assistance Program (Section 8).

List of Subjects

24 CFR Part 247

Low and moderate income housing, Public housing, Tenant eviction.

24 CFR Part 882

Grant programs—Housing and community development, Housing, Low and moderate income housing, Mobile homes.

24 CFR Part 888

Rent subsidies.

Accordingly, the Department amends 24 CFR Parts 247, 882, and 888, as follows:

PART 247—EVICTIONS FROM CERTAIN SUBSIDIZED AND HUD-OWNED PROJECTS

1. The authority citation for 24 CFR Part 247 continues to read as follows:

Authority: Sec. 101, Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); Secs. 211, 221, and 236 National Housing Act (12 U.S.C. 1715b, 1715f, and 1715z-1); Sec. 202, Housing Act of 1959 (12 U.S.C. 1701q); Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. Section 247.1 is revised to read as follows:

§ 247.1 Applicability.

Except as provided in §§ 247.5 and 247.6(c), the provisions of this subpart shall apply to all decisions by a landlord

to terminate the occupancy of a tenant in a subsidized project as defined in § 247.2(e). (Termination of tenancy of a family assisted with tenant-based assistance under the Section 8 Existing Housing Certificate or Housing Voucher Program is not subject to this part.)

3. Section 247.2(e) is revised to read as follows:

§ 247.2 Definitions.

(e) "Subsidized project" means a multifamily housing project (with the exception of a project owned by a cooperative housing mortgagor corporation or association) that receives the benefit of subsidy in the form of: below-market interest rates under section 221(d) (3) and (5), interest reduction payments under section 236 of the National Housing Act, or below market interest rate direct loans under section 202 of the Housing Act of 1959. For purposes of this Part 247 "subsidized project" also includes those units in a housing project that receive the benefit of rental subsidy in the form of rent supplement payments under section 101 of the Housing and Urban Development Act of 1965; or housing assistance payments through: Project-Based Assistance under the Section 8 Certificate Program (24 CFR Part 882, Subpart G), Section 8 in connection with Section 202 Loans for Housing for the Elderly or Handicapped (24 CFR Part 885), the Section 8 Additional Assistance Program for Projects with HUD-Insured and HUD-Held Mortgages (24 CFR Part 886, Subpart A) or the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects (24 CFR Part 886, Subpart C).

PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING

4. The authority citation for Part 882 continues to read as follows:

Authority: Secs. 3, 5, and 8 of the United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

5. The table of contents for Part 882 is revised by adding at the end a new table of contents for Subpart G to read as follows:

PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING

Subpart G—Section 8 Certificate Program Assistance Attached to Units (Project-Based Certificate Assistance)

Sec.	
882.701	Purpose and applicability.
882.703	Additional definitions.
882.705	Information to be submitted to HUD by the PHA.
882.707	HUD review of PHA plans to attach assistance to units.
882.709	Annual Contributions Contract; schedule of leasing.
882.711	Housing quality standards.
882.713	Eligible and ineligible properties; rehabilitation requirement.
882.715	Relocation.
882.717	Other Federal requirements.
882.719	Initial Contract Rents.
882.721	Contract Rent adjustments.
882.723	PHA selection and initial inspection of units.
882.725	Prohibition against rehabilitation with U.S. Housing Act of 1937 assistance and use of flexible subsidy; pledge of Agreement or HAP Contract.
882.727	Owner selection of contractor.
882.729	Work write-ups, Agreement to Enter into Housing Assistance Payments Contract, and Contract Rents in Agreement.
882.731	Rehabilitation period.
882.733	Rehabilitation completion.
882.735	Housing Assistance Payments Contract (Contract).
882.737	Reduction of number of units covered by Contract.
882.739	Responsibilities of the PHA.
882.741	Responsibilities of the Owner.

- Sec.
 882.743 Obligations of the Family.
 882.745 Family participation.
 882.747 Maintenance, operations and inspections.
 882.749 Reexamination of Family income and composition.
 882.751 Overcrowded and underoccupied units.
 882.753 Informal review or hearing.
 882.755 Grounds for denial or termination of assistance.
 882.757 Assisted tenancy and termination of tenancy.

6. In § 882.106, paragraphs (a)(2) and (b)(2) are revised, to read as follows:

§ 882.106 Contract rents.

(a) * * *

(2) The PHA may approve, on a unit-by-unit basis, initial Gross Rents that exceed the applicable Fair Market Rents by up to 10 percent. The total number of units with such rents approved under this paragraph (a)(2) and under paragraph (a)(2) of § 882.719, Initial Contract Rents, may not exceed 20 percent of the number of units under ACC for the PHA's Certificate Program. The PHA, however, may also exercise such authority with respect to more than 20 percent of the units under ACC if HUD approves such extension of the PHA's authority. In considering whether to grant such approval, HUD will review the appropriateness of the applicable Fair Market Rents and the relationship of estimated program costs to program objectives.

(b) * * *

(2) For an assisted unit that is subject to local rent control, comparable units are rent controlled units. However, for an assisted unit that is not subject to local rent control while it is assisted (regardless of whether the unit would be subject to such control if it were not assisted), comparable units are units that are not subject to local rent control.

7. In Part 882, a new Subpart G is added to read as follows:

Subpart G—Section 8 Certificate Program Assistance Attached to Units (Project-Based Certificate Assistance)

§ 882.701 Purpose and applicability.

(a)(1) This Subpart G establishes the procedures under which a Public Housing Agency (PHA) may, at its sole option, choose to provide Section 8 project-based assistance with funds provided to the PHA for its Section 8 Certificate Program. This Subpart G implements section 8(d)(2)(A) of the 1937 Act which directs the Department to permit a PHA to "attach to structures" up to 15 percent of the

Section 8 assistance provided by the PHA under the Certificate Program. Within this 15 percent limit, the PHA may attach a Section 8 assistance contract to a structure where the owner agrees to rehabilitate the structure *other than* with assistance provided under the United States Housing Act of 1937. The purpose of project-based assistance in the Certificate Program is to induce property owners to upgrade substandard rental housing stock, and make it available to lower income families at rents within the Section 8 Existing Housing Fair Market Rents.

(2) This Subpart G refers to assistance that is attached to units as "project-based" assistance to distinguish this assistance from the "tenant-based" assistance provided by the Certificate Program under Subparts A, B, C, and F of this Part and also by the Housing Voucher Program under 24 CFR Part 887. With tenant-based assistance, the assisted unit is selected by the Family. The PHA then enters into an assistance Contract, which only covers a single unit and the specific assisted family. If the Family moves out of a unit, the assistance contract terminates. And, the family may move with continued assistance under the Program, and may find a new unit anywhere in the PHA jurisdiction.

(b) Except as otherwise expressly modified or excluded by this Subpart G, all provisions of Subparts A and B of this Part 882 apply to project-based assistance under this Subpart G.

(c) The following sections in Subparts A and B of this Part 882, which implement the tenant-based aspect of the Certificate Program, do not apply to project-based assistance under this Subpart G: § 882.103, "Finders-Keepers" policy; § 882.208, *Activities to encourage participation by Owners and others*; and § 882.209(m), *Continued participation when Participant Family moves*. Other sections in this Subpart G identify other tenant-based provisions of Subparts A and B that do not apply to project-based assistance under this Subpart G.

§ 882.703 Additional definitions.

The following definitions apply to assistance subject to this Subpart G, in addition to the definitions in § 882.102:

Agreement to Enter into Housing Assistance Payments Contract (Agreement). As defined in § 882.402.

15-Percent Limit. Fifteen percent of the total of the number of units reserved by HUD for a PHA's Section 8 Certificate Program.

Funding Source. The ACC funding authority from which the HAP Contract is to be funded. Funding authority under the ACC that was appropriated by

Congress before Federal fiscal year 1988 constitutes a single pre-Federal fiscal year 1988 Funding Source. For funding authority appropriated in Federal fiscal year 1988 and later, each funding increment identified in the ACC is a separate Funding Source.

§ 882.705 Information to be submitted to HUD by the PHA.

(a) *Requirements.* A PHA may attach assistance to units in accordance with this Subpart G if:

(1) The number of project-based units in the PHA Certificate Program does not exceed the 15-Percent Limit.

(2) The unit sizes for units to which assistance will be attached are consistent with the unit size distribution for the Funding Source.

(3) The rehabilitation period and HAP Contract term are within the ACC term for the Funding Source.

(b) *PHA submission.* Before entering into any Agreements for project-based assistance, the PHA must submit the following information to the HUD Field Office for review. The PHA submission need not specify specific structures or units to be assisted. The PHA shall submit the following information:

(1) The number of units currently reserved for the PHA's Section 8 Certificate Program;

(2) The total number of units for which the PHA is requesting approval to attach assistance;

(3) The number of units by unit size (number of bedrooms) to be assisted from each Funding Source;

(4) The estimated rehabilitation periods and termination dates for HAP Contracts to be executed for project-based subsidies, and the termination date of the ACC for the Funding Source for each HAP Contract.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.707 HUD review of PHA plans to attach assistance to units.

(a) *Purpose of review.* The HUD Field Office shall review the information submitted by the PHA under § 882.705(b) only to determine whether the requirements of § 882.705(a) are satisfied.

(b) *Notice to PHA.* (1) If the requirements of § 882.705(a) are satisfied, the Field Office shall approve the PHA application.

(2) The Field Office shall notify the PHA of approval or disapproval within 20 calendar days after the date of the PHA submittal under § 882.705(b) (date

of postmark, if mailed, or date of receipt by HUD, if hand-delivered).

(3) If the application is approved, the Field Office shall notify the PHA that the PHA may proceed with execution of Agreements for project-based assistance. The approval letter shall specify the maximum number of units, by unit size and Funding Source, for which the PHA may execute Agreements, and shall specify, for each Funding Source, the ACC expiration date (last date of term). The HAP Contract term may not end after the ACC expiration date of the Funding Source from which the HAP Contract is to be funded.

(4) If any of the requirements of § 882.705(a) are not satisfied, the Field Office shall not approve the PHA application. The Field Office shall notify the PHA by letter of the reasons for disapproval.

§ 882.709 Annual Contributions Contract; schedule of leasing.

Section 882.206, *Annual Contributions Contract; schedule of leasing*. Applies. With respect to units assisted under this Subpart G, the Field Office may authorize the extensions of the schedule of leasing (see § 882.206(c)) to accommodate the time needed to complete the rehabilitation of the units.

§ 882.711 Housing quality standards.

Section 882.404(b), *Site and neighborhood-performance requirements*, applies, in addition to the housing quality standards in § 882.109.

§ 882.713 Eligible and ineligible properties; rehabilitation requirement.

(a) Section 882.110, *Types of housing*, does not apply. Existing structures of various types may be appropriate for attaching assistance to the units under this Subpart G, including single-family housing and multifamily structures. To be an eligible property, the property must require rehabilitation involving a minimum expenditure of \$1000 per assisted unit, including the unit's prorated share of work to be accomplished on common areas or systems, in order to:

- (1) Upgrade the property to decent, safe, and sanitary condition to comply with the Housing Quality Standards or other standards approved by HUD, from a condition below those standards;
- (2) Repair or replace major building systems or components in danger of failure;
- (3) Make improvements to the property essential to permit use of the property by handicapped persons; or
- (4) Convert or merge units to provide housing for large families.

(b) A PHA may not attach assistance under this Subpart G to units in the following types of housing:

(1) Housing that is owned by the PHA (or by an entity controlled by the PHA) administering the ACC under which assistance is to be provided;

(2) Housing that is HUD-owned;

(3) Shared housing, nursing homes, and facilities providing continual psychiatric, medical, nursing services, board and care or intermediate care facilities;

(4) Units within the grounds of penal, reformatory, medical, mental, and similar public or private institutions.

(5) Housing located in the Coastal Barrier Resources System designated under the Coastal Barrier Resources Act; or

(6) Housing located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(i)(A) 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

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

(ii) The PHA 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.*).

(c) A PHA may attach assistance under this Subpart G to a highrise elevator project for families with children only if HUD determines there is no practical alternative. HUD may make this determination for the PHA's project-based assistance, in whole or in part, and need not review each building on a case-by-case basis.

(d) A PHA may attach assistance to units under this Subpart G for use as single room occupancy (SRO) housing only if—

(1) The property is located in an area in which there is a significant demand for these units, as determined by the HUD Field Office;

(2) The PHA and the unit of general local government in which the property is located approve the attaching of assistance to these units; and

(3) The PHA and the unit of general local government certify to HUD that the property meets applicable local health and safety standards.

(e) Assistance may not be attached to a unit that is occupied by an Owner; however, cooperatives are considered to be rental housing for purposes of this Subpart G.

(f) For any Section 221(d)(3) BMIR, Section 202, Section 236 (insured or noninsured) or FmHA Section 515 interest credit unit or any State or locally subsidized unit, the housing assistance payment shall be the amount by which the rent otherwise payable by the Eligible Family under this Subpart G is less than the subsidized rent (which subsidy shall not be reduced on account of any assistance provided under this Subpart G).

(g) In no event may any occupant of a unit with project-based assistance under this Subpart G receive the benefit of any of the following: any other form of Section 8 assistance, rent supplement, Section 23 housing assistance, or Section 236 "deep subsidy" rental assistance payments.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.715 Relocation.

(a) *Prohibition against permanent displacement*. Rehabilitation of units to be subsidized with assistance under this Subpart G may not result in the permanent displacement of residential tenants from the structure or complex.

(b) *Temporary relocation*. The following policies apply to temporary relocation of tenants. The policies apply only to lawful tenants (but not to owner-occupants or businesses) who are temporarily relocated following submission of the Owner's proposal to the PHA. The following policies do not apply to tenants who commence occupancy after the Owner's submission of a proposal if, before they commence occupancy, they are provided adequate notice from the Owner of the impending rehabilitation and possible relocation, or whose tenancy is terminated for serious or repeated violation of the terms and conditions of the lease; violation of applicable Federal, State, or local law; or other good cause. (Good cause does not include expiration of the lease term or terminations because of Owner participation in the program.)

(1) Tenants may not be required to move temporarily from the property (building or complex) unless:

- (i) The Owner has given the tenants adequate, advance written notice and appropriate advisory services;
- (ii) Decent, safe, and sanitary temporary housing is available;
- (iii) The temporary relocation period will not exceed 12 months; and
- (iv) Tenants will receive reimbursement from the Owner for reasonable out-of-pocket expenses incurred in connection with the

temporary relocation, including moving costs to and from temporary housing and increases in monthly housing costs.

(2) The PHA is responsible for ensuring that all the relocation requirements are met. Preliminary or ongoing administrative funds may be used for costs of PHA advisory services for temporary relocation of tenants to be assisted under the program.

(3) Tenants who do not believe they have received relocation opportunities, services, or payments in accordance with this section may appeal to the PHA and must be given an informal hearing on this appeal.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.717 Other Federal requirements.

(a) Participation in this program requires compliance with the Equal Opportunity requirements specified in § 882.111, with section 504 of the Rehabilitation Act of 1973, and with the Age Discrimination Act of 1975. The PHA must also comply with its equal opportunity housing plan.

(b) Activities under this Subpart G are subject to HUD environmental regulations at 24 CFR Part 50. PHA's shall assist HUD in ensuring compliance with Part 50 requirements as follows:

(1) A PHA may authorize rehabilitation of a project in connection with project-based assistance approved by HUD under § 882.707 without further HUD approval only if the PHA documents in its file why the rehabilitation activity will not:

(i) Exceed the thresholds in § 50.20 (a) or (c) of this title for categorical exclusion from the NEPA requirements of Part 50 of this title. However, the PHA must notify HUD if it has reason to believe that notwithstanding inclusion in these categorical exclusion thresholds, the project might have a significant environmental effect because of extraordinary circumstances; in that case, HUD shall review the project and the PHA must await approval to proceed under paragraph (b)(2) of this section;

(ii) Based on information from the State Historical Preservation Officer, involve alterations to a property that is listed on the National Register of Historic Places; is located in an historic district or is immediately adjacent to a property that is listed on the Register; or is deemed by the State Historic Preservation Officer to be eligible for listing on the Register. A PHA is not required to contact the State Historic Preservation Officer if it documents in its file:

(A) For any property that involves only interior rehabilitation, that the property is not on the National Register of Historic Places and is not 50 years old or older; or

(B) For any property that involves exterior rehabilitation, that the property and all immediately adjacent properties are not on the National Register of Historic Places and are not 50 years old or older;

(iii) Take place in any 100-year floodplain designated by map by the Federal Emergency Management Agency; or

(iv) Conflict with HUD environmental standards in 24 CFR Part 51 or with the State's Coastal Zone Management plan.

(2) If further HUD approval is required under paragraph (b)(1) of this section, a PHA may authorize rehabilitation of a project in connection with project-based assistance only if:

(i) The PHA requests HUD to perform an environmental review of the project under Part 50 of this title, including the applicable related laws and authorities under § 50.4, HUD completes the environmental review required by Part 50, and HUD notifies the PHA that it may proceed; or

(ii)(A) The PHA informs HUD that an environmental review of the area in which the proposed rehabilitation is to be located:

(Z) Was previously completed for the purposes of another HUD program under 24 CFR Part 50 or 58; and

(2) Addressed properties, activities, and effects comparable to those proposed for assistance under this part;

(B) HUD finds that the prior review applies to the proposed activities; and

(C) HUD notifies the PHA that it may proceed.

(c) The PHA and Owner must agree to comply with the requirements of the following, where applicable:

(1) Clean Air Act and Federal Water Pollution Control Act;

(2) Flood Disaster Protection Act of 1973;

(3) Section 504 of the Rehabilitation Act of 1973;

(4) Executive Order 11246, Equal Employment Opportunity (for all construction contracts of over \$10,000);

(5) Executive Order 11625, Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprises;

(6) Executive Orders 12432, Minority Business Enterprise Development, and 12138, Creating a National Women's Business Enterprise Policy; and

(7) Payment of not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor

pursuant to the Davis-Bacon Act, to all laborers and mechanics employed in the rehabilitation of the project under an Agreement covering nine or more assisted units, and compliance with the Contract Work Hours and Safety Standards Act, Department of Labor regulations in 29 CFR Part 5, and other Federal laws and regulations pertaining to labor standards applicable to such an Agreement.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.719 Initial Contract Rents.

Section 882.106, *Contract Rents*, does not apply.

(a) *Fair Market Rent and Agreement limitation.* (1) The initial Contract Rent plus any applicable Utility Allowance (Gross Rent) for any unit approved under this Subpart G shall not exceed the Section 8 Existing Housing Fair Market Rent applicable to the unit on the date the Agreement is executed, except as provided in this paragraph (a). (See also § 882.729(c), *Contract Rents in Agreement*.)

(2) The PHA may approve, on a unit-by-unit basis, initial Gross Rents that exceed the applicable Fair Market Rents by up to 10 percent. The total number of units with such rents approved under this paragraph (a)(2) and under paragraph (a)(2) of § 882.106, *Contract Rents*, may not exceed 20 percent of the number of units under ACC for the PHA's Certificate Program. The PHA, however, may also exercise such authority with respect to more than 20 percent of the units under ACC if HUD approves such extension of the PHA's authority. In considering whether to grant such approval, HUD will review the appropriateness of the applicable Fair Market Rents and the relationship of estimated program costs to program objectives.

(3) HUD may approve, upon request from a PHA, maximum initial Gross Rents for all units of a given size of up to 20 percent above the applicable Fair Market Rents within a designated municipality, county, or similar locality. Any such request must be supported by a statement of the special circumstances warranting such increase in the maximum Gross Rents, including whether such higher rents are necessary to implement a Housing Assistance Plan. In considering whether to grant such approval, HUD will review the appropriateness of the applicable Fair Market Rents and the relationship of estimated program costs to program objectives. In no event shall a maximum

Gross Rent, as approved under this paragraph, exceed the rent, including Allowances for Utilities and Other Services, determined by HUD to be the average rent currently being charged for available standard units of similar size or type in the applicable municipality or county.

(4) On the basis of a showing by the PHA that special circumstances apply to units of a given size limited to a specific neighborhood, and by reason of these circumstances the reasonable Gross Rents for such units are as high as 20 percent above the applicable Fair Market Rents, and the units cannot be rented for less, HUD may authorize the PHA to approve Gross Rents for such units up to 20 percent above the applicable Fair Market Rents. Authorization under this paragraph (a)(4) shall be based upon substantially the same criteria as under paragraph (a)(3) of this section, except for the last sentence of that paragraph.

(b) *Rent reasonableness limitation.* Because the Fair Market Rents are established for a geographic area, within which the rents for modest Decent, Safe, and Sanitary housing may vary substantially, the PHA shall make an analysis to determine the reasonable rent for the particular unit.

(1) The PHA shall certify for each unit it approves for project-based assistance under this Subpart C that the initial Contract Rent for the rehabilitated unit is:

- (i) Reasonable in relation to rents currently being charged for comparable units in the private unassisted market, taking into account the location, size, structure type, quality, amenities, facilities, and management and maintenance service of the unit; and
- (ii) Not in excess of rents currently being charged by the Owner for comparable unassisted units.

(2) If a PHA proposes to project-base assistance for fifty or more units, the PHA must obtain HUD Field Office approval of the Contract Rents before executing the Agreement.

(3) For a rent-controlled unit, comparable units must be units that are rent-controlled; for a unit that is not subject to rent control, comparable units must be units that are not rent-controlled.

(c) *Congregate housing.* (1) The Fair Market Rent for each congregate housing unit shall be the same as for a 0-bedroom unit, except that if the unit consists of two or more private rooms, the Fair Market Rent shall be the same as for a 1-bedroom unit.

(2) In determining the reasonableness of the rents, consideration shall be given to the presence or absence of common

rather than private cooking, dining, and sanitary facilities and the provision of special amenities, maintenance or management services, or a combination of both.

(d) *Independent Group Residences.* (1) The Fair Market Rent for an Independent Group Residence shall be the Fair Market Rent applicable to the unit size being leased, for example, a 4-bedroom unit if the residence contains 4 bedrooms.

(2) A Resident Assistant who lives in the unit may be counted as a Family member in determining the appropriate number of bedrooms. However, the Resident Assistant's income shall be disregarded in determining the Total Tenant Payment, the Tenant Rent, or the Family's income eligibility.

(3) In determining the reasonableness of the rents, consideration shall be given to the presence of common (rather than private) cooking, dining and sanitary facilities, and to the provision of special amenities or of maintenance or management services.

(e) *Single room occupancy units.* (1) The Fair Market Rent for each SRO unit shall be equal to 75 percent of the 0-bedroom Fair Market Rent.

(2) In areas where HUD has approved the use of exception rents for 0-bedroom units under paragraphs (a)(3) or (a)(4) of this section, the SRO exception rent will be 75 percent of the exception rent which applies to the Existing Housing 0-bedroom unit. Further, a SRO unit may be granted an exception rent for its own specified unit size. In no case may the initial rent exceed 75 percent of 120 percent (i.e. 90 percent) of the 0-bedroom unit FMR.

(3) In determining the reasonableness of the rents, consideration will be given to the presence or absence of sanitary or kitchen facilities.

(f) *Other services—exclusion from Contract Rent.* The Contract Rent may not include the cost of providing supportive services, housekeeping or laundry services, furniture, food, or the cost of serving food.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.721 Contract Rent adjustments.

(a) Contract Rents shall be adjusted as provided in paragraphs (a)(1) and (a)(2) of this section, upon request of the Owner. The unit, however, must be in Decent, Safe, and Sanitary condition, and the Owner must otherwise be in compliance with the terms of the Lease and the Contract. Subject to § 882.719(b) (the rent reasonableness limitation),

adjustments to Contract Rents shall be as follows:

(1) *Annual adjustments.* (i) Annual adjustments as of any anniversary date shall be determined by using the applicable Section 8 Annual Adjustment Factor (Part 886 of this chapter) most recently published by HUD in the Federal Register.

(ii) Contract Rents may be adjusted upward or downward, as may be appropriate. In no case, however, shall the adjusted rent be less than the Contract Rent on the effective date of the Contract (subject to post-audit change of Contract Rent in accordance with HUD requirements, including the correction of errors in establishing the initial Contract Rent).

(2) *Special adjustments.* A PHA may make a special adjustment, subject to HUD approval, to reflect increases in actual and necessary expenses of owning and maintaining the unit that have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by the annual adjustments provided in paragraph (a)(1) of this section. The Owner must submit financial statements to the PHA which clearly support the increase.

(b) *Overall limitation.* Notwithstanding any other provisions of this part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable (as defined in § 882.719(b)) unassisted units, as determined by the PHA (and approved by HUD in the case of adjustments under paragraph (a)(2) of this section).

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.723 PHA selection and initial inspection of units.

(a) *PHA selection policy.* The PHA must adopt a written policy establishing criteria and procedures for selecting units to which assistance is to be attached under this Subpart C and must make this policy known to interested Owners. A PHA must select units in accordance with its written selection policy. PHAs are encouraged to establish preferences for units in troubled, HUD-insured subsidized multifamily projects, and for units to be used as limited equity cooperatives.

(b) *Initial inspection and determination of unit eligibility.* (1) Before selecting a unit, the PHA must inspect the property to determine that the property meets the \$1000 per assisted unit rehabilitation requirement under § 882.713(a). If the property meets this rehabilitation requirement, the PHA must determine the specific work items that are needed to bring each unit to be assisted up to the Housing Quality Standards specified in § 882.711 (or other standards as approved in the PHA's application) and to complete any other repairs needed to meet the \$1000 per assisted unit rehabilitation requirement.

(2) In addition to ascertaining whether the property meets the above repair requirement, the PHA must also consider whether the property is eligible housing within the meaning of § 882.713; meets the other Federal requirements in § 882.717 and the site and neighborhood standards cross-referenced in § 882.711; can be repaired without causing permanent displacement (see § 882.715); and will be rehabilitated with other than assistance under the U.S. Housing Act of 1937 in accordance with § 887.725. The PHA must also determine the number of current tenants that are lower income families.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.725 Prohibition against rehabilitation with U.S. Housing Act of 1937 assistance and use of flexible subsidy; pledge of Agreement or HAP Contract.

(a) Assistance may not be attached to any unit which was in the five years before execution of the agreement, or will be, rehabilitated with other assistance under the U.S. Housing Act of 1937 (e.g., public housing (development or modernization), rental rehabilitation programs under 24 CFR 511, housing development grants under 24 CFR 850, or other Section 8 programs). In addition, a unit to which assistance is to be attached under this Subpart G may not be rehabilitated with flexible subsidy assistance under Part 219 of this chapter. HUD may approve attachment of assistance to a unit rehabilitated with public housing modernization funds before conveyance to a resident management corporation if attachment of project-based assistance would facilitate sale of the public housing project to the corporation under section 21 of the U.S. Housing Act of 1937 (42 U.S.C. 1437s).

(b) If an Owner is proposing to pledge the Agreement or HAP Contract as security for financing, the Owner must

submit the financing documents to the PHA. In determining the approvability of a pledge arrangement, the PHA must review the documents submitted by the Owner to ensure that:

(1) The financing documents do not purport to pledge or give greater rights or payments to any party against the PHA than are provided to the Owner under the Agreement or HAP Contract and do not contain any requirements inconsistent with the Agreement or HAP Contract;

(2) The PHA is not a party to any of the financing documents and undertakes no obligations (other than those already specified under the Agreement or HAP Contract) in connection with the financing; and

(3) No modification or alteration is proposed or made to the Agreement or HAP Contract.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388.)

§ 882.727 Owner selection of contractor.

The Owner is responsible for selecting a competent contractor to undertake the rehabilitation. The Owner may not award contracts to, otherwise engage the services of, or fund any contractor or subcontractor that fails to provide a certification that neither it nor its principals is presently debarred, suspended, or placed in ineligibility status under 24 CFR Part 24 or is on the list of ineligible contractors or subcontractors established and maintained by the Comptroller General under 29 CFR Part 5. The PHA must promote opportunities for minority contractors to participate in the program.

§ 882.729 Work write-ups, Agreement to Enter into Housing Assistance Payments Contract, and Contract Rents in Agreement.

(a) *Work write-ups.* The Owner must prepare work write-ups and, where determined necessary by the PHA, specifications and plans. The PHA has flexibility to determine the appropriate documentation to be submitted by the Owner based on the nature of the identified rehabilitation. The work write-ups must address the specific work items identified by the PHA under § 882.723(b)(1).

(b) *Agreement.* The PHA must enter into an Agreement with the Owner in the form prescribed by HUD for assistance provided under this Subpart G. The Agreement must be executed before the start of any rehabilitation. Under the Agreement, the Owner agrees to complete rehabilitation of units in

accordance with the work write-ups, as approved by the PHA. These work write-ups must be attached to the Agreement as an exhibit.

(c) *Contract Rents in Agreement.* The Agreement must list the Contract Rents (as determined by the PHA in accordance with § 882.719, *Initial Contract Rents*) that will apply to the units after they are rehabilitated. The amounts of the Contract Rents that are listed in the Agreement or, if applicable, as reduced under § 882.713(c), shall be the initial Contract Rents upon execution of the Contract. These initial Contract Rents may not be increased for any reason. (After Contract execution the Contract Rents may be adjusted during the term of the Contract in accordance with § 882.721).

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388)

§ 882.731 Rehabilitation period.

(a) *Timely performance of work.* After the Agreement has been executed, the Owner must promptly proceed with the rehabilitation work as provided in the Agreement. In the event the work is not so commenced, diligently continued, or completed, the PHA may terminate the Agreement or take other appropriate action.

(b) *Inspections.* The PHA must inspect during rehabilitation to ensure that work is proceeding on schedule and is being accomplished in accordance with the terms of the Agreement. The inspection must be carried out to ensure that the work meets the levels of workmanship and materials specified in the work write-ups.

(c) *Changes.* The Owner must obtain prior PHA approval for any changes from the work specified in the Agreement that would alter the design or the quality of the required rehabilitation. The PHA may disapprove any changes requested by the Owner. PHA approval of changes may be conditioned on a reduction of the initial Contract Rents in the amount determined by the PHA. If the Owner makes any changes without prior PHA approval, the PHA may reduce Contract Rents in the amount determined by the PHA, and may require the Owner to remedy any deficiencies, prior to, and as a condition for, acceptance of the units. Initial Contract Rents, however, shall not be increased because of any change from the work specified in the Agreement as originally executed or for any other reason.

(d) *Notification of vacancies.* Sixty days before the scheduled completion of

the rehabilitation, the Owner must notify the PHA of any units expected to be vacant on the anticipated effective date of the Contract. The PHA must refer to the Owner appropriate-sized families from the PHA waiting list. When the Contract is executed, the Owner must notify the PHA which units are vacant. (See also §§ 882.723 and 882.745).

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388.)

§ 882.733 Rehabilitation completion.

(a) *Notification of completion.* The Owner must notify the PHA when the work is completed and submit to the PHA the evidence of completion described in paragraph (b) of this section.

(b) *Evidence of completion.* To evidence completion of the work the Owner must furnish the PHA with:

(1) A certificate of occupancy or other official approvals as required by the locality.

(2) A certification by the Owner that:

(i) The work has been completed in accordance with the requirements of the Agreement;

(ii) The unit(s) is in good and tenable condition;

(iii) There are no defects or deficiencies in the work except for items of delayed completion which are minor or which are incomplete because of weather conditions and, in any case, do not preclude or affect occupancy;

(iv) The unit(s) has been rehabilitated in accordance with the applicable zoning, building, housing and other codes, ordinances or regulations, as modified by any waivers obtained from the appropriate officials;

(v) Any unit(s) built before 1978 is in compliance with § 882.109(i) (*Lead-based paint*); and

(vi) The Owner has complied with any applicable labor standards requirements in the Agreement.

(c) *Review and inspections.* The PHA must review the evidence of completion for compliance with paragraph (b) of this section. The PHA also must inspect the unit(s) to be assisted to determine that the unit(s) has been completed in accordance with the Agreement, including meeting the Housing Quality Standards or other standards approved by HUD for the program. If the inspection discloses defects or deficiencies, the inspector must report these in detail.

(d) *Acceptance.* (1) If the PHA determines from the review and inspection that the unit(s) has been completed in accordance with the

Agreement, the PHA must accept the unit(s).

(2) If there are any items of delayed completion that are minor items or that are incomplete because of weather conditions, and in any case that do not preclude or affect occupancy, and all other requirements of the Agreement have been met, the PHA may accept the unit(s). The PHA must require the Owner to deposit in escrow with the PHA funds in an amount the PHA determines to be sufficient to ensure completion of the delayed items. The PHA and Owner must also execute a written agreement, specifying the schedule for completion of these items. If the items are not completed within the agreed time period, the PHA may terminate the Contract or exercise other rights under the Contract.

(3) If other deficiencies exist, the PHA must determine whether and to what extent the deficiencies are correctable, and whether the Contract Rents should be reduced.

(4) Otherwise, the unit(s) may not be accepted, and the Owner must be notified with a statement of the reasons for nonacceptance.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388.)

§ 882.735 Housing Assistance Payments Contract (Contract).

(a) *Required form.* The PHA must enter into a Contract with the Owner in the form prescribed by HUD for assistance provided under this Subpart G.

(b) *Term of Contract.* The Contract term may not be less than two years and may not extend beyond the ACC expiration date for the Funding Source. Within these limitations, the PHA has the sole discretion to determine the Contract term. For example, assuming that the ACC expiration date for the applicable Funding Source is June 30, 2003, and the effective date of a Contract will be July 1, 1988, that Contract could have a fixed term of 2 to 15 years. The Contract shall include a provision giving the Owner the right to terminate the Contract at the Owner's sole option after two years.

(c) *Renewal of Contracts.* A Contract that is attached to a structure under this Subpart G shall (at the option of the PHA but subject to available funds) be renewable for 2 additional 5-year terms, except that the aggregate term of the initial Contract and renewals shall not exceed 15 years.

(d) *Time of execution.* The PHA and Owner must execute the Contract if the PHA accepts the unit(s) under § 882.733.

The effective date of the Contract may not be earlier than the date of PHA inspection and acceptance of the unit(s).

(e) *Units under lease.* After commencement of the Contract term, the PHA shall make the monthly housing assistance payments in accordance with the Contract for each unit occupied under lease by a Family.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2502-0388.)

§ 882.737 Reduction of number of units covered by Contract.

Section 882.512, *Reduction of number of units covered by Contract*, applies.

§ 882.739 Responsibilities of the PHA.

Section 882.116, *Responsibilities of the PHA*, applies, except paragraphs (d), (f), and (j). The PHA must also:

(a) Brief the Family in accordance with § 882.745(d);

(b) Obtain requests for participation from Owners, and select projects;

(c) Establish initial Contract Rents in accordance with § 882.719, approve rent adjustments, and make rent reasonableness determinations;

(d) Inspect the project before, during, and upon completion of, rehabilitation; and

(e) Ensure that the amount of assistance that is attached to units is within the amounts available under the ACC.

§ 882.741 Responsibilities of the Owner.

Section 882.117, *Responsibilities of the Owner*, applies. The Owner is also responsible for performing all of the Owner responsibilities under the Agreement.

§ 882.743 Obligations of the Family.

Section 882.118, *Obligations of the Family*, applies; however, § 882.118(a) (4) and (5), which pertain to shared housing do not apply (because shared housing is not an eligible housing type under this Subpart G).

§ 882.745 Family participation.

Section 882.209, *Selection and participation*, does not apply, except as it is expressly made applicable by this section.

(a) *Selection for participation.* Section 882.209(a)(1) does not apply. All other paragraphs in § 882.209(a) apply, except paragraphs (4)(ii), (4)(iii), and (6). For purposes of this Subpart G, a Family becomes a participant when the Family and Owner execute a Lease for a unit with project-based assistance.

(b) *Determining eligibility of in-place Families.* Before a PHA selects a

specific unit to which assistance is to be attached, the PHA must determine whether the unit is occupied, and if occupied, whether the unit's occupants are eligible for assistance. If the unit is occupied by an eligible Family (including a Single Person) and the PHA selects the unit, the Family must be afforded the opportunity to lease that unit or another appropriately sized, project-based assisted unit in the project without requiring the Family to be placed on the waiting list. (The PHA is authorized, under § 812.3(b)(1) of this chapter and consistent with other applicable requirements of § 812.3, to permit occupancy of the project by Single Persons residing in the project at the time of the conversion to project-based assistance to prevent displacement.) A PHA may not select a unit, or enter into an Agreement with respect to a unit, if the unit is occupied by persons who are not eligible for participation in the program.

(c) *Filling vacant units.* (1) When the Owner notifies the PHA of vacancies in the units to which assistance is attached, the PHA will refer to the Owner one or more Families of the appropriate size on its Section 8 Existing Housing waiting list. A Family that refuses the offer of a unit assisted under this Subpart G keeps its place on the waiting list.

(2) All vacant units must be rented by the Owner to eligible Families referred by the PHA from its Section 8 Existing Housing waiting list. The PHA must determine eligibility for participation in accordance with HUD requirements.

(3) If the PHA does not refer a sufficient number of interested applicants on the PHA waiting list to the Owner within 30 days of the Owner's notification to the PHA of a vacancy, the Owner may advertise for or solicit applications from eligible very low income Families, or, if authorized by the PHA in accordance with HUD requirements, lower income Families. The Owner must refer these Families to the PHA to determine eligibility.

(4) The Owner is responsible for screening and selection of tenants. The Owner may refuse any Family, provided the Owner does not unlawfully discriminate. If the Owner rejects a Family and the Family believes that the rejection was the result of unlawful discrimination, the Family may request the assistance of the PHA in resolving the issue. If the issue is not resolved promptly, the Family may file a complaint with HUD.

(d) *Briefing of Families.* When a Family is selected to occupy a project-based unit, the PHA must provide the Family with information concerning the

tenant rent and any applicable utility allowance. The Family must also, either in group or individual sessions, be provided with a full explanation of the following:

(1) Family and Owner responsibilities under the Lease and Contract;

(2) Significant aspects of Federal, State, and fair housing law;

(3) The fact that the subsidy is tied to the unit and that the Family must occupy a unit rehabilitated under the program;

(4) The likelihood of the Family receiving Certificate after the HAP Contract expires;

(5) The Family's options under the program, if the Family is required to move because of a change in Family size or composition;

(6) The advisability and availability of blood level screening for children under seven years of age and HUD's requirements for inspecting, testing, and in certain circumstances, abating lead-based paint; and

(7) Information on the PHA's procedures for conducting informal hearings for participants, including a description of the circumstances in which the PHA is required to provide the opportunity for an informal hearing (under § 882.753), and of the procedure for requesting a hearing.

(e) *Continued assistance for a Family when the Contract is terminated.* If the Contract for the unit expires or if the PHA terminates the Contract for the unit:

(1) The PHA must issue the assisted Family in occupancy of a unit a Certificate of Family Participation for assistance under the PHA's Certificate Program unless the PHA has determined that it does not have sufficient funding for continued assistance for the Family, or unless the PHA denies issuance of a Certificate in accordance with § 882.210.

(2) If the unit is not occupied by an assisted Family, then the available funds under the ACC that were previously committed for support of the project-based assistance for the unit shall be used for the PHA's Certificate Program.

(f) *Amount of rent payable by Family to Owner.* Section 882.209(g), *Amount of rent payable by Family to Owner*, applies.

(g) *Lease requirements.* The Lease between the Family and the Owner must be in accordance with § 882.757 and any other applicable HUD regulations and requirements. The Lease must include all provisions required by HUD and must not include any of the provisions prohibited by HUD.

§ 882.747 Maintenance, operation and inspections.

Section 882.211, *Maintenance, operation and inspections*, does not apply. Instead, paragraphs (a), (b), (c), and (d) of § 882.516, *Maintenance, operation and inspections*, apply.

§ 882.749 Reexamination of Family income and composition.

Section 882.212, *Reexamination of Family income and composition*, does not apply. Instead, § 882.515, *Reexamination of Family income and composition*, applies.

§ 882.751 Overcrowded and underoccupied units.

(a) Section 882.213, *Overcrowded and underoccupied units*, does not apply.

(b) If the PHA determines that a Contract unit is not decent, safe, and sanitary because of an increase in Family size which causes the unit to be overcrowded or that Contract unit is larger than appropriate for the size of the Family in occupancy under the PHA's occupancy standards, Housing Assistance Payments with respect to the unit may not be terminated for this reason. The Owner, however, must offer the Family a suitable alternative unit if one is available and the Family shall be required to move. If the Owner does not have available a suitable unit within the Family's ability to pay the rent, the PHA (if it has sufficient funding) must offer Section 8 assistance to the Family or otherwise assist the Family in locating other standard housing in the PHA's jurisdiction within the Family's ability to pay, and require the Family to move to such a unit as soon as possible. The Family shall not be forced to move, nor shall Housing Assistance Payments under the Contract be terminated for the reasons specified in this paragraph, unless the Family rejects, without good reason, the offer of a unit that the PHA judges to be acceptable.

§ 882.753 Informal review of hearing.

(a) Section 882.216(a), *Informal review of PHA decision on application for participation*, applies, except §§ 882.216(a)(3)(ii), (iii), and (iv). In addition to the matters listed in § 882.216(a)(3)(i), the PHA is not required to provide an informal review, in accordance with § 882.216(a), to review the PHA's determination that the Contract unit is not appropriate for the Family size and composition under the PHA's occupancy standards.

(b) Section 882.216(b), *Informal hearing on PHA decision affecting participant Family*, applies, except § 882.216(b)(1)(iv) does not apply because there is no right to continued

participation in the PHA program for an assisted Family that wants to move to another dwelling unit.

§ 882.755 Grounds for denial or termination of assistance.

Section 882.210, *Grounds for denial or termination of assistance*, applies, except that for purposes of this Subpart G the grounds for denial of assistance in § 882.210(b) apply only to denial of participation in the program.

§ 882.757 Assisted tenancy and termination of tenancy.

(a) Section 882.215, *Assisted tenancy*, does not apply.

(b) *Term of Lease*. The term of a Lease, including a new Lease or a Lease amendment, executed by the Owner and the Family must be for at least one year, or the remaining term of the Contract if the remaining term of the Contract is less than one year.

(c) *Termination of tenancy*. (1) Subpart A of Part 247 of this title, *Eviction from Certain Subsidized and HUD-Owned Projects*, applies, except § 247.4(d).

(2) The Lease may contain a provision permitting the Family to terminate the Lease on not more than 60 days advance written notice to the Owner. In the case

of a Lease term for more than one year, the Lease must contain a provision permitting the Family to terminate the lease on such notice after the first year of the term.

(3) The Owner may offer the Family a new Lease for execution by the Family for a term beginning at any time after the first year of the term of the Lease. The Owner shall give the Family written notice of the offer at least 60 days before the proposed commencement date of the new Lease term. The offer may specify a reasonable time for acceptance by the Family. Failure by the Family to accept the offer of a new lease in accordance with this paragraph shall be "other good cause" for termination of tenancy (under § 247.3(a)(3)).

PART 888—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—FAIR MARKET RENTS AND CONTRACT RENT AUTOMATIC ANNUAL ADJUSTMENT FACTORS

8. The authority citation for 25 CFR Part 888 continues to read as follows:

Authority: Secs. 5 and 8, United States Housing Act of 1937 (42 U.S.C. 1437c and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

9. Section 888.111 is revised to read as follows:

§ 888.111 Fair market rents for existing housing and moderate rehabilitation: Applicability.

The Fair Market Rents (FMRS) for existing housing (see definition in § 882.102 of this chapter) are determined by the Department of Housing and Urban Development (HUD) and apply to the Section 8 Certificate Program (Part 882, Subparts A and B), including space rentals by owners of manufactured homes under the Section 8 Certificate Program (Part 882, Subpart F), the Section 8 Moderate Rehabilitation Program (Part 882, subparts D and E), Section 8 existing housing project-based assistance (Part 882, Subpart G), and Section 8 existing housing assisted under part 886, Subparts A and C (Section 8 loan management and property disposition programs).

Dated: December 28, 1988.

James E. Schoenberger,
General Deputy Assistant Secretary for
Housing-Federal Housing Commissioner.
[FR Doc. 89-72 Filed 1-3-89; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Parts 122, 123, 124, 125, 130 and
403

National Pollutant Discharge Elimination
System Permit Regulations; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, 125, 130 and 403

[FRL 3405-2]

National Pollutant Discharge Elimination System Permit Regulations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On February 4, 1987, Congress enacted the Water Quality Act of 1987 (WQA), which revised the Clean Water Act (CWA). This new statute makes a number of changes to EPA's existing National Pollutant Discharge Elimination System (NPDES) permit and pretreatment programs under section 402 of the CWA, and includes modifications to other CWA provisions as well. Today's rules revise EPA's existing NPDES, pretreatment, and water quality regulations to reflect statutory changes which supplement or supersede existing regulatory requirements.

These rules also change existing NPDES regulations to reflect recent court decisions and contain corrections of typographical errors, incorrect cross-references, and inadvertent omissions or additions of language in previous regulations implementing the NPDES permit program. These earlier regulations were published at 50 FR 6939 (February 19, 1985), 49 FR 37998 (September 26, 1984), 49 FR 31840 (August 8, 1984), 48 FR 39611 (September 26, 1983), 48 FR 14146 (April 1, 1983), and 47 FR 53685 (November 26, 1982).

EFFECTIVE DATE: These rules become effective January 4, 1989.

ADDRESSES: Comments should be addressed to: David Greenburg, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The supporting information and all comments on this rulemaking will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2402. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: David Greenburg at (202) 475-9524, Permits Division (EN-336), Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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I. Background

On February 4, 1987, Congress enacted the Water Quality Act of 1987 (WQA), which amends the Clean Water Act (CWA). The Water Quality Act makes a number of adjustments to the NPDES program.

Many of the changes necessitate revisions to the NPDES regulations. This rule contains changes which incorporate specific provisions from the Water Quality Act into existing NPDES regulations. Today's rulemaking also makes revisions to the NPDES regulations in response to recent court decisions by the U.S. Court of Appeals for the District of Columbia Circuit.

In addition to today's final rule, EPA is also preparing companion rulemakings which will propose modifications to existing regulations to implement other provisions of the WQA and court orders. These companion proposals will supplement the new provisions, as well as codify the remaining statutory language. EPA has codified in this rulemaking only those statutory provisions which can stand alone and out of context. In some cases, implementation of specific provisions of the WQA amendments will involve both codification of explicit statutory

requirements and notice and comment rulemaking to implement those parts of the statute where the Agency has discretion to act. Where these are inextricably intertwined, EPA has decided to defer codification in favor of a combined notice and comment rulemaking. This will avoid confusion which may arise from a piecemeal approach. Because the principal purpose of today's rule is to codify the new statutory requirements of the WQA, today's rulemaking is properly classified as an interpretive rule, *see, United Technologies Corporation v. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987), in that it "simply states what (EPA) thinks the [underlying] statute means and only 'reminds' affected parties of existing duties." quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n. 153 (D.C. Cir. 1979). It does not intend "to create new law, rights or duties." *Id.*

If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one. *United Technologies, supra*, at 719-20.

Today's final rule conforms to the Court's definition of an interpretative rule by revising existing regulations to implement the new statutory provisions. In most instances, EPA has codified the relevant statutory language. EPA recognizes that many of these provisions raise interpretive questions. EPA has avoided adding regulatory language to resolve interpretive questions. This is in keeping with EPA's view that the principal purpose of today's rule is to codify the new statutory requirements. EPA has articulated in the preamble, however, its view of what Congress intended these new requirements to be. Such statements of statutory interpretation are derived from legislative history and EPA's view of Congressional purposes for the new requirements.

The Administrative Procedure Act (APA) specifically excludes "interpretative" rules from its notice and comment procedures. 5 U.S.C. 553(b)(A) (1982). In addition, while EPA recognizes the importance of public comment in its rulemaking activity, the Agency believes that notice and comment is unnecessary because the "good cause" exception to the APA notice and comment requirement is applicable. The Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, specifically recognizes that there will be situations where an administrative agency need not go

through a round of public comment before issuing a rule. Under 5 U.S.C. 553(b)(B), a rule is exempt from notice and public comment requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedures thereon are impractical, unnecessary, or contrary to the public interest."

The Administrative Conference of the United States has summarized the case law on the issue of the "good cause" exemption, saying in relevant part that the exemption is warranted where:

"* * * delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial decision." ACUS Rec. 83-2: The "Good Cause" Exemption from APA Rulemaking Requirements, 1 CFR Part 305.83-2 (1984).

EPA believes the good cause exemption from the notice and comment requirements of the EPA is properly invoked here for the following reasons. The limited objective of this rule is to assure that the Code of Federal Regulations (CFR) accurately reflects the current requirements of the Water Quality Act. This serves important public policy and regulatory objectives. It eliminates any confusion on the part of the regulated community, which relies on the CFR as an accurate reflection of the controlling statutory requirements. It assures that the regulated community is aware of the new requirements and fully understands the impact of the requirements upon permitted facilities. In addition, many permits include citations to specific provisions of the federal regulations. Many State regulatory programs are modeled after EPA's regulations; some States even incorporate EPA's regulations by reference.

Today's rulemaking will eliminate many questions concerning implementation of the WQA, and will clarify in a number of areas which parts of the existing regulations are superseded by new requirements.

Moreover, it is essential to the Agency's enforcement program that the CFR accurately reflect the statutory requirements imposed on the regulated community by the WQA. Immediate codification of WQA requirements will put regulated parties on notice of their legal responsibilities and potential liabilities, without the potential for confusion that might arise in the event that a conflict is perceived between the requirements of the Act and those contained in the CFR. By reducing confusion about the program and clarifying permittees' responsibilities

under the CWA, EPA is ultimately serving the basic purposes of the statute—the protection of human health and the environment. It also promotes certainty and encourages efforts by responsible segments of the regulated community to move ahead to meet their responsibilities. By the same token, it prevents other members of the regulated community from using confusion as an excuse not to comply with the law.

For the reasons discussed above, EPA has concluded that to the extent this rule is deemed a legislative rule rather than an interpretive rule there is good cause to issue it without receiving public comment in accordance with 5 U.S.C. 553(b)(B), because under the circumstances, notice and comment procedures would be impracticable, unnecessary, and contrary to the public interest. For the same reasons, EPA believes that it has good cause to make today's rule immediately effective, as provided in 5 U.S.C. 553(d)(3).

II. Analysis of Regulatory Changes

A. Definitions

1. Point Source

Prior to passage of the WQA, the definition of "point source" in the CWA was very broad, encompassing any discharge of pollutants from a "discernible, confined and discrete conveyance." EPA has in practice interpreted this definition to include landfill leachate collection systems, since they channel runoff from landfills. Section 507 of the WQA confirmed EPA's interpretation by amending the statutory definition of point source to explicitly include landfill leachate collection systems. Accordingly, today's rulemaking revises EPA's existing definition of point source in § 122.2 by inserting the phrase "landfill leachate collection system."

2. Agricultural Storm Water Discharges

Section 503 of the WQA amended section 502(14) of the CWA to expressly exclude from the definition of point source agricultural storm water discharges. Thus, these discharges are not subject to NPDES permit requirements. Today's rule amends the existing definition of point source in § 122.2 to incorporate this statutory exclusion.

EPA's regulations had previously excluded certain agricultural and silvicultural discharges, which EPA defined as non-point, from the requirement to obtain an NPDES permit (see § 122.3(e)). This exclusion had been challenged by the Natural Resources Defense Council (NRDC) in *NRDC v. EPA*, No. 80-1607 (filed June 3, 1980) as

being beyond EPA's authority. In view of the new statutory exclusion for agricultural storm water discharges, the U.S. Court of Appeals for the District of Columbia Circuit dismissed NRDC's challenge to § 122.3(e) as moot.

Today's revision clarifies that the exclusion in § 122.3(e) includes agricultural and silvicultural storm water discharges. Silvicultural point source discharges under § 122.27 are still required to obtain NPDES permits. For consistency, EPA is also adding a reference to § 122.3(e) in the definition of point source.

3. State

Section 502 of the WQA amends the definition of "State" in § 502(3) of the CWA to include the Commonwealth of the Northern Mariana Islands. The rule promulgated today implements this statutory provision by revising EPA's existing definition in 40 CFR §§ 122.2 and 124.2 to include the Commonwealth of the Northern Mariana Islands. The Northern Marianas will be treated like any State under the Clean Water Act and can apply to administer the NPDES program.

B. Storm Water Permit Requirements

Sections 401 and 405 of the WQA address the NPDES permit program for storm water discharges and amend section 402 of the CWA by modifying paragraph (1) and adding a new paragraph (p). Today's rule incorporates both the statutory language of section 402(1)(2) relating to storm water runoff from oil, gas, and mining operations as well as the provisions of section 402(p)(1)-(p)(3) regarding municipal and industrial storm water discharges. This rulemaking codifies these WQA amendments as new regulatory provisions at § 122.26. The previous storm water provisions at § 122.26 and accompanying deadline provisions at § 122.21(c)(2) were recently withdrawn by the Agency in response to a D.C. Circuit Court of Appeals order in *NRDC v. EPA*, No. 80-1607 (December 4, 1987) (See 53 FR 4157, February 12, 1988). EPA has recently proposed NPDES application and designation requirements for storm water discharges under sections 402(p) (4) and (6) at 53 FR 49416 (December 7, 1988).

1. Section 402(1)(2)

Section 402(1)(2) prohibits EPA from requiring an NPDES permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows

which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and, which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations. Today's rule codifies this limitation on NPDES permitting authority at § 122.26(a)(3).

The legislative history accompanying this provision explains that "[w]ith respect to oil or grease or hazardous substances, the determination of whether storm water is contaminated by contact with such materials, as established by the Administrator, shall take into consideration whether these materials are present in such storm water runoff in excess of reportable quantities under section 311 of the Clean Water Act or section 102 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or in the case of mining operations, above natural background levels." (Conference Report, H 10574 *Cong. Rec.*, (daily ed. Oct. 15, 1986). The Agency will address the scope of this provision in future rulemaking.

2. Section 402(p)

Section 402(p) contains a number of important provisions and requirements relating to the issuance of NPDES permits for municipal and industrial storm water discharges. Today's rule codifies subsection 402(p)(1) at § 122.26 and provides that neither federally-administered nor approved State NPDES programs may require a permit for discharges composed entirely of storm water prior to October 1, 1992, unless the discharge falls within a list of five exceptions set forth in subsection 402(p)(2). These exceptions are also codified in today's rule and include the following storm water discharges:

(A) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(B) A discharge associated with industrial activity;

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000; or

(E) A discharge which the Administrator or the State, as the case may be, determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

The last exception at 402(p)(2)(E) provides the Administrator or the State, as the case may be, with authority to designate storm water discharges for a permit on a case-by-case basis. This authority can be used to require a designated storm water discharge associated with industrial activity or a discharge from a municipal separate storm sewer system serving a population of greater than 100,000 to obtain a permit prior to the development of permit application requirements for the particular class of storm water discharges in question. In addition, the authority applies to designated storm water discharges that are not otherwise required to obtain a permit prior to October 1, 1992 under section 402(p)(1).

In determining that a storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States for the purpose of a designation under Section 402(p)(2)(E) of the amended CWA, the legislative history for the Water Quality Act provides that "EPA or the State should use any available water quality or sampling data to determine whether the latter two criteria [of section 402(p)(2)(E)] are met, and should require additional sampling as necessary to determine whether or not these criteria are met." Conference Report, *Cong. Rec.* S16443 (daily ed. October 16, 1986). In accordance with this legislative history, EPA intends to require designated storm water dischargers to submit permit applications in accordance with the requirements of 40 CFR 122.21. The Agency will consider a number of factors when determining whether a storm water discharge is a significant contributor of pollutants to the waters of the United States. These factors include: the location of the discharge with respect to waters of the United States; the size of the discharge; the quantity and nature of the pollutants reaching waters of the United States; and any other relevant factors. As noted above, EPA has proposed a rulemaking to address NPDES application and designation requirements for storm water discharges. These factors are included in that rulemaking.

Until EPA conducts additional rulemaking under § 405 of the Water Quality Act, case-by-case designations of storm water discharges requiring a permit will be modeled on existing regulatory procedures found at § 124.52 [for permits required on a case-by-case basis]. The procedures at § 124.52 require the Regional Administrator to notify the discharger in writing of the decision that the discharge requires a permit and the reasons for the decision.

In addition, an application form is to be sent with the notice. Deadlines for submitting permit applications will be established on a case-by-case basis. Although the 60 day period provided for submitting a permit application under § 124.52 may be appropriate for many designated storm water discharges, additional time may be necessary depending upon site specific factors. For example, due to the complexities associated with determining whether a municipal, separate storm sewer system requires a permit, the Regional Administrator may provide the applicant with additional time to submit relevant information or may require that information be submitted in several phases.

The WQA also adds subsection 402(p)(3)(B)(i) to clarify that permits for municipal storm sewer discharges may be issued on a system or jurisdiction-wide basis. Today's rule codifies this clarification at § 122.26(a)(2).

A number of other provisions of Section 402 are not being codified in today's rule but still warrant discussion.

Section 402(p)(4) requires EPA to promulgate final regulations governing storm water application requirements for storm water discharges associated with industrial activity and discharges from municipal storm sewer systems serving a population of 250,000 or more by "no later than two years" after the date of enactment (i.e., no later than February 4, 1989). This provision also requires EPA to promulgate final regulations governing storm sewer permit application requirements for discharges from municipal separate storm sewer systems serving a population of 100,000 or more but less than 250,000 by "no later than four years" after enactment (i.e., no later than February 4, 1991).

In addition, section 402(p)(4) provides that permit applications for storm water discharges associated with industrial activity and large municipal separate storm sewer systems "shall be filed no later than three years" after the date of enactment of the WQA (i.e., no later than February 4, 1990). Permit applications for discharges from medium-sized municipal systems must be filed "no later than five years" after enactment (i.e., no later than February 4, 1992).

NPDES permits for all other storm water discharges are not required until October 1, 1992, unless a permit for the discharge was issued prior to the date of enactment of the WQA (i.e., February 4, 1987), or the discharge is determined to be a significant contributor of pollutants to waters of the United States or is

contributing to a violation of a water quality standard.

In addition, EPA, in consultation with the States, is required under section 402(p)(5) to conduct two studies on storm water discharges. The first study will identify those storm water discharges or classes of storm water discharges for which permits are not required prior to October 1, 1992 and determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges. This study was due by October 1, 1988. The second study will establish procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. This study was due by October 1, 1989. Based on the two studies, EPA, in consultation with State and local officials, is required to issue regulations by no later than October 1, 1992 which designate additional storm water discharges to be regulated to protect water quality and establish a comprehensive program to regulate such designated sources. The program must, at a minimum, (A) establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

C. Deadline Extensions

1. Compliance Dates

Section 301 in the WQA revises the compliance deadlines in § 301 of the CWA for the technology-based requirements of the CWA. The NPDES regulations in § 125.3 currently reflect compliance deadline requirements prior to the WQA. Under the existing rules, the compliance date for limits based on best practicable control technology currently available (BPT) is the date of permit issuance. For conventional pollutants subject to limitations based upon best conventional pollutant control technology (BCT) and for all toxic pollutants identified under CWA section 307(a) (listed at 40 CFR 401.15) and subject to limitations based upon best available technology economically achievable (BAT), compliance was required by July 1, 1984. For all other toxic pollutants subject to effluent limitations based on BAT, compliance was required no later than three years after the date such effluent limitations were incorporated into an NPDES permit. For BAT effluent limitations on other pollutants (i.e. nonconventionals), compliance was required no later than three years after the date such effluent

limitations were incorporated into an NPDES permit, or July 1, 1984, whichever was later, but in no case later than July 1, 1987.

The WQA revises certain deadlines for compliance with permits containing effluent limitations based upon BPT, BAT and BCT. Compliance with permit effluent limitations established based on BAT or BCT is required as expeditiously as practicable but in no case later than three years after the date such limitations are instituted, and in no case later than March 31, 1989.

The deadline for BPT effluent limitations continues to be July 1, 1977. However, the WQA sets a later deadline where EPA promulgates an effluent limitation after January 1, 1982 and the revised limitation requires a level of control substantially greater or is based on fundamentally different control technology than required in permits issued for the industrial category prior to January 1, 1982. Compliance for this second category of BPT effluent limitations is required as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989.

For permits based upon best professional judgment (BPJ) issued after enactment of the WQA (February 4, 1987), compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989. For BPJ permits issued before enactment of the WQA, compliance continues to be required in accordance with the Section 301(b)(1)(A), 301(b)(2)(A) and 301(b)(2)(E) deadlines in effect when the permit was issued.

Today's rule implements the statutory amendment by revising EPA's existing § 125.3(a)(2)(i)-(v) to extend the compliance deadline for each of the above mentioned categories.

2. POTW Application Deadline

Section 304 of the WQA reopens, for 180 days after enactment, the deadline for POTWs to apply under section 301(i)(1) of the CWA for extensions of the 1978 date by which secondary treatment and water quality standards in effect prior to 1977, must be achieved. The Administrator may extend this compliance deadline until no later than July 1, 1988. Many eligible POTWs applied for the 301(i) extension in 1977 and 1978. Congress enacted section 304 of the WQA to allow POTWs that did not apply in a timely manner for a 301(i) extension another chance to submit an application. Treatment works on a

compliance schedule established by a court order or final Agency (or State) order prior to February 4, 1987 were not eligible to apply for an extension under WQA section 304.

Even though the deadline for this extension is past, EPA is amending the existing regulations to conform to the statute in Section 301(i). This will assure that the regulations accurately reflect the statute. This statutory provision is implemented in today's rule by revising existing §§ 122.21(n)(2) and 122.21(m)(3). Section 122.21(n)(2) is revised to change the POTW filing deadline for a 301(i)(1) extension, from June 28, 1978 to August 3, 1987. Thus, the change in the application deadline effectively changes § 122.21(m)(3) by reopening the time period in which an industrial facility planning to discharge through a municipal treatment works that has requested an extension under 301(i) can apply for a 301(i)(2) extension. The deadline for these industrial dischargers is extended to January 30, 1988 (180 days after the POTW can request a 301(i) extension for delay in construction under § 122.21(n)(2)).

3. Innovative Technology

This codification incorporates WQA changes with respect to facilities proposing to use innovative technology to meet applicable BAT effluent limitations. Prior to passage of the WQA, the deadline for compliance with such effluent limitations by facilities using innovative technology under § 301(k) of the CWA was July 1, 1987. This date is currently found at 40 CFR 125.21, 125.23, 125.24 and 125.27. Section 305 of the WQA amends section 301(k) of the CWA, to allow the Administrator (or the State with an approved program, in consultation with the Administrator) to establish a date for compliance no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable. This codification changes §§ 125.21, 125.23, 125.24, and 125.27 to reflect the statutory change.

Prior to the 1987 amendments, the 301(k) deadline extension was available only for compliance with BAT limits. Many facilities subject to BAT also were required to meet limits for conventional pollutants based upon best conventional pollutant control technology (BCT) and used the same treatment equipment in meeting both limits. These facilities were essentially barred from obtaining 301(k) extensions because of the requirement to meet BCT. The WQA expands the scope of section 301(k) to allow an extension where the permittee

is using innovative technology for compliance with BCT. EPA is not, however, revising Subpart C of Part 125 to reflect these changes in today's rulemaking. These revisions will be addressed along with a number of additional issues in connection with section 301(k) in subsequent notice and comment rulemaking. In that rulemaking, EPA plans to define the term "significantly greater effluent reduction" for purposes of BCT. As part of that rulemaking, EPA also plans to propose regulations addressing the amendment to section 307(e) of the CWA (§ 309 WQA) which authorizes a compliance deadline extension for indirect dischargers who install an innovative technology. In addition, EPA will address specific substantive criteria for evaluating 301(k) compliance extensions. EPA proposed these criteria in 1985 pursuant to a remand in *NRDC v. EPA*, No. 84-1500 (D.C. Circuit, April 16, 1985). See 50 FR 49904, December 5, 1985. That earlier proposal was not finalized, however, and will be repropounded as part of the upcoming more general notice and comment rulemaking.

D. Industrial Variances

1. General Note on Fundamentally Different Factors Variances

Regulations establishing Fundamentally Different Factors (FDF) variances for BPT, BAT, BCT, and PSES are found at 40 CFR 125, Subpart D and 40 CFR 403.13. In the WQA, the Congress established an explicit statutory scheme for FDFs, as applied to BAT, BCT and PSES. In a future rulemaking, EPA intends to propose amendments to the substantive criteria for FDF variances consistent with the requirements of section 301(n) of the CWA for direct (40 CFR Part 125, Subpart D) and indirect (40 CFR 403.13) dischargers. The Agency will also address the regulatory authority for granting variances from BPT. However, because the legislative history of the WQA indicated that Congress intended the FDF variance provisions to be self-implementing (Conference Report, 132 H.10567, *Cong. Rec.*, Oct. 15, 1986) EPA is using the new FDF statutory criteria under section 306 of the WQA, when appropriate, on a case-by-case basis in addressing FDF variance requests.

2. Application Requirements for Fundamentally Different Factors Variance Requests

The existing NPDES regulation at § 122.21(m)(1) requires that a Fundamentally Different Factors (FDF) variance request be submitted by the

close of the public comment period on the draft permit. The existing filing deadline will continue to be used for FDF variance requests from BPT effluent guidelines. However, where variances are requested from best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT), the WQA establishes a new filing deadline in section 301(n)(2) of the CWA. The statute requires submission of an FDF application within 180 days after the date that the limitation from which the variance is sought is established or revised; EPA considers the date of the establishment of such limitation as the date the guideline or standard is published in the *Federal Register*. This is consistent with the Conference Report (132 H.10566, Oct. 15, 1986) which states that "an application under this section shall be submitted within 180 days after the publication of the initial guideline or standard" and EPA's handling of requests for relief under sections 301(c) and 301(g) of the Act (40 CFR 122.21(m)(2)) within 270 days after promulgation of an effluent guideline.

The statute is not clear when BAT and BCT FDF variance requests are due for those effluent guidelines established or revised before February 4, 1987. Such facilities previously were guided by EPA's regulations which, as stated above, allowed FDF requests to be submitted by the close of the public comment period on the draft permit. EPA will provide a period, not to exceed 180 days after publication of this final rule, to allow such facilities to file a request. (Only facilities for which the previously applicable filing deadline has not passed can make these FDF requests. The previously applicable filing deadline is the close of the draft permit's comment period.) This time period mirrors the time period for filing established by the statute, and will allow those whose time period to file a FDF variance request has not otherwise passed an opportunity to file such a request. EPA has modified the second sentence of the previously applicable provision and designated the sentence as § 122.21(m)(1)(ii), to indicate that FDF variance requests shall explain how applicable regulatory and/or statutory criteria are satisfied.

The general pretreatment regulations at 40 CFR 403.13(g) previously also contained application deadlines for FDF variance requests for indirect dischargers. Therefore, EPA has made changes to these regulations, as well, to reflect the statutory provision. Included in these changes is the provision requiring the submission of an

application within 180 days after the date an applicable categorical pretreatment standard is established or revised. As indicated above, EPA considers the date of the establishment as the date the standard is published in the *Federal Register*; this is a change from the previous regulatory requirement which was based upon the effective date of the categorical pretreatment standard.

3. Availability of Section 301(g) Variances

Section 302 of the WQA modified section 301(g) of the CWA to limit section 301(g) variance requests to five specific non-conventional pollutants (ammonia, chlorine, color, iron and total phenols (4AAP) (when the Administrator determines total phenols to be a pollutant covered by CWA section 301(b)(2)(F)). Additional non-conventional pollutants may be added to this group by the Administrator in response to petitions, under a new listing procedure specified in section 301(g)(4) of the CWA. Section 122.21(m)(2) is being revised to reflect this amendment. The current regulation does not list the five specific non-conventional pollutants and allows variances "pursuant to section 301(g) of the CWA, because of certain environmental considerations, when those requirements were based on effluent guidelines." The WQA did not revise application deadlines for section 301(g) applications which are based on section 301(j)(1)(B) of the CWA.

It has been brought to the Agency's attention that Congress did not specify how the time limit for filing the petitions for listing referenced above was to be applied to currently-pending 301(g) variance requests. EPA is only aware of one pending 301(g) variance application which requested relief for a non-conventional pollutant which was not one of the five listed pollutants. EPA will deal with this, and any other dischargers in a similarly situated position, on a case-by-case basis.

The WQA specifies deadlines for EPA decisionmaking. For example, section 301(j)(4) requires EPA to make a final decision on 301(g) applications within 365 days of filing a submission under 301(g). Because an application may be filed without being complete, the deadline for decisionmaking could pass without a complete application ever being filed. It is only logical to imply a deadline for completion of the application before EPA's decision must be made. Therefore, EPA is revising § 122.21(m)(2)(i)(B) to clarify that the complete application must be filed in

sufficient time, as determined by the Regional Division Director, to allow compliance with the decision timing requirement contained in section 301(j)(4) of the CWA. Generally, this period will require submission of the complete application no later than 180 days before the deadline for EPA to issue a decision.

EPA notes that it proposed, but has not to date finalized, substantive criteria regulations (40 CFR Part 125, Subpart F) for section 301(g) on August 7, 1984 (49 FR 31462).

4. State Concurrence on Fundamentally Different Factors and Section 301(g) Variances

Sections 301(g) and 301(n) of the CWA require State concurrence on sections 301(g) and 301(n) variance approvals. The NPDES regulations at § 124.62(e) are being revised to indicate that EPA will act on FDF or 301(g) variance requests which have been submitted to the State Director only after approval of the request by the State Director. EPA notes that in the case of a State that does not have the NPDES program, the variance request should be submitted to EPA, which will then forward the request to the appropriate State agency for concurrence; State concurrence must be obtained before EPA can approve either a 301(g) or 301(n) variance.

The general pretreatment regulation at § 403.13(k) does not authorize a State Director to forward a FDF variance request for an indirect discharger without a recommendation of approval, which EPA interprets to be the State's concurrence. Therefore, no change has been made to this provision. EPA again notes that in the case of a State that is not approved to administer the pretreatment program, State concurrence must be obtained before EPA will finally approve the FDF variance request.

E. Penalties

The WQA makes a number of changes to the civil and criminal penalty provisions of the CWA and adds an administrative penalty provision. The WQA adds CWA § 405 to the list of sections for which criminal penalties are applicable, and confirms the availability of civil and criminal penalties for violations of pretreatment requirements. Section 313 of the WQA amends CWA § 309(d) to provide that violators of CWA sections 301, 302, 306, 307, 308, 318 or 405, or any condition or limitation in an NPDES permit, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8), are subject to a maximum civil penalty of "\$25,000 per day for each

violation," in contrast to the previous maximum of "\$10,000 per day of such violation."

Section 312 of the WQA amends section 309(c)(1) of the CWA, increasing the penalty for any person who negligently violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of these sections in an NPDES permit, or any requirement imposed in a pretreatment program under section 402(a)(3) or 402(b)(8). Negligent violations of these provisions are subject to criminal penalties of \$2,500 to \$25,000 per day of violation or up to one year in prison, or both. A second offense under these provisions may be subject to penalties of not more than \$50,000 per day of violation or imprisonment of up to two years, or both.

Section 312 of the WQA also amends section 309(c) of the CWA by increasing the criminal penalties for knowing violations of sections 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such section in an NPDES permit, or any requirement imposed in a pretreatment program under section 402(a)(3) or 402(b)(8). Knowing violations of these provisions are subject to criminal penalties of \$5,000 to \$50,000 per day of violation or up to three years in prison, or both. A second offense under these paragraphs may be subject to penalties of not more than \$100,000 per day of violation or imprisonment of up to six years, or both.

The WQA also creates a new class of knowing violations. In the event of a knowing violation placing another person in imminent danger of death or serious bodily injury, individuals are subject to penalties of up to 15 years in prison or fines of up to \$250,000, or both. Organizations are subject to fines of up to \$1 million. Individuals committing a second offense under this paragraph may be subject to penalties of not more than \$500,000 or 30 years in prison, or both. Organizations are subject to fines of up to \$2 million. Section 309(c)(3)(B)(iii) of the CWA defines the term "organization" for the purpose of this provision.

Section 314 of the WQA adds section 309(g) to the CWA. This provision allows the Administrator to assess administrative penalties against persons violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any such section in a permit issued under section 402. Section 314 also provides administrative penalty authority for violations of State-issued permits under CWA section 404. Today's rulemaking,

however, does not address penalty authority for violations of section 404. Section 314 creates two classes of penalties. Penalties for Class I violations are not to exceed \$10,000 per violation, with the maximum amount assessed not to exceed \$25,000. Penalties for Class II violations are not to exceed \$10,000 per day for each day during which the violation continues, with the maximum amount not to exceed \$125,000.

EPA is revising § 122.41(a)(2) and (3) to reflect these changes. Section 122.41 sets out standard conditions that must be included in all permits. This language merely puts permittees on notice as to the applicable enforcement provisions of the CWA.

Section 312(c)(4) of the WQA increases the maximum penalty for knowingly making any false statements from six months to two years. The existing fine of not more than \$10,000 for first time false statements remains unchanged, but maximum penalties are doubled for second offenses. EPA is revising the language set out in § 122.41(j)(5) to reflect the requirements of the WQA.

F. Anti-Backsliding

EPA regulations in § 122.44(l) have generally prohibited the issuance of a permit with limitations less stringent than those in the previous permit, except in certain circumstances. The primary application of these rules has been to prohibit backsliding from permits written on a case-by-case basis under CWA section 402(a)(1) using best professional judgment (BPJ) to less stringent subsequently promulgated effluent limitations guidelines (see § 122.44(l)(2)).

In section 404 of the WQA, Congress added section 402(o) to the CWA to clarify the Congressional intent that backsliding from BPJ limits to such subsequent guidelines was prohibited. Congress also listed several exceptions to the prohibition. In general, these exceptions tracked the existing NPDES anti-backsliding rules applicable to BPJ permits. However, some of the exceptions have been changed or limited by the amendment and today's rulemaking is revising §§ 122.44(l)(2) and 122.82(a) to reflect these differences. Specifically, § 122.62(a)(15) which allowed a BPJ permit to be modified due to excessive costs is not authorized by the statute and is being deleted. The other exceptions in § 122.44(l)(2) are being conformed to the amendment. In addition, EPA is adding the limitation from CWA section 402(o)(3) prohibiting the issuance of a permit less stringent than existing effluent guidelines or

applicable State water quality standards.

The WQA also adds a prohibition against backsliding from water quality-based permits except in limited circumstances. Today's revision does not implement this prohibition. EPA plans to propose rules to implement the prohibition against backsliding from water quality-based permit limits in the near future. EPA's regulation at § 122.44(l)(1) restricts backsliding in cases not covered by the WQA amendments. EPA is not planning any rulemaking to revise this broader prohibition.

G. Inspection and Entry

In Section 310 of the WQA (amending § 308 of the CWA) Congress confirms EPA's practice of allowing contractors to represent the Administrator for purposes of entering and inspecting permitted facilities. The rule promulgated today revises EPA's existing standard permit conditions on entry and inspection under Section 308 (§ 122.41(i) of the regulations) to insert the statutory language from Section 310.

H. Sewage Sludge

Previously, the CWA regulated sludge through the NPDES program only when the sludge was discharged into surface water from a point source. In the case of publicly owned treatment works, the CWA prohibited disposal of sludge except in accordance with national criteria controlling disposal. Section 406 of the WQA amends section 405 of the CWA to expand the applicability of the sewage sludge criteria promulgated under this section to include sludge from any treatment works that treats domestic sewage, whether publicly or privately owned. Further, the amendments direct that any NPDES permits issued must include the sewage sludge criteria. Today's rulemaking revises existing § 122.44(o) by inserting a phrase to specify all treatment works treating domestic sewage are subject to national regulations controlling its disposal. Two future rulemakings will establish EPA's sludge management program. One rulemaking will propose technical standards for the use and disposal of sewage sludge; the other will establish sludge permitting requirements and requirements for approving state sludge management programs. A proposal for this second rulemaking appeared at 53 FR 7642 (March 9, 1988).

I. Partial NPDES Programs

Section 403 of the WQA amends CWA section 402 to allow States to seek partial NPDES approval in certain circumstances. Partial approval is

approval of a program which does not include NPDES, pretreatment and federal facilities authority over all facilities in the State subject to these programs. The amendment provides for two types of partial program approval. The first is intended for circumstances where jurisdiction over all direct and indirect wastewater discharges in the State is split between two or more State agencies. The amendment requires the program to cover at a minimum administration of a major category of discharges into the navigable waters of the State. The partial program must also represent a significant and identifiable part of the State program required by CWA § 402(b), and encompass all discharges under the jurisdiction of the State agency or agencies. The second type of partial program authorized is the "partial and phased" program. This requires initial approval of a major component of a State program (which also must represent a significant and identifiable part of the State program), with the State assuming the remaining program elements in phases. A State choosing this latter approach must submit a plan for assumption of the full program by a specified date not more than 5 years after submission of the partial program. To distinguish between the two types of partial programs authorized by the WQA, EPA will refer to the first as "partial" and the latter as "phased" in this and subsequent rules.

The existing regulation at § 123.1(g) expressly prohibits EPA from approving partial programs. As a first step towards implementing the amendment, today's rule deletes the existing regulatory provision prohibiting partial programs in § 123.1(g) and revises that provision to clarify that EPA will not accept partial or phased program submissions.

EPA will propose additional rules that will explain how a State can apply for and receive partial or phased program authority in a future rulemaking.

J. 304(l) Toxic Control Strategies

Section 308 of the WQA amends CWA section 304 by creating a new section 304(l). This provision requires States to develop lists of impaired waters, identify point sources and amounts of pollutants they discharge that cause violations of water quality standards and develop and implement individual control strategies for each such point source. The Agency is preparing a companion rulemaking that will address more completely the requirements of § 304(l).

1. Identification of Polluted Waters

Paragraph (A) of Section 304(l)(1) requires States to submit to EPA two

lists of waters. These lists include those waters within the State which, after application of BAT or BCT, cannot reasonably be anticipated to attain or maintain (i) State water quality standards adopted under section 303(c)(2)(B), due to toxic pollutants; or, (ii) the water quality goals of the CWA.

The list prepared under paragraph (A)(ii) includes all waters affected by toxic, conventional, and non-conventional pollutants from point and non-point sources. It includes all waters whose designated uses are less than the fishable/swimmable goals of the CWA as well as those that are not meeting water quality standards for established, designated uses. The list prepared under paragraph (A)(i) is a subset of the list required by paragraph (A)(ii) and identifies only segments where promulgated State water quality standards are not being met due to toxic pollutants. These two lists must be submitted to EPA not later than February 4, 1989.

Paragraph (B) of section 304(l)(1) requires each State to submit a list of waters for which the State does not expect the "applicable standard" under section 303 of the CWA to be achieved after the requirements of technology-based treatment standards are met due entirely or substantially to the point source discharge of any toxic pollutants listed under section 307(a) of the CWA. This list is also a subset of the (A)(ii) list.

Paragraph (C) of section 304(l)(1) requires States to determine, for each water body on the paragraph (B) list, the specific point source discharges of toxic pollutants believed to be preventing or impairing water quality. The States must also identify the amount of each pollutant discharged by each point source identified in paragraph (C). Like the three lists developed under paragraphs (A) and (B), the point sources identified under paragraph (C) must be submitted to EPA no later than February 4, 1989.

Paragraph (D) of section 304(l)(1) requires States to submit individual control strategies for each segment identified on the list required by paragraph (B) to EPA by February 4, 1989. The amendment requires that these control strategies contain effluent limitations which will result in achievement of the applicable water quality standard as soon as possible, but in no event later than 3 years after establishment of the strategy (June 4, 1992 at the latest). At section 304(l)(2), the amendment requires the Administrator to approve or disapprove

control strategies submitted by States by no later than June 4, 1989.

Today's rulemaking codifies the requirements contained in section 304(l)(1) (A), (B) and (C) at § 130.10 of the regulations. Section 304(l)(1)(D) and (2) is codified by today's rulemaking in a new section of the regulations at § 123.46.

In order to meet the deadline in paragraphs (A), (B) and (C) of section 304(l)(1), a draft final EPA guidance document, "Implementation of Requirements under Section 304(l) of the Clean Water Act As Amended" (Sept. 1987) allows States to use existing and readily available data to develop the required lists of waters. At the same time, States should continue to gather new data under existing programs where important information gaps exist. The toxics control program will continue to address emerging problems and ensure prevention of water quality impairment due to toxicity even after section 304(l) deadlines have been met.

2. EPA Review of Individual Control Strategies

Section 304(l)(3) addresses EPA review of State individual control strategies and is codified at § 123.46(b). Section 304(l)(3) requires EPA to implement the requirements of section 304(l)(1) where a State fails to submit a control strategy or where EPA does not approve a control strategy submitted by the State. The statute requires EPA to perform these tasks within one year and 120 days after the date States are required to submit individual control strategies to EPA. Thus, where EPA action is required under this provision, the Agency must carry out these tasks by June 4, 1990.

Where EPA implements the requirements of section 304(l)(1), EPA must also consider listing those waters for which any person submits a petition for listing. Today's rule adds a new provision at § 123.46 to implement this requirement.

K. New Source—Preconstruction Ban

EPA's existing regulation at § 122.29(c) (4) and (5) addresses requirements for new sources and new dischargers. Section (c)(4)(i) prohibits on-site construction of a new source for which an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) is required prior to final Agency action in issuing an NPDES permit. Section (c)(5) provides that violation of the on-site construction ban is grounds for permit denial.

The United States Court of Appeals

for the District of Columbia Circuit recently ruled on the validity of the on-site construction ban for new sources in *Natural Resources Defense Council v. Environmental Protection Agency*, 822 F.2d 104 (D.C. Cir., 1987). The court held that the construction ban exceeded the agency's authority under either the Clean Water Act or NEPA, and that EPA therefore lacks authority to ban construction of new sources pending permit issuance. Accordingly, the court granted the petition for review of this issue.

In response to the decision of the Court of Appeals for the D.C. Circuit, EPA is removing § 122.29(c) (4) and (5) from the existing NPDES regulations. EPA will address these issues in subsequent rulemaking.

L. Corrections

Today's rulemaking also corrects inadvertent omissions, erroneous internal cross-references, and typographical errors in the regulations.

III. Regulatory Analysis

A. Executive Order 12291: Regulatory Impact Analysis

Executive Order 12291 requires each Federal agency to determine if a regulation is a "major" rule as defined by the Order and "to the extent permitted by law," to prepare and consider a Regulatory Impact Analysis (RIA) in connection with every major rule. The regulation promulgated today is not a major rule, and therefore is not subject to the Regulatory Impact Analysis (RIA) requirement. This rule does not make changes in the existing law, but merely inserts the WQA provisions into the rules. This package does not incur more than \$100 million in costs and fails to qualify as a "major" rule under that standard.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each Federal agency to prepare a Regulatory Flexibility Analysis (RFA) when it promulgates a final rule. (5 U.S.C. 604). The purpose of the RFA is to describe the effects the regulations will have on small entities and examine alternatives that may reduce these effects. EPA has determined the Agency does not have to prepare a RFA to determine the impact of today's regulation on State NPDES programs and the waste-discharging industries because today's rule is merely a technical amendment implementing those provisions in the 1987 WQA that do not require additional interpretation or comments. EPA has concluded that

these amendments will not cause a significant impact on small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act is intended to minimize the reporting burden on the regulated community as well as minimize the cost of Federal information collection and dissemination. There are no information collection requirements triggered by this rule except for the listing requirements for State waters required by CWA section 304(l)(1) and implemented in today's rulemaking at 40 CFR 123.46. The public will have the opportunity to comment on this information-collection requirement in a companion rulemaking more fully implementing the requirements of section 304(l).

List of Subjects

40 CFR Part 122

Administrative practice and procedure; Air pollution control; Hazardous materials; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control; Water supply; Confidential business information.

40 CFR Part 123

Hazardous materials; Indians-lands; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control; Water supply; Intergovernmental relations; Penalties; Confidential business information.

40 CFR Part 124

Hazardous materials; Waste treatment and disposal; Water pollution control; Water supply; Indians-lands.

40 CFR Part 125

Water pollution control; Water treatment and disposal.

40 CFR Part 130

Water quality standards.

40 CFR Part 403

Confidential business information; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control.

Date: December 15, 1988.

Lee M. Thomas,
Administrator.

For the reasons set out in the Preamble, Chapter I of Title 40 of the Code of the Federal Regulations is amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS; THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.2 is amended by revising the definition of "point source" and "state" to read as follows:

§ 122.2 Definitions.

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

3. Section 122.3 is amended by revising paragraph (e) to read as follows:

§ 122.3 Exclusions.

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

4. Section 122.21 is amended by revising paragraphs (m)(1), (m)(2), (m)(3), (m)(4), (n)(2) and (o) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, § 123.25)

(m) ***

(1) *Fundamentally different factors.*

(i) A request for a variance based on the presence of "fundamentally different

factors" from those on which the effluent limitations guideline was based shall be filed as follows:

(A) For a request from best practicable control technology currently available (BPT), by the close of the public comment period under § 124.10.

(B) For a request from best available technology economically achievable (BAT) and/or best conventional pollutant control technology (BCT), by no later than:

(1) July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(2) 180 days after the date on which an effluent limitation guideline is published in the Federal Register for a request based on an effluent limitation guideline promulgated on or after February 4, 1987.

(ii) The request shall explain how the requirements of the applicable regulatory and/or statutory criteria have been met.

(2) *Non-conventional pollutants.* A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to section 301(g) of the CWA (provided however that a § 301(g) variance may only be requested for ammonia; chlorine; color; iron; total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by section 301(b)(2)(F)) and any other pollutant which the Administrator lists under section 301(g)(4) of the CWA) must be made as follows:

(i) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:

(A) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of the discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed not later than:

(1) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(2) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; and

(B) Submitting a completed request no later than the close of the public comment period under § 124.10

demonstrating that the requirements of § 124.13 and the applicable requirements of Part 125 have been met.

Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision (unless the Regional Division Director establishes a shorter or longer period).

(ii) For those requests for a variance from effluent limitations not based on effluent limitation guidelines, the request need only comply with paragraph (m)(2)(i)(B) of this section and need not be preceded by an initial request under paragraph (m)(2)(i)(A) of this section.

(3) *Delay in construction of POTW.* An extension under CWA section 301(i)(2) of the statutory deadlines in section 301 (b)(1)(A) or (b)(1)(C) of the CWA based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978 or 180 days after the relevant POTW requested an extension under paragraph (n)(2) of this section, whichever is later, but in no event may this date have been later than January 30, 1988. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

(4) *Innovative technology.* An extension under CWA section 301(k) from the statutory deadline of section 301(b)(2)(A) for best available technology or 301(b)(2)(E) for best conventional pollutant control technology, based on the use of innovative technology may be requested no later than the close of the public comment period under § 124.10 for the discharger's initial permit requiring compliance with section 301(b)(2)(A) or 301(b)(2)(E). The request shall demonstrate that the requirements of § 124.13 and Part 125, Subpart C have been met.

(n) ***

(2) *Delay in construction.* An extension under CWA section 301(i)(1) of the statutory deadlines in CWA section 301 (b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before August 3, 1987.

(3) ***

(o) *Expedited variance procedures and time extensions.* (1) Notwithstanding the time requirements in paragraphs (m) and (n) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a

condition of consideration of any potential variance request to submit a request explaining how the requirements of Part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2) A discharger who cannot file a timely complete request required under paragraph (m)(2)(i)(B) or (m)(2)(ii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

5. Section 122.26 is added to read:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see Section 123.25).

(a) *Permit requirement.* (1) Prior to October 1, 1992, a permit shall not be required for a discharge composed entirely of storm water, except for:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity;

(iii) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(iv) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000;

(v) A discharge which the Administrator or the State, as the case may be, determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(2) Permits for discharges from municipal separate storm sewers may be issued on a system or jurisdiction-wide basis.

(3) The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or do not come into contact with

any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(b) [Reserved].

§ 122.29 [Amended]

6. Section 122.29 is amended by removing subparagraphs (c) (4) and (5).

7. Section 122.41 is amended by revising paragraphs (a)(2), (i) introductory text, and (j)(5) and by adding paragraph (a)(3) to read as follows:

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25)

(a) * * *

(2) The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed \$25,000 per day for each violation. The Clean Water Act provides that any person who negligently violates sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious

bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.

(3) Any person may be assessed an administrative penalty by the Administrator for violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed \$10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$25,000. Penalties for Class II violations are not to exceed \$10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$125,000.

(i) *Inspection and entry.* The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

(j) * * *

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

8. Section 122.44 is amended by revising paragraphs (l)(2) and (o) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

(1) * * *

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions—A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if—

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) *Limitations.* In no event may a permit with respect to which paragraph (1)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in

effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(c) *Sewage sludge.* Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

§ 122.62 [Amended]

9. Section 122.62 is amended by amending paragraph (a) to remove existing paragraph (15); and redesignating existing paragraphs (16), (17), and (18) as (15), (16), and (17) respectively.

PART 123—STATE PROGRAM REQUIREMENTS

10. The authority citation for Part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

11. Section 123.1 is amended by revising paragraph (g) to read as follows:

§ 123.1 Purpose and scope.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

12. Section 123.46 is added to read as follows:

§ 123.46 Individual control strategies.

(a) Not later than February 4, 1989, each State shall submit to the Administrator for review, approval, and implementation an individual control strategy for each waterbody identified by the State pursuant to section 304(l)(1)(B) of the Act which will produce a reduction in the discharge of toxic pollutants from the point sources identified under section 304(l)(1)(C) through the establishment of effluent limitations under section 402 of the CWA and water quality standards under section 303(c)(2)(B) of the CWA, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of the establishment of such strategy.

(b) The Administrator shall approve or disapprove the control strategies submitted by any State pursuant to paragraph (a) of this section, not later than June 4, 1989. If a State fails to submit control strategies in accordance with paragraph (a) of this section or the Administrator does not approve the control strategies submitted by such State in accordance with paragraph (a), then, not later than June 4, 1990, the Administrator in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of CWA section 304(l)(1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under CWA section 304(l)(1) any navigable waters for which any person submits a petition to the Administrator for listing not later than October 1, 1989.

PART 124—PROCEDURES FOR DECISIONMAKING

13. The portion of the authority citation for Part 124 relating to the Clean Water Act continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

14. Section 124.62 is amended by revising paragraph (e) introductory text to read as follows:

§ 124.62 Decision on variances.

(e) The State Director may deny or forward to the Administrator (or his delegate) with a written concurrence a completed request for:

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

15. The authority citation for Part 125 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*, unless otherwise noted.

16. Section 125.3 is amended by revising paragraph (a)(2) to read as follows:

§ 125.3 Technology-based treatment requirements in permits.

(a) * * *

(2) For dischargers other than POTWs except as provided in § 122.29(d), effluent limitations requiring:

(i) The best practicable control technology currently available (BPT)—

(A) For effluent limitations promulgated under Section 304(b) after January 1, 1982 and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989;

(B) For effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPP) under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(C) For all other BPT effluent limitations compliance is required from the date of permit issuance.

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—

(A) For effluent limitations promulgated under Section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For effluent limitations established on a case-by-case (BPP) basis under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House

Committee on Public Works and Transportation, the best available technology economically achievable (BAT)—

(A) For effluent limitations established under Section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPP) basis under section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on BAT—

(A) For effluent limitations promulgated under Section 304(b) compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPP) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT—

(A) For effluent limitations promulgated under section 304(b), compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPP) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.

17. Section 125.21 is revised to read as follows:

§ 125.21 Statutory authority.

Section 301(k) provides that the Administrator (or a State with an approved NPDES program, in consultation with the Administrator)

may grant a compliance extension for BAT limitations to a discharger which installs an innovative technology. The innovative technology must produce either a significantly greater effluent reduction than that achieved by the best available technology economically achievable (BAT) or the same level of treatment as BAT at a significantly lower cost. The Administrator is authorized to grant compliance extensions to a date no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable.

18. Section 125.23 is amended by revising the introductory paragraph to read as follows:

§ 125.23 Request for compliance extension.

The Director shall grant a compliance extension to a date no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable, to a discharger that demonstrates:

19. Section 125.24 is amended by revising the introductory paragraph and paragraph (b) to read as follows:

§ 125.24 Permit conditions.

The Director may include any of the following conditions in the permit of a discharger to which a compliance extension beyond the otherwise applicable compliance date is granted:

(a) * * *

(b) Alternative BAT limitations that the discharger must meet as soon as possible and not later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable if the innovative technology limitations that are more stringent than BAT are not achievable.

20. Section 125.27 is amended by revising paragraph (a) to read as follows:

§ 125.27 Procedures.

(a) The procedure for requesting a section 301(k) compliance extension is contained in §§ 124.62 and 124.63. In addition, notwithstanding § 122.21(m)(4), the Director may accept applications for such extensions after the close of the public comment period on the permit if the applicant can show that information necessary to the development of the innovation was not available at the time the permit was written and that the innovative technology can be installed and operated in time to comply no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable.

PART 130—WATER QUALITY PLANNING AND MANAGEMENT

21. The authority citation for Part 130 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

22. Section 130.10 is amended by adding paragraph (d) to read as follows:

§ 130.10 State submittals to EPA.

(d) Not later than February 4, 1989, each State shall submit to EPA for review, approval, and implementation—

(1) A list of those waters within the State which after the application of effluent limitations required under section 301(b)(2) of the CWA cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 303(c)(2)(B) of the CWA, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(2) A list of all navigable waters in such State for which the State does not expect the applicable standard under section 303 of the CWA will be achieved after the requirements of sections 301(b), 306, and 307(b) are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a);

(3) For each segment of navigable waters included on such list, a determination of the specific point source discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source.

PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

23. The authority citation for Part 403 is revised to read as follows:

Authority: Sec. 54(c)(2) of the Clean Water Act of 1977, (Pub. L. 95-217) sections 204(b)(1)(C), 208(b)(2)(C)(iii), 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(b)(2)(C), 301(h)(5), 301(i)(2), 304(e), 304(g), 307, 308, 309, 402(b), 405 and 501(a) of the Federal Water Pollution Control Act (Pub. L. 92-500) as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 (Pub. L. 100-4).

24. Section 403.13 is amended by revising paragraph (g)(2) to read as follows:

§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

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(g) * * *

(2) In order to be considered, a request for a variance must be submitted no later than:

(i) July 3, 1989, for a request based on a categorical Pretreatment Standard promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(ii) 180 days after the date on which a categorical Pretreatment Standard is published in the *Federal Register* for a request based on a categorical Pretreatment Standard promulgated on or after February 4, 1987.

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Corrections

§ 122.3 [Amended]

25. Section 122.3(d) is amended by substituting "300" for "1510" and inserting "Contingency" before "Plan".

§ 122.28 [Amended]

26. Section 122.28 is amended by removing paragraph 122.28(b)(2)(i)(A) and redesignating the existing paragraphs (B), (C), (D), (E) and (F) as (A), (B), (C), (D) and (E) respectively.

§ 122.29 [Amended]

27. Section 122.29(c)(4)(i) is amended by revising the word "coditions" to read "conditions".

§ 122.45 [Amended]

28. Section 122.45(a) is amended by revising the reference to "§ 122.44(j)(2)" to read "§ 122.44(k)".

§ 122.62 [Amended]

29. Section 122.62 is amended by revising the reference to "paragraph (c) of this section" contained in the introductory paragraph to read "§ 124.5(c)".

PART 123—[AMENDED]

§ 123.27 [Amended]

30. Section 123.27, second note, is amended by revising the reference to "(a)(3)(iii)(B)" to read "(a)(3)(ii)".

PART 124—[AMENDED]

§ 124.10 [Amended]

31. Section 124.10(c)(2)(i) Note is amended by revising "NPDES of 404" to read "NPDES or Section 404."

§ 124.12 [Amended]

32. Section 124.12(a)(2) is amended by inserting a ", " after "whenever".

§ 124.56 [Amended]

33. Section 124.56(a) is amended by revising the reference to "§ 122.4" to read "§ 122.44."

§ 124.59 [Amended]

34. Section 124.59(b) is amended by revising the reference to "§ 122.47" to read "§ 122.49".

§ 124.62 [Amended]

35. Sections 124.62 (c) and (d), are amended by revising the references to "EPA Deputy Assistant Administrator for Water Enforcement" to read "EPA Office Director for Water Enforcement and Permits", and the reference in (d) to "Deputy Assistant Administrator" is revised to read "Office Director".

§ 124.65 [Amended]

36. Section 124.65 is removed and reserved.

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