(2) The posting of the above statement shall be in block letters of no less than 20-point bold type; in a color contrasting with the intended background. The label shall be placed on the vertical surface of the pump on each side with gallonage and price meters and shall be on the upper two-thirds of the pump, clearly readable to the public.

(3) The retailer shall be responsible for compliance with the labeling requirements of this section.

(b) For oxygenated gasoline programs with a credit program and no minimum oxygen content requirement, the following shall apply:

(1) Each gasoline pump stand from which oxygenated gasoline is dispensed at a retail outlet in the control area shall be affixed during the control period with a legible and conspicuous label which contains the following statement: The fuel dispensed from this pump meets the requirements of the Clean Air Act as part of a program to reduce carbon monoxide pollution from motor vehicles.

(2) The posting of the above statement shall be in block letters of no less than 20-point bold type; in a color contrasting with the intended background. The label shall be placed on the vertical surface of the pump on each side with gallonage and price meters and shall be on the upper two-thirds of the pump, clearly readable to the public.

(3) The retailer shall be responsible for compliance with the labeling requirements of this section.

[FR Doc. 92-25399 Filed 10-19-92; 8:45 am]
BILLING CODE 6560-50-M

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40 CFR Part 268

[FRL-4524-5]

Hazardous Waste Management System: Land Disposal Restrictions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Approval of Interim Final Hazardous Soil Case-By-Case Capacity Variance.

SUMMARY: In the final rule establishing land disposal restrictions (LDR) for Third Third hazardous wastes, EPA granted a national capacity variance for those hazardous soils whose best demonstrated available technology (BDAT) was incineration, retorting, or vitrification, as well as for soils contaminated with radioactive mixed waste, due to a lack of treatment capacity. Approximately 73 percent of the wastes restricted from land disposal by the Third Third rule received the national capacity variance when they were contained in soils. The national capacity variance expired on May 8, 1992.

While the variance was in effect, EPA received information from generators of hazardous soils and trade associations indicating that there would not be sufficient treatment capacity for hazardous soils when the variance expired on May 8, 1992. In response to this information, EPA gathered data to determine whether treatment capacity is available for hazardous soils to which the national capacity variance applied, and, if not, to determine the reasons that it is not available. Information obtained from various companies and trade associations indicated that a shortage of treatment capacity for hazardous soils continues to exist, for reasons beyond their control.

Under 40 CFR 268.5, EPA is approving an interim final case-by-case extension of the LDR effective date, to May 8, 1993, applicable to all persons handling Third Third hazardous soils whose BDAT is either incineration, retorting, or vitrification, or handling Third Third soils contaminated with radioactive mixed waste. No further applications will be required at this time from persons granted the extension by this action. However, EPA is requiring such persons to do certain recordkeeping, and to meet certain other requirements to qualify for the extension.

DATES: This action becomes effective on October 13, 1992 and expires on May 8, 1993. Comments on this action must be submitted on or before November 19, 1992.

ADDRESSES: Any person wishing to comment on this interim final variance must send an original and two copies of their comments to the EPA RCRA Docket (OS-305), room 2427, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Place the docket number F-92-CD2P-FFFFF on all copies of the comments. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, except on Federal holidays. The public must make an appointment to review docket materials by calling (202) 260-9327. The public may copy a maximum of 100 pages from any document in the docket at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at (800) 424-9346 toll-free or (703) 920-9810 locally. For information on specific aspects of this notice, contact Nicholas R. Vizzone, Analysis and Land Disposal Restrictions Section, Capacity Programs Branch (OS-321W), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460, (703) 308-8477.

SUPPLEMENTARY INFORMATION:

Outline

I. Background

A. History

Congress enacted the Hazardous and Solid Waste Amendments (HSWA) of 1984, which amended the Resource Conservation and Recovery Act (RCRA). Among other things, HSWA required EPA to develop regulations that would impose, on a phased schedule, restrictions on the land disposal of hazardous wastes. In particular, sections 3004(d), (e), and (g) of RCRA (2 USC 6924 (D), (e), and (g)) prohibit the land disposal of all wastes identified or listed as hazardous as of November 1984, unless the wastes are treated (or meet treatment standards) in a manner that "substantially diminish(es) the toxicity of the waste or substantially reduce(s) the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." That alternative to satisfying these treatment standards is disposal in a unit from which there will be no migration of hazardous constituents for as long as the waste remains hazardous.

In developing such a broad program, Congress recognized that adequate alternative treatment, recovery, or protective disposal capacity might not be available by the applicable effective dates. Therefore, section 3004(h)(2) authorized EPA to grant a national capacity variance (based on the earliest date that such capacity would be available but not to exceed two years) that delays the effective date for new treatment standards. In addition, under section 3004(h)(3), EPA can grant an extension of the deadline on a case-by-case basis for one year (renewable for one additional year); however, variances are limited to a four year time period from the effective date.

On June 1, 1990, EPA published a final rule (55 FR 22520) establishing prohibitions and treatment standards for wastes in the final third of scheduled prohibitions. Among other things, the

rule established prohibitions and treatment standards for soil contaminated with all hazardous wastes subject to the LDRs (except for soil contaminated with the solvents and dioxins under section 3004(e) and soil contaminated with "California List Wastes"-under section 3004(d) for which land disposal had been prohibited earlier). Because of a lack of treatment capacity as of June 1990, EPA granted a two-year national capacity variance for most hazardous soils (40 CFR 268.35(e)).[1] As such, disposal of these hazardous soils in untreated form became prohibited as of May 8, 1992.

B. Revised Treatment Standards for Hazardous Soils

Hazardous soils present unique problems under the land disposal restriction program.[2] Hazardous soils are not a distinct waste form; rather, they are an environmental medium which has become contaminated with hazardous waste. Furthermore, hazardous soils are not the product of particular industrial processes, but rather are generated, for the most part, when hazardous waste is released. The need for treatment generally occurs when the hazardous soil is removed as part of a cleanup effort.

Hazardous soils, however, are regulated as hazardous wastes by virtue of the principle that materials containing hazardous wastes are themselves considered to be hazardous wastes. When EPA promulgated treatment standards for hazardous wastes (see 57 FR 37225 (Aug. 18, 1992)), it did not establish separate standards for wastes contained in other materials such as soil. Rather, the standards for the specified wastes applied as well to materials in which such wastes are contained or mixed. Thus, the treatment standards for the wastes with which soil is contaminated are the applicable standards for treatment of the soil/waste matrix as well.

However, applying such standards to hazardous soils presents significant difficulties. In general, hazardous soil is more difficult to treat than the corresponding industrially generated RCRA hazardous waste. The treatment standards for most of the wastes affected by today's extension are based on performance of incineration. However, incineration of soil poses some technical problems including the following: (1) The feed systems for most solids incinerators are not designed to sufficiently handle the throughput needed for the large volumes of soils typically found at a site where cleanup is occurring; (2) a large percentage of the hazardous soil is contaminated with low concentrations of toxic organics and is, therefore, primarily non-combustible (due largely to the fact that soil does not burn); and (3) a significant amount of supplemental fuel must be burned and, as such, incineration of soils typically utilizes a great deal of energy to treat the waste with which the soil is contaminated.

In addition, incinerators that are currently commercially available are typically designed to manage conventional industrial hazardous wastes residues that consist primarily of organics rather than inorganics (such as those that comprise soil). These incinerators are not generally capable of handling significant volumes of hazardous soil due to their throughput designs, feed preparation units, retentions times, ash/residue handling units, etc. Incinerators designed specifically for soil have not generally been constructed, due to the previous low generation rates of soils requiring incineration and the practical problems discussed above which are exacerbated by the fact that the generation of hazardous soils is irregular both spatially and over time. This has made it difficult to develop an adequate amount of effective treatment capacity for their management. The irregular generation patterns has been a particularly significant factor impeding the development of commercial treatment capacity for soils contaminated with radioactive mixed wastes.

Because of these unique considerations where soils are concerned, EPA is currently developing a separate set of treatment standards for hazardous soils. These standards will be based on the use of alternative technologies, including the use of technologies such as soil washing, thermal desorption, and biodegradation. These standards have not been proposed to date, but EPA announced its intention to issue such standards in an Advance Notice of Proposed Rulemaking; see 56 FR 55160, 55172–77 (October 24, 1991). This notice discussed in detail the difficulty in applying the existing BDAT standards to hazardous soils and sought comment on a variety of issues to be addressed before such treatment standards are proposed.

In the meantime, however, the existing treatment standards remain applicable to soils contaminated with a hazardous waste, even though EPA has recognized the impracticality of attempting to comply with them in many instances. As would be expected in light of such impracticality and uncertainty about the standards that will ultimately be adopted, treatment capacity based on the BDAT standards of the Third Third rule has not been developed. While the existing regulations allow the regulated community to obtain treatability variances from the existing treatment standards, the regulated community believes, and EPA agrees, that it is inappropriate to use this regulatory mechanism (which was designed to address exceptional circumstances) as the means to develop treatment standards for hazardous soils; they believe it to be highly inefficient and resource intensive for both the regulated community and EPA.

Therefore, in contrast to other wastes for which the waste volumes and treatment technology are known, and capacity is lacking, but for which EPA expects capacity can and will be developed, EPA does not believe that the development of treatment capacity for effectively managing most hazardous soils can realistically be expected until revised standards more appropriate for such hazardous soils have been issued. In addition, EPA is concerned that fear of liability could hinder present and future voluntary cleanup operations. EPA believes that allowing cleanup projects to continue is more protective of the environment that allowing wastes to remain in the soil.

Therefore, EPA is granting today, on an interim final basis an extension under 40 CFR 268.5, until May 8, 1993, for most hazardous soils. Although such extensions are normally granted on the basis of site-specific applications, EPA previously granted such extensions on a nationwide basis where it has concluded that conditions warranting such an extension apply to a class of generators, or treatment or storage facilities nationwide. The Agency concludes that such circumstances exist in the case of certain hazardous soils as well.

The capacity extension provided today is applicable to hazardous soil containing Third Third wastes whose BDAT is either incineration, retorting, or vitrification, and to soils contaminated with radioactive mixed waste, which received a national capacity variance in

[1] The existing treatment standards for hazardous soil subject to the national capacity variance granted on June 1, 1990, and to today's case-by-case extension, are based upon incineration, retorting, or vitrification; the variance and extension also applies to soil contaminated with radioactive mixed wastes.

[2] Hazardous soil means soil that contains a hazardous waste listed in subpart D of 40 CFR part 261 that is subject to the LDRs of this part, or that exhibits a characteristic of hazardous waste identified in subpart C of 40 CFR part 261 that is subject to the LDRs of this part.

the Third Third rule.[3] Soils contaminated with listed solvent or dioxin waste covered by the section 3004(e) prohibition and soil contaminated with "California List Wastes" pursuant to section 3004(d) are not covered by this extension. The time for granting national and case-by-case capacity extensions for both of these groups has expired, so that further extension is not possible (See 55 FR 2265–52).

II. Justification for This Extension

A. Demonstration Under 40 CFR 268.5

In this notice, EPA is taking regulatory action to grant an interim final national case-by-case extension of the effective date for treatment standards for certain hazardous soil, as described elsewhere in the preamble.

40 CFR 268.5 specifies seven demonstrations that must be made for the approval of a case-by-case extension to a treatment standard of the prohibition effective date. From information it has obtained from generators and handlers of hazardous soils, EPA has made an evaluation of these seven required demonstrations as follows:

Demonstration 40 CFR 268.5(a)(1)

The applicant must demonstrate that he has made a good-faith effort to locate and contract with treatment, recovery, or disposal facilities nationwide to manage his waste in accordance with the effective date of the applicable restriction established under subpart C of this part.

Due to the generic nature of the problem presented by hazardous soils, it has not been practicable to gather this information from every owner/operator managing such wastes. However, site-specific information is not required because the information obtained by EPA (and placed in the docket for this extension) indicates that there is a general nationwide lack of capacity for treatment of certain hazardous soils. This is because, as discussed above, the technologies on which the promulgated treatment standards were based are simply not appropriately designed for soils in many cases, and alternative treatment standards, based on technologies designed specifically for such soils, discussed in this notice have not yet been promulgated. Parties involved in the chemical and petroleum industries, or in the remediation of contaminated sites, have indicated to EPA that they are unable at this time to locate treatment, recovery, or protective disposal capacity for hazardous soils. The data recently provided to the Agency indicate that hazardous soils contaminated with organics will be generated by hundreds of remediation efforts that are underway or are planned. The available capacity for soil incineration (the primary treatment technology for such soil) is limited and would not beable to handle this large influx of soil.

Likewise, there is limited commercial retorting capacity available for the treatment of hazardous soils contaminated with high levels of mercury. The feed systems for commercial mercury retorting units are typically designed for batch processing of small volumes of wastes (such as glass, electrical devices, and light bulbs). Other retorting systems are currently being designed for specific hazardous wastes from the chlor-alkali industry (K106—mercury sulfide wastes). Neither of these types of retorting systems have been specifically designed to handle soils nor the large volumes of soil that are expected. Information EPA has obtained from companies and trade associations indicate that clean-ups of more than 700 sites contaminated with mercury will produce over 30,000 tons of hazardous soil. The current limited retorting capacity would be overwhelmed by this amount of hazardous soil.[4]

EPA promulgated standards for arsenic wastes based on the use of a vitrification technology that was designed to handle industrial wastes with very high concentrations of arsenic. On the other hand, contaminated soils are comprised primarily of inert inorganic materials that require a significantly larger amount of energy to vitrify than the industry wastes. Commercial vitrification capacity designed specifically for soils is virtually nonexistent and, as such, is not adequate. Information obtained from companies and trade associations involved with hazardous soils (available in the docket) indicates that an estimated 120,000 tons or more of arsenic hazardous soil is expected to be generated at over 600 sites nationwide by remediation efforts. There is a clear shortfall of vitrification capacity with regard to arsenic contaminated hazardous soil.[5]

EPA believes that these data portray the existing insufficient capacity for treatment of hazardous soil. EPA agrees that there is, in general, far less treatment capacity available than would be required to handle the soil being generated, and that the development of capacity consistent with the current treatment standards is uncertain. Furthermore, the Agency would not expect the industry to construct and make available capacity based on alternative technologies until the Agency promulgates revised treatment standards for hazardous soils.

Therefore, for all of the reasons discussed above, through no fault of their own, generators are unable to, or cannot reasonably be expected to enter into contracts at this time, to construct or otherwise obtain access to treatment, recovery, or protective disposal facilities.

Demonstration 40 CFR 268.5(a)(2)

The applicant has entered into a binding contractual commitment to construct or otherwise provide alternative treatment, recovery (e.g., recycling), or disposal capacity that meets the treatment standards specified in subpart D or, where treatment standards have not been specified, such capacity is protective of human health and the environment.

For the reasons discussed above, the treatment of soil to meet certain existing BDAT standards is impractical in most cases and construction of additional capacity will require new standards to be issued. Therefore, until the anticipated revision of the treatment standards for hazardous soils is promulgated, it will be difficult, if not impossible, for generators to construct or enter into contractual commitments to

[3] The major waste types that did not receive a national capacity variance were corrosive wastes (D002), reactive wastes (D003), barium (D005), cadmium (D006), chromium (D007), lead (D008), selenium (D010), and silver (D011) wastes. For soils, contaminated with these wastes, the LDRs became effective May 8, 1990 and EPA has no authority to provide relief from these requirements. For toxicity characteristic wastes, treatment standards have not yet been set; therefore, these soils may still be land disposed.

[4] It should be noted that the process of retorting is designed to thermally desorb (i.e., extract) mercury from an inorganic matrix. In the final rule for debris wastes (57 FR 37194 (August 18, 1992)), EPA recognized the usefulness of other extraction technologies in addition to thermal desorption for the removal of other hazardous constituents from inorganic debris. As such, EPA is currently investigating alternative means of extraction of mercury that are specifically designed for contaminated soil and that could potentially achieve a level of performance similar to retorting.

[5] Many of the sites are contaminated with relatively low total concentrations of arsenic. Data received for the Third rulemaking indicated that industrial wastes containing low concentrations of arsenic could be chemically stabilized (with careful consideration of the unique chemistry of arsenic) to levels that could comply with the standard established based on vitrification. EPA is currently investigating the applicability of these special chemical stabilization process for contaminated soil as an alternative to the energy intensive vitrification processes.

construct or otherwise provide additional treatment capacity.

EPA is requiring, however, that each generator of hazardous soil subject to this extension make a good faith effort to enter into such a contract at the earliest date practicable after revised treatment standards are promulgated (if that occurs during the extension period) to provide the necessary treatment capacity.

Demonstration 40 CFR 268.5(a)(3)

Due to circumstances beyond the applicant's control, such alternative capacity cannot reasonably be made available by the applicable effective date. This demonstration may include a showing that the technical and practical difficulties associated with providing the alternative capacity will result in the capacity not being available by the applicable effective date.

As discussed above, information obtained by EPA indicates major technical and practical difficulties that make it impractical to provide alternative capacity under the current treatment standards. For example, large volumes of hazardous soils are typically found at a site where cleanup is occurring. Most feed systems on solids incinerators are not capable of handling these large volumes due to their throughput designs, feed preparation units, retention times, ash/residue handling units, etc.

EPA believes these to be valid concerns and agrees that additional time is needed to resolve these concerns by issuing revised standards tailored to the unique nature of hazardous soils. These circumstances are beyond the control of the generators who need to treat or dispose of their hazardous soils.

Demonstration 40 CFR 268.5(a)(4)

The capacity being constructed or otherwise provided by the applicant will be sufficient to manage the entire quantity of waste that is the subject of the application.

As discussed above, generators will be unable to provide capacity that meets treatment standards until the revised treatment standards are promulgated. Since generators cannot immediately plan to construct capacity because of uncertainty associated with appropriate treatment technology, EPA believes that these uncertainties make it difficult for generators to determine their capacity requirements at this time. In addition, a key timing concern relates to the immediate logistical problems relating to the time needed for permit modifications. EPA does believe, however, that adequate treatment capacity can be provided once the revised hazardous soil standards are promulgated.

Demonstration 40 CFR 268.5(a)(5)

He provides a detailed schedule for obtaining required operating and construction permits or an outline of how and when alternative capacity will be available.

As discussed above, it will be difficult for generators to provide a detailed schedule outlining how and when alternative capacity will be available until revised treatment standards are issued. EPA is requiring, however, as a condition of this variance that owners and operators place a planned schedule into their facility operating record within 90 days after the revised treatment standards are promulgated (if that date occurs before the extension expires).

Demonstration 40 CFR 268.5(a)(6)

The applicant must demonstrate that he has arranged for adequate capacity to manage his waste during an extension and has documented in the application the location of all sites at which the waste will be managed.

Due to the nature of this extension, EPA has little facility-specific information on the amount and location of the capacity that operators will use to manage their hazardous soil during this extension. Rather, as discussed below, EPA is requiring owners and operators to include documentation in the facility record describing the means by which their hazardous soil will be managed between October 13, 1992, and May 8, 1993, and showing the location and adequacy of such capacity.

Demonstration 40 CFR 268.5(a)(7)

Any waste managed in a surface impoundment or landfill during the extension period will meet the requirements of paragraph (h)(2) of 40 CFR 268.5.

Due to the nature of the extension, site specific information available to EPA on management in land disposal facilities during the extension period is not available. However, any generator who intends to manage his hazardous soil in a surface impoundment or landfill during the extension must ensure that the unit meets the requirements of 40 CFR 268.5(h)(2) (i.e., meets the minimum technology requirements set out in regulation 40 CFR parts 264 and 265) (see RCRA section 3004(h)(4)). Failure to do so may be grounds for revocation of the extension for the generator.

B. Consultation With the States

In addition to the above seven demonstrations, EPA is required under 40 CFR 268.5(e) to consult with appropriate State agencies in all affected States. EPA consulted with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) who developed a questionnaire regarding hazardous soils contaminated with mercury and arsenic, that was sent out to all the states. The questionnaire was sent to all states, of whom thirty-five states chose to respond to the survey. The responses from these states support the need for an extension of the LDR effective date for hazardous soils. These responses have been included in the docket for this extension.

C. Conclusion

Based on its evaluation of the demonstrations required under 40 CFR 268.5, and for the reasons stated above, EPA is approving an interim final case-by-case extension to the Land Disposal Restrictions for those hazardous soils previously subject to the national capacity variance for soils granted in the Third Third land disposal restriction rule (June 1, 1990) whose BDAT is either incineration, retorting or vitrification, or those Third Third soils were contaminated with radioactive mixed waste. This extension is effective from October 13, 1992, to May 8, 1993. EPA is taking this exceptional regulatory action because of the unique circumstances which have resulted in the lack of treatment, recovery, and protective disposal capacity for hazardous soil, the need for promulgation of revised treatment standards before such capacity can be constructed, and EPA's conclusion that treatment capacity meeting those standards is limited, or is limited due to logistical problems, but can be provided after revised treatment standards are promulgated. EPA believes that granting this extension is the most environmentally protective option because it will eliminate some of the regulatory obstacles that could force cleanup projects to be postponed.

III. Requirements for This Extension

To receive the benefit of this extension, a generator or owner/operator must include the following information in its onsite records by December 21, 1992, or at the time the hazardous soil is generated:

(1) The name, mailing address, location, and EPA identification number (if assigned) of facility. The term "facility" includes any site, whether permanent (such as a manufacturing plant), or temporary where hazardous soil will be generated;

(2) A description of the hazardous soil waste stream, including the RCRA waste code(s);

(3) Waste generation rates (cu.m./yr.), and estimated inventories (cu.m.);

(4) Certification as required under 40 CFR 268.5(b);

(5) The method of any storage for hazardous soil, storage capacity, and RCRA permit status (i.e., interim status, permitted, or 90-day generator) of the storage unit during the extension period; and

(6) If management of hazardous soil during the extension includes the use of a surface impoundment or landfill, the owner operator must certify that such unit meets the requirements of 40 CFR 268.5(h)(2).

In addition, within 90 days after revised treatment standards are promulgated (if this occurs before the extension expires), each owner and operator must maintain in the facility record (or, for generators, in the files maintained pursuant to § 268.7(a)(5)) a written plan that describes how the facility will obtain adequate treatment capacity. At a minimum, this plan must include a schedule of how the owner or operator plans to design, construct, and obtain the necessary permits to provide on-site treatment, recovery, or disposal capacity or a description of how the owner or operator intends to obtain a binding contractual commitment for off-site capacity.

This information must be furnished upon request, and made available at all reasonable times for inspection by any officer, employee, or representative of EPA, or the appropriate State agency who is duly designated by EPA or the State agency.

Under 40 CFR 268.5(e), the Administrator may renew this extension to allow continued land disposal from May 8, 1993, to May 8, 1994. Prior to the May 8, 1993 effective date, EPA will evaluate the status of available capacity, current capacity needs, as well as the status of the revised treatment standards for hazardous soils as they relate to an owner or operators ability to satisfy the demonstrations. Based on this evaluation, EPA may extend the national case-by-case for up to an additional year; if so, all persons who qualify for today's extension would be allowed until May 1994 to construct or otherwise provide the necessary treatment, recovery, or protective disposal capacity for his hazardous soil.

EPA is also using this opportunity to make certain clarifications to the amendatory language promulgated on June 26, 1992 (57 FR 28628) in connection with a similar extension for contaminated debris. These changes do not alter that extension and are intended solely to clarify the Agency's original intention.

List of Subjects in 40 CFR Part 268

Hazardous waste, Reporting and recordkeeping requirements.

Dated: October 13, 1992.

Don R. Clay,

Assistant Administrator, Office of Solid Waste and Emergency Response.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

2. In § 268.35 paragraphs (c), (d) and (e) are revised to read as follows:

§ 268.35 Waste specific prohibitions—Third Third wastes.

* * * * *

(c) Effective May 8, 1992, the following waste specified in 40 CFR 261.31 as EPA Hazardous Waste Numbers F039 (nonwastewaters); the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste Number K031 (nonwastewaters); K084 (nonwastewaters); K101 (nonwastewaters); K102 (nonwastewaters); K106 (nonwastewaters); the wastes specified in 40 CFR 261.33(e) as EPA Hazardous Waste Numbers P010 (nonwastewaters); P011 (nonwastewaters); P012 (nonwastewaters); P036 (nonwastewaters); P038 (nonwastewaters); P065 (nonwastewaters); P087; and P092 (nonwastewaters); the wastes specified in 40 CFR 261.33(f) as EPA Hazardous Waste Numbers U136 (nonwastewaters); and U151 (nonwastewaters); the following wastes identified as hazardous based on a characteristic alone: D004 (nonwastewaters); and D009 (nonwastewaters); and RCRA hazardous wastes that contain naturally occurring radioactive materials are prohibited from land disposal.

(d) Effective May 8, 1992, hazardous wastes listed in 40 CFR 268.10, 268.11 and 268.12 that are mixed radioactive/hazardous wastes are prohibited from land disposal, except as provided in paragraph (e) of this section.

(e) Subject to applicable prohibitions in §§ 268.30, 268.31, and 268.32, contaminated soil and debris are prohibited from land disposal as follows:

(1) Effective May 8, 1993, debris that is contaminated with wastes listed in 40 CFR 268.10, 268.11, and 268.12 (including such wastes that are mixed radioactive hazardous wastes), and debris that is contaminated with any characteristic waste for which treatment standards are established in subpart D of this part (including such wastes that are mixed radioactive hazardous wastes), are prohibited from land disposal.

(2) Effective May 8, 1993, hazardous soil having treatment standards in subpart D of this part based on incineration, mercury retorting or vitrification, and soils contaminated with hazardous wastes listed in 40 CFR 268.10, 268.11 and 268.12 that are mixed radioactive hazardous wastes, are prohibited from land disposal.

* * * * *

[FR Doc. 92-25398 Filed 10-19-92; 8:45 am]

BILLING CODE 6560-01-M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-26

[FPMR Amendment E-272]

Purchase of New Motor Vehicles

AGENCY: Federal Supply Service, GSA.

ACTION: Final rule.

SUMMARY: This regulation provides current coverage on the procurement by civilian executive agencies and the Department of Defense (DOD) of new motor vehicles from source suppliers. The regulation is issued to reflect recent changes in GSA procurement policy and procedures, methods of acquisition, and responsibility to DOD customers. The intended result is to improve overall efficiency in the Federal procurement of new motor vehicles.

EFFECTIVE DATE: October 20, 1992.

FOR FURTHER INFORMATION CONTACT: Dave Pickeral, Automotive Commodity Center (703-603-1249).

SUPPLEMENTARY INFORMATION: The General Services Administration (GSA) has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for and consequences of this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the

alternative approach involving the least net cost to society.

Regulatory Flexibility Act

The General Services Administration has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

List of Subjects in 41 CFR Part 101–26

Government property management, Motor vehicles.

For reasons set forth in the preamble, 41 CFR part 101–26 is amended as follows:

PART 101–26—PROCUREMENT SOURCES AND PROGRAMS

1. The authority citation for part 101–26 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

Subpart 101–26.5—GSA Procurement Programs

2. Section 101–26.501 is revised to read as follows:

§ 101–26.501 Purchase of new motor vehicles.

(a) It shall be the policy to procure commercially available motor vehicles, unless other vehicles are specifically required.

(b) New sedans, station wagons, and light trucks (other than those to be used for law enforcement or where other than standard vehicles are required) shall be procured as follows: Sedans, class IB-subcompact or II-compact; station wagons, class I-subcompact or class II compact vehicles, as described in Federal standard No. 122; and light trucks as defined in Federal standard Nos. 292 and 307. (Federal standard Nos. 122, 292, and 307 as used in this section mean the latest editions.)

Requisitions submitted to GSA for motor vehicles shall be in conformance with the requirements of subpart 101–38.1.

(1) Standard passenger vehicles as defined in Federal standard No. 122 are considered to be completely equipped for ordinary operation and are subject to the maximum statutory price limitation.

(2) Items (vehicles) included in Federal standard No. 122 other than those listed as standard (basic units) are considered to be equipped with additional systems and equipment for passenger vehicles.

(c) Requisitions submitted to GSA for the acquisition of new passenger vehicles and light trucks under 8500 GVWR (gross vehicle weight rating) shall be in conformance with Pub. L. 94–163 and Executive Order 12375.

(d) New trucks and buses shall be requisitioned in accordance with the provisions of this § 101–26.501 and the following:

(1) Light trucks shall be in accordance with Federal standard Nos. 292 and 307; and

(2) Medium and heavy trucks and buses, when not procured from standardized buying programs, shall be in accordance with the latest editions of Federal standard No. 794, Federal specification Nos. KKK–T–2107, 2108, 2109, 2110, 2111, and Federal specification No. KKK–B–1579. Standardized buying programs shall be based on these specifications as appropriate.

(e) Selection of additional systems or equipment in new vehicles shall be made by the requiring agency and shall be based on the need to provide for overall safety, efficiency, economy, and suitability of the vehicle for the purposes intended pursuant to § 101–38.104–2.

(1) The essentiality of such systems or equipment shall be weighed against the economic factors involved, the potential benefits to be derived therefrom, and the impact on the fuel consumption characteristics of the vehicle.

(2) Additional systems or equipment requested to be purchased by GSA will be construed to have been determined essential for the effective operation of the vehicle involved by the agency head or a designee. When systems or equipment other than those listed in Federal standards are requested, these systems or equipment shall be considered and treated as deviations under § 101–26.501–4(b).

3. Section 101–26.501–1 is amended by revising paragraph (a) to read as follows:

§ 101–26.501–1 General.

* * * * *

(a) DOD shall submit to GSA for procurement its orders for purchase in the United States for all non-tactical vehicles including, but not limited to, commercial-type passenger motor vehicles (FSC 2310), including buses, and trucks and truck tractors (FSC 2320).

* * * * *

4. Section 101–26.501–2 is revised to read as follows:

§ 101–26.501–2 Standardized buying programs.

Wherever practical, requirements for motor vehicles will be satisfied under existing standardized buying programs (Indefinite Quantity, Requirements, Federal Supply Schedule contracts). Agencies not familiar with these programs, or seeking additional information about them, are encouraged to contact the GSA Automotive Commodity Center prior to submitting their orders.

(a) Requirements contracts are in place or anticipated to be in place for the following types of standard motor vehicles:

(1) Medium and heavy trucks:

(i) 4x2 and 6x4 cab-chassis, stake, van, dump, and truck-tractor; 19,000 to 60,000 pounds GVWR.

(ii) 4x4 and 6x4 cab-chassis, stake, dump, and truck-tractor; 26,000 to 52,000 pounds GVWR.

(iii) 1,200 and 2,000 gallon fuel servicing vehicles; and 2,000 gallon aircraft refueler.

(2) Ambulances (in accordance with Federal Specification No. KKK–A–1822): Type I, modular body on cab-chassis; Type II, van body with raised roof; Type III, modular body on van cutaway chassis.

(3) Buses and mini-buses, including school buses:

(i) 32 to 44 adult passenger; 48 to 66 school age passenger.

(ii) 12 to 28 adult passenger; 24 to 42 school age passenger.

(4) Sedans and station wagons (based on standardized, consolidated requirements).

(5) Certain types of light trucks (e.g., conventional carryall, maintenance telephone utility); requirements contracts are established to cover as many types of light trucks as feasible.

(b) Federal Supply Schedule contracts are available to cover certain special purpose motor vehicles, such as firefighting trucks, waste disposal trucks, and construction equipment.

5. Section 101–26.501–3 is revised to read as follows:

§ 101–26.501–3 Consolidated purchase program.

(a) Except as noted in § 101–26.501(a) and where motor vehicle requirements can not be satisfied under the standardized buying programs described in § 101–26.501–2, GSA will continue to make consolidated procurements of all motor vehicle types each year to achieve maximum benefits and economies, as follows:

(1) Family buys—Large annual consolidated buys for sedans, station wagons, and standard light trucks, purchased in the aggregate by group to the extent practical. These procurements are designed to obtain the best market prices available and are normally definite quantity type with maximum option potential. It is anticipated that

resulting contracts will remain in place from approximately mid-November to approximately May 1 (or end of model year closeout).

(2) Two (2) volume procurements each year for light trucks of the types covered by Federal standard Nos. 292 and 307, but not covered by standardized buying programs or family buys, as previously described. Requisitions to be included under these two procurements should reach the GSA Automotive Commodity Center by June 15 and December 1 respectively.

(3) Up to three (3) consolidated procurements for medium and heavy trucks and buses of the types covered by Federal standard No. 794, Federal specification Nos. KKK–T–2107, 2108, 2109, 2110, 2111, and Federal specification No. KKK–B–1579.

(b) Requirements not covered by Federal standards 122, 292, 307, or 794 shall conform with the provisions of § 101–26.501–4.

6. Section 101–26.501–4 is revised to read as follows:

§ 101–26.501–4 Submission of orders.

Orders for all motor vehicles shall be submitted on GSA Form 1781, Motor Vehicle Requisition, or DD Form 448, Military Interdepartmental Purchase Request (MIPR), to the General Services Administration, Automotive Commodity Center (FCA), Washington, DC 20406, and shall contain required FEDSTRIP data for mechanized processing. The Department of Defense shall ensure that appropriate MILSTRIP data are entered on DD Form 448.

(a) Requisitions covering vehicle types not included in Federal standard Nos. 122, 292, 307, or 794, in a military specification, or in an agency specification on file with GSA, shall contain complete descriptions of the vehicles required, the intended use of the vehicles, and terrain in which the vehicles will be used.

(b) Requisitions for vehicles within the category of Federal standard Nos. 122, 292, 307, or 794, but for which deviations from such standards are required, unless already waived by the Director, Automotive Commodity Center (FCA), Federal Supply Service, GSA, Washington, DC 20406, shall include with the requisition a justification supporting each deviation from the standards and shall contain a statement of the intended use of the vehicles, including a description of the terrain in which the vehicles will be used. Prior approval of deviations shall be indicated on the requisitions by citing the waiver authorization number.

(c) GSA Form 1781, Motor Vehicle Requisition, has been specifically designed for agency use to expedite ordering of all vehicles. Agencies are requested to use GSA Form 1781 as a single-line-item requisition for nonstandard as well as standard vehicles. When ordering standard vehicles, the appropriate standard item number for such vehicles equipped to meet specific operational needs may be selected from the applicable table in the Federal standards. Additional systems and equipment may be added by inserting in the "Option Codes" portion of the form the appropriate code for the selected items from the table of options in the standard. When ordering nonstandard vehicles or options, the instructions on the reverse of GSA Form 1781, properly completed, will satisfy the requirements regarding the submission of requisitions as set forth in paragraph (a) of this section.

(d) Each requisition shall indicate the appropriation fund code to be charged and must bear the original signature of an officer authorized to obligate cited funds.

(e) Separate requisitions shall be submitted for each vehicle type and consignee.

7. Section 101–26.501–5 is revised to read as follows:

§ 101–26.501–5 Procurement time schedules.

(a) Requisitions covering vehicle types included in Federal standard Nos. 122, 292, 307, 794, Federal specification Nos. KKK–T–2107, 2108, 2109, 2110, 2111, and Federal specification No. KKK–B–1579 will be procured either under a standardized buying program, as described in § 101–26.501–2, or a consolidated purchase program, as described in § 101–26.501–3, unless a statement is included justifying the need for delivery other than the delivery times indicated in this section. Requisitions containing a statement of justification will be handled on an emergency basis in accordance with § 101–26.501–5(b).

(b) *Emergency requirements.* Emergency requirements will receive special handling only when the requisitions are accompanied by adequate justification for individual purchase action. Every effort will be made to meet the delivery date specified in the requisition.

(c) *Delivery time.* Delivery times for motor vehicle requirements will range widely depending on method of purchase.

(1) *Existing contracts.* Delivery times for motor vehicle requirements submitted and placed against existing in-place contracts (family buy option, requirements contract or Federal Supply Schedule contract) will range from 60 to 150 days from date of purchase order.

(2) *Volume consolidated procurements.* Delivery times for motor vehicle requirements submitted for volume consolidated purchases will range from 210 to 330 days after solicitation consolidation date. Included in delivery time estimates are 90 to 105 days required for soliciting and receiving offers, 30 to 60 days for evaluation and award of contracts, 90 to 180 days from date of award for delivery of vehicles to destination (dealer or consignee, as applicable).

(3) For buses, ambulances, and other special duty vehicles which can not be procured under the standardized buying programs or consolidated purchase programs described in §§ 101–26.501–2 and 101–26.501–3, 240 to 270 days from date of award are usually required to effect delivery. However, special purpose vehicles with unique characteristics, such as certain types of firetrucks, may require longer delivery. In such instances, every effort will be made by GSA to facilitate deliveries and keep the requisitioning agencies informed of any unauthorized delay.

8. Section 101–26.501–6 is amended by revising paragraphs (b) and (c) to read as follows:

§ 101–26.501–6 Forms used in connection with delivery of vehicles.

* * * * *

(b) *Standard Form 368, Quality Deficiency Report (Category II).* GSA is constantly striving to improve customer service and the quality of motor vehicles for which it contracts. To inform contractors of the deficiencies noted during the life of the vehicles, Standard Form 368 shall be prepared by the consignee and sent to GSA describing details of vehicle deficiency and action taken for correction. Procedures for documenting and reporting quality deficiencies are set forth in the GSA Publication "Discrepancies or Deficiencies in GSA or DOD Shipments, Material or Billings." Agencies are urged to report all deficiencies to GSA irrespective of satisfactory corrective action taken by the manufacturer's authorized dealer. If the dealer refuses to take corrective action on any vehicle within its warranty period, the report shall so state and include an explanation of circumstances. Standard Form 368 shall also be used to report all noncompliance with specifications or other requirements of the purchase order.

(c) *Instructions to Consignee Receiving New Motor Vehicles Purchased by General Services*

Administration. This information is printed on the reverse of the consignee copy of the delivery order. Personnel responsible for receipt and operation of Government motor vehicles should be familiar with the instructions and information contained in the document entitled "Instructions to Consignee Receiving New Motor Vehicles Purchased by General Services Administration."

9. Section 101–26.501–7 is revised to read as follows:

§ 101–26.501–7 Sale of vehicles.

GSA will not solicit trade-in bids when purchasing new motor vehicles for replacement purposes because experience has shown that suppliers (manufacturers) are unwilling to accept used vehicles in part payment for new ones. Accordingly, used vehicles that are being replaced will be disposed of by sale as set forth in Part 101–46.

§ 101–26.501–8 [Reserved]

10. Section 101–26.501–8 is removed and reserved.

Dated: August 28, 1992.

Richard G. Austin,

Administrator of General Services.

[FR Doc. 92–25320 Filed 10–19–92; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 412 and 466

[HSQ–199–F]

RIN 0938–AF88

Medicare Program; Payment to Hospitals for Furnishing Photocopies to Peer Review Organizations

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations governing Utilization and Quality Control Peer Review Organizations (PROs) to provide for a uniform methodology for determining payment to hospitals for the costs of furnishing photocopies of medical records of Medicare beneficiaries to PROs. We also are establishing the rate of payment for these costs at $.07 per page. This amount includes payment for labor and supply costs, but not the costs of equipment and overhead, which are already otherwise paid under the Medicare program.

EFFECTIVE DATE: This regulation is effective November 19, 1992.

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FOR FURTHER INFORMATION CONTACT: Sandy Kappert, 410–966–6890.

SUPPLEMENTARY INFORMATION:

I. Background

The Peer Review Improvement Act of 1982 (Title I, subtitle C of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248) amended part B of title XI of the Social Security Act (the Act) to establish the Utilization and Quality Control Peer Review Organization (PRO) program. The 1982 legislation provided that PROs assume the responsibilities that previously had been assigned to Professional Standards Review Organizations (PSROs) and fiscal intermediaries. Those responsibilities include the review of health care services funded under Medicare (Title XVIII of the Act) to determine whether those services are medically necessary, are furnished in the most appropriate setting and are of a quality that meets professionally recognized standards. In addition, PROs monitor and validate a sample of diagnostic and procedural information supplied by hospitals to fiscal intermediaries regarding the inpatient hospital prospective payment system.

To carry out their responsibilities, PROs acquire information from the medical records of patients and from other records maintained by health care facilities, practitioners, and claims payment agencies. In addition, they generate information regarding the quality and appropriateness of health care services. PROs use this information to develop and review profiles (practice patterns) that enable them to focus on suppliers of health care (for example, practitioners and hospitals) and specific aspects of Medicare payment (for example, the assignment of discharges to diagnosis-related groups (DRGs) in the hospital prospective payment system) for the purpose of assessing the care being furnished and to recommend any required corrective action.

Under section 1866(a)(1)(F) of the Act, in order to receive payment under the Medicare program, a hospital must enter into an agreement with the PRO in the area in which the hospital is located for the peer review of Medicare services provided by the hospital. Section 466.78(b) provides that health care facilities that submit Medicare claims must cooperate in the assumption and conduct of PRO review. Facilities must provide patient care data and other pertinent data to the PRO at the time the PRO is collecting review information necessary for making its determinations.

Section 466.78(b)(2) currently provides that when the PRO review is conducted offsite, the facility must photocopy and deliver to the PRO, without charge, all required information within 30 days of the request. This regulation was challenged by a group of Wisconsin hospitals that brought suit against the Wisconsin Peer Review Organization (WiPRO) and the Secretary of the Department of Health and Human Services (HHS) arguing that the "without charge" provision did not adequately take into account the hospitals' increased costs of offsite review. The United States District Court for the Western District of Wisconsin handed down a decision in the case in favor of the hospitals. *Burlington Memorial Hospital et. al.* v. *Bowen*, 644 F. Supp. 1020 (W.D. Wis. 1986).

The Court found that the rulemaking record did not adequately address the Secretary's contention that photocopying costs were already included as part of a hospital's payment under the Medicare prospective payment system. The Court concurred, however, with the Secretary's position that the statute does not require that these costs be paid twice; that is, once under the prospective payment system and again under section 1866(a)(1)(F) of the Act.

The thrust of the Court's holding in the *Burlington Memorial Hospital* case was echoed in two similar suits, *American Hospital Association (AHA)* v. *Bowen*, No. 86–1487–A (E.D. Va. July 13, 1987) and *Beverly Hospital et al.* v. *Bowen*, No. 86–3079 (L.F.O.), (D.D.C. Oct. 26, 1987). In the *AHA* and *Beverly Hospital*

cases, the courts expressed the expectation that HHS would promulgate regulations that would specifically accommodate the increased costs that providers incur in the context of offsite review that are not already otherwise paid under the Medicare program.

In light of these court decisions, on March 16, 1988, we published in the Federal Register a proposed rule that would, among other things, permit payment to hospitals for the costs of photocopying medical records required by the PROs for their review (53 FR 8654–8687). In particular, we proposed to revise § 466.78(b)(2) and add a new paragraph (c) to that section. The Secretary would furnish PROs with funds to pay hospitals directly for photocopying and mailing records for offset review. These payments would be in addition to other payments made to a hospital under the prospective payment system. A hospital not being paid under the prospective payment system would continue to be paid for photocopying costs as part of its overall payment under Medicare's principles of reasonable cost.

In determining that HHS should pay certain costs of photocopying related to PRO review, the Agency does not concede that it is necessarily required to do so under law. The prospective payment system is designed to cover the general category of administrative costs without regard to particular increased or decreased burdens that particular hospitals might incur because of changes in Medicare program requirements, other legal requirements, or other external forces that may impose greater or lesser administrative burdens on a hospital. Based on the court decisions reviewing the photocopying regulation and our further analysis of costs incurred by hospitals under the PSRO and PRO review systems, we concluded, however, that the cost of PRO photocopying could reasonably be the object of separate payment.

II. Payment Under the Proposed Rule

Under the proposed rule PROs would negotiate with prospective payment hospitals in their area and, within established constraints, implement a payment process with each hospital that would determine the frequency of payments and the manner by which the PRO would verify aspects of the hospital's photocopying costs. The supplemental payment for photocopying would be made at a national rate based on a fixed cost per page. The fixed cost per page was to be determined by dividing the total costs of photocopying by the number of pages. The resulting cost per page was equivalent to $.0498. We proposed to pay postage costs as an item over and above the amount we would pay for photocopying costs.

In determining the payment rate per page, in both the proposed rule and this final regulation, we have examined the four basic cost components of photocopying: Labor, supplies, equipment, and overhead. In the proposed regulation, the labor cost per page was determined by dividing the annual salary and fringe benefit costs of the individual performing the photocopy activities by the number of pages photocopied in one year. We assumed an average salary cost of $16,310 based on the payment rate for a GS–5 federal employee, an experienced mid-level secretary. Fringe benefits for the individual were set at 27.9% of salary, a standard rate set forth in OMB Circular A–76, that amounted to $4,551. As a result, total labor costs were estimated to be $20,861 per year.

To determine a per-page rate, the total labor costs were divided by the number of pages that could reasonably be expected to be photocopied in a year. In the proposed rule, we indicated that a typical photocopy machine copies 748,000 pages per year. This amount was based on copying documents at a rate of six pages per minute for each hour in an eight hour day, five days a week, 52 weeks a year. This estimate was quite conservative since it was based entirely upon hand feeding of documents when it is clear that there are many times when automatic feeds will be used. Automatic feeds permit copying at a rate of 60 pages per minute. The use of automatic feeds greatly increases the number of pages that can be generated on an hourly basis, and as a result, greatly decreases the cost of photocopying per page.

Under the proposed rule, labor costs amounted to approximately $.0279 per page. This amount was derived by dividing the total labor costs of $20,861 by 748,000, the number of copies made in one year.

In the proposed rule, paper costs were based on a provider's projected average use of 150 cases of paper purchased for slightly in excess of $30 per case. Costs for toner and developer were calculated on the basis of a machine producing 748,000 copies annually.

The equipment costs were determined based on a price range of lease costs of typical machines that reasonably represented the spectrum of types and costs that would tend to be found nationally. For each machine we determined the basic rental amount and the costs for maintenance and repairs.

Total additional Medicare payment was calculated at $.0498 per page for labor, supplies and equipment. Under the proposed regulation no additional payment was provided for indirect, overhead or space costs as these costs are already paid under the Medicare program.

In the March 16, 1988 proposed rule, we proposed to make the change in the regulation governing the payment of photocopying costs retroactive to April 1, 1987. That is, we concluded that an adjustment to a provider's reimbursement to reflect a greater use of offsite review was warranted for periods after April 1, 1987. The April 1st date signified the date HCFA determined an adjustment to the current rule was justified in light of what was essentially a change in circumstances surrounding the implementation of the PRO program, namely the increased use of offsite review which may have increased the costs of a provider in a way that was not accounted for in the prospective payment system. Therefore, with publication of the proposed rule, HCFA began paying PROs, who in turn paid hospitals, at $.0498 per page. Under the proposed regulation, any challenge relating to payment for photocopying costs for offsite review for cost reporting periods ending before the effective date of the regulation had to be expressed in the form of a claim for additional payment for inpatient costs on the hospital's cost report submitted to the fiscal intermediary and subject to review pursuant to the provisions of section 1878 of the Act and subpart R of 42 CFR part 405.

Subsequent to publication of the proposed regulation, however, the United States Court of Appeals for the District of Columbia Circuit ruled in the appeal of the *Beverly Hospital* decision that the rulemaking process was not the proper vehicle for providing retroactive payment for photocopying. *Beverly Hospital, et al.* v. *Bowen*, 872 F.2d 483 (D.C. Cir. 1989). The Court of Appeals remanded the case to the District Court with instructions that HHS ensure the hospitals a fair opportunity to recover photocopy costs incurred from the time of the initial promulgation of the regulation requiring photocopies to be provided without charge.

Before the District Court took any action on the remand, a class action was filed seeking similar retroactive payments for all hospitals participating in the Medicare program. *Swedish Hospital, et al.* v. *Sullivan* (D.D.C. filed June 12, 1989). Subsequently, the parties in the *Swedish Hospital* case reached a settlement agreement with regard to the

additional payments to be made to hospitals for PRO photocopying for the period July 1, 1984 to June 30, 1991. As a result of the decision in *Beverly Hospital* and the settlement in *Swedish Hospital* governing prior periods, this final rule deals only with prospective payment for PRO photocopying from the date of publication of this final regulation. Additional issues that were included in the proposed regulation, but do not involve photocopy costs, are being addressed in a separate rule.

We have continued to make payment for photocopying at a rate of $.0498 per page since July 1, 1991. Additional payments will be made by HHS, outside the rulemaking process, for PRO photocopying for the period from July 1, 1991 (the end of the settlement period) to the effective date of this final rule to provide for the difference between $.0498 and the amount established by this final regulation.

III. Provisions of This Final Rule and Discussion of Comments

We received a total of 197 comments regarding photocopy costs in response to our March 16, 1988 proposed rule. Comments were received from 159 hospitals that participate in the Medicare and Medicaid programs. We also received comments from 19 hospital associations, six medical record associations, and several miscellaneous sources. The American Hospital Association (AHA) also provided HHS with the results of a study it had conducted entitled "Photocopy Cost Determination Study: Final Report" ("AHA Report"). Many of the commenters referred to and relied upon this study. In addition, the parties in the *Swedish Hospital* litigation have conducted discovery with regard to the costs of photocopying for PRO review. The comments received, including the results of the AHA study, and the relevant information obtained during the course of the *Swedish Hospital* litigation have been included in the rulemaking record and have been considered in the development of this final rule. Specific comments are addressed following the description of the provisions of this final rule.

A. Payment Under the Final Rule

In the proposed rule, we presented a methodology that yields a uniform per-page rate that would be applied on a nationwide basis to all Medicare prospective payment hospitals that have PRO agreements. We received no comments concerning the use of a uniform per-page rate and we continue to believe it should be utilized; accordingly, we have not changed this approach in this final rule. As described below, however, we have modified the calculation of that rate.

In developing the final rule, we took into account the two major principles enunciated in the court decisions described above. First, hospitals should be paid for the reasonable costs of providing photocopies pursuant to their PRO agreements. Second, hospitals should not be paid twice for these costs. In other words, any costs of complying with the PRO agreement that are paid elsewhere under the Medicare program should not be paid through the methodology established in this rule. With these principles in mind, and based on the comments received as well as other considerations set forth below, we have made two basic changes to the approach taken in the proposed rule: Prospective payment for PRO photocopying will be made under the regulation from the data of publication of the final regulation and the additional Medicare payment will be increased from $.0498 per page to $.07 per page, exclusive of postage costs.

As described in greater detail below, we believe that, as a result, total payment to hospitals under the Medicare program for PRO photocopy costs will amount to over $.10 a page. Of this amount, hospitals will be paid directly under this regulation for $.07 per page for labor and supply costs. The remaining costs per page represent equipment and overhead costs for which hospitals are already paid under other payment provisions of the Medicare program.

Labor Costs

In response to the proposed rule, commenters objected that labor costs were not accurately calculated because it was unrealistic to assume that an individual photocopying records for a PRO could make 748,000 copies per year. They objected that time was required for processing the request in addition to the actual time spent photocopying and that these costs were not adequately accounted for in the prospective payment system base year rate. In addition, we have determined that the number of hours available for copying should be reduced to allow for vacation and sick leave and holidays.

As a result, the total number of hours available for an individual to perform photocopying has first been reduced to account for 2 weeks of vacation leave, 2 weeks of sick leave, and 10 holidays, or a total of 30 days times 8 hours a day or 240 hours. The total number of hours available in a work year is 2080 (52 weeks times 40 hours). When 240 hours are subtracted for leave and holidays there are 1840 hours remaining. Under the formula set forth above, 662,400 copies could then be made per year (6 pages per minute times 60 minutes in an hour times 1840 hours).

In addition, we carefully considered the comments regarding the need to perform other tasks such as retrieval and refiling of the records, in addition to the actual photocopying. As a result, we have further adjusted the calculation to take into account the appropriate amount of labor time required to perform all the steps identified by the commenters that are performed in addition to the actual photocopying, for example, log in the request, retrieve the record, refile the record, and mail the copies. Although it is impossible to determine precisely what percentage of time is devoted to these tasks, several indicators provide guidance in determining a reasonable allocation of time for these tasks.

The AHA Report included a time study of the steps believed to be included in the production of copies of hospital records for PRO review. An examination of the results of this study indicates that between 42% and 57% of the time was spent on photocopying, depending upon which steps are included in the definition of photocopying. The remainder of time was dedicated to other tasks such as logging in the request, retrieving the record, refiling the record, and mailing the copies.

In addition, during the discovery conducted in the *Swedish Hospital* litigation, deposition testimony described another time study conducted by a photocopy company of the steps necessary for copying hospital records for PRO review. This study indicated that 65% of the time was devoted to actual photocopying with the remainder of the time spent on such tasks as logging in the request, retrieving the record, disassembling the chart, reassembling the chart, and mailing the copies to the PRO. Although it is impossible to determine exactly what percentage of time any given hospital will devote to the steps necessary to complete the required photocopying, these studies provide some general indication of the division of tasks necessary to provide the required copies.

As a result, we have adopted a figure of 55%, which is the rounded average of the three figures that are available from these studies and which we believe is a reasonable division of the steps required. If it is assumed that only 55% of the time is available for actual photocopying, then the number of copies

which can be made by an individual would be reduced accordingly. Fifty-five percent of 662,400 copies equals 364,320 copies annually.

We have also increased the salary level of the employee to $17,686 to reflect the calendar year 1992 GS–5 level secretary pay rate. When this number is added to the fringe benefits, calculated at 27.9%, the total annual labor costs equal $22,620. When the annual labor costs of $22,620 are divided by 364,320, the revised number of copies in a year, the labor cost to be paid per page equals $.06 per-page.

Supply Costs

We have also increased the amount for paper, toner, and supplies from $.0063 to $.01 per page. We note at the outset that, as described below, it is clearly documented that the costs for all supplies used in PSRO delegated review were reported as indirect, overhead costs on each hospital's cost report and thus were included in the hospital's base year costs upon which the base year prospective payment rates were established. We believe that supply costs for the extensive activities conducted as part of PSRO delegated review were by definition greater than the paper and toner required for the single activity of PRO photocopying. Thus, there is a strong basis for excluding the costs of supplies from the additional amount to be paid. However, because it is difficult to document the amount already paid, and relatively easy to ascertain supply costs, additional payment is being made through this rule for supply costs, notwithstanding the fact that we are not obligated to do so.

The $.01 per page provided for supplies is calculated on the basis of $.005 for paper and $.005 for toner and developer. The paper cost is based on a cost of $25 per case of paper with 5,000 sheets in a case. In the March 16, 1988 proposed rule we estimated the cost of paper to be $30 per case. The reduced figure of $25 per case was established based on comments on the proposed rule from individual hospitals and a national hospital association. Deposition testimony in the *Swedish Hospital* litigation also confirmed a paper cost of $25 per case. The costs of toner and developer vary widely depending on the types of photocopy machine utilized. However, based on comments from hospitals, and a large hospital association, we believe a reasonable amount for toner and developer is $.005 per page.

Also, as indicated under new § 466.78(c)(3) of this final rule, we have revised the calculation of the payment rate per page by including a separate calculation of the per-page costs of supplies. As discussed above, based on comments received on the proposed rule, we have increased the payment for supplies from $.0063 per page to $.01 per page for paper, toner, and developer. The increased payment reasonably reflects the information available to HHS concerning supplies and is, in fact, even slightly more than the amount for supplies included in the AHA study of $.0094 per page.

Total Payment Per Page

The total additional payment per page to be provided for labor and supplies thus equals $.07. We acknowledge that it is impossible, in setting such a national rate for these costs, to guarantee that payment will duplicate precisely the costs of any one hospital. However, we have established a reasonable rate of payment that is fully supported by information provided to the Agency in comments on the regulation from providers, their employees, and associations representing providers. This information has been confirmed by information received as a result of discovery in the *Swedish hospital* litigation.

Based on the comments received, the number of copies made annually has been reduced by more than 50% from 748,000 to 364,320 copies. As a result, the payment for labor costs has more than doubled from approximately $.027 under the proposed rule to $.06 under the final regulation, an increase of over three cents per page. Supplies have likewise been increased from $.0063 per page under the proposed rule to $.01 in the final rule, an increase of 58%.

Payment at $.07 per page is also fully supported by the AHA Study, which found a total median cost per page for labor and supplies of $.0556, an amount significantly less than the $.07 payment rate adopted here. While the average, as opposed to median, cost calculations contained in the AHA study resulted in a slightly higher rate ($.077), we believe this figure is not as accurate as the median figure because the calculations for average costs fail to make adjustments for the unexplained, extremely high amounts reported by two hospitals in the study for labor and supply costs. In any event, even the average figure in the AHA Study is only slightly higher than the $.07 adopted by the HCFA. Furthermore, as described below, when additions are included to account for equipment and overhead that are already paid, the total estimated Medicare payment would amount to well over $.10 per page.

Equipment Costs

The proposed rule included a methodology that would have provided additional payment for the costs of photocopying equipment. In response to the comments received on this issue, as well as our review of the statutory provisions concerning how these costs are already paid, we have determined that additional payment for photocopy equipment cannot be provided under this rule. Pursuant to sections 1886(a)(4), 1886(d)(1)(A), 1886(g)(1), and 1814(b) of the Act, and regulations at § 413.130, capital-related costs, including the costs of photocopy equipment, repairs, and space costs are paid directly to each hospital based on the hospital's actual reasonable costs for equipment, repairs, and space for cost reporting periods beginning prior to October 1, 1991. For future cost reporting periods, capital-related costs are paid for under the capital prospective payment system implemented by regulations at 42 CFR 412, Subpart M, published in the **Federal Register** on August 30, 1991 (56 FR 43358). Thus, hospitals are already being paid for these costs, and no additional Medicare payment is provided through the per-page rate of payment described here. To do so would, we believe, violate the statutory provisions governing the payment of these costs and the clear Congressional intent that payment for these costs must be through the appropriate payment provisions. (See 56 FR 43358 (Aug. 30, 1991) for discussion of Congressional action with regard to these payments.) Additionally, it would provide for the kind of duplicate payment that the court in *Burlington Memorial Hospital* specifically ruled must not occur.

Payment of equipment costs through the capital-related cost provisions is likewise consistent with section 1866(a)(1)(F)(i) of the Act, which states that the costs of the PRO agreement with a hospital are considered costs incurred in providing inpatient services under Part A of Medicare. As indicated above, capital-related costs incurred under Part A are paid through the capital prospective payment system. Thus, we believe payment of such costs incurred in photocopying must be paid as well under these Part A provisions.

We note that current statutory limitations at sections 1886(g)(1)(A) and 1886(g)(3)(A) of the Act on the payment of capital-related costs prohibit HHS from paying 100% of the facility's equipment costs. These limitations are imposed on the payment of all capital-related costs and there is no basis for exempting equipment that is already

paid for under the capital-related cost provisions merely because it is used to produce copies for PRO review.

Payment of equipment costs is also based on a utilization formula, applicable to all providers, that apportions costs between Medicare and non-Medicare patients in order to determine Medicare's share of the cost incurred based on the percentage of Medicare patients. (See 31 FR 14808 (Nov. 23, 1966); 51 FR 11142 (April 1, 1986).) This system ensures that Medicare pays for only its portion of total hospital costs since it is clear that not all hospital patients are Medicare patients; that not all costs are attributable to Medicare; and, as is the case here, that not all hospital photocopy equipment is used exclusively for PRO review. There is thus no basis for exempting these equipment costs from this required apportionment of costs (*Boswell Memorial Hospital* v. *Heckler*, 749 F.2d 788 (D.D.C. 1984); *St. James Hospital* v. *Heckler*, 760 F.2d 1460 (D.D.C. 1985)).

Overhead Costs

Payment for the overhead costs of photocopying is provided through the Medicare prospective payment system for operating costs. Therefore, additional payment for overhead was not provided in the proposed rule and is not included in the per-page rate of payment adopted through this final regulation. The payment rates for hospitals under the prospective payment system were established utilizing a base year ending on or after September 30, 1982, and before September 30, 1983. (See § 412.71(a).) During this period, the review of hospital services was conducted not by PROs but under the predecessor PSRO program. In contrast to the current PRO program in which review is conducted by the PROs themselves, under the PSRO program, review was delegated almost entirely to the individual participating hospitals through an agreement with a PSRO.

The hospital's review costs under the PSRO program were paid in two ways. The direct costs of review were paid based upon the actual costs reported by the hospitals on a form entitled "Delegated Hospital Function Cost Summary". Payments were made directly to the hospitals by the fiscal intermediaries based on a unit cost rate for these actual costs. Direct costs were defined as the costs of physicians, physician advisors, other health care professionals, review coordinators, technical/support personnel, applicable fringe benefits, training, and travel.

All other review costs incurred by the hospital, including overhead costs, were considered indirect costs and were required to "be included in administrative and general or other appropriate overhead expense accounts." (See § 466.62(c)(1) (1982).) Even hospitals that were not delegated review but that provided the PSRO with space or other services were required to include these indirect costs "in administrative and general or other appropriate overhead expense accounts." (See § 466.63(d) (1982).)

These overhead costs included, but were not limited to, "administrative costs, utilities, maintenance, space, depreciation, data costs, office supplies, etc." The hospitals were directed that such costs "should continue to be accounted for under the appropriate cost center for Medicare cost reporting." Hospitals were instructed not to include the indirect costs on the "Function Cost Summary", which included the direct costs of review. Instead, they were to "be reflected in all other hospital indirect costs on the cost reporting form filed at the close of the cost reporting period" (1975 Amendments Supplement to the Provider Reimbursement Manual, at pages 14 and 16).

As a result of these requirements, the indirect costs of PSRO review clearly were included in a hospital's base year costs upon which the prospective payment system base year rates were established, a fact confirmed by comments on the proposed rule and in the *Swedish Hospital* discovery. The overhead costs of these delegated PSRO review programs, which included the overhead for all of the PSRO functions and the individuals responsible for performing these functions (including physicians, nurse coordinators, other health care professionals, and administrative staff) were by definition much greater than those associated at present with the single activity of photocopying. This fact was confirmed as well during deposition testimony taken in the *Swedish Hospital* litigation. Accordingly, the payment of the overhead costs of the photocopy activity, minor in comparison to the costs of the prior, more extensive PSRO delegated review system, are adequately paid under the prospective payment system through their inclusion in the base year rate calculations.

Under this final rule, HCFA will pay all of the labor costs of PRO photocopying because the amount of photocopying required by offsite review is probably greater now than under PSRO delegated review and because the majority of the labor costs of PSRO review were paid outside the cost reporting process and thus were not included in the base year calculations forming the prospective payment. In contrast, however, the overhead costs of PSRO review were included in the cost report and were included in the base year calculation. Furthermore, payment for space costs is also provided through the capital-related cost provisions described above. Thus, there is a clear basis for excluding additional payment for these costs from this rule.

As discussed above, the equipment and overhead costs of hospitals attributable to photocopying are paid through other payment provisions of the Medicare statute on the basis of the actual costs reported by the specific hospitals. While we have no precise figures as to the amounts paid to each hospital by Medicare, we can only assume that hospitals have claimed and are receiving all such payments to the extent permitted by law. According to the AHA Report, the median equipment cost per page of the hospitals profiled in the report was $.0153 per page. AHA also calculated a median overhead factor of $.0145 per page. When the total costs per page for labor and supplies provided under this final rule are added to the AHA-reported equipment and overhead costs, the estimated total amount of payment equals $.12, more than the $.10 per page requested by the majority of commenters. Similar and even higher figures are obtained from data on equipment and overhead costs submitted by hospitals along with comments on the proposed rule as well as information obtained in the course of discovery in the *Swedish Hospital* litigation.

While the current payment rate has been set at $.07 per page, HCFA will periodically review the rate to ensure that it still accurately reflects hospital costs. Notice of any such changes will be published in the **Federal Register**. As described above, the payment rate for labor and supplies has been increased substantially from the amount included in the proposed rule. With regard to any additional increases, we note that comments received in response to the regulation as well as information obtained in the *Swedish Hospital* litigation indicate that hospital employees performing photocopying currently often make less per hour than the amount for labor included in the payment rate to be provided here. New photocopy equipment, which is able to process more easily irregular size sheets of paper, such as medical records, will enable copies to be made much more rapidly. Furthermore, deposition testimony indicated that the current cost of paper is $25 per case, just as is included in our calculation. In light of

this information we can find no basis at this time for further increasing the payment rate per page.

In addition to the changes made in 42 CFR 466.78 to permit payment of photocopy costs, regulations at 42 CFR 412.115 governing Medicare payments under the prospective payment system have been amended to include payment for the costs of photocopying and mailing records required for PRO review. Consequently, as with other disputes regarding Medicare payments to hospitals, disputes concerning payments for the costs of PRO review under 42 CFR 466.78 and the other payment provisions of the Medicare statute and regulations must be presented in accordance with the administrative and judicial review requirements of section 1878 of the Social Security Act and subpart R of 42 CFR part 405.

B. Comments and Responses

The majority of commenters objected to the total proposed rate of payment per page and the specific payment rates for the four components making up the rate: labor, supplies, equipment, and overhead.

Comment: Most of the commenters believed that the per-page amount did not include enough payment for the many labor steps included in photocopying. There was also one comment that noted that the proposed rule did not provide for a search fee, despite the fact that HCFA charges a search fee when responding to a request made under the Freedom of Information Act (FOIA). In addition, several commenters indicated that a GS–5 level employee is not capable of performing the retrieval and refiling steps and that a certified medical records technician would be necessary at a higher level of pay.

Response: As indicated above, the labor costs have been recalculated since the publication of the proposed rule and the recalculation takes these comments into account. Under this final rule, payment for all of the steps involved in photocopying a record are accounted for, including time for "searching" for the record. This was done by reducing the number of copies that could be made by almost one-half to provide for the time needed for retrieval, refiling, etc. As a result of this change, as well as calculations made to account for leave days and holidays, the amount paid per page for labor has more than doubled from the amount under the proposed rule of $.027 to $.06 under the final regulation.

We have not accepted the comments regarding the need to use more costly personnel such as accredited medical records technicians to perform the steps necessary to photocopy records for PRO review. We proposed a salary component that reflect the payment rate for a GS–5 federal employee, an experienced mid-level secretary. That figure has been increased in this final regulation to reflect current federal payment rates. As we indicated in the preamble to the proposed rule, while provider experience may vary, the operation of a photocopy machine is not a complicated task regardless of the fact that medical records do not always consist of pages that are the same size or that are inserted in the file in a uniform manner. Training an employee to retrieve and refile a record and operate a photocopy machine is not a particularly difficult undertaking nor does it require great technical expertise on the part of the trainee. Therefore, it would not be unreasonable to expect that such a person would earn the minimum wage for these tasks. In order to ensure an adequate skill level, however, we have provided for additional payment amounting to twice the federal minimum wage.

While some hospitals may use accredited medical records technicians to perform photocopy functions, information supplied by other commenters indicates that in the majority of cases such highly trained personnel are not required to perform these functions. Comments received on the proposed rule as well as deposition testimony obtained in the *Swedish Hospital* litigation from hospital administrative staff confirm that clerical staff are used to perform these functions and that the skill level required is often that of a high school graduate.

The rulemaking record also includes comments that indicate that the salary level accurately reflects the level of skill required for photocopying. Furthermore, during deposition testimony in the *Swedish Hospital* litigation, hospital representatives testified that the individuals performing the photocopy functions currently make less than that proposed in the regulation. While some hospitals may use more highly trained staff to perform these functions and pay higher wage costs as a result, it is clear that these activities can be and are performed by hospital personnel who are paid at lower rates than those used for the calculation of this final rule. This is further confirmed by the fact that the labor cost component payment under this final rule is higher than that found in the AHA study. Thus, we believe that there is no reasonable basis for further increasing the salary level.

Comment: One commenter noted that our calculation of fringe benefits at 27.9% of annual salary was generous.

Response: We agree. In several instances, such as the adopt of OMB Circular A–76 as the basis for the fringe benefit computation, we have provided a higher rate of payment than is prevalent in the hospital industry.

Comment: Several commenters suggested that the amount provided for supplies under the proposed rule did not reflect the true costs of these items.

Response: As noted above, in response to these comments we have increased the amount of payment for supplies to $.01 per page. This amount reflects the figures submitted by commenters, is slightly more than the median amount reported for supplies in the AHA Report, and is consistent with information submitted in the *Swedish Hospital* litigation.

Comment: Two commenters indicated that basing costs on nearly 750,000 copies per year was unrealistic, especially for small rural hospitals who made far fewer copies.

Response: As described above, we have reduced the number of copies used in the per-page calculation by more than half, from 748,000 to 364,320 copies per year. While some hospitals may make fewer copies, this figure is a reasonable average that reflects the overall hospital experience. Furthermore, while this figure is a component of the per-page amount, the amount of payment is based on the actual number of copies made.

Comment: Fifty-four comments were received, many from hospitals and a few from hospital associations, concerning their estimates of costs per page for photocopying. These costs ranged from a low of $.058 to a maximum of $.57. Other commenters noted that, since we charge $.10 per page for FOIA requests, the rate per page under this rule ought to be the same. Several other commenters requested payment for photocopying and associated costs at the rate of $.1259 per copy, based on what they believed were the results of the AHA study. Other individuals felt that $.10–.15 per copy would be reasonable.

Response: We examined carefully all of the comments received concerning the establishment of a per-page rate of payment, including the results of studies conducted by individual hospitals and the AHA study upon which many commenters relied. As a result, we have increased the additional amount per page to be paid under the Medicare program by $.02 per page to $.07 for labor and supplies. The rulemaking record would not support an increase beyond this amount.

As is also described above, equipment and overhead costs are already paid under other provisions of the Medicare statute. Although we have no specific calculations as to how much is paid to a specific hospital for equipment and overhead, based on information supplied by the commenters and the AHA study, and information obtained in the conduct of the *Swedish Hospital* litigation, we believe this payment equals well over $.03 per page. Thus, the total amount of payment per page will be at least $.10 per page, as many commenters have requested. This amount is above what some hospitals stated were their costs and below the costs stated by others. We note that the very high per page amounts submitted by some commenters, such as $.57 per page, were not accompanied by any documentation as to whether these amounts were based on actual costs. We do not believe that such high and entirely undocumented rates, which are not consistent with comments received from other hospitals, compel further increases in the payment rate.

As to the AHA Report, we have fully considered its contents and have now increased the amount to be paid for both labor and supplies to an amount that is higher than that proposed in the report.

Comment: Several hospitals indicated that because they were never subject to PSRO review, either delegated or undelegated, the costs of such review would not have been included in their base year calculations and thus they are not receiving payment for photocopying under the prospective payment system.

Response: As indicated above, we have established a per-page payment amount that provides for all labor and supply costs without regard to whether some are paid under the prospective payment system. Capital-related costs are separately paid to these hospitals as they are to all other prospective payment hospitals. With regard to overhead costs, although they would not have been reporting these as PSRO costs, hospitals not under PSRO review were required to provide their own utilization review and all of these costs were included the calculations of the prospective payment system rate. Utilization review costs included in the costs of personnel, supplies, and overhead for the entire medical review system. These costs were much greater than those for the single activity of photocopying. When the PRO assumed review, the hospitals were no longer required to conduct Medicare utilization review and thus no longer were required to incur these costs for the Medicare program. These costs, however, were included in the establishment of the rate and thus continue to be paid at that rate.

Comment: Several commenters indicated that we should provide special payment for costs of repairs to photocopying equipment.

Response: A facility's equipment repair costs, including repairs to photocopy machines, are already paid as operating costs under the Medicare program, and thus, no additional payment is made for such costs in this regulation. Prospective payment system hospitals are paid for such costs through the prospective payment rate. As indicated above, costs such as these were included in the overhead costs of PSRO review which were in turn included in the hospitals' base year costs upon which the prospective payment system base year rates were established. Hospitals excluded from the prospective payment system are already paid for these costs on a reasonable cost basis to the full extent permitted by law and regulation.

Comment: Two commenters indicated that an enhanced amount of payment should be provided for outpatient surgery and longer stays because these would require more photocopying. Four comments noted that enhanced payment should be available when PROs misplace records and hospitals are required to replace the copies.

Response: We believe these concerns are resolved in this regulation because our payment of a hospital's PRO photocopying costs is being made on a per-page basis and not per medical record. Payment thus is made for each page, no matter how long the record. Furthermore, if records are misplaced, hospitals would be paid for making additional copies.

Comment: Twenty comments were received concerning the preamble language that stated that payment for photocopying costs would be retroactive only to April 1, 1987. They indicated that HHS' liability began when the program started on November 15, 1964, since that was when hospitals were faced with review requirements that differed from the preceding PRSO program.

Response: As indicated previously, retroactive payment of PRO photocopying costs for all Medicare hospitals from July 1, 1984 to July 1, 1991 is provided for in the settlement of the *Swedish Hospital* litigation. HCFA plans to provide for an additional retroactive payment of $.0202 per page for the period from July 1, 1991 to the effective date of this rule. This payment represents the difference between the proposed rate of $.0498 per page and the $.07 per page set forth in this final rule. Thus, the $.07 per page will be paid for photocopying for PRO review on July 1, 1991 and thereafter, until further revised by HCFA.

Comment: A total of 84 commenters stated that the proposed regulation omitted any mention of a payment schedule to pay hospitals for photocopying. Sixty-nine of the commenters suggested that HHS should require a maximum 60-day payment cycle from the date the medical record is received by the PRO. Nine commenters felt that a maximum 30-day payment cycle was more appropriate. The commenters suggested that this kind of requirement would be consistent with billing requirements for most contractors, allow a more accurate accounting system of payment, provide a reasonable cash flow for the hospital, and cause little disruption of current PRO responsibilities.

Response: We recognize that the issue of payment cycle is important to hospitals. For this reason, we will direct PROs to make payment no later than 30 days after receiving a request for payment from the hospital.

Comment: Thirty-five commenters suggested that the PRO should be required to state clearly which records the hospital is being paid for in order for hospitals to maintain accurate accounting systems.

Response: In addition to requiring that PROs pay hospitals no later than 30 days after receiving a payment request, we will also direct the PROs to indicate for which records the payment is being made.

Comment: One commenter stated that no consideration has been given to publishing the appropriate method of handling additional costs for cost reporting. Regulations for handling such costs would facilitate the settlement of cost reporting for both the intermediaries and the provider.

Response: As discussed previously, payment for PRO photocopy costs is to be made on the basis of a uniform per-page rate. To the extent there are disputes with regard to payment under that rate, they must be presented pursuant to section 1878 of the Social Security Act and subpart R of 42 CFR part 405, as would any other disputes regarding payments to hospitals under the Medicare statute.

Comment: Three commenters suggested that HCFA should clarify that the proposed rule was intended to include per page payment for all PRO copying, regardless of whether the copies were to be sent offsite or used onsite.

Response: We agree that when a hospital is responding to a request by a PRO for a photocopied record, it is irrelevant whether the PRO's request is for the use of the records offsite or onsite since the hospital's per-page copying costs would be the same. Accordingly, we have revised § 466.78(b)(2) to clarify that copying costs will be paid on a per-page basis regardless of whether the review is being done onsite or offsite.

Comment: Ninety-one commenters expressed dissatisfaction with the postage costs allowed under the proposed rule. The majority of commenters were concerned that first class postage does not ensure that records will arrive intact or timely and does not assure patient confidentiality. According to the commenters, time deadlines are a problem because PRO requests for records specify deadlines that often leave no alternative but the use of overnight delivery or express mail.

Response: As the proposed rule indicated, postage costs are to be paid as an item over and above the payment for copying costs. Under the proposed rule, first class postage would be paid, except for review of denial notices, for which overnight mail costs would be paid. In light of the fact that hospitals are to respond to PRO requests for records within 30 days, we believe that first class postage is reasonable and appropriate. Accordingly, we will not pay overnight mail or courier expenses except for reviews of denial notices. We also believe that the use of first class mail through the United States Postal Service assures confidentiality of medical records.

Comment: One commenter noted that the proposed rule erroneously characterized the process of paying hospitals for photocopying costs associated with the PRO program as "prenegotiated," and suggested that "predetermined" is a better word.

Response: In the proposed rule, the third sentence of § 466.78(b)(2) contained the phrase that use the word "prenegotiated." This sentence has been changed to indicate that the photocopying costs will be paid in accordance with the payment rate methodology provided in § 466.78(c) of this final rule.

Comment: A number of commenters raised the issue of photocopying costs for non-prospective payment system hospitals (including "waivered" hospitals) and distinct part units of hospitals that are not paid under the prospective payment system. Specifically, they urged us to include such hospitals and distinct parts within the scope of this rule.

Response: We disagree. Hospitals and distinct part units excluded from the prospective payment system are paid on a reasonable cost basis to the full extent permitted by law and regulation. Accordingly, to provide an additional per page payment amount under this regulation would result in impermissible double payments to the hospitals for these costs.

Comment: One commenter stated that the proposed rule does not make any reference to photocopying costs incurred by health maintenance organizations (HMOs) and competitive medical plans (CMPs) undergoing PRO review, and another made the same comment with regard to home health agencies (HHAs).

Response: Payment of photocopy costs under this rule is provided pursuant to section 1866(a)(1)(F)(i) of the Act, which deals with the costs of PRO review of hospitals. As a result, the payment of costs incurred by HMOs, CMPs, and HHAs is beyond the scope of this regulation.

Comment: One commenter indicated that costs under Medicaid should be included in this rule.

Response: Under section 1902(a)(13)(A) of the Act, States have a great deal of flexibility in setting payment rates for hospitals. To the extent that States require hospitals to incur costs under the State Medicaid program that are analogous to the costs incurred by hospitals for PRO photocopying under Medicare, it is the individual State that must address the issue of how these costs should be reflected in the hospital's payment rate under Medicaid.

III. Regulatory Impact Analysis

A. Executive Order 12291

Executive Order (E.O. 12291) requires us to prepare and publish a regulatory impact analysis for any final rule that meets one of the E.O. 12291 criteria for a "major rule"; that is, a rule that would be likely to result in—

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects 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.

Since none of the provisions being implemented in this final rule are expected to generate effects meeting one or more the E.O. threshold criteria, we have not prepared a regulatory impact analysis.

In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis also must conform to the provisions of section 603 of the RFA.

Since PROs are our contractors, they are not among the types of entities to which the RFA is primarily intended to apply. Nonetheless, when a rule would have a substantial effect on them, it is our practice to treat all PROs as small entities. This final rule will have no impact on payment to PROs.

We consider hospitals subject to the prospective payment system to be small entities. Under this final rule, we furnish PROs with funds to pay prospective payment Medicare hospitals directly for the costs of photocopying and mailing records related to PRO review. We anticipate that these costs will result in approximately $3.3 million yearly in hospital revenue.

Based on the foregoing, we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities and will not have a significant impact on the operations of substantial number of small rural hospitals. We have, therefore, not prepared a regulatory flexibility analysis.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511) requires that any information collection requirements included in a regulatory document must be submitted to and approved by the Executive Office of Management and Budget (EOMB) before the public is required to comply with those requirements. The requirements of this final regulation do not impose any information collection requirements that must be approved under the Paperwork Reduction Act. Therefore, it need not be reviewed by EOMB for that purpose.

List of Subjects

42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 466

Grant programs—Health, Health care, Health facilities, Health professions, Peer review organizations.

42 CFR chapter IV is amended as follows:

CHAPTER IV—HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Subchapter B—Medicare Program

I. Part 412 is amended as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

A. The authority citation for part 412 continues to read as follows:

Authority: Secs. 1102, 1815(e), 1871 and 1886 of the Social Security Act (42 U.S.C. 1302, 1395g(e), 1395hh, and 1395ww).

B. In subpart H, § 412.115 is amended by adding a new paragraph (c) to read as follows:

Subpart H—Payments to Hospitals Under the Prospective Payment System

§ 412.115 Additional payments.

* * * * *

(c) *PRO photocopy and mailing costs.* An additional payment is made to a hospital in accordance with § 466.78 of this chapter for the costs of photocopying and mailing medical records requested by a PRO.

II. Part 466 is amended as follows:

PART 466—UTILIZATION AND QUALITY CONTROL REVIEW

A. The authority citation for part 466 is revised to read as follows:

Authority: Secs. 1102 1154, 1159, 1866, and 1871 of the Social Security Act (42 U.S.C. 1302, 1320c–3, 1320c–8, 1395cc, and 1395hh).

B. In subpart C, § 466.78, the introductory text of paragraph (b) is republished, paragraph (b)(2) is revised, and new paragraphs (c) and (d) are added to read as follows:

Subpart C—Review Responsibilities of Utilization and Quality Control Peer Review Organizations (PROs)

§ 466.78 Responsibilities of health care facilities.

* * * * *

(b) *Cooperation with PROs.* Health care facilities that submit Medicare claims must cooperate in the assumption and conduct of PRO review. Facilities must—

* * * * *

(2) Provide patient care data and other pertinent data to the PRO at the time the PRO is collecting review information that is required for the PRO to make its determinations. The facility must photocopy and deliver to the PRO all required information within 30 days of a request. PROs pay hospitals paid under the prospective payment system for the costs of photocopying records requested by the PRO in accordance with the payment rate determined under the methodology described in paragraph (c) of this section and for first class postage for mailing the records to the PRO. When the PRO does post-admission, preprocedure review, the facility must provide the necessary information before the procedure is performed, unless it must be performed on an emergency basis.

* * * * *

(c) *Photocopying reimbursement methodology for prospective payment system hospitals.* Hospitals subject to the prospective payment system are paid for the photocopying costs that are directly attributable to the hospitals' responsibility to the PROs to provide photocopies of requested hospital records. The payment is in addition to payment already provided for these costs under other provisions of the Social Security Act and is based on a fixed amount per page as determined by HCFA as follows:

(1) *Step one.* HCFA adds the annual salary of a photocopy machine operator and the costs of fringe benefits as determined in accordance with the principles set forth in OMB Circular A–76.

(2) *Step two.* HCFA divides the amount determined in paragraph (c)(1) of this section by the number of pages that can be reasonably expected to be made annually by the photocopy machine operator to establish the labor cost per page.

(3) HCFA adds to the per-page labor cost determined in paragraph (c)(2) of this section the per-page costs of supplies.

(d) *Appeals.* Reimbursement for the costs of photocopying and mailing records for PRO review is an additional payment to hospitals under the prospective system, as specified in § 412.115 of this chapter. Thus, appeals concerning these costs are subject to the review process specified in part 405, subpart R of this chapter.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare Hospital Insurance; No. 93.774, Medicare Supplementary Medical Insurance)

Dated: October 3, 1992.

William Toby,

Acting Deputy Administrator, Health Care Financing Administration.

Approved: October 14, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 92–25327 Filed 10–19–92; 8:45 am]

BILLING CODE 4120–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 65

Changes in Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: Modified base (100-year) flood elevations are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

EFFECTIVE DATES: The effective dates for these modified base flood elevations are indicated on the following table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect for each listed community prior to this date.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646–2754.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the final determinations of modified base flood elevations for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Administrator has resolved any appeals resulting from this notification.

The modified base (100-year) flood elevations are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified base flood elevation

determinations are available for inspection.

The modifications are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program.

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities.

These modified base flood elevations shall be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for second layer coverage on existing buildings and their contents.

The changes in base flood elevations are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

Regulatory Impact Analysis

This rule is not a major rule under Executive Order 12291, February 17, 1981. No regulatory impact analysis has been prepared.

Executive Order 12612, Federalism

This rule involves no polices that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

2. The tables published under the authority of § 65.4 are amended as follows:

State	County	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community number
California	San Diego	Unincorporated Areas (Docket No. 7046).	June 19, 1992, June 26, 1992, San Diego Union Tribune.	The Honorable George F. Bailey, Chairman, San Diego County Board of Supervisors, 1600 Pacific Highway, Room 335, San Diego, California 92101.	June 12, 1992	060284
Nevada	Washoe	Unincorporated Areas (Docket No. 7046).	June 19, 1992, June 26, 1992, Reno Gazette-Journal.	The Honorable Gene McDowell, Chairman, Washoe County Board of Commissioners, P.O. Box 11130, Reno, Nevada 89520.	June 10, 1992	320019
Texas	Bexar	City of San Antonio (Docket No. 7051).	June 2, 1992, June 9, 1992, San Antonio Light.	The Honorable Nelson Wolff, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, Texas 78283.	May 8, 1992	480045

Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance."

Issued: October 8, 1992.

C.M. "Bud" Schauerte,

Administrator, Federal Insurance Administration.

[FR Doc. 92-25385 Filed 10-19-92; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 65

[Docket No. FEMA-7052]

Changes in Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the base (100-year) flood elevations is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified base (100-year) flood elevations for new buildings and their contents.

DATES: These modified base flood elevations are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Administrator reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646-2754.

SUPPLEMENTARY INFORMATION: The modified base (100-year) flood elevations are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection is provided.