of the President as Commander in Chief. When commitment of Federal Armed Forces has taken place, the duly designated military commander at the objective area will act to the extent necessary to accomplish his mission. In the accomplishment of his mission, reasonable necessity is the measure of his/her authority, subject of course, to instructions he/she may receive from his/her superiors.

(b) Federal Armed Forces committed in aid of the civil authorities will be under the command of, and directly responsible to, their military and civilian superiors through the Department of the Army chain of command. They will not be placed under the command of an officer of the State defense Forces or of the National Guard not in the Federal service, or of any local or State civil official; any lawful or unauthorized act on the part of such troops would not be excusable on the ground that it was the result of an order received from any such officer or official. As directed by the Army Chief of Staff, service will be provided in accordance with paragraph 3–2, Army Regulation 75–15.

§ 501.4 Martial law.

It is unlikely that situations requiring the commitment of Federal Armed Forces will necessitate the declaration of martial law. When Federal Armed Forces are committed in the event of civil disturbances, their proper role is to support, not supplant, civil authority. Martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration. The extent of the military force used and the actual measures taken, consequently, will depend upon the actual threat to order and public safety which exists at the time. In most instances the decision to impose martial law is made by the President, who normally announces his decision by a proclamation, which usually contains his instructions concerning its exercise and any limitations thereon.

§ 501.5 Protection of Federal property.

The right of the United States to protect Federal property or functions by intervention with Federal Armed Forces is an accepted principle of our Government. This form of intervention is warranted only where the need for protection exists and the local civil authorities cannot or will not give adequate protection. This right is exercised by executive authority and extends to all Federal property and functions.

§ 501.6 End of commitment.

The use of Federal Armed Forces for civil disturbance operations should end as soon as the necessity therefor ceases and the normal civil processes can be restored. Determination of the end of the necessity will be made by the Department of the Army after coordination with the Department of Justice.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 93–16185 Filed 7–12–93; 8:45 am]

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federal register

Tuesday
July 13, 1993

Part III

Department of Defense

Department of the Army

32 CFR Part 552
Improper Associations of Personnel on Ft. Jackson, SC; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 552

Improper Associations of Personnel on the Installation of Ft. Jackson, SC

AGENCY: Department of the Army, DOD.

ACTION: Proposed rule.

SUMMARY: This action establishes 32 CFR Part 552, Subpart K, Improper Associations of Personnel and authenticates Fort Jackson Regulation 600–5. This subpart contains the association procedures between permanent party soldiers or civilian employees and soldiers-in-training, receptees or holdovers on the installation of Fort Jackson, South Carolina.

DATES: Written comments must be submitted not later than August 12, 1993.

ADDRESSES: Comments should be sent to: U.S. Army Training Center and Fort Jackson, Office of the Staff Judge Advocate, Fort Jackson, SC 29207–5000.

FOR FURTHER INFORMATION CONTACT: CPT Thomas M. Gagne, Trial Counsel, (803) 734–6811.

SUPPLEMENTARY INFORMATION: This subpart applies to all permanent party soldiers, civilian employees, soldiers-in-training, receptees and holdovers, as defined herein, on or off Fort Jackson. Any violation of this part by a permanent party soldier, except for a violation of § 552.136, provides a basis for punitive action under the Uniform Code of Military Justice against the violating permanent party soldier. Any violation of this subpart by a civilian employee, except for a violation of § 552.136, provides a basis to impose disciplinary procedures contained in applicable Fort Jackson, Training and Doctrine Command, Army or Department of Defense directives and regulations against the violating civilian employee. Violation of this subpart by a soldier-in-training, receptee or holdover does not provide a basis for punitive action under the Uniform Code of Military Justice against the violating soldier-in-training, receptee or holdover.

Executive Order 12291

This proposed rule is not affected by Executive Order 12291.

Regulatory Flexibility Act

The Regulatory Flexibility Act has no bearing on this proposed rule.

Paperwork Reduction Act

This proposed rule does not contain reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 32 CFR Part 552, Subpart K

Military personnel, Government employees, Fraternization.

PART 552—[AMENDED]

Accordingly, 32 CFR part 552, subpart K is added to read as follows:

Subpart K—Improper Association of Personnel—Ft. Jackson

Authority: 10 U.S.C. Ch. 47.

Subpart K—Improper Association of Personnel—Ft. Jackson

§ 552.131 Purpose.

This subpart prohibits improper associations between permanent party soldiers or civilian employees and soldiers-in-training, receptees or holdovers. Improper association is harmful to mission accomplishment. The goal of this subpart is to establish and maintain the training environment necessary to develop pride, motivation, military skills, discipline and confidence in soldiers-in-training, receptees and holdovers.

§ 552.132 Scope.

This subpart applies to all permanent party soldiers, civilian employees, soldiers-in-training, receptees and holdovers, as defined herein, on or off Fort Jackson. Any violation of this part by a permanent party soldier, except for a violation of § 552.136, provides a basis for punitive action under the Uniform Code of Military Justice against the violating permanent party soldier. Any violation of this subpart by a civilian employee, except for a violation of § 552.136, provides a basis to impose disciplinary procedures contained in applicable Fort Jackson, Training and Doctrine Command, Army or Department of Defense directives and regulations against the violating civilian employee. Violation of this subpart by a soldier-in-training, receptee or holdover does not provide a basis for punitive action under the Uniform Code of Military Justice against the violating soldier-in-training, receptee or holdover.

§ 552.133 Definitions.

(a) *Improper association.* Any actual or attempted personal relationship, association, contact or socializing between any permanent party soldier or civilian employee and any soldier-in-training, receptee or holdover, on or off Fort Jackson, that is not required to accomplish the training mission. This includes, but is not limited to the following actual or attempted personal relationships, associations, contacts, or socializing between any permanent party soldier or civilian employee and any soldier-in-training, receptee or holdover:

(1) Gambling or wagering.

(2) Touching of a sexual nature, handholding, embracing, caressing, dating or any other meeting that is not official in nature, kissing, engaging in sexual intercourse, sexual fondling or sodomy.

(3) Using sexually explicit, suggestive, or obscene language or gestures.

(4) Accepting or providing gifts or favors.

(5) Loaning or borrowing money.

(6) Drinking or providing alcoholic beverages.

(7) Dancing.

(8) A permanent party soldier or civilian employee permitting or inviting any soldier-in-training, receptee, or holdover to enter into or ride in a privately-owned vehicle that is owned, operated, maintained, or occupied by a permanent party soldier or civilian employee; a soldier-in-training, receptee or holdover entering into or riding in a privately-owned vehicle that is owned, operated, maintained, or occupied by a permanent party soldier or civilian employee. These prohibitions shall not preclude transportation of soldiers-in-training, receptees or holdovers in cases of medical or other emergencies when military transportation is not available, or in specific cases when authorized by a company commander or superior commander.

(9) A permanent party soldier or civilian employee entering any living quarters or latrines designed for soldiers-in-training, receptees or holdovers of the opposite sex, unless required by official duties, or in the performance of police or fire-fighting duties, or in the case of an emergency; soldiers-in-training, receptees or holdovers inviting any permanent party soldier or civilian employee to enter any living quarters or latrines designed for soldiers-in-training, receptees or holdovers of the opposite sex, unless required by official duties, or in the performance of police or fire-fighting duties, or in the case of an emergency.

(10) A permanent party soldier or a civilian employee permitting or inviting any soldier-in-training, receptee, or holdover to enter into any living quarters, on or off Fort Jackson, that are assigned to, occupied, rented, owned, or maintained by a permanent party soldier or a civilian employee, unless required by official duties, or in the case of an emergency; a soldier-in-training, receptee or holdover entering into any living quarters, on or off Fort Jackson, that are assigned to, occupied, rented, owned, or maintained by a permanent party soldier or a civilian employee, unless required by official duties, or in the case of an emergency.

(11) Attendance by a permanent party soldier or civilian employee at a party or social gathering at which a soldier-in-training, receptee or holdover is present, unless such party or social gathering is sponsored by a military unit on Fort Jackson and permanent party soldiers or civilian employees, as well as soldiers-in-training, receptees, or holdovers have been invited by the military unit sponsoring the party or social gathering.

(b) *Permanent party soldier.* (1) Any soldier, other than a soldier-in-training, receptee or holdover, as defined in paragraphs (d), (e), and (f) of this section.

(i) Assigned or attached to any military organization at Fort Jackson or

(ii) Performing duty at Fort Jackson, including National Guard and Reserve soldiers on active duty or active duty for training.

(2) Soldiers who have completed accession processing into active duty at Fort Jackson from a Reserve/National Guard status, and who have previously completed basic training and a Military Occupational Specialty (MOS)-producing school, and who are being retained in the 120th Adjutant General (AG) Battalion (Reception) awaiting receipt of a security clearance prior to attending an additional MOS-producing school which requires a security clearance.

(3) Prior service soldiers assigned to the 120th AG Battalion (Reception) who are pending port call instructions for an overseas assignment.

(4) Soldiers in the grade of E–4 and above in the 4th Training Brigade who are attending reclassification training.

(5) Soldiers assigned or attached to any military organization at any installation who are performing temporary duty (TDY) at Fort Jackson.

(6) Soldiers at Fort Jackson for mobilization, demobilization, or Estimated Time of Separation (ETS) processing.

(7) Holdovers who have been designated by bridage commanders, in writing, as permanent party soldiers.

(c) *Civilian employee.* All non-military, i.e., civilian persons employed by, working at, assigned to or attached to any organization or activity at Fort Jackson, including, but not limited to, personnel who are temporary or permanent overhires, part-time employees, seasonal (summer hire) workers, employees of non-appropriated fund instrumentalities, contractors, and employees of contractors.

(d) *Receptee.* All Active Army, Army National Guard, and Army Reserve personnel processing through the 120th AG Battalion (Reception), for entry into Basic Combat Training (BCT) or Advanced Individual Training (AIT), except those 4th Brigade personnel, E–4 and above, described in paragraph (b)(3) of this section.

(e) *Soldier-in-training.* All Active Army, Army National Guard, and Army Reserve personnel assigned or attached to Fort Jackson for the purpose of attending BCT or AIT.

(f) *Holdover.* Any graduate of BCT or AIT who has not departed Fort Jackson for administrative reasons, any nongraduate of BCT or AIT who is in remedial training after course/cycle graduation, or any soldier who is removed from BCT or AIT for administrative reasons; provided, however, that brigade commanders may designate, in writing, a holdover as a permanent party soldier, in which case such holdover is considered a permanent party soldier as described in paragraph (b)(6) of this section.

§ 552.134 Improper associations prohibited.

Improper associations between any permanent party soldier or civilian employee and any soldier-in-training, receptee, or holdover is prohibited.

§ 552.135 Reporting procedures.

All suspected violations of this subpart will be reported to the unit commander, or directors/heads of staff agencies of personnel involved, or to the Military Policy.

§ 552.136 Dissemination.

Personnel will be informed of the provisions of this subpart as follows:

(a) Permanent party soldiers—within five working days of assignment or attachment to Fort Jackson and again semi-annually during the months of March and September. Those permanent party soldiers at Fort Jackson for mobilization/demobilization or ETS processing will be informed within one working day of reporting to Fort Jackson. Personnel present at Fort Jackson for TDY will be informed within one working day of reporting to Fort Jackson.

(b) Civilian employees—within five working days of assignment or attachment to Fort Jackson and again semi-annually during the months of March and September.

(c) Soldiers-in-training—prior to beginning each new training cycle.

(d) Receptees—during processing at the TAG Battalion (Reception).

(e) Holdovers—upon graduation or upon release or removal from training.

§ 552.137 Responsibilities.

Major subordinate commanders and directors/heads of staff agencies will establish procedures to ensure compliance with this subpart.

§ 552.138 Management Information Requirements (MIR).

This proposed rule does not require an MIR.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 93–16186 Filed 7–12–93; 8:45 am]

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federal register

Tuesday
July 13, 1993

Part IV

Environmental Protection Agency

40 CFR Part 63

Hazardous Air Pollution: Proposed Regulations Governing Equivalent Emission Limitations by Permit

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL-4575-9]

Hazardous Air Pollution: Proposed Regulations Governing Equivalent Emission Limitations by Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The proposed rule would implement section 112(j) of the Clean Air Act (Act), as amended. The proposed rule establishes requirements and procedures for the owners or operators of a major source of hazardous air pollutant(s) (HAPs) to follow in order to comply with section 112(j). The proposed rule also contains guidance for reviewing agencies in implementing section 112(j), to maintain consistency in these reviews. After the effective date of a title V permit program in a State (but not before May 15, 1994), each owner or operator of a major source in a source category for which the EPA was scheduled to, but failed to promulgate a maximum achievable control technology (MACT) standard would be required to submit an application for a permit, permit revision, or permit renewal containing case-by-case MACT emission limits that are at least as stringent as the Federal MACT standard would have been.

DATES: *Comments.* Comments must be received on or before August 27, 1993.

Public Hearing. If anyone contacts the EPA requesting a public hearing by July 27, 1993, a public hearing will be held on August 11, 1993, beginning at 10 a.m. Persons interested in attending the hearing should call Theresa Adkins at (919) 541-5645 to ensure that a hearing will be held.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact the EPA by July 27, 1993.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate if possible) to: Air Docket (LE-131), Attention Docket Number A-93-32 (see Docket section below), room M1500, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Public Hearing. If anyone contacts the EPA requesting a public hearing, it will be held at the EPA's Environmental Research Center auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Theresa Adkins, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone number (919) 541-5645.

Docket. Docket No. A-93-32, containing supporting information used in developing the proposed rule is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the EPA's Air Docket, room M1500, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Ms. Katherine Kaufman, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone (919) 541-0102.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

The purpose of this notice is to provide the public with the opportunity to comment on the proposed rule implementing the requirements of section 112(j) of the Act. This preamble is organized to serve readers needing (1) an overview of the proposed requirements of the section 112(j) program, and (2) a detailed discussion of the alternatives considered in developing the proposed requirements.

The first section provides an overview of the requirements of the regulations being proposed today.

The second section provides background information on section 112(j) in the context of the 1990 amendments to the Act.

The third section provides a detailed discussion of the requirements of the proposed rule and the rationale for these requirements, including other regulatory options that were considered.

The fourth section of this preamble discusses the relationship of the proposed requirements of section 112(j) of the Act with other requirements of the Act under other subsections of section 112.

The fifth section of this preamble demonstrates that the proposed rulemaking is consistent with a number of federal administrative requirements.

This preamble makes use of the term "State," usually meaning the State air pollution control agency which would be the permitting authority implementing the section 112(j) program. The reader should assume that use of the word "State" also applies, as defined in section 302(d) of the Act, to the District of Columbia and territories of the United States, and may also include reference to a local air pollution control agency. These agencies can either be the permitting authority for the area of their jurisdiction or assist the State or EPA in implementing the section 112(j) program. In some cases, the term "reviewing agency" is used and can refer to both State agencies and to local agencies (when the local agency directly makes the determinations or assists the State in making the determinations). The term "reviewing agency" may also apply to the EPA, where the EPA is responsible for the program.

The proposed rule and preamble make a number of references to three regulations which have not yet been proposed. The first is subpart A to 40 CFR part 63. This subpart would provide general provisions that would apply to all subparts of part 63, including the proposed rule. The EPA expects these general provisions to be promulgated before today's proposed rule is promulgated. The second is the rule governing constructed, reconstructed, or modified major sources, which EPA intends to propose in additional sections of subpart B to 40 CFR part 63. The third is the federal operating permits program which EPA intends to promulgate as 40 CFR part 71. Today's proposed rule and this preamble refer to "Part 70 or Part 71" permits. At this time, only 40 CFR part 70 has been promulgated, but it is expected that part 71 will be promulgated before the promulgation date of today's proposed rule.

I. Summary of Proposed Rule

The rule proposed today would implement the requirements of section 112(j) of the Clean Air Act, as amended in 1990. Section 112(j) establishes requirements for regulation of major sources of hazardous air pollutants in the event that EPA lags more than 18 months behind schedule in issuing a control technology standard for an industry.

Section 112 requires EPA to set maximum achievable control technology (MACT) standards for all categories of major sources of hazardous air pollutants by November 15, 2000. EPA is required to issue a schedule for regulating all source categories within two, four, seven, or ten years of enactment. The Agency on September 24, 1992 proposed the draft source category schedule for standards in the Federal Register.

Section 112(j) would be triggered if EPA has failed to promulgate a MACT standard for a source category 18 months after the deadline listed in the final schedule. Under the proposed rule, the owner or operator of each major source with emission units in that category would have to apply for a case-by-case (facility-specific) determination of maximum achievable control technology. Section 112(j) requirements apply in a state beginning on the effective date of a permit program established under title V of the Act, but not before May 15, 1994.

Case-by-case MACT determinations would be made by the permitting authority. This generally would be the state air pollution control agency, but in some circumstances could be EPA or a local air pollution control agency.

Once a source category becomes subject to 112(j), the proposed rule would require MACT for all emission units in that source category that are:

- Part of an existing major source
- Part of a new major source
- New emission units added to a major source

An emission unit would be considered "new" if construction or reconstruction commenced after the section 112(e) deadline. The section 112(e) deadline is the scheduled date for issuing a national MACT standard applicable to those emission units.

The proposed rule would require owners or operators of new and existing sources covered by 112(j) to apply for case-by-case determination of MACT emissions limitations by the permitting authority. Section 63.53 specifies the required contents of these applications.

Permitting authorities would determine MACT emission limitations for emission units based on principles established in § 63.56 and a more detailed guidance document titled "Draft Guidelines for MACT Determinations," which the EPA is making available today for comment. (The Draft Guidelines are also available through the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, or at (703) 487–4650. The NTIS document number is PB93–183283). Comments on the Draft Guidelines should be submitted together with comments on today's rule. The Draft Guidelines contain procedures for evaluating whether a control technology is consistent with the minimum requirements established in section 112(d) of the Act. Because section 112(j)(5) requires that case-by-case MACT determinations be "equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)," EPA believes that consideration of the Guidelines is a crucial component of the 112(j) case-by-case MACT determination process.

Permits for new and existing sources subject to section 112(j) would have to contain the elements listed in § 63.54(c). (Today's proposal includes requirements for the substantive terms of permits and the content of permit applications because the operating permits rules do not include similar requirements).

Existing major sources would be required to comply with their MACT emissions limitations by the date set by the permitting authority, which can be no more than three years after permit issuance. New sources would have to comply with their MACT limits at permit issuance.

Under other federal or state regulations, many new sources covered by section 112(j) will be required to obtain approval of the design of their hazardous air pollutant control equipment prior to construction. Preconstruction approval will be mandatory for: (1) New sources that are subject to forthcoming regulations implementing section 112(g) of the Act, and (2) new sources in states that require operating permit issuance or revision prior to construction.

For new sources not required to undergo preconstruction review, states may elect to provide a preconstruction MACT determination process containing elements set out in § 63.54. Procedures for incorporating such emission limitations subsequently into operating permits are described in § 63.55. Another voluntary option for these sources is to obtain an operating permit or permit revision prior to construction, so long as the State's part 70 operation permit program provides for that option.

Finally § 63.57 of today's proposal establishes requirements for complying with a 112(d) standard that is promulgated subsequent to a case-by-case MACT determination under 112(j).

The term "emission unit" in the proposed rule corresponds to the term "source" in section 112 of the statute. EPA has chosen to use "emission unit" rather than "source" to avoid creating any misperception that the section 112(j) rule could somehow constrain the Agency's flexibility to define source in other rulemakings under section 112, including national MACT standards for each source category to be issued under subsection (d) or (h).

II. Background Discussion

A. Clean Air Act Amendments. Section 112

The Clean Air Act amendments of 1990 (Public Law 101–549) contain major changes to section 112 of the Act pertaining to the control of hazardous air pollutant (HAP) emissions. Section 112(b) includes a HAP list that is composed of 189 chemicals, including 172 specific chemicals and 17 compound classes. Section 112(c) requires publication of a list of source categories and subcategories of major sources emitting these HAPs, and of area sources warranting regulation. Section 112(d) requires promulgation of emission standards for each listed source category or subcategory according to a schedule set forth in section 112(e).

B. Clean Air Act Amendments. Provisions for Equivalent Emission Limitation by Permit

1. General Requirements of Section 112(j)

The amendments to section 112 include new section 112(j). This section is entitled "Equivalent Emission Limitation by Permit." Subsection 112(j)(2) of the Act provides that section 112(j) applies if EPA misses a deadline for promulgation of a standard under 112(d) established in the "source category schedule for standards":

In the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3), and beginning 18 months after such date (but not prior to the effective date of a permit program under title V), the owner or operator of any major source in such category or subcategory shall submit a permit application.

The owner or operator of a major source subject to the provisions of section 112(j) is required under subsection 112(j)(3) to submit a complete permit application 18 months after the missed promulgation deadline:

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit.

Subsection 112(j)(3) also requires that EPA must establish requirements for permit applications, including content and criteria for the reviewing agency to determine completeness. In addition, subsection 112(j)(3) provides that if the reviewing agency deems the application incomplete, or disapproves the application, then the applicant has up to six months to revise and resubmit the application.

Subsection 112(j)(5) establishes a requirement for case-by-case MACT determinations:

The permit shall be issued pursuant to title V and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d).

Subsection 112(j)(5) also establishes compliance dates:

No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i).

If the applicable criteria for voluntary early reductions, established under section 112(i)(5), are met, then this alternative emission limit satisfies the requirements of section 112(j), provided that the emission reductions are achieved by the missed promulgation date.

In the event that EPA promulgates a given MACT standard for the applicable source category before the permit application is approved, the permit must reflect this standard, not the case-by-case MACT determination, and the source shall be required to comply by the date provided under subsection (i). In this case, the owner or operator of an existing source has no more than 3 years to comply, and the owner or operator of a new source must comply immediately upon issuance of the permit. However, under section 112(i)(2) any new source that commenced construction or reconstruction between proposal and promulgation of the MACT standard may elect to comply with the proposed standard for three years in lieu of the promulgated MACT standard, if the promulgated MACT standard is more stringent than the proposal.

In the event that EPA promulgates a given MACT standard after the permit containing case-by-case emission limits is issued, section 112(j)(6) allows a longer compliance period:

If the Administrator promulgates a standard under subsection (d) * * * after the date on which the permit has been issued, the Administrator (or the State) shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator providing such source a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the emissions limitation established by paragraph (5), whichever is earlier.

2. Definition of Emission Unit and Applicability of New Source MACT

MACT determinations must be made on a wide variety of emitting equipment at major sources in different source categories. Today's proposed rule defines "emission unit" in a way designed to allow States broad flexibility in designing case-by-case MACT emission limitations. This flexibility is essential because of the variety of source categories, diverse in size and complexity, which may be subject to 112(j). A narrower definition of "emission unit" would make it difficult for States to tailor MACT determinations to the equipment specific to a particular source category.

One approach the EPA considered, but rejected, would be to require new source MACT only on those emission units that are in and of themselves "major" at a major source—i.e. those emission units at a major source which themselves emit at least 10 tons per year or more of a single HAP, or 25 tons per year or more of a combination of HAPs.

Prior to a missed promulgation deadline, through section 112(g) the statute clearly requires new source MACT only on constructed or reconstructed major sources. Any other equipment added to an existing major source would be a modification (unless specifically exempted from regulation by 112(g)), and would be subject to existing source MACT levels of control. However, the language of section 112(j) is somewhat different from that of 112(g). Section 112(j) does not specify that new source MACT is only applicable to new major sources.

The EPA believes that the standards developed through section 112(j) must anticipate and reflect the likely requirements of section 112(d) and 112(h). The basis for the applicability of new source MACT selected is the section 112(j)(5) requirement that case-by-case MACT standards must be:

"emission limitations for the hazardous air pollutants * * * emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)."

As discussed in section I.C. (below) of this preamble, it is the judgement of EPA that 112(j) case-by-case MACT standards must require new source MACT to be applied to those same sources to which a standard promulgated under section 112(d) would apply new source MACT. Therefore, it is necessary to determine what entity is considered a new source under section 112(d) for the purpose of implementing MACT standards.

Section 112(a) provides that "new source" shall mean a "stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source." Section 112(a)(3) gives "stationary source" the same meaning as under section 111(a), i.e. any new "building, structure, facility, or installation"; thus the term stationary source clearly includes both major and area sources under section 112(a)(3). Section 112(d) requires MACT standards to be set for "sources," and "sources" can be both major and area. Once there is a 112(d) standard in place, any new source will be required to meet new source MACT emission limits, as defined by the standard.

If, however, the language of section 112(g) is interpreted as dispositive as to whether new or existing source MACT must be applied to any given increase in emissions, new sources within the definition in 112(a)(4) would escape having to comply with new source MACT under section 112(j). But if a MACT standard establishes a definition of source that would apply to a unit smaller than a "major source," this result would conflict with the requirement for section 112(j) case-by-case MACT determinations to be "equivalent to the limitation that would apply to such source * * *." Yet under this reading, although major sources adding new non-major sources could avoid new source MACT on those new sources, if MACT is then set under 112(d) for area sources in that category, any new area source would have to meet new source MACT. This would be an anomlous result. Therefore EPA today proposes requiring new source MACT on all constructed or reconstructed emission units.

The EPA today requests comment on the desirability of requiring or not requiring new source MACT on all new emission units, and also specifically requests comment on the question of whether new source MACT should be required only on those emission units that are in and of themselves "major" at a major source.

3. Subsequent Changes to a Major Source

The EPA believes that section 112(j) emission limitations apply to subsequent changes made at major sources already complying with case-by-case MACT limitations under 112(j), where EPA has not promulgated a final standard for the source category under section 112(d). The EPA intends to require, in subpart A of this part (§63.5(b)(6)), that subsequent changes to a major source already complying with a section 112(d) or (h) standard shall comply with established MACT emission limitations for the source to which changes are made. Therefore requiring subsequent changes to sources already meeting case-by-case MACT emission limitations under section 112(j) would satisfy the 112(j)(5) statutory requirement that case-by-case MACT determinations under 112(j) be "equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)."

The EPA requests comment on this approach, as well as on the alternative approach of treating 112(j) as a one time permitting requirement applicable 18 months after EPA fails to set a relevant MACT standard, and therefore requiring subsequent changes at major sources with 112(j) permits to comply only with section 112(g).

C. Implementation Principles

In designing guidance for case-by-case MACT determinations, the EPA's thinking is guided primarily by the need for 112(j) standards to be substantively equivalent to 112(d) MACT standards. Subsection 112(j)(5) requires that a case-by-case MACT determination be "equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)," and subsection 112(j)(6) requires eventual compliance with subsequently promulgated 112(d) standards. Consistency in standard-setting will smooth a major source's eventual transition from compliance with 112(j) to compliance with 112(d), making implementation of toxics control easier on both States and industry.

The EPA's other major goal in establishing 112(j) requirements is to achieve and maintain consistency across section 112 programs. The EPA intends for administrative and operational requirements under 112(j) to be consistent with the requirements of section 112(g) rules for construction, reconstruction, and modification of major sources (to be proposed as §§63.40 through 63.48 of this subpart) and with the general provisions for section 112 (established in subpart A of this part). Section IV. A. of this preamble discusses likely overlapping requirements and major substantive differences across these programs.

III. Summary and Rationale for §§63.50 Through 63.57 of the Proposed Rule

This section of the preamble is a detailed discussion of the provisions of the proposed rule. This discussion outlines the rationale for the decisions that were made, and describes other options that were considered.

A. Section 63.50: Applicability

1. Section 63.50(a). Applicability

Paragraph 63.50(a) of the proposed rule indicates that the intent of the rule is to implement section 112(j) of the Act. This paragraph indicates that 112(j) applies to the owner or operator of a major source of HAPs after the "effective date of a title V program" in each State, but not before May 15, 1994.

(a) Effective date of title V. The meaning of "effective date of a title V program" is indicated in the final regulations for implementation of title V of the Act. Under these regulations, States are required to submit a permit program for review by the EPA on or before November 15, 1993. The EPA is required to approve or disapprove the permit program within one year after receiving the submittal. The EPA's program approval date is termed the "effective date."

The effective date of title V permit programs is defined in section 502(h) of the Act, which says "The effective date of a permit program, or partial or interim program, approved under * * * [title V] * * * shall be the date of promulgation." This definition is incorporated into the operating permit regulations as 40 CFR 70.4(g).

This language refers to two types of title V programs: one type where the EPA "approves" the title V program under 40 CFR part 70 and another type where the EPA "promulgates" a program under 40 CFR part 71. Programs "approved" by the EPA under part 70 will be developed by the State or local area and submitted to the EPA for approval. The language in section 502(h) of the Act makes these programs immediately effective upon EPA approval. Programs "promulgated" by the EPA under part 71 are anticipated to be rare, and they occur only where a State failed to submit a program, submitted a program that EPA could not approve, or has failed to adequately administer an approved program. For example, the EPA is required by section 502(d)(3) of the Act to promulgate and administer a title V program if, by November 1995, the EPA has not approved the State program. The language in section 112(j), because it refers to the effective date of a title V program in any State (and not by any State), means that the program will apply to both the EPA "approved" and "promulgated" programs.

The title V regulations provide for approval of "interim" and "partial" programs in certain limited circumstances. The EPA believes that, because partial programs must ensure compliance with "all requirements established under section 112 applicable to 'major sources' and 'new sources'," and interim programs must "substantially meet the requirements of [title V]," an interim or partial program would trigger the requirements of section 112(j).

(b) Major source. Section 112(j) applies only to an owner or operator of a major source. Section 112(a)(1) of the Clean Air Act defines major source as any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

The determination of whether a source is major is based on the source's "potential to emit". A source's potential to emit is based on its capacity to emit hazardous air pollutants considering federally enforceable limits on that capacity. If a source's potential to emit is equal to or greater than 10 tons/yr of a single HAP, or 25 tons/yr of any combination of HAPs, the source is a major source. The EPA is currently developing a rule to define a source's potential to emit for section 112 standards. This rule will also provide ways for an owner or operator of a source to establish voluntary, federally-enforceable restrictions to limit the source's potential to emit below the major source threshold. If a source limits its potential to emit to below the major source threshold it will not be subject to the provisions of section 112(j) as long as the source maintains its emission status.

The EPA specifically requests comment on how area sources that increase their emissions enough to become major sources after the 112(j) effective date should be treated under 112(j). The EPA is considering treating these sources as existing major sources as of the date that they achieve that major source emissions threshold, but treating any new source within the major source as a new source for the purposes of section 112(j).

4. Section 63.50(b). Relationship to State and Local Requirements

Many State and local regulatory agencies maintain regulatory programs that involve toxic air pollutant reviews for stationary sources. This paragraph clarifies that the requirements of section 112(j) do not pre-empt any requirements of these programs that are at least as stringent as the proposed rule.

5. Section 63.50(c). Retention of State Permit Program Approval

Some States may not currently have specific legislative or administrative authority sufficient to establish the regulations required by section 112(j). Paragraph 63.50(c) requires that States obtain such statutory authority as a condition of retaining their part 70 permit program approval.

B. Section 63.51: Definitions

1. Terms Defined in the General Provisions

A number of terms used in the proposed rule will be defined for all of 40 CFR part 63 by the General Provisions, to be contained in subpart A of this part. The terms which will be defined in the General Provisions include:

Administrator
Effective date
Hazardous air pollutant
Major source
Permit program
Potential to emit
Relevant standard

Today's rule contains a definition of "potential to emit" that is the same as the definition in part 70. The EPA is currently developing a definition of "potential to emit" to be included in subpart A of this part. The EPA intends that if subpart A of this part is promulgated before today's rule is promulgated, the definition included in subpart A will be included in the final rule implementing section 112(j) of the Act. The EPA requests comment on the definition of "potential to emit" for the purposes of this rule.

2. Terms Related to Maximum Achievable Control Technology

Definitions for the following terms related to levels of control technology are included in § 63.51 of the proposed rule:

Maximum Achievable Control Technology
Control Technology
Maximum Achievable Control Technology (MACT) Floor
Maximum Achievable Control Technology (MACT) Emission Limitation for Existing Sources
Maximum Achievable Control Technology (MACT) Emission Limitation for New Sources

The basis for all of these definitions is statutory language contained in section 112(d) of the Act. The term "maximum achievable control technology" appears only in section 112(g) of the Act, and does not appear elsewhere in section 112. There is, however, considerable legislative history indicating that this term refers to the level of control required by section 112(d) emission standards. This term was used in this context in the House Bill, H.R. 3030. For purposes of the definitions in the proposed rule, the EPA assumes that "maximum achievable control technology" is a reference to the "maximum degree of reduction in emissions" language contained in section 112(d)(3). The minimum control technology requirements of section 112(d), often referred to as the "MACT floor" are cited a number of times in the proposed rule. To avoid repeating these requirements each time, the regulation includes a definition of "MACT floor."

3. Terms Affecting the Extent of Coverage by Maximum Achievable Control Technology

The following terms are used to describe equipment subject to a MACT determination:

Emission point
Emission unit
New source

An "emission point," in this regulation, is defined narrowly to refer to any individual point of release to the atmosphere. However, an individual MACT determination will often be made at once for a number of emission points. The term "emission unit" is used to refer to the collection of all emission points considered when a MACT determination is made.

The term "new source" refers to an emission unit for which construction or reconstruction is commenced after the section 112(e) scheduled deadline for a relevant standard, or after proposal of a relevant standard under section 112(d) of the Act, whichever comes first. "New source" is defined in Clean Air Act section 112(a)(4) as follows:

"* * * a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source."

Section 112(j) requires States to establish case-by-case MACT limitations where EPA has failed to promulgate a relevant standard, and there may be instances where a 112(j) MACT limitation is required for a source category for which a standard has not yet been proposed under section 112(d). Since 112(j)(5) refers explicitly to case-by-case standards for new sources, the EPA has determined that the Act did not intend that the EPA's failure to propose a standard implies that no sources in that source category, no matter what the date of construction, could ever be considered "new." The EPA has therefore selected the 112(e) scheduled deadline as the date, under a 112(j) case-by-case MACT determination, most closely equivalent to the 112(d) proposal date for the purposes of defining "new source," because had EPA met the schedule in setting a standard under 112(d) the proposal could not have been any later than the date in the schedule. The EPA requests comment on this determination of what sources should apply new source MACT under 112(j).

4. Federally Enforceable

The Subpart A General Provisions will include a definition of "federally enforceable" which lists the types of limitations and conditions that are considered federally enforceable. The EPA believes that, for purposes of Subpart B requirements, this definition should contain additional language to ensure that the case-by-case determinations are practically enforceable. A more detailed discussion of EPA's rationale for this determination is contained in section III.E. of this preamble. Section 63.51 includes a definition of "federally enforceable" that incorporates these concepts. The EPA requests comment on this definition.

C. Section 63.52: Requirements for Existing Sources

Section 63.52 of the proposed rule requires that case-by-case MACT determinations for existing sources be made through the title V permit process. The overall process for case-by-case MACT determinations for existing sources is shown in Figure 1. The owner or operator of an existing major source must submit a permit application containing case-by-case MACT demonstrations for all emission units in a source category not later than 18 months after the missed promulgation date for that source category. The State must then review and approve or disapprove the permit in accordance with the procedures and principles set out in part 70 and in § 63.55 of this proposal, and, EPA suggests, in accordance with the procedures and principles set out in the case-by-case guidance. Section 63.52(c)(1) of the proposal implements the requirement in section 112(j)(4) of the Act that if a source's permit application is incomplete or disapproved by the permitting authority, the source has up to six months to resubmit and meet the requirements of the permitting authority.

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CASE-BY-CASE MACT DETERMINATION PROCESS FOR EXISTING SOURCES

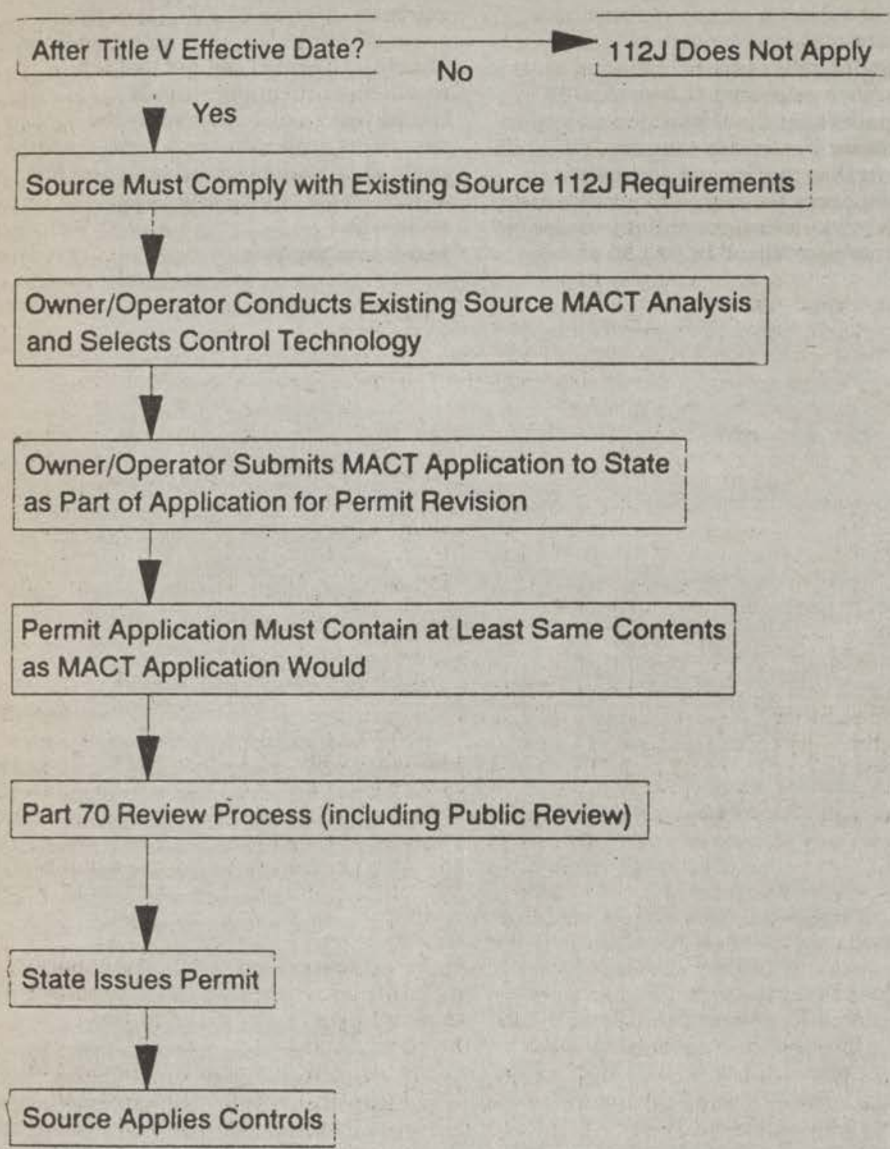

Figure 1

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For existing sources, the permitting authority at its discretion may require compliance as expeditiously as practicable, but within no more than three years from permit issuance. In addition the permitting authority may allow an extra year, on a case by case basis, where necessary to the installation of controls. The EPA believes that this approach is consistent with section 112(j)(5) which requires that MACT standards must ensure compliance ". . . immediately for new sources and, as expeditiously as practicable, but not later than the date three years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i)."

D. Section 63.53: Application Content for a Case-by-Case MACT Determination

Section 63.53 of the proposed rule describes the information the owner or operator is required to provide with an application for a MACT determination. These information requirements are designed to identify the emission units to be controlled and to demonstrate that the selected control technology for those units is consistent with or exceeds the requirements of the statute. Further information on the uses of this information are described in the Draft Guidelines for MACT Determinations.

E. Section 63.54: Preconstruction Procedures for New Sources

Section 112(j), when read together with title V, presents certain ambiguities which must be resolved in this rulemaking. Section 112(j) requires case-by-case determinations of MACT for new as well as existing sources. Section 112(j)(5) directs that case-by-case MACT is to be "equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)." The timing for application to new sources of any standard promulgated under section 112(d) is in turn articulated in section 112(i)(1), which prohibits the construction of a new major source or reconstruction of an existing major source except where there has been a determination that the construction or reconstruction will meet the MACT standard.

However, the timing of this determination for new sources under section 112(j) is different than the timing required by the statute for section 112(d) standards. Section 112(j) requires that the permit containing the case-by-case determination of MACT be "reviewed and approved or disapproved according to the provisions of section 505" (section 112(j)(4)) and issued "pursuant to title V" (section 112(j)(5)). This conflicts with a requirement for preconstruction review for new sources subject to only section 112(j), because title V does not give EPA discretion to require applications for sources newly subject to the title earlier than 12 months after commencing operation. (Section 503(c)). Because the part 70 permit must be issued within 18 months of the application, it could be up to 30 months after operation before section 112(j) requirements would be incorporated into the title V permit.

As noted above, the EPA believes that sources subject to case-by-case MACT determinations should undergo preconstruction review. While in some cases States may require review under the part 70 program to occur in the preconstruction phase, the Act does not authorize EPA to mandate this result. It follows that, while title V is sufficiently comprehensive to handle the section 112(j) review process for existing sources, it is not broad enough in its mandatory coverage to implement section 112(j) for new sources. However, EPA believes that the preconstruction review requirements of section 112(g) will be applicable to many new sources subject to 112(j). For example, construction of all new major sources, and all new sources constructed as part of a modification of an existing major source, would require preconstruction review under section 112(g). States also have the option of establishing an accelerated voluntary administrative process for preconstruction review of new sources subject to section 112(j), to cover those sources not subject to the requirements of 112(g). EPA is strongly recommending to States that they provide these procedures.

As an alternative to relying on the preconstruction review procedures of section 112(g) for new major sources, EPA considered relying on the language of section 112(i)(1) to require preconstruction review of new sources under 112(j). However, section 112(i)(1) requires preconstruction review only for new major sources and therefore adds nothing to the preconstruction review requirement applicable under 112(g). EPA solicits comment on its decision to rely on the preconstruction review requirements of 112(g) in this proposal.

Section 63.54 of today's proposed rule describes an optional preconstruction review process for new sources not required to undergo preconstruction review under 112(g). States need not provide this additional preconstruction review opportunity. Moreover, since the preconstruction review process set forth in § 63.54 is optional, States may provide for a different process. However, an alternative process for making these determinations would not necessarily yield federally enforceable conditions. The procedures set forth in § 63.54 contain the elements EPA believes to be necessary for a federally enforceable preconstruction MACT determination. The EPA solicits comment on these minimum procedures, and in particular whether different criteria are appropriate.

As discussed below, States may further enhance this process to allow for incorporation of the MACT determination by administrative amendment.

The EPA believes that section 112(j) alone does not provide the authority to impose federally enforceable restrictions that could implement case-by-case MACT determinations. The EPA solicits comment on whether States should have the option of submitting, for approval under section 112(l), programs establishing administrative review processes that would allow the imposition of federally enforceable MACT determinations. The EPA proposed a rule under section 112(l) of the Act on May 19, 1993 (58 FR 29296). This proposal set forth the criteria for approval of state programs to implement the requirements of section 112. This proposal did not specifically address approval of state programs establishing federally enforceable preconstruction review processes for section 112(j). However, such programs could be approved under section 112(l) without difficulty wherever they could be shown to be at least as stringent as section 112(j) requirements.

The majority of new sources subject to 112(j) will be subject to section 112(g) preconstruction review requirements prior to filing their permit applications under part 70. The overall process for MACT determinations contained in § 63.54 of the proposed rule is shown in Figure 2. For those sources not subject to preconstruction review under 112(g), the optional review process begins with a MACT analysis by the owner and operator. This MACT analysis should be consistent with the Guidelines for MACT Determinations (hereafter referred to as the Guidelines), including general principles described in § 63.56(b). The owner or operator provides an application for a MACT determination to the reviewing agency (generally a State or local agency to whom authority for implementation of the program has been delegated). Requirements for the contents of this application are outlined in the Guidelines and in § 63.53. This application for a MACT determination is then evaluated by the reviewing agency according to procedures described in § 63.54(b). If approved, the reviewing agency will issue a Notice of MACT Approval containing certain basic elements described in § 63.54(c). Provisions dealing with compliance with the requirements of the Notice of MACT Approval are described in §§ 63.54 (d) through (h).

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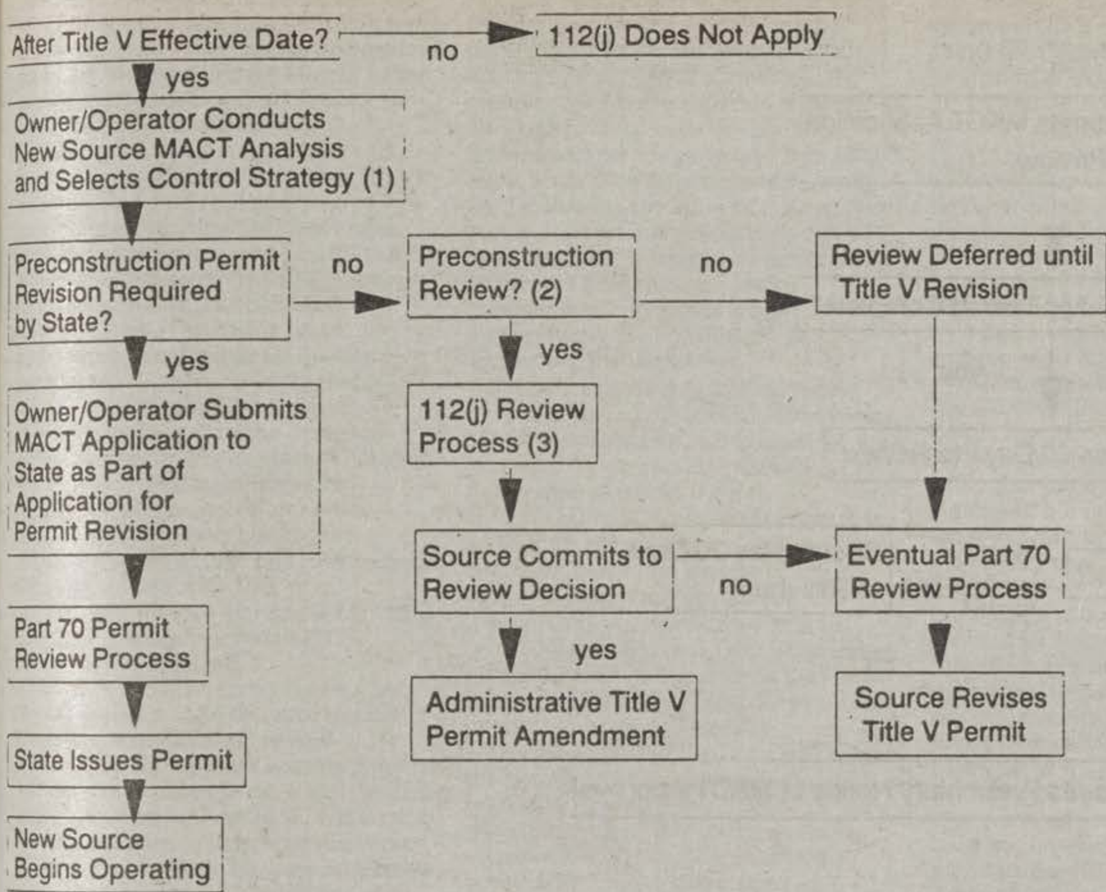
ADMINISTRATIVE PROCESS FOR NEW SOURCES



(1) Control Strategy Must Be Adopted Irrespective of Review Status

(2) Preconstruction Review May be Required under 112(g) for Some Sources or May Occur at the Applicant's Request

(3) 112(j) Review Process Detailed in Figure 2a

Figure 2

112(J) REVIEW PROCESS FOR NEW SOURCES

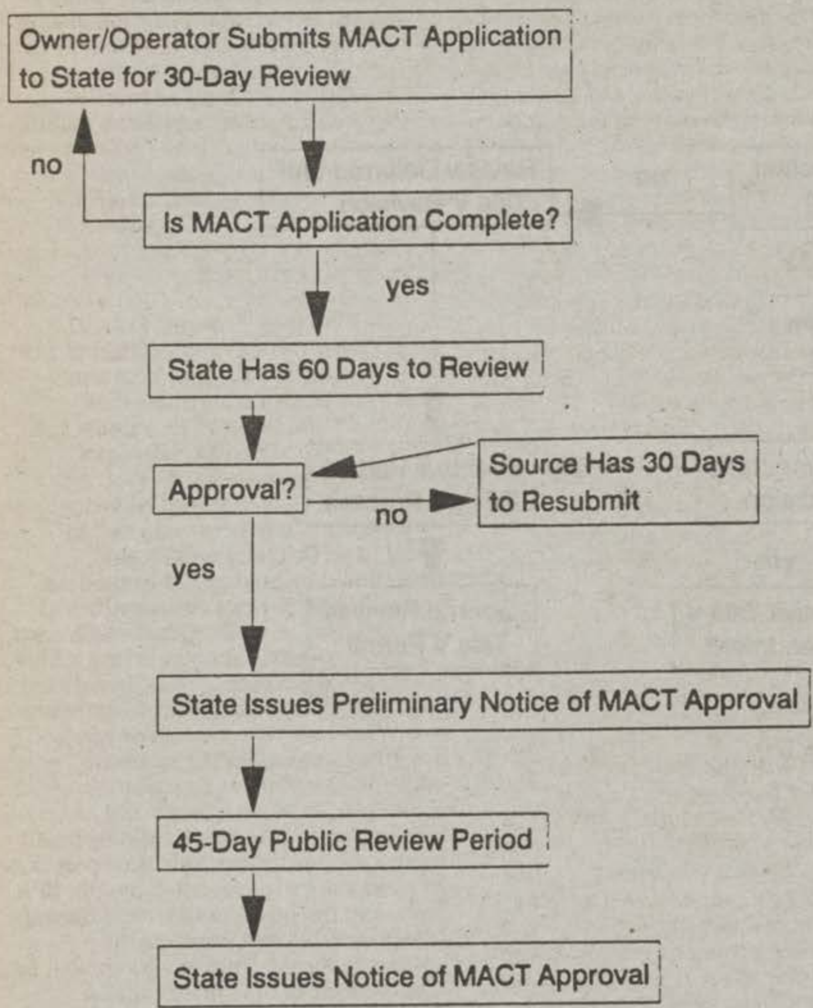


Figure 2a

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The EPA believes that there are substantial implementation advantages to preconstruction review for sources subject to 112(j). Preconstruction review provides sources with the benefit of the State's control determination prior to construction. This minimizes the possibility that initial control technology installed by a source in anticipation of a 112(j) new source MACT determination will need to be replaced in order to comply with the eventual requirements of 112(j) as well as the subsequent 112(d) MACT determination. The EPA's past experience in enforcing air quality regulations suggests strongly that it would be very difficult to require substantial changes in the design of equipment once it is in place. Therefore the EPA strongly urges States to establish a preconstruction review process for sources subject to the requirements of 112(j). The EPA today requests comment on the implementation consequences for 112(j) and 112(d) when preconstruction review is not required.

Another benefit of preconstruction review is that a State can also require compliance earlier than permit issuance. If, under State law (through section 112(l) delegation), a State wishes to enforce case-by-case MACT at startup for new sources, then preconstruction review is the avenue for enforcement of such a requirement. The EPA today specifically requests comment on the likely consequences of the lack of such an enforcement mechanism at the federal level.

The EPA is, however, sensitive to the concern that preconstruction review should not lead to unreasonable delays. For sources not covered by 112(g) preconstruction requirements, § 63.54 contains streamlined administrative procedures which should ensure that the preconstruction review is done quickly.

The process outlined in § 63.54 begins with a 30-day completeness determination. Once a complete application is received, approval or an intent to disapprove the application is required. If an intent to disapprove is issued, the owner or operator is given the opportunity to provide further information.

Section 63.54(b) establishes an administrative process for reviewing a request by an owner or operator for a MACT determination. If the determination is to be federally enforceable, the proposed decision to either approve or disapprove the application is then subject to public review. Today's proposed rule would provide for public review through issuance of a notice containing all the relevant background information about the application and 45 days for the public to comment on whether the application should or should not be granted. In order to expedite approval of noncontroversial case-by-case MACT determinations the proposed rule would allow such determinations to be made final following the close of the comment period if no adverse comments have been received. If adverse comments are received a final notice must be published either approving or disapproving the application and addressing the comments.

Today's proposal requiring public review prior to approval of case-by-case MACT determinations is consistent with current EPA practice in other Clean Air Act programs where federal enforceability is required. For example, 40 CFR 51.161 requires a 30 day public comment period for review of an agency's proposed approval or disapproval of a minor new source permit. Similarly, in a 1989 rulemaking EPA enumerated five criteria that must be met before a State-issued operating permit can become federally enforceable. One of those criteria is that the permit must be subject to public review before issuance. This criterion was described in the notice as being consistent with the EPA's current practice for construction permits codified at 40 CFR 51.161. (See 54 FR 27283, June 28, 1989).

Thus, the Agency's current practice is to require public review of decisions required to be federally enforceable. As stated by the Supreme Court in *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Automobile Insurance Co. et al*, 463 U.S. 27, 43 (1983), "an agency changing its course * * * is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." In this case there is an established practice of requiring public review as a prerequisite to federal enforceability. EPA proposes to follow that practice in this case unless a more compelling reason is identified for either changing that practice or deviating from it in this specific case.

As discussed above, the EPA is proposing to require public review as a prerequisite to federal enforceability of case-by-case MACT determinations. Comment is specifically requested concerning whether public review should be a prerequisite to federal enforceability of case-by-case MACT determinations, and if it should not, what justification there would be for deviating from established practice.

In § 63.51 of the regulation, EPA has established a definition for federally enforceable for application to section 112(j) MACT determinations. This definition is based on the five criteria for federal enforceability established in 40 CFR parts 51 and 52 (54 FR 27274). Part of the criteria for conferring federal enforceability to a State or locally established emission limitation requires the emission limitation to undergo some public scrutiny and be kept in standardized files in EPA's Regional Offices. In addition, the emission limitation must be enforceable as a legal and practical matter.

In *United States* v. *Louisiana-Pacific Corporation* (682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 Supp. 1141 (d. Colo. March 22, 1988),) the court ruled that permit conditions that contained blanket emission limits (i.e. tons/yr) were not enforceable as a practicable matter because such restrictions "* * * would be virtually impossible to verify or enforce." In order to be federally enforceable, operational or production limitations including limitations on quantities of raw material consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emission to a specified emission rate or level, must be imposed on the source in addition to a blanket emission limitation. These operation and production limitations should be based on the shortest practicable time period, generally not to exceed one month. EPA has taken the position that requirements for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating enforcement action.

To ensure federal enforceability, the owner or operator must at a minimum be subject to monitoring, recordkeeping and reporting requirements sufficient to document the source's compliance with proper maintenance and operational requirements. Because major sources obtaining MACT determinations will incorporate such determinations into a title V permit, the regulations that are the subject of this preamble have included a requirement that the monitoring, recordkeeping, and reporting requirements required for a case-by-case MACT determination be consistent with the compliance requirements contained in part 70. Part 70 requires monitoring, recordkeeping and reporting sufficient to demonstrate compliance with the emission standard—as well as compliance with maintenance and operational requirements.

EPA believes that consideration of the part 70 compliance requirements within the MACT determination process will be much more efficient for both the source and the reviewing agency. If the public review process for the MACT determination is substantially equivalent to that which will be required for a title V permit (under part 70 or part 71), the source would not need to undergo another public review of the compliance requirements to assure that the requirements are sufficient for the purposes of issuing the title V permit. In addition, consideration of these requirements will prevent a source from having to retrofit monitoring equipment in order to obtain a title V permit. States may also enhance the preconstruction process by the addition of a formal 45-day review period and notice to affected States, consistent with 40 CFR 70.8.

In addition to part 70 compliance requirements, additional requirements may need to be considered at the time of the MACT determination. Section 114 of the Act directs EPA to require enhanced monitoring and compliance certifications for all major sources. For the same reasons stated for considering the part 70 compliance requirements, the EPA believes that these section 114 enhanced monitoring and compliance principles should also be considered at the time of the MACT determination, and enforced at start-up.

The end result of the administrative review process for new sources is a determination set forth in a document that is termed a "Notice of MACT Approval." Requirements for this Notice are provided in paragraph 63.54(c) of the proposed rule. This Notice is required to contain the emission limitations, notification, operating and maintenance, performance testing, reporting, recordkeeping, compliance dates, and any other requirements needed to ensure that the case-by-case MACT emission limitation will be met.

The Notice of MACT Approval serves to provide the obvious mechanism for federal enforceability of these conditions in the interval between initial operation of the new source and the time the conditions are added to the part 70 or part 71 permit.

The EPA recognizes that there are cases for which sources would prefer to minimize delays in the process, particularly for operations which change relatively frequently, and where the owner or operator is willing to control emissions from those changes with technologies that could be recognized as best available controls. The EPA requests comment on further procedures to achieve this goal.

The EPA is especially interested in exploring suggestions that the general permit procedures, outlined in 40 CFR 70.6(d), be available for such situations. The general permit may have application for section 112(j) determinations where the permitting authority is able to make a presumptive determination of MACT for a given type of source. The general permit would have to set forth the controls required by part 70. Once the general permit is issued, application of the MACT determination at a particular source would involve merely a determination that the source falls within the source category covered by the general permit.

As discussed in the preamble to the operating permit regulation, general permits may be issued to cover discrete emissions units at permitted facilities. 57 FR, at 32279. While a general permit cannot be used to modify the terms of an existing title V permit, it may be issued to cover a change at an existing plant, such as addition of a new MACT-emitting unit, that would otherwise be eligible to apply for a new individual permit. In that case, the requirements of the general permit could be incorporated into the permit for the facility at renewal.

The EPA solicits comment on the approach to preconstruction review described above. EPA specifically solicits comment on whether 112(j) can be interpreted to require mandatory preconstruction review for all new sources.

F. Section 63.55: Incorporation of Requirements for New Sources Into the Operating Permit

Section 63.55 describes the relationship of the MACT review process for new sources to the operating program requirements pursuant to title V of the Act amendments. The requirements for title V permits, contained in 40 CFR part 70, were published on July 21, 1992 (57 FR 32250). For existing sources, the approach to establishing an administrative process for determinations under section 112(j) of the Act is to rely on the title V review process as the mechanism for establishing MACT requirements. For new sources, however, the EPA believes that reliance on the title V permit process may not be sufficient. First, the title V requirements clearly do not require a new "greenfield" plant to apply for an operating permit until 1 year after the plant begins operation. Because the title V permit must be issued within 18 months of the application, it could be up to 30 months after commencement of operation before section 112(j) requirements would be incorporated into the permit. Second, the title V requirements do not ensure that a MACT determination will be conducted before construction. While in some cases States with title V programs may require preconstruction reviews as part of the operating permit process, this will not always be the case.

Therefore, while for existing sources the title V permit process is sufficiently comprehensive to handle section 112(j) reviews, the EPA believes, based upon the above considerations, that when the title V process does not occur until after construction has begun, new sources should be subject to preconstruction review. All new major sources and new sources constructed as part of a modification of an existing major source will likely be subject to preconstruction review under section 112(g), and the proposed rule provides a mechanism, optional with the State, for providing a preconstruction review process yielding a federally enforceable determination of MACT.

Regardless of the timing for incorporation of 112(j) new source determinations into the operating permit, there are certain requirements that apply. The title V permit must be revised or issued according to procedures set forth in §§ 70.7 and 70.8. In addition, the permit must incorporate compliance provisions of § 70.6. If, during the EPA's review of the section 112(j) determination, it becomes apparent that the determination is not in compliance with the Act, then EPA must object to the issuance or revision of that permit.

These requirements are obviously satisfied either when part 70 requires revision to an existing title V permit prior to construction, or when the permitting authority otherwise requires incorporation of conditions into a title V permit as a step in the section 112(j) new source case-by-case MACT determination process. However, even where there is no formal incorporation of conditions into a title V permit prior to operation, subsequent additional title V review may effectively be avoided if the State's section 112(g) or optional 112(j) process is "enhanced" to include the important title V procedures, thereby allowing for later incorporation into the title V permit by administrative amendment.

Section 70.7(d) of the operating permits rule defines an "administrative amendment" to include a revision that "[i]ncorporates into the part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to those contained in §§ 70.7 and 70.8 of this Part * * * and compliance requirements substantially equivalent to those contained in § 70.6 of this part." This process of "enhancement" of preconstruction procedures was discussed in the preamble to the operating permits rule in the context of existing State new source review programs (see 57 FR, at 32289), but was not discussed in relation to section 112(j) because the procedures associated with section 112(j) determinations had not then been articulated. However, the language of § 70.7(d)(v) would allow for use of administrative amendments for an enhanced preconstruction review process, and the EPA believes such use is clearly within the intent of that provision.

Enhancement of the preconstruction review process may be partial only, incorporating some elements of the required part 70 review or compliance provisions in the preconstruction review process itself, with the remaining elements occurring during the title V process. For instance public review of the MACT determination that meets the requirements of § 70.7(h) need not be repeated at the time of incorporation into the title V permit. However, for the administrative amendment procedures to be available for determinations that have been through an enhanced process, the public, EPA and affected States must have had the opportunity to review all aspects of the MACT determination, including any compliance provisions required under § 70.6. Thus, public review during the preconstruction review process would not suffice for purposes of title V if the process did not specify the application of compliance provisions substantially equivalent to those in § 70.6, including monitoring, reporting, recordkeeping, and compliance certification.

G. Section 63.56. MACT Determinations

As discussed previously, §§ 63.52 and 63.54 require MACT determinations, after the effective date of a title V permit program in a State, for all HAP-emitting equipment that is located at a major source and is in a source category for which the Agency has failed to promulgate a maximum achievable control technology (MACT) standard under sections 112(d) or 112(h) of the Clean Air Act within 18 months after the date listed in the source category schedule for standards. This section of the preamble discusses the EPA's proposed procedures for making these MACT determinations. These procedures include technical review procedures needed to establish a MACT emission limitation and a corresponding MACT control technology. In the proposed rule, the overall process for MACT determinations is outlined in § 63.56. In addition to the proposed rule, EPA is making available today a draft document entitled Draft Guidelines for MACT Determinations under 112(j) (EPA-450/3-92-007). This document will contain more details on both technical and administrative procedures.

The primary emphasis in the MACT guidelines is on the procedures for case-by-case MACT determinations when no applicable MACT standard has been proposed by the EPA. The procedures for determinations after MACT standards have been proposed are more straightforward.

Section 63.56 reviews a number of general principles that would govern MACT determinations under the proposed rule. In general, the purpose of a case-by-case MACT determination is to develop technology-based limitations for HAP emissions that the Administrator (or a permitting agency to whom authority has been delegated) approves as equivalent to the emission limitations required for the source category if promulgated MACT standards were in effect under section 112(d) or section 112(h) of the Act.

The EPA believes that if a MACT standard has been proposed, but not yet promulgated, this proposed standard is the best estimator of the Agency's final action, and therefore should be considered in establishing a case-by-case MACT emission limitation, and followed unless the State can adequately support an alternative. Accordingly, paragraph 63.56(a)(1) requires that in the absence of a supportable alternative, the selected control technology should be consistent with any such proposed standard. Of course, where improved information has become available since MACT proposal, such information should be considered.

When no MACT standard has been proposed, the proposed rule requires, for a determination by the reviewing agency, that the technology selected by the owner or operator is consistent with the overall requirements described in section 112(d) of the Act.

Section 112(d)(3) of the Act describes the general considerations for a MACT determination. A MACT level of control is "the maximum degree of reduction in emissions of the hazardous air pollutants * * * that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new and existing sources in the category or subcategory * * *." This paragraph of the Act continues to describe a number of items that might be considered in designing MACT standards such as material substitutions, enclosure of processes, capture and control of emissions, design and work practice standards, and operational standards. In the proposed rule, this list of items is included in the definition of "control technology" in § 63.51 of the proposed rule.

Section 112(d) also imposes certain minimum requirements on the determination of "maximum achievable control technology." Collectively, these minimum requirements are defined in the proposed rule as the "MACT floor."

For new sources, the MACT floor for a case-by-case MACT determination, consistent with section 112(d), is the level of control that is achieved in practice by the best controlled similar source. The EPA believes that the legislative history of section 112 suggests that the "best controlled similar source" could be located outside of the United States. The definition of MACT floor for new source MACT is therefore not restricted to sources in the United States, but could instead be based on a technology known to be used in practice on a similar source located anywhere.

For existing sources, the MACT floor for the case-by-case determination, consistent with section 112(d) of the Act, is an emission limitation equal to the average emission limitation achieved by the best performing 12 percent of existing sources in the category for categories or subcategories with 30 or more sources, or the average emission limitation achieved by the best 5 sources for categories with fewer than 30 sources. The MACT floor for existing sources also takes into account sources achieving the "lowest achievable emission rate" as defined for the criteria pollutant new source review program under section 171 of the Act, and excludes them from the floor calculation. The EPA interprets the "best performing 12 percent" to mean the best performing 12 percent of sources in the United States, because all sources in each category are in the United States. The phrase "in the United States" is added to the existing source MACT floor definition in order to clarify that territories and possessions of the United States are included.

The EPA believes that when information is available to define a MACT floor, the case-by-case MACT determination must take that information into account. The EPA currently maintains a number of databases that can be used as a resource for information on available control technologies, or to obtain data to calculate the MACT floor. These databases include the National Air Toxics Information Clearinghouse (NATICH), the Best Available Control Technology/Lowest Achievable Emission Rate (BACT/LAER) Clearinghouse, and the Aerometric Information Retrieval System (AIRS)/ AIRS Facility Subsystem (AFS).

The EPA requests comment on the general principle that a "sufficient effort" be made to determine the MACT floor.

The EPA believes that in most cases where 112(j) requirements are triggered, the EPA will have collected a substantial amount of information on the source category. When it appears that the 112(j) requirements will take effect, the EPA intends to make available any such information it has collected. For example, the data collection may be readily available in EPA-proposed Background Information Document (BID) for which a MACT floor has been determined. The EPA believes that for such cases it would be reasonable to expect that such a BID would be taken into consideration in establishing a case-by-case MACT emission limitation.

In other cases, the EPA may have collected a great deal of information on the industry but a BID will not be available at the time of the 112(j) trigger date. The EPA anticipates sharing its information with interested parties. The EPA believes that it is reasonable to expect that a dialogue can be established with affected industries and States to review this information for purposes of establishing a case-by-case MACT emission limitation.

In other cases, the EPA may have collected only qualitative information on the types of control measures in existence for a source category. Such information would often be a good starting point for evaluating control options; in addition, such qualitative information may sometimes indicate which measures have been taken by the best performing 12% of the industry.

The EPA expects that, in rare cases, if any, the Agency will have collected little or no information about a source category that would be useful for the purposes of implementing section 112(j).

When a MACT floor can be determined, the proposed rule requires that the control technology selected by the owner or operator achieve an equal or greater level of control than that MACT floor. The owner or operator should consider, in determining whether to request approval of a control technology achieving a level of control greater than the floor, the cost, non-air quality health and environmental impacts and energy requirements of achieving that level of control. (See section 112(d)(2) of the Act)

When a MACT floor cannot be determined, the proposed rule requires a maximum degree of reduction in emissions with consideration to the cost, non-air quality health and environmental impacts and energy requirements. The MACT Guidelines discuss methods for establishing a case-by-case MACT emission limitation under these circumstances. These methods are patterned after similar guidelines for best available control technology (BACT) determinations under criteria pollutant permitting programs.

A significant issue for this rulemaking is how to avoid placing unmanageable information-gathering burdens on sources and permitting authorities—while still ensuring that emissions limitations under 112(j) are equivalent in stringency to MACT standards that the EPA would have issued. The EPA specifically requests comment on how to better define the "available information" that, at a minimum, an owner or operator must use to document a MACT floor finding and to select a MACT candidate. EPA also requests comment on the definition of "available information" that, at a minimum, a permitting authority must consider in determining emission limitations for new and existing sources under this rule.

Section 63.56(c) establishes the requirement that the permitting authority submit summary information pertinent to the MACT application to an EPA-established national database. The EPA requests comment today on whether approval or disapproval of a MACT application can be tied to submission of such data to the national database.

H. Section 63.57: Requirements After Promulgation of a Subsequent Standard Under 112(d)

Section 63.57 of the proposed rule sets out requirements for incorporating subsequent standards into an operating permit after the owner or operator has submitted a permit application for a 112(j) case-by-case MACT determination, or after a case-by-case MACT determination has been made under section 112(j). Section 63.57 implements the specific requirements of subsection 112(j)(6) of the Act.

Section 63.57 provides, as required in the Act, that if the EPA promulgates a 112(d) standard for a source category before approval of a 112(j) permit application for a source in that source category, then the permit must reflect the 112(d) standard. New sources must comply upon startup with the 112(d) rule except that, if the MACT standard is more stringent than the proposal, source commencing construction or reconstruction between proposal and promulgation may comply with the proposal for 3 years, then meet the final MACT standard.

If EPA promulgates a 112(d) standard after issuance of a 112(j) permit for a source in the relevant source category, then the permit must be revised upon renewal to reflect the 112(d) standard. However, the compliance period must be no longer than a total of eight years from the initial 112(j) compliance date, or the 112(d) promulgation date, whichever is earlier.

Paragraph 63.57(c) clarifies a State's responsibilities when a case-by-case MACT standard is more stringent than a subsequent 112(d) standard, and a permit containing that case-by-case standard has been issued. In that instance, the State is not required to revise the permit to reflect the less stringent 112(d) standard, but may presume that the more stringent case-by-case determination satisfies the requirements of both 112(j) and 112(d). The EPA believes that nothing in section 112 of the Clean Air Act requires pre-emption of these more stringent State standards.

IV. Discussion of the Relationship of the Proposed Requirements to Other Requirements of the Act

A. 112j, 112g and 112d: Overlapping Requirements

States and sources implementing the requirements of section 112 of the Clean Air Act need to understand the potentially complex relationships among several interlocking provisions. The EPA is currently contemplating different interpretations of the relationship among the requirements of section 112 (d), (g) and (j).

Internal Consistency

As discussed in section II.C. of this preamble, EPA's primary goal is to create as seamless a web as possible between case-by-case MACT determinations under 112(j) and implementation of subsequent 112(d) standards for those same source categories. In addition, the Agency desires to rationalize the 112(j) provisions with the 112(g) provisions requiring case-by-case MACT determinations for constructed, reconstructed, and modified major sources. While under the Act some of the specific substantive requirements of section 112(g) differ under the Act from the substantive requirements of 112(j) and 112(d), the EPA intends to ensure the greatest possible operational consistency among section 112 (d), (g), and (j) provisions.

One fundamental principle guiding the design of all three programs is that substantive control requirements under 112(g) hold only until the requirements of a 112(j) or 112(d) standard become effective. In other words, after the effective date of a 112(j) case-by-case MACT determination or a 112(d) MACT standard, the control requirements of section 112(j) or section 112(d) supersede the control requirements of section 112(g).

The EPA considered an alternative approach, i.e. the finding that 112(g) governs all changes and additions of new emission units at existing sources whether or not a 112(d) or (j) standard exists. The EPA rejected this approach for reasons enumerated below. Nevertheless the EPA requests comment on both approaches.

One reason for rejecting the approach that 112(g) control extends to sources covered by 112(d) or 112(j) standards is that it leads to the conclusion that many new sources within the section 112(a)(4) definition of new source would forever escape having to apply a new source MACT level of control. Such an interpretation is in conflict with the requirements of section 112(d).

Section 112(a)(4) defines a new source as "a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source." Thus, once a standard has been set under section 112(d), any new source will be subject to new source MACT. Moreover, under section 112(a), a "stationary source" can be "major" (112(a)(1)) or "area" (112(a)(2)). The MACT standard will define the portion of a facility that is considered a "source" for the purposes of the particular standard.

Section 112(g) applies to construction, reconstruction, or modification of major sources, and in many cases will have an effect on sources earlier than section 112(d) or (j) standards. However, section 112(g) only requires new source MACT on new major sources, and considers any other new emission unit to be a modification of an existing major source. As a "modification," such a new emission unit will be required to apply for existing source case-by-case MACT determination under 112(g). Therefore if 112(g) were to constrain the application of a subsequent 112(j) or 112(d) standard, many new emission units under the 112(a)(4) definition of "new source" would never be required to comply with new source MACT.

In addition, under 112(g) a new emission unit might not even be required to meet an existing source MACT level of control. Section 112(g) allows for modifications to either: (1) Comply with a case-by-case "existing source" MACT determination under 112(g); (2) offset emissions increases in lieu of applying 112(g) existing source MACT requirements; or (3) if its emissions were below 112(g) de minimis levels, not be subject to any control requirements at all. The EPA believes that 112(g) thus provides major sources with a great deal of needed flexibility before 112(d) or (j) standards are set; but that once those standards are in place the Act intends that these sources must comply with the specific requirements of those standards.

Finally, the interpretation that 112(g) governs the addition of new equipment at major sources to which 112(d) or (j) standards already apply has some anomalous implications. One example would be a new emission unit whose emissions are below 112(g) de minimis levels for a particular hazardous air pollutant. If that emission unit were added to a major source, it would be exempt from the requirements of 112(g), but would be required to apply new source MACT control under 112(j). However, if that emission unit were not below 112(g) de minimis levels, it would be required to comply with 112(g). If 112(g) requirements limit the application of 112(j), then the source would be required to apply existing source MACT. In this instance, a smaller emission unit would be required to control more stringently than a larger emission unit.

Another example of anomalies resulting from this reading of the statute would be a 112(d) standard that sets new source MACT for new area sources in a source category. Under this reading, major sources adding new sources could avoid new source MACT, but any new area source would have to meet new source MACT. Again, a smaller unit would be required to control more stringently than a larger emission unit.

Therefore EPA believes that the substantive control requirements of 112(g) are pre-empted by the requirements of a relevant 112(j) or 112(d) standard.

Administrative Consistency

Voluntary administrative procedures for new sources under 112(j), as outlined in § 63.53 of the proposed rule, are intended to be analogous to administrative requirements to be set out for modified, constructed, and reconstructed sources under section 112(g) of the CAA, which will be proposed in §§ 63.40 through 63.48 of this subpart.

Figure 3 illustrates the link between the voluntary section 112(j) preconstruction review process and section 112(g) administrative requirements. Although the EPA believes that section 112(j) does not provide authority for preconstruction review of all new sources, the EPA strongly believes, as a matter of policy, that the administrative process for new major sources or existing sources adding new equipment should be the same regardless of whether the 112(j) effective date has passed.

Before the 112(j) effective date, such sources will be required to make a case-by-case MACT determination under 112(g). After the 112(j) effective date, these sources will be required to make a case-by-case MACT determination under 112(j). In cases where 112(g) and 112(j) substantive control requirements differ, the more stringent 112(j) controls will in effect apply. However, these sources will only be subject to preconstruction review under 112(g). Sources applying for preconstruction approval under 112(g), but who will be subject to 112(j) new source MACT, need to know this before they construct, in order to install the right equipment.

In addition there will be sources, such as some new emission units added to an existing major source, that may not be covered by 112(g), but who will be required to install new source MACT under 112(j). For example, an owner/operator may intend to make an offset showing that would avoid a case-by-case MACT determination under 112(g). Or a new unit's emissions may fall below a 112(g) de minimis level for a specific pollutant. In both of these cases, the owner/operator will need to know in advance of a missed promulgation date that they will be required to install new source MACT under 112(j). Without a preconstruction review process, there is no way to ensure that new sources not covered by 112(g) will know whether they are complying with 112(j) requirements until up to one year after they have already commenced construction.

Therefore, anyone planning to construct a new major source, or any existing major source planning to install a new emission unit after a scheduled promulgation date for a source category, is strongly encouraged to undergo preconstruction review under 112(j), in order to provide some certainty as to required new source controls prior to construction.

The EPA specifically requests comment on the desired relationships between the 112(g) and 112(j) administrative processes in regard to preconstruction review, and on the policy implications of a voluntary preconstruction review process.

B. Section 112(l) Delegation Process

Under section 112(l) of the Act, States have the option of developing and submitting to the Administrator a program for implementing the requirements of section 112, including section 112(j). The EPA proposed rules for the implementation of section 112(l) on May 19, 1993 (58 FR 29296). This rule proposed to add §§ 63.90 through 63.96 to 40 CFR part 63.

The EPA proposes that the delegation process provided under section 112(l) be used to smooth the transition to State implementation of section 112(j) in a way that minimizes disruption of existing State and local toxic air pollutant permit programs. The EPA proposes that the section 112(l) process be used for States wishing to preserve existing requirements, or add new requirements, in combination with the requirements and suggested actions of this proposed rule, into an overall program that meets the requirements of the Act.

C. Section 112(i)(5) Early Reductions Program

Section 112(i)(5) of the Act allows EPA to grant a source a six year compliance extension from a section 112(d) MACT standard if the source achieves "early reductions" of its emissions. An early reduction is defined as a 90% reduction in a source's hazardous air pollutant emissions (95% reduction in a source's particulate emissions) before the applicable MACT standard is proposed. The source's commitment to achieve early reductions is federally enforceable, must be included in the title V permit, and must be submitted to EPA before the relevant 112(d) standard for that source category is proposed. (Sources subject to MACT standards scheduled for promulgation in November 1992 must submit an enforceable commitment to 90% reductions to EPA by December 1, 1993. By December 1, 1994, the source must achieve the federally enforceable emission reduction). These commitments to reduce emissions early become classified as alternative emission limitations throughout the six year extension period. Alternative emission limitations are the "applicable emission requirements" for the early reduction source.

Paragraph 63.52(e) provides that an alternative emission limitation established for the purpose of early reduction credit can be included as a case-by-case MACT limit in the permit, so long as the reduction was achieved by the date established in the source category schedule for standards. This requirement is established pursuant to the specific provisions of 112(j)(5).

V. Administrative Requirements

A. Executive Order 12291

An impact analysis was prepared for the proposed regulation. The impact analysis was prepared even though the proposed regulation is not expected to meet the "major rule" requirement as defined in Executive Order 12291. The regulation is not expected to have an annual effect on the economy of $100 million or more; it is not expected to cause significant adverse effects on competition. The objective of the impact analysis is to evaluate, to the extent possible, the costs and benefits associated with the proposed regulation.

The impacts (cost and emission reduction) of the section 112(j) program are assumed to begin in either 1994 or 1996 and increase as additional source categories are subject to the program.

The absence of valuation and sufficient exposure-response information precludes a full quantitative benefits analysis. Therefore, EPA evaluated the minimum benefits that would justify general program directions.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the EPA to consider potential impacts of proposed regulations on small business "entities." If a preliminary analysis indicates that a proposed regulation would have a significant economic impact on 20 percent or more of small entities, then a regulatory flexibility analysis must be prepared.

Present Regulatory Flexibility Act guidelines indicate that an economic impact should be considered significant if it meets one of the following criteria: (1) Compliance increases annual production costs by more than 5 percent, assuming costs are passed on to consumers; (2) compliance costs as a percentage of sales for small entities are at least 10 percent more than compliance costs as a percentage of sales for large entities; (3) capital costs of compliance represent a "significant" portion of capital available to small entities, considering internal cash flow plus external financial capabilities; or (4) regulatory requirements are likely to result in closures of small entities.

This regulation does not affect a significant number of small businesses, small governmental jurisdictions, or small institutions. Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small business entities.

C. Paperwork Reduction Act

The information collection requirements in this proposal have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by the EPA (ICR No. 1648.01) and a copy may be obtained from Sandy Farmer, Information Policy Branch (PM–223Y), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, or by calling (202) 260–2740.

This collection of information is estimated to have an average annual public reporting burden of approximately 200 hours per respondent. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch (PM-223Y); U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Part 63

Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 30, 1993.

Carol M. Browner,

Administrator.

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

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Part 63 is amended by adding a new subpart B, consisting of §§ 63.40–63.57 to read as follows:

Subpart B—Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections 112(g) and 112(j)

Subpart B—Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act sections 112(g) and 112(j)

§§ 63.40–63.49 [Reserved]

§ 63.50 Applicability.

(a) *General applicability.*[1] The requirements of §§ 63.50 through 63.57 implement section 112(j) of the Clean Air Act (as amended in 1990). The requirements of §§ 63.50 through 63.57 apply in each State beginning on the effective date of an approved title V permit program in such State, but not before May 15, 1994. These requirements apply to the owner or operator of a major source of hazardous air pollutants which includes one or more stationary sources included in a source category or subcategory for which the Administrator has failed to promulgate an emission standard under this part by the section 112(j) deadline.

(b) *Relationship to State and local requirements.* Nothing in §§ 63.50 through 63.57 shall prevent a State or local regulatory agency from imposing more stringent requirements than those contained in these subsections.

(c) *Retention of State permit program approval.* In order to retain State permit program approval, a State must, by the section 112(j) deadline for a source category, obtain sufficient legal authority to make case-by-case MACT determinations, to incorporate those determinations into a 40 CFR part 70 permit, and to incorporate and enforce other requirements of section 112(j).

§ 63.51 Definitions.

Terms used in §§ 63.50 through 63.57 of this subpart that are not defined below have the meaning given to them in the Act, in subpart A[2] of this part, or in 40 CFR part 70.

Control technology means measures, processes, methods, systems, or techniques to limit the emission of hazardous air pollutants including, but not limited to, measures which:

(1) Reduce the quantity, or eliminate emissions, of such pollutants through process changes, substitution of materials or other modifications;

(2) Enclose systems or processes to eliminate emissions;

(3) Collect, capture, and treat such pollutants when released from a process, stack, storage or fugitive emissions point;

(4) Are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in 42 USC 7412(h); or

(5) Are a combination of paragraphs (1) through (4) of this definition.

Emission point means any part or activity of a major source that emits or has the potential to emit any hazardous air pollutant.

Emission unit means the emission point or collection of emission points, within a major source, which the permitting authority determines is the appropriate entity for making a MACT determination under section 112(j). An emission unit can be defined (by the permitting authority) as any of the following:

(1) An emitting point that can be individually controlled, e.g. a boiler or a spray booth.

(2) The smallest grouping of emission points, that, when collected together, can be commonly controlled by a single control device or work practice.

(3) Any grouping of emission points, that, when collected together, can be commonly controlled by a single control device or work practice.

(4) A grouping of emission points that are functionally related. Equipment is functionally related if the operation or action for which the equipment was specifically designed could not occur without being connected with or without relying on the operation of another piece of equipment.

(5) A grouping of emission points that, when collected together, comprise a building, structure, facility, or installation.

Existing major source means a major source, construction or reconstruction of which is commenced before EPA proposed a standard under 112 (d) or (h), or if no proposal was published, then before the section 112(e) promulgation deadline.

Federally enforceable, when applied to emission limitations and conditions, means that they are enforceable by the Administrator, including those requirements established by State or Local agencies that have received approval to impose such limitations through an approved part 70 permit program or through section 112(l) of the Act. Requirements developed pursuant to part 60 and part 61 of this chapter and requirements within any applicable State Implementation Plan are also federally enforceable. To be federally enforceable, the limits and conditions must undergo public review and be reported to the EPA. Emission limits that are federally enforceable include limits on the allowable capacity of the equipment; requirements for the installation, operation and maintenance of pollution control technologies; limits on hours of operation; and restrictions on amounts of materials combusted, stored, or produced. Any federally enforceable limitations or conditions must be practically enforceable and ensure adequate testing, monitoring, and recordkeeping to demonstrate compliance with the limitations and conditions. Therefore, general limitations such as yearly limits (e.g. tons per year) are not sufficient for federal enforceability. The use of hourly, daily, weekly, or monthly rolling averages is acceptable.

Maximum achievable control technology (MACT) emission limitation for existing sources means the emission limitation reflecting the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and

[1] The requirements of §§ 63.50 through 63.57 implement section 112(j) of the Clean Air Act (42 U.S.C. 7401 *et seq.*, as amended by Pub. L. 101–549).

[2] EPA intends to propose subpart A of part 63.

any non-air quality health and environmental impacts and energy requirements, determines is achievable by sources in the category or subcategory to which such emission standard applies. This limitation shall not be less stringent than the MACT floor.

Maximum achievable control technology (MACT) emission limitation for new sources means the emission limitation which is not less stringent than the emission limitation achieved in practice by the best controlled similar source, and which reflects the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by sources in the category or subcategory to which such emission standard applies.

Maximum Achievable Control Technology (MACT) floor means:

(1) For existing sources:

(i) The average emission limitation achieved by the best performing 12 percent of the existing sources in the United States (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined in section 171) applicable to the source category and prevailing at the time, in the category or subcategory, for categories and subcategories of stationary sources with 30 or more sources; or

(ii) The average emission limitation achieved by the best performing 5 sources in the United States (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory, for a category or subcategory of stationary sources with fewer than 30 sources;

(2) For new sources, the emission limitation achieved in practice by the best controlled similar source.

New major source means a major source for which construction or reconstruction is commenced after the section 112(e) promulgation deadline, or after proposal of a relevant standard under section 112(d) or 112(h) of the Clean Air Act (as amended in 1990), whichever comes first.

New source means an emission unit for which construction or reconstruction is commenced after the section 112(e) deadline, or after proposal of a relevant standard under section 112(d) of the Clean Air Act (as amended in 1990), whichever comes first.

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is federally enforceable. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in Title IV of the Act or the regulations promulgated thereunder.

Section 112(j) deadline means the date 18 months after the date for which a relevant standard is scheduled to be promulgated under this part. The applicable date for categories of major sources is contained in subpart C of this part.

Similar source means an emission unit that serves a like function and/or is structurally similar in design and capacity to an emission unit.

United States means the United States, its possessions and territories.

§ 63.52 Requirements for existing sources.

(a) If the Administrator fails to promulgate an emission standard under this part on or before an applicable the section 112(e) deadline, the owner or operator of an existing major source that includes one or more stationary sources in such category or subcategory, that does not already have a permit requiring compliance with a limit that would meet the requirements of section 112(j) of the Act, shall submit an application for a 40 CFR part 70 or 40 CFR part 71[3] permit or application for a significant permit modification, whichever is applicable, in accordance with the provisions of 40 CFR part 70 or 40 CFR part 71. The owner or operator of a major source that already has a 40 CFR part 70 or 40 CFR part 71 permit requiring compliance with a limit that would meet the requirements of section 112(j) of the Act, shall submit an application for an administrative permit amendment, in accordance with the provisions of 40 CFR part 70 or 40 CFR part 71.

(b) *Submittal of permit application.* The application for a 40 CFR part 70 or 40 CFR part 71 permit, significant permit modification, or administrative amendment by an owner or operator of an existing major source shall be submitted to the permitting authority not later than the section 112(j) deadline. The application shall contain the information required by § 63.53.

(c) *Permit review.* (1) Permit applications submitted under this paragraph will be reviewed and approved or disapproved according to the provisions of 40 CFR part 70 or 40 CFR part 71, whichever is applicable, and any other regulations approved under Title V in the State in which the source is located. In the event that the State disapproves a permit application submitted under this paragraph or determines that the application is incomplete, the owner or operator shall revise and resubmit the application to meet the objections of the State not later than 180 days after being notified that the application was disapproved or is incomplete.

(2) If the owner or operator has submitted a timely and complete application for a 40 CFR part 70 or 40 CFR part 71 permit or significant modification required by this paragraph, any failure to have this permit will not be a violation of the requirements of this paragraph, unless the delay in final action is due to the failure of the applicant to submit, in a timely manner, information required or requested to process the application.

(d) The permit shall contain information consistent with the requirements of § 63.54(c).

(e) *Emission limitation.* The permit issued shall contain an equivalent emission limitation (or limitations) (as further defined in § 63.56(a)), for that category or subcategory determined on a case-by-case basis by the permitting authority, or, if the applicable criteria in Subpart D of this part are met, the permit may contain an alternative emission limitation. For the purposes of the preceding sentence, early reductions made pursuant to section 112(i)(5)(A) of the Act shall be achieved not later than the date on which the relevant standard should have been promulgated according to the date in Subpart C of this part.

(f) *Compliance date.* The owner or operator of an existing major source subject to the requirements of this paragraph shall comply with the emission limitation(s) established in the source's 40 CFR part 70 or 40 CFR part

[3] 40 CFR part 71 has not yet been promulgated. This citation assumes that 40 CFR part 71 will be issued final before this proposed rule is issued as a final rule.

71 permit. In no case will such compliance date exceed 3 years after the issuance of the permit for that source, except where the permitting authority issues a permit that grants an additional year to comply in accordance with section 112(i)(3)(B), and unless otherwise specified in § 63.55, or in subpart D of this part.

(g) *Enhanced monitoring.* In accordance with section 114(a)(3) of the Act, monitoring shall be capable of detecting deviations from each applicable emission limitation or other standard with sufficient reliability and timeliness to determine continuous compliance over the applicable reporting period. Such monitoring data may be used as a basis for enforcing emission limitations established under this subpart.

§ 63.53 Application content for case-by-case MACT determinations.

(a) An application for a MACT determination shall specify a MACT candidate selected by the owner or operator that, if properly operated and maintained, would achieve a MACT emission limitation.

(b) The application for a MACT determination shall contain the following information:

(1) The name and address (physical location) of the major source;

(2) A brief description of the major source, its source category or categories, a description of the emission unit(s) requiring a MACT determination pursuant to other requirements in this Subpart, and a description of whether the emission unit(s) require new source MACT or existing source MACT based on the definitions established in § 63.51;

(3) For a new source, the expected date of commencement of construction;

(4) For a new source, the expected date of completion of construction;

(5) For a new source, the anticipated date of startup of operation;

(6) The hazardous air pollutants emitted by each emission unit, and the emission rate for each hazardous air pollutant, stated in terms that would be considered federally enforceable as defined in § 63.51.

(7) Any existing federally enforceable emission limitations applicable to the source.

(8) The uncontrolled emissions for the source(s) in tons/yr or production unit in tons/yr (potential to emit in an uncontrolled state);

(9) Controlled emissions for the covered emission unit(s) in tons/yr or production unit in tons/yr (potential to emit in a controlled state);

(10) The MACT floor and supporting calculations for cases where the MACT floor must be computed on a case-by-case basis.

(11) Recommended emission limitations for the source(s), and supporting information, consistent with § 63.54(c).

(12) The selected MACT candidate to meet the emission limitation including technical information on the design, operation, size, estimated control efficiency, and any other information deemed appropriate by the permitting authority;

(13) Supporting documentation including identification of alternative control technologies considered to meet the emission limitation, and analysis of non-air quality health and environmental impacts or energy requirements for the selected MACT candidate;

(14) Parameters to be monitored and frequency of monitoring to demonstrate continuous compliance with the standard over the applicable reporting period.

(15) Any other information required pursuant to subpart A of this part.

§ 63.54 Preconstruction review procedures for new sources.

(a) *Review process for new sources.* (1) If the permitting authority requires an owner or operator to obtain or revise a 40 CFR part 70 permit before construction of the new source, or when the owner or operator chooses to obtain or revise a 40 CFR part 70 permit before construction, the owner or operator shall follow the administrative procedures established in part 70 of this chapter before construction of the new source.

(2) If an owner or operator is not required to obtain or revise a 40 CFR part 70 permit before construction of the new source (and has not elected to do so), but the new source is covered by the preconstruction review requirements of section 112(g), then the owner or operator shall comply with those requirements. If the new source is not covered by 112(g), the State, in its discretion, may provide a Notice of MACT Approval in accordance with the procedures set forth in paragraphs (b) through (h) of this section, before construction of the new source.

(3) Regardless of the preconstruction review process, the MACT determination shall be consistent with the principles established in § 63.56, and the Notice of MACT Approval or the permit, whichever is applicable, shall include the documentation required by § 63.53.

(b) *Optional administrative procedures for preconstruction review for new sources.* The permitting authority may provide for preconstruction review of section 112(j) MACT determinations upon approval by EPA of a program that is submitted pursuant to the requirements established under section 112(l) of the Act, and that provides for review procedures and compliance requirements no less stringent than those set forth in paragraphs (b) through (h) of this section.

(1) The permitting authority will notify the owner or operator in writing, within 30 days from the date the Notice of MACT Approval application is first received, as to whether the application for a MACT determination is complete or whether additional information is required.

(2) The permitting authority will approve an applicant's proposed MACT, or the permitting authority will notify the owner or operator in writing of its intention to disapprove a MACT candidate, within 60 calendar days after the receipt of a complete application. The 60-day period will begin on the calendar day that the owner or operator is notified in writing that the application is complete.

(3) The owner or operator may present, in writing, within 60 calendar days after notification of the permitting authority's intent to disapprove a MACT candidate, additional information, considerations, or amendments to the application before the permitting authority's issuance of a final disapproval.

(4) The permitting authority will approve or issue a final disapproval of the application no later than 30 days from the date additional information is received from the owner or operator.

(5) A final determination to disapprove any application will be in writing and will specify the grounds on which the disapproval is based.

(6) Approval of an applicant's proposed MACT will be set forth in the Notice of MACT Approval as described in paragraph (c) of this section.

(c) *Notice of MACT Approval.* (1) The Notice of MACT Approval will contain an emission standard or emission limitation to control the emissions of hazardous air pollutants. The MACT emission limitation will be determined by the permitting authority and will be based on the degree of emission reductions that can be achieved, if the control technologies or work practices are installed, maintained, and operated properly. Such emission limitation will be established consistent with the principles contained in § 63.56.

(2) The Notice of MACT Approval will specify any notification, operation and maintenance, performance testing,

monitoring, reporting and recordkeeping requirements. The Notice of MACT Approval shall include the following information:

(i) In addition to the MACT emission limitation required by paragraph (d)(1) of this section, additional emission limits, production limits, operational limits or other terms and conditions necessary to ensure federal enforceability of the MACT emission limitation;

(ii) Compliance certifications, testing, monitoring, reporting and recordkeeping requirements that are consistent with the requirements of 40 CFR 70.6(a) and 40 CFR 70.6(c).

(iii) In accordance with section 114(a)(3) of the Act, monitoring shall be capable of detecting deviations from each applicable emission limitation or other standard with sufficient reliability and timeliness to determine continuous compliance during the applicable reporting period. Such monitoring data may be used as a basis for enforcing emission limitations established under this Subpart.

(iv) A statement requiring the owner or operator to comply with all applicable requirements contained in subpart A of this part;

(v) A compliance date(s) by which the owner or operator shall be in compliance with the MACT emission limitation, and all other applicable terms and conditions of the notice.

(3) All provisions contained in the Notice of MACT approval are federally enforceable upon the effective date stated in such notice.

(d) *Opportunity for public comment on Notice of MACT Approval.* The permitting authority will provide opportunity for public comment on the draft Notice of MACT Approval prior to issuance, including, at a minimum,

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the permitting authority's tentative determination;

(2) A 45-day period for submittal of public comment; and

(3) A notice by prominent advertisement in the area affected of the location of the source information and analysis specified in paragraph (d)(1) of this section.

(e) *EPA notification.* The State or local agency, when authority for the MACT determination has been conferred to that State or local agency by the Administrator, shall send copies of the draft notice (in time for comment) and final notice required by paragraph (c) of this section to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which the new source would be located.

(f) *Effective date.* The effective date of a MACT determination for new sources under this paragraph shall be the date a Notice of MACT Approval is issued to the owner or operator of a new source.

(g) *Compliance date.* New sources shall comply with case-by-case MACT upon permit issuance.

(h) *Compliance with MACT determinations.* An owner or operator of a major source that is subject to a MACT determination shall comply with notification, operation and maintenance, performance testing, monitoring, reporting, and recordkeeping requirements contained in 40 CFR part 70.

§ 63.55 Incorporation of requirements for new sources into the operating permit.

(a) The owner or operator of a new source in a source category or subcategory subject to these subsections, that does not already have a permit requiring compliance with a limit meeting the requirements of section 112(j) of the Act (as in effect on the date of permit application) shall submit an application for a 40 CFR part 70 or 40 CFR part 71 permit or application for a significant permit modification, whichever is applicable, in accordance with the provisions of 40 CFR part 70 or 40 CFR part 71. The owner or operator of a source that already has a permit requiring compliance with a limit meeting the requirements of section 112(j) of the Act, shall submit an application for an administrative permit amendment, in accordance with the provisions of 40 CFR part 70 or 40 CFR part 71, and not later than the date 30 days after the date construction or reconstruction is commenced.

(b) *Permit review.* (1) Permit applications submitted under this paragraph will be reviewed and approved or disapproved according to the provisions of 40 CFR part 70 or 40 CFR part 71, whichever is applicable, and any regulations approved under title V in the State in which the source is located. In the event that the State disapproves a permit application submitted under this paragraph or determines that the application is incomplete, the owner or operator shall revise and resubmit the application to meet the objections of the State not later than 180 days after being notified that the application was disapproved or is incomplete.

(2) If the owner or operator has submitted a timely and complete application for a 40 CFR part 70 or 40 CFR part 71 permit or significant modification required by this paragraph, any failure to have a permit will not be a violation of the requirements of this paragraph, unless the delay in final action is due to the failure of the applicant to submit, in a timely manner, information required or requested to process the application.

(c) The permit shall contain information consistent with the requirements of § 63.54(c).

(d) *Emission limitation.* The permit issued shall contain an equivalent emission limitation (or limitations) for that category or subcategory determined on a case-by-case basis by the permitting authority, or, if the applicable criteria in subpart D of this part are met, the permit may contain an alternative emission limitation. For the purposes of the preceding sentence, the early reduction required by section 112(i)(5)(A) of the Act shall be achieved not later than the date on which the relevant section 112(d) standard should have been promulgated according to the date in subpart C of this part.

(e) *Compliance date.* The owner or operator of a new source subject to the requirements of this paragraph shall comply with the emission limitation(s) established in the source's 40 CFR part 70 or 40 CFR part 71 permit immediately upon permit issuance.

§ 63.56 Maximum achievable control technology (MACT) determinations for sources subject to case-by-case determination of equivalent emission limitations.

(a) *Requirements for sources subject to case-by-case determination of equivalent emission limitations.* The owner or operator of a major source subject to this subpart shall submit a permit application or application for a MACT determination, whichever is applicable, containing emission limitations at least as stringent as those that would have applied had the relevant emission standard been promulgated according to the schedule established in subpart C of this part for the source category or subcategory of which the source is a member.

(1) When a relevant emission standard has been proposed pursuant to section 112(d) or section 112(h) of the Act, then the control technology selected by the owner or operator for the MACT candidate shall be capable of achieving all emission limitations and requirements of the proposed standard, unless the application contains information adequately supporting an alternative.

(2) When the Administrator has not proposed a relevant emission standard

pursuant to section 112 (d) or (h), but the Administrator (or the State) has adopted guidance or collected and distributed information establishing a MACT floor for a source category or subcategory for which an emission standard has not been promulgated according to the schedule established in subpart C of this part, then the emission limitations established in the 40 CFR part 70 or 40 CFR part 71 permit application of a major source in such source category or subcategory must be at least as stringent as those established in said guidance or distributed information, unless the application contains information adequately supporting an alternative.

(3) If a relevant emission standard has not yet been proposed pursuant to section 112(d) or section 112(h) of the Act, then the owner or operator shall document a MACT floor finding based on all available information, unless the selected MACT candidate achieves the best achievable level of control, and:

(i) If the MACT floor can be determined, then the control technology selected by the owner or operator for the MACT candidate shall obtain the maximum reduction in emissions of hazardous air pollutants that is achievable considering costs, non-air quality health and environmental impacts, and energy requirements, and shall achieve an emissions limitation at least as stringent as the MACT floor.

(ii) If the MACT floor cannot be determined, then the owner or operator shall select a control technology that will achieve a maximum reduction in emissions of hazardous air pollutants considering costs, non-air quality health and environmental impacts, and energy requirements;

(iii) The owner or operator shall select a specific design, equipment, work practice, or operational standard, or combination thereof, when it is not feasible to prescribe or enforce an equivalent emission limitation due to the nature of the process or pollutant. It is not feasible to prescribe or enforce a limitation when the Administrator determines that a hazardous air pollutant (HAP) or HAPs cannot be emitted through a conveyance designed and constructed to capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(b) *Requirements for permitting authorities.* (1) After receiving a permit application or an application for a MACT determination, whichever is applicable, the permitting authority will review the application and other information available to the permitting authority and shall establish hazardous air pollutant emissions limitations at least equivalent in stringency to the limitation that would apply to such emission unit if an emission standard had been issued in a timely manner under subsection 112(d) of the Act.

(2) The permitting authority will establish these emissions limitations consistent with the following requirements and principles (which are further clarified in the "Draft Guidelines for MACT Determinations" [4]):

(i) For each major source subject to section 112(j), equivalent emissions limitations will be established for all emission units within a source category or subcategory for which the section 112(j) deadline has passed.

(ii) An equivalent emission limitation for an existing source will reflect the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emission, where achievable) that the permitting authority, taking into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements, determines is achievable by sources in the category or subcategory for which the section 112(j) deadline has passed. This limitation will not be less stringent than the MACT floor, and will be based on available information.

(iii) An equivalent emissions limitation for a new source will not be less stringent than the emission limitation achieved in practice by the best controlled similar source, and must reflect the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions, where achievable) that the permitting authority, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by sources in the category or subcategory to which such emission standard applies. The limitation shall be based on available information.

(iv) Nothing in subpart B of this part will prevent a state or local permitting authority from establishing an emission limitation more stringent than required by federal regulations.

(c) *Reporting to National Data Base.* Within 60 days of the issuance of a Notice of MACT Approval under § 63.53(c) of the subpart, or issuance of a 40 CFR part 70 permit, whichever is earlier, any State, to whom authority for implementation of this subpart has been delegated by the Administrator, shall provide a copy of the Notice of MACT Approval to the Administrator, and shall provide a summary of information pertinent to the MACT application in a standard format outlined in the "Guidelines for MACT Determinations."

§ 63.57 Requirements for case-by-case determination of equivalent emission limitations after promulgation of a subsequent MACT standard.

(a) If the Administrator promulgates an emission standard that is applicable to one or more emission units within a major source before the date a permit application under this paragraph is approved, the permit shall contain the promulgated standard rather than the emission limitation determined under § 63.55, and the owner or operator shall comply with the promulgated standard by the compliance date in the promulgated standard.

(b) If the Administrator promulgates an emission standard under section 112(d) of the Act that is applicable to a source after the date a permit is issued pursuant to § 63.52 or § 63.54, the permitting authority shall revise the permit upon its next renewal to reflect the promulgated standard. The permitting authority will establish a compliance date in the revised permit that assures that the owner or operator shall comply with the promulgated standard within a reasonable time, but not longer than 8 years after such standard is promulgated or 8 years after the date by which the owner or operator was first required to comply with the emission limitation established by permit, whichever is earlier.

(c) Notwithstanding the requirements of paragraph (a) or (b) of this section, if the Administrator promulgates an emission standard that is applicable to a source after the date a permit application is approved under § 63.52 or § 63.54, the permitting authority is not required to change the emission limitation in the permit to reflect the promulgated standard if the level of control required by the emission limitation in the permit is at least as stringent as that required by the promulgated standard.

[FR Doc. 93-16140 Filed 7-12-93; 8:45 am]

BILLING CODE 6560-50-P

[4] EPA is releasing for comment the "Draft Guidelines for MACT Determinations" available from the National Technical Information Service (NTIS) Document Number PB93-183283; 5285 Port Royal Rd., Springfield, VA 22161; NTIS telephone 703-487-4650.

federal register

Tuesday
July 13, 1993

Part V

Department of Housing and Urban Development

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

Preservation of Multifamily Low Income Housing and Funding Proposal for Intermediaries for Administering Preservation Technical Assistance Grants, et al.; Interim Rule and Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 236, 241, and 248

[Docket No. R-93-1655; FR 3384-I-01]

RIN 2502-AF83

Preservation of Multifamily Low Income Housing

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

ACTION: Interim rule.

SUMMARY: This interim rule implements sections 304, 305, 306, 307, 308(b), 309, 312, 313 (a) and (b)(1), 316 (a) and (b), and 331 of the Housing and Community Development Act of 1992. In brief, these amendments permit public entities to become mortgagors of projects with mortgages insured under section 236 of the National Housing Act; authorize the Department to insure equity and acquisition loans for a term of 40 years and combine rehabilitation loans with equity or acquisition loans; protect proprietary information submitted by owners as part of their plans of action; require regulations setting forth the Department's procedures and criteria for approving plans of action to prepay or terminate; ensure that owners receive an 8 percent annual authorized return during the rent phase-in period; ensure that priority purchasers receive incentives sufficient to meet project oversight costs and receive an 8 percent annual authorized return on any actual cash investment and reimbursement for all reasonable transaction expenses; allow resident councils purchasing under a resident homeownership program to assume the federally-assisted mortgage; require low-income affordability restrictions to be maintained on all units not sold to residents; eliminate the requirement that limited equity cooperatives transfer ownership to residents in a timely manner; establish a technical assistance program for priority purchasers; impose LIHPRHA (the preservation program enacted in 1990) notification requirements on ELIHPA (the preservation program enacted in 1987) owners; and ensure that owners under ELIHPA are not refused incentives based on the date they filed a plan of action.

DATES: Effective date: The provisions of this rule are effective July 13, 1993.

Section 241.1060 applies on July 13, 1993 to projects being processed under subpart B of part 248 and also applies on August 12, 1993 to projects being processed under subpart C of part 248.

Comment due date: September 13, 1993.

ADDRESSES: Submit written comments to the Office of the General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.–5:30 p.m. Eastern Standard Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Kevin J. East, Office of Multifamily Housing Preservation and Property Disposition, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. Telephone, voice, (202) 708–2300; TDD, (202) 708–4594. (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION: The Information collection requirements contained in this rule have been submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, HUD Desk Officer, room 3001, New Executive Office Building, Washington, DC 20503, for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3502). No person may be subject to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

Subtitle A of title III of the Housing and Community Development Act of 1992 (Pub. L. 102–550 (106 Stat. 3672), approved October 28, 1992) ("title III") amends certain provisions of section 236(j) of the National Housing Act, regarding the provision of Federal mortgage insurance for multifamily projects, section 241(f) of the National Housing Act (12 U.S.C. 1715z–6), concerning supplementary financing of insured mortgages, and subtitle A of title VI of the Cranston-Gonzalez National Affordable Housing Act, the Low Income Housing Preservation and Resident Homeownership Act of 1990 (Pub. L. 101–625; 12 U.S.C. 4101 *et seq.*) ("LIHPRHA"), the successor to title II of the Housing and Community Development Act of 1987, the Emergency Low Income Housing Preservation Act of 1987 (Pub. L. 100–242; 12 U.S.C. 1715*l* note) ("ELIHPA"), governing the preservation of privately-owned multifamily low income housing. The history of the preservation programs is set forth in an interim rule implementing LIHPRHA which was published on April 8, 1992 at 57 FR 11992, (the "April 1992 interim rule") and will not be repeated here.

This interim rule implements certain provisions of title III by amending parts 236, 241 and 248 of the Department's regulations, as addressed in the following discussion. Other provisions of title III were implemented by interim rules published on December 3, 1992 at 57 FR 57312 and January 15, 1993 at 58 FR 4870. One remaining provision of title III, section 316(c), concerning insuring equity and acquisition loans under shared-risk agreements with State housing finance agencies, has not yet been implemented.

It should be noted that the following discussion uses "LIHPRHA" when addressing statutory changes that affect title II of the Housing and Community Development Act of 1987, as amended by LIHPRHA, and uses "ELIHPA" when discussing changes which affect title II of the Housing and Community Development Act of 1987, as in effect on November 27, 1990, the day before enactment of LIHPRHA.

Part 236—Mortgage Insurance and Interest Reduction Payment for Rental Projects

Section 236.10 (Eligible Mortgagors)

Section 331 of title III amends section 236(j)(4)(A) of the National Housing Act to permit public entities to be mortgagors of mortgages insured under section 236 of the National Housing Act. Prior to this amendment, section 236(j)(4) of the National Housing Act authorized a mortgage to be insured under the Section 236 program only if the mortgage was executed by a "private mortgagor eligible under subsection (d)(3) or (e) of section 221 [of the National Housing Act]." Section 236(b) of the National Housing Act contained a similar provision, excluding public mortgagors under the section 236 State-financed "non-insured" program. In section 203(a)(1) of the HUD Reform Act of 1989, Congress amended section 236(b) of the National Housing Act to permit public mortgagors of State-financed section 236 projects, however, Congress did not make a comparable amendment to section 236(j)(4)(A). This oversight is now corrected by section 331 of title III.

Section 236.10 of title 24 of the Code of Federal Regulations, which governs eligible mortgagors under the section 236-insured program, is amended in this rule by removing the existing language in paragraph (e) and adding the language contained in § 221.510(b), which lists the eligible public mortgagors for the section 221 program. The § 221.510(b) language is used in § 236.10 because section 236(j)(4)(A) states that eligible mortgagors under the section 236-insured program are those which are eligible under section 221(d)(3) and (e) of the National Housing Act. Section 221.510(b) implements the eligibility requirements of section 221(d)(3) and (e) of the National Housing Act.

Section 236.60 (Excess Rental Charges)

Section 236.60 of the Department's regulations addresses excess rental charges under the section 236 program. Due to an error in publishing a revision to § 236.60, on September 21, 1990 at 55 FR 38958, part of the provision was inadvertently removed from the Code of Federal Regulations. This rule restates the correct text of § 236.60. This amendment is a correction and is not part of the implementation of the Housing and Community Development Act of 1992.

Section 236.901 (Audit)

Because of the inclusion of public entities as eligible mortgagors under the section 236-insured program, § 236.901 is amended to require State and local governments that are mortgagors of mortgages insured or held by the Commissioner under section 236 of the National Housing Act to be subject to the Department's audit requirements, set forth in part 44 of title 24 of the CFR.

Part 241—Supplementary Financing for Insured Project Mortgages

Subpart E—Insurance for Equity and Acquisition Loans—Eligibility Requirements

Section 241.1060 (Maturity)

Section 316(a) of title III amends section 241(f)(5) of the National Housing Act, by adding new subparagraphs (A) (i) and (ii) which establish terms of up to 40 years for equity loans and not less than 40 years for acquisition loans that are insured pursuant to an approved plan of action under LIHPRHA. Section 316 of title III amends section 241(f) of the National Housing Act, as that section was amended by LIHPRHA. However, section 316 does not amend section 241(f) as it existed prior to amendment by LIHPRHA. In accordance with section 604(c) of LIHPRHA, section 241(f), as it existed immediately before enactment of LIHPRHA (i.e., on November 27, 1990), is the statute under which equity loans are insured for projects under ELIHPA. Because section 316(a) does not amend section 241(f) as it was in effect on November 27, 1990, section 316(a) has no impact on equity loans for projects under ELIHPA. Equity loans under ELIHPA may, in accordance with section 241(f)(2)(B) as in effect on November 27, 1990, "have a maturity and provisions for amortization satisfactory to the Secretary."

The Department stated this interpretation of the applicability of section 241(f) to ELIHPA projects in the preamble to the proposed rule to implement LIHPRHA at 56 FR 20281–20282, published on May 2, 1991 (the "May 1991 proposed rule"), as follows:

[O]wners whose plans of action are processed under [ELIHPA] will be subject to section 241(f) as it existed under [ELIHPA], while owners whose plans of action are processed under [LIHPRHA] will be subject to section 241(f) as amended by [LIHPRHA]. Although section 602(a) [of LIHPRHA] amends section 241(f) and, under section 605 [of LIHPRHA], is effective upon enactment of [LIHPRHA] i.e., on November 28, 1990), it is the Department's view that the provisions of section 241(f) as they existed prior to their amendment remain in effect for owners who are or will be seeking approval of plans of action under [ELIHPA] and subpart C of part 248. The Department takes this position because section 241(f) was originally enacted by section 231 of [ELIHPA], which is subpart B of title II of [ELIHPA] and is thus part of the "Emergency Low Income Housing Preservation Act of 1987," * * * and * * * under 604 (a) and (b) of [LIHPRHA] owners retain their right to proceed under [ELIHPA] and subpart C.

Based on this interpretation, the Department has continued to permit equity loans under ELIHPA of up to 90 percent of the projected net operating income of the project (see section 241(f)(2)(A) of the National Housing Act as in effect on November 27, 1990 and 24 CFR 241.1065). Equity loans under LIHPRHA are limited to the lesser of 70 percent of extension preservation equity or an amount supportable by the project on the basis of an 8 percent return on the extension preservation equity, subject to normal debt service requirements (see section 241(f)(2)(B)(i) of the National Housing Act as of November 28, 1990 and 24 CFR 241.1067).

Before enactment of the Housing and Community Development Act of 1992, section 241(f), both as in effect before November 28, 1990 and as amended by LIHPRHA, authorized the Department to use its discretion in establishing loan terms for equity and acquisition loans which are insured by HUD. The Department, in initially implementing ELIHPA, permitted equity loans with up to 40-year terms. However, after analyzing the relevant data, the Department determined that a 20-year equity loan maturity would be sufficient to ensure that owners received the annual authorized return on their investment and the shorter loan terms would also protect the FHA insurance fund from losses due to mortgage insurance claims. Based on this analysis, the Department, in the May 1991 proposed rule, published at 56 FR 20262, proposed that loan terms for equity loans (for both ELIHPA and LIHPRHA owners), and the newly authorized acquisition loans (for LIHPRHA owners), would be for 20 years or the remaining term of the first insured mortgage, whichever is longer.

In response to this proposal, the Department received 86 public comments objecting to the 20-year loan term and requesting a return to the 40-year term. The Department received no comments in favor of the 20-year loan term. The bases for the objections are set out in the preamble to the April 1992 interim rule at 57 FR 12032. In the April 1992 interim rule, the Department maintained its position that equity and acquisition loans would be insured for 20 years or the remaining term of the first insured mortgage, whichever is longer. The Department received two comments on the April 1992 interim rule concerning loan terms and both commenters objected to the 20-year term and suggested that the Department return to its original policy of insuring loans for 40 years.

In addition to the public comments received by the Department, the legislative history to the Housing and Community Development Act of 1992 indicates Congress' opposition to the shorter loan term. In a summary of the Housing and Community Development Act of 1992 presented on the Senate Floor, Senator Cranston stated that,

The conferees are disturbed that owners were induced to file [ELIHPA] notices of intent and proceed with plans of action based on HUD's practice of providing a 40-year loan, only to have HUD change the rules in April 1992. The foreshortening of the 241(f) loan term is jeopardizing pending sales of [ELIHPA] projects to nonprofits and public agencies, and undermining the legitimate expectations of owners who are willing to extend affordability restrictions in exchange for incentives. The clear intent of the conferees is to require 40-year section 241(f) loans for projects proceeding under ELIHPA. 138 Cong. Rec. S17909 (October 8, 1992), (statement of Sen. Cranston).

Because of the foregoing legislative history and the overwhelming number of comments received by the Department in favor of the 40-year loan term, the Department has decided to administratively change its policy and apply the longer loan term to all equity loans under ELIHPA, as well as to increase the equity loan terms under LIHPRHA in accordance with section 316(a) of title III. Therefore, this rule amends § 241.1060 to provide for equity loan terms of up to 40 years under both ELIHPA and LIHPRHA.

Section 241.1060 is also amended to allow 40-year loan terms for acquisition loans under LIHPRHA. (Acquisition loans were authorized under section 602(a) of LIHPRHA but were not authorized under ELIHPA, and this rule does not add acquisition loans as an incentive under ELIHPA.) While section 316(a) permits the Department to use its discretion and insure acquisition loans for longer than 40 years, HUD's practice has always been to insure loans for no more than 40 years. A longer term would pose a greater risk to the FHA insurance fund and would have little impact on a mortgagor. Extending the loan term beyond 40 years would result in lower debt service payments, but this impact is de minimis after the fortieth year. Because of this, the Department will insure acquisition loans for a term equal to 40 years.

The revised § 241.1060 is an interim rule which is effective immediately upon publication for LIHPRHA owners and 30 days after publication for ELIHPA owners. Because the public had the opportunity to comment on the 20-year loan term in both the May 1991 proposed rule and the April 1992 interim rule; and HUD received 88 public comments opposed to the 20-year loan term and in favor of a 40-year term and no comments in support of the 20-year term, the Department believes it is unnecessary, in accordance with 24 CFR 10.2, to publish another proposed rule for notice and comment prior to implementing a regulatory change permitting 40-year terms for equity loans under ELIHPA. Therefore, the revised § 241.1060 is published as an interim rule. For owners receiving equity or acquisition loans as an incentive under LIHPRHA, the rule change is effective on the date of publication, in accordance with section 332 of title III. For owners receiving equity loans as an incentive under ELIHPA, the rule change is effective thirty days after the date of publication, in accordance with 24 CFR 10.2.

Section 241.1067 (Maximum Loan Amount—Loans Insured in Connection With a Plan of Action Under Subpart B of Part 248 of This Chapter)

Section 316(a) of title III amends section 241(f)(2)(B)(i) and (3)(B) of the National Housing Act to require that rehabilitation costs be included in the amount of the maximum equity and acquisition loans insured under section 241(f). Section 316(a) also deletes section 241(f)(6) of the National Housing Act which left to the Secretary's discretion combining equity and acquisition loans insured under section 241(f) with rehabilitation loans insured under section 241(a). The preamble to the April 1992 interim rule, at 57 FR 12031, addressed the Department's intention to consider combining rehabilitation and equity or acquisitions loans in order to facilitate processing of these loans.

The Senate Committee on Banking, Housing, and Urban Affairs (the "Committee"), in a report concerning S. 3031, one of the bills from which title III was derived, indicates that the Committee altered the position originally taken by the conferees in drafting LIHPRHA, where the conferees expected that combining the loans could be done effectively. The Committee concludes in the Senate Report that there is no "mechanism for combining the underwriting of rehabilitation and equity or acquisition loans under the section 241 program." Sen. Rpt. No. 332, 102d Cong., 2d Sess., at 68, 69 (the "Senate Report"). The Committee also states that S. 3031, which contains language identical to section 316(a) (1) and (2) of title III, "would enable loans insured under section 241(f) of the National Housing Act to cover the amount of rehabilitation costs required by the preservation plan of action and related charges."

The Senate Report indicates that the Committee does not intend for HUD to combine section 241(a) rehabilitation loans with section 241(f) equity and acquisition loans, as was formerly contemplated by section 241(f)(6). Rather, the Committee intends that rehabilitation costs and related charges be included as part of the 241(f) loan. This amendment authorizes the Department to insure 241(f) equity and acquisition loans in amounts sufficient to cover 100 percent of the costs to rehabilitate the project plus all related charges. Prior to this amendment, an owner or purchaser could obtain a section 241(a) loans in addition to a 241(f) equity or acquisition loan, but the 241(a) loan would cover only 90 percent of the value of improvements, additions and equipment and the owner or purchaser would be required to finance 10 percent of the rehabilitation costs itself.

While owners may now receive a 241(f) loan to cover all of the rehabilitation costs, they will also be required to escrow a larger amount of the loan proceeds. Section 316(a) amends section 241(f)(2)(B)(i) to add rehabilitation costs and related charges to an equity loan, however, section 316 does not amend section 241(f)(2)(B)(ii) which requires that "10 percent of the loan amount" be escrowed for a 5-year period. There is no legislative history indicating whether or not Congress intended to leave section 241(f)(2)(B)(ii) unamended, but, because section 241(f)(2)(B)(ii) immediately follows the amended section 241(f)(2)(B)(i), this implies that Congress did not merely overlook this provision, but intended to require a larger escrow deposit, possibly as a concession for permitting a larger loan amount.

In the absence of any legislative history to the contrary, the Department has not amended § 241.1069(a) which requires that 10 percent of total equity loan amount be placed in escrow for 5 years. Owners of LIHPRHA projects receiving equity loans under § 241.1067, as amended, will be required to escrow 10 percent of the entire loan amount, including rehabilitation costs and related charges. The Department specifically requests comments from the public on this interpretation.

Increasing the maximum equity and acquisition loan amounts also affects the calculation of preservation rents under § 248.121. Paragraph (c) of § 248.121 includes in the calculation of extension preservation rent, an owner's annual authorized return and debt service on any rehabilitation loan. Paragraph (d) of § 248.121 includes as part of transfer preservation rent, debt service on an acquisition loan and debt service on any rehabilitation loan. Because preservation rents must be calculated early in the preservation process, prior to the calculation of actual loan amounts, the Department must estimate certain factors in determining debt service. In calculating the debt service on a rehabilitation loan, the Department assumes, in accordance with section 241(a) of the National Housing Act, that the loan amount would cover 90 percent of the rehabilitation. However, because section 316(a) of title III requires that equity and acquisition loans include 100 percent of the rehabilitation costs and related charges, this affects the Department's estimates of preservation rent.

When the owner is retaining the property, it has the choice of receiving its authorized return on an annual basis, or receiving all or a portion of the return in an equity loan. If an owner chooses an equity loan, 100 percent of the rehabilitation costs will be included in the loan amount and the owner would not need a section 241(a) rehabilitation loan. If an owner does not request an equity loan, it may cover 90 percent of the costs of rehabilitation through a 241(a) loan. However, at the time preservation rents are determined, HUD will not know which route an owner will choose. For this reason, when calculating the extension preservation rent, the Department will assume that the rehabilitation loan will cover 90 percent of the value of improvements, additions and equipment. It is important to note that in setting actual tenant rents at the time the plan of action is approved, the Department will include debt service payments on rehabilitation costs whether they are included as part of the Section 241(f) equity loan or in a separate Section 241(a) rehabilitation loan.

As a result of the statutory amendments, where the property is to be transferred, a purchaser will receive a section 241(f) acquisition loan which will include rehabilitation costs, making it unnecessary for the purchaser to obtain a section 241(a) rehabilitation loan. Therefore, when determining the transfer preservation rent, the Department will calculate the debt service on a rehabilitation loan which is assumed to cover 100 percent of the rehabilitation costs plus related charges.

Section 316(a)(3)(A) also amends section 241(f) of the National Housing Act by adding as part of the new subparagraph (A)(i) the requirement that equity loans have "amortization provisions which will, to the extent practicable, support the loan amount authorized * * *." Paragraph (a)(ii) of §241.1067 of the April 1992 interim rule is amended by this rule to conform to this requirement.

Section 241(f)(5)(B) of the National Housing Act, as amended by section 316(a)(3)(B) of title III, provides that equity and acquisition loans should bear interest at a rate agreed upon by the mortgagor and mortgagee and be secured in such manner as the Secretary may require. No revisions to part 241 are needed to implement this amendment. Section 241.1070 already permits borrowers and lenders to determine interest rates for equity and acquisition loans. The Secretary was authorized under section 241(f) of the National Housing Act, both before and after its amendment by LIHPRHA, to use his discretion as to loan security, and §241.1045 requires the lender to use security instrument forms approved by the Commissioner.

Section 241.1068 (Renegotiation of an Equity Loan)

Section 316(b) of title III amends section 241(f) of the National Housing Act by adding a new paragraph (10) directing the Department to renegotiate and modify the terms of an equity loan, at an owner's request, if "the loan was made" within 30 days before enactment of the Housing and Community Development Act of 1992 or within 90 days after such date and the loan was made pursuant to an ELIHPA plan of action "and accepted by the Secretary for processing in December 1991." A new § 241.1068 has been added to the Department's regulations to implement this provision.

The language of section 316(b) is ambiguous in certain respects and there is no legislative history indicating Congressional intent behind this provision. Therefore, the Department has used its discretion in interpreting this provision. The statutory language states that HUD should renegotiate the terms of a loan depending on when "the loan was made." The plain meaning of the phrase "the loan was made" seems to refer to the loan closing. Hence, § 241.1068 provides for renegotiation of equity loans for which a loan closing occurred between September 28, 1992 and January 26, 1993.

Under section 316(b) of title III, in order for an equity loan to be renegotiated, the loan must also be "made pursuant to a plan of action under the provisions of [ELIHPA] and accepted by the Secretary for processing in December 1991." This language does not clearly indicate whether it is the loan application or the plan of action which must have been accepted for processing in December 1991. If it is assumed that this language refers to the loan application, this would indicate a period of at least nine months between submission of the application and the issuance of a commitment. Because commitments are generally issued in a much shorter time period, the Department has assumed in this rule that this statutory language requires that the plan of action, and not the loan application, must have been submitted in December 1991.

As long as the owner meets the requirements of § 241.1068, and the owner and the lender agree to change the terms of the loan and the change is in compliance with the Department's regulations and statutory authority, the Department will approve a refinancing or modify the commitment for mortgage insurance. However, under section 241(f) the Department insures loans made by private lenders, but the Department is not a party to the loan agreement and has no right to require renegotiation of any loan terms. Therefore, if the lender refuses to change the loan maturity, the Department will not modify its commitment or approve any refinancing.

Pursuant to section 316(b) of title III, the Department will approve a refinancing or modify the mortgage insurance commitment where such refinancing or modification involves a change in loan term, interest rate, or debt service payments, as long as the debt service does not exceed the limits established in § 241.1065 and the loan amount does not exceed ninety percent of the owner's equity, as determined in the approved plan of action.

Part 248—Preservation of Multifamily Low Income Housing

Subpart A—General

Section 248.5 (Election To Proceed Under Subpart B or Subpart C of This Part)

This rule revises §§ 248.211, 248.213 and 248.217 to require owners electing under § 248.5 to proceed under subpart C to comply with the notice requirements of subpart B; revises § 248.5 to require HUD to provide sufficient assistance to nonprofit organizations purchasing projects for which an election was made, to meet "project oversight costs;" and revises § 248.5 to ensure that owners who elected subpart C are not denied incentives because of the date they filed a plan of action.

Section 313(a) of title III amends section 604(a) of LIHPRHA to require owners who elect to proceed under ELIHPA, to comply with sections 212(b), 217(a)(2) and 217(c) of LIHPRHA. These provisions require owners to notify tenants, State and local governments, and the mortgagee of its submission to HUD of a notice of intent, plan of action, and any revisions to a plan of action. Sections 248.211, 248.213 and 248.217 have been amended to apply the LIHPRHA notification requirements to owners who elected to proceed under ELIHPA. HUD includes in the class of owners who "elected" to proceed under ELIHPA not only those owners who filed a notice of election to proceed under § 248.5, but all owners who continued processing under ELIHPA after the enactment of LIHPRHA.

Section 313(b)(1)(A) requires HUD to provide incentives sufficient to meet project oversight costs to nonprofit purchasers who purchase projects for which an election has been made under section 604 of LIHPRHA to proceed under ELIHPA. A new paragraph (e), which restates the statutory language, is added to § 248.5 by this rule. A definition of "project oversight costs" is also added to § 248.201 of subpart C of this part, which is cross-referenced in § 248.5(e). That definition is discussed in the preamble section concerning § 248.201. Sections 248.101, 248.145 and 248.157 are also amended to incorporate project oversight costs as a cost for which incentives may be provided under subpart B for priority purchasers.

In a summary of the Housing and Community Development Act of 1992 presented on the Senate Floor, Senator Cranston stated that "the conferees expect the Secretary to adjust project rents and increase the section 8 assistance provided to [priority] purchasers—amending the approved plan of action, if necessary—in order to cover project oversight expenses, and to adopt this practice with respect to future nonprofit purchases under the transitional rule." 138 *Cong. Rec.* S17909 (October 8, 1992), (statement of Sen. Cranston). This legislative history implies that HUD should provide additional incentives for project oversight costs to owners who are already receiving incentives under an approved plan of action. HUD will do so upon the owner's request. Section 313(b)(1) of title III amends Section 604(c) of LIHPRHA by adding subsection (1)(b), which prohibits the Secretary from refusing to offer incentives to owners filing plans of action under the Emergency Low-Income Housing Act of 1987 based solely on when the owner filed the plan of action. The subsection further applies this provision to any owner who filed a Notice of Intent under section 222 of ELIHPA before October 15, 1991.

The Department, to its knowledge has never refused to offer incentive to any owner who has filed a plan of action, regardless of the date of filing, under ELIHPA. The legislative history with respect to this provision offers only one clarification as to its intent. The House Committee report references the Department's change in policy for offering increased distributions based on revalued equity on July 16, 1991. July 16, 1991 is the effective date of a Notice of Redelegation of Authority to Regional Administrators to approve plans of action, published on July 23, 1991 at 56 FR 33763. July 16, 1991 is also the date that the administrative guidance for reviewing and approving plans of action under ELIHPA, HUD Notice H91–29, "Processing Plans of Action Under the Low-Income Housing Preservation and Resident Homeownership Act of 1990" ("Notice H91–29"), became effective.

Until Notice H91–29 was made effective, the Department followed a policy of allowing so-called "unlimited distributions," access to all surplus cash, to any owner requesting increased distributions based on revaluated equity. Since incentives authorized under section 224 of ELIHPA also included access to residual receipts, an owner could request both incentives in the plan of action, with the effect of having an increased distribution and full access to residual receipts. A sensible alternative was to allow unlimited distributions which would have the same effect. (A corresponding policy was to allow annual rent increases for units receiving Section 8 Loan Management Set-Aside assistance with the Annual Adjustment Factor, and to allow rent increases for units not receiving such Section 8 assistance by an administrative formula.) Further since the administrative rent limitations imposed on plans of action under ELIHPA might not yield to any owner a return on equity reflecting a project's full, revalued equity, allowing "unlimited" distributions was viewed by the Department as a correction to a design defect in the authorizing legislation, which was in turn "corrected" by LIHPRHA.

The policy of allowing "unlimited distributions" was found to be unworkable when applied to section 236 projects, because it rendered the collection of income in excess of the basic rent, required by section 236(g) of the National Housing Act, impossible. This is the case because the calculation of basic rent requires a fixed distribution for limited distribution mortgagors. Despite the many changes that ELIHPA made to both the nature and operation of a section 236 project, it had not repealed section 236(g) and the requirement to collect excess income. In fact, section 219 of LIHPRHA reinforces Congressional intent for the Department to collect excess income from section 236 projects with approved plans of action under that statute. Although section 219 of LIHPRHA has no legal bearing on the literal construction of ELIHPA, the Department finds it instructive with respect to Congressional intent regarding section 236 projects under the general heading of preservation.

Thus, the Department with the publication of Notice H91–29 reverted to a policy of negotiating distributions, generally reflecting net cash at the end of the statutory rent phase-in period, and corrected what was generally held as an administrative error. Further, rent increases would henceforth be governed by the budgeted method, common now to virtually all projects insured under sections 221(d)(3) and 236 of the National Housing Act. Although only a few Section 236 projects had plans of action approved with surplus cash distributions, the Department did not seek to renegotiate the plans of action after the adoption of the new policy, choosing not to penalize owners, who had negotiated plans of action in good faith, for the Department's administrative error.

Section 313(b)(1) makes it clear that the Congress wishes the Department to return to its policy of surplus cash distributions for plans of action approved under ELIHPA. It is also clear that the Congress intends that HUD continue to collect excess income from section 236 projects. Therefore, section 221(d)(3) mortgagors may retain all rental collections over and above normal operating costs and debt service as distributable, subject to the surplus cash computation. Section 236 projects may do likewise, subject to the collection of excess income and the surplus cash computation. In order to determine the amount of excess income to be collected, the Department must establish a basic rent.

The basic rent will be set in the following manner: (1) Units assisted by Section 8 loan management set-aside will have a basic rent of the lesser of the Section 8 existing fair market rent or the rent for comparable unassisted units; (2) low income units not assisted by Section 8 loan management set-aside will have a basic rent set at 30 percent of one twelfth of 75 percent of the area median income (or 125 percent of the national median income, if less) adjusted for unit size; (3) moderate income units will have a basic rent set at 30 percent of one twelfth of 90 percent of the area median income (or 125 percent of the national median income, if less) adjusted for unit size. Section 236 market rents will be established in accordance with current procedures. Owners will be required to remit monthly rental income collected in excess of the aggregate basic rent, not to exceed the amount of the monthly interest reduction payments.

Rent increases for units assisted by section 8 will be adjusted by the Annual Adjustment Factor. Rent increases for units not assisted by Section 8 will be adjusted by adjustments to the "factored rents" set forth in Notice H91–29 or when tenant incomes are recertified, depending on which method the owner chooses for determining tenant rents for units not assisted by Section 8 loan management set-aside at plan of action approval. Owners may at their option apply for and receive a limited distribution under ELIHPA. For owners choosing this option, rent increases will be governed by the budget method.

There is no requirement in section 313(b) of title III nor is there any indication in the legislative history that Congress intended that this provision retroactively apply to any owner who has had a plan of action approved under the conditions set forth in Notice H91-29. Therefore, the Department will not reconsider plans of action which have received final approval in accordance with § 248.218.

Any Section 236 project which has received a surplus cash distribution as an incentive will have section 236 basic and market rents calculated in accordance with the above methodology effective with the first approved increase in project rents after the effective date of this rule. However, the collection of excess income foregone due to the Department's administrative error will not be required.

Subpart B—Prepayment and Plans of Action Under the 1990 Act

Section 248.101 (Definitions)

Section 248.101 is revised by this rule to add definitions of "project oversight costs" and "proprietary information." Sections 307, 308(b) and 313(b) of title III require HUD to provide sufficient incentives to priority purchasers of eligible low income housing under LIHPRHA, and to nonprofit purchasers of projects for which an election was made under ELIHPA, to meet "project oversight costs." The definition of "project oversight costs" recognizes that some priority purchasers may not have the experience and expertise needed to own and operate low income housing and may want to hire a third party to provide assistance, education and training for the board and members of the priority or nonprofit purchaser. The Department may provide incentives to cover costs incurred by priority purchasers hiring third parties to assist the priority purchasers' board of directors in making ownership and management decisions. Because the board of directors must make all ownership decisions, project oversight costs must be directly related to educating and supporting the board in its decisionmaking. It is intended that third parties will provide project oversight to facilitate the functions of the board of directors, rather than to usurp the board's responsibilities. Since project oversight is intended to provide education and training to priority purchasers which may not have the experience necessary to own and operate low income multifamily housing, the Department expects that as priority purchasers gain this experience, project oversight costs will diminish and eventually be eliminated. The Department is considering limiting project oversight costs to the first five years of operation after plan of action approval and specifically requests comments regarding whether a five-year limitation is reasonable.

Section 304 of title III amends section 217(a)(2) and (c) of LIHPRHA to require owners and the Department to make available to the tenants and the chief executive officer of the appropriate State or local government in the jurisdiction where the housing is located copies of all documentation supporting the plan of action and revisions to the plan of action, except for any documentation which HUD deems to be proprietary information. To implement section 304 of title III, this rule adds a definition of the term "proprietary information" to § 248.101 and amends the notice provisions of § 248.135 (c) and (f). The amendments to § 248.135 (c) and (f) are addressed in the following discussion of that section.

In his discussion on the Senate Floor, Senator Cranston indicated that tenants should have access to "all information submitted that is relevant to the preservation process, with a narrow exception. Only proprietary information is privileged. The privilege extends only to information which is equivalent to trade secrets, confidential financial information, such as partnership audits, personal financial information about partners in the ownership entity, or project tenants * * * in the case of documents that include both proprietary and nonprivileged information, it is the intent of the conferees that the documents be released, with the proprietary information redacted." 138 Cong. Rec. S17909 (October 8, 1992) (statement of Sen. Cranston). The Department has taken into consideration this statement in formulating its definition.

Section 248.135 (Plans of Action)

As discussed in the previous section, section 304 of title III amends section 217(a)(2) and (c) of LIHPRHA to require an owner and the Department to make available, upon request, to the tenants and the chief executive officer of the appropriate State or local government in the jurisdiction where the housing is located copies of all documentation supporting the plan of action and revisions to the plan of action, except for any documentation which HUD deems to be proprietary information.

Section 248.135(c) currently requires the owner to provide copies of its plan of action to the tenant representative and the officer of State or local government to whom the owner submitted a copy of its notice of intent. The owner is also required to post, in all occupied buildings, a summary of the plan of action which includes a statement that the tenants may obtain a copy of the plan of action from the tenant representative, the local HUD office or the owner. As noted in the preamble to the April 1992 interim rule, at 57 FR 12010, a plan of action is a complete, self-contained document, having all the information necessary for the Department to make the determinations required under LIHPRHA. All supporting documentation is included in, and is a part of, the plan of action itself and is available to the tenants and the State and local government under § 248.153(c). However, because of the direction in section 304 of title III, and in the event that there is some supporting documentation that is not included in the plan of action, this rule amends paragraphs (c) and (f) of § 248.135 in order to permit tenants and the State or local governments to request copies of the supporting documentation. In addition, § 248.101 is amended, as noted in the preceding discussion, to add a definition of "proprietary information."

Section 248.141 (Criteria for Approval of a Plan of Action Involving Prepayment and Voluntary Termination)

Section 305 of title III amends section 218 of LIHPRHA to require HUD to issue written findings based on an analysis of the evidence it relies on in approving a plan of action to terminate the low income affordability restrictions on eligible low income housing. Section 305 also directs the Department to publish, in a regulation, a procedure for determining whether the conditions needed to approve a plan of action to terminate the low income affordability restrictions exist and the type of evidence the Department will rely on in making its determination. This rule revises § 248.141 to include the Department's current policies and procedures, as set forth in HUD Handbook 4350.6, "Processing Plans of Action Under the Low Income Housing Preservation and Resident Homeownership Act of 1990" for approving plans of action under this section.

Section 248.145 (Criteria for Approval of a Plan of Action Involving Incentives)

Section 307(a) purports to amend section 220(d)(2) of LIHPRHA by adding the parenthetical language to the following provision: "[s]ubject to the availability of amounts approved in appropriations Acts, the Secretary shall, for approval plans of action, provide assistance sufficient to enable qualified purchasers (including all priority purchasers other than resident councils acquiring under the homeownership program authorized by section 226) to * * *" acquire the project, pay debt service on the federally assisted mortgage and the rehabilitation loan, meet project operating expenses and establish adequate reserves, receive an 8 percent return on actual cash investment, reimbursement for transaction expenses incurred by priority purchasers and training for resident councils under a resident homeownership program. This provision establishes the level of assistance the Department is authorized to provide to qualified purchasers under LIHPRHA.

The effect of section 307(a) would be to make section 220(d)(2) inapplicable to resident councils submitting a resident homeownership plan. However, because there is no other provision in LIHPRHA which indicates the level of incentives a resident council with a resident homeownership plan should receive, this amendment seems to be incorrect. Section 219(a) sets forth the amount of incentives which can be provided to an owner who retains the project and section 220(d)(2) does the same for purchasers where the owner decides to sell the project. If section 220(d)(2) is not applicable to resident councils with a homeownership plan, they would be the only entities which are not covered by a statutory provision defining the amount of incentives they may receive. This interpretation seems contrary to the entire preservation scheme which is intended to provide owners with a specific return on their investment while preserving the low income housing.

The position that Congress did not intend to amend section 220(d)(2) by adding the quoted parenthetical language is also supported by the fact paragraph (G) was not deleted from section 220(d)(2). Section 220(d)(2)(G) provides that the Department may award sufficient incentives to a resident council with an approved homeownership plan to cover, inter alia, the costs incurred to train the resident council and to provide homeownership training for the tenants. It would be unreasonable to make section 220(d)(2) inapplicable to resident councils with a homeownership plan and yet have a paragraph in that section which deals solely with those entities.

Rather than amending section 220(d)(2), the Department believes that section 307(a) is intended to amend section 220(d)(1) of LIHPRHA. If the quoted parenthetical language were added to section 220(d)(1), it would read as follows: "[I]f the qualified purchase is a resident council, the Secretary may not approve a plan of action for assistance under this section unless the council's proposed resident homeownership program meets the requirements under section 226. For all other qualified purchasers (including all priority purchasers other than resident councils acquiring under the homeownership program authorized by section 226), the Secretary may not approve the plan unless the Secretary finds that the criteria for approval under section 222 have been satisfied." Section 222 states that incentives cannot be provided unless binding commitments have been made to preserve the property as low income housing, to protect current tenants from displacement, to regulate rent increases for current and future tenants, and to ensure that the property is maintained in accordance with housing quality standards.

In implementing section 222, the Department, in § 248.145, inadvertently excluded from the criteria for approval under section 222 all resident councils, instead of just those resident councils under the resident homeownership program. It is likely that section 307(a) was intended to correct the Department's mistake in § 248.145. Section 248.145(a) is amended to apply to all resident councils, except those under the resident homeownership program.

While HUD interprets section 307(a) as intending to amend section 220(d)(1), section 307(a) could have been meant to amend section 221(d)(2) of LIHPRHA. Section 221(d)(2) authorizes the Department to provide grants to qualified purchasers to assist in the completion of sales and transfers under the mandatory sale procedures. It is possible that the language of section 307(a) was intended to exclude resident councils purchasing under a resident homeownership plan from receiving grants under section 221(d)(2). This position could be supported by section 226(a) of LIHPRHA which states that a resident homeownership plan should be developed by "[t]enants seeking to purchase eligible low income housing in accordance with section 220 * * *;" implying that resident homeownership is only an option under the voluntary sale provisions of section 220 and not the mandatory sale provisions of section 221. The Department requests comments which may clarify this matter.

Section 308(b) of title III amends section 222(a)(2)(G)(i) of LIHPRHA which governs future rent increases for tenants residing in projects with approved plans of action. Prior to this amendment, section 222(a)(2)(G)(i) stated that future rent adjustments generally would be made based on an annual adjustment factor applied to the portion of rent attributable to project operating expenses and by making changes in the owner's annual authorized return. Where there were extraordinary expenses which were not covered by the annual adjustment factor or the owner's return, an owner could appeal to HUD for an additional rent increase. Section 308(b) amends this provision by deleting all references to the annual authorized return and by adding the requirement that, when the owner is a priority purchaser, the annual adjustment factor be applied to the portion of rent attributable to project oversight costs, as well as that portion attributable to operating expenses. A definition of the term "project oversight costs" is also added to § 248.101.

Section 248.153 (Incentives To Extend Low Income Use)

Section 306 of title III amends section 219(a) of LIHPRHA to require the Department to provide incentives which would be sufficient to permit an owner to receive its annual authorized return "for each year after approval of the plan of action." Section 248.153(a)(1) is amended accordingly.

Section 306 also amends section 219(a) of LIHPRHA to permit HUD to provide the following incentives, in the following order of preference, to ensure that an owner receives its annual rate of return during the tenant rent phase-in period: (1) permitting owner access to residual receipts accounts; (2) deferring remittance of excess rent payments; and (3) increasing rents, as permitted under an existing Section 8 contract. To implement this provision, the Department adds a new paragraph (c) to § 248.153 stating that, if necessary to enable an owner to receive its annual authorized return during the tenant rent phase-in period required by § 248.145(a)(6), HUD shall permit the owner to withdraw funds from the residual receipts accounts. If this is inadequate, and the project is insured or assisted under section 236 of the National Housing Act, the owner may defer remittance of excess income. If both of these incentives fail to permit an owner to obtain the annual authorized return, the Department will then temporarily increase Section 8 rents, as permitted under the existing Section 8 contract.

Seciton 248.153(b)(1) currently permits an owner to have access to the project's residual receipts accounts, "as necessary to enable the owner to realize the annual authorized return." Therefore, an owner will already receive this incentive during the rent phase-in period. Because the owner and the Department will be unable to ascertain in the first 12 months after approval of a plan of action whether the incentives awarded under the plan of action are sufficient to enable the owner to obtain its annual authorized return, the additional remedies permitted under the revised § 248.153(c) will be unavailable until one year after plan of action approval. If an owner can document, through an audit, that it is not receiving its annual authorized return, these remedies may be made available to the owner during the first year after plan of action approval. Otherwise, at the end of the first year, if it has been determined that an owner has not obtained its annual authorized return, an owner of a section 236 insured or assisted project will be permitted to defer remittance of excess rent payments, and an owner of a project, other than one insured or assisted under section 236, will receive an increase in rents, to the extent permitted by an existing section 8 contract. At the end of the second year of the rent phase-in period, if it is determined that an owner of a section 236 insured or assisted project still has not received the total annual authorized return, rents will be temporarily increased during the phase-in period to the extent permitted by an existing section 8 contract.

Section 248.157 (Voluntary Sale of Housing Not in Excess of the Federal Cost Limit)

Sections 307(b) through (d) of title III amend section 220(d)(2) of LIHPRHA to make available additional incentives for priority purchasers. Section 307(e) amends section 220(d)(3) of LIHPRHA to permit selling owners to retain a project's residual receipts account without a corresponding decrease in the sales price.

Section 307(b) authorizes HUD to provide sufficient incentives to meet project oversight costs where the owner is a priority purchaser. Section 220(d)(2)(D) previously permitted incentives at a level which would cover project operating expenses and establish adequate reserves, but did not include project oversight costs. Section 248.157(m)(4) is amended to include this cost. As previously noted, § 248.101 contains a definition of "project oversight costs" which sets forth the types of costs which can be covered by incentives.

Section 307(c) permits qualified purchasers to receive an 8 percent annual return on any cash investment, other than assistance provided under LIHPRHA, to acquire or rehabilitate the project. Prior to this amendment, section 220(d)(2)(E) allowed qualified purchasers to receive an adequate return on any actual cash investment to acquire the project. The Secretary was authorized to use his discretion to determine what would be considered an "adequate return." The current section 248.157(m)(5) restates the statutory language of section 220(d)(2)(E), but the preamble to the April 1992 interim rule expanded upon this by stating, at 57 FR 12021, that HUD would "build into the rent stream a return on any actual cash investment by the purchaser and debt service on any gap financing. The extra income must be allocated towards debt service payments on the non-federal loan, or if the return exceeds the debt service on the loan, then the surplus cash must be deposited in the residual receipts account * * *." In the Senate Report, on page 70, the Committee took issue with the fact that priority purchasers would have to return any surplus cash not needed for debt service to the residual receipts account, rather than retain it for their own purposes. In order to comply with statutory intent, § 248.157(m)(5) is revised to permit an 8 percent return for any actual cash investment made by priority purchasers to rehabilitate, as well as to acquire, eligible low income housing. The Department has also amended its administrative requirement that all surplus cash not needed for debt service be returned to the residual receipts account. Instead, priority purchasers will be permitted access to funds in the residual receipts account which are not needed for project purposes. As is the case with for-profit owners, HUD-approval will be required before funds may be withdrawn by priority purchasers from the residual receipts account.

Section 307(d) authorizes HUD to reimburse priority purchasers for "all reasonable transaction expenses associated with acquisition, loan closing and implementation of an approved plan of action." Section 220(d)(2)(F) originally allowed priority purchasers "an adequate reimbursement for transaction expenses relating to acquisition of the housing, subject to approval by the Secretary." Section 307(d) enlarges the scope of the term "transaction expenses" to permit reimbursement of expenses incurred in loan closing and implementation of an approved plan of action, as well as those expenses incurred in acquiring the property. Section 248.157(m)(6) is revised to restate the language of section 307(d). The Department specifically requests comments concerning the types of expenses which may be incurred by priority purchasers in implementing an approved plan of action. The Department will consider any comments it receives on this point in order to expand on this provision in the administrative guidance it is currently formulating.

In the current § 248.157(m)(6), the Department, using its discretion to implement section 220(d)(2)(F), placed a cap on the reimbursement of transaction expenses at 5 percent of the project's transfer preservation equity, made reimbursement subject to HUD's approval and required that the reimbursement be "in accordance with standards applicable to insured loan transactions under this chapter." The Senate Report indicates, on page 71, that the Committee objected to both the 5 percent cap and the requirement that the reimbursement be in accordance with other loan transactions. "HUD's regulations arbitrarily limit the reimbursement of transaction expenses in two ways: first, by setting a cap of 5 percent of preservation equity; and second, by conditioning reimbursement on 'standards applicable to insured loan transactions under this chapter.' These limits are contrary to the legislative intent that the reimbursement be 'adequate' for all reasonable expenses. The limits are also contrary to industry practice, because transaction expenses do not correlate with the value of [sic] size of the property acquired." Because of this amendment and the Committee' objections, § 248.157(m)(6) is amended to remove the 5 percent cap and the requirement that reimbursement be comparable to other loan transactions.

Section 307(e) amends section 220(d)(3)(A) which provided that where a selling owner retained any residual receipts from the project upon sale, the sale price would be decreased by the amount of the residual receipts being retained. As noted in the preamble to the proposed rule to implement LIHPRHA, at 56 FR 20277, published on May 2, 1991, the Department took the position that section 220(d)(3)(A), as enacted, "would deprive an owner of a portion of the project's value" because the project's preservation value does not take into consideration the amount of the project's escrow accounts, including residual receipts. Section 307(e) corrects section 220(d)(3)(A) by eliminating the requirement that residual receipts retained by the owner be deducted from the sale price. Section 248.157(n) is revised to implement this amendment.

Section 248.173 (Resident Homeownership Program

Section 309 of title III amends section 226 of LIHPRHA, which governs the resident homownership program, to prohibit the Department from requiring prepayment of the mortgage as a condition of approving a resident homeownership plan of action; to require low income use restrictions to remain on all rental units; and to take away the Department's discretion to determine whether a purchase under the resident homeownership program involves an assumption of the mortgage and whether the purchasing entity intends to own the housing on a permanent basis.

Section 248.173(s) prohibits resident councils from assuming the federally-assisted mortgage under a resident homeownership program where fee simple ownership of the project's units are being transferred to the tenants. However, § 248.175, which permits resident councils to purchase and operate a project as a limited equity cooperative under a resident homeownership plan, does not prohibit mortgage assumptions. The Department revises paragraph (s) of § 248.173 to clarify that a resident council may choose to assume the federally-assisted mortgage or prepay the mortgage in connection with a resident homeownership plan. If the resident council chooses to assume the mortgage, the project must be sold to a limited equity cooperative pursuant to § 248.175 and the project must be operated as a limited equity cooperative.

The Department limits mortgage assumptions to limited equity cooperatives because where there is to be a mortgage assumption, the only workable form of resident homeownership is as a cooperative where shares in the project are transferred to the tenants, rather than fee simple ownership of the units. Section 226(b)(5)(A)(iii) requires homeowners, whether purchasing a share in the project, or the actual unit, to execute a promissory note payable to the Secretary. It would be infeasible where fee simple ownership of units is transferred, to require promissory notes for each unit, as well as to have a mortgage outstanding on the entire project.

Where the federally assisted mortgage is assumed by a resident council, the regulatory agreement on the project would remain in place and all current and prospective homeowners would be required to comply with low income restrictions. Paragraph (b)(10) of section 226 of LIHPRHA requires as a condition of assuming the mortgage, that the low income restrictions on the project remain in place for the remaining useful life of the project. However, section 226(b)(3) of LIHPRHA requires that only initial homeowners meet the low income restrictions established by HUD. (Note that the Department, in § 248.173(g), requires initial owners to fall within the same type of income profile imposed on projects which are transferred under § 248.157.) Subsequent owners are not subject, either by statute or by regulation, to meet income requirements. This implies that Congress contemplated that resident councils could choose to assume the federally assisted mortgage and continue the low income use restrictions for the project's remaining useful life or could pay off the mortgage and eliminate the low income use restrictions once all initial homeowners have sold their units to subsequent owners. The revised § 248.173(s) provides resident councils with these two options.

In order to ensure that low income use restrictions continue to be applied to all rental units for the period during which they remain as rental units, paragraph (g) of § 248.173 is revised to require as a condition of approval of a resident homeownership program, that all tenants residing in rental units be subject to the protections of § 248.145 (a)(5), (a)(6), (a)(7), and (a)(9), which restrict rent levels, and that the rental units be available to new tenants in the proportions of very low, low and moderate income tenants, as required under § 248.145(a)(8).

Section 248.175 (Resident Homeownership Program—Limited Equity Cooperative)

Section 309 of title III also amends section 226(b)(8) of LIHPRHA to add the phrase "Except in the case of limited equity cooperatives, * * *" before "resident councils shall transfer ownership of the property to tenants within a specified period of time that the Secretary determines to be reasonable." It is unclear whether this amendment is intended to delete all time requirements for transfer of ownership shares from a limited equity cooperative to the tenants, such as the 4-year requirement imposed in § 248.175(b), or whether this is a technical change to omit limited equity cooperatives from the requirement that "ownership of the property" be transferred in a timely manner because individual owners in a cooperative do not obtain ownership of the property, but a share in the entire project.

Paragraph (b) of § 248.175, which governs resident homeownership by limited equity cooperatives, is revised to delete the cross-reference to § 248.173(o), which requires that ownership be transferred to the tenants in a timely manner. The Department specifically requests comments on this revision.

Subpart C—Prepayment and Plans of Action Under the Emergency Low Income Preservation Act of 1987

Section 248.201 (Definitions)

As noted in the discussion of § 248.5, section 313(b)(1)(A) of title III requires the Department to provide sufficient incentives to nonprofit purchasers to meet "project oversight costs." Section 248.201 of the Department's regulations is amended by this rule to add the definition of the term "project oversight costs." The definition in § 248.201 is identical to the definition adopted in § 248.101, except that the term "nonprofit purchaser" is substituted for the term "priority purchaser," since ELIHPA does not create a category for priority purchasers. The definition of "project oversight costs" is addressed in the preceding discussion of § 248.101.

Section 248.211 (Notice of Intent To Prepay)

Section 248.211(b) of the Department's regulations is amended in order to extend the notice requirements of section 313(a) of title III to cover those who elected to proceed under ELIHPA. The preceding discussion concerning § 248.5 addresses the reasoning behind this revision. Section 248.211(b) currently requires an owner to submit a copy of its notice of intent to the governor in the State where the project is located or with the appropriate State or local government agency for the jurisdiction in which the project is located and to each tenant in the project, as well as to post a copy of the notice of intent in each occupied building of the project. The Department revises § 248.211(b) by including language from § 248.105(c), requiring, for owners who made an election, that the notice of intent be submitted to the chief executive officer of the appropriate State or local government in which the project is located, or any officer designated by executive order or State or local law to receive such information and to the mortgagee.

Section 248.213 (Plan of Action)

The Department amends § 248.213(b) of its regulations to require owners who made an election to proceed under ELIHPA to notify the State and local governments and the tenants of the submission. The rationale behind this amendment is addressed in the preceding section concerning § 248.5. This revision incorporates in § 248.213(b), language similar to that in § 248.135(c) in order to create a uniform standard for notifying affected tenants and State and local governments under both preservation programs.

While ELIHPA does not create a mechanism for identifying tenant representatives, the LIHPRHA requirement that the tenant representative be given a copy of the plan of action is retained in case there is a tenant representative who is known to the owner. Although section 304 of title III does not extend the ban on releasing proprietary information to ELIHPA, the Department proposes to do so in this rule. There is no basis for permitting certain tenants and State and local governments to receive proprietary information and not others simply because of the preservation program chosen by the owner.

Section 248.217 (Revisions to Plan of Action)

The Department also amends § 248.217, which governs revisions to plans of action submitted under ELIHPA, to require that all revisions, and supporting information, except for proprietary information, be provided to the tenants and State and local governments. The reasons for this change are discussed in the preceding section concerning § 248.5. The language revising § 248.217 is derived from the language of § 248.135(f), as amended.

Subpart E—Technical Assistance and Capacity Building

Section 312 of title III amends LIHPRHA by adding new sections 251 through 257 which establish a technical assistance and capacity building program for providing grants to resident groups, resident councils and community-based nonprofit housing developers. This program is codified in a new subpart E which is added to part 248. Subpart E restates the provisions of sections 251 through 257. More specific information will be provided in a Notice of Fund Availability (the "1993 NOFA") which is currently being drafted by the Department. The Department intends to award technical assistance grants on a noncompetitive, rolling basis.

As enacted, LIHPRHA did not provide the Department with authority to provide funds prior to plan of action approval to priority purchasers to assist them in organizing and training. Pursuant to section 220(d) of LIHPRHA, funds could only be provided retroactively under an approved plan of action to reimburse priority purchasers for transaction expenses related to acquisition and resident councils for training expenses incurred in connection with a resident homeownership plan. However, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1992 set aside funds "for tenant and community-based nonprofit education, training and capacity building * * *." On September 3, 1992 at 57 FR 40570, the Department published a Notice of Fund Availability (the "1992 NOFA") announcing technical assistance and planning grants which would be awarded to certain priority purchasers in accordance with the standards established in the 1992 NOFA.

The Department is currently accepting applications on a rolling basis under the 1992 NOFA. In a statement on the Senate Floor, Senator Cranston remarked that "[t]he conferees expect HUD to proceed expeditiously with the [1992] NOFA and receive and approve grant applications on the 30 day schedule provided, while moving forward with the implementation of the new technical assistance program. The Department may run the programs concurrently or sequentially, but must take steps to assure that no funding gap occurs between the temporary technical assistance grant program and the permanent program established by this title." Cong. Rec. S17910 (October 8, 1992) (statement of Sen. Cranston). HUD intends to continue to accept applications under the 1992 NOFA until the funding set aside under the 1992 appropriations Act runs out. Applications for funding will be reviewed in accordance with the standards and criteria established in the 1992 NOFA and not based on the technical assistance and capacity building program set forth in subpart E. The Department intends to administer grants under the 1992 NOFA and the 1993 NOFA simultaneously.

Potential grant recipients should be aware of the substantive differences between the technical assistance program set forth in the 1992 NOFA and the program established in subpart E. Under the 1992 NOFA, funds are provided directly by HUD and are available in three separate phases; for start-up funding, for an expression of interest and development of a purchase offer, and for preparation of a plan of action. Successful applicants may receive up to $25,000 for phase I activities, $50,000 for phase II activities and $50,000 for phase III activities. Those eligible for the assistance are resident groups, resident councils, community groups, and community-based nonprofit organizations.

Pursuant to subpart E, grants are administered by intermediaries selected by HUD. Resident organizations and community-based nonprofit housing developers may apply for two types of grants: Resident capacity building and/or predevelopment. Funding for each grant may not exceed $30,000 and $200,000, respectively. In addition, State and local government agencies, nonprofit intermediaries, and experienced resident councils and community-based nonprofit organizations, may apply for grants to conduct community outreach, training programs, organization activities, and any other activities HUD deems appropriate under the preservation program.

Miscellaneous Matters

The Housing and Community Development Act of 1992 contains two additional provisions, pertaining to section 8 certificates and vouchers and flexible subsidy assistance, which also affect the preservation program. Section 141 of the Housing and Community Development Act of 1992 amends sections 8(c)(4) and 8(o)(3)(A) of the United States Housing Act of 1937 to make eligible for section 8 certificates and vouchers, tenants who have been displaced, under section 223 of LIHPRHA, as a result of a mortgage prepayment or termination of a mortgage insurance contract and nonpurchasing families residing in a project under a resident homeownership plan, pursuant to section 226 of LIHPRHA. Since their enactment, sections 223(a) and 226(b)(6)(B) of LIHPRHA provided that displaced tenants and nonpurchasing families are eligible for section 8 certificates and vouchers. However, section 8 was not amended to include these tenants and families as eligible certificate and voucher recipients. Section 141 corrects this oversight. No amendment is needed to part 248 in order to implement this provision.

Section 405(d) of the Housing and Community Development Act of 1992 amends section 201 of the Housing and Community Development Amendments of 1978 by adding a provision stating that "[p]rojects receiving assistance under this section are not eligible for prepayment incentives under [ELIHPA] or [LIHPRHA]. Projects receiving financial assistance under such Acts are not eligible for assistance under this section." Section 405(b) of the Housing and Community Development Act of 1992 repeals section 201(k)(4) of the Housing and Community Development Amendments of 1978 and establishes new selection criteria for awarding flexible subsidy capital improvement loans, including giving priority to projects with HUD-insured mortgages over projects with HUD-held mortgages and those noninsured projects which are assisted by State agencies. Section 201(k)(4) had created a priority for projects receiving incentives under ELIHPR and LIHPRHA, but this amendment eliminates preservation projects from the list of selection criteria. On their face, these amendments would seem to preclude ELIHPA and LIHPRHA projects from receiving flexible subsidy assistance, and vice versa.

However, Congress did not amend section 224(b)(6) of ELIHPA or section 219(b)(4) of LIHPRHA which list flexible subsidy capital improvement loans as a permissible incentive. Nor did Congress repeal sections 201(m)(1) and (m)(2) of the Housing and Community Development Amendments of 1978, which discuss rental payments for ELIHPA and LIHPRHA projects receiving flexible subsidy assistance. In addition, Congress enacted section 318 of title III, requiring the Department to present a report to Congress detailing the cost of providing preservation incentives to owners of projects deemed ineligible for incentives because the owners entered into agreements to maintain the projects' low income use in exchange for flexible subsidy assistance. This report is required because Congress "is concerned that many of these projects may not be preserved, even with flexible subsidy, for lack of necessary additional funding * * * the report [should] include any recommendation which the Committee can consider for ways to make these projects eligible for the preservation program * * *" House Rpt. No. 760, 102d Cong., 2d Sess., at 117 (the "House Report"). The failure of Congress to eliminate capital improvement loans as an incentive, or to delete all flexible subsidy provisions pertaining to ELIHPA and LIHPRHA projects, and the fact that Congress is requesting a report to attempt to make projects with flexible subsidy eligible for incentives, seem to imply that Congress intended to continue to permit capital improvement loans as an incentive.

While owners proceeding under ELIHPA or LIHPRHA may finance rehabilitation with a loan insured under section 241 of the National Housing Act, a capital improvement loan is preferred by nonprofit purchasers because nonprofit mortgagors are not subject to the owner contribution requirements imposed on for-profit mortgagors, the interest rate on capital improvement loans is lower than for section 241 loans, and capital improvement loans are paid back from surplus cash. The amendment to section 241(f) made by section 316(a) of title III eliminates the need for a rehabilitation loan under LIHPRHA because rehabilitation costs will now be included in the section 241(f) equity and acquisition loans. However, capital improvement loans would be beneficial for nonprofit purchasers under ELIHPA whose only other choice is to finance improvements with a section 241(a) loan.

In light of the foregoing, the Department will allow nonprofit purchasers to obtain a flexible subsidy capital improvement loan as an incentive under ELIHPA. Because nonprofit purchasers requesting capital improvement loans in their plans of action will not be "receiving financial assistance" under ELIHPA or LIHPRHA at the time they are determined eligible for flexible subsidy, this position will not violate section 405(d) of the Housing and Community Development Act of 1992.

The Department intends to issue a Notice of Fund Availability for capital improvement loans which will announce funding for HUD-insured projects which are being sold to nonprofit purchasers pursuant to approved plans of action under ELIHPA. These projects will have to conform to the new selection criteria established in section 201(n)(1) and will be awarded assistance as their applications are received. Nonprofit purchasers of projects which do not have mortgages insured by HUD will also be eligible to apply for a capital improvements loan, but because of the statutory preference granted to projects with HUD-insured mortgages in section 201(n)(2), these projects will not be awarded funding until the end of the funding year.

Findings and Other Matters

A. Regulatory Impact

This rule does not constitute a "major rule" as that term is defined in section 1(d) of Executive Order 12291 on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

B. Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of General Counsel, Rules Docket Clerk, room 10276, 451 Seventh Street, SW., Washington, DC 20410.

C. Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order.

D. Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that some of the policies in this rule will have a significant impact on the formation, maintenance and general well-being of the family. Achievement of homeownership by low income families under the regulation can be expected to support family values, by helping families to achieve security and independence, by enabling them to live in decent, safe and sanitary housing, and by giving them the skills and means to live independently in mainstream American society. Since the impact on the family is beneficial, no further review is necessary.

E. Regulatory Flexibility Act

Under section 605 of the Regulatory Flexibility Act (5 U.S.C. 601), HUD certifies that this rule does not have a significant economic impact on a substantial number of small entities, because it carries out statutorily-mandated limitations on prepayment of the affected mortgages. Any economic impact is a direct consequence of the statute and is not separately imposed by this rule.

F. Information Collection Requirements

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, HUD Desk Officer, room 3001, New Executive Office Building, Washington, DC 20503, for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3502). No person may be subject to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register.**

TABULATION OF ANNUAL REPORTING BURDEN:

Description of information collection and applicable program reference	Number of respondents	Number of responses per response	Total annual responses	Hours per response	=	Total hours
A. Resident capacity grant application 1992 statute: Section 248	221.00	1	221.00	5.00		105.00
B. Predevelopment grant application 1992 statute: Section 248	77.00	1	77.00	10.00		770.00
C. Other purpose grants 1992 statute: Section 248	50.00	1	50.00	10.00		500.00
D. Application by intermediaries 1992 statute: Section 248	50.00	1	50.00	16.00		800.00
E. Voucher submission:						
1. Resident capacity grantees: 248	221.00	10	2,210.00	0.10		221.00
2. Predevelopment grantees: 248	77.00	15	1,155.00	0.10		115.50
3. Intermediary grantees: 248	50	7	348.00	0.50		174.00
F. Reporting:						
1. Resident capacity grantees: 248	221.00	2	442.00	1.00		442.00
2. Predevelopment grantees: 248	77.00	2	154.00	1.00		154.00
3. Other purpose grantees: 248	50	2	100.00	1.00		100.00
4. Intermediary grantees: 248	50	4	200.00	3.00		600.00
G. Title II NOI to mortgages	200	1	200.00	0.1		20.00
H. Title II plan of action to tenant rep and state or local government	200	1	200.00	0.2		40.00
Total						5,041.50

G. Regulatory Agenda

This rule was listed as item 1473 in the Department's Semiannual Agenda of Regulations published on April 26, 1993 (58 FR 24382, 24416) in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number is 14.137 (Mortgage Insurance—Rental and Cooperative Housing for Low and Moderate Income Families).

List of Subjects

24 CFR part 236

Grant programs—housing and community development, Low and moderate income housing, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR part 241

Energy conservation, Home improvement, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR part 248

Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, the Department amends chapter II of title 24 of the Code of Federal regulations as follows:

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION PAYMENT FOR RENTAL PROJECTS

1. The authority for part 236 continues to read as follows:

Authority: 12 U.S.C. 1715b–1715z–1; 42 U.S.C. 3535(d).

2. In § 236.10, paragraph (e) is revised to read as follows:

§ 236.10 Eligible mortgagors.

* * * * *

(e) *Public mortgagors.* The public mortgagor shall be a Federal instrumentality, a State or political subdivision thereof, or an instrumentality of a State or of a political subdivision thereof, which certifies that it is not receiving financial assistance from the United States exclusively pursuant to the United States Housing Act of 1937 (with the exception of projects assisted or to be assisted pursuant to section 8 of such Act) and which is acceptable to the Commissioner. Such a mortgagor shall be regulated or supervised as to rents, charges and methods of operation in such manner as, in the opinion of the Commissioner, will effectuate the purposes of this part.

3. Section 236.60 is revised to read as follows:

§ 236.60 Excess rental charges.

Except as agreed to by the Commissioner pursuant to a plan of action approved under part 248 of this chapter or in connection with an adjustment of contract rents under section 8 (c)(10) of the United States Housing Act of 1937, the mortgagor shall agree to pay monthly to the Commissioner the total of all rental charges collected in excess of the Basic Rent in accordance with instructions prescribed by the Commissioner.

4. Section 236.901 is revised to read as follows:

§ 236.901 Audit.

Where a State or local government receives interest reduction payments under section 236(b) of the National Housing Act or is the mortgagor of a mortgage insured or held by the Commissioner under this part, it shall conduct audits in accordance with HUD audit requirements at 24 CFR part 44.

PART 241—SUPPLEMENTARY FINANCING FOR INSURED PROJECT MORTGAGES

5. The authority for part 241 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715z–6; 42 U.S.C. 3535(d).

6. Section 241.1060 is revised to read as follows:

§ 241.1060 Maturity.

(a) Equity loans shall have a term not to exceed 40 years; and

(b) Acquisition loans shall have a term of 40 years.

7. Section 241.1067 is revised to read as follows:

§ 241.1067 Maximum loan amount—loans insured in connection with a plan of action under subpart B of part 248 of this chapter.

(a) The amount of the equity loan shall not exceed:

(1) The amount of rehabilitation costs as determined under an approved plan of action and related charges; plus

(2) The lesser of 70 percent of the extension preservation equity of the project; or

(3) The amount the Commissioner determines can be supported by the project on the basis of an 8 percent return on extension preservation equity, assuming normal debt service coverage. To the extent practicable, equity loans shall have amortization provisions which will support the maximum loan amount authorized under this section.

(b) The amount of the acquisition loan shall not exceed:

(1) The amount of rehabilitation costs as determined under an approved plan of action and related charges; plus

(2) Ninety-five percent of the transfer preservation equity of the project; and

(3) If the purchaser is a priority purchaser, the loan may include any expenses associated with the acquisition, loan closing, and implementation of the plan of action, subject to the approval of the Commissioner.

8. A new § 241.1068 is added to read as follows:

§ 241.1068 Renegotiation of an equity loan.

The Commissioner shall renegotiate and modify the terms of an equity loan insured under this subpart at the request of the owner of the project for which a loan closing occurred if—

(a) The loan closing occurred between September 28, 1992 and January 26, 1993;

(b) The loan was made pursuant to a plan of action submitted under subpart C of part 248 of this chapter; and

(c) The plan of action was accepted by the Commissioner for processing in December 1991.

PART 248—PREPAYMENT OF LOW INCOME HOUSING MORTGAGES

9. The authority for part 248 continues to read as follows:

Authority: 12 U.S.C. 1715l note; 12 U.S.C. 4101, *et seq.*; 42 U.S.C. 3535(d).

10. In § 248.5, paragraph (d) is redesignated as paragraph (f) and new paragraphs (d) and (e) are added to read as follows:

§ 248.5 Election to proceed under subpart B or subpart C of this part.

* * * * *

(d) For an owner who has elected under paragraph (c) of this section to proceed under subpart C of this part, the Commissioner shall provide sufficient assistance to enable a nonprofit organization that has purchased, or will purchase, eligible low income housing to meet project oversight costs, as that term is defined in § 248.201.

(e) The Commissioner shall not refuse to offer incentives under § 248.231 to any owner who filed a notice of intent under § 248.211 before October 15, 1991, based solely on the date of filing of the plan action.

* * * * *

11. In § 248.101, the following definitions are added in alphabetical order to read as follows:

§ 248.101 Definitions.

* * * * *

Project oversight costs. Reasonable expenses incurred by a priority purchaser in carrying out its ongoing ownership responsibilities under an approved plan of action. Project oversight costs must be directly related to educating the priority purchaser's board of directors or otherwise supporting the board in its decision making. Project oversight costs may include staff, overhead, or third-party contract costs for:

(1) Ensuring adequate and responsible participation by the board of directors and the membership of the priority purchaser in ownership decisions, including ensuring resident input in these decisions;

(2) Facilitating long-range planning by the board of directors to ensure the physical, financial and social viability of the project for the entire time the project is maintained as low income housing; and

(3) Assisting the ownership in complying with regulatory, use, loan and grant agreements.

Proprietary information. That information which cannot be released to the public because it consists of trade secrets, confidential financial information, audits, personal financial information about partners in the ownership entity, or income data on project tenants. Where proprietary information cannot be separated from the rest of a document, the entire document shall be deemed "proprietary information" and shall not be releasable to the public. Where proprietary information can be reasonably segregated from the rest of the document, the proprietary information shall be deleted and the remainder of the document shall be releasable to the public.

* * * * *

12. Section 248.135 is amended by revising the last sentence of paragraph (c) and adding a new sentence to the end of that paragraph and by revising the last sentence of paragraph (f) to read as follows:

§ 248.135 Plans of action.

* * * * *

(c) * * * The Commissioner shall submit a copy of the plan of action to the chief executive officer of the appropriate agency of such State or local government which shall review the plan of action and advise the tenants of the project of any programs that are available to assist the tenants in carrying out the purposes of this subpart. The summary of the plan of action posted by the owner and the copies of the plan of action submitted to the tenant representative, the officer of State or local government to whom the owner submitted a notice of intent under § 248.105(c) and the chief executive officer of the appropriate State or local government, shall all state that, upon request, the tenants and the State or local government, may obtain from the owner or from the local HUD field office a copy of all documentation supporting the plan of action except for that documentation deemed "proprietary information" under § 248.101.

* * * * *

(f) * * * The owner shall submit any revision to the Commissioner, and provide a copy of the revision and all documentation supporting the revision except for that documentation deemed "proprietary information" under § 248.101, to the parties, and in the manner, specified in paragraph (c) of this section.

* * * * *

13. In § 248.141, paragraph (b) is redesignated as paragraph (e) and new paragraphs (b), (c), and (d) are added as follows:

§ 248.141 Criteria for approval of a plan of action involving prepayment and voluntary termination.

* * * * *

(b) For purposes of approving a plan of action under this section, the Commissioner shall find that the requirements of paragraph (a)(1) of this section have been met if the owner agrees to execute a use agreement which provides that rents for all tenants residing at the project at the time of plan of action approval will not exceed the limit established in paragraph (a)(1)(i) of this section and that no tenant residing in the project at the time of plan of action approval will be involuntarily displaced without good cause.

(c) For purposes of approving a plan of action under this section, the Commissioner shall find that the requirements of paragraph (a)(2) of this section have been met if the project is located in a housing market area which has been determined to have an adequate supply of decent, safe and sanitary rental housing; and it has been determined, based on the specific characteristics of the project, that the prepayment would not materially affect the housing opportunities of low and very-low income families.

(1) For purposes of this section, a "housing market area" is defined as an area where rental housing units of similar characteristics are in relative competition with each other. If a project is in a non-metropolitan area, the housing market area is the county in which the project is located. If the project is located in a metropolitan area the housing market area is the primary metropolitan statistical area (PMSA), or in the case of very large metropolitan areas, the housing market area may be a portion of the PMSA.

(2) For purposes of this section, a housing market area may be determined to have an adequate supply of decent, safe, and sanitary rental housing if the housing market area has a soft rental market. A soft rental market is a housing market area in which the supply of vacant available rental housing significantly exceeds the demand. A soft rental market exists if:

(i) There is currently a surplus of rental housing such that the current excess supply of vacant available housing, plus units currently under construction, is expected to exceed demand for at lest the next 24 months; or

(ii) Within the next 12 months, based on the housing production (units currently under construction or with firm planning commitments), in combination with the current supply of available vacant units, supply is expected to exceed demand for at least 24 months.

(3) In order to determine whether the housing market area ha a soft rental market, the Commissioner shall consider data from the 1990 Decennial Census and the most recent available local data concerning changes in population, households, employment, the housing inventory, residential construction activity, and the current and anticipated supply/demand conditions within the overall rental market, as well as the occupancy and vacancy situation in assisted housing projects in the area, including information on waiting lists and the experience of certificate and voucher holders in finding units.

(4) A determination must also be made on whether the prepayment would materially affect the housing opportunities of low and very-low income families in the area, based on the specific characteristics of the project including unit sizes, the type of tenants, e.g., elderly, handicapped, large families, minorities, the location of the project with respect to its proximity to employment opportunities; and the availability of other assisted housing within the immediate area. The prepayment would be determined to materially affect housing opportunities if:

(i) The project is needed to assist in preserving low income housing in a neighborhood which is being revitalized;

(ii) The project represents a rare source or the only source of low-and moderate-income rental housing in the immediate area;

(iii) There is a shortage of the particular type of rental housing provided by the project such as units suitable for the disabled, single room occupancy, or units for large families;

(iv) The preservation of the housing would be necessary to avoid adversely affecting the housing opportunities of low and very-low income families to find housing near employment opportunities; or

(v) The preservation of the housing would be necessary to avoid adversely affecting the housing opportunities of minorities in the community within which the housing is located.

(d) Once the Commissioner has compiled the necessary data and conducted the analysis under paragraph (c) of this section the Commissioner shall issue a written finding to the owner stating whether the plan of action to terminate the low income affordability restrictions is approved or disapproved. The written finding shall contain a specific determination of whether the market area is a soft rental market and prepayment would materially affect housing opportunities. The written finding shall include:

(1) A statement as to whether the owner has agreed to execute a use agreement to protect current tenants, in accordance with paragraph (b) of this section;

(2) A description of the geographic boundaries of the housing market area in which the project is located;

(3) An analysis of current and anticipated supply/demand conditions in both the overall rental market and the assisted housing inventory; and

(4) A discussion of whether the prepayment would materially affect the housing opportunities, given the specific characteristics of the project.

* * * * *

14. In § 248.145, the introductory text of paragraph (a) and paragraph (a)(9)(i) are revised to read as follows:

§ 248.145 Criteria for approval of a plan of action involving incentives.

(a) *Approval.* The Commissioner may approve a plan of action for extension of the low income affordability restrictions on an eligible low income housing project or for transfer of the housing to a qualified purchaser, other than a resident council acquiring the project under a resident homeownership plan, only upon a finding that—

* * * * *

(9) * * *

(i) Made by applying an annual factor, to be determined by the Commissioner, to the portion of rent attributable to operating expenses for the project, and, where the owner is a priority purchaser, to the portion of rent attributable to project oversight costs, as that term is defined in § 248.101; and

* * * * *

15. Section 248.153 is amended by revising paragraph (a)(1), redesignating the existing paragraphs (d) and (e) as (e) and (f), respectively, and adding a new paragraph (d), to read as follows:

§ 248.153 Incentives to extend low income use.

(a) * * *

(1) Receive the annual authorized return for the project as determined under § 248.121 for each year after the approval of the plan of action;

* * * * *

(d) *Rent phase-in period.* To the extent necessary to ensure that owners receive the annual authorized return during the tenant rent phase-in period established in § 248.145(a)(6), the Commissioner shall permit owners to receive the following additional incentives:

(1) Access to residual receipts accounts;

(2) Deferred remittance of excess rent payments; and

(3) Increases in rents, as permitted under an existing Section 8 contract.

These incentives shall be provided to owners in the order listed. An owner will not be eligible to receive these additional incentives unless it can demonstrate that it is not receiving the annual authorized return. Once an owner has adequately demonstrated that it is not receiving the annual authorized return, the Commissioner will provide the owner with each incentive in turn during the rent phase-in period, until it has been determined that the owner is receiving the annual authorized return.

* * * * *

16. In § 248.157, paragraphs (m)(4), (m)(5), (m)(6), and (n) are revised, to read as follows:

§ 248.157 Voluntary sale of housing not in excess of Federal cost limit.

* * * * *

(m) * * *

(4) Meet project operating expenses and establish adequate reserves for the housing, and in the case of a priority purchaser, meet project oversight costs;

(5) Receive a distribution equal to an 8 percent annual return on any actual cash investment made to acquire or rehabilitate the project;

(6) In the case of an priority purchaser, receive reimbursement for all reasonable transaction expenses associated with the acquisition, loan closing and implementation of an approved plan of action; and

* * * * *

(n) *Incentives.* The Commissioner may provide assistance for all qualified purchasers under this subpart in the form of one or more of the incentives authorized under § 248.153. The incentives provided by the Commissioner to any qualified purchaser may include an acquisition loan under subpart E of part 241 of this chapter.

* * * * *

17. In § 248.173, paragraphs (e)(2)(i) through (e)(2)(vi) are redesignated (e)(2)(ii) through (e)(2)(vii), respectively; new paragraphs (e)(2)(i) and (g)(5) are added; and paragraph (s) is revised, to read as follows:

§ 248.173 Resident homeownership program.

* * * * *

(e) * * *

(2) * * *

(i) The debt service on the federally-assisted mortgage(s) covering the project, when such mortgage is assumed by the resident council;

* * * * *

(g) * * *

(5) All units which remain as rental units, from the date of approval of the resident homeownership program, until they are purchased by an initial owner under the resident homeownership program, shall be maintained in accordance with § 248.145 (a)(5), (a)(6), (a)(7), (a)(8), and (a)(9).

* * * * *

(s) *Assumption of the federally assisted mortgage(s).* In connection with a resident homeownership plan, the resident council may assume a mortgage insured, held or assisted by the Commissioner under part 236 of this chapter or under part 221 of this chapter and bearing a below market interest rate as provided under § 221.518(b) of this chapter or may choose to pay off the mortgage. If the resident council decides to assume the mortgage, the project must be sold pursuant to § 248.175 and the project must be operated as a limited equity cooperative.

18. In § 248.175, paragraph (b) is revised to read as follows:

§ 248.175 Resident homeownership program—limited equity cooperative.

* * * * *

(b) The purchase of a project by a limited equity cooperative and the operation of the project by the limited equity cooperative shall be carried out in accordance with the provisions of § 248.173 (a), (b), (c), (d), (except that paragraph (d)(1)(i) of this section shall include a statement of the amount and type of incentives requested, rather than only the amount of grant funds requested), (e), (g)(3), (i) (except paragraphs (i)(1) and (3)), (m) and (n).

* * * * *

19. In § 248.201, a new definition is added in alphabetical order to read as follows:

§ 248.201 Definitions.

* * * * *

Project oversight costs. Reasonable expenses incurred by a nonprofit purchaser in carrying out its ongoing ownership responsibilities under an approved plan of action. Project oversight costs must be directly related to educating the nonprofit purchaser's board of directors or otherwise supporting the board in its decision making. Project oversight costs may include staff, overhead, or third-party contract costs for:

(1) Ensuring adequate and responsible participation by the board of directors and the membership of the nonprofit purchaser in ownership decisions, including ensuring resident input in these decisions;

(2) Facilitating long-range planning by the board of directors to ensure the physical, financial and social viability of the project for the entire time the project is maintained as low income housing; and

(3) Assisting the ownership in complying with regulatory, use, loan and grant agreements.

* * * * *

20. In § 248.211, paragraph (b) is revised to read as follows:

§ 248.211 Notice of intent to prepay.

* * * * *

(b) An owner simultaneously shall file the notice of intent with:

(1) The chief executive officer of the appropriate State or local government in which the project is located, or any officer designated by executive order or State or local law to receive such information;

(2) Each tenant in the project; and

(3) The mortgagee.

In addition, the owner shall post a copy of the notice of intent in each occupied building in the project.

* * * * *

21. In § 248.213, paragraph (a) is amended by adding to the end of the paragraph the following text to read as follows:

§ 248.213 Plan of action.

(a) * * * An owner shall submit the plan of action to the Commissioner in such form and manner as the Commissioner shall prescribe. The owner shall notify the tenants of the plan of action by posting in each occupied building a summary of the plan of action and by delivery of a copy of the plan of action to the tenant representative, if any. In addition, the summary must indicate that a copy of the plan of action shall be available from the tenant representatives, whose names, addresses and telephone numbers are indicated on the summary, the local HUD field office, and the on-site office for the project, or if one is not available, in the location where rents are collected, for inspection and copying, at a reasonable cost, during normal business hours. Simultaneously with the submission to the Commissioner, the owner shall submit the plan of action to that officer of State or local government to whom the owner submitted a notice of intent under §248.211(b). The summary of the plan of action posted by the owner and the copies of the plan of action submitted to the tenant representative and the officer of State or local government shall all state that, upon request, the tenants and the State or local government, may obtain from the owner or from the local HUD field office a copy of all documentation supporting the plan of action except for that documentation deemed "proprietary information" under § 248.101.

* * * * *

22. Section 248.217 is revised to read as follows:

§248.217 Revisions to plan of action.

The owner may from time to time revise the plan of action before its approval as may be necessary to obtain the commissioner's approval thereof. An owner shall submit any revision to the Commissioner, and provide a copy of the revision and all documentation supporting the revision except for that documentation deemed "proprietary information" under § 248.101, to the parties, and in the manner, specified in §248.213(a).

PART 248—[AMENDED]

23. In part 248, a new subpart E is added to read as follows:

Subpart E—Technical Assistance and Capacity Building

Sec.

Subpart E—Technical Assistance and Capacity Building

§248.401 Purposes.

The purposes of this subpart are:

(a) To promote the ability of residents of eligible low income housing to participate meaningfully in the preservation process established by this part and affect decisions about the future of their housing;

(b) To promote the ability of community-based nonprofit organizations and resident councils to acquire, rehabilitate, and competently own and manage eligible housing as rental or cooperative housing for low and moderate income people; and

(c) To assist the Commissioner in discharging the obligation under §248.157(b) to notify potential qualified purchasers of the availability of projects for sale and to otherwise facilitate the coordination and oversight of the preservation program established under this part.

§248.405 Grants for building resident capacity and funding predevelopment costs.

(a) *General.* Assistance made available under this subpart shall be used for direct assistance grants to resident organizations and community-based nonprofit housing developers and resident councils to assist the acquisition of specific projects (including payment of reasonable administrative expense to participating intermediaries.) Assistance made available under subpart E of this part will be distributed on a noncompetitive basis. HUD will publish a Notice in the **Federal Register** announcing the availability of assistance, as well as the application requirements and procedures and selection criteria that HUD will use in making the assistance available.

(b) *Allocation.* Thirty percent of the assistance made available under this subpart shall be used for resident capacity grants in accordance with paragraph (d) of this section. The remainder shall be used for predevelopment grants in connection with specific projects in accordance with paragraph (e) of this section.

(c) *Limitation on grant amounts.* A resident capacity grant under paragraph (d) of this section may not exceed $30,000 per project and a grant under paragraph (e) of this section for predevelopment costs may not exceed $200,000 per project, exclusive of any fees paid to a participating intermediary by the Commissioner for administering grants under this subpart.

(d) *Resident Capacity grants.* (1) *Use.* Resident capacity grants under paragraph (d) of this section shall be available to eligible applicants to cover expenses for resident outreach, incorporation of a resident organization or council, conducting democratic elections, training, leadership development, legal and other technical assistance to the board of directors, staff and members of the resident organization or council.

(2) *Eligible housing.* Grants under this paragraph (d) of this section may be provided with respect to eligible low income housing for which the owner has filed a notice of intent under subpart B or subpart C of this part.

(e) *Predevelopment grants.* (1) *Use.* Predevelopment grants under paragraph (e) of this section shall be made available to community-based nonprofit housing developers and resident councils to cover the cost of organizing a purchasing entity and pursuing an acquisition, including third party costs for training, development consulting, legal, appraisal, accounting, environmental, architectural and engineering, application fees, and sponsor's staff and overhead costs.

(2) *Eligible housing.* These grants may only be made available with respect to any eligible low income housing project for which the owner has filed a notice of intent to transfer the housing to a qualified purchaser in accordance with § 248.105 or § 248.211, or has filed a notice of intent and entered into a binding agreement to sell the housing to a resident organization or nonprofit organization.

(3) *Phase-in of grant payments.* Grant payments under paragraph (e) of this section shall be made in phases, based on performance benchmarks established by the Commissioner in consultation with intermediaries selected under § 248.415.

(f) *Grant applications.* Grant applications for assistance under paragraphs (d) and (e) of this section shall be received monthly on a rolling basis and approved or rejected on at least a quarterly basis by intermediaries selected under § 248.415(b).

(g) *Appeal.* If an application for assistance under paragraphs (d) or (e) of this section is denied, the applicant shall have the right to appeal the denial to the Commissioner and receive a binding determination within 30 days of the appeal.

§248.410 Grants for other purposes.

The Commissioner may provide grants under this subpart E:

(a) To resident-controlled or community-based nonprofit organizations with experience in resident education and organizing for the purpose of conducting community, city or countywide outreach and training programs to identify and organize residents of eligible low income housing; and

(b) To State and local government agencies and nonprofit intermediaries for the purpose of carrying out such activities as the Commissioner deems appropriate to further the purposes of this part.

§248.415 Delivery of assistance through intermediaries.

(a) *General.* The Commissioner shall approve and disburse assistance under § 248.405 and § 248.410 through eligible intermediaries selected by the Commissioner under paragraph (b) of this section. If the Commissioner does not receive an acceptable proposal from an intermediary offering to administer assistance under this section in a given State, the Commissioner shall administer the program in such State directly.

(b) *Selection of eligible intermediaries.* (1) *In General.* The Commission shall invite applications from and shall select eligible intermediaries to administer assistance under subpart E of this part through Notices of Funding Availability published in the **Federal Register.** The process shall include provision for a reasonable administrative fee.

(2) *Priority.* With respect to all forms of grants available under § 248.405, the criteria for selecting eligible intermediaries shall give priority to applications from eligible intermediaries with demonstrated expertise under subpart B or subpart C of this part.

(3) *Criteria.* The criteria developed under this section shall:

(i) Not assign any preference or priority to applications from eligible intermediaries based on their previous participation in administering or receiving Federal grants or loans (but may exclude applicants who have failed to perform under prior contracts of a similar nature);

(ii) Require an applicant to prepare a proposal that demonstrates adequate staffing, qualifications, prior experience, and a plan for participation; and

(iii) Permit an applicant to serve as the administrator of assistance made available under § 248.405(d) and (e), based on the applicant's suitability and interest.

(4) *Geographic coverage.* The Commissioner may select more than one State or regional intermediary for a single State or region. The number of intermediaries chosen for each State or region may be based on the number of eligible low income housing projects in the State or region, provided there is no duplication of geographic coverage by intermediaries in the administration of the direct assistance grant program.

(5) *National nonprofit intermediaries.* National nonprofit intermediaries shall be selected to administer the assistance made available under § 248.405 only with respect to State or regions for which no other eligible intermediary, acceptable to the Commissioner, has submitted a proposal to participate.

(6) *Preference.* With respect to assistance made available under § 248.410, preference shall be given to eligible regional, State and local intermediaries, over national nonprofit organizations.

(c) *Conflicts of interest.* Eligible intermediaries selected under paragraph (b) of this section to disburse assistance under § 248.405 shall certify that they will serve only as delegated program administrators, charged with the resposibility for reviewing and approving grant applications on behalf of the Commissioner. Selected intermediaries shall:

(1) Establish appropriate procedures for grant administration and fiscal management, pursuant to standards established by the Commissioner; and

(2) Receive a reasonable administrative fee, except that they may not provide other services to grant recipients with respect to projects that are the subject of the grant application and may not receive payment, directly or indirectly, from the proceeds of grants they have approved.

§ 248.420 Definitions.

Community-based nonprofit housing developer means a nonprofit community development corporation that:

(1) Has been classified by the Internal Revenue Service as an exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986;

(2) Has been in existence for at least two years prior to the date of the grant application;

(3) Has a record of service to low and moderate income people in the community in which the project is located;

(4) Is organized at the neighborhood, city, county, or multi-county level; and

(5) In the case of a corporation acquiring eligible low income housing under subpart B of this part, agrees to form a purchaser entity that conforms to the definition of a community-based nonprofit organization under such subpart and agrees to use its best efforts to secure majority tenant consent to the acquisition of the project for which grant assistance is requested.

Eligible intermediaries. For purposes of this subpart, the term "eligible intermediary" means a State, regional, or national nonprofit organization (including a quasi-public organization) or a State or local housing agency that:

(1) Has as a central purpose the preservation of existing affordable housing and the prevention of displacement;

(2) Does not receive direct Federal appropriations for operating support;

(3) In the case of a national nonprofit organization, has been in existence for at least five years prior to the date of application and has been classified by the Internal Revenue Service as an exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986;

(4) In the case of a regional or State nonprofit organization, has been in existence for at least three years prior to the date of application and has been classified by the Internal Revenue Service as an exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 or is otherwise a tax-exempt entity;

(5) Has a record of service to low income individuals or community-based nonprofit housing development in multiple communities and, with respect to intermediaries administering assistance under § 248.405, has experience with the allocation or administration of grant or loan funds; and

(6) Meets standards of fiscal responsibility established by the Commissioner.

Dated: June 30, 1993.

Nicolas P. Retsinas,

Assistant Secretary for Housing—Federal Housing Commissioner.

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